"Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping

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The Kentucky Supreme Court recently upheld the conviction of a black man for selling crack cocaine based on the testimony of a white police officer, who stated that an unknown voice on an audio tape sounded like a "black" male—the defendant.[1] *The officer had never met or seen the defendant before trial. This Article argues that the decision is an example of court-sanctioned racial stereotyping, and that such testimony should not be admissible.*[2]

Introduction

Do you think you can identify the color of a person's skin by listening to his voice? If so, would you swear to it in court? Would you know if you harbor any deep-seated racial prejudices? Would you recognize them if you did?[3] Would you testify to a defendant's guilt in a criminal trial based on listening to his voice and deciding on his race—never having seen him? If you would, you will applaud a recent state supreme court ruling.

Kentucky's highest court recently held that a white police officer, who had not seen the black defendant allegedly involved in a drug transaction, could, nevertheless, identify him as a participant by saying that a voice on an audiotape "sounded black."[4] The police officer based this "identification" on the fact that the defendant was the only black man in

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1. Clifford v. Commonwealth of Kentucky, 7 S.W.3d 371 (Ky. 1999).
2. This author first discussed this case on *All Things Considered* (National Public Radio, May 19, 2000).
3. *See generally* Jeffrey Goldberg, *The Color of Suspicion*, N.Y. Times Mag., June 20, 1999 (asserting that most people racially profile in some way).
4. *Clifford*, 7 S.W.3d at 375.

the room at the time of the transaction and that an audio-tape—contained the voice of a man the officer said sounded black selling crack cocaine to a white informant planted by the police.

In affirming the trial court, a majority of the Kentucky Supreme Court held that because witnesses are routinely permitted to give their lay opinions about certain common observations,[5] such as a person's age or whether he or she was intoxicated,[6] it was proper for this police officer to opine about a man's race, based solely on what he had heard.[7] The majority reasoned that because witnesses have been allowed to testify about accent or dialect, it was proper for this police officer to testify about the defendant's race, and thus his identity without having seen him.[8]

All of the participants in this trial were white, except the defendant.[9] At trial, the prosecution needed to prove that it was the defendant who sold crack cocaine to the state's informant.[10] The testifying police officer had never seen the defendant, and the defendant denied the charge.[11] To make matters worse, this was a case involving crack cocaine—a drug predominately associated with African Americans.[12] The police officer's testimony that the person he heard offering to sell the drugs to the undercover police officer "sounded black," and the fact that the defendant was the only black person at the apartment where the sale was made, may have clinched the prosecution's case.

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5. *See* Fed. R. Evid. 701:

   > If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue . . . .

   Id.

6. *Clifford*, 7 S.W.3d at 374, (citing Howard v. Ky. Alcoholic Beverage Control Bd., 172 S.W.2d 46 (Ky. 1943) (permitting testimony regarding the age of a person and whether that person was intoxicated)). *See also id.*, (citing Clement Bros. Constr. Co. v. Moore, 314 S.W.2d 526 (Ky. 1958) (the speed of a moving car); Zogg v. O'Bryan, 314 Ky. 821, 237 S.W.2d 511 (Ky. 1951) (the degree of physical suffering endured by another); Commonwealth v. Sego, 872 S.W.2d 441, 444 (Ky. 1994), Emerine v. Ford, 254 S.W.2d 938 (Ky. 1953) (the mental and emotional state of another); and King v. Ohio Valley Fire & Marine Ins. Co. 280 S.W. 127 (Ky. 1926).
7. *Id.* at 375–76.
8. *Id.*
9. *Id.* at 376.
10. *See id*. at 377.
11. *Id*. at 373.
12. *See* United States v. Clary, 846 F.Supp. 768 (E.D.Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1172 (1995) ("The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society." *Id.* at 783.); according to *U.S.A. Today*, the racial disparity caused by the "100 to 1 ratio" and the mandatory minimum sentencing practices in the country, blacks accounted for forty-two percent of all drug arrests in 1991 though they comprise only twelve percent of the population. Blacks comprise 1.6 million of the illegal drug users while 8.7 million whites admit to illegal drug use. Yet, blacks are four times as likely as whites to be arrested on drug charges. *Id.* at 786 (citations omitted). *See also* John Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. Davis L. Rev. 557, 599–616 (1991).

To this author's ear, this Kentucky decision sounds like court-sanctioned racial stereotyping. After all, what does it mean to "sound" black, white, Asian, or Native American? What biases, conscious or otherwise, spring to mind when one hears that a particular individual is of a certain race? The Kentucky decision is not an isolated example: courts in Arkansas, Missouri, and Washington state have issued similar rulings.[13] Do these rulings allow jurors to decide a case on an improper basis[14]—racial stereotyping?

Part I of this Article details the facts behind the Kentucky Supreme Court's decision in *Clifford v. Commonwealth*. Part II analyzes the argument propounded by the majority in *Clifford v. Commonwealth* that allowing lay witnesses to testify about race, based on voice alone, is akin to allowing them to testify about things people commonly perceive by sight—such as intoxication or age.[15] Part II also addresses the issue of whether race identification, based on voice alone, is as reliable as lay witness testimony on accent, dialect, or gender. Part III argues that even if race identification testimony, based on voice alone, is an inference that lay witnesses commonly and reliably draw, such testimony is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice.[16] In addition, Part III discusses the cases cited by the *Clifford* majority and their treatment of the issue raised by Clifford as to the risk of prejudice associated with identifying an accent or dialect,[17] particularly in drug cases. In Part IV of this Article, the author discusses racial profiling which leads to selective enforcement and selective prosecution-particularly in crack cocaine cases. Finally, in Part IV the author argues that race identification, based on voice alone, is uniquely troubling because it con-

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13. Rhea v. State, 147 S.W. 463 (Ark. 1912) (admitting testimony that a witness heard a white man's voice from among a crowd of blacks as evidence of the defendant's presence at the time of the homicide); State v. McDaniel, 392 S.W.2d 310 (Mo. 1965) (admitting testimony of a witness who claimed to hear Negro accents before a robbery); State v. Kinard, 696 P.2d 603 (Wash. Ct. App. 1985) (admitting testimony from victim that the burglar sounded black).
14. FED. R. EVID. 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See also* United States v. Bogan, 267 F.3d 614, 623 (Wis. 2001) ("Evidence is *unfairly* prejudicial only if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." (quoting United States v. Long, 86 F.3d 81, 86 (7th Cir.(1996))); State v. Hurd, 360 A.2d 525, 528 n.5 (Me. 1976) (in clarifying what he meant by undue prejudice, the judge stated:

    > It should be emphasized that prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.

    (quoting MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 439, n.31 (2d ed. E. Cleary ed. 1972))).
15. FED. R. EVID. 701, *supra* note 5 (governing opinion testimony by lay witnesses).
16. FED. R. EVID. 403, *supra* note 14 (governing exclusion of relevant evidence based on prejudice, confusion or waste of time).
17. *See* cases cited *supra* note 13.

fers judicial legitimacy on the admission of evidence based on racial bias and stereotyping.

I. *Clifford v. Commonwealth*

Detective William Birkenhauer (Birkenhauer) of the Northern Kentucky Drug Strike Force had an agreement with Gary Vanover (Vanover), a police informant, whereby Vanover would assist Birkenhauer in setting up a drug "sting" operation.[18] On May 20, 1996, Birkenhauer and Vanover set up a meeting with Charles Clifford (Clifford) for approximately 3:00 p.m. at Vanover's apartment.[19] Birkenhauer instructed Vanover to tell Clifford that he wanted to buy a quarter of an ounce of crack cocaine.[20]

At Clifford's trial, Birkenhauer testified that when he arrived at Vanover's apartment, Vanover answered the door and a female friend of Vanover's was also present.[21] Birkenhauer testified that Clifford emerged from a back bedroom and told him that he had only $75 worth of cocaine with him, because he did not like to carry more than that on his person, but that he could get more by later that afternoon.[22] Birkenhauer testified that Clifford went into the back bedroom with Vanover and Vanover, not Clifford, came out carrying a baggie of crack cocaine, which he gave to Birkenhauer. Birkenhauer said he gave Vanover $75 and told him to tell Clifford that he would return later in the afternoon for the rest.[23]

Birkenhauer never actually saw Clifford with the crack cocaine. Birkenhauer testified that it was Vanover with whom he actually made the deal. At Clifford's trial, Vanover testified that the crack cocaine actually belonged to him (Vanover), that he had made the sale to Birkenhauer, and that Clifford was not involved in the transaction. Clifford did not testify at trial.[24]

Unbeknownst to Clifford or Vanover, Birkenhauer was "wired" with an audio transmitter. Other police officers, including one Darin Smith (Officer Smith), were in a nearby apartment with surveillance equipment and a receiver. Officer Smith was listening to the transaction over the receiver. A tape recording of the transaction was made but was found by the trial judge to be inaudible, and therefore, inadmissible at Clifford's trial.[25]

However, Officer Smith was permitted to testify to what he heard over the receiver as the transaction was occurring. Officer Smith testified that he saw Birkenhauer enter the apartment and that he then heard four different voices, the first of which he recognized to be Birkenhauer's. Officer Smith testified that he then heard the voice of a second male, the voice of a female, and, finally, the voice of a fourth person, a male, that

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18. Clifford v. Commonwealth of Kentucky, 7 S.W.3d 371, 373 (Ky. 1999).
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.

