University of the Pacific Law Review

Volume 55 | Issue 1 Article 11

11-1-2023

Patrolling for Police Disguised as Cultural Experts: California's Opportunity to Dissolve the Expert Admissibility Double Standard And Restore Due Process

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2024; B.A. English & Theatre Arts, Santa Clara University, 2020. First, I would like to thank the Honorable Judge Deborah Ryan, for taking me on as an intern, during my 1L summer, providing me with the opportunity to observe a trial which introduced me to the issue explored in this comment. Additionally, I would like thank Professor of Law Nadia Banteka, for advising me throughout this process. Finally, I would like to thank my parents and Braden Baker for their love and support—I wouldn't be where I am today without it.

I. INTRODUCTION

In summer 2022, a three-defendant murder-robbery case in Santa Clara, California—*California v. Toledo, Diaz & Smith*— centered on the meaning of the word "lick."[1] Prosecutors introduced a defendant's Instagram messages, in which he used the term "lick", to show the defendants planned the robbery.[2] Introduction of this term allowed the prosecution to call a police officer to testify as an alleged expert on "street language."[3] The officer offered opinion testimony stating that "lick," as used in the defendant's Instagram messages, meant robbery or other illegal activity.[4]

The defense attempted to introduce their own witness—a Black poet from a neighborhood demographically similar to the defendants' community—to clarify the everyday use of "lick."[5] The judge could not easily qualify the poet as an expert because the poet's knowledge of the term resulted from personal experience, rather than the requisite data, education, or professional experience.[6] The poet also could not offer a lay opinion because his linguistic knowledge was general, not based on any personal perception of these defendants or their alleged crimes.[7]

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[1] California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022); *see also* Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers at 4–5, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*) (discussing the role of the term "lick" in this case).

[2] Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers at 4–5, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*).

[3] *Id*.; CAL. EVID. CODE § 720 (West 2020) (describing an expert as someone who has demonstrated "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates").

[4] Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers at 14, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*). I was able to observe this trial as an intern at the court, and the officer testified as was predicted in the pleadings.

[5] Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers at 16, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*); *see also* Ambrose M. Gallagher, *On Operating From a Loving Space*, THE CREATIVE INDEP. (Jan. 11, 2023), https://thecreativeindependent.com/people/poet-and-activist-donte-clark-on-operating-from-a-loving-space/ (on file with the *University of the Pacific Law Review*) (discussing the work of Donte Clark).

[6] *See* CAL. EVID. CODE § 720 (West 2022) (describing expertise as "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates"); CAL. EVID. CODE § 801 (West 2022) (allowing expert opinion based on experience which "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject"); Chang-Castillo, *Qualified Lingusits Can Serve as Expert Witnesses in Legal Proceedings*, CHANG-CASTILLO & ASSOC. (Sept. 25, 2019), https://ccalanguagesolutions.com/qualified-linguists-can-serve-as-expert-witnesses-in-legal-proceedings/ (on file with the *University of the Pacific Law Review*) ("[C]ourts are more likely to support or uphold the statements, interpretations, or translations provided by the linguist with the highest credentials.").

[7] *See* CAL. EVID. CODE § 800 (West 2022) (describing admissible lay opinion, which requires the testimony be based on the witness' personal perception and be helpful to the jury's understanding of such testimony); *see, e.g.*, People v. Ogg, 258 Cal. App. 2d 841 (1968) (" A nonexpert witness may testify as to his opinion only if that opinion is based on his own perception."); People v. Thomas, 64 Cal. App. 5th 924, 971 (2021), *rev. denied* (Aug. 25, 2021) (affirming trial court's exclusion of a lay witness' opinion that defendant's house was located in gang territory—despite witness living and gorwing up in the area—because she did not know the defendants personally).

In response, counsel for one of the defendants, Keonte Smith, filed a motion to suppress the officer's expert opinion testimony regarding "street language."[8] Smith argued the officer's opinion tapped into jurors' biases about Black culture by depicting Black language as foreign and requiring expert interpretation.[9] The defendant argued this testimony violated the 2020 California Racial Justice Act (CRJA), which renders convictions based on "race, ethnicity, or national origin" illegal.[10] To prevent these types of convictions, the CRJA requires California courts to more consistently exclude racially-biased experts.[11] However, in this case, the court denied Defendant's CRJA motion and admitted the police officer's sociolinguistic testimony.[12] While the court allowed the defense to offer their own cultural expert to counter the officer's opinion, most defendants are not so lucky.[13]

Having an expert opinion that does not fall squarely within either the expert or lay category is relatively common, and often causes parties to challenge a witness's classification.[14] Courts more frequently admit challenged prosecution experts than challenged defense experts.[15] For example, federal criminal trial courts admit ninety-two percent of challenged prosecution experts but only thirty-three percent of challenged defense experts.[16] Criminal appellate courts admit ninety-five percent of challenged prosecution experts but only eight percent of

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[8] Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers at 14–16, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*); *see also Motion to Suppress*, CORNELL, https://www.law.cornell.edu/wex/motion_to_suppress (last visited Mar. 2, 2023) (on file with the *University of the Pacific Law Review*) (defining a "motion to suppress" as "a request made by a criminal defendant in advance of a criminal trial asking the court to exclude certain evidence from the trial").

[9] Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers at 14–15, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*).

[10] CAL. PENAL CODE § 745(a) (West 2022); Def.'s Mot. in Lim. to Exclude Instagram Messages and "Interpretation" of Slang by Police Officers 14–15, California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022) (on file with the *University of the Pacific Law Review*).

[11] *See* CAL. PENAL CODE § 745(a)(2) (West 2022) (describing that a violation of the CRJA occurs when an expert witness uses discriminatory language or exhibits racial bias, "whether or not purposeful"); *see also* Young v. Super. Ct. of Solano Cnty., 79 Cal. App. 5th 138, 157 (2022) (discussing the significant "involvement of the court as a gatekeeper" in determining whether a CRJA violation occurred).

[12] *See* California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022); *Sociolinguistic*, LINGUISTIC SOC'Y OF AM., https://www.linguisticsociety.org/resource/sociolinguistics (last visited Mar. 3, 2023) (on file with the *University of the Pacific Law Review*) (defining sociolinguistics as the study of how "[l]anguage use symbolically represents fundamental dimensions of social behavior and human interaction").

[13] California v. Toledo, Diaz & Smith, No. C1915685 (Cal. Super. Ct. Santa Clara Cnty. Sept. 22, 2022); *see also* Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551, 554, n.5 (2012) (describing how courts' inconsistent admission of experience witnesses often favors the prosecution, such as allowing police experience-based testimony but not other types of experience testimony); Joelle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TULANE L. REV. 1, 3 (2004) (explaining federal trial courts admit 92% of challenged prosecution experts compared to 33% of the defense's, while appellate courts admit 95% compared to only 8% respectively).

[14] *See* Poulin, *supra* note 13, at 553 (discussing how witnesses with unusual experience bases do not always fit neatly in either category of opinion testimony).

[15] Moreno, *supra* note 13, at 3.

[16] *Id.*

defendants' experts.[17] This admissibility double standard strips communities of relaible self-definition in the courtroom by illogically rendering police officers better-qualified to testify about a culture than its native members—such as Donte Clark.[18] This double standard is especially problematic becuase police officers' opinions on music, linguistics, and other cultural elements often relies on hearsay evidence, thus lacking reliable methodology.[19] Nevertheless, courts often admit police officers cultural-linguistic opinions, permitting the jury to determine the persuasiveness of the expert.[20]

However, the law does not provide for a third category of expert opinions provided by highly-experienced, lay witnesses.[21] The legal standard for expert opinion admissibility does not turn on whether an expert is persuasive but rather on whether testimony's subject and foundation are reliable and legally permissible.[22] Expert qualification and admissibility are issues of law.[23] Under both federal and California state law, legislation and judicial precedent assign expert "gatekeeping"—determining the admissibility and reliability of expert testimony—specifically to judges.[24] Therefore, if courts properly follow expert standards, the judge—not the jury—should determine expert qualification.[25] The United States Supreme Court affirmed judicial gatekeeping in *Daubert v. Merrell*

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[17] *Id*.

[18] Telephone Interview with Emily Galvin-Almanza, Senior Legal Analyst and Co-Founder, Partners for Just. (June 3, 2022) ("Police definition trumps the person's self-identification,…trumps the community's identification . . . in the eyes of the law it's that officer's declaration and testimony that is fairly dispositive.") (recording and notes on file with *University of the Pacific Law Review*).

[19] *See* Moreno, *supra* note 13, at 6 (describing the speculative testimony often allowed by police experts, such as unproven "facts" or inferences about defendant intent); Poulin, *supra* note 13, at 554 (highlighting that, when it comes to experience-based witnesses, courts often "admit unreliable and unwarranted opinion testimony and grant unqualified witnesses latitude in presenting opinion"); *see generally* CAL. EVID. CODE § 1200 (West 2022) (defining hearsay evidence as a statement made by someone other than the testifying witness that a party offers "to prove the truth of the matter stated").

[20] *See* CAL. EVID. CODE § 805 (West 2022) (emphasizing that opinion testimony that meets the evidneece code requireements should be admitted and left to the trier of fact).

[21] People v. Chapple, 138 Cal. App. 4th 540, 548 (2006).

[22] *See* Sargon Enters., Inc. v. Univ. of S. Cal., 55 Cal. 4th 747, 771–72 (2012) (explaining that California Evidence Code sections 801(b) and 802 give trial judges a gatekeeping duty, requiring them to exclude expert opinions that fail to comply with evidentiary requirements); United States v. Mejia, 545 F.3d 179, 194 (2d Cir. 2008) ("The problem was not [the expert's] qualifications. It was the subjects about which he testified and the sources on which he relied.").

