

LEXSEE 15 STAN. L. & POL'Y REV. 579

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Stanford Law & Policy Review

2004

*15 Stan. L. & Pol'y Rev 579***LENGTH:** 12448 words

FEATURE ARTICLE: Linguistic Profiling and the Law

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SUMMARY:

... "Linguistic profiling" is a term used to describe inferences that are often made about a person's speech. ... Detective Birkenhauer testified that when he arrived at the informant's apartment, he saw the informant and a female friend of the informant. ... " The dissent argued that the officer's testimony "that the voice he heard sounded like an "African American accent" in no way tended to increase the probability that Clifford was the speaker because there was no showing that Clifford himself spoke in the manner described. ... In *State v. McDaniel*, the court went so far as to declare linguistic profiling testimony relevant to the probable race of the speaker, reasoning that "the testimony was not offered or received in evidence to identify specifically defendant as one of the robbers, but was merely to identify the probable race of the robbers. ... Particularly problematic is the fact that linguistic profiling testimony appears to be subject to a higher standard in the civil context than in the criminal context; whereas courts express doubt about a person's ability to distinguish a speaker's race in the realm of housing discrimination, courts often categorically accept this premise in the criminal law. ...

TEXT:

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I. Introduction

"Linguistic profiling" is a term used to describe inferences that are often made about a person's speech. Inferences may include where a speaker is from, whether he/she is male or female, or whether he/she is native born to the United States. These judgments reflect learned speech characteristics that communicate much of this information. However, this process can be used for discriminatory purposes and to the detriment of language and racial minorities.

This Note seeks to document the occurrence of linguistic profiling in the law. This includes an examination of its use in employment discrimination, housing discrimination, and finally the criminal law.

II. Generally

Linguistic profiling is a term that has recently been coined to represent the auditory equivalent of "racial profiling." n1

Whereas "racial profiling" is based on visual cues that result in the confirmation or speculation of the racial background of an individual, or individuals, "linguistic profiling" is based upon auditory cues that may include racial identification,

but which can also be used to identify other linguistic subgroups within a given speech community. n2

Linguists confirm this proposition. A study by Purnell, Isardi, and Baugh preliminarily indicates that "(a) dialect-based discrimination takes place, (b) [*580] ethnic group affiliation is recoverable from speech, (c) very little speech is needed to discriminate between dialects, and (d) some phonetic correlates or markers of dialects are recoverable from ... speech." n3 The study determined that white listeners were able to correctly identify a speaker's dialect more than 70% of the time. n4 This finding is significant since listeners were able to discern this information solely from the word "hello," a word that neutralizes "lexical, syntactic, and phonological differences across dialects." n5

It is important to note that linguistic differences among racial minorities and whites are not anatomically determined or a result of "racial genetics." n6 Rather, such linguistic differences are "learned speech characteristics" that connote "shared knowledge about society in general, interlocutors' positions in society, and appropriate discourse norms given the discourse situation." n7 While linguistic profiling often most acutely affects linguistic communities of color, whites speaking with "undesirable" accents may be subject to linguistic profiling as well. n8

III. Employment

It is clear that speakers of nonstandard dialects "face significant disadvantages in the job market." n9 A poignant example is provided by a [*581] Chicago Tribune article that describes the experiences of several black professionals and the role language plays in their professional advancement. The article recounts the story of Michael Evans, an assistant to the president of a small marketing company whose supervisor encouraged him to attend speech improvement classes "after hearing how some customers responded to him." n10 The supervisor, who was also black, surmised that Evans "was identified as a minority straightaway as he spoke... . Some customers, in talking to Michael on the telephone, would rough him up because they associated his voice with negative things about blacks. Even though he was polite and always professional, it didn't seem to matter when they heard his voice." n11 Interestingly the supervisor, a forty-eight-year-old Jamaican immigrant educated in England and Norway, found that he did not receive the same negative reaction encountered by many black Americans, noting that "there is a problem [in the U.S.] with language, whether people want to admit it or not." n12

Accordingly, several scholars have advocated the extension of Title VII protection to speakers of nonstandard dialects, particularly those that are closely linked with linguistic and ethnic minorities. n13 Title VII analysis has been applied to at least one case to mixed results. In *United States v. Ferrill*, n14 a telephone marketing firm employed to make get-out-the-vote calls for political candidates assigned callers scripts and areas to call on the basis of race. Ferrill, an African American employee of the firm, filed suit after she was fired following the election. The firm's rationale was that voters would respond better to callers that sounded like them and with whom they could identify, and the firm applied this policy uniformly. n15 Using 1981 and Title VII analysis, the court found that the company could legally assign jobs based on accent, speech pattern, or dialect expressly based on race, n16 but found the company's policy grounded in "'a racial stereotype' that blacks would respond to blacks and 'on [*582] the premise that [Ferrill's] race was directly related to her ability to do the job.'" n17 The inference the marketing firm made was that not only would blacks respond better to black callers (which was permissible) but that whites being targeted would not respond favorably to black callers (which was not).

IV. Housing

The search for housing presents an ideal setting for linguistic profiling. It often begins when a person inquires about housing over the telephone. There has been no prior contact and no information is available beyond that which can be inferred from the caller's speech. John Baugh, a Stanford University linguist, confronted this situation when he attempted to obtain housing in the Bay Area. His account of his experience is as follows:

I moved to Palo Alto first in search of accommodations that would serve my entire family. Any reader who has ever tried to rent a home or apartment knows the experience of scouring the classified advertisements and then calling to make an appointment. During all calls to prospective landlords, I explained my circumstances, as a visiting professor at [Stanford], always employing my "professional voice," which I am told "sounds white." No prospective landlord ever asked me about my "race," but in four instances I was abruptly denied access to housing upon arrival for my scheduled appointment.

Although I suspected that these refusals were directly the result of my race, which was confirmed through visual racial profiling, my standard English fluency was (and is) such that I escaped "linguistic profiling." n18

Baugh is more skilled than most. Most African Americans do not have the ability to "sound white" and thereby elude linguistic profiling. A more typical experience is recounted by a 1994 study by Feagin and Sykes. "She called, and they told her that the apartment was rented. And she called [a friend] on the phone and said 'I'd like for you to call them ... because you sound like a white person.' And the friend called and the apartment was still unrented." n19

Unfortunately, there is little case law documenting the use of linguistic profiling to circumvent the fair housing laws. While the practice is well-known within the fair housing industry, n20 most cases brought under this theory settle, n21 [*583] leaving a void in case law and an inability to track the frequency and success of these cases. Nonetheless, there are a few poignant examples. For instance, in *Alexander v. Riga*, the landlord falsely told African American plaintiffs and an African American "tester" for the Fair Housing Project that the apartment was unavailable and refused to return their phone calls while returning the calls of white testers. n22 Similarly, in *United States v. Lorantffy Care Center*, n23 the government filed suit against a nursing home having found "a pattern and practice of discrimination against applicants for its services simply because those applicants were African-Americans." n24 A defendant in the case was quoted as saying that a prospective applicant sounded black and that "we don't want any of those." n25 In response the Lorantffy court held:

[The Fair Housing Act] also recognizes that decisionmakers can discriminate against applicants long before they reach the point of deciding whether to accept an application. They may discriminate in how they solicit and encourage applications. They may discriminate in how they treat applicants who ask questions about the dwelling, and in the process by which they inform applicants about a residency opening. They may also discriminate in the terms of residency which they offer to an otherwise successful applicant. All of these actions might discourage an interested person from pursuing an application to the point of ultimate decision. Consequently, these actions might be just as effective in limiting housing opportunities for members of a protected group as any policy which ultimately turns them away on the basis of their group membership. n26

[*584] However it is not necessary to rely on anecdotal evidence or select examples in the case law. A study undertaken by researchers at the University of Pennsylvania n27 found that while 76% of white male speakers of Standard American English n28 ("SAE") gained access to a potential unit, only 63% of male speakers of Black Accented English ("BAE"), 60% of female speakers of SAE, 57% of female speakers of BAE, 44% of male speakers of Black English Vernacular ("BEV"), and 60% of female speakers of Black English Vernacular gained access to a potential unit. n29 The study also found that African Americans were more likely to have creditworthiness mentioned as a potential problem in qualifying for a lease n30 and more likely to be told of application fees. n31 The research shows that not only are people able to identify the race of someone speaking Black English Vernacular, a dialect that includes distinctive grammatical, syntactic, and phonetic features, n32 which the authors hypothesize is regularly associated with lower socio-economic backgrounds, n33 they are also able to identify the race of "code-switching blacks -- those speaking Standard English but with a 'black' pronunciation of certain words," often associating speakers of "Black Accented English" with middle-class backgrounds. n34

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A. The Fair Housing Act

The Fair Housing Act makes it unlawful to represent to any person on the basis of race that any dwelling is not available for inspection or rental when such dwelling is in fact available. n35 Additionally, Department of Housing and Urban Development regulations state that it is unlawful to (1) provide false or inaccurate information regarding the availability of a dwelling for rental to any person, including testers, regardless of whether such person is actually seeking housing, because of race; n36 (2) discourage any person from inspecting or renting a dwelling because of race; n37 (3) discourage the rental of a dwelling because of race by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community, neighborhood, or development; n38 and (4) deny or delay the processing of an application made by a renter because of race. n39