"sounded as if it was of a male black."[26] Clifford was the only black male in the apartment.

As to his qualifications to offer such testimony, Officer Smith said that as a police officer for thirteen years he had spoken to black males on numerous occasions. Based on that experience, Officer Smith testified that he could identify the last voice he heard as that of a black male.[27] Officer Smith is a white male.

Officer Smith's testimony was as follows:

> Q. Based on that [Smith's experience], as best you can recall, I just want you to tell me what you can recall the conversation you heard between Detective Birkenhauer, just telling the jury what the male black said, or the person you believed to be a male black.
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> A. That would have been the fourth and final voice on the tape. Detective Birkenhauer stated that he would take the "75" now and asked how long it would be, something along those line, before he could get back with the additional drugs. What was believed to be a male black responded, fifteen or twenty minutes or so, I didn't bring it with me, I left it at my house, you know what I am saying, I didn't want to have it on me. Detective Birkenhauer said, I'll take the "75" now, and we will hook up later.[28]

The cross-examination of Officer Smith included the following exchange:

> Q. Okay. Well, how does a black male sound?
>
> A. Uh, some male blacks have a, a different sound of, of their voice. Just as I have a different sound of my voice as Detective Birkenhauer does. I sound different than you.
>
> Q. Okay, can you demonstrate that for the jury?
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> A. I don't think that would be a fair and accurate depiction of the, you know, of the way the man sounds.
>
> Q. So not all male blacks sound alike:
>
> A. That's correct, yes.
>
> Q. Okay. In fact, some of them sound like whites, don't they?
>
> A. Yes.
>
> Q. Do all whites sound alike?
>
> A. No sir.
>
> Q. Okay. Do some white people sound like blacks when they're talking?
>
> A. Possible, yes.[29]

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26. *Id*.
27. *Id*.
28. *Id.* at 373–74.
29. *Id.*

On appeal, the government argued that the probative value of Officer Smith's testimony outweighed the prejudice to Clifford.[30] The government argued that Officer Smith had personal knowledge and testified only as to what he heard via the body wire transmission.[31] Officer Smith, however, was not present at the transaction, so the basis for his interpretation of the tapes was not actual, personal knowledge.

The government also argued that Officer Smith was merely corroborating Birkenhauer's testimony.[32] Officer Smith's statement that the voice "sounded black," however, was tantamount to an identification of the defendant. Because Clifford never testified at trial, Officer Smith had absolutely no idea how Clifford actually "sounded." Officer "Smith's testimony that the voice he heard sounded like an 'African American accent' in no way tended to increase the probability that Appellant [Clifford] was the speaker, because there was no showing that Appellant [Clifford], himself, spoke in the manner described."[33] Birkenhauer never actually saw Clifford with the crack. It was Vanover who had confessed to the crime thus exonerating Clifford. Therefore, the jury was faced with conflicting testimony between Vanover and Birkenhauer and Officer Smith's race-based testimony became the linchpin of the government's case.

II. It's the Admissibility, Not the Weight: The Collective Facts Rule

In support of the court's admission of Officer Smith's testimony, the majority opinion cites to the collective facts rule.[34] The collective facts rule is an exception to the general rule that lay witnesses may not present opinion testimony.[35] The rule permits lay witnesses to testify as to what would otherwise be considered "opinion" testimony if "the opinion is a type of inference that lay persons *commonly* and *reliably* draw; and . . . the lay witness cannot verbalize all the underlying sensory data supporting the opinion."[36]

The rule is a pragmatic approach to common evidentiary problems. In some common circumstances, an essential element of a party's case depends on the proof of a set of facts that can only be proven by eyewitness testimony, and yet the eyewitness cannot verbalize their observations in a way that avoids the evidentiary prohibition on lay witnesses presenting opinion testimony. To avoid the risk that a party's case will be irreparably harmed by the failure to meet a technical rule about admissibility of evi-

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30. Brief for Appellee, at 7–8, Clifford v. Commonwealth of Kentucky, 7 S.W.3d 371 (Ky. 1999) (No. 97-SC-000368). *See* Fed. R. Evid. 403 *supra* note 14.
31. Brief for Appellee, at 8, Clifford v. Commonwealth of Kentucky, 7 S.W.3d 371 (Ky. 1999) (No. 97-SC-000368).
32. *Id.*
33. *Clifford*, 7 S.W.3d at 379 (dissenting opinion).
34. *Id.* at 374.
35. *See* State v. Boucher, 376 A.2d 478, 481 (Me. 1977) (holding that the witness's testimony that the matter "appeared to be blood," was admissible as a "short-hand rendering of his perception"). *See also* Wood v. United States, 361 F.2d 802, 805 (8th Cir. 1966) (permitting agent to testify that he saw grease and blood on the defendant's shirt).
36. Edward J. Imwinkelried, Evidentiary Foundations 280 (Lexis Law Publishing, 4th ed. 1998) (emphasis added).

dence, the court allows an exception to the general rule on opinion testimony.

A. Is the Proffered Evidence—Lay Witness Testimony About Race, Based on Voice Alone—Something People Commonly Perceive?

The *Clifford* majority cites, as examples of the application of the collective facts rule, cases in which lay witnesses were permitted to testify as to the speed of a vehicle; the age of a person; whether a person was intoxicated; the degree of physical suffering of another; the mental and emotional state of another; and the smell of gasoline at an arson scene.[37]

In none of these cases did the opinion testimony serve as evidence concerning the identification of a suspect. In each case the witness was allowed to testify to his or her conclusion because there was no other feasible alternative by which to communicate that observation to the trier of fact.[38]

For example, in *Clement Brothers Constr. Co. v. Moore*,[39] the plaintiff's theory of the case was that he had been struck by a truck being driven too fast in light of the icy road conditions present at the time.[40] An eyewitness testified that the truck was traveling at 40 to 45 miles per hour, which testimony was admitted by the court.[41] Such testimony is almost universally permitted, in recognition of the fact that otherwise bystanders would find it almost impossible to testify as to how they perceived the speed of a vehicle. Were such testimony barred, absent concrete evidence of speed, this essential fact in negligent driving cases would almost never be provable.

In such a case it is entirely appropriate to allow the witness to testify. Lay people commonly and accurately estimate the speed of a vehicle. Cross-examination can reveal any doubts about the accuracy of the witness's judgment in the matter, and the jury can be relied on to weigh the extent to which they wish to credit the reliability of the testimony. This is true of each of the traditional collective facts cases cited by the *Clifford* majority.[42]

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37. *See supra* note 6.
38. *Id*.
39. 314 S.W. 2d 526 (Ky. 1958).
40. *Id*. at 529.
41. *Id.*
42. *See* cases cited *supra* note 6. In *Howard v. Kentucky Alcoholic Beverage Control Bd.*, 172 S.W.2d 46 (Ky. 1943) the witness, a liquor commissioner, testified as to the age of persons served in a bar that was accused of selling alcoholic beverages to minors. The age of the persons served was an element of the charged offense, not an aspect of identifying any persons charged. The fact that the drinkers looked young would have been relevant in evaluating the knowledge of the bar owners that they were serving alcohol to under-age drinkers. Furthermore, the inspector did not merely assert without support that he could judge the patrons' ages. The agent explained how

> he formed the opinion by their clean, smooth appearance in respect to their faces—no beard, the manner in which they dressed, their actions and their talk. He said he had asked one of the boys his age and he told him he was sixteen years old. He said the boy was about five feet and six inches tall and weighed about 125 pounds.

The other cases relied on by the *Clifford* majority were similar in nature.[43] In each, the witness testified as to an element of the offense or an issue relating to an evaluation of the damages suffered by the plaintiff, not as to the identification of any suspect. In each case the testimony was entirely free of any risk of prejudicial impact, making it appropriate to admit the evidence, allow the cross-examination process to reveal any possible weakness in the testimony, and allow a jury to determine the reliability of the testimony. The proffered evidence in each case was relevant because it went to an issue relating to an element of the cause of action, or to an evaluation of the injuries incurred, and therefore was unquestionably relevant.[44]

Most of the examples of the collective facts rule relied on by the *Clifford* court involve the identification of *visual* characteristics by use of testimony about what the witness *saw*.[45] When a witness identifies a person's accent, they identify an *aural* characteristic by use of testimony about what they *heard*.

