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The Courtroom as White Space: Racial Performance as Noncredibility

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ABSTRACT

Central to critical race theory (CRT) is the notion that law is constitutive (and not merely reflective) of race. This Comment operates within the CRT tradition to point to the development of the courtroom as white space and the construction of legal narrative and legal truth as distinctly white. It traces the exclusion of people of color from the courtroom to create a courtroom comprised of only white actors. As such, undergirding its newly created legal rules and expectations were white social and behavioral norms. With the invisible baseline of whiteness guiding courtroom behavior, nonwhite performance was marked as other and inappropriate. Thus, the formal exclusion of people of color persisted as a functional exclusion. Using Rachel Jeantel's testimony in the George Zimmerman trial as a case study, this Comment highlights credibility determinations as a tool of exclusion, and argues that the courtroom has always already discredited narratives and testimony of color.

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INTRODUCTION

Before Rachel Jeantel took the stand in the George Zimmerman trial, she was widely recognized as the prosecution's star witness. As the last person to speak to Trayvon Martin before he was killed, Jeantel was charged with relaying Martin's impressions of Zimmerman, as well as the fight that she heard over the phone.[1] When she took the stand, however, she was met with disdain and incredulity—both in the courtroom and in the media. Ultimately, Jeantel's testimony was discredited, and her performance in the courtroom was used as a justification for Zimmerman's acquittal.

Jeantel did not resemble your typical star witness. She was not well educated, or white, or a man. By contrast, she was a large, dark skinned teenage girl, whose language was peppered with slang. By entering the courtroom, Jeantel found herself in a white space that deemed her unintelligible. Her race and class status directly conflicted with her role as star witness. Among the first questions asked to Jeantel were: where she was from (Miami); where she was born (Miami); and where she grew up (Miami).[2] Finding the answers to these questions insufficient, the prosecutor then confirmed that Jeantel had Haitian and Dominican roots. He further clarified that Jeantel lived with her Haitian mother.[3]

As if it were not already apparent, the prosecutor immediately marked Jeantel as an outsider. Tying Jeantel to her Haitian and Dominican roots further distanced her from the composition and expectations of the court. Unable to perform according to the expected and respected norms dictating courtroom behavior, Jeantel was castigated, and her testimony rejected as untrustworthy.[4] As this Comment attempts to show, Jeantel never stood a chance.

1. Amanda Sloane & Graham Winch, *Key Witness Recounts Martin's Final Phone Call*, HLN Tv (June 27, 2013, 8:00 AM), http://www.hlntv.com/article/2013/06/26/will-eyewitnesses-help-george-zimmerman—trial-day-3-prosecutors [https://perma.cc/T3R2-PXFL].
2. Les Grossman, *Rachel Jeantel FULL Testimony. George Zimmerman Trial*, YOUTUBE (June 29, 2013), https://www.youtube.com/watch?v=XdzrBw-x8Xc [https://perma.cc/RQ6G-HSC8].
3. *Id.*
4. *See, e.g.*, *AC360 Exclusive –Juror B37: 'Race Did Not Play a Role,'* CNN PRESS ROOM (July 15, 2013, 10:54 PM), http://cnnpressroom.blogs.cnn.com/2013/07/15/juror-b37-in-exclusive-invu-w-andersoncooper-race-did-not-play-a-role [https://perma.cc/7XRN-WG3N]. A cursory search for social media responses to Jeantel's testimony reveals an immediate and widespread negative reaction to her testimony. *See, e.g.*, Sherri Williams, *Good, Bad and Ugly Tweets About Rachel*

The tools used to devalue Jeantel's testimony are tools of exclusion that have a long history in the courtroom.[5] Jeantel represents yet another instance within this history where exclusionary tools have been wielded against people of color. Starting with antebellum laws barring slaves from testifying against whites, the courtroom comprised only white men. The courtroom was an explicitly and intentionally white space, where only white actors were deemed reliable and trustworthy. With whites as the only courtroom actors, the speech, narrative structures, and behavior codes grew out of an all-white context, and therefore assumed particularly white personalities. Truth developed as distinctly white, as only white people ever spoke legal truths.

After slavery was abolished, free blacks were still often barred from the courtroom through black codes and other state laws.[6] After the Civil Rights era, although people of color were no longer formally excluded from the courtroom, their exclusion persisted informally. Having developed in the absence of nonwhite actors, the whiteness of the courtroom faded into the background. Codes of conduct mimicked white behavior, yet obscured their inherent whiteness. Without any nonwhite referent, courtroom actors were ignorant to the implicit racial aspects of their growing set of behavioral expectations. These expectations thus became a neutral baseline. As such, any explicit performance of race—in other words, any exhibition of nonwhite racial identity—was marked as nonconforming and thus inappropriate.

Credibility determinations are one of the tools used to exclude people of color from testifying in court. Using racial performance a signal of inappropriateness, the white courtroom has always already cast people of color as unreadable. As unreadable witnesses, they are untrustworthy and noncredible. In the Zimmerman trial, Jeantel did not conform to the white codes of conduct guiding courtroom behavior. As a result, she was deemed inappropriate, and, in turn, noncredible.

The purpose of this Comment is to show that tools of exclusion, like credibility determinations, are not new. This Comment traces the progression from formal exclusion to argue that the courtroom is still a white space, functionally foreclosing any meaningful participation of people of color. Starting with a brief history of exclusion, Part I provides a foundation for the courtroom as white space. Part II shows that by initially excluding people of color, the courtroom developed as distinctly white but remained ignorant of its whiteness. Part III then

Jeantel, STORIFY, https://storify.com/SherriWrites/good-bad-and-ugly-tweets-about-rachel-jeantel (last visited Aug. 5, 2015) [https://perma.cc/VE6V-W8MS].

5. *See infra* Part I, notes 7–13 and accompanying text.

6. *See infra* Part I, notes 14–17 and accompanying text.

traces the transition from explicit exclusion to the beginning stages of legal attempts to functionally exclude people of color from the courtroom. Part IV addresses how credibility is used as a tool of functional exclusion by emphasizing both racial difference and the failure to conform to white courtroom norms. Part V concludes with a case study of Rachel Jeantel to show the multiple burdens she carried on the witness stand, and what was at stake in her uncompromising gender and racial performance in the courtroom.

I. FORMAL EXCLUSION: A BRIEF HISTORY

This Part paints in broad strokes to lay a basic foundation for the thesis of the courtroom as white space. It sketches out the timeline from formal to functional exclusion of people of color. The timeline starts with antebellum laws barring slaves from testifying in court,[7] and then continues with the transition to state laws and black codes that perpetuated testimonial bars against freed blacks. Next, judicial decisions began addressing the rights of people of color to testify in court. In a profound rhetorical move, the California Supreme Court in *People v. Hall* used the term "Negro" to include Chinese people, and therefore held that all nonwhite people were barred from testifying against a white person.[8]

The courtroom as white space, unsurprisingly, starts with slavery. Slaves were expressly excluded from the courtroom.[9] "The definition of the slave as chattel property implied a condition of rightlessness on the part of the slave," writes historian David Brion Davis. "In neither Europe nor the Americas could a slave testify in court against a free person, institute a court action in his own behalf, make a legally binding will or contract, or own property."[10] Slaves were explicitly disavowed as untrustworthy and could not provide reliable legal

7. FREDERICK C. BRIGHTLY, A DIGEST OF THE DECISIONS OF THE FEDERAL COURTS, FROM THE ORGANIZATION OF THE GOVERNMENT TO THE PRESENT TIME 403 (1870) (listing cases relating to enslaved and free blacks' testimonial rights from 1789 to 1870).

8. 4 Cal. 399 (1854). While there are other cases that address courts' delineations of race and citizenship, *Hall* directly addresses the intersection of race and testimonial rights. For a discussion of the impact of *Hall* on subsequent naturalization law, see Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 659–61 (2009) (describing *Hall*'s effect on the U.S. Supreme Court's subsequent Japanese naturalization case *Ozawa v. United States*, 260 U.S. 178 (1922)).

9. *See generally* David Brion Davis, *Slavery*, *in* THE COMPARATIVE APPROACH TO AMERICAN HISTORY 121 (C. Vann Woodward ed., 1997). *See also* Ariela Gross, *Slavery, Anti-Slavery, and the Coming of the Civil War*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–) 280, 287 (Michael Grossberg & Christopher Tomlins eds., 2008) ("Slaves had no right of movement, no right of contract, no right to bear witness in court, no right to own property.").

10. Davis, *supra* note 9, at 125.

testimony.[11] While slave testimonial rights varied across states, slaves generally could not testify against whites.[12]

In a literal sense, white voices were the only voices of legal truth.[13] While there were no restrictions as to white testimony, blacks were only allowed to testify, occasionally, against other blacks or nonwhites.[14] By restricting who could testify against them, white testimony became legally unassailable. With no restrictions on whom they could testify against, whites became the only wholly credible witnesses.

After the Civil War, slavery was formally abolished, but states varied in their willingness to grant rights to free blacks. Most new state constitutions adopted during the 1830s barred free people of color from testifying in court against whites.[15] Some northern states barred black testimony until as late as 1860.[16] In the South, black codes prevented blacks from testifying against whites in court.[17]

11. The often-quoted Thomas Cobb quotation illustrates this general mentality toward slaves (and blacks, in general): "[T]he negro, as a general rule, is mendacious . . . ." THOMAS COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 233 (1858).
12. BRIGHTLY, *supra* note 7. Thomas v. Jamesson, 23 F. Cas. 952 (C.C.D.D.C. 1802) ("A slave cannot be a witness if a free white man be a party.").
13. Historian Thomas D. Morris discusses the influence of the exclusion of slaves. He writes, "As Chief Justice Drewry Ottley of St. Vincent noted, the result of exclusion was that 'the difficulty of legally establishing facts is so great, that White men are in a manner put beyond the reach of the law.'" Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, *in* SLAVERY & THE LAW 209 (Paul Finkelman ed., 2002). This was changed in the West Indies during the 1820s, as the British colonies inched toward abolition. Whites would receive the testimony of slaves who could show they were Christians and understood the significance of an oath. Even then, there remained a vital exclusion: the testimony would be excluded if the white defendant were on trial for his life. No comparable shift in policy occurred in the American South. The wholesale exclusion remained in force to the end of slavery. *Id.*
14. BRIGHTLY, *supra* note 7. United States v. Swann, 27 F. Cas. 1379, 1379 (C.C.D.D.C. 1803) ("A slave is not a competent witness for a free mulatto in a public prosecution."); *cf.* United States v. Birch, 24 F. Cas. 1148, 1148 (C.C.D.D.C. 1827) (disallowing blacks from testifying against joint black and white defendants, and citing a Virginia statute permitting blacks to testify only against black defendants).
15. "In most of the new state constitutions adopted during the 1830s, free people of color were barred from testifying in court against a white person, voting, serving in one of the professions, or obtaining higher education." Gross, *supra* note 9, at 287.
16. "By 1866 the right to testify against whites was recognized in the North, and secession states yielded to permit testimonial rights. Yet, as late as 1867, Kentucky still refused to grant blacks the right to testify." Victor B. Howard, *The Black Testimony Controversy in Kentucky: 1866–1872*, 58 J. NEGRO HIST. 140, 140–41 (1973). For a breakdown of testimonial rights by state in the North in 1830 and 1860, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 424–25 (1986).
17. Black codes were southern state laws that often reproduced former slave codes, aimed to perpetuate the civil servitude of newly freed blacks by restricting movement and criminalizing behavior. One of the central tenets of the black codes was vagrancy laws, which criminalized nonworking blacks, and coerced them into a system of de facto slavery. Black codes continued to bar blacks from testifying in court or serving on juries. For a brief description of black codes, see *SLAVERY by*