Generally a plaintiff must prove four components to establish a prima facie case of discrimination. First, the plaintiff

must establish that she is a member of a protected group; second, that she applied for the housing in question; third, that she was qualified for the housing; and fourth, that she was turned down for the housing and that the housing went to a member of an unprotected group. Establishing a prima facie case gives the plaintiff a presumption of discrimination. n40 Once the presumption is established, the burden then shifts to the defendant to articulate some legitimate nondiscriminatory reason for the action. n41 If the defendant is able to provide a nondiscriminatory reason for the decision to deny the plaintiff housing, the burden then shifts back to the plaintiff to prove that the defendant's explanation is pretextual. Plaintiff may persuade the court that the defendant's reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the [defendant] or indirectly by showing that the [defendant's] proffered explanation is unworthy of credence." n42

One of the most effective methods of proving pretext is to provide testing evidence. Testing evidence relies on "testers," people who do not intend to actually rent the property in question but who are sent to investigate suspected discriminatory practices, "to present comparable housing needs and family characteristics, express similar tastes and desires for housing, and offer a similar socioeconomic profile." n43 Both African American and Caucasian testers [*586] are then asked to inquire about the same housing. Plaintiffs are afforded presumptive proof of discrimination when landlords systematically decline to return the calls of African Americans testers.

B. Role of Linguistic Profiling

Linguistic profiling is introduced into a housing discrimination suit in one of two ways. The first instance in which linguistic profiling appears is in conjunction with accompanying testing evidence. Such evidence includes either testing evidence based on face-to-face encounters or testing evidence based on phone calls. In this scenario linguistic profiling testimony serves a supplemental evidentiary role, bolstering the testing evidence and eliminating the need to prove discrimination "solely on voice evidence." n44 Many would argue that in this scenario the linguistic profiling evidence is immaterial – the testing evidence can stand on its own.

The other situation in which linguistic profiling appears is in a situation where the testing evidence is absent. Here, the linguistic profiling testimony is central to the plaintiff's case. In this scenario, the plaintiff, much like the woman in the Feagin and Sykes study, alleges that she called for an appointment and did not have her call returned due to information inferred from her speech. In this situation there is only one incident of discriminatory behavior at issue and the plaintiff must prove based on that one incident that the defendant acted on discriminatory motives. To establish a cause of action the plaintiff must prove that the landlord was able to determine the race of the caller and that the landlord discriminated against the caller based on the information the landlord inferred from the caller's speech. Most often, the defendant will not acknowledge and will indeed dispute any ability to discern race from the caller's voice. n45 Therefore, the caller must affirmatively establish that the landlord had the ability to discern the caller's race based on the sound of his or her voice. Even if the fact-finder is inclined to believe that people have this ability, it is unlikely that he will find a defendant liable absent supporting evidence.

Expert testimony can often be helpful in this scenario. Professor Baugh, for example, often acts as an expert witness in such cases and employs an approach that seeks to establish what the defendant will admit. Questions often begin with something along the lines of: "Can you tell the difference between a man and a woman? Can you tell whether you are speaking to an adult or a child? Can you tell the difference between someone who is native born and someone who was not born in this country?" And so on. The goal is to compel the [*587] defendant to concede as much as possible such that the fact-finder can logically conclude that the defendant was capable of inferring the race of the speaker based on the sound of his or her voice. While expert testimony can play an important role, the suggestion that one cannot prove a fair housing case without a linguistic expert has been a cause for concern for fair housing lawyers. n46

It is important to note that the recent focus on this issue is changing practices within the housing industry. A recent issue of an apartment broker newsletter stated:

Landlords can now be sued for discriminatory housing decisions based on the way people talk on the telephone. This is called linguistic profiling and some studies indicate that most of us can determine a person's race (particularly white or black) or national origin (such as Hispanic or Asian) just by hearing a person count from one to 20. Prospects may now be able to have their day in court simply by alleging that they weren't afforded an apartment or set up an appointment because the landlord knew that they were of a particular race or ethnic group based solely on a telephone conversation.

The wise property manager or owner will work with leasing staff to develop some telephone procedures to better ensure that this claim cannot be made; at the very least every telephone prospect should be asked if they would like to make an appointment to visit the property. n47

These lawsuits can and do bring change.

V. Criminal Law

While the inquiry began in employment and housing, it is easy to find several other areas in the law where linguistic profiling is prevalent. The most troubling is its appearance in the criminal law. Here witnesses are regularly allowed to testify to the race of the speaker based solely on the linguistic inferences gathered from the speaker's speech, without additional identifying information. The majority of the case law includes cursory references to testimony offered by a witness that a perpetrator "sounded black" or "sounded white." n48

[*588] Clifford v. Commonwealth n49 provides an illustration of the different factors that are involved in determinations about the admissibility of linguistic profiling testimony. Clifford is a controversial ruling by the Kentucky Supreme Court that has sparked new focus on linguistic profiling and the role it can play in the law. In Clifford, the local police organized a sting operation with the help of an informant. The informant was responsible for setting up a meeting between an undercover police officer (Detective Birkenhauer) and Clifford, a suspected drug dealer, at the informant's apartment. Another officer (Officer [*589] Smith) was set to monitor the operation via a wire. n50

Detective Birkenhauer testified that when he arrived at the informant's apartment, he saw the informant and a female friend of the informant. Subsequently, Clifford emerged from the bedroom and told Birkenhauer that "he only had \$75 worth of cocaine with him ... but ... could complete the order later that afternoon." n51 Birkenhauer testified that he said he would take the "75" and would return later for the rest of the order. Clifford then went back into the bedroom and told the informant to follow him. The informant followed Clifford into the bedroom and emerged with a \$75 bag of cocaine. n52

It is critical to note that it was the informant and not Clifford who came out of the bedroom with the drugs. The informant later testified that the crack cocaine actually belonged to him, that he had made the sale to Birkenhauer, and that Clifford was not involved in the transaction. Clifford did not testify. Although the tape recording of the transaction was found by the court to be inaudible, Officer Smith, who was monitoring the audio tape, was permitted to testify to "what he heard over the receiver as the transaction was occurring." n53 Smith testified that he heard four voices, the first of which was Detective Birkenhauer. He then testified that he heard the voice "of another male, the voice of a female, and then later a fourth voice which "sounded as if it was of a male black." n54 Clifford was a black male. The informant was white. n55

Clifford was found guilty of trafficking in a controlled substance and subsequently sentenced to twenty years in prison for being a persistent felony offender. On appeal, Clifford argued that there was insufficient evidence to support a conviction since the informant contradicted both Officer Smith and Officer Birkenhauer's testimony about who negotiated the drug deal, there was no physical evidence presented at trial, and there was no testimony that he actually exchanged money or drugs with Birkenhauer. Viewing the facts in the light most favorable to the prosecution, the standard upon appeal, the court concluded that there was sufficient evidence to support the jury's verdict. The court reasoned that the jury was free to believe Birkenhauer and disbelieve the informant, that physical evidence was not necessary, and that while there was no testimony that Clifford actually gave money or drugs to Birkenhauer, there was evidence (i.e. Birkenhauer and Smith's testimony) that Clifford negotiated the deal just prior to its consummation, which the court ruled sufficient to infer he was engaged in drug trafficking. n56

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A. Admissibility Under *Rule 701 of the Federal Rules of Evidence*

Even though the officer was not familiar with the voice of either Clifford or the informant, the Kentucky Supreme Court found the testimony proper, observing:

No one suggests that it was improper for Officer Smith to identify one of the voices he heard as being female. We perceive no reason why a witness could not likewise identify a voice as being that of a particular race or nationality, so long as the witness is personally familiar with the general characteristics, accents, or speech patterns of the race or nationality in

question i.e., so long as the opinion is "rationally based on the perception of the witness." n57

While overall, the court's reasoning is sound (i.e., a person who is familiar with the general characteristics, accents, or speech patterns of a race or nationality should be able to testify to the race or nationality of the speaker), the fact that the court found an adequate foundation for the testimony in this case is disturbing. Hearsay issues aside, n58 the witness's qualifications consisted of thirteen years on the police force and having spoken to blacks on numerous occasions. If one were to abide by this reasoning, it is unclear if anyone would be unqualified to testify to the race or nationality of any speaker.

