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LIMITATIONS OF WASHINGTON EVIDENCE RULE 413

Sarah Desautels*

Abstract: This Comment analyzes Washington State Evidence Rule 413 (ER 413). ER 413 renders evidence of the immigration status of criminal defendants, civil plaintiffs, and witnesses presumptively inadmissible at trial. The Washington State Supreme Court adopted ER 413 in September 2018. It is the first of its kind in the nation. ER 413 provides a clear, uniform rule limiting the use of immigration evidence, an area where prior caselaw had created uncertainty. However, ER 413 falls short of its goal of promoting access to justice and protecting immigrants from jury bias without a supporting system that addresses (1) the dangers of implicit bias for immigrant litigants and (2) an acute issue inhibiting access to justice—immigration arrests outside of local courthouses. This Comment recommends that all Washington state courts adopt implicit bias safeguards that focus on identifying and eradicating implicit biases stemming from immigration status. It further identifies Washington State Attorney General Bob Ferguson's lawsuit against the federal government, challenging the arrests of noncitizens outside of courthouses by immigration officials, as a necessary prerequisite to the effectiveness of ER 413's access to justice goals.

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INTRODUCTION

On a wet day in October 2002, Alex Salas, a carpenter, was climbing a ladder on some scaffolding put in place by Hi-Tech Erectors, his employer.[1] The ladder did not have a textured surface.[2] Salas slipped, fell more than twenty feet, suffered ten fractures, and eventually endured over a dozen surgeries.[3] He sued Hi-Tech Erectors for negligence.[4] At his first trial, evidence of Salas's immigration status was admitted.[5] At the conclusion of trial, the jury ruled that Hi-Tech Erectors had been negligent, but did not award Salas damages, concluding that the company did not cause the injury.[6] Salas appealed, arguing that admission of his immigration status had overly prejudiced the jury.[7] When the case reached the Washington State Supreme Court, the Court agreed with Salas and ordered a new trial, but this time without admission of the evidence of his immigration status.[8] Thirteen years after the injury, at the conclusion of his second trial, the jury awarded Salas $2.6 million.[9] There was one obvious difference between Salas's first and second trial: the admission of his immigration status.[10]

Reacting to *Salas v. Hi-Tech Erectors*,[11] on September 1, 2018, the Washington State Supreme Court adopted Evidence Rule 413 (ER 413).[12] ER 413 makes evidence of the immigration status of criminal defendants, civil plaintiffs, and witnesses presumptively inadmissible at trial.[13] This Comment focuses on ER 413's effect as it relates to criminal defendants and civil plaintiffs only.[14] ER 413 provides a clear, uniform rule limiting

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1. Beena Raghavendran, *After 13 Years, Worker in Country Illegally Awarded $2.6M for Injuries*, SEATTLE TIMES (July 8, 2015), https://www.seattletimes.com/seattle-news/immigration-court/ [https://perma.cc/W65P-2UX7].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. 143 Wash. App. 373, 177 P.3d 769 (2008).

12. David Martin et al., *Evidence Rule 413: Unpacking Washington's New Procedural Protections for Immigrants*, NWLAWYER, July 2018, at 34, 34.

13. WASH. R. EVID. 413.

14. While this Comment focuses on criminal defendants and civil plaintiffs, it should not be construed to convey an opinion on the effect of this Rule regarding witnesses. There is a space for a robust debate on this topic, with one side representing the importance of protecting witnesses/victims

the use of immigration evidence, an area where prior caselaw had created uncertainty. Yet, without supporting structural changes, ER 413 falls short of its goal of promoting access to justice and protecting immigrants from jury bias. The rule does not adequately address (1) the dangers of implicit bias for immigrant litigants, or (2) a more acute issue inhibiting access to justice—arrests by immigration agents outside of local courthouses.

To complement ER 413, Washington courts should adopt implicit bias safeguards in every county that focus on identifying and remedying implicit biases stemming from immigration status in addition to race, gender, and age. Specifically, courts across the state should show jurors an informational video regarding the prevalence of implicit bias and provide methods to combat its insidious effect. This video should include immigration status as a potential subject of that bias. Further, Washington State Attorney General (AG) Ferguson's lawsuit challenging arrests conducted by immigration officials outside of local courthouses is a necessary prerequisite for the success of ER 413. Without these additional protections, ER 413 will be unable to achieve its ultimate protective goal.

Part I of this Comment identifies the immigrant demographic in Washington State, reviews pre-ER 413 caselaw regarding admission of immigrations status evidence, explores the debate over ER 413, and explains the intricacies of ER 413. Part II defines explicit and implicit bias and identifies ways to combat each—both utilized in courts and suggested by scholars. It then argues that ER 413 provides broader protections against the admission of immigration status evidence in courts than did preexisting caselaw, but fails to achieve its goal of protecting immigrant litigants from juror prejudice without a supporting regime to combat implicit bias. Part II continues by defining access to justice, explaining how immigrants face special challenges with access to justice, and identifies a pressing access to justice issue—immigration arrests outside of Washington's courthouses. It argues that ER 413's purpose of promoting access to justice is obviated by the immigration arrests outside of Washington courts. Part III proposes solutions to each of these structural issues. To combat implicit bias, Part III suggests that all Washington courts adopt implicit bias safeguards that focus on identifying and eradicating implicit biases stemming from immigration status. To promote access to justice, Part III identifies Washington State AG

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and encouraging them to testify, and the other side concerned with upholding the constitutional rights of criminal defendants under the Confrontation Clause. *See* State v. Romero-Ochoa, 1 Wash. App. 2d 1059, 2017 WL 6616736 (2017), *rev'd*, 193 Wash. 2d 341, 440 P.3d 994 (2019); Letter from Christopher Dumm, Att'y, to Clerk of the Supreme Court (June 16, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Christopher%20Dumm.pdf [https://perma.cc/ZMV6-KB6N]; Letter from Andy Miller, Prosecuting Att'y, Benton Cty., to Clerk of the Supreme Court (Sept. 8, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Andy%20Miller.pdf [https://perma.cc/AUN6-QPRL].

Ferguson's lawsuit against the federal government challenging the arrests of noncitizens outside of courthouses by immigration officials as a necessary prerequisite to the effectiveness of ER 413. The Comment ultimately argues that evidence rules are inadequate as solutions to large, structural issues.

I. THE NECESSITY, HISTORY, AND MECHANICS OF EVIDENCE RULE 413

A. The Immigrant Demographic in Washington

As of 2017, Washington State's population was just over 7.5 million.[15] About one seventh of the total population was born outside of the United States (14.3% or 1,060,153).[16] Broken down further, about half of all immigrants in Washington are from Asia (44.5%), about a third are from Latin America (29.5%), a seventh are from Europe (14.5%), 6% are from Africa, 4.3% are from North America, and 1.3% are from Oceania.[17] Of those Washington residents born outside of the United States, a little less than half are naturalized citizens (47.9%) and a little more than half are non-citizens (52.1%).[18] Approximately half of Washington's immigrant population have limited English proficiency (44%).[19]

Since 1990, the proportion of Washington's immigrant population has more than doubled.[20] Like all residents of Washington, immigrants will inevitably interact with the court system, whether as victims, witnesses, civil litigants, or criminal defendants. Washington courts strive to provide litigants with a fair and impartial trial and equal access to courts for all Washington residents, including immigrants.[21] In reality, the admission of

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15. *QuickFacts: Washington*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/wa [https://perma.cc/8DL4-R35Y].

16. *Washington: Demographics & Social*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/state-profiles/state/demographics/WA [https://perma.cc/4MC2-QU2S].

17. *Id.*

18. *Id.*

19. *Washington Immigration Data Profile: Language & Education*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/state-profiles/state/language/WA [https://perma.cc/Z2M6-FZGA].