[23] Sargon Enters., Inc., 55 Cal. 4th at 771–72 ("[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative."); *see also Evidence*, CORNELL, https://www.law.cornell.edu/wex/evidence (last visited Mar. 4, 2023) (on file with the *University of the Pacific Law Review*) (explaining the court's role in admitting or excluding evidence that is "not relevant, hearsay or otherwise inadmissible").

[24] FED. R. EVID 702 advisory committee's note to 2000 amendment ("In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science."); Sargon Enters., Inc., 55 Cal. 4th at 771–72 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993).

[25] *See* CAL. EVID. CODE § 802 (West 2022) (describing judicial discretion to allow explanation of an opinion's foundation before admitting such testimony, in order to ensure it complies with all relevant laws and statutory requirements).

Dow Pharmaceuticals, Inc. (*Daubert*), which established judicial criteria for determining expert admissibility.[26]

Nevertheless, judges often afford police experts greater deference than other experts, despite the judicial duty to screen for reliability.[27] When judges fail to limit police expertise on cultural subjects, they fail to fulfill their evidentiary gatekeeping responsibility—violating defendants' Fourteenth Amendment due process rights.[28] California courts should more consistently analyze expert admissibility in order to appropriately exclude police experts who fail *Daubert*-style scrutiny and violate the CRJA.[29] Part II details the development and expansion of the judicial doctrine on expert opinion testimony.[30] Part III analyzes the due process implications of inconsistent application of expert admissibility standards.[31] Part IV proposes solutions for more reliably evaluating sociolinguistic experts in a manner that better protects defendants' constitutional rights.[32]

II. DEVELOPMENT OF THE DOUBLE STANDARD OF ADMISSIBLE EXPERT TESTIMONY

The California Evidence Code governs evidence admissibility in state courts, while the Federal Rules of Evidence (FRE) govern federal courts.[33] Both federal and state procedures for qualifying experts are consistently evolving.[34] Section A examines provisions of the California Evidence Code regarding opinion testimony.[35] Section B discusses cases that expanded the scope of expert testimony

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[26] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993) (requiring courts to evaluate an expert's theory based on whether it has been tested, whether it is subjected to peer review, whether it is found to have a known error rate, and whether it is generally accepted by the relevant scientific or academic community).

[27] *See generally* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1998–99 (2017) (describing the judicial role in the development of police expertise and the reasons judges often afford officer witnesses more deference than other witnesses).

[28] *See* Moreno, *supra* note 13, at 6 ("Judges abjure their gatekeeping responsibilities when they fail to scrutinize an expert's qualifications, methodology, and application of these methods to the facts."); Sargon Enters., Inc., 55 Cal. 4th at 772 (quoting Daubert v. Merrell Dow Pharms., Inc*., 5*09 U.S. 579, 595 (1993)) (explaining how courts have a responsibility to admit expert opinions based on "principles and methodology, not on the conclusions they generate"); *see generally Infra* Part II.D. (describing Due Process rights under the Fourth and Fifteenth Amendments of the United States Constitution).

[29] Lvovsky, *supra* note 27, at 1998 ("[J]udicial embrace of police judgment has not necessarily reflected judges' reasoned deliberation about police competence, but has also refracted numerous structural biases and presumptions…[which] raise intrinsic due process concerns."); *see* U.S. CONST. amend. XIV (the due process clause, which entitles defendants to an impartial factfinder, whether judge or jusry); *see generally* CAL. EVID. CODE § 720 (West 2022) (describing the requirements for judicial scrutiny prior to admitting an expert witness); CAL. EVID. CODE § 801 (West 2022) (detailing the requirements for expert opinion testimony).

[30] *Infra* Part II.

[31] *Infra* Part III.

[32] *Infra* Part IV.

[33] CAL. EVID. CODE § 2 (West 2022); Fed. R. Evid. 101.

[34] *See, e.g.,* Sargon Enters., Inc., 55 Cal. 4th at 771–72 (explaining why California's standards of expert admissibility would change from the *Frye v. United States* test to *Daubert*); *see generally* Lvovsky*, supra* note 27, at 1998–99 (discussing the development of police expertise and courts' growing acceptance of the use of police experts); *see generally* Jennifer L. Groscup et al., *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCH. PUB. POL'Y & L. 339 (2002) (detailing legal changes that led up to *Daubert* and explaining the findings of a scientific study of the decision's effect on case outcomes).

[35] *Infra* Section II.A.

through statutory interpretation and the development of judicial gatekeeping.[36] Section C reviews recent legislative reforms in California, including the CRJA, which target the expansive use of expert testimony and racial bias in state courts.[37] Section D explains Fourteenth Amendment procedural due process and its connection to expert testimony.[38]

A. Opinion Testimony in the California Evidence Code

The California Evidence Code allows two types of opinion testimony: lay and expert opinion.[39] A lay witness's opinion must be rationally based on their personal perception.[40] On the contrary, expert opinions do not require personal perception; courts allow expert opinions to rely on any type of evidence on which similar experts would reasonably rely.[41] However, expert opinions must address a topic that is sufficiently beyond common experience so as to justify expert assistance to the jury.[42]

Additionally, before offering opinions, expert witnesses must demonstrate "special knowledge, skill, experience, training, or education sufficient to qualify…as an expert on the subject to which his testimony relates."[43] California courts require trial judges to act as gatekeepers, preventing speculative or unreliable expert testimony from reaching the jury.[44] This gatekeeping role requires the court to focus on the reliability of an expert's methods rather than the persuasiveness of their conclusions.[45] The Supreme Court of California explained that a witness is not an expert just because some professional experience or training informs their personal knowledge.[46]

B. The Judicial Gatekeeping Standard and Evidentiary Decisions Expanding Expert Testimony

In *Frye v. United States* (*Frye*), the United States Supreme Court adopted the first judicial standard for expert opinion admissibility.[47] The *Frye* test requires an expert's methods of forming an opinion to have achieved "general acceptance"

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[36] *Infra* Section II.B.

[37] *Infra* Section II.C.

[38] *Infra* Section II.D.

[39] CAL. EVID. CODE § 800 (West 2022); CAL. EVID. CODE §801 (West 2022).

[40] CAL. EVID. CODE § 800 (West 2022).

[41] CAL. EVID. CODE § 801 (West 2022).

[42] CAL. EVID. CODE § 801 (West 2022).

[43] CAL. EVID. CODE § 720 (West 2022).

[44] CAL. EVID. CODE § 801 (West 2022); Sargon Enters., Inc., 55 Cal. 4th at 753; *see, e.g.,* S.F. Print Media Co. v. The Hearst Corp., 44 Cal. App. 5th 952, 962 (2020) (upholding a trial court's exclusion of an expert based on an in-depth examination of the court's gatekeeping role, citing *Sargon*).

[45] Sargon Enters., Inc., 55 Cal. 4th at 595; *see also* People v. Jablonski, 37 Cal. 4th 774, 823 (2006) (preventing a psychologist, testifying as a lay witness, to give expert opinion on the defendant's mental state).

[46] Jablonski, 37 Cal. 4th at 823.

[47] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

in the specific discipline or scientific field.[48] Many state courts still use the *Frye* test to evaluate expert testimony.[49]

In 1993, enactment of the FRE forced the United States Supreme Court to reconsider expert opinion admissibility in *Daubert*.[50] The *Daubert* Court explained that the FRE superseded *Frye* and adopted new criteria for evaluating expert admissibility, based on FRE Section 702.[51] The *Daubert* criteria evalute an expert's methodology based on whether the scientific community has tested, peer-reviewed and accepted the method, as well as whether there are standards controlling application of the method.[52] However, the Court specified that these criteria apply only to scientific experts—like chemists or mathematicians—giving lower courts no guidance on non-scientific experts, such as sociologists or linguists.[53]

In *Kumho Tire Co. v. Carmichael* (*Kumho Tire*), the United States Supreme Court expanded judges' "*Daubert*-type" gatekeeping role to all experts, not just scientific ones.[54] The Court, knowing the *Daubert* factors derived from traditional scientific methods, recognized that different factors might be more appropriate for assessing the reliability of non-scientific experts.[55] The *Kumho Tire* holding gave judges the freedom to assess non-scientific expert opinion admissibility by choosing whatever *Daubert*-style factors they believe are relevant to a particular expert's reliability.[56] However, the concurring opinion cautioned judges not to use this new discretion to completely refrain from adequately scrutinizing expert reliability or to lower the standard of admissibility.[57]

California adopted a *Daubert*-type standard in the 2012 decision, *Sargon Enterprises, Inc. v. University of Southern California* (*Sargon*).[58] Like *Daubert*, the *Sargon* standard—based on Sections 801(b) and 802 of the California Evidence Code—requires trial judges to act as "'gatekeeper[s]' to exclude speculative expert

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[48] *Id*.; Daubert, 509 U.S. at 589.

[49] Anjelica Cappellino, Daubert v. Frye*: Navigating the Standards of Admissibility for Expert Testimony*, EXPERT INST. (Apr. 11, 2022), https://www.expertinstitute.com/resources/insights/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/ (on file with the *University of the Pacific Law Review*) (highlighting that while 27 states have adopted Daubert, the minority of states use the Frye test, or some different test entirely).

[50] Daubert, 509 U.S. at 587.

[51] *Id*. at 588 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); CAL. EVID. CODE § 702 (West 2022).

[52] Daubert, 509 U.S. at 593–95.

[53] *Id*. at 590 n.8.