Lay opinion testimony is structured to elicit testimony that is drawn from common knowledge. n59 It has been said that the difference between lay and [*591] expert testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony draws upon expert or specialized knowledge resulting "from a process of reasoning which can be mastered only by specialists in the field." n60 Subjects deemed appropriate for lay opinion testimony include: the appearance of persons or things, the identity of persons, the manner of a person's conduct, the competency of a person, degrees of light or darkness, the nature of sounds the witness heard, the size of a person or an object the witness saw, the weight of a person or an object the witness saw, distances a witness perceived in connection with a variety of events the witness may attempt to describe for the trier of fact, the speed at which a vehicle was traveling, the mental state of another individual, the health of another individual, the value of property, n61 or in other matters where "witnesses often find difficulty in expressing themselves in language which is not that of an opinion." n62

The language of Rule 701 is intentionally broad and has led to a liberal interpretation of the rule. n63 This interpretation has permitted lay witnesses in some instances to testify to opinions and inferences "based wholly or partly on experience or specialized knowledge" n64 that by design are reserved for expert testimony. n65 This practice illuminates a certain ambiguity in the rules. While the concepts of "common knowledge" and "specialized knowledge" are clear in the abstract, the distinction becomes much more difficult when presented with specific examples. n66 It is often the case that certain kinds of testimony fall [*592] somewhere in the middle.

B. A Matter of Common Knowledge?

The benchmark for lay witness testimony is whether the basis for such testimony is a matter of common knowledge. n67 At least one court has explicitly questioned whether the ability to determine a person's race from the sound of his voice is a matter of common knowledge. n68 The Eighth Circuit in *Nevitt* noted:

No evidence was presented to the court which would support the trustworthiness of the conclusion as to the racial description of the burglars. The person who drew the conclusion did not testify and no other witness was able to testify as to why the conclusion was drawn. While I can, in the circumstances of this case, assume the trustworthiness of the person who drew the conclusion ... I have been presented with no evidence as to the basis for that conclusion. That is, what exactly was it about the voices that convinced the listener that the voices were black or at least that one of them was black? n69

The Purnell study determined that white listeners were able to correctly identify a speaker's dialect more than 70% of the time. n70 It is unclear what level of accuracy is sufficient to make an issue a matter of common knowledge. In any case, it is illogical to assume that everyone has the same ability to accurately make linguistic inferences about race. It is not insignificant that the Massey and Lundy study took place in Philadelphia, a city with a large African American community, a setting that affords familiarity with African Americans as a linguistic subgroup. Any inferences based on such experiences are inherently more reliable than inferences that are not. Accordingly, a listener from Alaska would not be able to draw the same inferences as a listener from Philadelphia and vice versa. It would also follow that such inferences become more accurate the more experience or exposure a person has had with the linguistic subgroup in question.

C. Laying a Foundation

A witness testifying on the basis of some sort of specialized knowledge [*593] will often be required to establish the basis for his or her testimony before he or she is allowed to testify. In this situation, the witness is often called a "limited expert witness" and is subject to qualification procedures not usually required of lay witnesses. This approach requires the

trial judge to rigorously examine the reliability of lay opinion testimony "by ensuring that the witness possesses sufficient specialized knowledge or experience germane to the lay opinion offered." n71 This approach does not "subject the witness or the testimony to the strictures of Rule 702 but rather requires" the witness who "relies on prior personal experiences to interpret his or her perceptions of the event or circumstances in question to formulate his or her opinion" to have "prior personal experiences ... sufficiently numerous or informative to provide a rational basis for the opinion." n72 This is because "the helpfulness of lay opinion testimony necessarily depends on the extent to which it bears the appearance of reliability, both common-sense reliability and evidentiary reliability." n73

Although this approach was expressly endorsed by the Advisory Committee to the 2000 Amendment, n74 courts have irregularly followed this approach when faced with linguistic profiling testimony. In *Jones v. State*, the witness testified that the party who committed the assault upon her spoke in Spanish and that "he was not a mexican [sic] but a negro [sic]." n75 The court found that the witness:

Had lived among mexicans for a number of years and [was] familiar with the musical sound they gave their language; from this fact she knew that the party talking was not a mexican; that he did not give it the same sounds a mexican does. The evidence discloses from other sources that appellant did talk [*594] Spanish and that there were few other negroes, if any, in the neighborhood who did. n76

In contrast, in *State v. McDaniel*, defendant challenged the witness's testimony for lack of a proper foundation, n77 questioning the witness's capacity to offer such testimony. The state court surmised:

Defendant assigns as error the admission in evidence of the testimony of Henri Tron that the voices he heard during the robbery had a negro [sic] accent. The reason stated in his objection to this testimony was: "I don't believe the proper foundation has been laid." We can assume only that defendant had reference to the qualifications of the witness to identify negro [sic] accents for defendant makes no further explanation of what he meant by lack of foundation. Mr. Tron testified that he had heard negro [sic] accents before this occasion. The witness was obviously qualified to identify the accent and the court did not err in admitting this testimony. n78

A similar approach was taken in *United States v. Bostic*, where defendants argued that an inadequate foundation had been laid for linguistic profiling testimony "since none of the witnesses was a linguistic expert." n79 The court acknowledged that "perhaps an insufficient foundation was laid for this testimony" but found the admission of the testimony did not necessitate a new trial since "there was other proper evidence in the record identifying, on the basis of skin color, at least one of the robbers as being black." n80

Contrast this approach with one found in a recent California state court decision. *People v. Poole* provides an example of the lengths to which a court may, and arguably should, go to ensure the reliability of linguistic profiling testimony. n81 The *Poole* court noted that the witness, a linguistics and psychology student, was blind and therefore had a greater ability to identify people by voice. The court went on to note that the witness had extensive contact with African Americans, including daily contact with an African American boyfriend and his African American family.

Thus, when the defendant in *Poole* challenged the reliability of the witness's testimony, the court was able to offer detailed findings to support it. Because the foundation had been laid, the court was able to find that research indicated that the blind have a stronger ability at voice identification than the sighted, that the witness had considerable experience with African Americans and initially recognized defendant's voice as that of an African American man, [*595] and that the witness was 95% certain of her identification. n82 While a witness should not be required to have a background in linguistics, or to have an African American boyfriend to be permitted to offer such testimony, this case demonstrates that establishing a basis for a witness's testimony can assure reliability and significantly add to the integrity of the judicial proceedings.

D. Is the Opportunity for Cross-Examination Enough to Ensure a Fair Proceeding?

Rule 701 relies on cross-examination to expose any weaknesses in lay opinion testimony, n83 relying on the "natural characteristics of the adversary system" to ensure an acceptable result. n84 In the case of linguistic profiling it appears

that cross-examination is either ineffectiveⁿ⁸⁵ or inadequately utilized.ⁿ⁸⁶ However, the need for cross-examination is underscored by cases like *United States v. Melton*ⁿ⁸⁷ and *State v. Hubert*.ⁿ⁸⁸ In *Melton*, the defense introduced a police report that indicated that one of the robbers was black. Under defense questioning, the policeman who completed the report explained that the entry was based on a remark that one of the robbers "sounded black."ⁿ⁸⁹ Yet the identifying witness testified that the skin around the eyes of the robber was white. Similarly, in *Hubert*, the witness conceded on cross examination that "all black people do not sound the same and, on recross-examination, agreed that a person's speech is dependent upon what part of the country they are from rather than the color of their skin."ⁿ⁹⁰

Disturbingly, a remarkable number of cases, many of which involve an identification in which the witness did not see the face or skin of the [*596] perpetrator,ⁿ⁹¹ make no mention of any cross-examination at all. As the only opportunity a defendant is given to attack such testimony, it is absolutely critical that an aggressive cross-examination take place to illuminate some of the problems with this kind of testimony.

E. When is the Relevance of Linguistic Profiling Testimony Outweighed by its Prejudicial Effect?

The dissent in *Clifford* objected wholeheartedly to the idea that a person's race could be ascertained from the sound of his voice, arguing that the testimony was "incredibly prejudicial" and "should have been excluded under [*597] [Kentucky Rule of Evidence] 403."ⁿ⁹² The dissent argued that the officer's testimony "that the voice he heard sounded like an "African American accent"" in no way tended to increase the probability that *Clifford* was the speaker because there was no showing that *Clifford* himself spoke in the manner described.ⁿ⁹³ In particular, the dissent protested "the overwhelming inference that [*Clifford*] was the fourth speaker and therefore guilty."ⁿ⁹⁴

Kentucky Rule of Evidence 403 is the state counterpart of *Rule 403 of the Federal Rules of Evidence*,ⁿ⁹⁵ which among other things, serves to bar evidence whose prejudicial value outweighs its helpfulness to the trier of fact. Although "identification testimony that has some questionable features"ⁿ⁹⁶ is often admissible and put before a jury, the Rule gives a court wide discretion "in determining whether the probative value of lay opinion or inference testimony outweighs its potential prejudicial value."ⁿ⁹⁷

The Sixth Circuit found upon *Clifford*'s appeal that "the limited research conducted on the issue of racial voice identification indicates this type of identification is extremely reliable,"ⁿ⁹⁸ and that "the vast majority of courts that have addressed the admissibility of racial voice identification evidence have concluded it is admissible, which indicates those courts did not believe it was inherently unreliable."ⁿ⁹⁹ However, it is clear from the examples below that linguistic profiling testimony can have a powerfully prejudicial effect,ⁿ¹⁰⁰ and [*598] that the reliability of such testimony is often problematic and may unduly influence the trier of fact's deliberations.ⁿ¹⁰¹