Historian Paul Finkelman writes, "The most important due process right—to testify in court without racial restrictions—was available to blacks in all but four northern states by 1860. This contrasts with the South where only in Louisiana did free blacks have an unfettered right to testify against whites."[18]

During this slow period of rights acquisition, the California Supreme Court moved in the opposite direction, broadening the category of black for the purpose of testimonial exclusion.[19] In 1854, in the wake of an influx of Chinese immigration, the court decided that Chinese people were legally considered black, for the purpose of providing legal testimony, so that Chinese witnesses could not testify against a white defendant.[20] In *People v. Hall*, George Hall, a white man, was charged with the murder of Ling Sing, a Chinese man. The court overturned Hall's conviction, reasoning that the lower court erred when it relied on the testimony of a Chinese witness; rather, the court concluded that the Chinese witness should have been barred from testifying pursuant to the Civil Practice and Criminal Acts.[21]

The court reasoned that the terms "Negro" and black in the Civil Practice and Criminal Act must apply widely to any nonwhite person—barring testimony not only from free blacks, but also from any person deemed by the courts to be nonwhite.[22] The court asserted,

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Another Name: Black Codes and Pig Laws, PBS SOCAL, http://www.pbs.org/tpt/slavery-by-another-name/themes/black-codes (last visited Aug. 5, 2015) [https://perma.cc/7FRJ-62S2].

18. Finkelman, *supra* note 16, at 451.

19. People v. Hall, 4 Cal. 399, 404–05 (1854). *Hall* represents only one example of a series of race and naturalization cases; however, it directly addresses the intersection of race and testimonial rights. Consequently, *Hall* had a significant impact on subsequent naturalization law and policy. *See, e.g.*, Ronald Takaki, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 102 (1998) ("What all three groups—blacks, Indians, and Chinese—shared seemed singularly striking: they were all nonwhite. This perception went beyond a matter of prejudice. In the 1854 California Supreme Court decision of *People v. Hall*, it became a basis for public policy.").

20. *Hall*, 4 Cal. at 399, 404–05.

21. *Id.* at 399 ("Section 394 of the Civil Practice Act provides: 'No Indian or Negro shall be allowed to testify as a witness in any action in which a white person is a party.'"); *id.* ("Section 14 of the Criminal Act provides: 'No Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man.'").

22. In rationalizing why the term "Negro" in the Civil Practice Act must apply widely to any nonwhite person, the Court maintained:

> The European white man who comes here would not be shielded from the testimony of the degraded and demoralized caste, while the Negro, fresh from the coast of Africa, or the Indian of Patagonia, the Kanaka, South Sea Islander, or New Hollander, would be admitted, upon their arrival, to testify against white citizens in our courts of law. To argue such a proposition would be an insult to the good sense of the Legislature.

Id. at 402–03. The Court then addressed the term black in section 14 of the Criminal Act, which it also considered a generic category, stating:

> In using the words "no black, or mulatto person, or Indian shall be allowed to give evidence for or against a White person," the Legislature, if any intention can be ascribed to it, adopted the most comprehensive terms to embrace every known class or shade of color, as the apparent design was to protect the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude everyone who is not of white blood.[23]

Since the conviction at least partly rested on the testimony of a Chinese witness, the court reversed it. It maintained that a conviction based on Chinese testimony could not stand, as Chinese people were not allowed to testify against whites.[24] In a strategic rhetorical move, the court expanded the terms "Negro" and black to mean any person of color; it classified Chinese people as black, and then used the classification as the basis to bar their testimony against whites.

Through cases like *Hall*, whiteness was characterized as an exclusive category. Everyone who was not white was black, and, therefore, unreliable and unable to testify. The presumption was against people of color—that is, people of color were presumptively barred from testifying. To gain testimonial rights, they would require an affirmative grant of such a right. The natural state of the law was one of exclusion, where only white actors were afforded the presumption of truth.

The official grant of testimonial rights came with the passage of the 1866 Civil Rights Act.[25] Yet, the introduction of people of color into the courtroom occurred piecemeal.[26] A century later, in *Hernandez v. Texas*, the U.S. Supreme Court addressed the lasting exclusion of Mexican Americans from jury selection.[27]

> We are of the opinion that the words "white," "negro," "mullatto," "Indian," and "black person," wherever they occur in our Constitution and laws, must be taken in their generic sense, and that . . . the words "black person," in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian.

Id. at 404.

23. *Id.* at 403.
24. *Id.* at 399.
25. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2012)).
26. Kentucky, for example, staunchly resisted allowing people of color to testify in court. After the 1866 Civil Rights Act, Kentucky law still barred the testimony of people of color. Howard, *supra* note 16, at 140–42. In *Bowlin v. Commonwealth*, the Kentucky Supreme Court held that the Civil Rights Act was unconstitutional insofar as it dictated state regulation, and in particular, black testimony. 65 Ky. (2 Bush) 5, 6 (1867).
27. 347 U.S. 475 (1954).

In *Hernandez*, a Mexican American man was convicted of murder by an all-white jury. The case reached the U.S. Supreme Court on the question of whether Hernandez had been afforded a fair trial because the jury selection committee was entirely white. In fact, jury members during the twenty-five years prior to *Hernandez* were all white; no person with a Mexican or Latina/o name had served on a jury in Jackson County, Texas.[28] The Court ruled that Hernandez had "the right to be indicted and tried by juries from which members of his race are not systematically excluded."[29] Thus, the Supreme Court recognized the exclusion of people of color from the courtroom. Yet the right granted in *Hernandez* was not an affirmative grant of testimonial and jury rights, but rather an affirmation of the negative right against exclusion.

Moving from outright exclusion to the ruling in *Hall*, and later to the *Hernandez* decision, demonstrates the shift away from formally excluding people of color from the courtroom. But because *Hernandez* articulated a right to be free from exclusion, instead of recognizing the affirmative right to be present in the courtroom, the decision enabled more subtle tools of exclusion.[30] So while people of color were no longer legally and explicitly barred from the courtroom, their presence within it was not secure.

II. THE COURTROOM AS WHITE SPACE

As the previous Part has demonstrated, people of color have historically been excluded from the courtroom. Relying on critical race theory (CRT), Part II analyzes the effect this history has had on the development of the courtroom as a white space. A foundational tenet of CRT is the recognition that the law is constitutive of race. As its point of departure, CRT engages in a sociohistorical critique of the law based on the particular understanding that the law has historically taken an active role in defining whiteness. Through Reconstruction-era civil

28. *Id.* at 481 ("The State of Texas stipulated that, 'for the last twenty-five years, there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.'").

29. *Id.* at 482.

30. As a quick example of a subtler, perhaps less explicit strategy for excluding people of color from the courtroom, the Supreme Court in 1991 held that "bilingual" was a race-neutral and therefore permissible characteristic for a prosecutor's peremptory strike of a potential jury member. Hernandez v. New York, 500 U.S. 352, 361 (1991). The Court therefore allowed concomitants of race as a means to exclude people on the basis of race, so long as race itself was not explicitly employed. This type of distinction simultaneously obscures race while reifying whiteness through the seemingly neutral English-only rule.

rights cases and naturalization law, courts have reinscribed the narratives and values of whiteness to determine its exclusionary contours.[31]

It is not only through doctrine, however, that the law is cloaked in whiteness. Even more fundamentally, the courtroom itself is a distinctly white space. As a white space, the courtroom is ignorant of its own whiteness, positioning its codes of conduct as exercises in neutrality and reason, while implicitly signifying the inappropriateness of raced and gendered deviations—what legal scholar Barbara Flagg calls the "transparency phenomenon."[32] This Part seeks to first define white space and then deconstruct it, by illuminating its transparency and situating people of color therein.[33]

Through the formal exclusion of people of color from testifying in court and serving on juries,[34] the courtroom was populated exclusively by whites, who served as the judges, juries, witnesses, and advocates inside courthouse walls. Thus, every opinion coloring the development of the judicial system was a white one. The judicial determinations, as well as the legal narrative voice, developed within this white space.

31. *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Richard Delgado & Jean Stefancic eds., 10th anniversary ed. 2006).

32. Flagg defines the "transparency phenomenon" as whites' total ignorance of their whiteness, or norms or perspectives that are particular to whites. She writes, "Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks [such as requiring black assimilation to achieve pluralism]." Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (alteration added).

33. My aim in illuminating and critiquing the courtroom as a fundamentally and self-perpetuating white space is to critique the (white) assumptions inherent in the operation of the law and the obstacles to meaningful participation for people of color. I therefore reiterate the words of scholar Meredith Reitman in describing the purpose of her work:

> A focus on oppressed places gives needed voice to those facing daily material and psychological hardship, though it also turns attention away from the detailed agency of privileged groups in creating and reproducing dominant places. Since groups maintain privilege precisely through the characterization of their actions as 'normal' and therefore unbefitting critical analysis, uncovering their role in actively racializing space could upset embedded systems of dominance and oppression. For this reason, I focus on the opposite side of the power dichotomy (privilege versus oppression, dominance versus marginalization) and seek to 'identify and interrogate spaces of silence.'

Meredith Reitman, *Uncovering the White Place: Whitewashing at Work*, 7 SOC. & CULTURAL GEOGRAPHY 267, 267 (2006) (citation omitted).

34. *See supra* Part I.