[54] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

[55] Edward J. Imwinkelried*, Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by* Kumho Tire Co. v. Carmichael, 52 ME. L. REV. 19, 27 (2000).

[56] *Id*. at 22 (citing Kumho Tire Co. v. Carmichael*,* 119 S. Ct. 1167, 1176 (1999)).

[57] Kumho Tire Co., 526 U.S. at 158–59 (emphasizing that the opinion does not grant judges "discretion to abandon the gatekeeping function…. [or] to perform the function inadequately"); *see also Concurring Opinion,* CORNELL, https://www.law.cornell.edu/wex/concurring_opinion (last visited Apr. 23, 2023) (on file with the *University of the Pacific Law Review*) ("A concurring opinion. . .agrees with the majority opinion but does not agree with the rationale behind it . . . the concurring judge will write a separate opinion describing the basis behind their decision.").

[58] Sargon Enters., Inc., 55 Cal. 4th at 595.

testimony."[59] According to the California Supreme Court's reasoning in *Sargon*, proper judicial gatekeeping does not require courts to admit the most persuasive or correct expert opinion.[60] A witness is not an expert simply because some professional training informs their personal observations.[61] Rather, the *Sargon* standard requires courts to focus on the reliability of the principles and methodologies used by experts in forming their opinions.[62]

The California Supreme Court's opinion in *People v. Gardeley* (*Gardeley*) was also essential to the expansion of expert testimony in the state.[63] *Gardeley* held that an expert's opinion could rely on "matter that is ordinarily inadmissible," such as hearsay statements from other officers or previous defendants.[64] The Court reasoned that statements supporting expert opinions are not hearsay because the expert is not offering them as truth, but rather to demonstrate expertise.[65] *Gardeley* set a precedent that allowed expansive police expert testimony to permeate trials for many years.[66]

C. Limiting Expert Testimony in California

Twenty years after the *Gardeley* decision, California courts began to limit hearsay-based expert opinions.[67] In *People v. Sanchez*, the California Supreme Court held that when experts use hearsay statements as the foundation of opinion testimony, jurors inevitably consider the statements' truth.[68] For instance, when an officer's opinion rely relies on out-of-court statements from other officers, jurors

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[59] *Id*. at 771–72 (interpreting California Evidence Code sections 801(b) and 802); CAL. EVID. CODE § 802 (West 2022); CAL. EVID. CODE § 801(b) (West 2022).

[60] Sargon Enters., Inc., 55 Cal. 4th at 772 (explaining that the admissibility of an expert opinion is not "a decision on its persuasiveness" but only on whether the opinion's foundation is based on sound logic).

[61] Jablonski*,* 37 Cal. 4th at 823 (failing to allow a police officer—testifying as a lay witness but had taken a few psychology classes—to give an opinion on the defendant's mental state).

[62] Sargon Enters., Inc., 55 Cal. 4th at 595.

[63] *See* People v. Gardeley, 14 Cal. 4th 605, 617, 620 (1996) (permitting a police officer to testify as an expert on gang psychology).

[64] Gardeley, 14 Cal. 4th at 618; *see generally* CAL. EVID. CODE § 1200 (West 2022) (defining hearsay evidence as a statement made by someone other than the testifying witness that a party offers "to prove the truth of the matter stated").

[65] *See* Gardeley, 14 Cal. 4th at 619 ("[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact.").

[66] *See* Gardeley, 14 Cal. 4th at 618 (expanding expert testimony, allowing "matter that is ordinarily inadmissible" to form the bases); *see, e.g.*, People v. Killebrew, 103 Cal. App. 4th 644, 652 (2002) (allowing the prosecution's officer experts to testify at length in the trial court about gang psychology, as well as on the ultimate issue of the specific defendant's intent); *see generally* Patrick Mark Mahoney, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L.Q. 385, 386 (2004) (arguing that "the California Supreme Court went too far in approving the broad scope of police expert testimony in *Gardeley*").

[67] *See* People v. Sanchez, 63 Cal. 4th 665, 686 (2016) (explaining that testimonial hearsay is not allowed because it often violated the confrontation clause violation).

[68] *Id*. ("When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.").

must contemplate whether the hearsay statements are reliable to determine the credibility of the testifying officer's opinion.[69]

The 2022 enactment of the CRJA further limited expert testimony by barring convictions or sentences based on racial bias, even implicitly.[70] Racial bias has been an improper basis for convictions since 1987, when the United States Supreme Court decided *McCleskey v. Kemp* (*McCleskey*).[71] Yet, under *McCleskey*, defendants had to prove intentional or purposeful discrimination to challenge a conviction.[72] Using this standard, courts failed to condemn anything less than overt racism, rendering *McCleskey* useless to many defendants whose trials relied on subtle or unconscious racial biases.[73]

In California, the CRJA has replaced the *McCleskey*-intent requirement with a lesser burden, only requiring defendants to show their case involved any of the enumerated bias-based violations, whether or not purposeful.[74] One enumerated violation occurs when an expert uses racially discriminatory language or appeals to racial bias in their testimony.[75] The CRJA defines racially discriminatory language as that which "explicitly or implicitly appeals to racial bias," such as language referencing "physical appearance, culture, ethnicity, or national origin."[76]

To prevail on a CRJA challenge, defendants must make a prima facie showing of a substantial likelihood of a violation.[77] The statute defines this prima facie showing as "more than a mere possibility, but less than a standard of more likely than not."[78] In *Young v. Superior Court of Solano County*, the First District of the California Court of Appeal determined defendants must present plausible facts demonstrating a CRJA violation "could or might have occurred."[79] If the

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[69] *Id*. at 684 ("Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth."); *see*, *e.g*., Poulin, *supra* note 13, at 552–53 (offering an example hypothetical in which an officer bases his opinion about a narcotics case the statements and behaviors of prior perpetrators).

[70] CAL. PENAL CODE § 745(a)(2) (West 2022).

[71] McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987).

[72] *Id*. at 298 ("But '[d]iscriminatory purpose' . . . implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

[73] *See Hearing on AB 25*42 *Before the S. Comm. On Pub. Safety*, 2020 Leg., 2019–2020 Sess. 7 (Cal. 2020) (describing how *McCleskey's* created an "unreasonably high standard for victims of racism in the criminal legal system" because it requires proof of "conscious, deliberate and targeted" discrimination); *see generally* Randall L. Kennedy, McClesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419 (1988) (analyzing the way "[t]he Court's theory of purposeful discrimination leaves untouched deeper layers of racially oppressive official action").

[74] CAL. PENAL CODE § 745(a) (West 2022) (enumerating violations that occur when a judge, attorney, witness, juror, or officer exhibits bias, uses racially discriminatory language, or imposes a more severe sentence or charge on the defendant).

[75] CAL. PENAL CODE § 745(a)(2) (West 2022).

[76] CAL. PENAL CODE § 745(h)(4) (West 2022).

[77] CAL. PENAL CODE § 745(h)(2) (West 2022); *see generally Prima Facie*, CORNELL, https://www.law.cornell.edu/wex/prima_facie (last visited Mar. 3, 2023) (on file with the *University of the Pacific Law Review*) (defining "prima facie" as "sufficient to establish a fact or raise a presumption unless disproved or rebutted").

[78] CAL. PENAL CODE § 745(h)(2) (West 2022).

[79] Young v. Super. Ct. of Solano Cnty., 79 Cal. App. 5th 138, 158 (2022).

defendant makes this prima facie showing, the court must hold a hearing, outside the jury's presence, to determine whether a violation occurred.[80] If the court discovers a violation before final judgment, the judge can declare a mistrial or call for jury reselection; however, post-judgment violations require retrial or resentencing.[81]

As a case of first impression in the California Courts of Appeal, the *Young* decision relied on legislative findings.[82] The court found, through the CRJA's legislative history, that the legislature intented to target implicit and explicit courtroom discrimination through the court's role as an evidentiary gatekeeper.[83] This decision links the CRJA to evidentiary gatekeeping, creating a new opportunity for judges to exclude speculative or biased cultural opinion testimony.[84]

D. Fourteenth Amendment Procedural Due Process

Two clauses of the United States Constitution form the foundation of modern due process: the Fifth and Fourteenth Amendments.[85] The Fourteenth Amendment prevents states from depriving any citizen "of life, liberty, or property without due process."[86] In addition, this Amendment incorporates several more-specific procedural requirements, such as a defendant's Sixth Amendment right to counsel in state criminal proceedings.[87]

More generally, the Fourteenth Amendment requires states to ensure criminal defendants have, at minimum, fair notice and the opportunity to present their case before an impartial tribunal.[88] Thus, due process entitles defendants to a neutral factfinder, with "no actual bias against the defendant or interest in the outcome of [their] particular case."[89] Additionally, due process demands courts allow defendants meaningful participation in their trial, including the opportunity

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[80] CAL. PENAL CODE § 745€ (West 2022).

[81] CAL. PENAL CODE § 745(e)(1) (West 2022).

[82] Young, 79 Cal. App. 5th at 157–58; *see also Case of First Impression*, CORNELL, https://www.law.cornell.edu/wex/case_of_first_impression (last visited Apr. 22, 2023) (on file with the *University of the Pacific Law Review*) (defining a "case of first impression" as "a case that presents a legal issue that has never been decided by the governing jurisdiction").

[83] Young, 79 Cal. App. 5th at 157; Assem. B 2542, 2020 Leg., 2019–2020 Reg. Sess. 2 (Cal. 2020) (recounting cases of explicit bias—an expert testifying Indian people are predisposed to bribery—and implicit bias—prosecutors describing defendants of color using implicitly discriminatory animal imagery).