For example in *United States v. Card*, the defendant made a motion "to prohibit Government witnesses from testifying that a perpetrator of the robberies "talked like' or "acted like' an African-American or had mannerisms like an African-American" contending that the testimony was not credible and that because a defendant was African American, the evidence would be prejudicial.ⁿ¹⁰² The court ruled that the evidence was "logically probative" of defendant's involvement in the robbery and "directly related to the legitimate factor of identification in the case."ⁿ¹⁰³ The court further found that the defendant had failed to demonstrate how the evidence would be prejudicial, finding that "the mere fact that [the defendant] is African-American, [did] not make the evidence prejudicial."ⁿ¹⁰⁴

In *State v. McDaniel*, the court went so far as to declare linguistic profiling testimony relevant to the probable race of the speaker, reasoning that "the testimony was not offered or received in evidence to identify specifically defendant as one of the robbers, but was merely to identify the probable race of the robbers."ⁿ¹⁰⁵ This contention fails to account for the fact that a suspect may have adopted a dialect of a race different from his own.ⁿ¹⁰⁶ For example, in *State [*599] v. Johnson*,ⁿ¹⁰⁷ the defendant told his accomplices that they should put panty hose over their heads and bandannas over their faces and portray themselves as blacks. The Defendant planned to do so by using "dialect in order to sound like a black person."ⁿ¹⁰⁸ Similarly, contrasting voice exemplar evidence with physical evidence such as scars and tattoos, the Eighth Circuit found that "voice exemplar evidence is relatively easy to feign. An accent can be exaggerated or muted through a person's conscious efforts, such as avoiding particular words that one cannot pronounce without an accent."ⁿ¹⁰⁹ This proposition has been confirmed by *Baugh*'s research, which demonstrates that many speakers often have "considerable linguistic elasticity."ⁿ¹¹⁰ In particular, *Baugh* notes that a majority of African Americans "style shift" or adjust their speech depending on the circumstances, thereby incorporating at least two linguistic varieties.ⁿ¹¹¹ *Baugh*, a tridialectal speaker retaining fluency in Standard American English, Black English Vernacular, and Chicano English,ⁿ¹¹² notes that "competency in more than one dialect is quite common, especially among speakers of nonstandard varieties."

n113

Importantly, few courts correctly treat linguistic profiling testimony as a manner of speech. n114 Further, the inferences that one might gather from a [*600] person's speech are often given undue weight. For example in *State v. Rusher*, the officer quoted the complainant as reporting that one of the people who yelled at the time of the shooting sounded like a black male. n115 When the officers arrived to investigate, they informed defendant that they were looking for a black male. According to the officers, the defendant responded that there was no black man and that he had done the shooting. n116 Similarly, in *Jefferson v. State*, a rape victim testified that the voice of her assailant sounded "to her to be that of a black man." n117 The court found that "although the victim was approached from behind, was blindfolded during the attack, and had no opportunity to observe her assailant, evidence showed the assailant spoke to her numerous times, and she had ample opportunity to hear his voice." n118 The police picked up Jefferson, a black male, "after an investigation revealed that he was seen near the victim's residence shortly after the time of the rape, attempting to remove his truck from a ditch." n119 This means, on the facts in the record, that a black man was brought in for questioning because he was black and male and in the general area at the time of the rape. Although no information is included about the demographics of the neighborhood, it seems inherently unreasonable that the police detained Jefferson because the victim thought her attacker sounded like a black male and because he happened to be in the area. Such assumptions are dangerous and can prematurely limit the scope of an investigation.

This is nowhere better illustrated than in *United States v. Nevitt*, a case in [*601] which the court took issue with the "poor police practice which resulted in ignoring potential white suspects." n120 In *Nevitt*, two police officers proceeded to the scene after hearing over the radio that a burglary was occurring at a credit union four miles away. An Officer Wilde was informed by the dispatcher that voices could be heard inside the credit union and that "at least one voice was that of a Negro male, although exactly what was being said either could not be discerned or the content was not passed on to Wilde." n121 Officer Wilde was then informed that voices could no longer be heard and that a second perimeter alarm had sounded. From this, Wilde concluded that the intruders had left the building. When Officer Wilde and his partner Officer Betts arrived at the street of the credit union they encountered two cars passing them going south. Officer Betts was instructed to get the license plates of the two cars while Officer Wilde continued on to the credit union. Officer Wilde was then informed, while investigating a third vehicle, that the first two cars were not involved in the robbery even though the cars were never stopped. n122

The court found that the police halted their investigation of the first two vehicles "merely upon the basis of the skin color of the visible occupants" and ruled that the radio message by Betts that the first two cars "checked out" must therefore be disregarded. n123 Further, the court found the linguistic profiling testimony insufficiently "trustworthy to be considered in determining probable cause," noting "even if there had been some evidence as to what exactly it was about the voices that caused the listener to draw his racial conclusion, I would still be reluctant to include that conclusion as a factor in determining probable cause ... the United States has presented no evidence as to a voice-race correlation." n124 The unreliability of the testimony was underscored by the fact that the words were not even discernable. n125 However, the court ultimately found that the circumstances which pointed to the defendants were much stronger than those which may have justified an investigatory stop of the other cars and concluded that the "discriminatory police conduct [was] the result of a mistake or laxity in procedures and not ... deliberate and purposeful discrimination." n126

F. Voice Identification Procedures

The *McDaniel* court found the linguistic profiling testimony non-prejudicial because the courts of that jurisdiction had held that "recognition and identification of a defendant by his voice alone was sufficient to carry a [*602] robbery case to the jury." n127 However, the testimony allowed in *McDaniel* was distinctly different from normal voice identification testimony. There was no "identification" because the witness was not given anything to identify. Rather, the court confused the inference that was drawn from the speaker's speech for some sort of identification.

It is unclear how much weight should be given to linguistic profiling evidence when the listener cannot positively identify the accused. n128 In *State v. McSwain*, a black male charged with conspiracy to obtain money by false pretense, objected to the admission of evidence that a caller who fraudulently arranged for the transfer of money "sounded like that of a black male." n129 What distinguishes this case from others is the fact that the witnesses later had face-to-face contact with the defendant and were unable to identify him as the caller. *McSwain* raises the question whether witnesses who offer linguistic profiling testimony should be required to identify the voice they heard as the voice of the defendant. n130

Defendants have requested additional identification procedures with mixed results. The defendant in *State v. Kinard*

argued that it was prejudicial error for "the State not to have conducted a lineup wherein [the witness] could have compared the voice she heard with several others" and argued that such lineups were mandatory. n131 The court found that precedent did not require such a lineup, finding subsequent authentication procedures unnecessary because the witness never sought to identify her attacker as the defendant – she only stated that "her attacker was big, heavy, male, and sounded like a black man." n132 Similarly, whether the defendant in *Newman v. Hopkins* n133 fit the description of [*603] the attacker turned on whether the defendant spoke with a Hispanic accent. Since the fact was at issue, the defendant asked the trial court for the opportunity to present a voice exemplar, consisting of the reading of a neutral statement, to prove that he did not have a Hispanic accent. The circuit court found that in view of the conflicting testimony with respect to whether Newman spoke with a Hispanic accent, "the presentation of a voice exemplar would have been relevant evidence going to the issue of identity." n134

Such identification measures are feasible. The Poole court required the witness, notwithstanding her background and extensive contact with African Americans, to submit to a competent identification procedure requiring the witness to listen to a tape of the defendant and identify it as the voice of the man who attacked her. n135 Cases such as *McSwain* and *Newman* demonstrate that it would often be beneficial to require witnesses offering linguistic profiling testimony to adhere to additional identification procedures.

VI. Conclusion

A point that is usually underestimated is the fact that it is generally easier to discriminate when someone is not standing right in front of you. In an age where an ever-increasing amount of business is conducted over the telephone, linguistic profiling is of supreme concern. Most of the research to date has almost exclusively focused on discrimination that takes place in person, failing to account for discrimination that occurs over the telephone. n136 Yet the facility of this form of discrimination and the fact that identifying information about one's race can be inferred simply from the word "hello" n137 suggests that this form of discrimination is more pervasive than one would initially believe. Further study is needed to record the pervasiveness of this "new" form of discrimination.

In addition, it is troubling that there is a blatant lack of consistency in the treatment of linguistic profiling testimony in both state and federal courts. Particularly problematic is the fact that linguistic profiling testimony appears to be subject to a higher standard in the civil context than in the criminal context; whereas courts express doubt about a person's ability to distinguish a speaker's race in the realm of housing discrimination, courts often categorically accept this premise in the criminal law.

Further, it is clear that courts do not incorporate enough of the concerns outlined in this paper into their analysis of the admissibility and prejudicial effect of linguistic profiling testimony. Linguistic research in this area is [*604] instructive and should be used to inform the legal analysis of this issue. Assumptions that people have the same ability to infer information about a speaker's background from the speaker's speech, irrespective of the listener's exposure to and/or experience with members of that background, undermine the reliability of such testimony and fail to provide the trier of fact with the relevant information needed to appropriately weigh linguistic profiling testimony.

