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CHAMBERS V. MISSISSIPPI: THE HEARSAY RULE AND RACIAL EVALUATIONS OF CREDIBILITY

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CHAMBERS V. MISSISSIPPI: THE HEARSAY RULE AND RACIAL EVALUATIONS OF CREDIBILITY

Andrew Elliot Carpenter*

I. INTRODUCTION

One of the foundations of our adversary trial system is witness testimony. The opportunity for people with knowledge of events to recite facts, and the chance for the adverse party to cross-examine, is a fundamental part of the truth-seeking function of a trial. An awareness of how judges evaluate witness testimony is critical to eradicating the unconscious racism in American society.

Unconscious racism arises out of viewpoints, fears and stereotypes of which people are unaware.[1] One federal judge wrote that "[t]he root of unconscious racism can be found in the latent psyches of white Americans that were inundated for centuries with myths and fallacies of their superiority over the black race," and that a form of "benign neglect" has replaced overt and intentional discrimination.[2] This subtle prejudice forms over years of accumulated social and cultural experiences.[3] It is an entrenched social bias, which most white Americans would deny holding.

Unconscious racism often influences the perception of witness credibility.[4] Judges and lawyers bring preconceived and unconscious stereotypes to trials, and this subtle bias can influence a trial's course and outcome.[5] One manifestation of this subtle bias is when judges make credibility decisions based on their life experiences and unconscious stereotypes of witnesses and parties. For example, a judge who subconsciously distrusts black people may tend to disregard their testimony as unreliable and use the hearsay rule to keep it out. Specifically, if a black witness is testifying for a black defendant, the judge may be more likely to exclude the testimony on the basis that it lacks probative value or is unreliable.

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1. RANDALL KENNEDY, RACE, CRIME & THE LAW 367 (1997); *see also* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

2. United States v. Clary, 846 F. Supp. 768, 778-779 (E.D. Mo. 1995), *rev'd* 34 F.3d 709 (8th Cir. 1994).

3. Lawrence, *supra* note 1, at 330.

4. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264 (1996).

5. *Id.*

In *Chambers v. Mississippi*,[6] the Supreme Court held that the trial judge misused the hearsay rule to exclude relevant testimony from black witnesses that would have exonerated the black defendant, Leon Chambers.[7] Although the Supreme Court reached the just and proper result in this case, it missed an opportunity to make a clear statement about race and credibility decisions when it ignored the unconscious racism that pervaded the entire investigation and trial. *Chambers* is an important evidence case, but its importance could have been greater had the Court used its review authority to diminish the effects of racism in the courtroom. Because Chambers' appeal turned on evidentiary decisions made by the trial court, and because nothing is known of the makeup of the jury, this paper focuses on the prejudice of judges with respect to credibility determinations, their role as evidentiary gatekeepers and how this affects the fundamental right to a fair trial of minority criminal defendants.

The goal of the hearsay rule is to eliminate irrelevant and unreliable evidence and prevent the jury from basing its decision on improper information.[8] Yet, unconscious prejudices exacerbate this already imprecise process. However, an increased awareness by judges and lawyers of how racial stereotypes creep into trials is one way to prevent prejudicial credibility judgments from hindering the adversarial process and jeopardizing a defendant's right to a fair trial.

Chambers is a clear example of how race can cloud a hearsay analysis and warp the fairness of a trial. The Supreme Court's opinion made a clear statement about the parameters of the hearsay rule and its proper use. However, it failed to address how race created the error in the first place.

Part II of this paper recounts the facts in Leon Chambers' case and explains why they are important in analyzing the Court's opinion from a racial perspective. Part III explains how race affects witness credibility using historical examples. Part IV examines how the hearsay rule allows credibility prejudice to bar the admission of reliable evidence. Part V analyzes the *Chambers* facts from a critical race theory perspective. Finally, Part VI demonstrates how the Supreme Court's opinion in *Chambers* ignores the role of racial bias in the outcome of the trial.

II. THE *CHAMBERS V. MISSISSIPPI* FACTS MAKE THIS A RACIAL CASE

On the night of June 14, 1969, in Woodville, Mississippi, black part-time

6. 410 U.S. 284 (1972).
7. Chambers v. Mississippi, 410 U.S. 284 (1972).
8. FED. R. EVID. 804.

police officer, Aaron Liberty, and his white partner, Officer Forman, went to Hayes Café to arrest C.C. Jackson pursuant to a warrant for disturbing the peace.[9] A crowd of between 20 and 60 black patrons at the nightspot gathered to prevent the officers from making the arrest.[10] Officer Forman made a radio call for help, to which three additional officers responded.[11]

Officer Liberty stood in the middle of the street with his back to an alley that ran beside Hayes Café.[12] Someone fired five or six shots from the alley in the direction of the officers.[13] Four of the shots hit Officer Liberty in the back and side.[14] Officer Liberty turned and fired two shotgun blasts into the alley.[15] The first shot passed over the crowd and sent them fleeing down the alley into the darkness.[16] The second shot hit Chambers in the back of the head and neck.[17] Both Liberty and Chambers fell to the ground.[18]

The other officers took Liberty to the hospital where doctors pronounced him dead on arrival.[19] According to their later trial testimony, the officers assumed that Chambers was dead and left his body in the alley.[20] Once the officers were gone, Chambers' friends returned to the scene where they found him still alive and took him to the hospital, where the sheriff arrested Chambers and charged him with Officer Liberty's murder.[21]

On November 10, 1969, Gable McDonald, one of the black men that had been at the Hayes Café the night of the shooting, confessed to the murder of Officer Liberty.[22] The events leading up to this confession began with Reverend Stokes, a local gas station owner and civil rights leader in Woodville. He had heard that McDonald admitted to his friends within hours of the shooting that he, not Leon Chambers, had actually shot Officer Liberty.[23] McDonald agreed to accompany Stokes to the office of attorneys

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9. Under Mississippi law, disturbing the public peace (as opposed to a domestic disturbance) is a misdemeanor punishable by no more than a $500 fine and up to six months in the county jail. MISS. CODE ANN. § 97-35-15 (1960).