[84] *See* Young, 79 Cal. App. 5th at 167 ("[A] 'good cause' requirement is the traditional way of conferring judicial gatekeeping discretion.").

[85] U.S. CONST. amend. XIV; U.S. CONST. amend. V.

[86] *Id*.

[87] Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (establishing the "fundamental right of the accused to the aid of counsel in a criminal prosecution"); *see also* U.S. CONST. amend. XI; *see Incorporation Doctrine*, CORNELL, https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Apr. 22, 2023) (on file with the *University of the Pacific Law Review*) (explaining incorporation, "through which parts of the [Bill of Rights] . . . are made applicable to the states through the Due Process clause of the Fourteenth Amendment").

[88] Withrow v. Larkin, 421 U.S. 35, 46 (1975); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

[89] Bracy v. Gramley, 520 U.S. 899, 904–905(1997) (emphasizing that "the Due Process Clause clearly requires a "fair trial in a fair tribunal"); *see also Hearing on AB 254*2 *Before the S. Comm. on Pub. Safety*, *supra* note 73, at 9.

to offer a full defense.[90] Therefore, Fourteenth Amendment due process violations occur when an action or procedure biases a jury or prevents a defendant from fully presenting their defense.[91]

III. A TWO-FOLD DUE PROCESS PROBLEM CREATED BY THE EXPERT ADMISSIBILITY DOUBLE STANDARD

Because expert testimony has immense power to sway a jury, the admission of a biased or erroneous expert—or exclusion of a reliable rebuttal expert—can violate due process.[92] Because the interest in a criminal case is the defendant's life or liberty, full due process in criminal proceedings requires extra attention and analysis.[93] The courts' failure to adequately limit police expert testimony creates a two-fold due process problem.[94] Inconsistent application of *Daubert*-type standards allows admission of overly expansive police expert testimony while unfairly excluding defense expert testimony based on equally valuable, specialized experience.[95] Section A explains how inconsistent judicial scrutiny fails to adequately protect defendants' due process rights by admitting unreliable police expert testimony that prejudices juries.[96] Section B analyzes the ways disproportionate exclusion of defense experts impacts a defendant's ability to develop a full and meaningful defense.[97]

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[90] *See* Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (describing the Fourteenth Amendm'nt's guarantee of "fundamental fairness," includes the right to "participate meaningfully in a judicial proceeding in which [the defendant's] liberty is at stake"); Ross v. Moffitt, 417 U.S. 600, 612 (1974) (explaining that the Fourteenth Amendment requires all defendants have "an adequate opportunity to present their claims fairly within the adversary system"); Draper v. State of Wash., 372 U.S. 487, 496 (1963) ("[T]he State must provide the indigent defendant with means of presenting his contention to the. . .court which are as good as those available to a nonindigent defendant with similar contentions.").

[91] *See, e.g.*, Berger v. United States, 255 U.S. 22, 28, 36 (1921) (excluding a judge with expressed bias against German Americans from presiding over the trial of German American defendants).

[92] *See, e.g.*, United States v. Alvarez, 837 F.2d 1024, 1030 (11th Cir. 1988) ("When the expert is government law enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased."); Melissa Fulgencio, *A Basic Tool of Due Process: The Necessity of an Expert Witness*, 4 IRVINE L. F. J. 47, 48 (2006) ("In denying [the defendant] his own expert witness to help build his defense, the court denied him a 'basic tool' that the right to due process guarantees to all.").

[93] *See* Ake, 470 U.S. at 78 ("The private interest in the accuracy of a criminal proceeding that places an individ'al's life or liberty at risk is almost uniquely compelling.").

[94] *See* David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451, 459 (2008) (explaining that current federal expert admissibility standard is both too restrictive of experience-based experts, but too permissive, still allowing adversarial, party-chosen experts that create underlying reliability issues).

[95] *See id*. at 482–83 (describing how the methodological requirements of *Daubert* prevent many experience-based experts from testifying based on specialized experience).

[96] *Infra* Section III.A.

[97] *Infra* Section III.B.

A. Jury Bias Created by the Failure of Daubert *and the Judicial Presumption of Police Expertise*

Daubert and its California equivalent, *Sargon*, attempted to limit the admissibility of unreliable expert testimony by requiring judges to serve as gatekeepers—evaluating experts based on reliability factors.[98] However, for a few reasons, *Daubert* has primarily impacted civil cases and scientific experts, having little effect on non-scientific experts in criminal trials.[99] First, many courts afford police a presumption of expertise simply because of their status as officers, rather than a reliable foundation for their testimony.[100] Courts have carried this presumption into modern *Daubert* analysis—leading judges to often presume officers' methods are reliable, on any topic remotely related to criminality, without much scrutiny.[101]

The second reason *Daubert* has failed to initiate an expert testimony revolution in criminal trials is because of limited public defense resources.[102] Even with *Daubert*'s admissibility standards in place, overworked and underfunded public defenders often lack the necessary resources to challenge government experts or hire their own.[103] Without any challenge raised by the defense, judges have no opportunity to exercise their evidentiary gatekeeping role to exclude unreliable prosecution experts.[104]

The third reason *Daubert* and its progeny failed to revolutionized expert admissibility—perhaps the reason most relevant to this discussion—is that the "same level of intellectual rigor" standard inadequately addresses self-regulating disciplines.[105] For non-scientific experts to be admissible under *Kumho Tire*, they must only employ the same level of integrity and accuracy that characterizes their field.[106] California Evidence Code Section 801(b) codifies a similar, self-reinforcing standard, allowing experts to base opinions on any evidence upon which similar experts reasonably rely.[107] This standard, though seeming to scrutinize experts, fails to actually analyze the reliability of an experts method because it does not scrutinize the reliability of the field which employs such a method.[108]

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[98] *See* Sargon Enters., Inc., 55 Cal. 4th at 772 ("The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion.").

[99] *See* Moreno, *supra* note 13, at 7 (explaining *Daubert* has had "little or no impact in real criminal cases"); *see generally* Groscup et al., *supra* note 34, at 347 (describing a study of criminal cases before and after Daubert, which found trial courts' expert admission decreased by only 3.2%, while appeals admission rates actually increased by 3.9%).

[100] *See generally* Lvovsky, *supra* note 27, at 1998–99 (describing the judicial role in the development of police expertise and the reasons judges often afford officer witnesses more deference than other witnesses).

[101] *See* Moreno, *supra* note 13, at 4 (describing how judges might fail to fully scrutinize police experts because of their uniform and a familiarity with officer presence in the courtroom).

[102] Bernstein, *supra* note 94, at 461.

[103] Bernstein, *supra* note 94, at 461.

[104] *Id*.

[105] Imwinkelried, *supra* note 55, at 29–30.

[106] *Id*.; Kumho Tire Co., 526 U.S. at 152.

[107] Sanchez, 63 Cal. 4th at 678; CAL. EVID. CODE § 801 (West 2022).

[108] *See* Imwinkelried, *supra* note 55, at 22 ("It is not enough that the self-proclaimed experts who practice these disciplines accept the premises and techniques of the discipline.").

Some disciplines are based almost entirely on unreliable or speculative methods.[109] For example, courts often permit police to testify as experts based only on knowledge or opinions they have received from other officers.[110] Such evidence, thought considered reliable among officers, would usually be inadmissible if presented by a non-expert witness.[111] Nevertheless, this opinion-forming method is often permissible under *Kumho Tire* or California Evidence Code Section 801, since it is the type of evidence on which other reasonable officers would also rely.[112] Thus, police knowledge of the cultures and communities they patrol is one example of an unreliable, self-validating discipline.[113]

However, relying on other others' unsupported opinions provides no reliable or consistent evaluative method by which to analyze cultural or linguistic evidence.[114] This is especially true in regard to cultural knowledge passed between police officers, who often form biases against the cultural communities present in the areas they frequently patrol.[115] These biases are then necessarily reflected in their alleged "expertise," which they pass on to other officers or present as "expert" testimony.[116]

Daubert, as well as its state and federal progeny, aimed to eliminate expertise that lacked reliable methodology.[117] Nevertheless, the practice of admitting police testimony as expertise is difficult to dissolve because broad police opinions can significantly expedite trials, preserving limited judicial resources.[118] It can be time-consuming and costly to litigate expert testimony and CRJA challenges, which can require a full day of evidentiary hearings outside the jury's

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[109] Imwinkelried, *supra* note 55, at 22 n.31 (giving an example of "clinical ecology" as a discipline often considered self-validating); Kumho Tire Co., 526 U.S. at 151 (describing the inability of "*Daubert's* general acceptance factor [to] help show that an expert's testimony is reliable where the discipline itself lacks reliability," naming, as obvious examples, "astrology or necromancy").

[110] Christopher McGinnis & Sarah Eisenhart, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology*, 7 HASTINGS RACE & POVERTY L.J. 111, 141 (2010) (stating that police expert opinions are often based on training received from other officers and are generally hearsay).

[111] *See generally* CAL. EVID. CODE § 1200 (West 2022) (defining hearsay evidence as a statement made by someone other than the testifying witness that a party offers "to prove the truth of the matter stated").

[112] *See* CAL. EVID. CODE § 801 (West 2022) (articulating the standard for admissible expert testimony as that which is "Based on matter…that is of a type that reasonably may be relied upon by an expert" in the relevant field); Kumho Tire Co., 526 U.S. at 152 (describing the goal of Daubert-style scrutiny is to ensure experts "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice . . . in the relevant field").

[113] *See* McGinnis & Eisenhart, *supra* note 110, at 131 ("A venerable history of police officers passing as sociologists does not explain why police officers are reliably able to provide testimony on sociological concepts.").