FOOTNOTES:

n1. John Baugh, *Linguistic Profiling*, in *Black Linguistics: Language, Society, and Politics in Africa and the Americas* 155, 155–63 (Sinfree Makoni et al. eds., 2003).

n2. *Id.* at 158.

n3. Thomas Purnell et al., *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 *J. Language & Soc. Psychol.* 10, 11 (1999).

n4. *Id.* at 22. The study used fifty undergraduate Caucasian speakers of Standard American English at the

University of Delaware. Each participant was twice presented with 120 instances of "hello" spoken in Standard American English, Black English Vernacular, and Chicano English and then asked to indicate what dialect they believed they heard after a two second pause. The study found that participants were able to successfully identify the dialects from the word hello more than 70% of the time. *Id.*

n5. *Id.*

n6. *Id.* at 20; see also Walt Wolfram & Natalie Schilling-Estes, *Language in Society* 170 (1999) ("There is no foundation for maintaining that there is a genetic basis for the kind of language differentiation evidenced by some black Americans. Dialectologists can point to a number of cases in which African Americans raised in Anglo American families talk no differently than their Anglo peers. Conversely, Anglo Americans raised by AAVE [African American Vernacular English] speakers in the black community speak AAVE – not Anglo English.").

n7. *Id.*

n8. Baugh, *supra* note 1, at 163.

n9. Jill Gaubling, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. Mich. J.L. Reform. 637, 640 (1998); see also *Preston v. Compass Bank*, No: 3:99-CV-2377-M, 2001 U.S. Dist. LEXIS 15018, at 17 (N.D. Tex. Sept. 24, 2001) (noting plaintiff's testimony that he was subjected to discriminatory acts in a racially hostile atmosphere, including the fact that he was told that he did not sound "black enough" on the telephone); *Upshaw v. Dallas Heart Group*, 961 F. Supp. 997, 1000 (N.D. Tex. 1997) (noting witness's testimony that she overheard a supervisor stating that plaintiff was fired because "she sounded too black," and that she would be "padding" plaintiff's personnel file to justify plaintiff's termination on nonracial grounds); *E.E.O.C. v. Louisiana Network, Inc.*, 809 F. Supp. 1210 (M.D. La. 1992) (documenting television anchor's suit against employer television station for discrimination, alleging among other things that comments were made that she "did not sound white enough"); *Mayse v. Prot. Agency, Inc.*, 772 F. Supp. 267, 269 (W.D.N.C. 1991) (documenting notes found on plaintiff's employment application, "sound good – black?"); Mari J. Matsuda, *Voice of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Law Reconstruction*, 100 *Yale L.J.* 1329 (1991); cf. *Dais v. Lane Bryant, Inc.*, 168 F. Supp. 2d 62, 68 (S.D.N.Y. 2001) (noting plaintiff's testimony that he was told by his supervisor "you know what, you don't sound like a black guy, Jim.").

n10. Pamela Sherrod, *Some Try to Fine-Tune a Voice of Experience*, *Chi. Trib.*, June 25, 1998, at 1A.

n11. *Id.*

n12. *Id.*

n13. Gaubling, *supra* note 9, at 673–97 (arguing that Black English Vernacular ("BEV") is so closely linked with blacks that Title VII should afford the same level of protection against discrimination against BEV speakers). See

generally Matsuda, supra note 9 (advocating Title VII protection for accent discrimination when communication is minimally related to the job).

n14. *168 F.3d 468 (11th Cir. 1999)*.

n15. *Id. at 471*. The company also matched callers with Midwestern accents to Midwestern voters.

n16. *Id. at 474*.

n17. *Id.* (quoting *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981)).

n18. Baugh, supra note 1, at 158-59.

n19. Douglas S. Massey & Garvey Lundy, Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings, 36 Urb. Affairs Rev. 452, 455 (2001).

n20. See Equal Housing Opportunity Flyer "Sounds like Discrimination" ("What matters is how you look on paper - not how you sound over the phone. Judging you by your national origin or race instead of your qualifications is discrimination... . The best way to stop housing discrimination is to report it.").

n21. Fair Housing - Fair Lending Vol. XVII No. 12, Dec. 1, 2002, at 8 (reporting settlement of action based on evidence gathered over a three year period which led the Fair Housing Council of Montgomery County Pennsylvania to conclude that the only explanation for the disparate treatment of white and black persons who called to inquire about vacancies was discrimination based on the sound of the callers' voices.); Oralandar Brand-Williams, Landlord Settles Race Bias Lawsuit: Woman Says She Was Denied an Apartment Because of Her Voice, Detroit News, Mar. 21, 2001, at 1C (reporting \$15,000 settlement from a landlord who told the plaintiff that the apartment was no longer available while plaintiff's Hispanic friend was given an appointment and quoted cheaper rates).

n22. *Alexander v. Riga*, 208 F.3d 419, 424 (3d Cir. 2000); see also *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1092 (7th Cir. 1992) (finding that a black employee's name and accent, as heard at trial, probably identified her as a black person.); *Wilson v. Souchet*, 168 F. Supp. 2d 860, 864 (N.D. Ill. 2001) (referring to an action brought by the Leadership Council for Metropolitan Open alleging that defendant discriminated against plaintiffs on account of race when defendant misrepresented the apartment's availability to black phone testers). The court found that even though there was evidence that three African Americans were told someone placed a deposit on the apartment while three non African Americans were given appointments, that a question of fact existed with regard to defendant's ability "to discern race based on a telephone caller's voice." *Id.*; *Fugardi v. Angus*, 216 A.D.2d 85, 86 (N.Y. App. Div. 1995) The court held that a prima facie showing of discrimination was established by the fact that the complainant was a black woman with a pronounced West Indian accent and by evidence presented at the hearing that petitioner told the complainant over the phone that the house was no longer available while he continued to advertise it in a local newspaper and showed the house and negotiated

its sale with others. *Id.*

n23. 999 *F. Supp.* 1037 (*E.D. Ohio* 1998).

n24. *Id.* at 1041.

n25. *Id.*

n26. *Id.* at 1045; see also Jerome D. Williams et al., Racially Exclusive Real Estate Advertising: Public Policy Implications for Fair Housing Practices, 14 *J. Pub. Pol'y & Marketing* 225, 228-44 (1995) (finding that linguistic profiling often serves to discourage a seeker from visiting "a particular housing complex, thereby increasing the number of search visits and associated costs to secure housing").

n27. Massey & Lundy, *supra* note 19 (measuring overall access to the Philadelphia housing market by calculating the number of callers able to reach a real estate agent and the number of callers who were told that a unit was available).

n28. Standard English is a "codified form of language, accepted by and, serving as a model to a larger speech community" that generally includes "a well-established bias toward the speech of those with the most prestige in a society." Stephan Gramley & Kurt-Michael Patzold, A Survey of Modern English 2-3 (1992) (quoting P.L. Garvin, *The Standard Language Problem: Concepts and Methods*, in *Language in Culture and Society* 521-26 (Dell Hymes ed., 1964)).

n29. *Id.* at 460-61 (finding 87% of white male SAE speakers were able to speak with a rental agent compared to 80% of BAE speaking males, 75% of female SAE speakers, 72% of male BEV speakers, 71% of female BAE speakers, and 63% of female BEV speakers; similarly, the study found 86% of male SAE speakers were told that a unit was still available compared to 80% of female SAE speakers, 79% of male BAE speakers, 61% of male BEV speakers, and 60% of female BEV speakers).

n30. *Id.* at 461 (finding credit was spontaneously mentioned to 3% of white male SAE speakers, 5% of white female SAE speakers, 10% of black male speakers of both BAE and BEV, 21% of female BAE speakers, and 23% of female BEV speakers).

n31. *Id.* (finding only 11% of white middle class males and 20% of white middle class females were told of the need for a fee for a credit evaluation compared to 29% of black lower class males, 37% of lower class black females, and 47% of middle class black men).

n32. Purnell et al., *supra* note 3, at 18 (noting some of the distinctive characteristics of BEV include the absence of certain sonorants /r l n/, the /-s/ suffixes which include the plural, third person singular, possessive, the absence

of certain consonants such as /t d/ from consonant clusters, and final obstruent devoicing and consonant mergers).

n33. Massey & Lundy, *supra* note 19, at 456.

n34. *Id.* at 454.

n35. Fair Housing, 42 U.S.C..3604(d) (2000).

n36. Discriminatory Housing Practices, 24 *C.F.R* 100.80(b)(5) (2004).

n37. *Id.* 100.70(c)(1).

n38. *Id.* 100.70(c)(2).

n39. *Id.* 100.70(d)(3).

n40. *Harris v. Itzhaki*, 183 *F.3d* 1043, 1052-53 (9th Cir. 1999).

n41. *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792, 802 (1973).

n42. *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 *U.S.* 248, 256 (1981).

n43. Massey & Lundy, *supra* note 19, at 453.

n44. Michael Erard, Language Matters, Legal Affairs, July/Aug. 2002, available at http://www.legalaffairs.org/issues/July-August-2002/story_erard_julaug2002.html.