20. AM. IMMIGRATION COUNCIL, NEW AMERICANS IN WASHINGTON: THE POLITICAL AND ECONOMIC POWER OF IMMIGRANTS, LATINOS, AND ASIANS IN THE EVERGREEN STATE 1 (2015) ("The foreign-born share of Washington's population rose from 6.6% in 1990 . . . to 13.5% in 2013.").

21. *GR9 Cover Sheet*, WASH. CTS., https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=605 [https://perma.cc/8SPC-M6RJ].

the immigration status can detrimentally affect Washington residents' right to a fair and impartial trial.

B. Pre-Evidence Rule 413 Caselaw Governing the Admissibility of Immigration Evidence

An important part of providing immigrant litigants with a fair and impartial trial[22] is determining when, if ever, it is appropriate for evidence of their immigration status to be admitted at trial. Before the adoption of ER 413, Washington courts conducted fact-specific inquiries to determine the admissibility of evidence of the immigration status of litigants.[23] Courts grounded these determinations in ER 403.[24] ER 403 is Washington's evidence rule governing the exclusion of relevant evidence when its probative value is "substantially outweighed" by potential prejudice.[25]

1. Caselaw Regarding Admissibility of Immigration Evidence in Criminal Cases

The first time a Washington appellate court considered whether evidence of immigration status was admissible in a criminal trial was in *State v. Avendano-Lopez*.[26] In that case, the defendant, Ignacio Avendano-Lopez, was charged with possession of cocaine with intent to deliver.[27] During cross-examination, the prosecutor asked the defendant whether he was in the country legally.[28] Defense counsel objected and the judge sustained the objection.[29] Defense counsel then asked to be heard outside of the presence of the jury, intending to ask for a mistrial based on the prejudicial effect of the question.[30] The judge refused and the trial continued.[31] On appeal, the court held that this misconduct likely did not affect the jury's verdict and thus did not deny the defendant the right to a

22. The right to a fair and impartial trial is enshrined in the United States Constitution and the Washington State Constitution. *See* U.S. CONST. amend. VI and WASH. CONST. art. I, § 22.

23. *See, e.g.*, State v. Acevedo, No. 25080-6-III, 2007 WL 2422127 (Wash. Ct. App. Aug. 28, 2007); State v. Avendano-Lopez, 79 Wash. App. 706, 904 P.2d 324 (1995).

24. *See, e.g.*, Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 671–72, 230 P.3d 583, 586 (2010).

25. WASH. R. EVID. 403.

26. 79 Wash. App. 706, 904 P.2d 324 (1995).

27. *Id.* at 708, 904 P.2d at 326.

28. *Id.* at 718, 904 P.2d at 331.

29. *Id.*

30. *Id.*

31. *Id.*

fair trial.[32] The court did hold, however, that evidence regarding a defendant's immigration status is "irrelevant and designed to appeal to the trier of fact's passion and prejudice and thus [is] generally [an] improper area[] of inquiry."[33] The court further stated that, "[t]he dark shadow of arrogant chauvinism would eclipse our ideal of justice for all if we allowed juries to infer that immigrants, legal or illegal, were more likely to have committed crimes."[34] However, the court added a caveat: When the defendant makes a "'blanket[] assertion" of abiding by the law, evidence regarding immigration status may be proper.[35]As indicated by that caveat, *Avendano-Lopez* did not completely bar the admission of evidence of immigration status in criminal trials.

In *State v. Acevedo*,[36] evidence of the defendant's immigration status was admitted in the prosecution of a domestic violence offense.[37] The prosecution argued that the evidence was relevant under ER 404(b)[38] because the argument which led to the alleged domestic violence arose when the defendant's wife threatened to leave the defendant, Miguel Angel Acevedo.[39] The defendant allegedly needed his wife to sponsor his visa, and thus was prone to react to this threat more severely.[40] The court held that this case was distinguishable from *Avendano-Lopez* because, in that case, the question was immaterial to the crime.[41] By contrast, in *Acevedo*, the evidence of the defendant's immigration status "assisted the jury in understanding both the relationship of the parties and Mr. Acevedo's motive" and, as a result, the probative value of the immigration evidence outweighed the prejudice.[42] As illustrated by the contrary decisions regarding admission of evidence of immigration status in *State v. Avendano-Lopez* and *State v. Acevedo*, courts' pre-ER 413 jurisprudence was fundamentally fact-specific. As a result, admissibility

32. *Id.* at 721–22, 904 P.2d at 332.

33. *Id.* at 719, 904 P.2d at 331.

34. *Id.* at 723, 904 P.2d at 333.

35. *Id.* at 721, 904 P.2d at 332.

36. No. 25080-6-III, 2007 WL 2422127 (Wash. Ct. App. Aug. 28, 2007).

37. *Id.* at *5.

38. "Before admitting ER 404(b) evidence, the trial court must determine that the evidence meets two criteria: (1) it must be logically relevant and necessary to prove an essential element of the crime charged, and (2) its probative value must outweigh the prejudicial effect. Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at *4 (first citing State v. Bell, 60 Wn. App. 561, 564–65, 805 P.2d 815, 817 (1991), then citing WASH. R. EVID. 401).

39. *Id.* at *1.

40. *Id.*

41. *Id.* at *5.

42. *Id.*

of evidence of immigration status was largely dependent on the trial court judge's discretion, leading to inconsistent results.

2. *Caselaw Regarding Admissibility of Immigration Evidence in Civil Cases*

While decisions regarding admissibility of evidence of immigration status in the criminal context were certainly inconsistent, it was a civil case that prompted the Court to adopt ER 413. In *Salas v. Hi-Tech Erectors*,[43] the plaintiff, Alex Salas, was injured at work on a construction site and brought suit against his employer for negligence.[44] Before trial, the court decided that if the plaintiff made a claim for loss of future earnings, his immigration status would be probative to that issue and, as a result, would be admissible at trial.[45] The plaintiff made a claim for loss of future earnings, and evidence of his immigration status was admitted at trial.[46] At the close of trial, the jury found the employer was negligent, but awarded no damages.[47] The plaintiff appealed to the court of appeals, which affirmed the judgment.[48] He then appealed to the Washington State Supreme Court.[49] In its opinion, the court conducted an analysis based on ER 403[50] and held:

> In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. Consequently, we are convinced that the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.[51]

The court concluded that Salas was entitled to a new trial.[52] In his second trial, evidence of his immigration status was not admitted, Salas prevailed, and the jury awarded him $2.6 million.[53]

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43. 168 Wash. 2d 664, 230 P.3d 583 (2010).

44. *Id.*

45. Salas v. Hi-Tech Erectors, 143 Wash. App. 373, 377, 177 P.3d 769, 771 (2008).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Salas*, 168 Wash. 2d 664, 230 P.3d 583.

50. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WASH. R. EVID. 403.

51. *Salas*, 168 Wash. 2d at 672, 230 P.3d at 586–87.

52. *Id.* at 673, 230 P.3d at 587.