B. Is Race Identification, Based on Voice Alone, Akin to Lay Witness Testimony Concerning Accent, Dialect, or Gender?

The collective facts rule will allow a lay witness to testify as to their opinion regarding a person's accent assuming that an appropriate foundation has been laid concerning the witness's ability to recognize the accent in question.[46] It is not unusual for a court to allow lay witness testi-

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Id. at 48. This additional testimony went to the reliability of his testimony, a factor appropriately evaluated by the jury. Similarly, with regard to his testimony as to the intoxication of the bar's customers, the commissioner was able to explain how he formed this opinion, "[b]y their general action, the stupor on their faces, their speech, which was not at all plain English, and sometimes staggering around." *Id.* at 48. There was no issue of any potential prejudicial effect of the testimony, and cross-examination could be used to discredit the witness's ability to make the judgments, allowing the jury to determine the weight to be placed on the commissioner's judgment.

43. *See supra* note 6. The other cases concerned witnesses testifying as to various aspects of parties' mental and emotional states relevant for an evaluation of damages, and a witness's ability to identify the smell of gasoline at the scene of an alleged arson fire. Clifford v. Commonwealth of Kentucky, 7 S.W.3d 371, 374 (Ky. 2000).

44. *See* Fed R. Evid. 401 (defining "relevant evidence" as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

45. *See supra* notes 6 and 42.

46. *See* United States v. Williams, 212 F.3d 1305, 1310 n.6 (2000):

> [T]o admit lay opinion evidence rationally based on the witness's perception, a sufficient factual foundation must exist . . . . The Office of Legal Education of the Executive Office for United States Attorneys provides guidelines to establish a proper foundation for the opinion testimony of a skilled lay observer: 1. That the witness has, on prior occasions sufficient in number to support a reasonable inference of knowledge of or familiarity with a subject, observed particular events, conditions, or other matters. 2. That the witness on a certain occasion observed a specific event, condition, or matter of the same nature as previously observed. 3. That on the basis of his knowledge or familiarity with the event, condition or matter, he has an opinion as to the event, condition or matter involved in the case. 4. That the statement of the opinion will be helpful to a clear understand-

mony regarding a person's accent because it may be hard to put into words how one recognizes a particular dialect.[47]

However, the *Clifford* court takes the application of the collective facts rule one step further. Officer Smith was attempting to identify a person's race based solely on having heard the person speak. Identification of a person's race is an inherently visual concept.[48] Therefore, Officer Smith's testimony concerned the identification of an inherently *visual* concept by use of testimony regarding his *aural* impressions. Furthermore, the term "accent" in everyday usage defines the manner of speech associated with people from specific regions or particular nationalities.[49] While it is certainly commonplace to speak of a person as having a French or southern accent, is it equally common to speak of someone as sounding "white" or "black"? Indeed, this distinction is recognized by the courts in Title VII cases in which plaintiffs allege they have been accused of discrimination on the basis of their accent. Title VII bans discrimination on the basis of "race, color, religion, sex or national origin."[50]

Professor John Baugh,[51] a leading expert in the field of linguistics, asserts that an African American's voice can accurately be identified. His studies have shown that landlords continue to use racial profiling to discriminate against African Americans in housing.[52] With an accuracy rate of 80–90%,[53] the experts in the linguistic field[54] agree that the average lay-

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ing of the testimony of the witness [or] the determination of a fact in issue.) J. Randolph Maney, Jr. & Ruth E. Lucas, COURTROOM EVIDENCE 130 (citing MURL A. LARKIN, FEDERAL EVIDENCE FOUNDATIONS 119–20 (1988).

Id. at 1310.

47. People v. Sanchez, 492 N.Y.S.2d 683, 684-85 (1985) (holding that "the opinion of a lay witness is admissible when, by virtue of his life experience, the witness is familiar with the subject matter in question, and the opinion does not require technical or scientific expertise") *id*. at 684–85.
48. *Webster's Dictionary* defines race as "any of the major biological divisions of mankind, distinguished by color and texture of hair, color of skin and eyes, stature, bodily proportions, etc . . . ." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1983).
49. *Webster's Dictionary* defines accent as "a distinguishing *regional* or *national* style of pronunciation; as, a French accent." *Id.*
50. 42 U.S.C. §§ 2000e-2 (1994). Even when the person's race potentially could be at issue, the courts have treated such "accent discrimination" under the rubric of "national origin discrimination." *See, e.g.*, Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (treating discrimination based on accent of U.S. national born in the Philippines as national origin discrimination rather than racial discrimination).
51. John Baugh, Professor of Education and Linguistics at Stanford University. Most recently he has integrated this work into studies of linguistic discrimination in the United States and South Africa.
52. *See* Thomas Purnell, William Idsardi & John Baugh, *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. LANGUAGE & SOC. PSYCHOL., 10–30 (1999).
53. Walt Wolfram is William C. Friday Distinguished Professor at North Carolina State University. He is considered the national expert on dialectology. During a recent conversation he stated that "[v]irtually all judgment samples indicate that listeners can, in fact, identify African American speakers at levels of 80–90% accuracy. That is empirical data that has been replicated time and time again in studies over the last 30 years." Interview with Walt Wolfram.
54. *See supra* notes 51, 53, and *infra* note 62.

person can identify the race of a person on the other end of the phone.[55] Amazingly, these studies show that a person can identify an African American caller within the first 5–7 seconds of a phone call.[56]

Misidentifying other races, however, is not uncommon. A study by Lanita Jacobs-Huey, Ph.D,[57] was done using three male subjects; two were African American and the other was white. All three men were college educated, from middle-class backgrounds, and were in their early to mid-twenties when they were interviewed.[58] The white male had adopted the style and speech associated with African Americans. Their interviews were taped and then listened to by ninety-two assessors.[59] The two African American males were identified as such 92% and 85% of the time, respectively, while the white male was *misidentified* as black 92% of the time.[60] Another professor of linguistics[61] admitted that she, herself, had misidentified a white woman as black. In a very candid moment, she stated that she would have sworn that the person on the other end of the telephone was an African American woman. In fact, the person on the other end of the telephone was a middle-class, white woman from Alabama. Ironically, this professor resides in Kentucky.

In another study done in 1973, video footage was shot of three children speaking: one white American, one African American, and one Hispanic. Each child was filmed separately. "The videotapes were side views of [the] children whom could be seen speaking but whose utterances could not be lip read." The same standard English voice was dubbed on to all three tapes. The assessors were told to score the speech they heard for standardness and fluency. The white child was judged the most standard and fluent; the African American child was judged fluent, but not standard; and the Hispanic child was judged the least fluent. Yet, the assessors heard the exact same voice for all three children. The assessors thought they were reacting to the speech they heard, but in fact they were reacting to racial stereotypes based on what they had *seen*.[62]

Perhaps Officer Smith, knowing that it was a crack cocaine deal that was about to happen, mistakenly heard a "black" voice as well. Presumptions play a key role in how people live day-to-day. Experts conclude that the problem is not in associating a particular speech pattern with a specific race, but rather, the problem is with what the identifier

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55. According to John Baugh, "The ability to discern the use of a nonstandard dialect is often enough information to also determine the speaker's ethnicity, and speakers may consequently suffer discrimination based on their speech." *Supra* note 52.
56. Purnell, Idsardi, and Baugh, *supra* note 52 at 28.
57. Lanita Jacobs-Huey, Ph.D, is assistant professor, Anthropology Department and Program in American Studies and Ethnicity, at the University of Southern California. Her study *Is There an Authentic African American Speech Community: Carla Revisited*, U. Penn Working Papers in Linguistics, 335–57, Volume 4.1, 1997, was published while she was a graduate student at the University of Pennsylvania.
58. *Id*. at 335.
59. *Id.* at 355.
60. *Id.* at 357.
61. For obvious reasons, this professor of linguistics prefers to remain anonymous.
62. Frederick Williams, *Some Research Notes on Dialect Attitudes and Stereotypes*, Language Attitudes: Current Trends and Prospects , 113–28. (Roger Shuy ed.) This edition was edited by Roger W. Shuy, Distinguished Research Professor of Linguistics, Emeritus, Georgetown University.

does with that particular information.[63] Preventing the use of evidence in a discriminatory way is precisely why Rule 403 exists.[64]

Putting the reliability issue aside, the problem with allowing this kind of race-based testimony is twofold. First, courts have consistently warned about using identification testimony by police or parole officers.[65] "[T]he use of the identification by police officers, while constitutionally permissible, did increase the possibility of prejudice to the defendant in that he was presented as a person subject to a certain degree of police scrutiny."[66] The police officer in *Clifford*, testified that the reason he could identify a person as "sounding black" was because of his thirteen years spent on the force talking with "black males on numerous occasions."[67] Second, statements referring to the race of an accused can move the jury to decide the case on an improper basis.[68] In a perfect world, identifying someone as black would have no prejudicial effect. In today's society, however, racial biases still exist. Even the police use racial profiling in drug interdiction cases.[69] The media continually reinforces these stereotypes.[70] Because no one can ever truly know why a juror decided the way she did, this kind of race-based testimony cannot be allowed in a court of law.