n45. Baugh, *supra* note 1, at 160 (noting that in his experience as a consultant and an expert witness, defendants routinely deny any ability to infer race or ethnicity based on speech that is heard over the telephone).

n46. Erard, *supra* note 44.

n47. The Apartment Broker: Glenn Sather Online, Apartment Info & Local News, at <http://www.aptrbrkr.com/news.html> (last visited Jan. 27, 2002) (citing an article by Naleen Green for Multi-Housing News).

n48. *United States v. Brown*, 934 F.2d 886, 888 (7th Cir. 1991) ("On one occasion when he called Henry in Indianapolis, a man who sounded like a black man answered Henry's telephone and identified himself as Charles."); *Hance v. Zant*, 696 F.2d 940, 945 (11th Cir. 1983) ("The military police and the police receptionist who received the calls thought the caller was a young black male."); *United States v. Andrews*, 600 F.2d 563, 566, n.3 (6th Cir. 1979) ("At approximately 2:15, I answered the phone ... and an individual who I believed to be a Negro male from the sound of his voice, started to tell me about someone coming into the airport with narcotics."); *United States v. See*, No. 3:95-cr-9, 1995 U.S. Dist. LEXIS 10550, at 6 (N.D. Ind. Mar. 15, 1995) ("This call was also transferred to Special Agent Tate, who noted that the caller sounded like a white male in his twenties, possibly intoxicated."); *United States v. Hernandez*, 282 F. Supp. 272, 273 (S.D.N.Y. 1968) ("[The agent] received a phone call from a woman who refused to give her name. Her voice sounded like she was of Spanish extraction."); *United States v. Martin*, 33 M.J. 599, 600 (A.C.M.R. 1991) ("At approximately 1010 hours, she called Mrs. Ricker, who told her that she had received an anonymous call from someone who sounded like a black man, with a sleepy voice, who told her about a mini-cab robbery that occurred the night before."); *Dubose v. State*, 662 So. 2d 1156, 1159 (Ala. Crim. App. 1993) ("Then, a male who in the minister's opinion sounded like a black man, asked the minister if the church would be open that day, and the minister said no."); *Noble v. State*, 112 S.W.2d 631, 633 (Ark. 1938) ("We could not tell whether they were white or colored men, it was too dark. I thought the voice sounded like a white man."); *People v. Jeffers*, 41 Cal. App. 4th 917, 921-22 (Cal. Ct. App. 1996) ("The following day Bodoh received a telephone call regarding the gun. The caller sounded like an older White man."); *State v. Williams*, 742 So. 2d 509, 512 (Fla. Dist. Ct. App. 1999) ("While Whitfield was inside the house, the telephone continued to ring. He answered it and heard an unidentified voice that "sounded like ... a black male' stating "I thought you were going to meet me."); *People v. Rhoiney*, 252 Ill. App. 3d 320, 323 (Ill. App. Ct. 1993) ("Defendant stated that the caller, who sounded like a black male, asked if there was "a white guy living in the building with you."); *People v. Smith*, 246 Ill. App. 3d 647, 648 (Ill. App. Ct. 1993) ("The assailant, who sounded like a black male, asked her if she had any money."); *People v. Seel*, 68 Ill. App. 3d 996, 1001 (Ill. App. Ct. 1979) (documenting witness testimony that she only recognized one voice and that the rest "sounded like black men's voices"); *State v. Barlow*, 550 So. 2d 899, 900 (La. Ct. App. 1989) ("The police dispatcher said he received a call at 10:40 p.m. from one who would not give his telephone number or identify himself The voice sounded "like a white male."); *Gray v. Earls*, 250 S.W. 567, 570 (Mo. 1923) ("Hannah testified that before they went up toward where the Negro was, they had heard the sound of two parties talking, and did not know who they were, but supposed they were Negroes."); *State v. Scharfstein*, 79 N.J. Super. 236, 238 (N.J. Super. Ct. App. Div. 1963) ("The detective did not and could not identify the caller beyond saying that the voice was that of a male, and sounded to him "like he was a white person."); *People v. Hassele*, 53 A.D.2d 699, 699 (N.Y. App. Div. 1976) ("On the afternoon of December 5, 1974, a detective in the New York Police Department received an anonymous telephone call from a man who sounded Hispanic."); *State v. Robbins*, 214 S.E.2d 756 (N.C. 1975) ("On 21 January 1974 at 6 p.m. an unidentified caller whose voice sounded like a black male telephoned the Greensboro Police Department and stated that a body was to be found in the ditch under three tires on the right hand side of Bothwell Street."); *White v. State*, 702 P.2d 1058, 1060 (Okla. Crim. App. 1985) ("His wife was in the living room where the television was on at a high volume when she heard loud voices, one sounding as that of a young black man."); *Meador v. State*, 811 S.W.2d 612, 619 (Tex. Crim. App. 1989) ("Powell testified she gave the caller, who sounded white, her Hallsville address."); *Randle v. Texas*, 828 S.W.2d 315, 316 (Tex. Ct. App. 1992) ("While conducting the search, [the officer] allegedly answered a telephone call ... [he] informed his partners that a black male had called and that this man was probably coming from San Marcos to Rodriguez's house to buy some drugs. [The officer] based this statement on the fact that [the caller] sounded like a black male and Rodriguez was a drug dealer.").

n49. 7 S.W.3d 371 (Ky. 1999).

n50. Id.

n51. *Id. at 373.*

n52. *Id. at 375-76.*

n53. *Id. at 373.*

n54. Id.

n55. Id.

n56. *Clifford v. Chandler*, 333 F.3d 724, 727-28 (6th Cir. 2003).

n57. *Clifford v. Commonwealth*, 7 S.W.3d 371, 375-76 (Ky. 1999); see also *People v. Sanchez*, 492 N.Y.S.2d 683, 684 (N.Y. Sup. Ct. 1985) (approving lay opinion evidence as to whether a voice expression or accent was Puerto Rican or Dominican). The court stated that "it is clear that lay witnesses can often detect the distinctive accent related to particular ethnic or geographic groups Human experience has taught us to discern the variations in the mode of speech of different individuals. Individual speech patterns ... are influenced by major forces The first and most notable influence on speech behavior is the region and locale in which the individual grows up ... they ... clearly reveal an individual's geographic origin. Id.

n58. See *Clifford*, 7 S.W.3d at 376. The court dismissed Appellant's objection to the officer's testimony as hearsay, reasoning that

Smith testified that the relevant statements were uttered by the last voice he heard, which he believed to be that of a black male, and Appellant was both the last person to enter the room (according to Birkenhauer) and the only black male present at the time the statements were made. Assuming Appellant was the declarant, the statements were admissible as admissions under K.R.E. 801A(b)(1). Smith clearly could have identified Appellant as the declarant had he been familiar with the Appellant's voice Smith testified that the declarant's voice sounded like that of a black male. The fact that Appellant was the only black male present when the conversation took place was sufficient circumstantial evidence to satisfy the authentication requirement of K.R.E. 901(b)(5) and bring the statement within the parameters of K.R.E. 801A(b)(1).

Id.

n59. Lay opinion testimony is governed by *Federal Rule of Evidence 701*, which provides:

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, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

n60. *Fed. R. Evid. 701* advisory committee's note (citing *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)).

n61. 4-701 *Weinstein's Fed. Evidence 701.03* (LEXIS 2004) (citing *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196-98 (3d Cir. 1995)); see also *Fed. R. Evid. 701* committee note to 2000 amendment ("The amendment is not intended to affect the "prototypical examples of the type of evidence contemplated by the adoption of Rule 701 relating to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences."); Michael H. Graham, *Handbook of Federal Evidence 701.1*, at 13 (4th ed. 1993) ("The topics upon which lay witnesses have been permitted to express an opinion are extremely varied. They include "the appearance of persons or things, identity, the manner of conduct, competency of a person, feeling, degrees of light or darkness, sound, size, weight, distance, and an endless number of things that cannot be factually described in words apart from inferences." (internal citation omitted)).

n62. *Fed. R. Evid. 701* advisory committee note.

n63. 4-701 *Weinstein's Fed. Evidence 701.03* (LEXIS 2004).

n64. *Id.*

n65. *Id.*

n66. The 2000 amendment to the rule was designed to remedy ambiguities in the rule that, among other things, provided "no clear indication of the types of subject matters that are sufficiently technical in nature" to require analysis under Rule 702. See 4-701 *Weinstein's Fed. Evidence 701.03* (LEXIS 2004). The Advisory Committee explicitly noted that the 2000 amendment "makes clear that any part of a witness's testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of 702 and the corresponding disclosure requirements of the Civil and Criminal Rules." *Fed. R. Evid. 701* committee note to 2000 amendment.

n67. See *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 203-04 (4th Cir. 2000) (finding lay witnesses are not permitted to express opinions concerning matters beyond common experience and requiring

expert skills and knowledge); *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979) (finding that Rule 701 "does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness.").

n68. *United States v. Nevitt*, 409 F. Supp. 1075, 1080 (W.D. Mich. 1976).