10. Petitioner's Brief at 4 (No. 71-5908). Respondent's Brief at 2 (No. 71-5908). The brief submitted by Chambers' lawyers put the number of the crowd at "50 to 60", and the brief for the State of Mississippi estimated the crowd at "20 or 30."

11. *Id.*

12. Petitioner's Brief at 4 (No. 71-5908).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Respondent's Brien at 2 (No. 71-5908).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*; Petitioner's Brief at 5 (No. 71-5908).

23. Petitioner's Brief at 5 (No. 71-5908).

Mullins, Smith, and West who represented Chambers.[24] In response to their questioning, McDonald confessed to the murder.[25] The sheriff then arrested McDonald, but McDonald later repudiated his confession, alleging that Stokes coerced McDonald by promising that he would not go to jail and would share in the proceeds of a civil suit damage awarded to Chambers from the City of Woodville.[26]

At trial, Chambers asserted two defenses. First, he denied that he shot Officer Liberty.[27] One black witness at the scene testified that he did not see Chambers fire the shots.[28] Three of the white police officers at the scene denied seeing Chambers with a gun.[29] A diligent search of the alley did not produce the murder weapon, and the State had no evidence that Chambers had ever owned a .22 caliber pistol.[30] Only one officer testified that he thought Chambers might have had a gun.[31] He was white.[32]

Second, Chambers argued that Gable McDonald was the killer.[33] One black witness at the scene testified that he saw McDonald shoot Officer Liberty, and McDonald's own first cousin, also a black man, testified that he saw McDonald carrying a pistol in the alley immediately after the shooting.[34] On the witness stand, McDonald admitted the he owned a unique nine-shot .22 caliber pistol that he "lost" before the shooting and that he owned another .22 that he bought just after the shooting.[35] The judge excluded the testimony of two witnesses to whom McDonald had confessed to the killing as hearsay, based on its inherent unreliability.[36]

The judge also refused to allow the defense to introduce McDonald's

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24. Respondent's Brief at 2 (No.71-5908).

25. *Id.*; Petitioner's Brief at 5 (No. 71-5908).

26. Petitioner's Brief at 6 (No. 71-5908). The parties' briefs to the Supreme Court indicate that Reverend Stokes thought that Leon Chambers would have a civil cause of action against the city for his wounds. The briefs did not explain the specific theory of negligence on which this cause would proceed. Respondent's Brief at 3 (No. 71-5908); Petitioner's Brief at 5 (No. 71-5908).

27. Petitioner's Brief at 7 (No. 71-5908).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Petitioner's Brief at 8 (No. 71-5908). The defense indicated that McDonald had confessed to a couple of his friends, who were also at the Hayes Café, that he had been the one who shot Officer Liberty. Sam Hardin, a black man, had grown up with McDonald and they attended the same church. Hardin testified that McDonald confessed to him as Hardin drove McDonald home the night of the shooting. Berkley Turner, McDonald's friend who helped him carry Chambers to the hospital, also was to testify that McDonald confessed to the murder on the way to the hospital. Several days later, McDonald went to Turner and asked him not to go to the police and "mess him up." Despite these admissions of guilt, the judge did not allow the two men to testify in the presence of the jury that McDonald confessed to them the night of the murder because he said the confessions were hearsay.

confession to Reverend Stokes as a declaration against penal interest.[37] The judge did not want to allow McDonald to make statements that would implicate him in the crime because he was not on trial.[38] The judge did, however, allow the jury to hear testimony about McDonald's written confession.[39] The defense called McDonald as a witness and attempted to get him to confess on the stand.[40] When McDonald refused, the defense counsel asked the judge for permission to treat him as a hostile witness and elicit the confession by leading questions as if on cross-examination.[41] The judge denied this request.[42] When questioned by the State, McDonald retracted his confession and denied that he was even at the Hayes Café at the time.[43] Instead, he said he was drinking beer elsewhere at the time of the shooting with Berkley Turner, one of the witnesses the judge prevented from testifying.[44] Additionally, McDonald denied all of the allegations of owning a .22 caliber gun.[45] The defense then tried to rebut and impeach McDonald's testimony with a third prior confession made to another black man the day following the murder.[46] The defense tried to use this statement not as hearsay but to impeach McDonald with a prior inconsistent statement.[47] The judge refused on the same basis that he used to justify his refusal to allow the defense to treat McDonald as hostile: if the defense could not treat their own witness as hostile, then they surely could not impeach their own witness with

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37. Petitioner's Brief at 9 (No. 71-5908).