53. Martin et al., *supra* note 12, at 34.

The Court further explained that "it should be noted that Salas' immigration status is the only evidence in the record that suggests that he may be deported."[54] The Court emphasized that Salas had resided in the United States for years, many of which were without a visa.[55] During this time he had worked, purchased a home, and had three children.[56] The Court continued with a discussion of the statistics, procedures of deportation, and the facts in the record, concluding that Salas was at a very low risk of being deported.[57]

Similar to *State v. Avendano-Lopez*, *Salas v. Hi-Tech Erectors* did not stand for a complete bar on the admission of evidence of immigration status in all circumstances throughout civil litigation. In *Diaz v. Washington State Migrant Council*,[58] a chair member of the Washington State Migrant Council (Migrant Council), Carlos Diaz, was suspected of using a fake social security number.[59] He was alleged to have used a social security number identical to a woman living in Spokane, Washington.[60] In response, the Migrant Council asked its board members to provide proof of their legal status or, if not legally in the United States, to step down.[61] Later, the board fired Diaz.[62] He filed a lawsuit challenging the termination as invalid.[63] The Migrant Council claimed that Diaz was fired for "misconduct and poor performance" as opposed to his immigration status.[64] During discovery, Diaz sent interrogatories and requests for production seeking the immigration status of each of the board members.[65] The Council objected, contending that the immigration status of its board members was not relevant to Diaz's claim that he was fired in retaliation for insisting that undocumented board members resign.[66] The trial court ordered that the Council answer the discovery and found that the evidence was relevant.[67] Further, the trial court ruled that the question regarding immigration status would be allowed during the depositions of board

54. *Salas*, 168 Wash. 2d at 669, 230 P.3d at 585.
55. *Id.*
56. *Id.*
57. *Id.* at 669–70, 230 P.3d at 585.
58. 165 Wash. App. 59, 265 P.3d 956 (2011).
59. *Id.* at 66, 265 P.3d at 960.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 67, 265 P.3d at 961.
66. *Id.*
67. *Id.*

members.[68] Finally, the trial court decided that the board member's immigration status would be allowed at trial if it was probative of Diaz's case.[69]

Important in *Diaz* is its discussion of *Salas*. The appellate court in *Diaz* held that *Salas* should not be interpreted to apply before trial: "There is nothing in *Salas* that supports cutting off inquiry at the outset of discovery."[70] As a result, the Migrant Council had "not shown an abuse of discretion by the trial court in denying a protective order."[71] *Diaz* made clear that the appellate courts interpreted the *Salas* inquiry to not extend before determinations at trial. The Washington State Supreme Court soon signaled that the appellate court had misinterpreted its holding.

C. Evidence Rule 413

On the heels of *Salas*, the Washington State Supreme Court began drafting and eventually adopted ER 413.[72] ER 413 took effect on September 1, 2018.[73] The rule is the first of its kind in the nation.[74] ER 413 was adopted in the form that follows:

> Rule 413. Immigration Status
>
> (a) Criminal Cases; Evidence Generally Inadmissible. In any criminal matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607. The following procedure shall apply prior to any such proposed uses of immigration status evidence to show bias or prejudice of a witness:
>
> (1) A written pretrial motion shall be made that includes an offer of proof of the relevancy of the proposed evidence.
>
> (2) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

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68. *Id.*

69. *Id.*

70. *Id.* at 75, 265 P.3d at 965.

71. *Id.*

72. Hayat Norimine, *Barring a Good Reason, Attorneys Can No Longer Mention Immigration Status*, SEATTLE MET (Nov. 28, 2017), https://www.seattlemet.com/articles/2017/11/28/attorneys-can-no-longer-ask-about-immigration-status-what-will-that-do [https://perma.cc/5EPD-ZL8Q].

73. Martin et al., *supra* note 12, at 34.

74. *Id.*

> (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing outside the presence of the jury.
>
> (4) The court may admit evidence of immigration status to show bias or prejudice if it finds the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.
>
> (5) Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights.
>
> (b) Civil Cases; Evidence Generally Inadmissible. Except as provided in subsections (b)(1), evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of a party's cause of action.
>
> (1) *Posttrial Proceedings.* Evidence of immigration status may be submitted to the court through a posttrial motion:
>
> (A) Where a party who is subject to a final order of removal in immigration proceedings was awarded damages for future lost earnings; or
>
> (B) Where a party was awarded reinstatement to employment.
>
> (2) *Procedure to review evidence.* Whenever a party seeks to use or introduce immigration status evidence, the court shall conduct an in camera review of such evidence. The motion, related papers, and record of such review may be sealed pursuant to GR 15, and shall remain under seal unless the court orders otherwise. If the court determines that the evidence may be used, the court shall make findings of fact and conclusions of law regarding the permitted use of that evidence.[75]

1. Application of Evidence Rule 413 in Criminal Cases

ER 413 addresses criminal trials in subsection (a). That subsection provides that evidence of the immigration status of a criminal defendant is presumptively inadmissible unless (1) the defendant's immigration status is an essential fact necessary to prove the element of a crime or is essential to defend against the alleged offense; or (2) is necessary to show bias or prejudice.[76]

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75. WASH. R. EVID. 413.

76. *GR9 Cover Sheet*, *supra* note 21.

Subsection (a) also specifies the procedure to admit evidence of immigration status in a criminal trial.[77] First, there must be a written pretrial motion with an offer of proof.[78] Second, there must be an affidavit supporting the offer of proof.[79] Third, there must be a court hearing outside the presence of the jury to determine if the offer of proof is sufficient.[80] Finally, the evidence of immigration status must be reliable and relevant and the probative value of that evidence must outweigh the prejudice.[81]

Subsection (a)(5) specifies that nothing in the rule should be construed to prohibit cross-examination of a witness regarding their immigration status if prohibiting that questioning would violate the defendant's constitutional rights under the Confrontation Clause.[82]

2. Application of Evidence Rule 413 in Civil Cases

ER 413 addresses civil trials in subsection (b). That subsection provides that evidence of a civil litigant's immigration status is presumptively inadmissible unless it is an element of the cause of action or unless any of the following exceptions apply.[83]

Subsection (b)(1) outlines two circumstances where evidence of immigration status is handled through a motion to alter or amend judgment (under Civil Rule 59(h)).[84] In the first circumstance (subsection (b)(1)(A)), a party can submit a post-trial motion with evidence of immigration status if the opposing party prevailed on a future lost earnings claim and subsequently was subject to a final order of removal in an immigration proceeding.[85] The court can then review the evidence of immigration status to determine whether it is appropriate to adjust the future lost earning award.[86] This rule is consistent with the *Salas* decision because, in that case, the court considered Salas's probability of removal, concluded it was low, and only then determined that evidence of

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. This section refers to the admissibility of victim's immigration status, which is not addressed in this Comment. *Id.*

83. *Id.*

84. CR 59(h) motion refers to a motion to alter or amend a judgment. *Id.*

85. *Id.*

86. *Id.*

his immigration status was irrelevant.[87] The second circumstance, outlined in subsection (b)(1)(B), provides for post-trial review when a party is seeking reinstatement of employment. This allows for the review of evidence of immigration status where a party is rewarded with reinstatement of employment in order to avoid potential conflict with federal law prohibiting the employment of undocumented workers.[88]

Finally, subsection (b)(2) outlines the procedure a party must use when it intends to offer evidence of immigration status in either criminal or civil cases.[89] The party must file a written motion that must be kept under seal pursuant to General Rule 15.[90] The court then must hold an in-camera hearing to review the evidence offered.[91] If the court determines that the evidence falls under an exception enumerated in ER 413—and thus is admissible—the court should make the findings of fact and conclusions of law regarding the use of the evidence.[92] All documents and the record of the hearing must remain sealed unless the court orders otherwise.[93]

D. The Ensuing Debate Over Evidence Rule 413

Prior to adoption of ER 413, members of the Washington legal community had the opportunity to weigh in about the proposed rule.[94] The opinions expressed throughout the state were diverse and wide-ranging.[95] Opponents of the rule stressed that it would not offer protection beyond that offered by ER 403, and that ER 403 is better equipped to deal with admitted evidence that is truly relevant to the case.[96] Proponents, on the other hand, argued that a uniform rule like ER 413 offered more protection

87. Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 669–70, 230 P.3d 583, 585–86 (2010).

88. *Id.*

89. *Id.*

90. General Rule 15 is the rule that Washington courts follow regarding the procedure for the "destruction, sealing, and redaction of court records" WASH. CT. G.R. 15; *GR9 Cover Sheet*, *supra* note 21.

91. *GR9 Cover Sheet*, *supra* note 21.

92. *Id.*

93. *Id.*

94. *See, e.g.*, E-mail from Kevin March, Staff Att'y, Nielson, Broman & Koch, PLLC, to Wash. State Supreme Court Clerk (Sept. 15, 2017) [hereinafter E-mail from Kevin March to Wash. State Supreme Court Clerk], https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Kevin%20March.pdf [https://perma.cc/25DE-ZU6R].