[114] *See* Bernstein, *supra* note 94, at 482 (explaining that experience-based experts often cannot explain how their "experience is reliably applied to the facts").

[115] *See* Galvin-Almanza, *supra* note 18 (explaining the police tendancy to criminalize elements of "association and identity" such as "writing your name a certain way," liking a certain rap artist," or living in a certain area).

[116] *See* Moreno, *supra* note 13, at 6 (describing the often highly speculative nature of police expertise); McGinnis & Eisenhart, *supra* note 110, at 141(stating that police expert opinions are often based on training received from other officers, and is generally hearsay).

[117] Sargon Enters., Inc., 55 Cal. 4th at 595.

[118] *See* Mejia, 545 F.3d at 190 ("As the officer's purported expertise narrows…the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them.").

presence.[119] Furthermore, if a defendant succeeds in a CRJA proceeding, the remedies require lengthy processes, such as jury reselection or even retrial.[120] Therefore, the common practice of presuming police expertise is efficient because it can save courts unnecessary time and money.[121]

However, judicial failure to limit expert testimony causes significant due process concerns that outweigh efficiency arguments.[122] Procedural due process requires criminal judges to balance a current procedure's likelihood of depriving the defendant of liberty against the government's interests and costs of improved procedures.[123] Speculative and often-biased police expert sociological testimony can be highly prejudicial—often telling jurors exactly what inferences to make.[124]

For instance, if an officer testifies that certain clothing is indicative of gang participation, jurors will often believe the officer and convict the defendant—regardless of other evidence.[125] However, an officer's opinion linking clothing to criminality is often highly speculative, based on what other officers told him, rather

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[119] *See* Young, 79 Cal. App. 5th at 163 (describing that the CRJA was a policy choice that the legislature made despite the fact that it might impose "some cost to prosecutorial time and resources"); Cal. Evid. Code § 402 (West 2022) (permitting the court to determine evidentiary admissibility of a disputed fact, outside "the presence or hearing of the jury").

[120] *See* CAL. PENAL CODE § 745(e)(1) (West 2022).

[121] *See* McGinnis & Eisenhart, *supra* note 110, at 156 ("[I]n the absence of a strong tradition of scientific inquiry…courts accommodate a prosecutor's 'need for evidence' by granting it easy admission."); Young, 79 Cal. App. 5th at 163 (implying the CRJA, which allows more expert challenges on the basis of race, was a legislative policy choice that might impose "some cost to prosecutorial time and resources").

[122] *See* McGinnis & Eisenhart, *supra* note 110, at 156 (emphasizing that the fact that community cultural witnesses are often difficult to find "is not a sufficient justification for removing the 'qualification' prong of [expert] admissibility under the opinion rule so that readily-accessible police/experts may testify"); *see also* Mejia, 545 F.3d at 191 ("The Government cannot satisfy its burden of proof by taking the easy route of calling an 'expert' whose expertise happens to be the defendant."); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (explaining that one of the main concerns of due process analysis is "an erroneous deprivation of [the defendant's] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" such as using unreliable experts).

[123] Mathews, 424 U.S. at 335 ("[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."); *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 263–70 (1970) (applying the due process balancing analysis to the government's process for terminating welfare payments, finding that the government's interests could not "in the welfare context" because welfare provides the "recipient of the very means by which to live").

[124] *See* Deon J. Nossel, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV 231, 248–49 (discussing the way law enforcement experts can unconsciously influence jurors, leading them to believe the officer's conclusions without actually evaluating the bases for such opinions); Mejia, 545 F.3d at 190–91 ("The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.").

[125] *See* Mitchell L. Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISCOURSE 2, 17 (2014) ("[I]nforming a jury that the defendant is a gang member significantly increases the likelihood of a guilty verdict . . . [A] significant minority of jurors will vote to convict even when reasonable doubt has been clearly established."); *see also* COMM. ON REVISION OF THE PENAL CODE, 2020 ANNUAL REPORT AND RECOMMENDATIONS 46 (2020) ("Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.").

than on scientific methods or empirical data.[126] Similar concerns develop when an officer testifies as an expert on music, slang, or other cultural elements, arguing they are indicative of criminality.[127] This presumption of police expertise on sociolinguistic topics criminalizes cultural traits, causing juries to convict based on cultural or racial factors instead of evidence.[128] A court's failure to exclude an officer's speculative cultural opinion deprives defendants of *Daubert*-style safeguards and, consequently, an impartial jury.[129] Therefore, the efficiency courts gain from expansive police expert testimony cannot justify the harm to criminal defendants, whose Constitutional right to liberty relies on an impartial jury.[130]

B. The Disproportionate Exclusion of Experts Deprives Defendants of a Full Defense

Police experts and community-based experts often offer the same basis for their expertise: specialized experiences based on interaction with certain groups.[131] Specialized experience can be a proper basis for expert testimony, under both California and Federal law.[132] In fact, the California Evidence Code lists specialized knowledge as one appropriate foundation for expertise.[133] However, courts often qualify police officers as experts based on specialized knowledge, while limiting similar defense witnesses to lay opinion or excluding them altogether.[134] When prosecutors offer expert police opinions but the defense cannot offer a counter-expert, the jury is likely to believe the only presented opinion—that of the seemingly authoritative officer.[135]

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[126] *See* Moreno, *supra* note 13, at 6 (describing the often highly speculative nature of police expertise); McGinnis & Eisenhart, *supra* note 110, at 141 (stating that police expert opinions are often based on training received from other officers, and is generally hearsay); United States v. Boissoneault, 926 F.2d 230, 234 (2d Cir. 1991) (explaining that "a Government expert's personal opinion that ambiguous conduct constitutes criminal activity, given its inherently speculative nature, holds only slight probative value").

[127] *See* Moreno, *supra* note 13, at 42 ("[A] Government expert's personal opinion that ambiguous conduct constitutes criminal activity, given its inherently speculative nature, holds only slight probative value.").

[128] *See* Mejia, 545 F.3d at 190–91 (explaining that expansive expert opinions can "serve as shortcuts to proving guilt").

[129] *See* Kimm Channick, *You Must Be This Qualified To Offer An Opinion: Permitting Law Enforcement Officers to Testify as Laypersons Under Federal Rule of Evidence 701*, 81 FORDHAM L. REV. 3439, 3452 (2013) ("[C]ourts that admit 'experience-based' testimony without sufficient scrutiny permit the jury to hear 'unreliable and unwarranted opinion testimony.'").

[130] *See* Moreno, *supra* note 13, at 8 ("There is no excuse for failing to subject expert opinions to the more rigorous scrutiny required by any reasonable reading of *Daubert*,…*Kumho Tire Co. v. Carmichael*, and the new Rule 702.").

[131] *See* Mejia, 545 F.3d at 190 ("[J]ust as an anthropologist might be equipped by education and fieldwork to testify to the cultural mores of a particular social group…law enforcement officers may be equipped by experience and training to speak on the operation, symbols, jargon, and internal structure of criminal organizations.").

[132] *See* Poulin, *supra* note 13, at 568 ("The comments to the [Federal] Rules acknowledge that…a witness may qualify to give expert opinion solely through experience."); Mejia, 545 F.3d at 190 (describing how experience can equip officers to testify as experts); CAL. EVID. CODE § 801 (West 2022).

[133] CAL. EVID. CODE § 801 (West 2022).

[134] *See* Poulin, *supra* note 13, at 553 ("In some cases, the court undervalues relevant experience as a basis for opinion…In others, the court defers too readily to the claim that a witness's experience qualifies the witness to provide an opinion ….").

[135] *See* Moreno, *supra* note 13, at 4 ("[T]he purpose of and problem with [expansive police] expert testimony is that it tells jurors precisely which inculpatory inferences they should draw from the factual evidence.").

One-sided expert testimony can severely impact due process by limiting defendants' ability to counter the prosecution's case theory with a full defense.[136] One-sided expert testimony violates due process in criminal cases by telling juries which inferences to make, instead of allowing them to consider both sides before making their decision.[137] One-sided testimony is particularly problematic when the expert is offering opinions on otherwise innocent conduct.[138] For example, in one infamous case, the court permitted an officer expert to testify that a defendant's rolled-up jeans were a "sure sign" of drug dealing.[139] Without a defense expert to counter this seemingly-authoritative opinion, the jury convicted the defendant of distributing cocaine, instead of simple possession.[140] Repeatedly depriving defendants of accurate cultural experts, while allowing officers to offer interpretations of such things, criminalizes slang, clothing, music, and other cultural elements, violating California public policy.[141]

The United States Supreme Court addressed the importance of an expert to due process and preparation of a defense in *Ake v. Oklahoma* (*Ake*).[142] In that case, the indigent defendant could not afford to pay a psychiatric expert to support his insanity defense, while the prosecution could.[143] As a result, the defendant presented no witnesses to counter the prosecution's psychiatrist, the jury convicted the defendant, and the judge sentenced him to death.[144] The Supreme Court overturned the conviction, holding that depriving the defendant of expert assistance violated his due process right to present a full defense.[145] California

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[136] *See* Fulgencio, *supra* note 92, at 55 (explaining the 8th Circuit case, *Little v. Armontrout*, which held that admitting the State's expert while denying the defendant's, prevented the defendant from "marshal[ing] an effective defense").

[137] *See* Moreno, *supra* note 13, at 4 (describing the problem with expert testimony as "tell[ing] jurors precisely which inculpatory inferences they should draw from the factual).

[138] *See* Boissoneault, 926 F.2d at 234 (explaining that this type of speculative testimony, opining "that ambiguous conduct constitutes criminal activity," is especially dangerous "given its inherently speculative nature").