A. The Beginning Stages of the Functional Exclusion of People of Color

Even after the era of explicit exclusion of people of color, legal practices continued to functionally exclude people of color from serving on juries. Prior to the Jury Service and Selection Act of 1968,[35] many federal juries were compiled under the "key-man" system, where jury commissioners selected the jury from a pool of "the names of all qualified, nonexempt citizens in the county . . . who are 'generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment . . . .'"[36] In 1970, the U.S. Supreme Court in *Carter v. Jury Commission of Greene County* addressed the constitutionality of the key-man selection system.[37] The Court found that, while excluding blacks from the jury constituted discrimination, the key-man system was nevertheless per se constitutional.[38] In addition, the Court held that the historical twelve-year exclusion of blacks from the jury selection process was insufficient proof of discrimination to support an injunction requiring the selection of black jurors and the appointment of a new jury commissioner.[39]

In *Greene County*, the Court relied on its 1953 *Brown v. Allen* decision over a similar jury selection challenge.[40] At issue in *Brown* was a jury selection process whereby the jury commissioner chose jury members from tax lists, and then subsequently whittled the pool down based on property ownership.[41] The jury

35. 28 U.S.C. § 1861 (2012).
36. Carter v. Jury Comm'n of Greene Cty., 396 U.S. 320, 323 (1970) (citation omitted).
37. *Id.* at 322–23.
38. *Id.* at 338. Recently, state key-man, or "pick-a-pal" systems have come under increased scrutiny for their high risk of cronyism and racial exclusion. Radley Balko, *Houston Grand Juries: Too White, Too Law-and-Order, and Too Cozy With Cops*, WASH. POST (Aug. 1, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/08/01/houston-grand-juries-too-white-too-law-and-order-and-too-cozy-with-cops/ [https://perma.cc/SWH8-3SSN]. A 2004 study out of the University of Houston found that more than half of the commissioners chosen between 2002 and 2003 in Harris County, Texas, were in some way employed by the criminal justice system. *Id.* California still uses the key-man system for grand jury selection in civil cases. Juan A. Lozano, *Texas' Unusual Grand Jury System Gets New Scrutiny*, SAN DIEGO UNION TRIB. (Mar. 17, 2015, 10:35 AM), http://www.sandiegouniontribune.com/news/2015/mar/17/texas-unusual-grand-jury-system-gets-new-scrutiny [https://perma.cc/24WK-4M7A]. The Texas Senate passed a bill in 2015 to outlaw its longstanding pick a pal jury selection system. Mike Ward, *Governor Signs Grand Jury Bill Ending 'Pick-a-Pal' System*, HOUS. CHRON. (June 20, 2015, 12:40 AM), http://www.houstonchronicle.com/news/politics/texas/article/Governor-signs-grand-jury-bill-ending-6338583.php [http://perma.cc/7WSV-ANQM]; Mike Ward, *Senate Panel Recommends State Dump 'Key-Man' Grand Jury Selection*, HOUS. CHRON. (Mar. 10, 2015, 11:02 PM), http://www.houstonchronicle.com/news/politics/texas/article/Senate-panel-recommends-state-dump-key-man-6126542.php [http://perma.cc/N79U-EPWQ].
39. *Greene Cty.*, 396 U.S. at 335–36.
40. *Id.* at 332–33.
41. Brown v. Allen, 344 U.S. 443, 467–74 (1953).

commissioner ultimately considered those with the most property as those "suitable in character" for jury duty.[42] In *Greene County*, the Court replicated its reasoning in *Brown* to support the notion that the key-man system was race-neutral, in order to uphold its constitutionality.[43] The Court rationalized,

> The clerk . . . is acquainted with a good many Negroes, but very few 'out in the county.' She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been 'in trouble.' She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.[44]

Through the rhetorical move of restating the "suitable character" criterion of its 1953 decision in *Brown*, the Court in *Greene County* cloaked the discretionary and racially manipulable key-man system in harmless happenstance. In reality, jury members were not drawn randomly from county census data, but rather were hand-selected by (white) jury commissioners and clerks based on (white) social circles and property ownership. Scholar Fran Lisa Buntman has highlighted the inherent racialization in the key-man selection system, noting that "[f]or the clerk, therefore, 'Negroes' were excluded for not being within her understanding of community. They were either rural or not members of the groups she deemed to have a positive reputation, such as white churches or fraternal organizations."[45] People of color were easily excluded from the jury selection process precisely because they were not white and therefore could not participate in the white social networks that created jury pools. The decisionmakers' whiteness thus became obscured, so that the fact that their selection pools were entirely white was not

42. *Id.* at 474; *Greene Cty.*, 396 U.S. at 333.

43. *Greene Cty.*, 396 U.S. at 332–33 ("'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.'" (quoting *Brown v. Allen*, 344 U.S. at 474)).

44. *Id.* at 324–25 (citing to the district court evidentiary hearing).

45. Fran Lisa Buntman, *Race, Reputation, and the Supreme Court: Valuing Blackness and Whiteness*, 56 U. MIAMI L. REV. 1, 14–15 (2001). Further, as Buntman poignantly notes, there is more distancing at work than mere exclusion; since "to the extent [the clerk] was 'familiar' with African Americans, the familiarity was based precisely on a criminal or suspect reputation." *Id.* at 15. Meaning, if black people were ever perceived as appropriate inside the courtroom, it was only as criminal defendants. This singular acceptance also helped shape the courtroom as white space—just as the "respectable" positions within the courtroom developed as white, so did the position of criminal defendant develop as distinctly black. Such a characterization doubtless adds to the lack of credibility people of color confront in the courtroom, whether they are advocates, witnesses, or defendants.

seen as a racial decision.[46] The exclusion of people of color became a nonracial exclusion, and the whiteness of the jury box became a nonracial given.

The concurrent privileging and obscuring of whiteness in these explicitly white decisions evidences the courtroom as white space. By presenting the formal exclusion of people of color from the courtroom as natural and nonracial, the courtroom could continue to segregate through subtler, more embedded means. Having deemed white commissioners' decisions as nonracial, the whiteness of the courtroom was reinforced and, in turn, influenced courtroom expectations. In other words, with only white people present inside the courtroom, the norms of the court developed as distinctly white. And as a result, the courtroom privileged whiteness, while simultaneously treating whiteness as nonracial.

According to anthropologists Helán Page and R. Brooke Thomas, "Either in its material or symbolic dimensions, white public space is comprised of all the *places* where racism is reproduced by the professional class. That space may entail particular or generalized locations, sites, patterns, configurations, tactics, or devices that routinely, discursively, and sometimes coercively privilege Euro-Americans over nonwhites."[47] The routinized, discursive, and coercive tactics inside the courtroom are tools that create and buttress the courtroom as white space. As Page and Thomas add, "White privilege is institutionally and interpersonally constructed in white public space when social closure takes place in the interest of the dominant group."[48] White privilege operates through laws barring participation of nonwhites in legal proceedings and interpersonal decisionmaking by whites. White privilege becomes the standard; nonwhite participation, which does not conform to the white standard, is consequently foreclosed as outside the legal norm. What's more, this (re)constituting is self-perpetuating, as the legal behaviors and traditions—that is, white codes of conduct, legal precedent steeped in white norms,[49] as well as past

46. *See* Hiroshi Fukurai, Edgar W. Butler & Richard Krooth, *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196, 207–09 (1991) (describing this and other cases of systematic privileging of whiteness through institutional and interpersonal decision making).

47. Helán Page & R. Brooke Thomas, *White Public Space and the Construction of White Privilege in U.S. Health Care: Fresh Concepts and a New Model of Analysis*, 8 MED. ANTHROPOLOGY Q. 109, 111 (1994) (emphasis in original).

48. *Id.* at 112.

49. The Mashpee Indian Case provides a stark example of legal precedent and rhetoric serving to disempower a community of color. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979) (discussed in Part II.B, *infra*); *see also* Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 647 ("The determinations of relevance—what can be admitted as evidence—locate the court as the indexer: The one who determines significance. The story told by the parties must point back constantly to the story told by the court and the precedents, which, of course, are merely

decisions privileging whites—persist through the continued dominance of whites inside the courtroom.[50]

B. The Transparency Phenomenon in the Courtroom

Accordingly, the operation of white supremacy in the courtroom becomes invisible, with its invisibility only strengthened by the fact that the saturation of white actors in the courtroom precludes any confrontation of whiteness. As a result, race becomes the deviation from the nonracial (read: white) baseline of the court, thus further substantiating whiteness as unraced. Legal scholar Barbara Flagg named this occurrence the "transparency phenomenon," defined as the unique experience of whites never having to recognize their whiteness.[51] Arising out of white spaces, comprising exclusively white actors, the "transparency phenomenon" masks whiteness, allowing it to fade into tacit expectation. Flagg states:

> Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and contrast with, the 'color' of nonwhites. . . . [W]hites' social dominance allows us to relegate our own racial specificity to the

the stories deemed acceptable by previous courts. By structuring legal storytelling this way, questions of power, perspective, and value are evaded."). In analyzing the Mashpee's land claim, the Court emphasized ownership of land through deeds, framing the Mashpee's claims "within the European indicia of *ownership* . . . . In doing so, defendant's counsel translated the Tribe's claims into terms foreign to the Mashpee. This rhetorical move stripped the land claim of nuances that deeds could not replace." *Id.* at 647–48.

50. The courtroom as white space is an off-shoot of the seminal concept of whiteness as property, articulated by legal scholar Cheryl Harris. In her article, Harris critically analyzes how whiteness became the basis of racialized privilege and the baseline for the allocation of social benefits. Harris argues that these associational rights became their own form of white status property, and their continual ratification and legitimation have served to cement systems of white power. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); *see also* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1573 (1989) ("If there is a cultural pattern of reacting instinctively to blacks as inferior and subject to control, it is unlikely that blacks will have figured in legal discourse as part of the 'we' that comes to mind as courts consider how 'we' will govern ourselves and relate to one another.").

51. Flagg, *supra* note 32, at 970. Flagg describes the power dynamics beneath the surface in a hypothetical situation in which a black female small business owner interviews for a job with a panel of white managers. In her article, Flagg describes a situation in which, during the interview, the black female candidate is questioned about the fact that she lacks a college degree—a characteristic arguably common in her community and unnecessary for a small business owner. *Id.* at 974. The line of questioning fuels the threat of unintelligence that black stereotypes deploy, and the candidate becomes defensive. Ultimately, the job candidate is pronounced "hostile." *Id.* at 975. Flagg identifies the transparent whiteness of the interview, "Transparency—here, the unconscious assumption that all interviewees will, or should, respond to a given line of questioning the way a white candidate (or the interviewers themselves) would respond—may account for the white questioners' inability to anticipate the larger meaning their queries might have for the nonwhite interviewee." *Id.*

> realm of the subconscious. Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different.[52]

Attempts by people of color to assert themselves inside the courtroom are marked as different and, therefore, legally incomprehensible. Consider, for example, the Mashpee Indian land claim case.[53] In this case, the Mashpee Tribe sued the Town of Mashpee to recover tribal lands. In order to prove its claim, the Mashpee Tribe had to demonstrate to the federal court in Massachusetts that they were indeed a tribe, as articulated by the U.S. Federal Government. The Mashpee tribal system did not conform to white conceptions of community and government, which had been given credence through the transparency phenomenon as articulated as legal precedent (and conceptions of legitimate white/Anglo democracy). Mashpee notions of property, which did not conform to white deed-based ownership, and Mashpee oral, as opposed to written, histories rendered the tribe invisible under the white gaze of the law. The Mashpee's land claims and the Mashpees themselves were untranslatable to the court. The court held that the Mashpee were not a tribe, under law, and therefore had no legal claim to the(ir) land. As scholars Gerald Torres and Kathryn Milun contend,

> The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible. The tragedy of power was manifest in the legally mute and invisible culture of those Mashpee Indians who stood before the court trying to prove that they existed.[54]

Having been excluded from the courtroom, communities of color have not participated in the development of legal rhetoric and conceptions of persuasiveness. People of color are forced to conform their behavior inside the courtroom in order to gain legal recognition. When people of color are unable or unwilling to conform to the constructed legal notions of narrative truth, the transparency phenomenon renders them untrustworthy. As the next Part addresses, it is this nonconformity that serves as the basis for determinations of credibility that are so often used to nullify black defendants and black witnesses.