III. The Risk of Prejudice to the Defendant Outweighs Any Probative Value of the Evidence

Issues of prejudicial impact of testimony only arise when the testimony relates to the identity or character of the defendant.[71] When there is no risk of prejudice to consider, the reliability of a witness's testimony is appropriately assessed at the discretion of the jury.[72] As required by Fed-

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63. Professor Wolfram stressed that "[t]he problem with the American stereotype is the association of other behaviors with "sounding black." Sounding African American is a matter of identity; associating that with negative behavior is a prejudice that links stigmatized language to negative behavior." Wolfram, *supra* note 53.
64. Fed. R. of Evid. 403, *supra* note 14.
65. *See, e.g.*, United States v. Butcher, 557 F.2d 666 (9th Cir. 1977); United States v. Calhoun, 554 F.2d 291 (6th Cir. 1976); United States v. Doe, 903 F.2d 16, (D.C. Cir. 1990); United States v. Farnsworth, 729 F.2d 1158 (8th Cir. 1984); and United States v. Henderson, 68 F.3d 323 (9th Cir. 1995).
66. *Butcher* 557 F.2d at 669.
67. Clifford v. Commonwealth of Kentucky 7 S.W.3d 371, 373 (Ky. 2000).
68. *See generally* United States v. Bogan, 267 F.3d 614, 623 (Wis. 2001).
69. *See infra* note 136.
70. *See generally* Craig Reinarman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 Contemp. Drug Probs. 535, 539–43 (1989) (documenting early media attention on crack cocaine).
71. Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352; and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. Rev. 1003, 1045–53 (1984). Other commentators have criticized Professor Mendez's orthodox view. *See, e.g.*, H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. Rev. 845, 883, 890 (1982); David P. Lenard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. Colo. L. Rev. 1 (1986-87).
72. Fed. R. of Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible: All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by others prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

eral Rule of Evidence (FRE) 104(a),[73] when evaluating the probative worth of evidence, the role of the judge is simply to act as a gatekeeper. The judge should admit a witness's testimony if she determines that a reasonable juror could find that the testimony has some probative value.[74]

Having played this gatekeeper role, it is for the jury to evaluate the weight to be given to the testimony.[75] If the only challenge to the testimony is to its reliability, a minimal standard is applied for admission.[76] When the question, however, is the risk of prejudice, FRE 403[77] requires that the judge determine whether the risk of prejudice outweighs any possible probative value of the testimony. In order to carry out this weighing function, the judge must *independently* evaluate the probative worth of the testimony, including its reliability.[78] Only after the judge has determined the reliability of the testimony is it possible to carry out the weighing required by Rule 403.[79]

The *Clifford* majority paid no attention to this distinction. Indeed throughout its opinion the court cites Kentucky Rule of Evidence (KRE) 701[80] regarding admissibility under the collective facts rule, but never once cites to KRE 403[81] regarding the risk of prejudice, despite this issue having been squarely presented to the court.[82]

A. How the Courts Cited in Clifford *Have Also Ignored the Risk of Prejudice Associated with Identifying an Accent or Dialect*

Because issues of prejudicial impact of testimony only arise when the testimony relates to the identity or character of the defendant, this issue is not typically present in collective facts cases. When the collective facts rule is broadened to allow in testimony as to a particular accent or dialect, however, the testimony specifically relates to the identity of the accused. The primary case relied upon by the *Clifford* court for the supposition that lay witness opinion testimony as to the defendant's identity is allowed is *People v. Sanchez*.[83]

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73. *See* Fed. R. of Evid. 104. ("Preliminary questions: (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court.") Note: Throughout, the Article cites to the Federal Rules of Evidence (FRE). The *Clifford* case was determined under the Kentucky Rules of Evidence, but as to the rules at issue, these are identical to the FRE.
74. *See* Fed. R. Evid. 401, *supra* note 44.
75. *See* Ballou v. Henri Studios, Inc, 656 F.2d 1147 (5th Cir. 1981); *see also* John R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rule of Evidence*, 79 Nw. U. L. Rev. 1097 (1984-85).
76. *See supra* notes 73–74.
77. *See supra* note 14.
78. *See generally* Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 Vand. L. Rev. 879 (1988).
79. *Supra* note 14.
80. *See supra* note 5.
81. *See supra* note 14. The concurring opinion mentions KRE 403 but merely to establish the appropriate standard of review. Clifford v. Commonwealth of Kentucky 7 S.W.3d 371, 377 (Ky. 2000).
82. *See supra* note 30.
83. People v. Sanchez, 492 N.Y.S.2d 683 (1985).

In *Sanchez*, Wilberto Sanchez was accused of second-degree murder and offered a defense of mistaken identity. Israel Torres had witnessed an argument between a man allegedly resembling Mr. Sanchez and the deceased just prior to the deceased being shot. The defendant, a Puerto Rican, claimed that the person whom the eyewitness had seen was a "'Dominican' who bore a remarkable resemblance to himself."[84] In light of the issue raised by the defendant, Torres was asked whether the person he had seen arguing with the deceased spoke with a Dominican or Puerto Rican accent. In response to a challenge that Mr. Torres was not an expert witness in linguistics, Torres, a native Puerto Rican, stated that Dominicans had a distinct accent that could be distinguished from a Puerto Rican accent. His testimony was accepted based on this statement.[85]

The issue before the *Sanchez* court therefore was the identification of *nationality* via testimony regarding accent. The first thing to note is that the testimony as to the witness's ability to recognize a Dominican accent was not used in any way to identify the *defendant* in *Sanchez*. Further, there was no concern that the prosecution was trying to introduce testimony as to nationality to inflame any prejudices the jury might have against Puerto Ricans. Indeed, the defendant himself had first raised the question of nationality.[86] There was no challenge to Mr. Torres's testimony on the grounds of prejudice, presumably because no one thought that a jury in New York City would harbor any particular prejudices as between Puerto Ricans and Dominicans. Since the only question was reliability, and since the court decided that the evidence was at least minimally probative, it was appropriate for the jury to be allowed to consider how much weight to place on the witness's ability to distinguish between such accents after hearing the witness being cross-examined.[87]

The *Sanchez* court attempts to find support for its decision to admit Mr. Torres's testimony in a series of prior New York court opinions.[88] At

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84. *Id.* at 684.
85. This decision seems dubious since presumably neither the judge nor jurors were Spanish speakers, so it is hard to see how they could evaluate the veracity of this statement. Courts generally require an expert to explain how to evaluate evidence when allowing testimony that a jury is incapable of evaluating based on their personal experience.
86. *Sanchez* 492 N.Y.S.2d at 684.
87. Not all courts have agreed that non-experts can reliably recognize nationality by accent. A 1992 New York Appellate Division court held that testimony regarding whether or not a party spoke with a Jamaican accent was inadmissible because the witness was not an expert in linguistics. People v. King, 584 N.Y.S.2d 153 (1992). *See also* United States v. Bostic, 713 F.2d 4101 (8th Cir. 1983) (testimony that witness believed robbers were black based on their voices was challenged as lacking adequate foundation since none of the experts was a linguistic expert. The court stated that "this kind of evidence should be regarded with care and circumspection" but decided that even though the testimony possibly lacked foundation, there was sufficient other evidence to convict, and noted that the lower court gave cautionary instructions to the jury regarding use of this testimony.).
88. The court claims "accepted lay opinions *sub silencio* on matters relating to accent." Sanchez 492 N.Y.S.2d at 685. To say that these cases even sub silencio provide support for the reliability of testimony as to accent strains the bounds of logical inference. The *Sanchez* court describes *People v. Pavao*, 451 N.E.2d 216 (Ct. App. N.Y. 1983), as relating to the "distinction between [a] Brazilian accent and [a] Portuguese accent." *Id.* In fact, there is no testimony about accents at issue at all in this case. The

most the logic of the *Sanchez* court's analysis provides support for use of testimony as to accent to assist in identifying a person's geographic origin when there is no risk of prejudice from admitting such testimony, and such testimony is not used to identify the defendant. This was squarely not the issue facing the *Clifford* court. The problem, in *Clifford*, is that Officer Smith's statement that the voice "sounded black" amounted to an identification of the accused.

The *Clifford* court tacitly recognizes that *Sanchez* is not directly on point, and so looks for more specific support for the admission of testimony identifying a suspect's *race* based on testimony concerning the suspect's voice.[89] The court claims that it finds support for admitting such testimony in five additional cases, *State v. Smith*,[90] *Rhea v. State*,[91] *State v. McDaniel*,[92] *State v. Phillips*,[93] and *State v. Kinard*.[94] The *Clifford* court cites each of these cases for the proposition that testimony identifying racial characteristics, based upon hearing a person speak, is admissible.

In *State v. Smith*,[95] the witness made a specific voice identification of the defendant based on *personal experience* of *hearing* his voice.[96] Identification by race was not at issue. Smith was in the sheriff's office, where the police dispatcher had taken a previous anonymous call. The dispatcher heard Smith speaking and recognized his voice as that of the previous caller. The fact that she described the voice as that of a white male, around forty years old "with a very country and rugged, scratchy like voice,"[97] was merely descriptive of how she recognized the specific voice again when she heard Smith speak in the sheriff's office a day later.