[139] Mark Hansen, *Dr. Cop on the Stand: Judges Accept Police Officers as Experts Too Quickly, Critics Say*, 88 A.B.A. J. 31, 31–32 (2002).

[140] *Id*. (explaining that defendant's lawyer was unaware of this testimony until it was offered, so the defense would not have known to call an expert to counter this); *see also* United States v. Harris, 192 F.3d 580, 583 (6th Cir. 1999) (discussing only the police officer's expert testimony, not any comparable community-oriented defense expert to counter such testimony).

[141] *See Hearing on AB 2542 Before the S. Comm. on Pub. Safety*, *supra* note 73, at 7 (defining the bill's purpose as eradicating "racial bias in the criminal justice system"); McGinnis & Eisenhart, *supra* note 110, at 126 (describing that a police expert's cultural opinion "enables a prosecutor to cast a wide net to establish criminal liability for seemingly innocent behaviors"); *see* Galvin-Almanza, *supra* note 18 (explaining the police tendancy to criminalize elements of "association and identity", such as "writing your name a certain way,"liking a certain rap artist" or living in a certain area).

[142] Ake, 470 U.S. at 77 (describing the issue as "whether…the participation of a[n expert] psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance").

[143] *Id*. at 72–73.

[144] *Id*.

[145] *See id*. at 76, 86–87 (1985) (describing the Fourteenth Amendment's guarantee of "fundamental fairness," which includes the right to "participate meaningfully in a judicial proceeding in which [the defendant's] liberty is at stake"); *see also* Crane v. Kentucky*,* 476 U.S. 683, 690 (1986) (reaching a similar conclusion to the court in *Ake*—namely, that the exclusion of the defense expert resulted in prejudice to the defendant and a deprivation of a fair trial and a complete defense).

courts have recognized similar principles of due process.[146] In *People v. Stuckey*, a California Court of Appeal adopted *Ake*, recognizing that due process encompasses the right to "prepare a defense," including "appointmentment of defense experts."[147]

While the *Ake* concurrence limits its holding to capital cases involving insanity, the court's reasoning could extend to the disproportionate exclusion of defense experts at issue here.[148] One might assume inconsistent expert admissibility rates simply indicate that the prosecution has more reliable experts; however, that is not the case.[149] Courts admit prosecution experts who rely on hearsay evidence ninety percent of the time, but exclude almost seventy percent of defense experts who support opinions with reliable empirical data.[150] Excluding necessary defense experts, while affording prosecutors nearly unlimited police expertise, significantly disadvantages defendants by denying them the power to fully challenge the evidence against them.[151]

IV. DISMANTLING DEFERENCE TO CREATE CONSISTENCY IN *DAUBERT* APPLICATION

To give due process full effect in cases involving non-scientific, sociolinguistic experts, judges must use their gatekeeping role to scrutinize all experts consistently.[152] California has already begun recognizing and resolving issues of cultural bias and overly broad expert testimony.[153] In 2022, California's Legislature passed Assembly Bill 2799, decriminalizing cultural expression by preventing rap lyrics from being used against criminal defendants.[154] Enactment of

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[146] People v. Stuckey, 175 Cal. App. 4th 898, 915 (2009).

[147] *Id*.

[148] Ake, 470 U.S. at 87 ("[T]he facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."); *see* Moreno, *supra* note 13, at 3 (explaining federal criminal trial courts admit 92% of challenged prosecution experts but only 33% of challenged defense experts, and, criminal appellate courts admit 95% of challenged prosecution experts but only 8% of defendants).

[149] McGinnis & Eisenhart, *supra* note 110, at 155.

[150] *Id*.

[151] *See* Moreno, *supra* note 13, at 6 ("This type of testimony, grounded only in an expert's subjective on-the-job experience, continues unabated as courts consistently reject defense challenges based on Federal Rules of Evidence 702, 704(b), and 403."); Ake, 470 U.S. at 76 (describing the Fourteenth Amendment's guarantee of "fundamental fairness," includes the right to "participate meaningfully in a judicial proceeding in which [the defendant's] liberty is at stake"); Fulgencio, *supra* note 92, at 55 (explaining the 8th Circuit case, *Little v. Armontrout*, which held that admitting the State's expert while denying the defendant's, prevented the defendant from "marshal[ing] an effective defense").

[152] *See* Bernstein, *supra* note 94, at 460 ("Enforced strictly and universally, [Daubert] would dramatically improve the quality of expert forensic testimony. In practice, however, defense attorneys are rarely successful at challenging the admissibility of prosecution forensic science.").

[153] *See Hearing on AB 25*42 *Before the S. Comm. on Pub. Safety*, *supra* note 73, at 7 (stating that the CRJA is is need because [California] " must confront racism in the courts" and including racially biased expert testimony in the enumerated violations); Sanchez, 63 Cal. 4th at 678–679 (analzying the legislative intent behind the hearsay provisions in the evidence code and, as a result, limiting hearsay as a basis for expert testimony, in attempt to conform with legislative intent).

[154] Ethan Shanfeld, *California Restricts Use of Rap Lyrics in Criminal Trials After Gov. Newsom Signs Bill*, VARIETY (Sept. 30, 2022), https://variety.com/2022/music/news/rap-lyrics-cant-be-used-evidence-newsom-california-new-bill-1235389803/ (on file with the *University of the Pacific Law Review*).

the CRJA is additional evidence of the Legislature's efforts to prevent prosecutors from using culture, language, and expression as evidence of guilt, even implicitly.[155] Implementing new laws to prevent racial and cultural biases at trial manifests the Legislature's intent to ensure courts convict defendants based on evidence of guilt, not culture.[156]

The California Supreme Court echoed this intent in *Sanchez*, which demonstrated the judiciary's willingness to limit opinion testimony by rendering case-specific hearsay an inadmissible basis for expert opinion. [157] The California judiciary should continue this progress by further limiting speculative police expertise so the jury can equally compare conflicting expert opinions.[158] Section A discusses the possibility of raising judicial scrutiny of police experts to eliminate the deference often afforded to their opinions.[159] Section B offers an alternative solution of giving the same level of deference afforded to police to other witnesses with similar, experience-based expertise.[160]

A. Daubert*'s Failure to Produce Greater Scrutiny of the Scope and Bases of Police Sociolinguistic Expert Opinions*

Prosecutors still rely heavily on police experts to obtain convictions, demonstrating that *Daubert* and its California equivalent, *Sargon*, failed to bring about the expected revolutionary limitation of experts.[161] The concurring justices in *Kumho Tire* explained that discretion—to determine the most effective factors for assessing non-scientific experts—should not allow trial judges to forgo scrutiny entirely.[162] Yet this is precisely how courts have used their discretion when faced with police experts—to favor police opinion testimony for reasons unrelated to

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[155] Assem. B. 2542, 2020 Leg., 2019–2020 Reg. Sess. 2 (Cal. 2020) ("Existing precedent countenances racially biased testimony, including expert testimony, and arguments in criminal trials.").

[156] *See* Assem. B. 2542, 2020 Leg., 2019–2020 Reg. Sess. 2 (Cal. 2020) (explaining the need for the new CRJA by explaining that "current legal precedent often resukts in courts sanctioning racism in criminal trials"); Sanchez, 63 Cal. 4th at 678–679 (analzying the legislative intent behind the hearsay provisions in the evidence code and, as a result, limiting hearsay as a basis for reliable expert testimony, in attempt to conform with legislative intent).

[157] Sanchez, 63 Cal. 4th at 686 ("When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.").

[158] *See* Mejia, 545 F.3d at 190–91 ("The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt."); Moreno, *supra* note 13, at 6 ("Once the police expert takes the stand, the court must control the scope of her testimony.").

[159] *Infra* Section IV.A.

[160] *Infra* Section IV.B.

[161] Moreno, *supra* note 13, at 6 ("This type of testimony, grounded only in an expert's subjective on-the-job experience, continues unabated as courts consistently reject defense challenges.").

[162] Kumho Tire Co., 526 U.S. at 159 (emphasizing that the majority is not granting judges "discretion to abandon the gatekeeping function…. it is not discretion to perform the function inadequately").

reliability.[163] Therefore, to solve expert reliability issues, courts must begin to equally scrutinize and appropriately limit experts on both sides of a case.[164]

The first solution to overly-expansive police expertise would require courts to completely reconsider which topics are appropriate for police expert testimony.[165] Courts that admit officer testimony on topics for which officers do not meet evidentiary standards can violate due process by allowing unreliable evidence to reach juries.[166] Courts should limit officer expertise to subjects about which officers have reliable empirical data and methods, such as investigation techniques and police procedures.[167] However, it is unlikely courts would make such a drastic reform since wide-ranging officer expertise is a longstanding practice that promotes efficiency in criminal trials.[168] Courts are often hesitant to make sweeping changes to doctrine or procedure because they seek to avoid inconsistent legal doctrine that could undermine the legitimacy of the courts.[169]

A more manageable solution would be to limit officer testimony on sociolinguistic topics to lay opinions, rather than expert opinions.[170] Because many officers' alleged sociolinguistic knowledge comes from personal perceptions of the relevant defendant or cultural group, their opinions more accurately fit the evidentiary requirements for lay opinion.[171] Additionally, courts are more capable of reliably assessing lay testimony—which is based on everyday perceptions—than expert testimony about complicated scientific disciplines and based on hearsay evidence.[172]

Positioning police sociolinguistic testimony as lay opinion would still allow officers with personal knowledge of the defendant's case or culture to give

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[163] *See* Lvovsky*, supra* note 27, at 2055 ("[T]he judiciary's escalating deference to the police did not necessarily reflect any deep-seated faith in police judgment. It vindicated judge/s more practical incentives to expand police authority, responding to such factors as public pressure, personal sympathy, and the politics of the courtroom.").