38. FED. R. EVID. 804(b)(3). The Federal Rules of Evidence now allow witnesses for the defense to make a declaration against penal interest if they are called as defense witnesses. Federal Rules of Evidence 804(b)(3) says that "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true" will be an exception to the hearsay rule. Professor Wigmore says that the old rule, that one must be bound by the oath of his witness, has slowly been whittled away, but two important aspects of the old rule remain. "All courts agree that the summoning party cannot discredit the witness by showing his bad character for veracity, or his bias, or interest, or his corruption, subject to occasional exceptions for bias or interest." Second, "All Courts also agree that the summoning party may show the witness' statement to be erroneous, by calling other witnesses to contradict him . . ." WIGMORE ON EVIDENCE, 188 (1972). The trial judge in Chambers' case seems to have violated the second part of the impeachment rule.

39. Petitioner's Brief at 9 (No. 71-5908).

40. *Id.*

41. *Id.*

42. *Id.*

43. Id. at 10.

44. *Id.*

45. *Id.*

46. *Id.* Albert Carter had known McDonald for 25 years and saw McDonald the day after the murder. When the defense called him, the judge excused the jury, having caught on to the defense's strategy. Carter testified for the record that McDonald confessed to shooting Officer Liberty because he was afraid that Officer Liberty was going to shoot him. McDonald told Carter that he used his own .22 caliber pistol to murder Officer Liberty and that McDonald had concealed the murder weapon after the shooting. *Id.*

47. *Id.*

a prior inconsistent statement.[48]

McDonald's testimony directly contradicted evidence already in the record. However, because the defense called McDonald, the judge disallowed the defense lawyer to cross-examine him.[49] In spite of insufficient evidence to convict and excluded evidence that would have produced an acquittal, the jury convicted Chambers of the murder of Officer Liberty and sentenced him to life in prison.[50]

III. RACE INFLUENCES CREDIBILITY ASSESSMENT

A. Historical Examples of Bias in the Criminal Justice System

During the twentieth century, stereotypical ideas about a black witness's credibility kept out reliable evidence which resulted too often in miscarriages of justice.[51] Blacks have always been at the mercy of white witnesses, particularly in rape and murder prosecutions.[52] The law required that juries were always white, and prejudice made jurors ready to believe a white victim's story even when the evidence strongly contradicted it or even when it was so questionable that they would not have believed it in any other circumstance.[53]

History reflects a traditional skepticism toward the veracity of black witnesses.[54] Racial prejudice has often worked as a filter that keeps the truth out of criminal trials. For instance, prosecutors often make inappropriate racial appeals to the jury.[55] In 1909, an Alabama prosecutor appealed to racial prejudice in a murder trial. In his closing he said, "You know the Negro race

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48. Petitioner's Brief at 11 (No. 71-5908).

49. *Id.* at 10 (No. 71-5908).

50. *Id.* at 11 (No. 71-5908). Neither party's brief gives any indication as to the racial composition of the jury venire or the jury that heard the case and convicted Chambers.

51. MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 187 (1991).

52. *Id.* at 177-204. *See also* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 529 (1990).

53. YANT, *supra* note 51 at 183-190.

54. Johnson, *supra* note 4, at 267. From 1702 through the end of the Civil War, Virginia did not allow blacks to testify in court unless the defendant was black. J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, 295-300 (1993). Historically, states generally excluded blacks from practicing law in the late nineteenth and early twentieth century. Although many blacks became members of the bar during Reconstruction, most judges around the state of Mississippi refused to allow blacks to practice in their courtrooms. As the post Reconstruction governments regained power, the role of black lawyers diminished. In 1935, there were five black lawyers in Mississippi. By 1944, there were only two. For those judges who did allow black lawyers to practice in their courtrooms, some local authorities imposed ridiculous restrictions upon them. The sheriff in Greenville, Mississippi required black lawyer Nathan S. Taylor to sit in the upper gallery, which was reserved for blacks, and argue his cases from there. Taylor soon relocated his practice to Chicago.

55. KENNEDY, *supra* note 1, at 258.

— how they stick up for each other when accused of crime and get up an alibi and prove it by perjured testimony from those of their own color."[56] The Alabama Supreme Court overturned the conviction because of the statement.[57] In 1979, the Sixth Circuit Court of Appeals reversed a black man's kidnapping conviction because the prosecutor, during his closing, said that the jury should convict the defendant because "not one white witness has been produced" to testify on his behalf.[58] This statement was reversible error because it was an appeal to racial prejudice that may have affected the jury's decision.[59]

B. Specific Examples of Juries' Verdicts Affected by Prejudicial Credibility

Juries are susceptible to prejudice similar to that of the judge in Leon Chambers' trial. Probably the most famous case that demonstrates how juries discount black testimony is that of the "Scottsboro Boys," in which nine black youths were all convicted of rape in the early 1930's in northeast Alabama.[60] Their accusers were two white women with poor reputations in the community.[61] Yet, all the white judges, lawyers and jurors believed the white girls without question because of their race.[62] In two other cases, the black defendant's own counsel as well as the judge questioned the credibility of black defense witnesses.[63]

Another obvious example of racial stereotypes poisoning a jury trial occurred in West Virginia in 1925. Payne Boyd was convicted once for murder, and an appellate court granted him a new trial based on legal error. At his second trial, the jury convicted him again and sentenced him to life in prison. Boyd's conviction came in spite of thirty-one witnesses who all testified that Boyd was not the real killer but was the victim of mistaken identity, and identity was the only issue at trial. All thirty-one witnesses were black. An appellate court ordered a third trial, at which the defense introduced fingerprint evidence that Boyd was not the killer. When faced with this evidence, the jury acquitted Boyd and he got out of prison after serving eighteen months.[64] Apparently, the jurors did not believe the testimony of