This case relied on the *specific* recognition of a *specific* voice, not on a general statement that the caller was white as the primary means of identification. As such, the description of the voice as belonging to a white man was entirely irrelevant—the dispatcher could simply have said that she recognized the voice by having heard it previously. Therefore this case provides no support for the proposition that identification of the race

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case concerns the disqualification of an interpreter who is unable to understand the Portuguese spoken by the witness for whom she is acting as interpreter due to the difference between the witness's accent and the Portuguese with which the interpreter is familiar. In *People v. Burdick*, 14 N.Y.S.2d 410 (1979), the fact that the defendant spoke with an accent was a factor in the court's decision that there was insufficient circumstantial evidence to convict the defendant. The employee on duty during a service station robbery testified that the robber had no discernible accent while the defendant, the witness's co-worker, spoke with a southern accent. In *People v. Brnja*, 406 N.E.2d 1066 (Ct. App. N.Y. 1980), a witness's testimony that a thief spoke with a Slavic, Polish, or Russian accent was never used at any point in the case, and therefore was never at issue. The statements about accents are completely extraneous to the case. Finally, in *People v. Brown*, 469 N.Y.S. 159 (1983), a suspect's accent, along with an extensive physical description, was the basis for a police stop, but there is no evidence that any testimony as to accent was used at trial.

89. Clifford v. Commonwealth of Kentucky 7 S.W.3d 371, 375 (Ky. 2000).
90. State v. Smith 415 S.E.2d 409 (S.C. Ct. App. 1992).
91. Rhea v. State 147 S.W. 463 (Ark. 1912).
92. State v. McDaniel 392 S.W.2d 310 (Mo. 1965).
93. State v. Phillips 212 S.E.2d 172 (N.C. Ct. App. 1975).
94. State v. Kinard 696 P.2d 603 (Wash. Ct. App. 1985).
95. *Smith*, 415 S.E.2d at 415.
96. *Id.*
97. *Id.*

of a person, based on their voice, is admissible as a primary means of identification.

Even were the racial description of the voice of consequence in this case, identifying a voice as white is not subject to the same fears of prejudice as identifying a voice as black. This case provides no guidance to the *Clifford* court as to how to approach the question of the prejudicial impact of the testimony offered by Officer Smith.

Rhea v. State[98] does provide an example where an accent was used to identify race as an essential part of identifying the defendant in a homicide investigation. The first question that one might ask about the *Clifford* court looking to this case is whether a court in 1999 should be looking to a case from Arkansas in 1912 as providing guidance as to the appropriate standard to be used in judging issues related to race. Even ignoring this concern, however, this case offers no guidance as to how to address the issue of the potential prejudicial impact of Officer Smith's testimony.

Rhea was a white plantation manager. One of his African American laborers had been taken into custody by a constable. Contested testimony suggested that Rhea ordered five of his African American laborers to accompany him in pursuit of the constable. On approaching the constable, someone from the party cried out "[t]urn that damn Negro loose" following which, a member of the party shot the constable.[99] Rhea testified that he was "not along with the Negroes when [the constable] was shot." One of the eye-witnesses to the incident testified that he could not determine, based on sight, whether any member of the crowd was white, but that he had heard the voice cry out, "Turn that damn Negro loose," and that he could identify the voice as being that of a white man.[100]

Much as was true of *Sanchez*, the issue facing the *Rhea* court was distinct from that facing the *Clifford* court. Even though the testimony in *Rhea* did concern race, not nationality, the testimony in *Rhea* raised no issue of potential prejudice to the defendant. The identification at issue in *Rhea* was a statement used to implicate the only white person among a group of African American laborers. If there was any risk of prejudice, it was surely that this testimony would prejudice the jury to acquit the defendant, blaming one of the African American laborers for the shooting—not that the jury would be prejudiced against the white defendant as a result of his race. Therefore, this case does not raise the question of prejudice faced by the *Clifford* court.

Of the five cases relied on by the *Clifford* majority, two involve identification of someone as being white based on speech identification, raising no fear of a prejudicial impact for the defendant. The remaining three cases, however, do present examples of courts that accepted identification of someone as "sounding black," the issue actually before the *Clifford* court.

The first of these cases is *State v. McDaniel*[101] in which the court permitted a furrier to testify that the people who robbed his store had "Ne-

98. *Rhea*, 147 S.W. 463.
99. *Id*. at 467.
100. *Id.* at 468.
101. State v. McDaniel, 392 S.W.2d 310 (Mo. 1965).

gro accents."[102] It is significant that additional evidence linking the defendants to the robbery existed, including testimony that the store personnel had seen the hands of one robber and identified them as being black an eyewitness who saw the thieves running from the store and identified them as "three Negroes," and numerous items found in the defendant's car linked them to the crime.[103] Because there was eyewitness testimony as to the race of the robbers, there was no additional risk of prejudice in identifying the race of the robbers via the testimony as to their dialects. Because the testimony had not been challenged on the grounds of undue prejudice, the court did not address this question. Therefore, once again, this case provides no guidance as to how to weigh the prejudicial impact of the testimony against its probative value.

In *State v. Phillips*[104] the North Carolina Court of Appeals remanded the case for a new trial based on the prejudicial effect of the admission into evidence of weapons that were discovered during an illegal search of the defendant's car.[105] The court did accept testimony that the men who robbed the witness "sounded like black people talking"[106] on the basis that the witness "did not purport to identify his assailants by race" and that the witness stated, "he did not know whether they [the assailants] were black or white."[107]

Unfortunately, the court did not make clear the grounds on which the testimony was challenged, so it is impossible to tell if the issue raised was reliability or prejudice. The court may well have given little thought to this issue, however, since it had already overturned the use of the key evidence in the case based on the illegality of the search, so that any other ruling on admissibility was likely to be irrelevant.

The case most directly on point regarding the issue before the *Clifford* court is *State v. Kinard*.[108] The trial judge denied a motion in limine to exclude the victim's testimony that her assailant "sounded black to me."[109] The defendant appealed, citing to the "inflammatory effect" of this testimony on the jury.[110] The trial judge appears only to have addressed the reliability of the testimony, never addressing at all the question of prejudice,[111] and the court of appeals repeats this analysis. Thus, neither the trial judge nor the appeals court addressed the issue raised by the defendant as to the inflammatory effect of this testimony on the jury.

The appeals court held that this was a question of evaluating the "weight of the testimony and not its admissibility."[112] The court noted that the defendant's attorney did not cross-examine the witness at all on this

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102. *Id.* at 313.
103. *Id.* at 314.
104. State v. Phillips 212 S.E.2d 172 (N.C. Ct. App. 1975).
105. *Id.* at 175.
106. *Id.*
107. *Id.*
108. State v. Kinard 696 P.2d 603 (Wash. 1985).
109. *Id.* at 604.
110. *Id.*
111. *See id*. at 605 (stating that the trial court was not required to make any record of the weighing done of the factors on the record).
112. *Id.* at 604.

issue.[113] The court's reference to the role of cross-examination makes it clear that the court is only addressing the question of reliability, ignoring completely the issue of prejudice. If, however, the defendant's challenge raised concerns about exposing the jury to certain evidence that may lead it to rule based on prejudice, cross-examination still would not cure this problem because the jury has already been exposed to the prejudicial information. Even though the defendant had clearly challenged the testimony on the grounds of prejudice,[114] the *Kinard* court merely addressed the objection as if it were challenging reliability, providing little guidance to the *Clifford* court on the question of prejudice.

In sum, no case cited by the *Clifford* majority involving racial identification via voice testimony ever addressed the issue of whether such testimony should be barred on the grounds that the testimony was prejudicial. The most similar case on the facts is *Kinard*. Despite the appellant in *Kinard* having, however, raised the issue of prejudice, the Washington Appeals Court ignores that challenge in its analysis, solely focusing on the reliability of the testimony.

B. Racial Stereotyping of Defendants Heightens the Concerns of Prejudice—Particularly in Drug Cases

The United States Supreme Court has warned: "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[115] Fortunately, not all courts have been as unenlightened as the *Kinard* and *Clifford* courts by ignoring the potential impact of testimony that plays on racial fears or stereotypes. Some courts have recognized the risk that racial identification, or identification of nationality, may be particularly prejudicial in cases that involve drug crimes, where the public has certain preconceptions about whom they expect to see dealing and using drugs, especially crack cocaine.[116]

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113. *Id.* at 605.
114. *Id.* at 604.
115. Rose v. Mitchell, 443 U.S. 545, 555 (1979) (upholding post-conviction challenge to exclusion of blacks from grand jury service).
116. *See supra* note 12. *See also* Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, at A1 (describing Los Angeles Times study performed over a six-year period that found that there were numerous cases where the white defendants prosecuted in state courts had similar quantities of drugs to the African American defendants prosecuted in federal courts. Because of federal mandatory sentences, those people prosecuted in federal court were subject to much harsher penalties than those prosecuted in state court. There was not a single white person prosecuted in federal court for a crack offense during this six year period.); *see also* Robert C. Carter, *Discrimination in the New York Criminal Justice System*, 3 N.Y. CITY L. REV. 267, 272 (2000):

> Crack, a form of cocaine, has long been associated with poor black communities. The association persists despite the Sentencing Commission's widely publicized 1995 Special Report to Congress on cocaine and federal sentencing . . . . This association between blacks and crack has proved a self-fulfilling prophecy. The Sentencing Commission's 1997 update report on cocaine and federal sentencing policy shows that, despite being a minority of crack users, ninety percent of persons convicted of crack offenses are black.