[164] *See* Moreno, *supra* note 13, at 6 ("Once the police expert takes the stand, the court must control the scope of her testimony."); Hansen, *supra* note 139, at 32–33 (explaining that the problem with police expert testimony is that "trial courts hardly ever hold police officers to the same admissibility standards that aply to other types of expert testimony").

[165] *See* McGinnis & Eisenhart, *supra* note 110, at 131 ("A venerable history of police officers passing as sociologists does not explain why police officers are reliably able to provide testimony on sociological concepts.").

[166] *See* Channick, *supra* note 129 ("[C]ourts that admit 'experience-based' testimony without sufficient scrutiny permit the jury to hear 'unreliable and unwarranted opinion testimony.'").

[167] *See* Moreno, *supra* note 13, at 8 (explaining that officers should be permitted to testify about subjects for which their experience and training provides reliable and applicable methods).

[168] *See* Young, 79 Cal. App. 5th at 163 (explaining the CRJA would likely impose costs on "prosecutorial time and resources").

[169] *See Stare Decisis*, CORNELL, https://www.law.cornell.edu/wex/stare_decisis (last visited Apr. 23, 2023) (on file with the *University of the Pacific Law Review*) ("[I]f a previous court has ruled on the same or a closely related issue, then the court will make their decision in alignment with the previous court's decision…'promot[ing] the evenhanded, predictable, and consistent development of legal principles…and contribut[ing] to the actual and perceived integrity of the judicial process.'").

[170] *See* Poulin, *supra* note 13, at 556 ("[M]ore of the testimony given by experience witnesses who inhabit the border between lay and expert status should be evaluated under the rules governing lay opinion ….").

[171] *See* Mejia, 545 F.3d at 190 (explaining that "law enforcement officers may be equipped by experience and training" to give opinions); CAL. EVID. CODE § 702(a) (West 2022) (allowing lay witnesses to give an opinion that is based on their personal perception of the topic at issue).

[172] Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 334 (2013).

an opinion.[173] However, this change would curb prosecutors' attempts to qualify officer experts, based only on status, simply to avoid lay witness limitations and ensure certain opinions reach the jury.[174] Many officers' supposed expertise on sociolinguistics is at least partially based on the observations and experiences of other officers.[175] These types of hearsay-based opinions are permissible only for expert witnesses, who, at times, must reference widely known facts, research, or other knowledge from their discipline.[176] Hearsay-based opinions are not permissible for lay witnesses, whose opinions must rely only on their own perceptions.[177] Because of this distinction, it is advantageous for the prosecution, who has the higher burden of proof, to qualify officers as broad experts.[178] The officer can then testify about what other officers or previous defendants have said, so long as the court finds that method reasonable for the discipline.[179]

However, hearsay is considered inherently more speculative and unreliable than first-hand knowledge.[180] If courts limited officers sociolinguistic opinions to lay, rather than expert, opinions, the prosecution would have to call an officer with firsthand knowledge that could render the lay opinion admissible.[181] This limitation would even the playing field by subjecting the prosecution's sociolinguistic police witnesses to the same limitations as the defense's witnesses, who are often denied expert qualification.[182]

California's recently-enacted CRJA facilitates this limiting of officer witnesses to lay opinion by requiring judges to better prevent racially-biased

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[173] *See* CAL. EVID. CODE § 800 (West 2022) (describing admissible lay opinion, which requires the testimony be based on the witness' personal perception and be helpful to the jury's understanding of such testimony).

[174] *See* Marissa N. Hamilton, *The End of Smuggling Hearsay: How* People v. Sanchez *Redefined the Scope of Expert Testimony in California and Beyond*, 21 CHAP. L. REV. 509, 511 (2018) (explaining that blurring expert admissibility standards, "opened the door to abuse; namely, expert witnesses being used as conduits to transmit inadmissible hearsay").

[175] *See, e.g.*, Mejia, 545 F.3d at 197 (reviewing testimony of a gang investigator who admitted his opinion was a "combination of both information from his own interrogations and that which he learned elsewhere").

[176] Sanchez, 63 Cal. 4th at 675 (comparing lay witnesses, who can testify from personal knowledge, and experts, who can relate information "derived from conversations with others, lectures, study of learned treatises, etc."); *see also* FED. R. EVID. § 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.").

[177] CAL. EVID. CODE § 702 (West 2022); *see also* Sanchez, 63 Cal. 4th at 675 (explaining that lay witnesses can only testify from personal knowledge).

[178] *See* Marissa N. Hamilton, *The End of Smuggling Hearsay: How* People v. Sanchez *Redefined the Scope of Expert Testimony in California and Beyond*, 21 CHAP. L. REV. 509, 511 (2018) (arguing a liberal approach to expert admissibility allows parties to ensure that damaging, otherwise inadmissible evidence gets before the jury "disguised as expert basis testimony").

[179] *See* CAL. EVID. CODE § 801 (West 2022) (articulating that admissible expert testimony is that which is "[b]ased on matter…that is of a type that reasonably may be relied upon by an expert" in the relevant field); Kumho Tire Co., 526 U.S. at 152 (describing the goal of Daubert-style scrutiny is to ensure experts "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice…in the relevant field").

[180] *See Hearsay in Criminal Cases*, NOLO, https://www.nolo.com/legal-encyclopedia/hearsay-criminal-cases.html (last visited Mar. 5, 2023) (on file with the *University of the Pacific Law Review*) (describing the unreliability of hearsay evidence, which is speculative "secondhand information that hasn't been subject to cross-examination").

[181] *See* CAL. EVID. CODE § 800 (West 2022) (requiring admissible lay opinion to be based on a witness' personal perception).

[182] *See* McGinnis & Eisenhart, *supra* note 110, at 155 (highlighting the disparity between prosecution and defense expert admission rates).

testimony from reaching juries and violating due process.[183] The CRJA requires California judges to limit or exclude expert testimony on cultural-linguistic topics when such testimony relies on racial bias.[184] The bill gives examples of cases in which witnesses offered opinions about the criminology of a defendant's conduct, rooted in a stereotypical or biased understanding of other cultures.[185]

In many cases, sociolinguistic police testimony likely violates the CRJA because both jurors and judges often allow unreliable, or biased, officer opinions to influence their judgment.[186] This acceptance is likely rooted in confirmation biases, which can prevent realistic analysis of opinions by aligning with unconscious biases and stereotypical expectations.[187] For example, in an interview, one officer explained that a person wearing "gang clothing" in a certain community was enough for him to consider them a suspect.[188] However, his knowledge of "gang clothing" and gang-dominated communities admittedly came from popular culture and other officers.[189] Nevertheless, the officer was confident in his ability to identify gang culture and stated that he would not believe the defendant, or the community, if they told him otherwise.[190]

A more reliable expert on sociolinguistics would be someone with education and experience that provides a consistent method by which to uniformly analyze any defendant or case.[191] An example of a reliable expert would be a trained sociologist who uses both qualitative and quantitative methods to understand cultural phenomena and form opinions.[192] Alternatively, a member of a cultural group would also have more authentic information about that group than a police officer.[193] Even an officer with a data-driven or statistical approach would be better suited to offer an expert opinion than one whose opinion is based on hearsay or speculation.[194] However, an officer observing a culture from the outside,

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[183] *See* Young, 79 Cal. App. 5th at 167–68 (2022) (tying judicial discretion to declare a CRJA violation to judges' evidentiary gatekeeping responsibility).

[184] *See* CAL. PENAL CODE § 745(a) (West 2022).

[185] *See* Assem. B. 2542, 2020 Leg., 2019–2020 Reg. Sess. 2 (Cal. 2020) (using the example of "a conviction based in part on an expert's racist testimony that people of Indian descent are predisposed to commit bribery").

[186] *See* Nossel, *supra* note 124, at 248–49 (discussing the way law enforcement experts can unconsciously influence jurors, leading them to believe the officer's conclusions without actually evaluating the bases for such opinions); Alvarez, 837 F.2d at 1030 ("When the expert is government law enforcement agent…the possibility that the jury will give undue weight to the expert's testimony is greatly increased.").

[187] *See* Eisen et al*., supra* note 125, at 9–10 (explaining how matching a defendant to a common stereotype can cause juror prejudice, based on confirmation biases—"seek[ing] information that supports a preconceived belief").

[188] McGinnis & Eisenhart, *supra* note 110, at 142 (describing an officer's method of identifying gang suspects as "if it looks like a duck, quacks like a duck, and swims like a duck, it must be a duck").

[189] *Id*.

[190] *Id*. at 142–43.

[191] *See* Sargon Enters., Inc., 55 Cal. 4th at 772 (stating that the court should determine expert reliability by focusing on the methods employed by the expert in forming opinions); CAL. EVID. CODE § 702 (West 2022) (stating that a witness can qualify as an expert only if their "testimony is based on sufficient facts or data").

[192] McGinnis & Eisenhart, *supra* note 110, at 143.

[193] *See id*. at 156 (2010) ("There *are* insider experts in the field of gang culture who do not require academic credentials to testify: members of the gang at issue.").