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52. *Id.* at 970–71. For an illuminating case study on the role of the transparency phenomenon in landlord-tenant legal proceedings, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

53. *See* Torres & Milun, *supra* note 49.

54. *Id.* at 649, 649 n.78.

III. PROSECUTORIAL MISCONDUCT: THE DEVELOPMENT OF THE LEGAL ARGUMENT OF RACIAL NONCREDIBILITY

The struggle for legitimacy in the courtroom did not end once people of color were allowed to serve as witnesses and jurors. Even though formal exclusion of people of color had ended by 1866, exclusion of people of color persisted.[55] The culture of the courtroom sustained its transparent whiteness through routinizing white notions of narrative, truth, and credibility—and often downright white supremacy.

There are several notable modern cases that indicate the court's common sense notions of race playing a determinative role in deciding questions of witness credibility and defendant guilt. These legal arguments of racial noncredibility serve as the underpinnings of the tacit rejection of black witnesses like Rachel Jeantel, addressed in Parts IV and V. Scholar Sheri Lynn Johnson traces the legal tradition of discounting black witnesses as untrustworthy. She writes, "The traditional refusal of white juries to convict white defendants accused of crimes of violence against African American victims is notorious: credible accusations backed by powerful physical evidence, countered only by obviously false denials, routinely led to acquittals."[56] Black testimony held no sway in the courtroom, and provided no support to prosecute white defendants or defend black ones.

Before the Civil Rights era, prosecutorial appeals explicitly relied on black witnesses' inherent untrustworthiness to overturn convictions.[57] Yet, even well into the nineteen seventies and eighties, racial animus was still legally sanctioned.[58] Johnson has thoroughly surveyed the various legal arguments prosecutors have deployed.[59] I do not reproduce her research here. But I highlight this

55. *See supra* Parts I & II.

56. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 275 (1996).

57. *Id.* at 274 (surveying multiple pre-Civil Rights era cases where prosecutors sought to discount black testimony, arguing that blacks were inherently less trustworthy or referencing black witnesses' willingness to lie for each other).

58. For examples of modern cases where prosecutors argued that witnesses' race made them noncredible, see *id.* at 305, n.287. For a list of cases (albeit uncommon) where prosecutors claim witnesses are less intelligent because of their race, see *id.* at 306, n.297. Additionally, for examples of prosecutors undercutting witnesses of color through racial epithets, animal imagery, and referring to the witness by her first name, see *id.* at 307, nn.298–300. It is also important to note that Johnson's survey is only a small sampling. Due to the common practice of affirming criminal convictions (even those with explicit racism) and the vague language of written opinions, the available case law portraying prosecutorial racial animus does not accurately reveal that extent to which such overt racism factored into judicial decision making. Furthermore, the fact that prosecutors deployed these arguments hints at their palatability to judges and juries. *Id.* at 307–08.

59. Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979) (reviewing whether a prosecutor's closing argument, that "[n]ot one white witness has been produced in this case that contradicts [the

prosecutorial misconduct trend to indicate not only the viability of such arguments in the courtroom, but also the presumption of whiteness that these arguments reveal.

That prosecutors relied on these racial pleas time and again demonstrates that the prosecutors themselves certainly believed in their effectiveness; their use is perhaps even an unsurprising development after the formal exclusion of people of color from serving on juries and testifying in court. Additionally, the availability of these kinds of arguments provides one example of the implicit whiteness in the development of legal codes of conduct and legal reasoning. In other words, marking witnesses as nonwhite in order to potentially discredit them substantiates the idea of the courtroom as white space.

These arguments illustrate the beginnings of the legal understanding of credibility, which have had reverberating effects.[60] While discussions of race in the courtroom generally focus on quantifiable race-determinative judicial outcomes, such as the crack/powder cocaine [61] or death penalty[62] sentence disparities between black and white defendants, race also permeates judicial reasoning in far subtler ways. Because of this subtlety, the operation of race can be difficult to root out. Despite this subtlety, it is sometimes still possible to glean the operation of race, such as in a court's credibility determinations.

The historical rejection of black witnesses in the courtroom can implicitly factor into juror decision making. According to legal scholar Joseph Rand, the

victim's] position," was harmless error); Smith v. State, 516 N.E.2d 1055, 1064 (Ind.1987), *cert. denied*, 488 U.S. 934 (1988) (reviewing a case in which the prosecutor described a black witness as "shucking and jiving on the stand"); People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977) (reviewing a case in which the prosecutor referred to blacks as "street people" and said "they lie every day"). For an extremely thorough survey of prosecutorial misconduct cases, see Johnson, *supra* note 56, at 305–08.

60. *See* Andrew Elliot Carpenter, Chambers v. Mississippi*: The Hearsay Rule and Racial Evaluations of Credibility*, 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 15, 32 (2002). ("The word of a white witness nearly always carries more weight with a decision-maker of the same race than that of a minority. This is particularly true when that minority is testifying on behalf of someone of his or her own race. These racial credibility assessments influence both psychology of the jurors and the trial strategy of the lawyers. The jurors unconsciously allow stereotypes to influence their credibility decisions, and lawyers build their trial tactics around these same racialized considerations.").

61. Since the 1980s penalties for crack cocaine were 100 times harsher than for powder cocaine—a disparity that mapped directly along color lines. *Race and the Drug War*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/race-and-drug-war [https://perma.cc/S5TP-TVXH]. In 2010, Congress passed the Fair Sentencing Act, which reduced the sentencing disparity to 18:1. *Fair Sentencing Act*, ACLU, https://www.aclu.org/node/17576 [https://perma.cc/PA58-WRCD].

62. For a brief overview of the "systemic racial bias in the application of the death penalty," see *Race and the Death Penalty*, ACLU, https://www.aclu.org/race-and-death-penalty [https://perma.cc/W9W2-9C4S]; Matt Ford, *Racism and the Execution Chamber*, ATLANTIC (June 23, 2014), http://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081 [http://perma.cc/FX9W-FDEE].

tradition of marking black witnesses as untrustworthy can influence jurors' implicit biases against black credibility.

> Three ways that whites could develop patterns of understanding about African-American witnesses through negative stereotypes include: (1) the stereotype that African Americans are less intelligent than whites, which would be invoked if the Black witnesses were called upon to recall and describe events accurately; (2) the stereotype that African Americans are not trustworthy and honest, which would have obvious implications for any sort of trial testimony; and (3) the stereotype that African Americans are violent, such that any allegation regarding violence would be bolstered by its consistency with the stereotype. There is good reason to believe that even well-meaning jurors are subject to these stereotypes that limit their thinking.[63]

This Part has briefly set the stage for the following discussion on the role of race in credibility determinations, provided evidence of the transition from formal to functional exclusion of people of color from the courtroom, and illustrated the use of truth and credibility as a means to discount black testimony.

IV. WITNESS CREDIBILITY DETERMINATIONS AND RACE

Generally speaking, people are not good at detecting lies.[64] What's more, we have inscribed particular social behaviors as signifiers of deception, most of which are not only false but easily discriminatory—for example, focusing on signs of nervousness, like eye contact, fidgeting, or other signs of discomfort or inappropriate behavior.[65] Appellate courts rely on lower court credibility determinations based on face-to-face judgments.[66] Judges have even gone so far as to direct

63. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42 (2000); *see also* Jacklyn E. Nagle, et al., *Gender, Smiling, and Witness Credibility in Actual Trials*, 32 BEHAV. SCI. & L. 195, 195–96 (2014); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012).

64. *See* Eugenio Garrido, et al., *Police Officers' Credibility Judgments: Accuracy and Estimated Ability*, 39 INT'L J. PSYCHOL. 254 (2004) (maintaining that studies have not been able to support the widespread belief that lies can be accurately detected and conducting a study where students and police officers' lie detection abilities were no greater than chance); Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2566 (2008); Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 380 (2005).

65. Jeremy A. Blumenthal, *A Wipe of The Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1162–63 (1993); Pager, *supra* note 64, at 388–89.

66. "[T]he role of demeanor in assessing witness credibility provides one of the standard (and oldest) justifications for appellate deference to lower court fact finding. Whether a question is an issue of law or an issue of fact often turns on whether a credibility determination needs to be made based on

jurors to scrutinize witnesses' appearance and demeanor.[67] Such scrutiny inevitably engages subtle cognitive shortcuts that hinge on courtroom expectations of behavior.[68]

Not surprisingly, the question of credibility is understudied, particularly as it intersects with race.[69] Credibility is a dynamic quality, relative to the expectations of a particular environment. Within the courtroom, the norms have grown to embody whiteness and, as stated previously, this was fostered by a history of exclusion and a tradition of discounting black presence in the courtroom. Indeed, the courtroom grew to be a hostile environment for black witnesses. And it is within this white space that black testimony is judged as credible or noncredible. This Part builds upon some of the assumptions undergirding social science studies to underscore the role that race inevitably plays in credibility determinations.

Implicit in both the concept of credibility and the idea of lie-detection is the notion that a noncredible witness is somehow marked by difference. An observer may expect a witness to act a certain way; when her behavior diverges from the observer's expectation, her performance becomes questionable.[70] Several scholars have postulated as to how such a demeanor gap would affect credibility determinations along racial lines.[71] This Comment explores this demeanor

demeanor." Minzner, *supra* note 64, at 2559 (citing Thompson v. Keohane, 516 U.S. 99, 111, 114 (1995) and Miller v. Fenton, 474 U.S. 104, 113–14 (1985)) (footnote omitted).

67. Pager, *supra* note 64, at 377.

68. *See supra* note 60 and accompanying text.