95. *See id. But see* Letter from Bob Ferguson, Attorney Gen., Wash. State, to Susan Carlson, Clerk, Wash. State Supreme Court (Sept. 15, 2017) [hereinafter Letter from Bob Ferguson to Wash. State Supreme Court Clerk], https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Bob%20Ferguson.pdf [https://perma.cc/JWY9-KFB3].

96. *See, e.g.*, E-mail from Kevin March to Wash. State Supreme Court Clerk, *supra* note 94.

to litigants than ER 403 and existing caselaw.[97] As a new rule, it is hard to concretely project the ways in which ER 413 functions in reality. Examining the arguments expressed by the proponents and opponents, as outlined below, can be an effective way to understand the possible benefits and shortcomings of the rule.

1. Arguments Advanced by Opponents of Evidence Rule 413

Opponents have argued that ER 413 is unnecessary because it does nothing beyond ER 403.[98] They assert that the Washington state courts "have already demonstrated themselves amply capable of applying the relevancy standards."[99] To prove this assertion, Kevin March, Staff Attorney at an appellate firm in Seattle, cited *State v. Streepy*.[100] *Streepy* was a domestic violence case in which the victim's statement at trial was given after she learned of the U-Visa program.[101] However, the victim's immigration status was found to be irrelevant and thus inadmissible under ER 403[102] because her testimony at trial was consistent with her previous report to the police.[103] The court reasoned that, because her previous report was given before learning about the U-Visa program (when she would have no incentive to lie), her knowledge of the U-Visa program was not relevant to the veracity of her testimony.[104] In addition, the victim believed that she was a United States resident, and, as a result, she did not believe that she would benefit from the U-Visa.[105] Based on these facts, the court held that she had "no motivation to provide false or exaggerated testimony for purposes of avoiding deportation or securing a U-Visa," and the evidence of her immigration status was irrelevant and inadmissible under ER 403.[106] As Mr. March explained, *Streepy* signaled that

97. *See, e.g.*, Letter from Bob Ferguson to Wash. State Supreme Court Clerk, *supra* note 95.

98. E-mail from Kevin March to Wash. State Supreme Court Clerk, *supra* note 94.

99. *Id.*

100. E-mail from Kevin March to Wash. State Supreme Court Clerk, *supra* note 94; State v. Streepy, 199 Wash. App. 487, 400 P.3d 339 (2017).

101. State v. Streepy, 199 Wash. App. 487, 400 P.3d 339 (2017). The U-Visa is a visa reserved for victims for mental or physical abuse who are helpful to law enforcement in the investigation or prosecution of the crime for which they are a victim. *See Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status [https://perma.cc/DM74-RSP5].

102. *Streepy*, 199 Wash. App. at 497, 400 P.3d at 343.

103. *Id.* at 499, 400 P.3d at 344.

104. *Id.*

105. *Id.*

106. *Id.* at 500, 400 P.3d at 345.

Washington state courts are capable of excluding immigration status when it is not relevant.[107]

Additionally, opponents assert that, in some cases, immigration status is relevant.[108] ER 403 gives judges more leeway to determine when immigration status is relevant than ER 413.[109] The concern is that, due to ER 413's rigidity, there will be circumstances in which immigration status is relevant yet not in the enumerated exceptions of the rule.[110]

Finally, those opposed to ER 413 contend that the rule causes uncertainty and "overburden[s] already overburdened litigants and attorneys with pretrial litigation, will result in prosecutorial gamesmanship, and will ultimately lead to significant appellate litigation."[111] Opponents fear additional litigation in every case where immigration status is potentially relevant because of ER 413.[112]

2. *Arguments Advanced by Those Advocating for the Adoption of Evidence Rule 413*

Proponents advocate that ER 413 provides a heightened level of protection beyond that of ER 403.[113] Because ER 413 came as a reaction to *Salas v. Hi-Tech Erectors*, proponents focus on *Salas*'s utility in excluding evidence of immigration status across a wide variety of cases.[114] They argue that the issue with the standard established in *Salas* is that "[l]ike all applications of ER 403, the *Salas* holding was necessarily fact specific."[115] Further, as evidenced by *Diaz v. Washington State Migrant Council*, *Salas* provided no instruction for resolving any disputes regarding immigration status outside of trial.[116] ER 403 determinations occur at the time of trial, not in the discovery phase.[117] Most importantly,

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107. E-mail from Kevin March to Wash. State Supreme Court Clerk, *supra* note 94.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*; *see, e.g.*, Letter from Sean O'Donnell, President, Superior Court Judges' Ass'n, to Hon. Charles Johnson, Chair, Supreme Court Rules Comm. (Sept. 8, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Sean%20O'Donnell.pdf [https://perma.cc/U9RR-G8S2].

113. *See, e.g.*, Letter from Bob Ferguson to Wash. State Supreme Court Clerk, *supra* note 95.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

ER 413 promotes a consistent standard that applies statewide, taking away the uncertainty of judge specific ER 403 determinations.[118]

Proponents advocate that ER 413's uniformity will help address the "adverse effects on the orderly administration of justice that arise from fights over the discoverability and admissibility of such evidence."[119] These arguments over discoverability and admissibility often come at "the cost of significant time, expense, and delay in the litigation, and at the cost of additional emotional distress and uncertainty to clients."[120] In essence, proponents argue that this rule will save the court and litigants both time and money because it is a categorial bar on the admission of immigration status evidence. As a result, resources will not be wasted on legal squabbles over admissibility.

Beyond concerns of uniformity, some proponents focus on the "'significant danger' that immigration status evidence poses to the fact-finding process."[121] The danger of prejudice is especially prevalent in light of the federal government's current rhetoric and policies on the topic of immigration.[122] Immigration status potentially has an unwarranted impact, "consciously or unconsciously" on judges and juries.[123] Proponents argue that, if immigration status evidence is excluded from trial, judges and juries will not have the opportunity to form biases that have the potential to disadvantage litigants and witnesses.

Proponents characterize ER 413 as a solution to "an access to justice issue,"[124] advocating for the idea that everyone deserves access to an equal and fair justice system.[125] Attorneys around Washington attest that they

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118. *Id.*

119. Letter from Adam Berger, Attorney, Schroeter Goldmark Bender, to Susan Carlson, Clerk, Wash. State Supreme Court (Sept. 7, 2017) [hereinafter Letter from Adam Berger to Wash. State Supreme Court Clerk], https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Adam%20Berger.pdf [https://perma.cc/SJU6-LS7W].

120. *Id.*

121. *GR9 Cover Sheet*, *supra* note 21.

122. *Id.*

123. Letter from Adam Berger to Wash. State Supreme Court Clerk, *supra* note 119.

124. Letter from Daniel Satterberg, Prosecuting Attorney, King Cty., to Susan Carlson, Clerk, Wash. State Supreme Court (Sept. 15, 2017) [hereinafter Letter from Daniel Satterberg to Wash. State Supreme Court Clerk], https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Daniel%20Satterberg.pdf [https://perma.cc/LFF8-WM9V]; *see also* Letter from Gabriel Portugal, Bd. Member, Latino Civic All. (Sept. 15, 2017), https://www.courts.wa.gov/court_Rules/ proposed/2017May/ER413/Gabriel%20Portugal.pdf [https://perma.cc/8NGX-NPSC].

125. Letter from Shayne Stevenson, Hagens Berman Sobol Shapiro LLP, to Susan Carlson, Clerk, Wash. State Supreme Court (Sept. 15, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Shayne%20Stevenson,%20et%20al..pdf [https://perma.cc/2BX7-WZDE].

have worked with individuals who have decided not to proceed with cases, have opted for early settlement, or have decided to limit their damage claims based solely on the fear that their immigration statuses would be revealed during discovery.[126] ER 413 addresses and protects those individuals "whose ability to pursue their legal rights has been impaired by fear that they may face detainment or deportation based on their immigration status if they pushed forward with their claims."[127] Proponents contend that exclusion of immigration status will encourage immigrants to utilize the legal system without fear of immigration consequences.