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56. Tannehill v. State, 159 Ala. 51 (1909); (cited in KENNEDY,supra note 1, at 258.
57. KENNEDY, *supra* note 1 at 258.
58. Withers v. United States, 602 F.2d. 124 (6th Cir. 1979); cited in KENNEDY, *supra* note 1,at 261.
59. KENNEDY, *supra* note 1, at 261.
60. DAN T. CARTER, SCOTTSBORO: A TRADEGY OF THE AMERICAN SOUTH (1969).
61. *Id.* at. 78, 81-84.
62. *Id.* at 37. For the most contemporary account of this saga, *see*, JAMES GOODMAN, STORIES OF SCOTTSBORO (1994). The lawyers for the boys considered it a victory that they were not given the death penalty and Judge Price of Decatur, the site of the first trials, made sure that the defendants were not lynched before the trials.
63. Johnson *supra* note 4, at 293, 300-04.
64. MICHAEL RADELET, ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL

thirty-one black witnesses, but could believe fingerprint evidence. The fact that fingerprints carried more weight than thirty-one witnesses exemplifies the credibility problems that blacks faced then and still face now.

C. The Intangible Influence of Prejudicial Credibility on Juries

Leon Chambers' trial did not occur in a vacuum. Although not a victim of a racial appeal to the jury, he was a victim of prejudicial evaluations of black witnesses' credibility. The same forces that drove some prosecutors to make racial appeals and juries to discount reliable testimony from black witnesses were at work in the *Chambers* trial.

Race-based evaluations of credibility have a psychological effect on jurors and affect the way that lawyers plan strategy for trial.[65] Judge Jerome Frank, of the Second Circuit Court of Appeals, said that prejudice is the thirteenth juror, and prejudice impacts the way the jurors interact with each other and the way that lawyers present testimony.[66] Lawyers may try to connect with the jurors based on race, subtly reinforcing the idea that the minority witness is part of the "other," and so should not be trusted.[67] This concept of "otherness" is important in understanding how prejudice affects a witness's credibility. If the jurors are of a different race than the witness, it becomes easier to group the witness with all the other members of his or her race, and impute onto that witness whatever negative stereotypes the juror harbors against that particular group.[68] This appeal attempts to reach that element of racism that considers minorities monolithic and unable to have characteristics not endemic of the whole.

IV. CREDIBILITY PREJUDICE BARS THE ADMISSION OF RELIABLE EVIDENCE

A. Prejudice in the Criminal Justice System

Hearsay is a broad evidence doctrine that seeks to prohibit the jury from using unreliable evidence to reach its verdict.[69] Because the bounds of the

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CASES 288 (Michael Radelet, et al, eds., 1992).

65. KENNEDY, *supra* note 1, at 258.

66. *Id.*

67. *Id.* at xi.

68. For a general discussion of the concept of otherness in the history of American race relations, *see* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). No discussion or understanding of "otherness" and race consciousness is complete without a review of C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877-1913, 350-428 (1951).

69. FED. R. EVID. 804.

hearsay rule are so vague, it serves as a "catch-all" rule to keep out evidence that the judge intrinsically does not trust. Judges who distrust the testimony of minorities usually can rely on the hearsay rule to keep that testimony out of evidence and away from the jury if it is not based on first-hand knowledge. This impermissibly allows the prejudice of well-meaning judges to creep into the evidence admission formula. This is particularly true when one minority testifies on behalf of another.[70] In this situation, a judge may be tempted to distrust the testimony because of the commonly held stereotype that blacks or other minorities feel a stronger bond to each other than to the rule of law.[71] One commentator says, "race may inappropriately skew the credibility determinations of perfectly respectable judges who do not seem to manifest any animosity, racial or otherwise, toward African American litigants."[72] Thus, judges may unconsciously think blacks and minorities are likely to lie for each other.[73]

This kind of discrimination is covert and subtle. One commentator has referred to it as a "slip of the mind."[74] Tacit and widespread cultural stereotypes perpetuate unconscious racism.[75] People with completely pure motives may still be unconscious racists because of their inability to shift their perspective to that of a minority person.

In general, people have one of three reactions to those of other races.[76] First, there are dominative racists. These people harbor fear, anger, or even hatred toward those of other races.[77] Dominative racists may manifest their prejudice overtly. Second, there are aversive racists. These people want to avoid contact with other races.[78] Third, there are those that harbor stereotyped bias, and they are most likely unconscious racists.[79] Unconscious racists have prejudicial views based on unfamiliarity and are free of animosity.[80] Usually, these people disavow any racist beliefs.[81]

Unconscious racism is the primary way that race factors into a credibility

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70. Johnson, *supra* note 4, at 264.
71. *Id.*
72. *Id.*
73. *Id.* Johnson says that judges are likely to engage in credibility prejudice and that victims of that prejudice can challenge it on Equal Protection grounds by showing disparate impact, a historical sequence of events that informs the judge's purpose, deviation from normal procedure, and the statements of the judge. *Id.* at 285.
74. Lawrence, *supra* note 1 at 341.
75. *Id.*
76. Johnson, *supra* note 1, at 315.
77. *Id.*
78. Id. at 316.
79. *Id.*
80. *Id.*
81. *Id.*

analysis.[82] A white judge may stereotype a black person in seemingly innocuous ways, such as through that person's speech pattern.[83] A fact-finder may make a prejudicial credibility assessment free from racial animosity based on such monolithic stereotypes.[84] This unconscious racism is pervasive in the criminal justice system.

