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Moving the Needle: Two Promising Tools to Attack Arkansas's Racial Disparity in Criminal Sentencing

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MOVING THE NEEDLE: TWO PROMISING TOOLS TO ATTACK ARKANSAS'S RACIAL DISPARITY IN CRIMINAL SENTENCING

Anastasia M. Boles[*]

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I. INTRODUCTION

Over the past few decades, social scientists have examined the ways that racial bias, in explicit and implicit forms, operates at all levels of the

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criminal justice system.[1] Racial bias can affect outcomes at every point human judgment is involved.[2] Studies have shown that bias may impact a range of actors in a criminal case, including law enforcement, prosecutors, defense attorneys, judges, and jurors.[3] A body of legal scholarship analyzes the intersection of racial bias and criminal punishment and recommends specific actions to reduce racial disparities.[4]

The Sixth Amendment grants criminal defendants the right to an impartial jury, yet the problem of racial bias by jurors still permeates the criminal justice system. Juror racial bias persists despite judicial and congressional efforts to guarantee access for black jurors to the jury pool,[5] ensure race-neutral peremptory strikes,[6] allow counsel to question jurors about racial bias during *voir dire*,[7] and invalidate other jury-related laws rooted in racism.[8] Despite these efforts, some jurors bring racial bias into the deliberation room:

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1. *See* Jerry Kang, *Implicit Bias: A Primer for Courts*, at 4–6 (August 2009), http://jerrykang.net/research/2009-implicit-bias-primer-for-courts/; Mark W. Bennett, *Manifestations of Implicit Bias in the Courts*, in ENHANCING JUSTICE: REDUCING BIAS 8 (Sarah E. Redfield ed., 2017); Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 872–74 (2015); BIAS IN THE LAW: A DEFINITIVE LOOK AT RACIAL PREJUDICE IN THE U.S. CRIMINAL JUSTICE SYSTEM (Joseph Avery & Joel Cooper eds., 2020).

2. *See* Kang, *supra* note 1, at 3–5.

3. *Id;* Bennett, *supra* note 1, at 8; Smith *et al.*, *supra* note 1, at 872–74; BIAS IN THE LAW, *supra* note 1.

4. *E.g.,* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013); Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); andré douglas pond cummings, *Reforming Policing*, 10 DREXEL L. REV. 573 (2018); Jelani Jefferson Exum, *Sentencing Disparities and the Dangerous Perpetuation of Racial Bias*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 491 (2020).

5. U.S. Const. amend. XIV, § 1; Strauder v. West Virginia, 100 U.S. 303, 303–09 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Hollins v. Oklahoma, 295 U.S. 394 (1935) (per curiam); Avery v. Georgia, 345 U.S. 559, 560–62 (1953); Hernandez v. Texas, 347 U.S. 475, 476–77 (1954); Castaneda v. Partida, 430 U.S. 482, 483–85 (1977).

6. *See* Batson v. Kentucky, 476 U.S. 79, 82–83 (1986); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Georgia v. McCollum, 505 U.S. 42 (1992).

7. Ham v. South Carolina, 409 U.S. 524, 526–27 (1973); Rosales-Lopez v. United States, 451 U.S. 182; Turner v. Murray, 476 U.S. 28 (1986).

8. *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (requiring unanimity in criminal verdicts).

- During a sexual assault trial of a Hispanic defendant, one juror was convinced the defendant was guilty because "[n]ine times out of ten Mexicans were guilty of being aggressive towards women."[9]

- A juror deliberating a death sentence for a Black defendant expressed, "[a]fter studying the Bible, I have wondered if [B]lack people even have souls."[10]

    - Another jury deliberated an assault charge involving a Native American defendant. [11] One juror expressed, "[w]hen Indians get alcohol, they all get drunk," and the jury needed to convict the defendant and "send a message back to the reservation."[12]

- During deliberations for a rape charge, one juror commented, "Let's convict this nigger already, I am ready to play golf." Another reportedly responded, "The nigger should have taken a plea deal anyway."[13]

In *Peña-Rodriguez v. Colorado,* a recent Sixth Amendment decision examining racial bias during jury deliberations, Justice Kennedy observed that the problem of racial bias and the jury process was "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[14]

The "familiar and recurring evil" of racism in the jury room helps explain the racial disparities that exist in criminal sentencing. The United States Census Bureau estimates that as of July 1, 2019, Black Arkansans comprised 15.7% of the state's population.[15] Yet, as of June 2019, Black inmates were 42% of the state's incarcerated population.[16] The racial disparity is even starker for serious offenses—53% of those serving a life sentence (with or without parole) and 52% of those on Arkansas's death row are Black.[17] Empirical studies examining the correlation of race and criminal

9. These facts are taken from *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017).

10. These facts are from *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019).

11. United States v. Benally, 546 F.3d 1230 (10th Cir. 2008), *abrogated by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

12. *Id.* at 1231–32.

13. State of Louisiana v. Hills, 2019 WL 3024107 at *1 (La. App. 2019); Joe Gyan Jr., *Convicted Rapist Granted New Trial; Baton Rouge Judge Cites Racial Animus Among Some Jurors*, THE ADVOCATE, Feb. 1, 2019, https://www.theadvocate.com/baton_rouge/news/courts/article_e124bf3c-e380-11e8-ad29-af274dd7986e.html.

14. *Peña-Rodriguez*, 137 S. Ct. at 868.

15. UNITED STATES CENSUS BUREAU, QUICK FACTS: ARKANSAS, https://www.census.gov/quickfacts/AR.

16. ARKANSAS DEPARTMENT OF CORRECTIONS, ANNUAL REPORT: FY 2019 at 22.

17. *Id*. at 25.

punishment in Arkansas have found a statistically significant relationship between race and the sentence an Arkansas defendant will receive in homicide cases.[18] In other words, the best predictor of the criminal sentence an Arkansas defendant will receive for homicide is not how severe the crime is, whether the defendant has access to legal services, the amount of education a defendant has, or whether a defendant has a mental health issue. The best predictor of the severity of sentence for homicide in Arkansas is whether or not the defendant is Black.[19]

Jury trials are a small but important part of Arkansas criminal sentencing. Arkansas juries decided just 3% of the criminal cases in the state in 2018.[20] Arkansas's capital murder statute requires a jury to find, beyond a reasonable doubt, the existence of "aggravating circumstances" before imposing the death penalty.[21] Defendants facing a capital murder charge cannot seek a plea bargain for a lesser charge, waive a jury trial, or waive jury sentencing unless the prosecutor agrees not to seek the death penalty.[22] A jury's imposition of a death sentence is not automatic—trial judges can delay sentencing to consider additional information before entering judgment of the death penalty,[23] and the Supreme Court conducts a review of each capital case.[24] Thus, jurors in Arkansas have an enormous role in deciding the cases with the most severe racial disparities in sentencing—homicide cases. Indeed, Arkansas jurors, along with any racial bias they harbor, are gatekeepers to the death penalty.