Proponents argue that ER 413 helps to promote other important policy goals, as well. For example:

> If an undocumented worker is encouraged to assert his rights under the wage laws, free from fear, it levels the playing field and promotes payment of proper wages for all workers," and "[i]f an undocumented individual can bring claims for injury arising from defective products or unsafe work sites, it improves the safety of all people.[128]

Not only is it important for immigrants to feel empowered to use the legal system for their own wellbeing, it also promotes safety and justice in society more broadly.

Finally, speculating whether a litigant might be deported in the future, as the court did in *Salas*, is unproductive, susceptible to inaccurate conclusions (due to the complexity of immigration law), and irrelevant to the determination of the admissibility of immigration status.[129]

As a new rule, there has been little judicial interpretation or empirical data on the ways in which ER 413 functions in reality. The arguments expressed by the proponents and opponents of ER 413 can be an effective way to understand the possible benefits and shortcomings of the rule. The proponents were likely correct in that ER 413 provides more protection than ER 403 and previous caselaw. However, they oversold the effectiveness of the rule in two regards: juror bias and access to justice.

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126. Letter from Adam Berger to Wash. State Supreme Court Clerk, *supra* note 119; Letter from Jan Peterson, Peterson Wampold Rosato Feldman Luna, to Susan Carlson, Clerk, Wash. State Supreme Court (Aug. 16, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Peterson,%20et%20al.pdf [https://perma.cc/9TYV-JVED] [hereinafter Letter from Jan Peterson to Wash. State Supreme Court Clerk].

127. Letter from Adam Berger to Wash. State Supreme Court Clerk, *supra* note 119; *see also* Letter from Thomas Breen, Attorney, Schroeter Goldmark Bender, to Susan Carlson, Clerk, Wash. State Supreme Court (Sept. 15, 2017), https://www.courts.wa.gov/court_Rules/proposed/2017May/ER413/Thomas%20Breen,%20et%20al..pdf [https://perma.cc/KVC8-VR6M]; Letter from Jan Peterson to Wash. State Supreme Court Clerk, *supra* note 126; Letter from Daniel Satterberg to Wash. State Supreme Court Clerk, *supra* note 124.

128. Letter from Adam Berger to Wash. State Supreme Court Clerk, *supra* note 119.

129. *GR9 Cover Sheet*, *supra* note 21.

II. EVIDENCE RULES CANNOT BE USED TO CURE LARGER, STRUCTURAL ISSUES

While ER 413 may be a superior mechanism in regulating admission of immigration status evidence as compared to ER 403, the stated purpose of ER 413 was to protect litigants from juror bias and to promote access to justice. Both juror bias and access to justice are complicated, structural issues that cannot be remedied by an evidence rule alone. Implicit bias affects litigants perceived to be immigrants without regard to whether their actual immigration status is admitted or not. As a result, ER 413 cannot accomplish its goal of eradicating bias without a supporting system that adequately targets implicit bias. Similarly, there are access to justice issues that extend beyond the courtroom. One of these access to justice issues is immigration arrests outside of state courthouses. This stifles the potential success of ER 413 because it discourages immigrant litigants and witnesses from even entering the courthouse.

A. Bias

One of the main purposes of excluding evidence of immigration status is to avoid jury bias.[130] Jury bias can emerge in the form of explicit bias or implicit bias.[131] Explicit bias is bias that is held knowingly[132] and implicit bias is that which is held unconsciously.[133] While the federal courts, state courts, and legislatures have done robust work in addressing and attempting to eradicate explicit bias from the courtroom, they are still grappling with the best approach to tackle implicit bias.[134]

1. Defining Explicit Bias

Explicit bias is bias that someone "knowingly—sometimes openly—embrace[s]."[135] It often manifests as blatant acts or expressions of discrimination or hate.[136] Although researchers have observed a decline in

130. *Id.*

131. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 881 (2012).

132. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

133. *See Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/ZR4E-8Q3W] [hereinafter Unconscious Bias Juror Video].

134. Roberts, *supra* note 131, at 842.

135. Rachlinski et al., *supra* note 132, at 1196.

136. Robin Smyton, *Bias in the Courtroom*, TUFTS NOW (Oct. 7, 2019), https://now.tufts.edu/articles/bias-courtroom [https://perma.cc/RW6M-XBB6].

explicit bias over time, explicit biases still exist and remain harmful to litigants.[137] Federal courts, state courts, and legislatures have attempted to address and remedy the problem of explicit bias in the courtroom.[138] Most of this work is done at the jury selection stage.[139] Attorneys use voir dire[140] and peremptory challenges[141] to root out jurors with apparent biases that could be harmful to litigants.

Recently, the United States Supreme Court has recognized certain post-jury selection protections from juror bias. In the criminal case *Peña-Rodriguez v. Colorado*,[142] the Court contemplated whether a juror's clear statement of explicit bias violates a defendant's right to a fair trial under the Sixth Amendment.[143] During deliberation, a juror said that he did not find the defendant or the defendant's alibi witness to be credible because they were "illegal[s]"[144] and that the defendant was guilty of sexual assault because "Mexican men take whatever they want."[145] The Court held that, where a juror makes a *clear* statement that indicates he or she relied on explicit biases to convict a defendant, the Sixth Amendment requires the trial court to consider the evidence in order to determine if the defendant has been denied his or her right to a fair trial.[146] While *Peña-Rodriguez* and other pre-trial bias safeguards protect litigants from jurors who clearly express their bias in jury deliberation, these safeguards do not protect any litigants from biases that are not vocalized or not even recognized by the juror. They do not protect litigants from implicit bias.

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137. Rachlinski et al., *supra* note 132, at 1196.

138. Roberts, *supra* note 131, at 843.

139. *Id.*

140. A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. *Voir Dire*, BLACK'S LAW DICTIONARY (10th ed. 2014).

141. A party's request that a judge disqualify a potential juror or an entire jury panel. *Challenge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

142. 580 U.S. __, 137 S. Ct. 855 (2017).

143. *See id.* at 869.

144. *Id.* at 862.

145. *Id.* (internal citation omitted); *see also* Robert Barnes, *Supreme Court Hears Case Concerning Biased Comments in Jury Room*, WASH. POST (Oct. 11, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-hears-case-concerning-biased-comments-in-jury-room/2016/10/11/f82de46c-8f2a-11e6-9c52-0b10449e33c4_story.html [https://perma.cc/E9D6-LTPP].

146. *Peña-Rodriguez*, 137 S. Ct. at 869.

2. Defining Implicit Bias

Implicit bias is pervasive in everyday life and, as a result, can be found throughout many areas of the law.[147] While courts have directly addressed explicit bias many times, they generally do not recognize the impact that implicit bias can have in the courtroom.[148]

Implicit bias is the "set of automatic preferences . . . that instantaneously influence our decisions and how we perceive people and situations without our conscious awareness."[149] They are "discriminatory biases based on implicit attitudes or implicit stereotypes."[150] An implicit bias is expressed through "an action that indicates favor or disfavor toward some object but is not understood by the actor as expressing that attitude."[151] An implicit stereotype is "the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category,"[152] or a trait that someone associates with a particular group.[153] For example, white people, without realizing it, often associate criminality with black people.[154] These biases are so subtle that most people are unaware of their influence.[155] This is evidenced by the fact that levels of implicit bias are often much higher than self-reported biases.[156]

Implicit biases are very common in the general public.[157] Thus, unsurprisingly, implicit bias is prevalent in the courtroom.[158] Judges, juries, and attorneys all have implicit biases.[159] For example, judges and jurors may misremember facts presented at trial in biased ways.[160]

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147. *Implicit Bias in the Law*, THOMAS J. MESKILL L. LIBR., U. CONN. SCH. L., https://libguides.law.uconn.edu/implicit/courts [https://perma.cc/D6RR-ZNKV].