In addition, some courts have recognized the risk of prejudice in identifying ethnicity or accent in drug cases. For example, the District Of Columbia Circuit Court of Appeals excluded testimony that an unidentified person who sold drugs to a police informant had a Jamaican accent and also excluded testimony as to the modus operandi of Jamaican drug dealers. The D.C. court excluded the testimony even though it may have been relevant, because the probative value of the testimony was outweighed by the prejudicial effect of appeals to racist inferences.[117]

Similarly, the Eighth Circuit excluded testimony regarding the likelihood that persons of Hmong descent were particularly involved in opium smuggling on the basis of its prejudicial impact when the defendants were themselves of Hmong descent.[118]

A Massachusetts appeals court set aside a judgment due to the prejudicial impact of repeated references by the prosecutor to "Columbian drug dealers" in the prosecution of a Columbian immigrant accused of cocaine trafficking.[119]

An Armed Forces Court of Appeals set aside the conviction of two Mexican American servicemen for marijuana possession and larceny when the prosecutor made repeated comments about their Hispanic ethnicity in his argument.[120]

The Ninth Circuit held it was plain error when the investigating detective repeatedly referred to defendant's Cuban origin.[121] As the Ninth Circuit said in *Cabrera*, this testimony "merely made it seem more likely in the eyes of the jury that [defendants] were drug dealers because of their ethnicity."[122]

The First Circuit has excluded, as prejudicial, testimony as to the defendant's Columbian nationality when it was used to show criminal association with another Columbian national in a drug case.[123] As the First Circuit said in *Rodriguez*, "this could be taken as an appeal to the jurors to find the defendant guilty by reason of his national origin, inviting them to believe that if a person is born in Columbia then he must be involved in drug trafficking. This form of reasoning is precisely the type of prejudice that Federal Rule of Evidence 403 is intended to guard against."[124]

Perhaps Officer Smith expected that the voice that he heard dealing drugs would be that of an African American.[125] After all, while African

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(New York city Law Review Summer 2000 Address Fourth Annual W. Haywood Burns Memorial Lecture the Committee on Minorities and the Law of the New York County Lawyers Association, 14 Vesey Street, New York, N.Y.); *see also* The Sentencing Project, *Drug Policy and the Criminal Justice System*, http://www. sentencingproject. org/brief/5047.htm (data on disparate impacts of crack prosecutions on blacks).

117. United States v. Doe, 903 F.2d 16, 21 (D.C. Cir. 1990).
118. United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994).
119. Commonwealth v. Gallego, 542 N.E.2d 323, 326 (Mass. App. Ct. 1989).
120. United States v. Diffoot, 54 M.J. 149, 152 (C.A.A.F. 2000).
121. United States v. Cabrera, 222 F.3d 590, 596 (9th Cir. 2000).
122. *Id*.
123. United States v. Rodriguez Cortes, 949 F.2d 532, 541 (1st Cir. 1991). *See also* People v. King, 584 N.Y.S.2d 153 (1992) (excluding a lay witness from testifying as to whether defendant spoke with a Jamaican accent where the witness was not an expert in linguistics).
124. *Id.* at 541. *See also* Fed. R. Evid. 403 *supra* note 14.
125. *See supra* note 116.

Americans represent only 13% of the nation's drug users, they make up 74% of those imprisoned for drug possession.[126] And the use of racial profiling by the police is well established.[127]

Even absent any conscious intent on Officer Smith's part, such preconceptions can affect one's interpretation of data and memory of events.[128] Officer Smith never saw the transaction take place; he simply heard it. The drug at issue in this case was crack cocaine, a drug widely associated with the African American community in the public's mind, and in the eyes of the police.[129]

By allowing the testimony of Officer Smith, the *Clifford* court conferred judicial legitimacy on racial stereotyping.[130] Officer Smith's race-based identification of a voice as a "black" male offered nothing to this jury except prejudice, both evidentiary and racial. It is simply not sufficient to chant the mantra "It goes to weight, not admissibility." Judges have been ignoring the prejudicial argument for far too long. Race-based testimony of this nature should not be allowed.

IV. The Tragic Results of Racial Stereotyping: Racial Profiling and Selective Enforcement, Irrational Crack Cocaine Laws, and Selective Prosecution

By definition, a stereotype is a conformance to a group of an "unvarying pattern . . . lacking any individuality."[131] When an entire group is suspect, because of the actions of a few, harsh consequences result.[132] In

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126. Marc Mauer & Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later 12 (1995).
127. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 806–07 (1999).
128. *See* A. Daniel Yarmey, *Earwitness Speech Identification*, 1 Psychol. Pub. Pol'y & L. 792, 797–98 (1995) (citing H. Hollien The Acoustics of Crime, (1990)). P. Ladefoged & J. Ladefoged, *The Ability of Listeners to Identify Voices*, 49 U.C.L.A. Working Papers in Phoenetics 43–51 (1980) (describing criminal investigation where narcotics agents phoned a hotel room on the pretense of arranging a deal and expected a Mr. Kalkin to answer. The police subsequently identified Kalkin as the speaker. Subsequent evidence revealed that Kalkin was not in the room at the time of the call and could not have been the person who spoke to the agents); P. Ladefoged *Expectation Affects Identification by Listening*, U.C.L.A. Working Paper in Phonetics, 41–42 (1980), (describing experiments using experienced phoneticians to test their ability to identify the voices of very familiar fellow lab workers. While the subjects correctly identified all the voices of fellow white lab workers, one half of them falsely identified a randomly selected African American as one of the two African Americans who worked in the laboratory reporting results of tests showing that expectations affect recognition of voice). *Id.* at 796–97; *see also id*. at 800 (stating that "voice stereotypes not only are elicited, they also influence recognition memory for perceived criminal and non-criminal speakers").
129. State v. Russell, 477 N.W.2d 886, 887 & n.1 (Minn. 1991) (96.6% of those charged with possession of crack cocaine were black while 79.6% of those charged with possession of cocaine were white). *See also infra* note 136.
130. *See supra* note 12 and *infra* note 153.
131. Webster's II New Riverside University Dictionary (1st ed. 1984).
132. *See generally* Delores D. Jones-Brown, *Fatal Profiles: Too Many "Tragic Mistakes" Not Enough Justice*, 207 N.J. Lawyer 48 (2001) (stating that African Americans are the "target of both excessive police suspicion and excessive police fear"). *Id*. at 48. *See also infra* notes 174–177.

his dissenting opinion in *Korematsu v. United States*, Supreme Court Justice Murphy denounced the use of stereotypes. "[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights."[133] In *Hirabayashi v. United States*, the Supreme Court condemned the practice of racial stereotyping. Speaking for the majority, Justice Stone stressed the following: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[134] In light of these strong prohibitions, how is it possible that racial stereotyping under the law still exists?

A. Racial Profiling and Selective Enforcement

Although courts have admonished against racial profiling,[135] police officers routinely and improperly use race as a reason to detain motorists.[136] Thousands of innocent motorists each year are targeted for the sole reason of "driving while black."[137] Given that white and black motorists

133. Korematsu v. United States, 323 U.S. 214, 240 (1944).

134. United States v. Doe, 903 F.2d 16, 22, (D.C. Cir. 1990) (quoting two Supreme Court cases: Hirabayashi v. United States, 320 U.S. 81, and *Korematsu* 32 U.S. 214 (1943)).

135. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that the Fourth Amendment did not allow a roving patrol of the border patrol to stop a vehicle near the Mexican border and question its occupants concerning their immigration status and citizenship where the occupants' apparent Mexican ancestry furnished the only ground for suspicion that the occupants were aliens); United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) (Hispanic appearance of drivers was not a proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop them); *See also supra* notes 133–134.

136. United States v. Montero-Camargo, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000) (stating that significant body of research shows that race is routinely and improperly used as a proxy for criminality, and is often the defining factor in police officer's decisions to arrest, stop or frisk potential suspects).