Moving the needle[25] closer to racial equity in criminal sentencing will require, among other things, mitigating racial bias throughout the jury pro-

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18. *See* David C. Baldus et al., *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990-2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 560 (2009); Adjoa A. Aiyetoro & Tara V. DeJohn, *Rejecting the Wrongs of Yesterday: A Multifacted Approach to Eliminating Racial Disparities in the Arkansas Criminal Justice System*, 6 TENN. JOURNAL OF RACE, GENDER, & SOCIAL JUSTICE 105, 107–09 (2017).

19. Aiyetoro & DeJohn, *supra* note 18, at 107–09.

20. COURT STATISTICS PROJECT, 2018 GENERAL JURISDICTION CRIMINAL JURY TRIALS AND RATES: ARKANSAS, http://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays (last visited Aug. 27, 2020). The Court Statistics Project maintains an interactive database available at the appended link.

21. Ark. Code Ann. § 5-4-603. Capital murder trials in Arkansas are bifurcated; the jury first decides whether a defendant is guilty of capital murder, then hears evidence relevant to sentencing and decides whether to impose the death penalty. Ark. Code Ann. § 5-4-602.

22. Ark. Code Ann. § 5-4-608; Ark. R. Crim. P. 31.4.

23. Ark. Code Ann. §§ 16-90-105(b) and 16-90-107(e).

24. State v. Robbins, 339 Ark. 379, 386, 5 S.W.3d 51, 55 (1999) (automatic review of death penalty sentence by Arkansas Supreme Court).

25. The common phrase "moving the needle" has particular significance to the Author. In a conversation with Professor Emerita Adjoa Aiyetoro about sustaining activism when faced with the reality of slow pace of social change, she advised, "Focus on the work. Focus on moving the needle."

cess. There is reason to be hopeful. Arkansas now has the benefit of two important tools to dismantle the operation of racial bias in the jury room. The first tool is Arkansas's new criminal jury instruction, amended AMI Crim. 2d 101(d), which empowers courts and attorneys to speak with potential jurors about bias in innovative ways.[26] The second tool is the United States Supreme Court's decision in *Peña-Rodriguez v. Colorado*, which held that the Sixth Amendment requires that verdicts be overturned when there is evidence that a juror acted from overt racial bias.[27] *Peña-Rodriguez* has not yet been analyzed by federal or state courts in Arkansas. This Article examines both tools and asserts that used together, AMI Crim. 2d 101(d) may help mitigate juror racial bias before a criminal verdict, and *Peña-Rodriguez* may operate to impeach jury verdicts tainted by racial bias after a verdict.

Momentum is building around the country to improve racial equity in the criminal justice system. During the editing of this article, the United States has been forced to turn new focus to the problem of racism in the criminal justice system, spurred by the deaths of Ahmaud Arbery, Breonna Taylor, George Floyd, and many others.[28] In response to the outrage, courts around the country have voiced a commitment to challenging the operation of racial bias in the legal system.[29] For example, Justice Bernette Joshua Johnson, Chief Justice of the Louisiana Supreme Court, has powerfully called for changes in the criminal justice system:

> As Chief Justice and chief administrator of our state's courts, I readily admit our justice system falls far short of the equality it espouses. And I see many of its worst injustices meted out in the criminal legal system . . . We need only look at the glaring disparities between the rate of arrests, severity of prosecutions and lengths of sentences for drug offenses in poor and African American communities in comparison to those in wealthier White communities, to see how we are part of the problem.[30]

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26. Appendix A contains a comparison view of the changes to AMI Crim. 2d 101. Arkansas has separate model instructions for criminal and civil cases. The amendment to the civil instruction, AMI Civ. 103, is identical.

27. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

28. *See* Grace Hauck, *Echoes of Emmett Till Case; George Floyd's Killing by Police Could Be 'Tipping Point' in Fight for Justice, like Boy's Murder in 1955*, USA TODAY, June 8, 2020, at 1A; Buchanon et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, July 3, 2020, https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

29. A collection of recent court statements addressing the need to address racism in the legal system can be found at NATIONAL CENTER FOR STATE COURTS, STATE COURT STATEMENTS ON RACIAL JUSTICE, https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice (last visited Aug. 27, 2020).

30. Letter from Bernette Joshua Johnson, Chief Justice of the Louisiana Supreme Court, to her colleagues (June 8, 2020), https://www.lasc.org/press_room/press_releases/2020/2020-

Arkansas's new jury instructions, along with the expanded Sixth Amendment protection in *Peña-Rodriguez*, provide powerful tools for eradicating racial bias from Arkansas criminal sentencing. Part II of this article examines the state of incarceration in Arkansas and the racial disparities in Arkansas's criminal sentencing. Part III analyzes the intersection of racial bias and the jury process. Part IV examines AMI Crim. 2d 101(d), Arkansas's new criminal jury instruction, and situates the instruction in the national trend of approaches. This section will recommend uses for the instruction pre-verdict to work toward racial equity in criminal trials. Finally, Part V discusses the implications of the *Peña-Rodriguez* case for Arkansas courts. This section briefly discusses the history of the no-impeachment rule, codified in Fed. R. Evid. 606(b) and Ark. R. Evid. 606(b), and how lower courts are applying *Peña-Rodriguez*. The section ends with recommendations on interpreting *Peña-Rodriguez* to further the goal of racial equity in criminal sentencing.

II. RACE AND INCARCERATION IN ARKANSAS

Black defendants are overrepresented in Arkansas prisons as well as throughout the United States.[31] The United States Census Bureau estimates that as of July 1, 2019, Black Arkansans comprise 15.7% of the state's population.[32] Yet, Black inmates were 42% of the state's prison incarcerated

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18_Justice_for_All_in_Louisiana.pdf. In response to the killings by law enforcement and private citizens, the Washington Supreme Court also issued a powerful statement:

. . . recent events have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge: the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems.

The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.

Joint Letter from the Justices of the Supreme Court for the State of Washington to Members of the Judiciary and the Legal Community (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

31. UNITED STATES CENSUS BUREAU, *supra* note 15; THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, June 14, 2016, https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnicdisparity-in-state-prisons/.