[194] *See*, *e.g.*, Hansen, *supra* note 139, at 31–32 (stating that, when an officer gave an expert opinion that a defendant's rolled up pant leg was evidence of drug distribution, the court should have required him to present proof of such assertion, such as "arrest records that show many drug dealers sport a rolled-up pants leg").

with a lens of criminality, is more likely to misunderstand the language, traditions, and culture, than someone who authentically participates.[195]

A sociologist or a community member with a genuine understanding of that community's culture presents a better foundation for expert sociolinguistic opinion than does a police officer.[196] The CRJA's enactment has given California judges a reason to subject police experts to greater scrutiny and limitations, in an effort to conform with evolving California policy.[197] Limiting officers' sociolinguistic testimony to lay opinion would help eliminate the expertise double standard that favors prosecutors, biases juries, and infringes on defendants' right to a complete defense.[198]

B. Elevating Self-Definition Through Admittance of More Experience-Based Experts

The second solution would be to elevate native cultural witnesses to the same level of courtroom expertise as police officers.[199] Courts typically admit cultural witnesses' opinions as lay, not expert, since such witnesses often fail to articulate bases for their opinions in a manner that meets evidentiary criteria.[200] Police witnesses often similarly fail to articulate reliable methodology, yet courts nevertheless admit them.[201] This is because courts often allow police witnesses a level of deference, as officers of the court.[202] Police have uniforms and a frequent court presence that can often compensate for a lack of articulable methodology.[203] Courts are hesitant to give non-police witnesses, lacking officers' indicia of authority and responsibility, the same deferential privilege, so they are unlikely to universally adopt this solution.[204]

However, qualifying community-based witnesses as experience-based experts would even the playing field, giving juries—rather than judges—the

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[195] *See* McGinnis & Eisenhart, *supra* note 110, at 144 (describing how police officer's unreliable opinions about cultural groups usually results from the nature of their contact with a group and their concentration on crime patterns).

[196] *See id*. at 143–45 (contrasting the sociological study of cultures with that of police officers).

[197] *See* Moreno, *supra* note 13, at 9 ("It is time for criminal courts to recognize that conscientious judicial oversight is critical in all prosecutions that rely on police officer expertise."); Young, 79 Cal. App. 5th at 157 (tying enforcement of the CRJA to the court's evidentiary gatekeeping function).

[198] *See* Channick, *supra* note 129 ("[C]ourts that admit 'experience-based' testimony without sufficient scrutiny permit the jury to hear 'unreliable and unwarranted opinion testimony.'").

[199] *See, e.g.*, McGinnis & Eisenhart, *supra* note 110, at 156 (emphasizing that members of the culture at issue are insider experts who do not require academic credentials to testify).

[200] *See* Bernstein, *supra* note 94, at 483 ("Most [experience-based experts] cannot explain how their 'experience is reliably applied to the facts' in any given case; instead, they implicitly need the presiding judge to simply take their words for it.").

[201] *See* Bernstein, *supra* note 94, at 483 (explaining that experience-based experts often cannot explain how their "experience is reliably applied to the facts").

[202] *See* Lvovsky*, supra* note 27, at 2054 (describing judges' "posture of deference to police witnesses").

[203] *See* Moreno, *supra* note 13, at 4 (describing how judges might fail to fully scrutinize police experts because of their uniform and a familiarity with officer presence in the courtroom).

[204] *See* People v. Chapple, 138 Cal. App. 4th 540, 548 (2006) (explaining that courts are hesitant to admit experience-based expert testimony, because there is no "third category of admissible opinions provided by highly experienced, nonexpert, lay witnesses").

opportunity to properly weigh the persuasiveness of both experts' opinions.[205] This solution is appropriate because courts have already recognized experience as a proper basis for sociolinguistic police expertise.[206] The next logical step toward eliminating the expertise double standard would be to require courts to expand the police expert privilege to other witnesses with similar experience-based cultural knowledge.[207] Labeling non-police, sociolinguistic witnesses as experts would be somewhat similar to giving them a police uniform—an external factor lending credibility to their opinion in the jury's eyes.[208] This labeling is essential because jurors tend to give undue weight to the opinion of an officer based on his appearance of expertise and authority.[209] Granting defense witnesses more legal credibility would help jurors view all experience-based testimony as equally-weighted—granting defendants an unbiased jury and a full defense, as due process requires.[210]

V. CONCLUSION

Courts often qualify police as experts on many topics based only on the presumption that police experience equates to expertise, failing to adequately exercise their evidentiary gatekeeping responsibility.[211] However, officers' experiences do not always provide the necessary methods for developing reliable expert opinions on sociolinguistic topics.[212] Nevertheless, courts often find police expert opinions consistent with *Daubert*-style scrutiny, while often excluding non-police, experience-based experts, usually offered by the defense.[213] Admitting native community members' testimony as lay opinion, while admitting similarly-based officer testimony as expert opinion, illogically elevates officers' opinions above a culture's native people.[214] This distinction deprives communities of self-definition and leads to the quasi-criminalization of particular words, music,

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[205] *See* Moreno, *supra* note 13, at 4 ("[T]he purpose of and problem with [expansive police] expert testimony is that it tells jurors precisely which inculpatory inferences they should draw from the factual evidence.").

[206] *See, e.g.*, Mejia, 545 F.3d at 190 (showing that experience can equip officers to testify as experts).

[207] *See* Poulin, *supra* note 13, at 568 ("The comments to the [Federal] Rules acknowledge that…a witness may qualify to give expert opinion solely through experience."); CAL. EVID. CODE § 801 (West 2022) (listing specialized experience as one matter on which an expert witness may base an opinion).

[208] *See* Alvarez, 837 F.2d at 1030 ("Where a government law enforcement agent testifies as an expert, on behalf of the prosecution, a serious risk of undue prejudice exists.").

[209] *See id*. (explaining that when an expert is a "government law enforcement agent testifying on behalf of the prosecution . . . the jury will give undue weight to the expert's testimony is greatly increased").

[210] *See* Ake, 470 U.S. at 76 (describing the Fourteenth Amendment's guarantee of "fundamental fairness," which includes the right to "participate meaningfully in a judicial proceeding in which [the defendant's] liberty is at stake").

[211] *See* Moreno, *supra* note 13, at 3, 6 (arguing that judges "abjure their gatekeeping responsibilities when they fail to scrutinize an expert[]" a prosecution expert).

[212] *See* Bernstein, *supra* note 94, at 483 (highlighting that experience-based experts often cannot explain how their "experience is reliably applied to the facts").

[213] *See* Moreno, *supra* note 13, at 4 (describing how judges often fail to fully scrutinize police experts because of their uniform and position as an officer); *see generally* Poulin, *supra* note 13, at 553–55 (describing the double standard in courts with regard to experience-based opinion testimony).

[214] Galvin-Almanza, *supra* note 18 ("Police definition trumps the person's self-identification, trumps the gang's identification, trumps the community's identification…in the eyes of the law it's that officer's declaration and testimony that is fairly dispositive.").

clothing, and cultures—violating California public policy.[215] Furthermore, this double standard in criminal courts deprives defendants of the full scope of their constitutional due process rights.[216]

Consistent, non-deferential *Daubert*-style scrutiny would eliminate due process concerns because it would allow experience-based witnesses—such as sociologist, poets, and community members—to testify as experts on cultural communities.[217] Alternatively, limiting the scope and admissibility of police expert testimony through judicial reconsideration and the CRJA would also help eliminate the expert admissibility double standard.[218] If California judges set a new precedent, other state courts—and perhaps federal courts—could follow suit, weakening the unfair presumption of police expertise on a national scale.[219] Therefore, California judges should use their gatekeeping role to limit the scope and admissibility of police sociolinguistic testimony.[220] This solution would restore defendants' due process rights by providing them a meaningful opportunity to defend against speculative, erroneous, or racially-biased sociolinguistic testimony offered by police witnesses.[221]

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[215] *See Hearing on AB 2542 Before the S. Comm. on Pub. Safety*, *supra* note 73, at 6–7 (illustrating legislative intent and California's policy goal of eliminating "racism in the courts" and "racially discriminatory language" which the new law defines as "language that, to an objective observer, explicitly or implicitly appeals to racial bias, including…language that references the defendant's physical appearance, culture, ethnicity or national origin."); McGinnis & Eisenhart, *supra* note 110, at 127 (describing that a police expert's cultural opinion "enables a prosecutor to cast a wide net to establish criminal liability for seemingly innocent behaviors").

[216] *See Supra* Part III; *see generally* Fulgencio, *supra* note 92 (explicating the due process implications of one-sided expertise at trial).

[217] *See* Bernstein, *supra* note 94, at 488–89, 573 (describing how *Daubert*, and the Rule 702 amendment which codifies it, admit a lot of unreliable science while excluding almost all experience-based experts offered by the defense); FED. R. EVID 702 advisory committee's note to 2000 amendment ("Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony."); Moreno, *supra* note 13, at 8 ("There is no excuse for failing to subject expert opinions to the more rigorous scrutiny required by any reasonable reading of *Daubert*,…*Kumho Tire Co. v. Carmichael*, and the new Rule 702.").

[218] *See* Poulin, *supra* note 13, at 556 (2012) ("[M]ore of the testimony given by experience witnesses who inhabit the border between lay and expert status should be evaluated under the rules governing lay opinion . . . .").

[219] *See* Moreno, *supra* note 13, at 9 ("It is time for criminal courts to recognize that conscientious judicial oversight is critical in all prosecutions that rely on police officer expertise.").

[220] *See* Sargon Enters., Inc., 55 Cal. 4th at 771–72 (clarifying that California Evidence Code sections 801(b) and 802 codify the gatekeeping duty, requiring judges to exclude opinions that do not comply with evidentiary standards or other laws).

[221] *See* Ake, 470 U.S. at 76 (describing Due Process "fundamental fairness," as requiring the right to "participate meaningfully in a judicial proceeding in which [the defendant's] liberty is at stake"); *see also* Ross, 417 U.S. at 611 (recognizing that unfairness, as prohibited under Due Process, exists if a proceeding denies defendants meaningful access to the system).