n69. *Id.* at 1079.

n70. Purnell et al., *supra* note 3, at 22.

n71. *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1201 (3d Cir. 1995) ("For lay opinion as to technical matters ... to be admissible, it must derive from a sufficiently qualified source as to be reliable and hence helpful to the jury. In order to satisfy these Rule 701 requirements, the trial judge should rigorously examine the reliability of the lay opinion by ensuring that the witness possesses sufficient specialized knowledge or experience which is germane to the lay opinion offered."); see also 4-701 *Weinstein's Fed. Evidence 701.02* (LEXIS 2004) ("Counsel for the proffering party can be expected to accommodate [the natural preference of judges, lawyers, and jurors alike for detailed factual information to show that a witness's opinions are well founded] by laying the best possible foundation for any lay opinion testimony. Accordingly, counsel will seek to introduce sufficient underlying factual information to show the reliability of the opinion based on those underlying facts.").

n72. 4-701 *Weinstein's Fed. Evidence 701.03* (LEXIS 2004).

n73. *Id.*

n74. The Advisory Committee to the 2000 amendment expressly approved of the court's analysis in *United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990), which found that two heavy amphetamine users were qualified to testify as to whether a substance was amphetamine. The court subsequently found that it was error to allow another witness who had no experience with the drug to make such an identification. See also *United States v. Sweeney*, 688 F.2d 1131, 1145-46 (7th Cir. 1982) (upholding the admission of lay opinion testimony from a user of PCP and methamphetamine identifying substances as those drugs, based on his prior drug use, knowledge gained from prior experiences, and sampling of drugs at issue).

n75. 245 S.W. 435, 436 (Tex. Crim. App. 1922).

n76. *Id.*

n77. 392 S.W.2d 310, 315 (Mo. 1965).

n78. *Id.*

n79. 713 F.2d 401, 404 (8th Cir. 1983).

n80. *Id.* at 405.

n81. No. D035661, 2001 Cal. App. LEXIS 1114 (Cal. Ct. App. Nov. 30, 2001); see also *State v. Kinard*, 696 P.2d 603, 604 (Wash. Ct. App. 1985) (stating that although the witness was born in New Zealand, she had lived in the South for several years and also on a United States military post overseas and had perceived from these experiences that blacks have a certain inflection or accent).

n82. *Poole*, 2001 Cal. App. LEXIS 1114, at 13.

n83. 4-701 *Weinstein's Fed. Evidence* 701.02 (LEXIS 2004) (observing that if counsel fails to introduce sufficient underlying factual information to show the reliability of the opinion based on those underlying facts, the counsel for the opponent can be relied upon to reveal any weaknesses in the opinion through cross-examination or argument); see also Mason Ladd, *Expert Testimony*, 5 *Vand. L. Rev.* 414, 417 (1952).

n84. *Fed. R. Evid.* 701 advisory committee's note.

n85. Lis Wiehl, "Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping, 18 *Harv. Blackletter J.* 201 (2002) ("If ... defendant's challenge raises 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.").

n86. See, e.g., *Kinard*, 696 P.2d at 605 (finding there was absolutely no cross-examination of a witness who concluded her attacker sounded like a black man); *Watson v. State*, 219 N.W.2d 398, 400 (Wis. 1974) (noting that no objection was made to testimony that the robber's speech "sounded like a Negro, male").

n87. No. 85-3529, 1987 U.S. App. LEXIS 3705, at 3-4 (6th Cir. Mar. 23, 1987).

n88. No. 82AP-942, 1984 Ohio App. LEXIS 10664, at 9 (Ohio Ct. App. Aug. 16, 1984).

n89. *Melton*, 1987 U.S. App. LEXIS 3705, at 3-4.

n90. *Hubert*, 1984 Ohio App. LEXIS 10664, at 9.

n91. *United States v. Murray*, No. 97-6113, 1998 U.S. App. LEXIS 12870, at 10-11 (6th Cir. June 10, 1998) (noting that the robber, who the witness said "sounded black," was "completely covered by a sweat suit, gloves, and ski mask"); *United States v. Bain*, No. 95-6419, 1996 U.S. App. LEXIS 33673, at 2 (10th Cir. Dec. 27, 1996) ("Witnesses could not even tell the race of the robber because he was so completely covered, but said that he 'sounded' like a white man."); *United States v. Hankins*, 931 F.2d 1256, 1260 (8th Cir. 1991) ("The bank teller testified that because the robbers were covered with clothing she could not see the color of their skin, but "they sounded like white males."); *Williams v. Weldon*, 826 F.2d 1018, 1019 (11th Cir. 1987) ("Although the man was wearing a stocking mask over his head, [the witness] said that she thought he had a mustache, and the inflection in his voice sounded as though he might be black"); *State v. Osman*, 573 A.2d 743, 753 (Conn. App. Ct. 1990) (relating the witness's testimony that she thought the robber, who was wearing a clown mask during the robbery, was white "because of the sound of his voice"); *People v. Little*, 585 N.E.2d 148, 151 (Ill. App. Ct. 1991) ("She could not see his face or tell whether he was white or black, but, because she heard him talk, she believed he sounded like a black man."); *People v. Black*, 437 N.E.2d 1282, 1283 (Ill. App. Ct. 1982) (noting that the victim, who was blindfolded, testified that her attacker "sounded like he was white and in his mid-twenties"); *People v. Fresco*, 409 N.E.2d 123, 124 (Ill. App. Ct. 1980) ("Both men had their faces covered during the robbery, but witnesses told police that one had a Spanish accent and that the other sounded like a black person."); *State v. Colbert*, 896 P.2d 1089, 1091 (Kan. 1995) (stating that victim had only seen her attacker for two or three seconds and identified his voice to police as "a high voice that sounded like a white person's voice"); *State v. Freeman*, No. A-95-1027, 1996 Neb. App. LEXIS 219, at 5 (Neb. Ct. App. Oct. 22, 1996) (stating that all four victims were in no position to see their attacker's face, but identified him as sounding black); *Ohio v. Collier*, No. 37750, 1979 Ohio App. LEXIS 12329, at 2 (Ohio Ct. App. Feb. 8, 1979) (observing that the police proceeded from a description of the robber as "a black male wearing sunglasses" even though the victim was approached from behind and did not see the face of the man holding the gun but "thought that his voice sounded like that of a black man's"); *State v. Lavender*, No. 01-C-01-9506-CR-00202, 1996 Tenn. Crim. App. LEXIS 703, at 4 (Tenn. Crim. App. Nov. 8, 1996) (noting that the witnesses, who had pillowcases over their heads during the robbery, testified that the men who robbed them "sounded black"); *Shelton v. State*, 10 S.W.3d 689, 692 (Tex. Ct. App. 1999) ("Compton averred that the robber's voice sounded like that of a white, middle-aged male."); *Simpson v. State*, No. 14-94-00317-CR, 1996 Tex. App. LEXIS 2497, at 2 (Tex. Ct. App. June 20, 1996) (stating that the victim had "a pillowcase over her head" and "testified the robber sounded like an educated black man and was polite"); *State v. Williamson*, No. 41060-1-I, 1998 Wash. App. LEXIS 1115, at 4 (Wash. Ct. App. July 27, 1998) ("RH could not positively identify the man as the room was very dark, but she testified that by the sound of his voice and his speech that he was African-American.").

n92. *Clifford v. Commonwealth*, 7 S.W.3d 371, 378 (Ky. 1999).

n93. *Id.* at 379.

n94. *Id.*; see also Wiehl, *supra* note 85, at 190 (arguing that because there was conflicting testimony between the informant and Detective Birkenhauer, "Officer Smith's race-based testimony became the linchpin of the government's case" and was "tantamount to an identification of the defendant").

n95. Rule 403 provides that, "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." *Fed. R. Evid.* 403.

n96. *Manson v. Braithwaite*, 432 U.S. 98, 116 (1977) (emphasizing that "juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature").

n97. 4-701 Wienstein's fed. evidence 701.06 (5) (LEXIS 2004); see also *Hogan v. Am. Tel. & Tel. Co.*, 812 F.2d 409, 411 (8th Cir. 1987) (finding the balance between the probative value of lay opinion or inference testimony and its potential prejudicial effect is appropriate for trial court to determine in exercise of its broad discretion); *Trotter v. Todd*, 719 F.2d 346, 349 (10th Cir. 1983) (observing that a trial court has broad discretion in determining whether probative value of lay opinion or inference testimony outweighs its potential prejudicial value); *Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir. 1981).

n98. *Clifford v. Chandler*, 333 F.3d 724, 731 (6th Cir. 2003) (citing Purnell, et al., supra note 3).

n99. *Id.* (citing *United States v. Card*, 86 F. Supp. 2d 1115 (D. Utah 2000)); see also *Rhea v. State*, 147 S.W. 463 (Ark. 1912); *State v. Smith*, 415 S.E.2d 409 (S.C. Ct. App. 1992); *State v. Kinard*, 696 P.2d 603 (Wash. Ct. App. 1985).