137. *See* Lisa Walter, *Eradicating Racial Stereotyping From Terry Stops: The Case For an Equal Protection Exclusionary Rule*, 71 U. Colo. L. Rev. 255, 256 (1996) (citing Michael Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, Wash. Post, Mar. 29, 1996, at A1:

> As Washington Post writer Michael Fletcher learned after interviewing prominent African American males in 1996, a well-dressed African American male driving a nice car draws a lot of attention from police officers. Men such as Christopher Darden, the prosecutor in the O. J. Simpson case; Salim Muwakkil, Chicago academic and journalist; and Wade Henderson, NAACP lawyer and lobbyist, all say they have been stopped for DWB—driving while black. Muwakkil claims he has been stopped so many times on driving trips in the Midwest that he computes the time spent in traffic stops into his overall travel time. Henderson says he once requested a different model rental car than the sporty red car he was originally assigned for his weekly trip from Washington, D.C., to Richmond to teach a law school class for fear the flashy car would attract too much police attention. Darden says he gets stopped about five times a year by "some cop who is suspicious of an African-American man driving a Mercedes.")

Id. at 256.

statistically commit traffic violations on a similar percentage basis,[138] the fact that police choose to pull over black motorists at an increasingly alarming rate is very telling. Logic would suggest that the sheer waste of money and manpower would alter the use of racial profiling in traffic stops.[139] As Rachel King, legislative counsel for the ACLU, explains, "police spend a great deal of time pulling over drivers even when there are no charges to file against them. In Florida, for instance, only ten percent of the thirty-two to thirty-five million traffic stops each year result in tickets. According to King, 'you must have a lot of time on your hands when [a large percentage] of the stops you do result in nothing.'"[140] The reality of these staggering statistics shows that ninety percent of drivers must have been pulled over for pretextual stops where even the police officer concluded that the "violation" did not warrant a ticket.

When these "violations" are selectively enforced, the entire legal system is called into question. In *United States v. Montero-Camargo*, the Ninth Circuit warned that the consequence of stops as a result of racial profiling is to "send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second."[141] The "war on drugs," specifically as it relates to crack cocaine, has conditioned whites, including law enforcement officials at every level, to think that the face of crime is black.[142]

B. Crack Cocaine Laws and Selective Prosecution

Drafted by Dr. Hamilton Wright, The Harrison Narcotic Drug Act[143] of 1914 was America's first comprehensive anti-drug legislation.[144] In speaking before Congress, Dr. Wright "used blatant racial politics in seeking the passage" of the Act.[145] He blamed problems in southern law enforcement on the cocaine use of the "Negroes." Basing his report on "unsubstantiated gossip," Dr. Wright knowingly allowed this misinformation to be widely circulated throughout the media, in medical records, and congressional reports.[146] This "helped create the stereotype of the

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138. Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 556, (citing David A. Harris, *"Driving While Black" and Other Traffic Offenses: The Supreme Court and Pretexual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545–46 (1997)).
139. *Id.* at 556.
140. *Id*. (citing Tamara Lytle, *Initiatives Would Track Race in Traffic Stops*, ORLANDO SENTINEL, Apr. 25, 1999, at A1).
141. *Montero-Camargo*, 208 F.3d at 1135, n.23 (stating that a report on race-based stops states police "engender feelings of fear, resentment, hostility, and mistrust by minority citizens").
142. *See* Walter *supra* note 137.
143. 38 Stat. 785 (1923).
144. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Traditional Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1245. (Note: the author does not agree with the rationale behind his proposed new crack/cocaine ratios).
145. *Id.* at 1246.
146. *Id.*

black man as a drug addict."[147] Seventy-two years later, Congress would repeat the same mistake.[148]

Inspired by the early hysteria over the crack epidemic in the mid-1980s,[149] Congress passed the Anti-Drug Abuse Act of 1986[150] to provide harsh new penalties for violations involving cocaine base, otherwise known as crack cocaine or 'crack.'"[151] This frenzy was fueled by the cocaine-related death of Boston Celtic's draft pick, Len Bias.[152] Relying on incorrect information, the media linked Len Bias' death to crack cocaine. Declaring crack the scourge of the inner-cities, the media played a key role in depicting the average crack user as a strung-out African American

147. *Id.*

148. United States v. Clary, 846 F.Supp. 768, 787 (E.D.Mo.SMCC 1994) (stating that Congress's decision was based, in large part, on the racial imagery generated by the media which connected the "crack problem" with blacks in the inner city).

149. *See generally* Craig Reinarman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 539–43 (1989) (documenting early media attention on crack cocaine).

150. Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 122 n.3 (1994) (citing Pub. L. No. 99-570).

151. *Id.* at 121, 122.

152. Spade, Jr., *supra* note 144 (stating that the passage of the Anti-Drug Abuse Act of 1986 (1986 Act) was significantly motivated by the death of University of Maryland basketball star, Len Bias, in June 1986. Eric Sterling, counsel to the House Judiciary Committee, summarized how the 1986 Act was enacted as follows:

> The Controlled Substances Act sentencing provisions were initiated in the [House] Subcommittee on Crime in early August 1986 in a climate in the Congress that some have characterized as frenzied. Speaker O'Neill returned from Boston after the July 4th district work period where he had been bombarded with constituent horror and outrage about the cocaine overdose death of NCAA basketball star Len Bias after signing with the championship Boston Celtics. The Speaker announced that the House Democrats would develop an omnibus anti-drug bill, easing the reelection concerns of many Democratic members of the House, by ostensibly preempting the crime and drug issue from the Republicans who had used it very effectively in the 1984 election season. The Speaker set a deadline for the conclusion of all Committee work on this bill as the start of the August recess—five weeks away . . . . The careful deliberative practices of the Congress were set aside for the drug bill. Ironically, because the circumstances surrounding Bias's death were distorted by the media, the legislators who enacted the 1986 Act, as well as the American public, misunderstood the role that crack played in his death. Bias died of cocaine intoxication the day after he was the second player drafted in the National Basketball Association's 1986 college draft. At the time of his death, it was not known, outside a small group of people who had been with him, what method of cocaine ingestion he had used. Papers across the country nevertheless ran stories that quoted Maryland's Assistant Medical Examiner, Dr. Dennis Smyth, that Bias had died of "free-basing" cocaine. There were several other medical analyses of the probable method of cocaine ingestion. For instance, Dr. Yale Caplan, a toxicologist in the Maryland Medical Examiner's Office said that a test of cocaine found in a vial at the scene "probably was not crack." Similarly, Maryland's Chief Medical Examiner, Dr. John Smialek, stated that evidence of cocaine residue in Bias's nasal passages suggested that Bias probably snorted cocaine. However, Dr. Smyth's statement received most of the coverage.

Id. at 1249–50.

despite the fact that crack use was as prevalent among whites.[153] Ignoring the fact that Len Bias probably died from a powder cocaine overdose, Congress decided to distinguish between powder cocaine and crack cocaine.

Congress incorporated a 100:1 quantity ratio that has since been the subject of much debate.[154] In effect, the law treats the possession of $575 worth of crack cocaine as the equivalent of possessing $50,000 worth of powder cocaine. This distinction has resulted in the mass incarceration of low-level crack users while virtually leaving the mid- to high-level powder cocaine traffickers untouched.[155] Because crack cocaine has been routinely associated with blacks,[156] the 100:1 ratio has resulted in the disparate treatment of the white and black cocaine/crack user and dealer.[157] To make matters worse, the selective enforcement practices of police departments[158] coupled with the blatant selective prosecution of black crack defendants in federal court,[159] have tipped the scales of justice so far over that it has seriously undermined the credibility of the justice system as a whole.[160]

The 100:1 ratio together with the mandatory minimum sentencing requirement has struck at the conscience of some judges, prosecutors and juries alike. When confidence in the justice system is undermined, vigilantism occurs. In order to avoid crack cocaine cases, some judges have used their seniority to avoid drug cases altogether.[161] Other judges have

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153. *See Clary*, 846 F.Supp. at 783 ("Crack cocaine eased into the mainstream of the drug culture about 1985 and immediately absorbed the media's attention. Between 1985 and 1986, over 400 reports had been broadcast by the networks.").
154. *See generally* Spade, Jr. *supra* note 144; *see also Clary*, 846 F.Supp. at 784 ("The evolution of the 100 to 1 crack to powder ratio mandatory minimum sentence was a direct result of a 'frenzied''Congress that was moved to action based upon an unconscious racial animus").
155. *See generally* Spade, Jr., *supra* note 144.
156. *Clary*, 846 F.Supp. at 784 (Judge Cahill stated. "These stereotypical images undoubtedly served as the touchstone that influenced racial perceptions held by legislators and the public as related to the 'crack epidemic.' The fear of increased crime as a result of crack cocaine fed white society's fear of the black male as a crack user and as a source of social disruption."). *Id*.
157. *Id.* (citing to: Def.Ex. 12K, *Is the Drug War Racist?*) ("The war on drugs . . . is being fought against blacks . . . . Blacks are four times as likely to be arrested on drug charges—even though the two groups use drugs at almost the same rate.").
158. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000).
159. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 476–83 (1996) (Stevens, J., dissenting) (stating that the elevated penalties within the sentencing guidelines fall more heavily on African Americans, thus threatening the integrity of federal sentencing reform.).
160. *See Clary*, 846 F.Supp at 787 (Judge Cahill aptly sums up this disparate affect:

> The crack statute in conjunction with the resultant mandatory minimum sentence, standing alone, may not have spawned the kind and degree of racially disparate impact that warrants judicial review but for the manner of its application by law enforcement agencies. The law enforcement practices, charging policies, and sentencing departure decisions by prosecutors constitute major contributing factors which have escalated the disparate outcome.)