69. *See* Pager, *supra* note 64, at 374 ("While the problems of jury lie-detection and jury bias have been extensively discussed independently, little attention has been drawn to the *intersection* between race and credibility and to the processes by which these twin failings of jury cognition are able to reinforce each other.") (emphasis in original); *see also* Minzner, *supra* note 64, at 2564–79 (providing a thorough survey of the academic literature contesting the reliance on demeanor-based credibility assessments by judges and law enforcement, even while failing, in his ultimate discussions on bias and credibility, to address race). For an example of a law review article devoted to witness credibility that does not address race, see Elaine D. Ingulli, *Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U.L. REV. 145 (1986).

70. There are a few studies regarding how different characteristics affect perceptions of credibility (such as smiling, displaying emotions, and age, for example). Yet these studies often rely on simulated testimony or written testimony that obscures the realities in the courtroom, reduce complex social processes, and have generated conflicting data. *See, e.g.*, Stanley L. Brodsky et al., *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research*, 28 BEHAV. SCI. & L. 892 (2010); Paola A. Castillo & David Mallard, *Preventing Cross-Cultural Bias in Deception Judgments: The Role of Expectancies About Nonverbal Behavior*, 43 J. CROSS-CULTURAL PSYCHOL. 967 (2012); John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 6 DUKE L.J. 1375 (1979); Jacklyn E. Nagle et al., *supra* note 63. They therefore do not provide a solid baseline for analyzing credibility. As a result, I focus on the role of difference, or what one scholar has called the "demeanor gap" in courtroom communication, as it bears directly on issues of credibility and the courtroom as white space. *See generally* Rand, *supra* note 63.

71. *See* Pager, *supra* note 64 (although Pager does not use the term "demeanor gap," he discusses the use of demeanor and difference in credibility determinations marked by race); Rand, *supra* note 63.

gap,[72] ultimately using it as a framework to address the moments of divergence in Rachel Jeantel's testimony that were used to discredit her as noncredible.

Although most social science studies on juror perceptions of witness credibility do not fully explore the impact of race, they are useful in how they generally share conceptions of what constitutes credible performative behavior. In other words, these studies classify performance in ways that may indicate how racial performance factors into credibility determinations.[73] Using these performance indicators as a background, this Part will discuss how performance in the courtroom takes on a conspicuously racial element in credibility determinations. First, this Part will address the general findings of credibility studies, and then, using social psychology frameworks, it will explain how the demeanor gap is able to operate.

A. The Importance of Difference

Social science studies focus on the impact of powerful and powerless performance and communication in the courtroom, yet their analysis rely on the courtroom's preconceived notions of what constitutes effective speech and behavior. In other words, baselines for proper courtroom communication still map onto white norms and expectations. As such, these studies merely replicate the power structures that the courtroom has created, and determine what types of performance are successful therein. Without studying these classifications in relation to race and gender, the studies cannot truly address the role of race in the courtroom, and how race fuels credibility determinations in particular.[74] Thus, instead of understanding how powerless speech influences observers, for example, this Subpart focuses on what constitutes powerful or credible speech, and how those expectations developed and persisted.

Underlying notions of powerful and powerless speech is the tradition of whiteness in the courtroom. Scholar and practitioner Chet Pager sums up the failings of these studies:

72. *See infra* Subpart IV.D.

73. For example, several studies focus on speaker confidence and use of powerful speech. Conley, *supra* note 70, at 1386 ("[F]or both male and female witnesses, the use of the powerless style produces consistently less favorable reactions to a witness than does the use of the powerful testimony style."). *But see* Johnson, *supra* note 56, at 317 (asserting that notions of forceful speech contain gender and racial implications).

74. In addressing how different groups may make different assumptions, Joseph Rand asks, "[A]re the cues that African-Americans associate with deception the same as the cues that whites associate with deception?" Rand, *supra* note 63, at 18.

> Studies have found that communication style also contributes to perceived credibility, with fragmented testimony devaluing and extreme explicitness contributing to impressions of credibility. While stylistic differences are especially professionally based (valuing the dry, factual, and explicit narrative of a police officer over a meandering layperson witness), they are also influenced by culture. Blacks, for instance, have more indirect speech patterns than whites, especially in confrontational situations—while blacks might use indirect speech to avoid conflict, whites might interpret this as evasive deception.[75]

Merely recognizing particular conduct as a sign of credibility misses the complicated racial processes that have privileged some behaviors over others. In other words, there are no gestures or expressions that generally indicate lying, or that everyone perceives as lying, or that everyone performs the same way. Instead, there are certain behavioral styles that have become associated with truth in the courtroom. It is, therefore, less important to recognize what certain people consider indicative of credibility and more important to consider how those preconceived notions of credibility implicate race.

The courtroom as white space is already set up to disqualify any notably racialized behavior, thereby serving white interests. It is therefore unsurprising that people of color do not operate within courtroom parameters in the same way as whites. For example, in discussing the significance of recognizing the role of difference in the courtroom, Joseph Rand asserts,

> We can safely assume that those who have been traditionally disenfranchised are less comfortable in a courtroom setting, since generally they have not had the opportunity to take advantage of the legal process to their benefit, and are in fact likely to be in situations where they feel the system has worked against them. Consequently, they are more likely to feel intimidated by the environment than those who have traditionally taken recourse in the legal system. This would especially be the case if the witness is presented with a jury box full of people that do not look like him.[76]

For our purposes, it matters less what exactly the difference is in terms of distinctly white or distinctly black performance. Instead, since the courtroom is already set up according to white norms, what matters is simply the fact that difference exists.

75. Pager, *supra* note 64, at 398–99.
76. Rand, *supra* note 63, at 50–51.

Professor Barbara Bezdek analyzed the ways in which people of color were disenfranchised in rent court proceedings.[77] Bezdek compared white and black behavioral styles to provide a possible explanation for black tenants' communicative failures in Baltimore rent court. She observed that even when tenants of color attempted to mimic the expected white norms, they were nevertheless marked as raced and inappropriate. She describes an interaction that she observed frequently, in which a judge cuts off an inexperienced and impassioned black litigant. She writes,

> [A] black man adopts the 'persuasion stance,' [which is passionate and confrontational, counter to the dispassionate white style] familiar in his own life, in dealing with the judge who then treats it as open and inappropriate hostility and throws the man out of court. Here is the painful irony of a tenant speaking in his own voice and own way, personally 'powerful,' yet preemptively trumped and silenced by the legal process. This is an assertion of self that, however expressive in terms of personal or black cultural norms, is rendered counterproductive in the legalistic perspective.[78]

Thus, a poor black tenant is faced with a no-win situation in court: he can assert himself in his own expressive terms, and be marked as inappropriate and unintelligible by not speaking the language of the law; or, he can attempt to perform whiteness in court. Yet by performing whiteness, already in itself a near impossible task, he is marked as speaking a language that is not his own—a sign that he must not be telling the truth.

B. Implicit Bias in Credibility Determinations

Social psychology scholarship can help to break down the cognitive processes taking place in these moments of difference to explain the systematic errors in determining credibility. It has defined two systems of cognitive processing: System 1 handles the majority of our mundane mechanical behaviors, while System 2 steps in during more intentional processing, most often to address a moment of uncertainty or confusion.[79] Scholars L. Song Richardson and Philip Goff have used this dual process theory of cognitive psychology as a framework to explain the slippage from race perception to racial animus.[80] Their analysis of System 1 cognitive processes is useful for our discussion of the demeanor gap in credibility

77. *See* Bezdek, *supra* note 52.
78. *Id.* at 595.
79. Richardson & Goff, *supra* note 63, at 298.
80. *Id.*

determinations because it focuses on the mental slippages that seamlessly incorporate implicit bias stereotypes into subconscious decision making.[81]

Richardson and Goff argue that racial cognitive processing depends on associative and representative activation networks, whereby one commonly held (or available) idea activates multiple ideas subconsciously. This process ultimately allows judgments to merely fall in line with the available salient categories to reproduce bias.[82] Moreover, it is possible that cross-race interactions themselves are stressful enough to provoke such cognitive shortcuts.[83]

Thus, the pivotal interaction for credibility determinations takes place in moments of difference between the witness and the jury. It is in these moments that implicit cognitive heuristics kick in. And when these heuristics play into decision making and assessments of credibility, the result is that any racial performance further entrenches white credibility in the courtroom. Using cognitive processing as our base for understanding the importance of difference for credibility determinations, the next Subpart addresses courtroom behavior to think about how these cognitive processes operate to discredit nonwhite credibility.

C. Language as a Tool of Exclusion

In addition to the visual cues that signify discomfort, and, as a result, deception in the courtroom, language is another tool that serves to exclude people of color while maintaining the white courtroom. This Subpart builds a foundation for the notion that communicative styles are marked by race and class, as evidenced by the demeanor gap in courtroom cross-race communication. For bilingual speakers, language is a site of policing and a constant source of anxiety.[84] As

81. Since the System 1 operations serve to reinforce the courtroom as white space, there is often no moment of uncertainty or confusion to activate System 2 processes to correct the stereotype-induced decision making. It is for this reason that some scholars have articulated that simply making race salient is a necessary step in counteracting implicit bias in the courtroom. For a more in-depth discussion of this argument, see Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

82. Richardson & Goff, *supra* note 63, at 312 ("Given the social construction of crime as racially Black, people are more likely to both consciously and non-consciously associate Blacks with criminality. What this means is that people are more likely to recall evidence of Black criminality than instances when that stereotype was proven false.").

83. *Id.* at 305. For more examples of activation networks at play in implicit bias reactions, see Lee, *supra* note 81, at 1582–86 (surveying multiple studies where implicit bias stereotypes activate racial animus behavior, specifically in the form of shooter bias); Cynthia Lee, *"But I Thought He Had a Gun," Race and Police Use of Deadly Force,* 2 HASTINGS RACE & POVERTY L.J. 1 (2004).

84. *See* Jane Hill, *Language, Race, and White Public Space*, 100 AM. ANTHROPOLOGIST 680, 681 (1998). Hill describes the clear distinctions between the language spoken at home, as a tool of solidarity, and that in public spheres, where language is used as a tool of exclusion. She writes, "Boundaries and order are everything. The pressure from interlocutors to keep the two languages

a site of race and class exposure, language becomes a burden and moment of anxiety, adding to the "deception cues" of noncredibility.[85] In addition, language is used to mark nonwhite speakers with race and lower class status, thus making it easier for the court to discredit nonwhite testimony as inscrutable or inappropriate. As a result, witnesses who have accents or speak any variation of "the King's English" run the risk of being excluded from the court.[86] Just as the codes of conduct guiding courtroom behavior are obscured by neutrality, with terms such as appropriateness, clarity, and confidence, the language rules in the courtroom (and white public space generally) deploy an invidious neutrality.