n100. Professor Wiehl argues that identification of race is an inherently visual concept and challenges any assertions that someone "sounds black" as racist. Wiehl openly challenges the reliability of linguistic profiling testimony and 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 outweighed by the danger of unfair prejudice" and argues that "race identification, based on voice alone, is uniquely troubling because it confers judicial legitimacy on the admission of evidence based on racial bias and stereotyping." Wiehl, supra note 85, at 187-88.

n101. *Id.* at 195-201. Wiehl argues that "statements referring to the race of an accused can move the jury to decide the case on an improper basis," believing that the introduction of linguistic profiling testimony plays on racial fears and stereotypes. *Id.* at 195; see also *United States v. Murray*, 1998 U.S. App. LEXIS 12870, 10-11 (6th Cir. 1998) (noting the defendant's argument that the witness's "entire testimony should have been stricken because her statement that the robber 'sounded black' suggested she was racially prejudiced and wanted him convicted because of his race")

n102. 86 F. Supp. 2d 1115, 1116 (D. Utah 2000).

n103. *Id.* at 1117-19. The court added that linguistic profiling testimony "is, therefore, a matter that is relevant for the jury as to what weight the opinion should be given. Such evidence, as in this case, could be logically probative on this issue of the identity of [the defendant] as a participant in the robberies." *Id.* at 1118.

n104. *Id.* at 1119; see also *Clifford v. Chandler*, 333 F.3d 724, 731-32 (6[su'th'] Cir. 2003). While acknowledging that "the use of a defendant's race in his criminal trial can be inappropriately prejudicial in some circumstances," the court rejected "the notion the mere identification of an individual's race by his voice will always result in unconstitutional prejudice." *Id.* at 731. The court argued to so hold would "result in the perverse result of not allowing the best evidence to be presented to the jury when the danger of impermissible prejudice is remote," concluding

that "under the facts of this case, we cannot say the racial voice identification by Smith was unconstitutionally prejudicial." *Id.* at 731, 732.

n105. 392 S.W.2d 310, 315-16 (Mo. 1965).

n106. See *State v. Melton*, No. 85-3529, 1987 U.S. App. LEXIS 3705, at 3-4 (6th Cir. Mar. 23, 1987) (observing that the police officer who indicated that one of the robbers was black explained under defense questioning that the entry was based on a remark that one of the robbers "sounded black," which conflicted with the testimony of the identifying witness that the skin around the eyes of the robber she had identified was white.); *State v. Mathers*, 796 P.2d 866, 871 (Ariz. 1990) (observing that although defendant was white there was testimony that defendant talked "like a black person" or "like he is trying to be black"); *People v. Law*, 114 Cal. Rptr. 708, 719 (Cal. Ct. App. 1974) (stating that appellant was alleged to have called a bank employee threatening to blow the bank "to bits" using a "put-on Negro voice"); *Franklin v. State*, 376 S.E.2d 225, 226, 227-28 (Ga. Ct. App. 1988) (stating that victim identified assailant as black by his voice, but realized he was white when she finally was able to see him and that there was testimony that in prison defendant socialized primarily with black inmates and "resembled a black person and could talk like a black person"); *State v. Justice*, C.A. No. 12835, 1987 Ohio App. LEXIS 7352, at 2 (Ohio Ct. App. June 3, 1987) (noting the witness's testimony that "the assailant initially sounded like a black man but then sounded like a white man when he spoke to the waitress").

n107. 446 S.E.2d 92 (N.C. 1994).

n108. *Id.* at 95.

n109. *Newman v. Hopkins*, 192 F.3d 1132, 1136 (8th Cir. 1999); see also *State v. Kinard*, 696 P.2d 603, 605 (Wash. Ct. App. 1985) (noting that the prosecutor questioned the reliability of voice identification lineups because of the ease with which voices can be disguised).

n110. Baugh, *supra* note 1, at 158.

n111. *Id.*

n112. Purnell et al., *supra* note 3, at 18.

n113. *Id.* at 20.

n114. *Kinard*, 696 P.2d at 604 (likening the witness's testimony to saying that someone had an Irish brogue); see also *United States v. Bostic*, 713 F.2d 401, 404-05 (8th Cir. 1983) (noting the remarks of defense counsel that "not all black people speak alike. There are some black people that speak like white people, or you just can't tell the race just on the basis of how they speak or their intonation."); *Bisordi v. Lavallee*, 461 F.2d 1020, 1022-25 (2d

Cir. 1972) (noting that the victim's description of the assailant "as a man ... who "looked white' but "sounded like a colored person" was further corroborated by a police officer's testimony about the manner of defendant's speech); *United States v. Card*, 86 F. Supp. 2d 1115, 1118 (D. Utah 2000) ("Sometimes persons of various ethnic, racial and geographic areas have accents and mannerisms of expression that are unique or particular and identify the speaker as one of a certain group. This, of course is not always the case but may be."); *United States v. Nevitt*, 409 F. Supp. 1075, 1081 (W.D. Mich. 1976) ("It may be true that where a person comes from or the extent of his education can be predicted from his voice. To the extent that blacks have a common background in these areas, it may be they have common vocal patterns, but I cannot, without further evidence, take judicial notice that the mere color of a person's skin is a factor in how he speaks. White people who have that same background will sound the same."); *State v. Phillips*, 212 S.E.2d 172, 175 (N.C. Ct. App. 1975) (rejecting defendant's objection to testimony that the men who robbed him "sounded like black people talking, that was as much identification as I could tell," finding that the witness did not purport to identify his assailant's by race but "merely testified as to the dialect he heard"); *State v. Loftus*, 573 N.W.2d 167, 173 (S.D. 1997) (finding that the trial court could not find a distinctive pattern in the defendant's speech that would provide a basis for determining that he sounded of Native American or Hispanic heritage a fact at issue since the victim testified that her attacker sounded like a white male).

n115. 468 A.2d 1008, 1008, 1011 (Me. 1983); see also *State v. Burdette*, 611 N.W.2d 615, 630 (Neb. 2000) (finding that because the defendant was white, and the witness stated that based on the sound of her assailant's voice, she thought he might be black, it was possible that the jury could have concluded that the witness was attacked by someone else). But cf. *People v. Canity*, 426 N.E.2d 591, 597 (Ill. App. Ct. 1981) (finding the discrepancy between the victim's testimony that her assailant "spoke in a clear-sounding, articulate voice ... that she might have described ... as sounding white" and the fact that the defendant was black "easily explainable.").

n116. *State v. Rusher*, 468 A.2d 1008, 1011 (Me. 1983).

n117. 425 S.E.2d 915, 917-18 (Ga. Ct. App. 1992).

n118. *Jefferson*, 425 S.E.2d at 917.

n119. *Id.* at 918.

n120. 409 F. Supp. 1075, 1081 (W.D. Mich. 1976).

n121. *Id.* at 1077.

n122. *Id.* at 1077 n.5.

n123. *Id.*

n124. *Id.* at 1079.

n125. *Id.* at 1081.

n126. *Id.*

n127. *State v. McDaniel*, 392 S.W.2d 310, 315-16 (Mo. 1965).

n128. See *State v. McSwain*, 229 N.W.2d 562 (Neb. 1975); see also *People v. Law*, 114 Cal. Rptr. 708, 720 (Cal. Ct. App. 1974) (finding that, with the exception of one witness, there was no direct proof that appellant made any of a series of threatening phone calls since the other witnesses were "either not asked to or were unable to identify the voice of the appellant as being the voice of the unknown caller"). But cf. *Jefferson v. State*, 425 S.E.2d 915, 917-18 (Ga. Ct. App. 1992) (noting that the witness's testimony was that her assailant sounded like a black man, and that upon hearing the defendant's voice when the defendant was brought in for questioning, that the witness was able to positively identify defendant as her assailant); *People v. Black*, 107 Ill. App. 3d 591, 592 (1982) (noting that the victim was later able to identify the defendant's voice as that of her attacker even though the witness was blindfolded during the attack).

n129. *McSwain*, 229 N.W.2d at 564 (finding that the witness's testimony was admitted without a proper foundation but was harmless error since "the defendant appeared to pick up the money arranged for in the telephone conversations and thereby established a direct connection between himself and the parties making the calls").

n130. See *State v. Burdette*, 611 N.W.2d 615, 630 (Neb. 2000) (noting that the witness testified that she had been sexually assaulted but did not see the assailant and was unable to unequivocally identify the defendant as the assailant).

n131. 696 P.2d 603, 605 (Wash. Ct. App. 1985).

n132. *Id.* at 604.

n133. 192 F.3d 1132, 1135 (8th Cir. 1999) (overruling trial court's holding that defendant could not introduce a voice exemplar without waiving his Fifth Amendment privilege against self-incrimination).

n134. *Id.* at 1136.

n135. No. D035661, 2001 Cal. App. LEXIS 1114, at 11-12 (Cal. Ct. App. Nov. 30, 2001).

n136. Id.

n137. Purnell et al., *supra* note 3, at 21 (finding that over 70% of listeners were correctly able to identify the dialect spoken based solely on hearing the word hello).