32. UNITED STATES CENSUS BUREAU, *supra* note 15. The U.S. Census Bureau reports the following demographic estimates for Arkansas: White non-Hispanic (72.2%), Black or African-American (15.7%), American Indian or Alaska Native (1%), Asian (1.7%), Native Hawaiian or Other Pacific Islander (.4%), two or more races (2.2%), Hispanic or Latino (7.7%). *Id*.

population as of June 30, 2018.[33] Compared to White inmates, Black inmates in Arkansas generally receive longer sentences and serve more time before release.[34]

In addition, Black men continue to be overrepresented both on death row and among inmates executed. As of August 2018, there were 15 White males, 14 Black males, and one Hispanic male on death row.[35] Of those executed on Arkansas' death row, Black men comprise 32% of inmates executed since 1990 (10 of 31 inmates), and 60% of inmates executed since 2000 (6 of 10 inmates).[36] The startling racial disparities in Arkansas should not be viewed in isolation. The current numbers must be contextualized with Arkansas's history of lynching, the over-criminalization of black men, convict leasing, and mass incarceration.[37] As Riley Kovalcheck recently observed, "Arkansas has never known a time when African Americans are not disproportionately jailed."[38]

Arkansas is experiencing a startling increase in incarceration generally. Despite an eight percent downward trend in national incarceration rates, the rate of imprisonment in Arkansas actually increased by 35 percent between 2000 and 2017.[39] While there have been efforts to decrease the state's prison population, the number of people incarcerated in Arkansas is projected to

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33. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 16, at 22. White inmates are 54% of the Arkansas inmate population, and Hispanic inmates are 3% of the population. *Id*.

34. *Id.* at 21. For Arkansas inmates released in FY 2019, the ADC reports that the average sentence was 9 years, 6 months, and 25 days for Black inmates, versus 7 years, 3 months, and 24 days for White inmates. Upon release, Black inmates had served an average of 5 years, 10 months, and 22 days, while White inmates served 4 years, 1 months, and 1 day. *Id. See generally* Aiyetoro & DeJohn, *supra* note 18.

35. ARKANSAS DEPARTMENT OF CORRECTIONS, *Inmates*, *Death Row*, https://adc.arkansas.gov/death-row (last updated August 23, 2018).

36. ARKANSAS DEPARTMENT OF CORRECTIONS, *Inmates*, *Executions, 1913 – present*, https://adc.arkansas.gov/executions. Under *Furman v. Georgia,* 408 U.S. 238, 238 (1972) (holding that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments). Arkansas did not execute any inmates from 1964–1990. Between 1913 and 1964, 77 of the 100 death row inmates executed were Black. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 16. Of the four men executed in April 2017, three were Black. *Id.* The number of Black men executed is the official count from the Arkansas Department of Corrections.

37. ALEXANDER, *supra* note 4. THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); *see generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); Jeff Rosenwieg, *A Short Recent History of the Death Penalty in Arkansas*, 52 ARK. LAW 20, 21 (2017); Calvin R. Ledbetter Jr., *The Long Struggle to End Convict Leasing in Arkansas*, 52 ARK. HIST. Q. 1 (1993); Aiyetoro & DeJohn, *supra* note 18, at 107–09.

38. Riley Kovalcheck, *The Modern Plantation: The Continuities of Convict-Leasing and an Analysis of Arkansas Prison Systems*, 7 CLA JOURNAL 96, 97 (2019).

39. AMERICAN CIVIL LIBERTIES UNION, BLUEPRINT FOR SMART JUSTICE: ARKANSAS 4 (2019), https://50stateblueprint.aclu.org/states/arkansas.

grow 9.1 percent by 2028.[40,41] As of June 2019, the population of the Arkansas Division of Correction was 17,907,[42] with an estimated 61,350 more people in local jails, federal prison, youth facilities, and other forms of criminal supervision.[43]

Multiple stakeholders in the Arkansas criminal justice community have engaged in efforts to decrease the overall number of people incarcerated in Arkansas. The community advocacy efforts tend to focus on changing policies to prevent incarceration and improving life for those who are incarcerated.[44] Arkansas government agencies are increasingly motivated to reduce the prison population due to the strain on the state's budget. In May 2017, the Council of State Governments Justice Center warned of the impact the projected prison growth would have on the state budget:

> Arkansas's prisons are now at capacity . . . . [T]he prison population is expected to increase by 19 percent between FY2016 and FY2023. If nothing is done to address this growth, the state will be forced to spend an additional $653 million in construction and operating costs by 2023 in order to accommodate anticipated prison population growth.[45]

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40. *Id*.; JFA ASSOCIATES, ARKANSAS DEPARTMENT OF CORRECTION, ARKANSAS SENTENCING COMMISSION, & ARKANSAS COMMUNITY CORRECTION TEN-YEAR ADULT SECURE POPULATION PROJECT 2018–2028, 1, 46 (2018), https://adc.arkansas.gov/images/uploads/2018_Arkansas_Prison_Projection_Ten-Year_Adult_Secure_Population_Projection_Report.pdf.

41. This article was edited during Novel Coronavirus Disease 2019 ("COVID-19") pandemic. The state has been criticized for its response to the pandemic within the prison system and has granted relatively few early or compassionate releases from prison. As of August 20, 2020, per 10,000 prisoners, Arkansas ranked first in the United States for COVID-19 prisoner cases and third in the nation in prisoner deaths due to COVID-19. THE MARSHALL PROJECT, A STATE-BY-STATE LOOK AT CORONAVIRUS IN PRISONS, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last updated August 20, 2020); Molly Minta, *Incarcerated, Infected, and Ignored: Inside an Arkansas Prison Outbreak*, THE NATION, June 17, 2020, https://www.thenation.com/article/society/cummins-prison-arkansas-coronavirus/. *See also* Max Brantley, *ACLU announces new complaint on state prisons' failure to cope with coronavirus pandemic*, ARKANSAS TIMES, (July 13, 2020), https://arktimes.com/arkansas-blog/2020/07/13/aclu-announces-new-complaint-on-state-prisons-failure-to-cope-with-coronavirus-pandemic.

42. ARKANSAS DEPARTMENT OF CORRECTIONS, *supra* note 16, at 24.

43. PRISON POLICY INITIATIVE, CORRECTIONAL CONTROL 2018: INCARCERATION AND SUPERVISION BY STATE, https://www.prisonpolicy.org/reports/correctionalcontrol2018.html#statedata.

44. *See e.g.* AMERICAN CIVIL LIBERTIES UNION, *supra* note 39, at 5 (advocating for alternatives to incarceration, sentencing reform, reducing revocations of parole and probation, and eliminating cash bail); DECARCERATE ARKANSAS, 2019 ANNUAL REPORT, A PIN PRICK OF LIGHT, https://www.decarceratear.org/annualreport (campaign to end solitary confinement and curb bail, court fines, and fees).

45. COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, ARKANSAS'S JUSTICE REINVESTMENT APPROACH: ENHANCING LOCAL MENTAL HEALTH SERVICES FOR PEOPLE IN THE

In an attempt to address the overcrowding, the legislature passed the Public Safety Improvement Act (Act 570) of 2011.[46] Act 570 focused on improving community supervision as an alternative to imprisonment.[47] The legislature passed another reinvestment act in 2017, the Criminal Justice Efficiency and Safety Act (Act 423) of 2017, which sought to improve mental health services as an alternative to criminalizing mental health.[48]

To be clear, Arkansas must address the state's exploding prison population. However, the enthusiasm for reducing the Arkansas prison population as a whole ignores the historic racial disparities in Arkansas criminal sentencing. While decarceration efforts will likely reduce the total number of people of color in prison, only a race-conscious solution will address the racial disparities. While there may be fewer Arkansans imprisoned overall, Black Arkansans (both those in prison and their families) will continue to experience disproportionate harm.

This section examines the Arkansas-specific empirical data connecting the racialized sentencing disparity to racial bias, as well as the science of racial bias. This section also discusses the work of one criminal justice advocacy organizations addressing racism in Arkansas criminal sentencing, the Racial Disparities in the Arkansas Criminal Justice System Research Project.

A. Sentencing Disparities in Arkansas

Two Arkansas-specific studies have found racial disparities in Arkansas criminal sentencing. In connection with the clemency petition of Arkansas death-row inmate Frank Williams, David Baldus and his colleagues studied the convictions flowing from one prosecutor (the one prosecuting Frank Williams) from 1990 through 2005.[49] The researchers studied 63 "death-eligible" cases[50] and found extensive evidence that Black defendants were targeted by the prosecutor for the death penalty, especially in cases with White victims.[51] Black defendants were 59% of the death-eligible sam-

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CRIMINAL JUSTICE SYSTEM 1–2 (2017), https://csgjusticecenter.org/wp-content/uploads/2020/01/Arkansas-JR-Approach_MAY2017.pdf.

46. COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, JUSTICE REINVESTMENT IN ARKANSAS: AN OVERVIEW 1 (2016), csgjusticecenter.org/wp-content/uploads/2020/01/Justice ReinvestmentinArkansasOverview.pdf.

47. *Id.*

48. *Id.*

49. Baldus et al., *supra* note 18. Frank Williams is no longer on death row. David Baldus did similar work throughout the United States. *See also* J. Thomas Sullivan, *The Abyss of Racism*, 13 J. APP. PRAC. & PROCESS 91, 98–101 (2012) (discussing the Williams case and the Baldus study).

50. *Id*. at 564.

51. *Id.* at 570.

ple, and received 100% of the death sentences.[52] Moreover, every case resulting in a death sentence involved at least one White victim.[53] Baldus concluded, "[t]his 'inexorable zero' evidence - no white-defendant cases and no black-victim cases on death row - is striking."[54]

In 2015, the Racial Disparities in the Arkansas Criminal Justice System Research Project (the "Racial Disparities Project" or "Project") [55] released the results of an extensive study finding a statistically significant racial disparity in the sentencing of Arkansas criminal defendants charged with homicide.[56] From 2012 to 2015, the Racial Disparities Project proceeded from design to data collection with the involvement of professors from at least four University of Arkansas at Little Rock departments.[57] The researchers focused on prisoners serving sentences for homicide with sentences of life, life without parole, or death.[58] Of the 1033 prisoners in the sample size, 836 agreed to release their data.[59] The researchers reviewed 538 records.[60] In August 2015, the Project released a report of its findings.[61] The Project found a statistically significant relationship between the race of the defendant and the sentence the defendant received.[62] It is clear from the Project's research that the racial disparity in the sentences Black defendants receive is not coincidental.

The data from the Racial Disparities Project work refutes the argument that the racial disparity in Arkansas criminal sentencing is caused by a factor

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52. *Id*.

53. *Id*.

54. *Id*.

55. Professor Emerita Aiyetoro, then director of the UA Little Rock Anderson Center on Race and Ethnicity, formed the Project in 2011. She worked with UA Little Rock Professors David Montague and Tara DeJohn to design the study. The Project was overseen by a 65-member Steering Committee. Upon Professor Aiyetoro's retirement in 2017, leadership of the Project shifted to a four-member directorship. The Project is now housed at the UA Little Rock, William H. Bowen School of Law. The Author is currently one of four co-directors for the Racial Disparities Project. While informed by the work of the Project, the opinions and recommendations described here are those of the Author alone.

56. The Project's history until 2015 and findings are set out fully in its final report, ARKANSAS CRIMINAL JUSTICE SYSTEM RESEARCH PROJECT, REPORT OF RESEARCH FINDINGS (2015), https://drive.google.com/file/d/19lqdTdzUkOhZ0LXaucDIxKk3qE3AQLTX/view. The Project's findings were published by the Tennessee Journal of Race, Gender & Social Justice. Aiyetoro & DeJohn, *supra* note 18.

57. Aiyetoro & DeJohn, *supra* note 18, at 109 – 111.

58. *Id*. at 113.

59. *Id*. at 115.

60. *Id*.

61. The Project presented its data at a conference in August 2015, entitled *Reveal, Restore and Resurrect: The Truth About Racial Disparities in the Arkansas Criminal Justice System.* The keynote speaker was Wilbert Rideau, an award-winning journalist and author who spent forty-four years in Louisiana's Angola Prison.

62. Aiyetoro & DeJohn, *supra* note 18, at 116 – 131.

other than racial discrimination against Black Arkansans. The report was full of detailed data and recommendations.[63] There were four critical findings about the sentencing experience of Black defendants. First, Black defendants were more likely to receive capital murder charges than white defendants.[64] Second, Black defendants were more likely to receive more severe punishment, especially the death penalty.[65] Third, even for the same type of conviction, Black defendants were more likely to receive more severe punishment than White defendants.[66] Fourth, in the four counties the researchers studied (Crawford, Faulkner, Lee, and Pulaski), Black defendants were overcharged by prosecutors for homicides and robbery.[67]

Since the release of the data and recommendations in 2015, the Racial Disparities Project has engaged in a variety of efforts to educate stakeholders about its findings and encourage racial bias reduction efforts at every stage in the criminal justice system.[68] To date, the Project has held at least sixteen community forums throughout the state, done focused outreach to stakeholder groups, and hosted three conferences.[69] The goal has been to create opportunities to disrupt the racially disparate sentence outcomes at as many interventions points as possible. The community forums have served the dual functions of community empowerment along with the chance to engage community members about how racialized criminal sentencing impacts the lives of Arkansas families. All three conferences have brought formerly-incarcerated people, law enforcement, attorneys, judges, criminal justice and community advocacy organizations, educators, healthcare professors, and concerned members of the public together for powerful and productive conversations. The Project's focused outreach efforts, with presentations to public defenders, prosecutors, judges, and bar associations, have been particularly helpful in advancing the Project's mission.