Linguistic and cultural anthropologist Bonnie Urciuoli writes, "The philosophy underlying U.S. linguistic racialization is that the natural language of the United States is an English as naturally unmarked as the white, middle-class heart of the nation-state itself."[87] Courtroom language is conceptually divorced from whiteness. It grew organically along with the nation-state, just as courtroom conduct developed. However, what these natural stories of evolution omit is the express whiteness of their origins. And through such omission, the language of the court remains white, both through self-perpetuation and through policing and exclusion.[88]

Since the language of the courtroom can claim neutrality, it has an amplified power to discredit deviation.[89] And by maintaining heavily policed boundaries—

'in order' is so severe that people who function as fluent bilinguals in the inner sphere become so anxious about their competence that sometimes they cannot speak at all." *Id.*

85. "Mediated by cultural notions of 'correctness' and 'good English,' failures of linguistic order, real and imagined, become in the outer sphere signs of race: 'difference as inherent, disorderly, and dangerous.'" *Id.* at 682 (quoting BONNIE URCIUOLI, EXPOSING PREJUDICE: PUERTO RICAN EXPERIENCES OF LANGUAGE, RACE, AND CLASS 2 (1996)).

86. Hill describes the rigidity with which courts police language boundaries. She states, "In an 'inner sphere' of talk among intimates in the household and neighborhood, the boundaries between 'Spanish' and 'English' are blurred and ambiguous both formally and functionally. Here, speakers exploit linguistic resources with diverse histories with great skill and fluency, achieving extremely subtle interactional effects. But in an 'outer sphere' of talk. . . with strangers and, especially, with gatekeepers like court officers . . . the difference between Spanish and English is 'sharply objectified.'" *Id.* at 681 (citing URCIUOLI, *supra* note 85, at 2).

87. URCIUOLI, *supra* note 85, at 37.

88. *See infra* note 102.

89. Being marked as inscrutably nonwhite or poor is not the only obstacle to legal respectability, however. As it has developed in an incubator of white privilege, the language of the law is often incomprehensible to those not well-versed in it. What's more, the expectations around courtroom availability and courtroom behavior are often impossible for low-income people of color to meet. Barbara Bezdek studied a Baltimore rent court to illuminate the inaccessibility of the courts for poor tenants of color. "[T]he poverty shared by many tenants in this city often carries with it real limitations such as functional illiteracy, poor health, hourly-wage work and/or child care obligations which make it very difficult to wait in court all day. Such material characteristics of

through concepts like credibility—the contours of legitimate English become increasingly rigid. Thus, with any sign of accent or divergent stylization (read: signs of race or class or both), even native English speakers can be marked as speaking improper English. Urciuoli studied code-switching and power structures of inner- versus outer-sphere linguistic behaviors in Puerto Rican communities. In her book, she discusses how Puerto Rican English speakers are discredited regardless of their language ability. She writes,

> Most Puerto Ricans living in U.S. cities speak English. What they speak is unequivocally English in phonology (sound structure) and grammar (word and sentence structure). Yet they often find their speech typified by Americans as "broken" or "mixed" and their accents as "heavy," all of which is contrasted with "good" English as if good English were a clearly defined object. Such typifications arise not from astute linguistic observation but from assumptions about race and class. The sense that Puerto Ricans' language is different or wrong is reinforced by reactions encountered in routine experiences. Yet most of that experience is not about language in the ordinary sense of words, grammar, or sounds. Most of that experience is about information barriers: who controls what one needs to know, what one must do or say to be understood or believed.[90]

Divergences (from whiteness) in communication styles are marked as inscrutable. As Urciuoli's work suggests, however, policing language is more about race and class than it is about communicative ability.

D. The Demeanor Gap

Legal academic Joseph Rand developed the term demeanor gap to address the moment of difference inherent in cross-cultural communication.[91] Rand studied courtroom communication between Americans and Jordanians, and applied his findings to cross-racial interactions within the U.S.[92] Rand articulates

living also limit many tenants' ability to use and understand middle-class white English, not to mention law talk." Bezdek, *supra* note 52, at 536.

90. URCIUOLI, *supra* note 85, at 2–3.

91. Rand, *supra* note 63. According to Rand, observers are already poor lie detectors, so "the inability of most observers to detect deception accurately—has even greater implications in cases where jurors have to overcome racial and cultural differences in determining a witness' credibility." *Id.* at 4.

92. *Id.* at 19, 23 ("African-Americans growing up in the United States have a different cultural upbringing from Caucasian-Americans, one that is arguably, in some ways, as different as Jordanians are from Americans. There is therefore a strong possibility that some of the deception dysfunction that the Bond study demonstrated would also be present in cross-racial lie detection within the United States."). A recent Australian study found that participants without information

the importance of the demeanor gap in courtroom interaction, particularly across race, and how it undermines bona fide attempts to convey truth. He writes, "There might be cultural variations in the types of cues that will convey deceit, and that in attempting to appear truthful according to his own experience and culture, the African-American speaker may give off cues that he does not realize are indicators of deceit to the white observer."[93] In so doing, "jurors 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."[94]

To combine the demeanor gap with the associative and representative heuristics from social psychology, when jurors are confronted with uncertainty—meaning, witnesses that do not conform to the traditional parameters of white courtroom behavior—mental shortcuts fill the gap. These mental shortcuts rely on courtroom codes of conduct that are founded in the unwavering and normalizing baseline of whiteness. As such, when these mental heuristics are activated, people of color are the ones who suffer.

Law scholar Sheri Lynn Johnson has addressed the role these available and representative heuristics play in credibility determinations. According to Johnson, "[T]o the extent that veracity is disputed, perceptions of honesty are important. With respect to both of these factors, stereotypes of African Americans would imply lesser credibility. . . . [since] African Americans, in particular, are . . . stereotyped as less honest and more criminal than the majority."[95] It is easy for the brain to jump to the awareness of the black witness as less credible, or even criminal, in making determinations of credibility.

So far the discussion has focused on black witnesses in court, without reference to gender. Yet the demeanor gap has significant implications for women in court as well. The courtroom behaviors that have come to comprise baselines for

about cultural normative differences were more suspicious of nonconforming or inconsistent behavior. Castillo & Mallard, *supra* note 70, at 967, 973.

> Such differences in normative nonverbal behavior may in turn lead to differences in perceived credibility during cross-cultural interactions. When a communicator and observer are from different cultures, the observer will apply social norms concerning nonverbal behavior that may differ from the communicator's own norms. As a result of this discrepancy, a communicator who is behaving consistently with his or her own cultural norms might violate the expectancies of the observer, potentially increasing the likelihood that the observer will suspect the communicator of being dishonest.

Id. at 968.

93. Rand, *supra* note 63, at 18.
94. *Id.* at 4.
95. Johnson, *supra* note 56, at 316.

conduct have far-reaching implications for women in court, as the courtroom is not only a white space, but a man's white space. Many of the communicative styles that are expected in the courtroom are simultaneously both—that is, white and masculine. This Subpart adds women to the discussion. The assertive styles that are expected and rewarded in the courtroom are often at odds with the codes of conduct that dictate gendered women's behavior. For example, hesitant speech patterns that some women exhibit may convey uncertainty, even when confidence is not a per se indicator of veracity.[96] Scholar Kathy Mack writes,

> The presumption of the noncredibility of women is most salient in rape allegations, where the common law developed a set of rules specifically to attack the credibility of women testifying in rape cases; these rules related to the expectation of a recent complaint, the relevance of sexual history, the requirement (mainly in the United States) of force or other forms of resistance, and the need for corroboration.[97]

Indeed, for women of color in particular credibility determinations are even more scrutinized than their white counterparts. The intersectional[98] experiences of women of color place them at the bottom of the credibility hierarchy, as they are refused both the privilege of whiteness and the privilege of maleness.[99]

The emphasis on credibility is yet another example of the courtroom as white space. Whereas the slave codes formally barred people of color from the courtroom, the exercise of the law now informally, or functionally, excludes people of color.[100] Starting with the acceptability of the legal argument that black defendants and witnesses are dishonest,[101] the courtroom continues to discredit people of color, and most often black witnesses, in the courtroom. And as the

96. Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 330 (1993) (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 100–01 (1979)).

97. *Id.* at 332. Notably, these rules ran counter to the common law rules entitling the jury to convict with only the unsupported testimony of a single witness. *Id.*

98. Intersectionality is a concept developed by critical race theorist Kimberlé Crenshaw, to analyze the ways in which women of color are uniquely burdened by their exclusions from systems of male and white privilege, in particular through their inability in antidiscrimination law to claim membership in a class of women or a class of blacks. *See generally* 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) (introducing this foundational concept to critical legal pedagogy).

99. *See* Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 634 (2000) ("There is a hierarchy when credibility issues arise in the courts. It is not only a simple hierarchy of men over women, but it is one where white women are found to be more credible than African American women.").

100. *See infra* Part I.

101. *See infra* Part III.

systematic undercutting of black testimony undermines black credibility, it simultaneously buttresses white credibility.[102] What makes black testimony noncredible or unintelligible is its distinction from whiteness; white performance can be rewarded as persuasive, and, as a result, continue to serve as the baseline against which credibility is determined.[103] As this Part has shown, the seemingly neutral concepts deployed to skewer black testimony—such as nervous tics and hesitant or indirect speech—are simply examples of racial nonconformance,[104] which operate as a new mechanism to exclude nonwhite racial performance in the courtroom.

V. CASE STUDY OF RACHEL JEANTEL AND WHAT'S AT STAKE IN THE CREDIBILITY QUESTION

This Comment has attempted to trace the use of credibility as a tool of exclusion for people of color, starting with the formal exclusion of slaves, freed blacks, and then nonwhites from serving on juries. As the courtroom evolved with only white actors, it became transparently white: its codes of conduct (read: respectability) arose inside white norms, all the while touting themselves as neutral markers of justice. The courtroom then became a white canvas against which any nonwhite act/or became anomalous. As a result, nonwhite witnesses are disparaged as noncredible. Manifestations of their burdens,[105] like nervousness, or

102. Torres & Milun, *supra* note 49, at 629 ("[T]here is a history and social practice reflected and contained within the language chosen. . . . [W]hen particular versions of events are rendered unintelligible, the corresponding counter-examples that those versions represent lose their legitimacy. . . . The existence of untranslatable examples renders unreadable the entire code of which they are a part, while simultaneously legitimizing the resulting ignorance."); *see also* Bezdek, *supra* note 52, at 535–36 ("Courts assigned to hear small claims were designed with the expectation that citizens would speak directly to courts without the aid or obstacle of formal rules of evidence, professionally trained representatives, or elaborate rules of entitlement or presentation. Yet, tenants are silenced by dynamics occurring in and around the court room. This is due both to differences in speech and to dissonant interpretations between speakers and listeners, since they do not share a culture of claiming.").