Often judicial errors arising out of race are subtle. In current judicial proceedings, prejudice most often does not appear in the form of in-court racist statements. Rather, judges make evidentiary rulings similar to those in the *Chambers* case. In these instances, judges deny motions for mistrials or fail to declare one *sua sponte* when racial prejudice has improperly tainted the trial.[85]

The judge's prejudice as to who is a credible witness is central to understanding the outcome in *Chambers.* This case represents the widespread prejudice in the criminal justice system.[86] The volume of prosecutorial misconduct cases and juror accounts of their deliberations show that credibility prejudice exists.[87] In six recent cases, appeals courts overturned convictions because the prosecutor argued to the jury that a witness's race made him less likely to be truthful.[88] On other occasions when litigants polled a jury or a party challenged a verdict based on race, some jurors said that race was a factor in their deliberations.[89] In other cases, jurors complained to the judge about the prejudicial conduct of fellow jurors.[90]

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82. *Id.* at 317.

83. *Id.*

84. For example, a judge might consider himself or herself extremely progressive in matters of race, yet, in his or her subconscious believe that all black people share immutable characteristics, like slovenliness, laziness, sexual promiscuity, perpetual tardiness, grammatical errors in speech and lower intelligence. *See* Johnson, *supra* note 4, at 315. This statement does not imply that all judges and all citizens can be categorized into one of these four groups. There could be people that are completely free of any racial stereotypes, in both thought and deed.

85. Higginbotham, *supra* note 51, at 543-544.

86. Johnson, *supra* note 4, at 305.

87. *Id.* at 305-308.

88. *Id.* In Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979), the white prosecutor argued that the jury should convict the defendant because, "Not one white witness has been produced in this case that contradicts the (white prosecution) witness's testimony." In Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), the prosecutor said that a black witness, during his testimony, had been "shucking and jiving on the stand." In George v. State, 539 So.2d 21 (Fla. App. Ct. 1989), the prosecutor asked the defendant, "Isn't it true in gypsy practice that it is okay to lie and cheat and steal if you can get away with it?" The prosecutor in State v. Kamel, 466 N.E.2d 860, 866 (Ohio 1984), argued to the jury that defense witnesses were unreliable because they had been born in the Middle East.

89. Johnson, *supra* note 4, at 308-309. In Tobias v. Smith, 468 F.Supp. 1287, 1289 (W.D.N.Y. 1979), the jury foreman said that "You can't tell one black from another" and a different juror said that the jury should take the word of the white witnesses over that of the black witnesses. An appellate court overturned the jury's verdict in Powell v. Allstate Ins. Co., 652 So. 2d. 354 (Fla. 1995) because the jury made many racially charged remarks during deliberations, including comparing one juror to a chimpanzee.

90. Johnson, *supra* note 4, at 308-309.

B. A Judge's Credibility Prejudice is Critical

Judges are the most important cogs in the criminal justice wheel. The system relies on them to function as referees and to maintain the integrity of the process. Thus, the judge's evaluation of a minority witness's credibility is integral to a fair trial. Judges may doubt a minority witness's credibility for several reasons. Some may doubt a minority's credibility because they have never questioned their stereotypes. Many continue to buy into the "mythology of racial hierarchy,"[91] which is based on the belief that minorities are inherently inferior and prone to undesirable behavior. This is particularly true of those trained and educated in segregated institutions and reared in a segregated environment.[92]

A bench that is unaware of the influence of subtle bias on a trial may reflect racial insensitivity when confronted with minority witnesses. These subconscious stereotypes seep into a judge's mind when making value judgments, exercising discretion and characterizing the important issues during a trial.[93] Clearly, the trial judge enjoys a great deal of discretion in deciding what he or she labels as hearsay, and it is the judge's perception of a witness's credibility that determines whether testimony is admissible.[94] If the judge thinks the witness lacks credibility, that testimony never reaches the jury.

The trial judge in Leon Chambers' murder trial may have held a stereotyped view of blacks. We do not know if he distrusted all Blacks testifying for one another or if something particularly troubled him about these witnesses so that he would stretch the hearsay rule and exclude their testimony. However, the judge ultimately denied Chambers a fair trial by denying his witnesses the chance to testify.

V. CHAMBERS AND EXCULPATORY EVIDENCE

A. The Supreme Court Forbids Mechanical Application of Hearsay

Chambers is important both for the change it produced in evidence law and for what the opinion failed to address about race.[95] After *Chambers*, a defendant can impeach his own witness and treat him as hostile.[96] Essentially,

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91. A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1047 (1991).

92. *Id.* at 1042.

93. *Id.* at 1042, 1060.

94. For a general discussion of the judge's importance in race related credibility assessments, *see* Higginbotham, *supra* note 91.

95. *Chambers*, 410 U.S. 284 (1972).

96. David Robinson, Jr., *From Fat Tony and Matty the Horse to the Sad Case of A.T.: Defensive and*

the Court struck down the old "voucher rule."[97] Yet, in making these important changes to the common law of evidence, the Court failed to take account of the racial factors that led to the appeal in the first place.