148. Roberts, *supra* note 131, at 842.

149. Unconscious Bias Juror Video, *supra* note 133.

150. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

151. *Id.* at 948.

152. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 15 (1995).

153. Roberts, *supra* note 131, at 833.

154. *Implicit Bias*, PERCEPTION INST., https://perception.org/research/implicit-bias/ [https://perma.cc/H657-LUMF].

155. Roberts, *supra* note 131, at 833.

156. *Id.* at 834.

157. *Id.*

158. *Id.* at 835.

159. *Id.* at 835–56.

160. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319 (2010).

Implicit bias is not unknown to the legal system. In fact, United States Supreme Court Justice William J. Brennan, in his concurrence in *Turner v. Murray*,[161] acknowledged the role of implicit bias in the courtroom: "racial bias inclines one to disbelieve and disfavor the object of the prejudice, and it is similarly incontestable that subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised."[162] However, courts across the country have generally ignored the effect of implicit bias and, instead, focused efforts to combat juror bias on solutions that address explicit bias. This narrow focus on explicit bias has allowed implicit biases to influence decisions in the courtroom, as evidenced by *Salas*.

3. Eradicating Implicit Bias from the Courtroom: Existing Solutions in Washington State

Despite the country's focus on explicit bias, Washington state federal and state courts have, perhaps uniquely, begun to address the issue of juror implicit bias. In the United States District Court for the Western District of Washington, a video is presented to prospective jurors to educate them about implicit bias.[163] The video begins with District Court Judge John C. Coughenour explaining what implicit bias is and why it has no place in a court of law.[164] Importantly, Judge Coughenour explains that everyone has implicit biases and provides prospective jurors with strategies to combat the effect of these biases so that they may objectively serve on a jury.[165]

The video proceeds with attorney Jeffrey Robinson, ACLU Deputy Legal Director, describing the difference between explicit and implicit biases, both of which may be harmful or unharmful in certain circumstances.[166] Frequently, he explains, the automatic nature of implicit biases facilitates the quick decisionmaking process that is necessary to function in society.[167] Yet, he continues, this is not always the case; however useful, implicit biases are often inaccurate and do not align with a subsequent synthesis of all relevant information.[168] The video includes

161. 476 U.S. 28 (1986).

162. *Id.* at 42 (Brennan, J., concurring in part and dissenting in part).

163. Unconscious Bias Juror Video, *supra* note 133.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

simple exercises to show viewers how implicit bias works and how it affects decision-making.[169]

Attorney Annette Hayes then explains how studies demonstrate that most people use age, race, and gender to make decisions about people in everyday life.[170] She goes on to explain that, when jurors are aware of implicit bias, it helps to remove these limitations and prompts them to make decisions using all relevant information without jumping to conclusions.[171] The video provides three steps that jurors should take to combat implicit bias: (1) jurors should know that implicit bias exists and occurs for everyone; (2) jurors should carefully examine their decisions and judgments as jurors; and (3) jurors should question their decisions by asking whether those decisions would be different if the witness, lawyer, or litigant were of a different race, age, or gender.[172]

Some state courts in Washington present a video to prospective jurors that is similar to the aforementioned federal video.[173] However, that video is not shown in all counties across the state. For example, prospective jurors at the Yakima County courthouse are shown a video[174] that discusses the role of the juror, the process of trial, and the legal basis for the right to a jury trial, but that video fails to mention bias at all.[175]

Washington state courts have also attempted to address implicit bias in civil cases through a jury instruction.[176] Prior to each civil trial, the trial court judge reads the following instruction to the jury:

> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *E.g.*, *Jury Information*, KING COUNTY, https://kingcounty.gov/courts/district -court/jury.aspx [https://perma.cc/99Y8-2HSD].

174. E-mail from Sheila Rank, Chief Deputy Clerk, Yakima Cty. Clerk's Office, to author (Oct. 7, 2019, 9:46 AM PST) [hereinafter E-mail from Sheila Rank to author] (on file with author).

175. Washington Courts, *Jury Duty in Washington: Making a Difference*, YOUTUBE (Dec. 23, 2013), https://www.youtube.com/watch?v=SMvCkaiAKl0 [https://perma.cc/V9X4-JVUP].

176. *See* 6 WASH. PATTERN JURY INSTRUCTIONS CIVIL 1.01(1) (7th ed. 2019).

> However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.[177]

This jury instruction allows judges in civil cases to alert jurors to their potential implicit biases. Finally, the Washington State Supreme Court recently adopted General Rule 37.[178] This rule helps to eradicate the implicit bias of attorneys during jury selection, and therefore is beyond the scope of this Comment.[179]

While certain Washington courts have attempted to address implicit bias in jurors, they have done so in patchwork. The result is that some litigants, depending on trial type and physical location, are left behind. ER 413 appears to be an attempt at uniformity.

4. Evidence Rule 413 Provides Broader Protection than Preexisting Caselaw but Fails at Achieving Its Goal of Protecting Immigrant Litigants from Juror Prejudice Without a Supporting Regime to Combat Implicit Bias

a. Evidence Rule 413 Does Provide Broader Protections than Evidence Rule 403 and Its Interpretation in Pre-Evidence Rule 413 Caselaw

Before the Washington State Supreme Court adopted ER 413, there was much debate about whether the rule would actually provide more protection to immigrant civil plaintiffs and criminal defendants in court proceedings than was provided by caselaw under ER 403.[180] Because the rule is still so new, empirical evidence of its effectiveness is not yet

177. *Id.*

178. Press Release, ACLU, New Rule Addresses Failings of U.S. Supreme Court Decision (Apr. 9, 2018), https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection [https://perma.cc/HQL2-A8NM].

179. This rule thwarts the unfair exclusion of potential jurors based on their race and ethnicity. However, this rule is irrelevant to this Comment, as it focuses on the implicit biases of attorneys, rather than the implicit biases of the members of the jury. WASH. CT. G.R. 37.

180. *See supra* Part I.

available. However, in evaluating court decisions post *Salas v. Hi-Tech Erectors*, it is clear that ER 403 did not provide litigants with consistent protection of their immigration status because ER 403 determinations are necessarily fact specific.[181] In contrast, ER 413 provides the consistency that determinations under ER 403 lack.

Moreover, ER 413 covers a broader range of issues than ER 403. ER 403 determinations are made during the trial; these determinations cannot be applied during the discovery portion of trial.[182] ER 413, in contrast, provides guidance regarding immigration status for all stages of the litigation, including discovery.[183] This has two advantages. First, immigrant civil plaintiffs and criminal defendants need not worry about disclosing their immigration status at any point of the litigation. This helps to remedy the chilling effect reported by many attorneys as discussed above.[184] As a result, immigrant litigants are more likely to be comfortable accessing justice through Washington state courts. Second, neither party will waste time with discovery of evidence of immigration status that might later be ruled inadmissible by the trial judge under ER 403.

Finally, although opponents of ER 413 feared that evidence of immigration status might be excluded in instances when it is especially relevant to the litigation, ER 413 does allow for admission of immigration status in certain circumstances. In criminal cases, immigration status is admissible when it is "an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness."[185] In civil cases, immigration status is admissible when it is "an essential fact to prove an element of a party's cause of action."[186] The exceptions outlined in ER 413 provide ample occasion for the admission of immigrant status when it is relevant.

b. Evidence Rule 413 Does Not Protect Immigrants Completely from Juror Bias

Although ER 413 does provide immigrant civil plaintiffs and criminal defendants more protection throughout the litigation process, it does not fulfill its goal completely; it does not protect them from the implicit biases of jurors. The purpose of ER 413 is to protect immigrants from unfair

181. Letter from Bob Ferguson to Wash. State Supreme Court Clerk, *supra* note 95, at 2.

182. *See, e.g.,* Diaz v. Wash. State Migrant Council, 165 Wash. App. 59, 66, 265 P.3d 956, 961 (2011).