Id.

161. "Similarly, as many as fifty senior federal judges, whose seniority allows them to choose which cases they will hear, have refused to preside over drug cases because

refused to accept plea agreements between the government and the defendant.[162] Still other judges, feeling that their hands are tied, have voiced their opposition to the 100:1 ratio on the record.[163] One federal judge simply resigned from the bench rather than have to apply the 100:1 ratio any longer.[164] "[I]n Miami some federal prosecutors have chosen not to charge certain crack suspects because they believe the punishment that they will face is too severe."[165] Juries are taking the law into their own hands as well by nullifying verdicts.[166] These responses are indicative that a change

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they feel that the punishments specified by the guidelines are too draconian. Spade, Jr., *supra* note 144 at 1281–82.

162.

> For instance, in one case, a street-level crack dealer and a drug kingpin were both convicted of crack trafficking, however, as a result of the kingpin's cooperation in the prosecution of other crack traffickers, the government recommended that he serve only a fourteen-year sentence, while recommending a thirty-year sentence for the street dealer. Judge James Carrigan of the United States District Court for the District of Colorado rejected the Government's recommendation based upon the unjustified disparity in the sentences.

Id. at 1279–80.

163. *Id.* at 1280–81 (discussing United States v. Willis, 967 F.2d 1220 (8th Cir. 1991) (Heaney, J. concurring):

> If there were any evidence that our current policies with respect to crack were deterring drug use or distribution, the extreme sentence might be justified. Unfortunately, there is none . . . . Until our society begins to provide effective drug treatment and education programs, and until young black men have equal opportunities for a decent education and jobs, a bad situation will only get worse.)

Id.; United States v. Patillo, 817 F.Supp. 839 (C.D.Cal. 1993) (The college-graduate defendant, under extreme financial pressure, had accepted a neighbor's offer to mail a package containing crack. Judge Letts, upon being forced to impose a mandatory minimum ten-year sentence, stated that "this sentencing appeared to place me in the position of making the most difficult choice I have yet faced, between my judicial oath of office, which requires me to uphold the law as I understand it, and my conscience, which requires me to avoid intentional injustice."); United States v. Gaviria, 804 F.Supp. 476, 480 (E.D.N.Y. 1992) (Weinstein, J.) (the defendant, a battered and abused Columbian woman whose husband compelled her through physical abuse to be a drug courier, pled guilty to possession with intent to distribute 67.7 grams of crack cocaine, which resulted in a guidelines range of 70–87 months; Judge Jack Weinstein departed downward to sentence her to a term of sixty months, noting his frustration that "the court has no power to consider the injustice of minimum terms in individual cases.").

164. Spade, Jr., *supra* note 144 at 1281. "Judge J. Lawrence Irving of the United States District Court for the Southern District of California, who was nominated to the bench by President Reagan, resigned because 'he could no longer impose the rules in good conscience, particularly in cases involving youthful, first-time drug offenders who were being sentenced to lengthy terms without the possibility of parole.'" *Id.*

165. *Id.* at 1282 (citing Charisse Jones, *Crack and Punishment: Is Race the Issue?*, N.Y. Times, Oct. 28, 1995, at A1. "Indeed, Attorney General Janet Reno, the nation's chief law enforcement officer, has gone on record as saying that the 100:1 ratio is unfair and should be abolished. *Id.*

166. "Indeed, rookie prosecutors in the District of Columbia are informed that they will lose many of their cases . . . because some black jurors refuse to convict black defendants whom they know are guilty in protest of what they feel is a racist system." *Id.* at 1282.

is desperately needed. However, as long as racial prejudice continues to rear its ugly head, one cannot rely on the goodwill of a few. Nor should our legal system either.

C. Racial Profiling and the Tragic Results

Chief Justice Warren, in delivering the majority opinion in *Terry v. Ohio*, stated that "courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the *objective* evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary . . . ."[167] When justice is supposed to be color-blind, how is it that those who have sworn to uphold the law in an even-handed way, have been so side-tracked from that which is morally right?

When the Supreme Court allows police officers to use minor traffic infractions as a ruse for narcotic investigations;[168] When police officers selectively enforce the law because they continue to use racial profiles despite statistics that show African Americans are no more likely to be carrying contraband than whites;[169] When prosecutors repeatedly opt to prosecute blacks in federal court and whites in state court resulting in the disparate treatment of equally situated defendants;[170] When judges no longer have the guts to stand by their convictions because they let political pressures based on racial stereotyping affect their decisions;[171] When police officers, who should know better, have decided that if the crime is crack then the perpetrator must be black;[172] When Congress allows racial stereotyping to affect their judgment and in turn pass laws that are racially motivated;[173] When police officers shoot innocent minorities,[174] including one of their own,[175] because they have been conditioned to believe that blacks are inherently dangerous;[176] How can one expect an average juror to act any differently?

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167. Terry v. Ohio, 392 U.S. 1, 15 (1968) (emphasis added).
168. Whren v. United States, 517 U.S. 806 (1996).
169. *See* Walter, *supra* note 137.
170. *See supra* notes 116, 157, and 159.
171. *See* Walter, *supra* note 137 at 270–72, (citing United States v. Bayless, 913 F.Supp. 232 (S.D.N.Y. 1996), *rev'd* 921 F.Supp 211 (S.D.N.Y. 1996)), (arguing that an immediate and vehement response from politicians and newspaper columnists compelled Judge Baer to invalidate his own decision and find that a middle-aged African American woman was indeed reasonably suspicious enough to justify a police stop and seizure of narcotics from her vehicle).
172. *See supra* notes 12, 116, 136, 156, and 157.
173. *See supra* notes 152 and 156.
174. *See generally* Delores D. Jones-Brown, *Fatal Profiles: Too Many 'Tragic Mistakes' Not Enough Justice*, 207 N.J. LAW. 48 (2001) (chronicling many recent shootings by police officers of innocent minorities.)
175. *Id.* at 48. Two Rhode Island police officers shot to death a black off-duty police officer. *Id.* One of the officers had gone to the police academy and worked for the past three years with the victim. These officers did not recognize their fellow officer out of uniform. *Id.* at 48–49.
176. "Blacks continue to be enslaved by perceptions of them as dangerous and criminal." *Id*. at 48.

As a result of prolonged racial stereotyping, African Americans continue to have their rights, which are guaranteed under the Constitution, infringed upon. Indeed, African Americans repeatedly suffer humiliations by various law enforcement agencies.[177] Allowing race-based identification testimony like that in *Clifford*, confers judicial legitimacy on racial discriminatory practices as a whole. "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."[178] As United States District Court Judge William W. Schwarzer so aptly stated: "[i]t may profit us very little to win the war on drugs if in the process we lose our soul."[179]

Conclusion

Racial bias runs rampant throughout the United States. The media plays no small role in perpetuating perceptions of the African American as a scourge on society. When a police officer testifies that the voice "sounded black," especially in a crack cocaine case, he is sending a clear message to the jury. Since racial prejudice exists throughout the entire law enforcement arena, keeping racial stereotypes from seeping into the jury's decision-making process has never been more clearly imperative.

Courts are routinely called upon to draw the line between what lay witnesses are allowed to testify to and what they are not. Court sworn testimony of a person's race, based on voice alone, is on the wrong side of that line. To conclude otherwise is to embrace court-sanctioned racial stereotyping. And the danger encompassed in that conclusion goes well beyond any rule of evidence.

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177. *See generally* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. .J. Const. L. 296 (Feb. 2001) (detailing horrific results of racial stereotyping. For example, an African American woman, who was seven months pregnant, was detained by Customs officials and sent to a nearby hospital where she was forced to take laxatives so officials could check her stools for drugs. She was released twenty-four hours later when no drugs were found. As a result, she had to undergo an emergency Caesarean. Her child was born weighing only three pounds, four ounces.) *Id.* at 298.

178. Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J. dissenting).

179. Spade, Jr., *supra* note 144, n.1 at 1289.

> These were the comments of United States District Court Judge William W. Schwarzer as he sentenced a 48-year-old longshoreman with no prior criminal convictions to ten years in prison pursuant to a federal mandatory minimum sentencing statute. The man had given an acquaintance a ride to a fast food restaurant where the acquaintance made a drug deal with a federal undercover agent. The drug-selling acquaintance escaped arrest, but the longshoreman, who testified that he knew nothing about the drug cargo, was convicted of conspiracy to traffic in narcotics. Judge Schwarzer, who was reduced to tears as he pronounced the sentence, summed up his feelings by saying that "in this case the law does anything but serve justice."
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> *Id.* at 1289.