In striking down the voucher rule, the Supreme Court mandated the admission of evidence in Leon Chambers' trial when most courts around the country would have excluded such evidence under their own evidence rules.[98] The Court's opinion points to two errors on the part of the trial court. First, the trial court refused to allow the defendant to treat Gable McDonald, the confessed killer, as hostile.[99] Justice Powell's opinion stated that such a rigid application of Mississippi evidence rules interfered with Chambers' ability to defend himself.[100] Second, the Supreme Court criticized the trial judge's refusal to allow the defendant to call the three other men to whom McDonald had confessed as rebuttal witnesses.[101] The Court held that this combination of both limiting the defendant's questioning of McDonald and the exclusion of McDonald's oral confessions constituted a denial of a fair trial in violation of Chambers' Due Process rights.[102] As a result of *Chambers,* a party may impeach its own witness and introduce statements against penal interest.[103] This is one of the most important decisions in evidence law.[104] Now, a defendant can call witnesses that can testify to statements that another person made implicating themselves in the crime.[105] In a case like *Chambers*, where mistaken identity is central to the defense, these hearsay witnesses are critically important to a fair trial.

The Court held that the trial judge misapplied the hearsay rule, by applying it too rigidly and without consideration of justice or fairness.[106] Justice Powell wrote, "[w]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[107] Powell seems to imply that the judge adhered to the black letter rule without considering the parties or the circumstances. For minorities, applying the hearsay rules in a mechanical fashion threatens the very fairness of a trial because it does not compensate for unconscious racism.

Offensive Use of Hearsay Evidence in Criminal Cases, 32 HOUS. L. REV. 895, 926 (1995).

97. EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE 9 (1990). *See also* Robinson *supra* note 96, at 926.

98. INWINKELRIED, *supra* note 97, at 9.

99. *Chambers,* 410 U.S. at 298.

100. *Id.*

101. *Id.* at 300-301.

102. *Id.* at 302.

103. Robinson, *supra* note 96, at 926.

104. *Id.*

105. *Id.*

106. *Chambers,* 410 U.S. at 302.

107. *Id.*; *see also* IMWINKELRIED, *supra* note 97, at 34.

After *Chambers*, a judge should admit testimony bearing sufficient indicia of reliability when not doing so would result in an injustice to one of the parties.

The Supreme Court faulted the judge for blinding himself to the circumstances.[108] One could argue that the judge was not blind at all, but acquiesced to an injustice because of unconscious racism. The judge could not have reasonably thought Chambers was guilty. Even the state of Mississippi, in its Supreme Court brief, conceded that there was not overwhelming evidence of Chambers' guilt.[109] Nonetheless, the exclusion of McDonald's out-of-court statements, arguably provoked by unconscious racism, prevented the jury from having the necessary information to acquit Chambers.[110]

The trial court's refusal to allow the defense to treat McDonald as a hostile witness had serious repercussions for Chambers' case. The defense could have impeached McDonald by using leading questions and referring to the oral confession McDonald made to his three friends right after the shooting and before he talked to Chambers' attorneys.[111] Instead, on direct and cross-examination, McDonald recanted all his earlier confessions.[112] He essentially became a witness for the prosecution, who never called him during their case-in-chief.[113] The trial judge's refusal to let the defense cross-examine their own witness in these circumstances essentially destroyed their case.

B. A Closer Look at the Impermissible Role Race Played in Chambers

One important fact sheds light on the trial court's perception of McDonald

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108. *Chambers*, 410 U.S. at 300. The circumstances to which Justice Powell and the Court refer are not racial, but involve the overwhelming reliability of the hearsay statements. "First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by other evidence in the case — McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22 caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest." In spite of all these factors, the trial judge refused to let the jury hear the testimony of any of the black men to whom McDonald had confessed.

109. *Id.* at 294.

110. Sheri Lynn Johnson argues that situations like this occur because both judges and juries are too quick to dismiss the testimony of black defense witnesses, believing that blacks are inherent liars or that depending upon the situation blacks are going to lie for one another. *See* Johnson, *supra* note 4.

111. Robinson, *supra* note 96, at 926.

112. Petitioner's Brief at 8 (No. 71-5908). The defense, after the court denied the admission of McDonald's confessions, was left with no choice but to offer his written confession. To lay a foundation for this written and sworn statement, the defense had no choice but to call McDonald as a defense witness. While calling McDonald as a defense witness may seem like a tactical blunder, the defense attorneys were on the horns of a dilemma because the judge did not allow evidence of McDonald's oral confessions. The only way they were going to get any kind of confession at all into evidence was to try to get the sworn statement admitted. To do that, the defense had to call McDonald and hope for the best. Unfortunately for Chambers, the worst happened.

113. *Chambers*, 410 U.S. at 290.

and the other witnesses for Chambers. Even though the judge refused to allow Chambers' attorneys to cross-examine McDonald because he was their own witness, the judge did allow the defense to proffer McDonald's written confession.[114] McDonald had confessed to a local gas station owner, Reverend Stokes, who took McDonald to Chambers' attorneys' office.[115] There the attorneys drafted the confession and McDonald signed it with his mark.[116] Although McDonald denied its truth from the witness stand, the judge allowed the jury to hear that McDonald had indeed confessed on paper once before.[117] Perhaps the judge thought that a confession written by a white lawyer, witnessed by a black business owner, and marked by an illiterate black man was more trustworthy than the testimony of any of the black witnesses for the defense. Because the judge's role is to keep out unreliable evidence, he must have thought his decisions vindicated the interests of the hearsay rule.