The Project, with the help of Judge Wendell Griffen, presented findings and recommendations to the Arkansas Judicial Council in June 2017. After the presentation and continued discussions with the Project, Arkansas Supreme Court Justice Rhonda Wood recommended that Arkansas adopt a

63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*. at 136.
68. UA LITTLE ROCK RACIAL DISPARITIES IN THE ARKANSAS CRIMINAL JUSTICE SYSTEM RESEARCH PROJECT, LEADING THE CHARGE: FIGHTING IMPLICIT RACIAL BIAS INSIDE AND OUT 6 (2019) (conference agenda on file with the author). The Project has been supported by law school staff and grant funding from the Rebsamen Foundation and the Darraugh Foundation. In January 2018, the Clinton School of Public Service Center on Community Philanthropy honored the Project with an inaugural Advancing Equity Award in recognition of the Project's work to advance racial equity in Arkansas. *Id*.
69. *Id*.

model jury instruction focused on mitigating implicit racial bias. Justice Wood continued to advocate for adoption of the instruction, with assistance from the Project. In the fall of 2019, both the criminal and civil committees approved an amendment to AMI Crim. 2d 101. The amendment adds language to better define bias, including racial bias, and incorporates some of the social science on how bias operates.

B. The Science of Racial Bias and the Criminal Justice System

The field of social psychology has extensively studied the persisting presence of racial bias despite outward social movements toward racial equity. Recent research reveals that despite widespread initiatives promoting racial equality, most Americans continue to demonstrate "pro-White" and "pro-light skin" preferences on measurements of explicit and implicit racial bias.[70] American anti-Black biases and pro-White preferences continue despite "egalitarian race norms" and the "sincere belief" that "it is wrong to discriminate on the basis of race and that Blacks should be treated the same as Whites."[71] Decades of research exploring the criminal justice system supports the conclusion that racial bias influences policing,[72] pre-trial detention,[73] prosecutorial charging decisions,[74] defense representation,[75] judicial decision-making,[76] the jury process,[77] sentencing,[78] parole, and probation.[79]

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70. Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes, I. Long-Term Change and Stability From 2007 to 2016*, 30 PSYCHOL. SCI. 174, 181 (2019).

71. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1570 (2013).

72. Rebecca C. Hetey, *Implicit Bias, the Power of Institutions, and How to Reduce Racial Disparities in Policing*, in BIAS AND THE LAW (Joseph Avery ed. 2020); Exum, *supra* note 4; Levinson *et al.*, *Implicit Bias: A Social Science Overview*, in ENHANCING JUSTICE: REDUCING BIAS 49 – 50 (Sarah E. Redfield ed., 2017); Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135 – 1139 (2012). *See also* Radley Balko, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof.*, WASHINGTON POST, June 10, 2020, https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/

73. Besiki Luka Kutateladze, *Racial and Ethnic Disparities in Prosecution, and What Can Be Done to Change the Status Quo*, *in* BIAS IN THE LAW 1793 (Joseph Avery & Joel Cooper eds., 2020).

74. *Id*.; Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012).

75. Andrea D. Lyon & Mortimer Smith, *Racial Bias, the Defense, and the Challenge of Misunderstanding*, *in* BIAS IN THE LAW 2165 (Joseph Avery & Joel Cooper eds., 2020).

76. Rachlinski *et al.*, *supra* note 4, at 1222 (despite widespread implicit racial bias among judges, the vast majority of judges overstate their ability to objective); Justin D. Levinson *et. al.*, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 111 (2017); Naci Mocan, *Biases in Judicial Decision-Making*, in BIAS IN THE LAW 2380 (Joseph Avery & Joel Cooper eds., 2020).

Recent research explores the complexity of racial bias in sentencing—for example, defendants with "afro-centric features" may receive harsher sentences than defendants with facial features that are less stereotypically Black.[80]

Courts are increasingly recognizing the role of bias in affecting criminal outcomes. Sixth Circuit Judge Bernice B. Donald, for example, offers a poignant illustration of the overcharging of Black defendants:

> As a U.S. District Court judge for 15 years, I have observed implicit bias at every stage of the process – in arrests, adjudications, plea bargains, and sentencing. One striking contrast occurred on a single day in my courtroom. During the morning session of court, an African-American male pled guilty to [each count] of an eight-count indictment charging violations of 18 U.S.C. § 922(g), felon in possession of a firearm . . . . In the afternoon session, a young White male pled guilty to a two-count indictment; the first count charged a violation of 18 U.S.C. § 922(j) (eight stolen weapons), while the second count charged a violation of 18 U.S.C. §(g), felon in possession of a firearm (eight weapons). While the prosecutors argued that no racial disparity resulted from the disparate charging decisions, the African-American male "stereotype of dangerousness" was perpetuated by a conviction on eight counts of being a felon in possession of a firearm, while the conviction of his White counterpart on a single count of the same activity reinforced a less dangerous stereotype—even though each possessed the same number of weapons.[81]

From the perspective of Judge Donald as the trial judge, the race of the defendant was the main difference between two defendants facing criminal charges for an identical crime—illegal possession of eight firearms.

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77. Amanda Nicholson Bergold & Margaret Bull Kovera, *The Effects of Racial Bias and Jury Diversity on Juror Decision-making*, in BIAS IN THE LAW 2790 (Joseph Avery & Joel Cooper eds., 2020).;Levinson *et. al*, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 557 – 559 (2014).

78. Kang et al., *Implicit Bias in the Courtroom*, *supra* note 71, at 1148 – 1152.

79. *See* BIAS IN THE LAW, *supra* note 1; ENHANCING JUSTICE: REDUCING BIAS (Sarah E. Redfield ed., 2017). From 2013 - 2017, the Kirwan Institute for the Study of Race and Ethnicity at the Ohio State University collected highlights from the emerging data on bias and the criminal justice system in an annual "State of the Science" report. The five reports can be downloaded at http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/implicit-bias-review/.

80. Mark W. Bennett and Victoria C. Platt, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 795 (2018). Bennett and Platt note that the most salient features are dark skin, a wide nose, course hair, dark eyes, and full lips. *Id*. at 755.