103. *See* URCIUOLI, *supra* note 85.

104. Rand, *supra* note 63.

105. To be present in a courtroom—or any other institution—that has historically and is actively trying to exclude you, not surprisingly, carries with it significant burdens. For women of color, these burdens must be multiple. For fat, working class women of color, these burdens are exponential.

> There are some things about Jeantel that are not hard to believe: that she remains profoundly affected by her friend's violent death; that she, as much as anyone in the courtroom, was aware of the presumptions that accompany imperfect grammar, race, and obesity; that her initial reluctance and antagonism toward the entire undertaking were products of this awareness.

awkwardness, or dialected speech, become fuel for the credibility witch-hunt. This Part uses the reluctant testimony of Rachel Jeantel as a case study for nonwhite credibility in the courtroom as white space.

Rachel Jeantel was the prosecutor's key witness in the George Zimmerman trial.[106] She was Trayvon Martin's best friend and the last person to speak to him before he was killed. Yet, as became evident from her days-long testimony, Jeantel was the one on trial.[107] Jeantel was forced to endure the legacy and practice of exclusion when she took the stand for her friend. Her race and class marked her as an anomalous presence in the courtroom and became a stand-in for her noncredibility, which then created an easy bridge to tarnish the innocence of Trayvon Martin. An article by Professor Regina Bradley described the pathway from Jeantel's exclusion to Zimmerman's acquittal:

> Jeantel's use of so-called "broken" English has overwhelmingly been heard . . . as a marker of her working class background—not her trilingual background—and thus, it sonically aligns Martin with the black working class and voids prospects of him being considered a victim of violence rather than its perpetrator. Don West's treatment of Jeantel on the witness stand attempted to impose a parallel between Jeantel's alleged "illiteracy" and Martin's criminality. The "crime" of illiteracy within the courtroom and supposed "crime" of Martin beating Zimmerman into shooting him co-exist within a

Jelani Cobb, *Rachel Jeantel on Trial*, NEW YORKER (June 27, 2013), http://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial [http://perma.cc/6WQ6-5PQA]. *See also* URCIUOLI, *supra* note 85.

106. Although there were some inconsistencies in her story—such as her age, whether she attended Martin's memorial service, and why she didn't immediately call the cops—Jeantel easily and sincerely explained why her story had changed. Notably, Jeantel lied to the police in an effort to avoid further engagement with law enforcement. Shereen Marisol Meraji, *What [BLANK] Folks Don't Understand About Rachel Jeantel*, NPR (June 29, 2013, 7:00 AM), http://www.npr.org/blogs/codeswitch/2013/06/29/196709577/what-blank-folks-dont-understand-about-rachel-jeantel [http://perma.cc/XC3Q-23X4]; *see also* Christina Coleman, *Why Black People Understand Rachel Jeantel*, GLOBAL GRIND (June 27, 2013), http://globalgrind.com/2013/06/27/what-black-people-understand-about-rachel-jeantel-christina-coleman-blog [http://perma.cc/M25Y-JLN6] ("The thing is, what white people see in Rachel has little to do about her own issues, and more to say about the America that white people are blind to. Let's take her testimony on not calling the police, for example. . . . Distrust in police stems from decades of being disenfranchised and treated unfairly by those who were supposed to protect us.").

107. *See, e.g.*, Regina N. Bradley, *To Sir, With Ratchety Love: Listening to the (Dis)Respectability Politics of Rachel Jeantel*, SOUNDING OUT! (July 1, 2013), http://soundstudiesblog.com/2013/07/01/disrespectability-politics-of-rachel-jeantel [http://perma.cc/5HLW-KZJE] ("Because her testimony operated outside of normal constructs of witness etiquette and respectability, it was greeted with a hailstorm of controversy paralleling the rawness of responses to scripted reality shows. The shallowness of 'critique' of Jeantel—whom, it must be continually repeated, is not on trial—was disgusting.") [http://perma.cc/5HLW-KZJE].

> policed space of (white) respectability that black bodies are frequently forced to adhere.[108]

Impeaching Jeantel as noncredible, the defense effectively used her as a conduit through which to impeach Martin. In other words, Jeantel's credibility became the lynchpin of the defense's case. Defense attorney Don West thus focused on the demeanor gap that highlighted Jeantel's discordant race and class background.

Visibly uncomfortable on the stand, Jeantel was castigated as rude and disrespectful.[109] Her Creole-Spanish-English-accented speech and slang marked her as lower class and unintelligent.[110] West emphasized her accented speech and marked her as incomprehensible—and at times, even cast her as racist. She was accused of injecting race into the trial, when she recited her and Martin's use of the n-word and phrases like "creepy ass cracker."[111] She became a racialized outsider in a purportedly race-neutral courtroom.

She did not conform to the codes of conduct dictated by the courtroom, and, as a result, she was marked—by race and class—as inappropriate and disrespectful. West set her apart from the whiteness of the courtroom. He showed the jury how Jeantel's language and demeanor did not fit within courtroom norms. And, by setting her apart from the expectations of white respectability in the courtroom, he portrayed Jeantel's presence, and therefore her testimony, as questionable.

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108. *Id.*

109. Besides the discomfort a young woman of color (with limited literacy) inevitably feels in the courtroom, it is important to remember that Jeantel was also mourning the loss of her friend. These compounding pressures likely influenced her behavior in court, especially as West peppered her with questions implying her friend's responsibility in his own death. Global Grind Editor Rachel Samara writes, "The guilt, shame and sorrow she must feel is something most of us will never be able to comprehend. You could hear it in her voice, see it in her jittery body language. She is feeling the wrath of this highly publicized case." Rachel Samara, *What White People Don't Understand About Rachel Jeantel*, GLOBALGRIND (June 26, 2013), http://globalgrind.com/2013/06/26/what-white-people-dont-understand-about-rachel-jeantel-trayvon-martin-blog [http://perma.cc/3KSK-DDW8]; *see also* Bradley, *supra* note 107 ("Her personal loss of a close friend is overshadowed by her performance of that grief in a space of hyper-respectability.").

110. *See, e.g.*, Cobb, *supra* note 105. "[T]he prosecution highlighted the fact she speaks Spanish and Haitian Creole in addition to English, a tacit admission that Jeantel's credibility was not the only thing being questioned. Her intelligence was, too."

111. "The implication, in this transforming trial, has become that *Trayvon Martin* was the racist for calling George Zimmerman a 'cracker,' rather than that Zimmerman was a 'creepy-ass' neighborhood watchmen who shot and killed a black kid after he bought some Skittles and an iced tea." Alexander Abad-Santos, *My Star Witness Is Black: Rachel Jeantel's Testimony Makes Trayvon a Show Trial*, WIRE (June 27, 2013, 4:33 PM), http://www.thewire.com/national/2013/06/rachel-jeantel-testimony-trayvon-martin-trial/66652 [http://perma.cc/8WTC-756F].

A. Highlighting the Demeanor Gap: Tools of Exclusion

The tactics used against Jeantel are not new, but in fact are reiterations of the tools of functional exclusion highlighted throughout this Comment. In particular, techniques such as casting Jeantel as combative and disrespectful are often used to discount the narratives and experiences of women of color. Situating the tools of exclusion in the courtroom within the larger tradition of discrediting black women's testimony, one journalist writes, "These kinds of terms—combat, aggression, anger—stalk black women, especially black women who are dark-skinned and plus-sized like Rachel, at every turn seeking to discredit the validity of our experiences and render invisible our traumas."[112]

By highlighting her discomfort in the courtroom, the defense labeled her as insolent and inappropriate. In turn, her narrative was discredited, and her testimony noncredible. The defense then used her noncredibility as a stepping stone to discredit the prosecution's case against Zimmerman. Where Jeantel's rawness and honesty could have been signifiers of her credibility, they instead became opportunities to discredit her.[113]

During her testimony, Jeantel relayed Martin's description of Zimmerman as a "creepy ass cracker" who was following him. Instead of recognizing the phrase as an obvious verbatim snippet of her conversation, underscoring the truth of her testimony, West capitalized on the epithet as a racial slur, starting on a line of questioning about Jeantel's and Martin's general attitudes toward white people and their use of the word "cracker." To be sure, colloquially describing Zimmerman as a "cracker" had no relevance to Zimmerman's innocence or guilt, a fact Jeantel herself easily recognized.[114]

But it is moments like these that disrupt white transparency. Through her use of the word "cracker," Jeantel was, in a way (albeit unintentionally), calling out the courtroom's whiteness—a fact the court was not ready to confront. West maintained the tacit whiteness of the courtroom by accusing Jeantel of inserting race into the trial and the courtroom. He subverted the possible realization of the

112. Brittney Cooper, *Dark-Skinned and Plus-Sized: The Real Rachel Jeantel Story*, SALON (June 28, 2013, 5:01 AM), http://www.salon.com/2013/06/28/did_anyone_really_hear_rachel_jeantel [http://perma.cc/WU39-RAW3]; *see also* Crenshaw, *supra* note 98.

113. Axiom Amnesia, *Rachel Jeantel Al Sharpton Interview—7-17-2013—Trayvon Martin George Zimmerman Case*, YOUTUBE (July 17, 2013), https://www.youtube.com/watch?v=P2oLtvZvabw [https://perma.cc/WV48-S8NM] (reproduction of an MSNBC television broadcast, Jeantel discusses how the 911 record corroborated her testimony, yet the defense focused on her character, and then used their judgment to impugn Martin's character.).

114. *Id.* (Sharpton discusses how he understood Martin's and Jeantel's use of the word "cracker," which is often used colloquially in younger generations, with Jeantel adding that the discussion of "cracker" should have had no bearing on the case).

courtroom as white space, which could have potentially softened the jury's reaction to Jeantel.

The contentious interactions between West and Jeantel clearly showed the demeanor gap at work. In a CNN interview between Chris Hayes and linguistics professor John McWhorter, Hayes asserted, "What we are watching in the courtroom, over the last two days, are two people from very different cultures, from very different linguistic backgrounds, encountering each other while all of America watches. It's been an incredible thing to watch."[115] Linguist John Rickford emphasized the structured nature of Jeantel's English and concluded that incomprehensibility was not the issue; rather, her black speech simply made her unrelatable to the (almost) all-white jury.[116]

West played up Jeantel's unrelatability and expanded it generally to her presence in the courtroom. He forced Jeantel to repeat herself constantly, and continued to repeat her responses back to her (until it reached the point where the judge intervened and ordered him to stop, in the interest of time).[117] He even asked her if she could read, and whether she understood English.[118] As a result of West's derisive questioning, Jeantel became understandably aggravated.[119] West

115. Livefree Ordie, *Chris Hayes and Linguistics Expert Break Down Rachel Jeantel's 'Articulate' Use of Black English*, YOUTUBE (June 28, 2013), https://www.youtube.com/watch?v=p-0Xd_pix_Y [https://perma.cc/FH78-5GKX]; *see also* Tommy Christopher, *Chris Hayes And Linguistics Expert Break Down Rachel Jeantel's 'Articulate' Use Of Black English*, MEDIAITE (June 28, 2013, 5:12 PM), http://www.mediaite.com/tv/chris-hayes-and-linguistics-expert-break-down-rachel-jeantels-articulate-use-of-black-english [http://perma.cc/D3UF-BYH2].