In addition, the judge allowed the white police officer at the scene to testify that he thought Chambers might have had a gun.[118] In spite of all the evidence indicating McDonald was the killer, the jury heard the testimony of the one white officer who offered inconclusive evidence of Chambers' guilt, and Gable McDonald, who recanted his earlier confessions.[119] The judge filtered out most of the exculpatory evidence, and the jury believed the officer.

Justice Powell wrote in the Court's opinion, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[120] The trial judge violated Chambers' right by prohibiting the three men to whom McDonald confessed from testifying in the presence of the jury. The Court stated that the judge lacked good reason to exclude evidence that was "demonstrably reliable."[121] McDonald had professed his guilt all over town, but the trial court judge still did not allow the testimony into evidence.[122] The judge excluded the evidence in spite of significant corroboration and indicia of reliability.[123]

One commentator on the *Chambers* case applied the "Grand Tradition of

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114. Petitioner's Brief at 9 (No. 71-5908)..

115. *Chambers*, 410 U.S. at 287.

116. *Id.*

117. *Id.* at 291.

118. *Id.* at 289.

119. Petitioner's Brief at 7 (No. 71-5908). Only one of the officers that testified thought he saw Chambers with a gun. Three of Officer Liberty's fellow officers, including one that was three feet from Officer Liberty and six feet from Chambers at the time of the shooting, denied seeing Chambers with a gun. The officer that testified that Chambers had done the shooting spent the day after the murder canvassing and questioning members of the black community to discover who shot Officer Liberty.

120. *Chambers*, 410 U.S. at 302.

121. *Id.*

122. *Id.*

123. *Id.* at 300.

American Common Law" to this case's facts and trial court ruling.[124] The grand tradition is the "legal rule follows where its reason leads; where the reason stops, there stops the rule."[125] Racial prejudice, conscious or unconscious, is not a valid reason for deciding that a man's testimony is unreliable. Racial stereotypes are always patently unreasonable. These beliefs and perceptions prevent lawyers and judges from being rational and making decisions in the best interest of justice.

In many cases, and probably at the trial of Leon Chambers, it was easier to allow the rules to work an injustice than to confront stereotypical and prejudicial views of a person's credibility. However, a defendant's constitutional right to present evidence should always trump hearsay rules. After *Chambers*, it does.

A witness's credibility is in the eye of the factfinder. Often, the factfinder is not a minority. When one person evaluates the credibility of someone from another race, there is room for unconscious racism to cloud that judgment.[126] The holding in *Batson v. Kentucky*[127] prohibits a lawyer from making a peremptory challenge of a juror based on the inference that the black juror would be biased in favor of a black defendant.[128] That reasoning should also prohibit a judge's racial determinations of credibility as well.[129] Attempting to eliminate racial stereotypes from discretionary decision-making would help ameliorate the lack of confidence that minorities have in the judicial system.[130]

VI. THE SUPREME COURT'S MISSED OPPORTUNITY TO DISCUSS RACE

A. The Supreme Court Intentionally Overlooks Race

Chambers holds that courts cannot use traditional hearsay doctrine to exclude important and reliable evidence for the defendant, but the Court makes this rule without ever mentioning race.[131] The Court was remiss for its failure

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124. IMWINKELRIED, *supra* note 97, at 419.

125. *Id.*

126. Johnson, *supra* note 4, at 331.

127. 476 U.S. 79 (1986).

128. Batson v. Kentucky, 476 U.S. 79 (1986).

129. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 80-82 (1999).

130. Johnson, *supra* note 4, 267-276. The ambivalence blacks feel toward the criminal justice system as an instrument of truth and dispenser of justice has deep historical roots. To understand the weight and impact of the cases involving race and credibility in the modern era, one must understand the cumulative experiences of blacks with the American justice system.

131. *Chambers*, 410 U.S. at 302-303. As evidence of the limited nature of the holding, the majority opinion concluded, "we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." This limited outcome was, in fact, rather easy for the Court to reach. Chambers was, after all, innocent.

to address the underlying cause of the trial court's error. The appeal arose because the trial court refused to recognize the reliability and credibility of minority testimony. Yet, the opinion never mentions race and its centrality to the history of the case.

One explanation for this failure to address race is that race simply did not matter to the Court. Both the victim and the defendant were black, even though the victim was a police officer. Throughout the past century, a white dominated judiciary wrongly accused and convicted many black men of acts of violence against white victims. The authorities prosecuted such attacks vigorously because they were also assaults on white supremacy.[132] This, however, was a case of black on black violence, so the Court might have thought that race did not figure into the trial court's decision. The Supreme Court justices could not have been so naive as to think that race is never a factor when a judge exercises his discretion in applying the hearsay rule. This trial judge made credibility decisions that were so nonsensical and unfair that racial stereotypes are the only explanation.

Throughout the opinion, the Court artfully dodges the race issues that pervade every aspect of this case. Justice Powell's statement of facts carefully obscures the issue. The facts state that Aaron Liberty, the victim, was a police officer, but not that he was a black man.[133] The Court does not say that the crowd that had gathered outside Hayes' Café was all black.[134] There is no indication that the defendant was black, and the reader never knows from the Court's opinion that McDonald was black.[135] The Court is so careful to ground its decision in principles of fairness, due process and the hearsay doctrine, that it misses an opportunity to bring unconscious racism to the attention of the legal community and the public at large. Upon recognition of how unconscious racism and prejudicial stereotypes muddy the judicial waters, judges and lawyers should work to eliminate these stereotypes from the process.