81. Bernice B. Donald & Sarah E. Redfield, *Framing the Discussion*, *in* ENHANCING JUSTICE: REDUCING BIAS 8 (Sarah E. Redfield ed., 2017).

The social science on racial bias suggests that jurors are making racially-biased decisions during criminal jury trials. The evolution of societal norms about race adds to the complexity of juror racial bias. The same racial bias operating in society infects the criminal justice system. When racial prejudice was socially acceptable, White jurors openly relied on biased views and stereotypes of Blacks as inferior and more criminal in their decision-making.[82] The vast body of research demonstrating racial bias in the jury process is in tension with the desire of modern White jurors to "embrace an egalitarian value system and a desire to appear nonprejudiced."[83] Modern jurors, however, may still hold bias against Black defendants, or favoritism for White defendants.[84]

As research evolves, scientists will continue to disagree about whether, and to what extent, measurements of racial bias can predict real-world behavior.[85] The reality is that any racially-biased action or behavior, whether conscious or unconscious, can significantly deteriorate racial equity in the criminal justice system. In Arkansas, Whites are overrepresented among court personnel, including trial court and appellate court judges.[86] Assuming the science of racial bias is in any way credible, Arkansas courts must be aggressive in countering and preventing racial bias or favoritism in decision-making and behavior.[87]

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82. Samuel R. Sommers and Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 202–203, 205 (2001) (citing Dorsey v. State, 108 Ga. 477 (1899), which found defendant's race was relevant in rape trial to determine whether a white woman consented to sex).

83. *Id*. at 203.

84. *Id*.

85. *Compare* Anthony G. Greenwald *et al.*, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 PERSONALITY & SOC. PSYCHOL. 17 (2009) (concluding the IAT can predict biased behavior) *with* Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 PERSONALITY & SOC. PSYCHOL. 171 (2013) (the IAT does not predict biased behavior). After their conflicting meta-analyses, the researchers have continued to debate the correlation between IAT measurements of bias and biased behavior. *See* Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 PERSONALITY & SOC. PSYCHOL. 553 (2015); Frederick L. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Social Significance*, 108 PERSONALITY & SOC. PSYCHOL. 562 (2015).

86. J.D. Gingerich, *The Face of the Arkansas Courts and the Communities They Serve*, 49 ARK. LAW 24, 26 (2014).

87. *Id*. at 5–6.

III. RACISM, THE CONSTITUTION, AND THE JURY PROCESS

Criminal defendants have a constitutional right to a trial free from racial prejudice and bias. The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[88] The Fourteenth Amendment extends the Sixth Amendment right to an impartial jury to state criminal defendants.[89] The Sixth Amendment is particularly significant when situated in the body of narrowly-interpreted constitutional jurisprudence about race and criminal punishment.[90] For example, the Eighth Amendment is not violated when there is a racial disparity in the imposition of the death penalty; for now, the defendant must prove the prosecutor acted with intentional discrimination.[91]

Historically, the push for an impartial jury process aimed to guarantee that racial bias did not unduly punish criminal defendants of color while allowing racial favoritism to benefit White defendants.[92] Some abolitionists fought unsuccessfully to guarantee the right to a jury trial under the fugitive slave laws.[93] Despite the protections of the Sixth Amendment, achieving racial equity in the jury process has been elusive. Courts have attempted to prevent the intrusion of racism in the jury process by prohibiting the exclusion of jurors of color from the jury pool, prohibiting race-based peremptory challenges, and allowing counsel to ask potential jurors about racial bias during *voir dire*.[94] In *Ramos v. Lousiana*, the Supreme Court recently acknowledged that state and federal juries must reach unanimous verdicts in criminal trials, recognizing that non-unanimous jury verdicts at issue in Louisiana and Oregon were rooted in an overtly racially discriminatory pur-

88. U.S. CONST. amend. VI.

89. U.S. CONST. amend. XIV, § 1.

90. *See* Batson v. Kentucky, 476 U.S. 79, 113–15 (1986).

91. McCleskey v. Kemp, 481 U.S. 279, 300–01 (1987).

92. James Foreman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 915–16 (2004) (studies showed disproportionate conviction of Black defendants in Georgia between 1866–1879 as well as the acquittal of each of 500 White defendants charged with killing a Black victim between 1865–1866).

93. *Id.* at 899–909 (discussing efforts of abolitionists to secure a right to a jury trial for fugitive slaves facing re-enslavement).

94. *See* U.S. Const. amend. XIV, § 1; Strauder v. West Virginia, 100 U.S. 303, 303–09 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Hollins v. Oklahoma, 295 U.S. 394 (1935) (per curiam); Avery v. Georgia, 345 U.S. 559, 560–62 (1953); Hernandez v. Texas, 347 U.S. 475, 476–77 (1954); Castaneda v. Partida, 430 U.S. 482, 483–85 (1977); Batson v. Kentucky, 476 U.S. 79, 82–83 (1986); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Georgia v. McCollum, 505 U.S. 42 (1992); Ham v. South Carolina, 409 U.S. 524, 526–27 (1973); Rosales-Lopez v. United States, 451 U.S. 182; Turner v. Murray, 476 U.S. 28 (1986); Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (requiring unanimity in criminal verdicts).

pose—to invalidate the dissenting vote of black jurors.[95] Unfortunately, the promise of Supreme Court precedent to bolster the fairness of the jury process continues to be constrained in impact by narrow judicial constructions. While the law technically prohibits racism in the jury process, racial bias remains a consistent concern.

In *Peña-Rodriguez v. Colorado,* Justice Kennedy emphasized the difficulty in reaching the promise of racial equity in the jury process:

> [R]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy. [96]

Justice Kennedy went on to emphasize the role of courts in mitigating racial bias during the jury process: "[t]he duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system."[97]

Before the jury reaches a verdict, Arkansas courts have broad ability to engage juror racial bias. The *Peña-Rodriguez* decision highlighted the importance of pre-verdict "safeguards" that can help "prevent racial bias in jury deliberations,"[98] including jury selection, jury instructions, and the court's ability to deter, detect, and remediate juror racial bias throughout the trial and jury deliberations.[99] Strategic use of the new jury instructions concerning bias in Arkansas can help interrupt the role of racial bias in civil and criminal litigation.