116. *See Language on Trial: Rachel Jeantel*, WBUR: HERE & NOW (June 28, 2013), http://hereandnow.wbur.org/2013/06/28/n-word-language [http://perma.cc/FQJ8-49XA] (quoting Rickford, saying, "[Jeantel] used a lot of the classic features of African-American English, which you can find spoken especially by working-class African-Americans almost every day. I don't think most of these caused active problems of understanding in the courtroom, but I think they probably affected the jury's and the public's ability to respect and believe her testimony and relate to her. Relatability is very important."); *see, e.g.*, Abad-Santos, *supra* note 108 ("Rachel Jeantel did not fit in with this courtroom where she very much matters.").

117. "Yes, she mumbled, but the amount of times she was asked to repeat herself, speak up and slow down proved that they were indeed speaking different languages. But let's be honest. Rachel Jeantel's attitude is exactly what I would expect from someone from the hood who has no media training and who is fully entrenched in a hostile environment." Samara, *supra* note 109.

118. On the second day of the trial, after Jeantel had already spoken on the stand and answered West's questions, West asked Jeantel, "Are you claiming in any way that you don't understand English? . . . When someone speaks to you in English, do you believe that you have any difficulty understanding it because it wasn't your first language?" Grossman, *supra* note 2.

119. One blogger analyzed the systematic undercutting of Jeantel's testimony:

> For Rachel, these little cultural differences get lost in translation. And instead of trying to understand her, people are reducing the miscommunication to semantics, what they call her broken "Kings English," and her anger. Without even realizing that she comes from a home where Creole is her first language, or that her friend

capitalized on Jeantel's seeming disdain for the proceedings and the obvious race gap between them, portraying Jeantel as incomprehensible and therefore a non-credible witness. Yet, as McWhorter easily identified, West opted to be willfully ignorant of Jeantel; most people could likely understand what she was saying, while he chose not to.[120]

By focusing on the ways in which Jeantel did not fit in the courtroom, the defense made it easy for the jury (and everyone following the trial) to discount her.[121] Her unrelatability was normalized in the context of the courtroom as a white space, so that unrelatable became a stand-in for incomprehensible and consequently unreliable. She was not just unrelatable to the white jury, but she was also unrelatable in the context of the law generally. As many commentators have pointed out, Jeantel could never be the ideal witness. She became the fulcrum of the Zimmerman trial because she so easily stuck out in the courtroom. "So why is her credibility and character so interesting to us?" asked one journalist. "I'm certain that at least in part it's because she seems so out of place in the courtroom. And by 'out of place,' I mean that she acts and talks exactly like what she is—a black teenager."[122]

B. Nonconformance

Criticism of Jeantel was not relegated exclusively to the courtroom, or even to her testimony. After she took the stand, Jeantel became the subject of intense racist, fatphobic, and classist vitriol. Any cursory glance at the comments following

> was killed just seconds after he last spoke to her. Wouldn't you be frustrated in front of a court that refuses to understand you?

Coleman, *supra* note 106.

120. *Chris Hayes and Linguistics Expert Break Down Rachel Jeantel's 'Articulate' Use of Black English*, *supra* note 115. In discussing the incredulity in response to Jeantel's description of the "mailing area" in Trayvon's building, Hayes: "Everyone understood what she was saying. Everyone understands the mailing area." Linguistics expert McWhorter: "She's quite comprehensible. It's just that people don't want to understand her and the whole larger question." *Id.*

121. *See, e.g.*, Matt Zebrowski, *Race and Language in the Zimmerman Trial*, SILVER TONGUE TIMES (July 9, 2013), http://silvertonguetimes.com/2013/07/09/race_and_language_zimmerman [http://perma.cc/P4DW-DV95] ("See, thing about courtrooms, is that the people in them (or at least the ones in charge in them) usually speak what we in the industry call 'Standard American English.' And Jeantel's use of AAVE [African American Vernacular English] stands out. Coupled with her snarky attitude and the already racially charged nature of this case, this makes her a pretty easy target for scrutiny and upturned noses.").

122. *Id.*; *see also, e.g.*, Mary Elizabeth Williams, *The Smearing of Rachel Jeantel*, SALON (June 27, 2013, 11:56 AM), http://www.salon.com/2013/06/27/the_smearing_of_rachel_jeantel [http://perma.cc/U2V6-QPW7] ("On the stand, she has been blunt, hostile and at times seemingly confused. Online, she has a documented history that includes partying. She is not thin or blond or demure. So there goes her credibility.").

an article about Jeantel reveals shocking and violent remarks about her.[123] Following the trial, theGrio and Ebony magazine "awarded" Jeantel with a makeover, where stylists gave her new straightened hair extensions, blond highlights, and "fabulous, sensible ensembles."[124] Instead of rejecting the criticism launched at Jeantel, the makeover affirmed them. Jeantel's makeover signified that there was indeed something "wrong" with her appearance, and that Jeantel was somehow to blame. The makeover legitimated the idea that Jeantel was at fault for providing noncredible testimony, and thus concealed the true perpetrator: the whiteness of the courtroom. The makeover encouraged musings like "if only she had presented herself differently, acted more respectable, the trial would have come out differently."[125]

While many lambasted Jeantel and others commended her, one thing was clear: she did not conform to the rules of the courtroom. As one repeatedly cited blogger noted, "Rachel was raw, emotional, aggressive and hostile, and she was unapologetically herself."[126] While the defense and the jury used her nonconformance as fodder to discredit her, many of Jeantel's supporters saw her nonconformance as an act of defiance, or at least self-preservation.[127] By refusing to follow the strict white codes of courtroom respectability and narrative—an endeavor she could never actually succeed at—Jeantel instead asserted and affirmed her presence in a hostile space. Professor Bradley points out, "Jeantel's refusal and inability to conform to expected cultural and aural scripts of black womanhood within the confines of the courtroom—the epitome of a hyper-respectable

123. I make the conscious choice not to reproduce any of the comments here, yet for a list of tweets responding to Jeantel's testimony, see Williams, *supra* note 4.

124. Alexis Garrett Stodghill, *theGrio and Ebony Magazine Team up to Give Rachel Jeantel a New Look*, GRIO (Nov. 7, 2013, 2:15 PM), http://thegrio.com/2013/11/07/thegrio-com-and-ebony-magazine-team-up-to-update-rachel-jeantels-look-from-teen-to-collegiate/#s:rachel-jeantel-ebony-1 [http://perma.cc/X98V-HZHR].

125. Jeantel herself has not been immune to the critiques of her behavior on the stand. CNN interviewed Jeantel one year after the verdict. When asked if she blames herself for the Zimmerman acquittal, she replied, "a little bit." Jeantel recognized that the jury didn't take her seriously, since they judged her on her looks and speech. Yet, when the interviewer asked if she thought she should have said something different or acted differently, Jeantel stated, "[a]ct different." *Zimmerman One-Year Later: Controversial Witness Speaks Out*, CNN (July 11, 2014, 9:45 PM), http://outfront.blogs.cnn.com/2014/07/11 (reproducing a CNN broadcast); *see also* Roz Edward, *Trayvon Martin's Friend Rachel Jeantel Blames Herself in George Zimmerman Trial*, CHICAGO DEFENDER (July 14, 2014), http://chicagodefender.com/2014/07/14/trayvon-martins-friend-rachel-jeantel-blames-herself-in-george-zimmerman-trial [http://perma.cc/D7HA-N4G3].

126. Samara, *supra* note 109.

127. *See* Cooper, *supra* note 109 ("Given the hostile and combative space into which she entered, a space in which she had to fight for the integrity of her own words, combativeness seems like the most appropriate posture.").

space—destabilizes not only racial paradigms of black (southern) respectability but *Americanized* expectations of black women's scripts of respectability."[128]

Jeantel revealed the courtroom's transparent whiteness by refusing to play into it. Her inability and refusal to present a white narrative highlighted the fact that there was no place for her in that courtroom. The defense's tactics to discredit her became unsubtle attempts at exclusion.[129] The more she refused to conform, the more blatant these tactics of exclusion became, exposing the hostility and violence of the courtroom.[130] When she took the stand, Jeantel was under siege. She was criticized and discredited when she did not and could not provide the white legal narrative the courtroom has come to expect.

CONCLUSION

The courtroom has created a white space through the historical and consistent exclusion of people and narratives of color. Jeantel flouted these norms by performing blackness on the stand. And by performing blackness, she was disparaged and her testimony diminished. Yet the very disparagers that rejected Jeantel's testimony potentially also sealed their own fate; by highlighting the inappropriateness of Jeantel's race and class, they inevitably called attention to their own. Through its willful misapprehension of Jeantel, the courtroom has been exposed for the white space that it is.

128. Bradley, *supra* note 107.

129. Professor Bradley interprets Jeantel's testimony as resistance, stating, "Jeantel's mastery of a low, monotone "sir" signifies her existence outside of the politics of respectability that frame not only black women's experiences but blacks' submission to white supremacy." She goes on to conclude, "Although much of her cunning was shortsightedly heard as uncouth and aural evidence of a lack of (middle class) home training, Jeantel signifies the usefulness of ratchet as a form of resistance to the white privilege that dictates respectable spaces like the U.S. courtroom. Sir." *Id.*

130. Kevin Browne, *Rhetoric and the Stoning of Rachel Jeantel*, ENCULTURATION (July 9, 2013), http://enculturation.net/rachel-jeantel [http://perma.cc/3JUE-DDEK] ("[T]here was no nuance that I could see in how Rachel Jeantel was treated on the stand, try as I did to look for it. Condescension is not nuanced; it is raw, uncompromising, and unmistakable. It is neither soft nor smooth. Abuse is never subtle. And yes, condescension is a form of abuse—it is meant to demean, undermine, ridicule."); Mychal Denzel Smith, *Thank You, Rachel Jeantel*, NATION (June 27, 2013), http://www.thenation.com/blog/175009/thank-you-rachel-jeantel [http://perma.cc/3LGM-YYQH] ("No matter what, though, Rachel stood and defended herself and Trayvon (and frankly, many other black youth) against the condescension, against silencing, and against the character attacks. For that, she should be commended and thanked.").