B. Race Was an Obvious Influence in Chambers

First, race influenced the behavior of the police, but nothing they did was violent or overtly racist. Rather, the police officers failed to diligently work the case, largely because Chambers was black.[136] The only evidence against

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132. Johnson, *supra* note 4, at 275. *See also* Higginbotham, *supra* note 51, at 535.

133. *Chambers*, 410 U.S. at 285.

134. *Id.* at 287.

135. *Id.*

136. Petitioner's Brief at 8 (No. 71-5908). At Footnote 6 of the Petitioner's Brief, the record indicates that the sheriff arrested Chambers and held him in custody in spite of the fact that McDonald confessed and

Chambers was circumstantial.[137] The Woodville police made no effort to search Chambers for the murder weapon or any clues around him at the scene.[138] They left him where Liberty had shot him in the alley, assuming he was dead.[139] The officers did not check to see if he was alive, or if he needed an ambulance.[140] The police never found a weapon on Chambers and never were able to prove that Chambers had ever even owned a .22 caliber pistol.[141] The officers never investigated the possibility that McDonald might have been the killer, in spite of the significant evidence of his guilt.[142]

One possible reason the local authorities were so willing to arrest Chambers was that they figured Officer Liberty shot Chambers because Chambers shot him first. Another explanation that the Court overlooked was that the local police and prosecutor were not interested in theories or evidence of Gable McDonald's guilt because they had already arrested Chambers for the murder. Charging and prosecuting a black man was and is too often tantamount to charging and arresting the guilty man.

Second, the Court also fails to address the possible motives of the trial court in excluding all the evidence that would have cleared Chambers. The judge relied on the hearsay rule to keep this evidence out, yet doing so was illogical and defeated the purpose of the evidence rules. The trial court was reluctant to entertain any notion that anyone other than Chambers might have been the killer. The Supreme Court failed to address the racial motivations, even unconscious ones, that drove the trial court's decisions.

Changing a judge or lawyer's perception of minority witnesses as inherently lacking credibility need not be the focus of the case, but should be addressed. The Supreme Court has the responsibility as the highest judicial body in the country to make sure that its audience is aware of all the factors that are at work in a case. Here, race played an obvious role in the trial court's decision to exclude evidence of a defendant's innocence. Those racial stereotypes do not have to be the basis for the reversal of the conviction, but the Supreme Court should discuss them in the opinion. If the Supreme Court fails to mention race when making new rules to overcome racialized decisions, that failure marginalizes race as a reason for injustice in the court system. The Supreme Court has the duty to address race when it decides a case, like *Chambers*, where race is the dominant force.

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was arrested for Officer Liberty's murder.

137. *Id.*

138. *Id.*

139. *Chambers*, 410 U.S. at 289.

140. *Id.*

141. *Id.*

142. *Id.*

VII. CONCLUSION

Race influences the criminal justice process from the arrest and investigation through trial and sentencing. Race unconsciously influences criminal cases when judges, jurors, and lawyers make prejudicial credibility assessments. Throughout the past centuries of American jurisprudence, minorities have suffered race-based prosecutions and injustice. The word of a white witness nearly always carries more weight with a decision-maker of the same race than that of a minority. This is particularly true when that minority is testifying on behalf of someone of his or her own race. These racial credibility assessments influence both the psychology of the jurors and the trial strategy of the lawyers. The jurors unconsciously allow stereotypes to influence their credibility decisions, and lawyers build their trial tactics around these same racialized considerations.

Prejudicial views of a person's credibility defeat the goal of the evidence rules by preventing the jury from hearing reliable exculpatory evidence. Courts often use malleable and vague hearsay rules to prevent juries from hearing testimony that the judges themselves do not trust. A judge's perception of the witness is the most important factor because the judge decides if that witness will testify in front of the jury. Therefore, judges have a considerable amount of discretion and should exercise it in a race-neutral manner. Jurists should be made keenly aware of how subconscious prejudices can creep into the decision-making formula when ruling on an evidentiary question.

All of these racial factors were present in *Chambers v. Mississippi*. Racial assessments of credibility kept the defendant from putting on testimony that he was not the killer. These racial stereotypes prevented Chambers from getting the fair trial to which he was entitled. The trial judge applied the hearsay rules to defeat the admission of reliable evidence and to work an unfathomable injustice on the black defendant. Race is the only plausible explanation for the injustice in this case.

The Supreme Court, however, failed to address race when reversing Chambers' conviction. The Court relied on the technical errors the trial judge made in applying the evidence rules, without ever discussing why the trial court made such errors. This was a missed opportunity for the highest court in the land to make courts all over the country aware of what terrible injustice can result from the seemingly innocuous behavior of judges. The Court failed to use this case as an informative example of ways to avoid prejudicial verdicts.

A greater consciousness and sensitivity to subtle stereotypes can help the criminal justice system avoid mistakes like this one in the future. If lawyers and judges are aware of how easily prejudicial stereotypes can arise during the course of a trial, unfairly altering its outcome, they can help prevent another innocent person like Leon Chambers from being wrongly convicted.