183. WASH. R. EVID. 413.

184. *See, e.g.,* Letter from Adam Berger to Wash. State Supreme Court Clerk, *supra* note 119.

185. WASH. R. EVID. 413.

186. *Id.*

prejudice in the courtroom.[187] The fear was that jurors, knowing the litigant's immigration status, might make irrational decisions based off that information—even if it had nothing to do with the issue presented at trial.[188] However, given the insidious effect of juror bias, especially implicit bias, ER 413 does not protect immigrants completely.

Even without evidence of immigration status, jurors may still make assumptions about the immigration status of the civil plaintiff or criminal defendant. Jurors may make these assumptions based on cultural differences that affect the way immigrant litigants act in the courtroom,[189] the use of an interpreter,[190] the perceived race of the civil plaintiff or criminal defendant, or any other characteristics that the juror perceives to be different. Without a system that effectively protects immigrants (or those perceived as immigrants) from implicit bias, ER 413 will fail in its attempt to protect civil plaintiffs and criminal defendants from prejudice. ER 413 not only fails in its attempt to fully protect litigants inside the courtroom, it also fails in its attempt to even get them there in the first place.

B. Access to Justice

ER 413 was meant to promote access to justice among the immigrant community in Washington.[191] However, it is difficult to envision the success of this goal given the presence of immigration agents outside of local courthouses.[192] ER 413 will only work if immigrants believe that they can access the court without being targeted.

1. Defining Access to Justice

The term "access to justice" describes the ability of all people to use the legal system to advocate for themselves.[193] The justice system offers a forum for people to have their voice heard, to exercise their rights, to challenge discrimination, and to hold those in power accountable.[194]

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187. *GR9 Cover Sheet*, *supra* note 21.

188. *Id.*

189. Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1401 (1999).

190. *Id.* at 1405.

191. *See supra* section I.D.2.

192. *See infra* section II.B.2.

193. *What is Access to Justice*, TEX. ACCESS TO JUST. COMM'N, https://www.texasatj.org/what-access-justice [https://perma.cc/KCV9-S4K4].

194. *Access to Justice*, U.N. & RULE L.., https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ [https://perma.cc/TM38-SEXN].

Courts serve as "a vehicle for effective political expression and association."[195] Access to courts is a "fundamental tenet of due process under law" guaranteed by the Fifth Amendment of the United States Constitution.[196] In order to take advantage of this constitutional guarantee, people need access to fair, unbiased courts, they need to understand court proceedings, and they need to be able to obtain legal representation.[197]

2. Access to Justice and Immigration

Despite the important role state courts play in providing access to justice, arrests outside of state courts by federal immigration officials inhibit this purpose, as many litigants and witnesses worry that their presence at courthouses may end in detention.[198] U.S. Immigration and Customers Enforcement (ICE) and U.S. Customs and Border Patrol (CBP) have historically used Washington state courts as a forum for arresting undocumented immigrants when they show up for hearings or to pay fines.[199]

This practice persisted well into 2019, even after Washington became a sanctuary state.[200] For example, on June 20, 2019, ICE agents arrested a man outside of the Thurston County Courthouse when he arrived at the courthouse for a hearing.[201] Thurston County Courthouse is located in Olympia, Washington, a sanctuary city.[202] The ICE agent followed the man into the courthouse, looked at the court calendar to identify the man, followed the man outside after his hearing, and arrested him on the spot.[203] The man is being held in the Northwest Detention Center in Tacoma, leaving his two children, American citizens, to wonder if and when they

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195. Borough of Duryea v. Guarnieri, 564 U.S. 379, 397 (2011).

196. Bing Le, *Constitutional Challenges to Courthouse Civil Arrests of Noncitizens*, 43 N.Y.U. REV. L. & SOC. CHANGE 295, 298 (2019).

197. *Access to Justice*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org/Topics/International/Judicial-Reform-Around-the-World/Home/Access-to-Justice.aspx [https://perma.cc/U3QN-KBL9].

198. Sara Gentzler, *ICE Arrest at Thurston County Courthouse Begs the Question: What Does Sanctuary Mean?*, OLYMPIAN (July 6, 2019), https://www.theolympian.com/news/local/article232346022.html (last visited Feb. 17, 2020).

199. Lilly Fowler, *More Immigrants Report Arrests at WA Courthouses, Despite Outcry*, CROSSCUT (Apr. 9, 2019), https://crosscut.com/2019/04/more-immigrants-report-arrests-wa-courthouses-despite-outcry [https://perma.cc/49Y4-SKAQ].

200. Zack Budryk, *Inslee Signs Bill Making Washington a Sanctuary State*, HILL (May 22, 2019), https://thehill.com/homenews/state-watch/445134-inslee-signs-bill-making-washington-a-sanctuary-state [https://perma.cc/AL6P-3S95].

201. Gentzler, *supra* note 198.

202. *Id.*

203. *Id.*

will see their father again.[204] After his arrest on June 20, the man missed his next hearing and a bench warrant was issued for his failure to appear.[205]

3. *Washington's Attempt to Curb Immigration Policing Outside of Washington Courts*

Washington has attempted to restrict immigration policing outside of local courts.[206] Some county courts have issued policies addressing the issue. For example, King County Superior Court has a policy prohibiting the execution of arrest warrants of individuals based on their immigration status within any King County Superior Court courtroom.[207]

The Washington State Supreme Court has even weighed in on the issue. On March 22, 2017, then-Washington State Supreme Court Chief Justice Mary Fairhurst wrote a letter to then-Department of Homeland Security Secretary John F. Kelly expressing concern regarding the presence of immigration agents in and around Washington courthouses.[208] In that letter, then-Chief Justice Fairhurst highlighted the importance of access to justice for everyone living in Washington and explained that the presence of immigration agents causes many people in the immigrant community to be afraid to appear in court, dampening their ability to "participate and cooperate in the process of justice."[209]

On April 15, 2019, then-Chief Justice Fairhurst wrote a letter to then-Commissioner of the U.S. Customs and Border Control Kevin McAleenan.[210] In that letter, she reiterated the concern of her previous letter.[211] She continued that, despite issuance of ICE's Directive Number 11072.1 (directing ICE officers to "minimize their impact on court operations" and to "generally avoid enforcement actions in courthouses")

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204. *Id.*

205. *Id.*

206. Press Release, King County Superior Court, Superior Court Policy on Immigration Enforcement in Courtrooms, https://www.kingcounty.gov/~/media/courts/superior-court/docs/get-help/general-information/superior-court-policy-on-immigration-enforcement-in-courtrooms.ashx?la=en [https://perma.cc/A7XE-DBR4].

207. *Id.*

208. Letter from Mary Fairhurst, Chief Justice, Wash. State Supreme Court, to John Kelly, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. (Mar. 22, 2017) [hereinafter Letter from Mary Fairhurst to John Kelly], https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf [https://perma.cc/9B4T-E5PJ].

209. Letter from Mary Fairhurst to John Kelly, *supra* note 208.

210. Letter from Mary Fairhurst, Chief Justice, Wash. State Supreme Court, to Kevin McAleenan, Comm'r, U.S. Customs & Border Prot. (Apr. 15, 2019), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KevinMcAleenanUSCustomsBorderProtection041519.pdf [https://perma.cc/VP46-LJ39].

211. *Id.*

and other improvements to policy, immigration officials continued to make arrests in and around local courthouses.[212] She again asked that immigration enforcement operations cease in the areas immediately surrounding local courthouses, as to promote participation and cooperation in the process of justice.[213]

As evidenced by the June 20, 2019 arrest outside of the Thurston County Superior Courthouse, immigration officials disregarded Justice Fairhurst's letters and have continued to conduct immigration enforcement actions in the areas surrounding Washington state courts. As a result, on December 17, 2019, Washington State AG Bob Ferguson filed a federal lawsuit against the Trump administration for arresting immigrants outside of courthouses in Washington State.[214] The complaint included three claims under the Administrative Procedure Act, a claim under the Tenth Amendment of the U.S. Constitution, and a claim based on the right to access courts (alleging violations of the First, Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution).[215] The State of Washington asked for declaratory relief and a preliminary injunction.[216] The court has yet to make a ruling.[217] A similar lawsuit in Massachusetts has resulted in a preliminary injunction preventing immigrations agents from making civil arrests at courthouses there.[218]

4. Evidence Rule 413's Attempt to Address Access to Justice Issues Will Fall Short While Immigrants Face More Imminent Threats

Proponents of ER 413 characterize it as promoting access to justice among the immigrant community in Washington.[219] Much more publicized than the adoption of ER 413, however, is the presence of immigration agents outside of courtrooms.[220] ER 413 only protects

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212. *Id.*

213. *Id.*

214. *AG Ferguson Sues to Stop Trump Administration from Using Washington Courthouses to Snare Immigrants with No Violent History*, WASH. ST. OFF. ATT'Y GENERAL (Dec. 17, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-sues-stop-trump-administration-using-washington-courthouses-snare [https://perma.cc/TW8R-Q3RJ].

215. Complaint for Declaratory & Injunctive Relief at 31–34, Washington v. U.S. Dep't of Homeland Sec., No. 2:19-cv-02043-TSZ (W.D. Wash. Dec. 17, 2019), 2019 WL 6894688.

216. *Id.* at 34.

217. Docket for *Washington v. U.S. Dep't of Homeland Sec.*, COURTLISTENER (Mar. 9, 2020, 7:09 PM), https://www.courtlistener.com/docket/16596756/state-of-washington-v-us-department-of-homeland-security/ [https://perma.cc/N7PH-4UU9].

218. Sara Gentzler, *AG Ferguson Sues Trump Administration Over Courthouse Immigration Arrests*, OLYMPIAN (Dec. 17, 2019, 4:07 PM), https://www.theolympian.com/news/politics-government/article238480538.html (last visited Mar. 6, 2020).

219. *See supra* section I.D.2.

220. *See supra* section II.B.2.

immigrants from bias and can only promote access to justice if immigrants are secure and confident that they can get into the courthouse without being targeted. The threat of immigration policing begins outside the courthouse. Individuals will be unable to appreciate the purpose of ER 413 if they feel as though they are being profiled and are in danger of being detained before they even step foot in the courthouse. As a result, Washington needs to address the issue of the presence of immigration officials outside of local courthouses before ER 413 can realize its potential.

III. PROPOSED SOLUTIONS TO IMPLICIT BIAS IN THE COURTROOM AND ACCESS TO JUSTICE ISSUES UNIQUELY IMPLICATING IMMIGRANTS

A. Proposed System that Would Effectively Protect Immigrants in the Courtroom from Bias

Washington state courts should implement a multi-step program to combat implicit bias as it relates to immigrant civil plaintiffs and criminal defendants. This program should (1) educate jurors in all counties about implicit bias and (2) include immigration status as a possible impetus of implicit bias. The Washington state court system is at the forefront of addressing implicit bias in the courtroom, yet there is still room for improvement.

1. An Implicit Bias Video Should Be Shown in All Courts in Washington

While local courts in some counties, such as King County, do show an implicit bias video, it is certainly not a statewide practice. For example, the video shown to jurors in Yakima County courts does not mention explicit or implicit bias.[221] This is not for a lack of need. Yakima County has a diverse population, meaning many residents of the county are in danger of profiling and bias. According to a 2018 census, 13% of Yakima County's residents are non-white, 50% are Latino, and 18% of are foreign-born.[222] Inevitably, many of these individuals will have the opportunity or be obliged to interact with the court system. As they do, it is crucial that they are met with equity. A juror video bringing awareness to, and addressing the dangers of, implicit bias should be shown in all state courthouses across Washington. This practice would not be difficult to

221. E-mail from Sheila Rank to author, *supra* note 174.

222. *Yakima County, Washington*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/yakimacountywashington [https://perma.cc/8RU2-58FK].

implement. After all, courthouses are already showing prospective jurors informational videos explaining other topics. Courts should simply show an implicit bias video in addition to the video already shown in preparation for jury duty.

2. Updating the Implicit Bias Video to Include Immigration Status

In Washington, current implicit bias solutions focus on race, gender, and age.[223] The issues of implicit bias with respect to immigration status are in some ways different than the issues related to race, and, as such, should be addressed separately. Washington State courts should create a video that educates jurors about possible biases towards all litigants susceptible to prejudice, including immigrants. Immigrants can face bias due to their use of interpreters, cultural factors that influence how they behave in the courtroom, and other differences. Even if jurors are aware of their implicit biases regarding race, perhaps they are not aware of their biases against litigants who do not speak English fluently or act differently in the courtroom.

The United States District Court for the Western District of Washington video is superior to the jury instruction currently read to jurors before civil trials in Washington state courts. This video offers a more profound explanation of implicit bias, its origins, and its insidiousness throughout society. Further, this video offers jurors techniques to identify and eradicate their own implicit biases. Overall, a video similar to the one shown in the United States District Court for the Western District of Washington (with the addition of at least a mention of immigration status) would be far more effective than the current jury instruction and should be shown to juries before both criminal and civil trials. A video that identifies a wider range of implicit biases would be more effective in protecting broader class of litigants, ensuring more equitable trials.

B. Washington's Challenge in Federal Court to Immigration Arrests Outside of Washington's Local Courts is the Only Conceivable Solution to the Access to Justice Issue

Washington State officials have begun to take the steps necessary to cure the access to justice issues discussed in Part II. Attorney General Bob Ferguson's lawsuit against the federal government is the only conceivable approach to stop immigration arrests outside of courthouses. Evidenced

223. *See* 6 WASH. PATTERN JURY INSTRUCTIONS CIVIL∞§ 1.01(1) (7th ed. 2019); Unconscious Bias Juror Video, *supra* note 133.

by the federal government's complete disregard for former Chief Justice Fairhurst's letters[224] and the Trump Administration's general attitude toward sanctuary jurisdictions,[225] the problem requires a federal solution.

The comparative drastic nature of suing the federal government versus enacting a state evidence rule demonstrates that evidence rules cannot be employed as the only solution to large, structural issues like access to justice. Certainly, ER 413 does not impair access to justice goals. However, in order for ER 413 to begin to promote access to justice, litigants and witnesses must know that they can attend court without fearing adverse consequences unrelated to the purpose of their visit. As a result, AG Ferguson's suit against the federal government was an imperative prerequisite to the effectiveness of ER 413.

CONCLUSION

As the immigrant population continues to increase in Washington State, it is important that immigrants that interact with the legal system know that their presence in a courtroom will not be tainted by juror assumptions regarding their immigration status. By adopting ER 413, the Washington State Supreme Court made it clear that evidence of a litigant's immigration status and jurors' prejudices stemming from that information had no place in the courtroom. With this rule, the Court meant to (1) shield immigrant litigants from juror bias stemming from immigration status; and (2) promote access to justice. While this rule provides broader protection than preexisting caselaw, it still fails in its goals of protecting immigrant litigants from juror bias and promoting access to justice because it lacks a supporting regime to address these structural issues.

Washington should adopt such a supporting regime. This regime must address implicit bias with a broader focus than just race, gender, and age; it should also draw attention to, and eradicate, implicit biases regarding immigration status. Finally, without addressing more pressing access to justice issues facing the immigrant community, ER 413's access to justice objectives will be obviated. To tackle these more pressing issues, Washington State officials have taken the only conceivable means of ceasing immigration arrests outside of courthouses: suing the federal government.

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224. *See supra* section II.B.3.

225. Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html [https://perma.cc/23WX-2EBD] ("The Trump administration is deploying law enforcement tactical units from the southern border as part of a supercharged arrest operation in sanctuary cities across the country, an escalation in the president's battle against localities that refuse to participate in immigration enforcement.").