During the second stage once the jury reaches a verdict, the "no-impeachment rule" codified in the federal and Arkansas Rule of Evidence

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95. *Ramos*, 140 S. Ct. at 1394. Before *Ramos*, Louisiana and Oregon were the two remaining states permitting non-unanimous criminal verdicts. Louisiana's allowance of non-unanimous verdicts was drafted to appear facially race-neutral" yet "ensure that African-American juror service would be meaningless." *Id.* at 1394 (citing State v. Maxie, No. 13–CR–72522 (La. 11th Jud. Dist., Oct. 11, 2018)). Oregon's rule originated with the influence of the Ku Klux Klan and was intended to counteract "the influence of racial, ethnic, and religious minorities on Oregon juries." *Id.* (citing State v. Williams, No. 15–CR–58698 (C. C. Ore., Dec. 15, 2016)).

96. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

97. *Id.* at 867.

98. *Id.* at 871.

99. *See* People v. Shaw, No. 346364, 2020 WL 2296873, at *2 (Mich. Ct. App. May 7, 2020) (removal of juror who made racially-biased remarks during trial).

606 controls and prohibits almost all evidence of juror misconduct. Before 2017, there were limited exceptions to Rule 606's shielding of jury deliberations. Faced with the uncompromising interpretation of the no-impeachment rule, most courts and litigants seeking to avoid the intrusion of racial bias into the jury process have had to rely upon pre-verdict tools, such as a juror willing to admit explicit racial bias during *voir dire*.[100]

In 2017, the Supreme Court in *Peña-Rodriguez* held that Rule 606's no-impeachment mandate must yield to the Sixth Amendment "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant . . . ."[101] The Court was convinced racial bias by jurorshould be treated differently from the traditional Rule 606 exceptions. Racial bias, the Court explained, should be treated "with added precaution."[102] *Peña-Rodriguez* makes clear the Sixth Amendment is violated when a juror acts from overt racial bias.[103]

IV. BEFORE THE VERDICT: ARKANSAS'S NEW JURY INSTRUCTION

Arkansas has adopted a model jury instruction, AMI Crim. 2d 101, to counter a juror's propensity to act from racial bias. Although the *Peña-Rodriguez* decision's lofty goal of mitigating juror racial bias focuses on overt bias, AMI Crim. 2d 101 can be used to mitigate all forms of racial bias. It is rare that a juror will make an overtly racist statement during deliberation, and even rarer that criminal defendants will ever discover evidence of racialized juror decision-making. Indeed, the *Peña-Rodriguez* Court recognized the limits of its decision and emphasized the importance of "standard and existing processes designed to prevent racial bias in jury deliberations."[104] First, the court highlighted the importance of "careful voir dire."[105] Next, the court emphasized the significance of jury instructions concerning racial bias:

> Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continu-

100. *See* United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008), *abrogated by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (juror failed to admit to racial bias during *voir dire* yet made racially biased statements during jury deliberations about Native Americans).

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

102. *Id.*

103. *Id.*

104. *Id.* at 871.

105. *Id.*

> ing developments and are common across jurisdictions. Instructions may emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues.[106]

In other words, model jury instructions counseling jurors to mitigate racial bias throughout the trial should be an integral part of the jury process.

A. AMI Crim. 2d 101

The revised model jury instruction, AMI Crim. 2d 101(d), provides:

> Many of us have biases about, or certain perceptions, or stereotypes of other people. We may be aware of some of our biases, but not fully aware of others. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party, witness, or attorney because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socio-economic status.[107]

AMI Crim. 2d 101(d) is a standard instruction in criminal cases.[108] Arkansas criminal defendants are entitled to a jury instruction when it is a correct statement of law and there is some basis in the evidence to support giving the instruction.[109] The Arkansas Model Criminal Instructions (AMCI 2d.) provide that a trial judge must articulate any reason for refusing to give a model instruction.[110]

Arkansas's adoption of a model criminal jury instruction concerning racial bias is an important, albeit incremental, step towards addressing juror racial bias in criminal sentencing. Courts have been reluctant to educate jurors about racial bias in the absence of a model instruction.[111] Arkansas courts can now use jury instructions to structure the trial with the goal of racial equity, encourage jurors to bring concerns about racial bias to the

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106. *Id.*

107. AMI Crim. 2d 101(d).

108. *Id.*

109. Barnes v. Everett, 351 Ark. 479, 492, 95 S.W.3d 740, 748 (2003). If an Arkansas Model Criminal Instruction (AMCI) contains an instruction applicable in a criminal case, and the trial judge determines that the jury should be instructed on the subject, the AMCI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event, the trial judge will state the reasons for refusing the AMCI instruction.

110. McDaniel Bros. Constr. Co. v. Mid-State Constr. Co., 252 Ark. 1223, 1235, 482 S.W.2d 825, 831 (1972) ("it is the better practice for the court to give [AMI 101] when requested or recite into the record the reasons for not giving it in the unusually exceptional cases when a refusal to give it is justified.")

111. United States v. Graham, 680 F. App'x 489, 492 (8th Cir. 2017) (affirming trial court's denial of an implicit bias instruction); State v. Nesbitt, 308 Kan. 45, 59, 417 P.3d 1058, 1068–69 (2018) (surveying cases).

court's attention before the verdict, and empower jurors to challenge the operation of racial bias in jury deliberation.[112] It also serves to educate other jurisdictions that may not have adopted a model instruction concerning racial bias, and adds to other judicial approaches aimed at mitigating bias in criminal trials.

B. Other Jurisdictional Approaches

Jurisdictions engage in a variety of approaches when addressing racial bias in jury instructions. [113] An early example of the use of jury instructions to mitigate racial bias is that of now-retired judge Mark W. Bennett.[114] In addition to his years of service on the bench, Judge Bennett was a prominent legal scholar in the area of juror bias.[115] He used several measures throughout jury selection and trial to address implicit bias, including jury instructions. After a twenty-five-minute juror orientation about implicit bias,[116] Judge Bennett gave a specialized jury instruction on implicit bias:

> Do not decide the case based on "implicit biases." As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, gen-

112. Arkansas courts have been willing to grant new trials based on jury misconduct when the issue arises before jury deliberation. State v. Cherry, 341 Ark. 924, 928, 20 S.W.3d 354, 357 (2000) (new trial order affirmed when jurors discussed and decided on evidence before juror deliberations, and the hearing on the motion for a new trial focused on discussions occurring prior to formal deliberations); Dimas-Martinez v. State, 2011 Ark. 515, 5–6, 385 S.W.3d 238, 243 (2011) (new trial ordered when one juror slept during trial and another tweeted about the trial).

113. Example jury instructions discussing implicit bias are collected at Appendix B.

114. Judge Bennett sat on the U.S. District Court for the Northern District of Iowa from 1994 – 2019. He now serves as the director of the Institute for Justice Reform & Innovation at Drake University Law School. Judge Bennett's biography is available at https://www.drake.edu/law/clinics-centers/ijri/director/.

115. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010); Kang et al., *Implicit Bias in the Courtroom*, *supra* note 71, at 1182; Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 491 (2014).

116. Kang et al., *Implicit Bias in the Courtroom*, *supra* note 71, at 1181–1182. In addition to jury instructions, Judge Bennett spent about 25 minutes educating the jury about implicit bias through discussion and a video. His jury orientation strategies are discussed *infra* at IV.B.5.

> eralizations, gut feelings, prejudices, sympathies, stereotypes, or biases.[117]

Judge Bennett's instruction accomplished multiple goals by providing education for jurors about implicit bias, and admonishing jurors to avoid racial bias in making decisions.

In 2015, influenced by Judge Bennett and others, the American Bar Association ("ABA") proposed use of an implicit bias jury instruction. The instructions were part of a larger toolbox of resources assembled by the ABA's *Achieving an Impartial Jury: Addressing Bias in* Voir Dire *and Deliberations* project ("AIJ Toolbox").[118] The grant-funded AIJ Toolbox was led by the ABA Criminal Justice Section, the Litigation Section, and an advisory group comprised of social scientists, legal scholars, judges, prosecutors, and defense attorneys.[119] The final Toolbox materials incorporated extensive feedback from pilot projects in three states, information sessions, ABA meetings, individual judges, and bar associations.[120]

The language of the AIJ jury instruction aims to educate jurors about the nature of bias while suggesting strategies to reduce it.[121] After a brief explanation about the operation of implicit bias,[122] the instruction offers several techniques, supported by the empirical research on de-biasing techniques,[123] for jurors to use while evaluating evidence and deliberating. In addition to the proposed jury instructions, the AIJ Toolbox contains a wealth of materials courts can use to mitigate juror bias, including recommended jury orientation materials, an overview of the science of bias, a courtroom checklist offering de-biasing techniques, and an approach for *voir dire*.[124] For each resource, the Toolbox contains extensive references to social science research and other scholarship.

State and federal jurisdictions have taken a variety of approaches in crafting jury instructions to mitigate juror bias. On one end of the spectrum are jury instructions that speak only generally to bias and prejudice or fail to take a methodical approach to mitigating racial bias. For example, many

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117. *Id.* at 1182–83.

118. AMERICAN BAR ASSOCIATION, ACHIEVING AN IMPARTIAL JURY: ADDRESSING BIAS IN VOIR DIRE AND DELIBERATIONS (2015). The AIJ's Toolbox is available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf.

119. *Id.* at 2.

120. *Id.* at n.13. The formal pilot projects were in California, North Carolina, and Washington.

121. *Id.* at 17–20. The full text of the AIJ instruction is at Appendix B.

122. *Id.* at 17–18.

123. *Id.* at n.72 (discussing empirical support for instruction's language).

124. AMERICAN BAR ASSOCIATION, ACHIEVING AN IMPARTIAL JURY: ADDRESSING BIAS IN VOIR DIRE AND DELIBERATIONS 3–4 (2015), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf.

jurisdictions use general admonishments to avoid "bias" or "prejudice" and fail to mention racial bias at all.[125] Arkansas's prior instruction took this path, instructing the jury, "You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case."[126] Some jurisdictions take the incremental step of explicitly mentioning bias on the basis of race within a general admonishment.[127]

In the middle of the spectrum are jurisdictions using bias mitigation instructions in limited, case-specific ways. For example, courts have used race-conscious jury instructions for specific issues, such as instructing jurors to identify potential issues in cross-racial eye-witness testimony,[128] or in evaluating witness credibility.[129] Some courts, including federal courts, include a general admonishment against racial bias in death penalty cases.[130] Other states have racial bias jury instructions only for civil cases.[131]

Finally, on the other end of the spectrum are states with robust model criminal instructions addressing racial bias.[132] These instructions share two

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125. *See, e.g.*, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS, MPJI-CR § 2:04 (jurors are instructed to decide the case "without bias or prejudice" and "not be swayed by sympathy, prejudice, or public opinion."); FIFTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, S1 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 1.01 (2019) ("Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.").

126. Former AMI Crim. 2d 101. Amended 101 retains the prior language and adds more specific language in subsection (d).

127. *See, e.g.,* NORTH DAKOTA PATTERN JURY INSTRUCTIONS – CRIMINAL, ND. J.I. CRIM. § 5.55 ("You should not be prejudiced against or biased for a person for such reasons as race, gender, religion, political views, social views, wealth, or poverty.").

128. *See, e.g.*, FIRST CIRCUIT PATTERN JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT, S1 MODERN FEDERAL JURY INSTRUCTIONS–CRIMINAL § 2.22 (2019) ("You may consider the following in evaluating the accuracy of an eyewitness identification: [risks of cross-racial identification] . . . "); MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY, THIRD EDITION, 1 MD CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 2.57(B) (2019); CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DIST. COURTS – MASS. INSTRUCTION § 9.160 (2015).

129. MICH. MODEL CRIMINAL JURY INSTRUCTIONS § 2.6.

130. 1 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL P § 9A.04 (2019); EIGHTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTION § 12.13; 18 U.S.C. § 3593(f) (requiring court to instruct jury considering death penalty that it may not recommend a sentence of death, "unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be."); *see also* ARIZ. JURY INSTRUCTIONS (CRIMINAL) 5TH CAPITAL CASE § 2.1 (2018); IDAHO CRIMINAL JURY INSTRUCTIONS § 1705; 1 FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (2020).

131. *See* IOWA CIVIL JURY INSTRUCTIONS, SUGGESTIONS FOR INSTRUCTING JURIES; ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL § 1.08 (2019).

132. *See, e.g*. Ninth Circuit Manual of Modern Criminal Jury Instructions, Duty of the Jury, S3 Modern Federal Jury Instructions-Criminal 1.1 (2019) (Ninth Circuit); Preliminary

themes—a broad illustration of the range of bias coupled with a clear directive for jurors to engage in thoughtful decision-making to avoid biased decisions. In Massachusetts, for example, trial judges give the following definition of bias before jury selection:

> Jurors, of course, are expected to bring their own life experiences, thoughts, opinions, beliefs, and common sense to this court and the deliberation room. Everyone, including me, makes assumptions and forms opinions arising from our own personal backgrounds and experiences. These biases or assumptions may have to do with any number of things, including an individual's race, color, nationality, ethnicity, age, disability, socioeconomic status, religious beliefs, gender, or sexual orientation.
>
> Bias, whether it is conscious or subconscious, can affect how we evaluate information and make decisions. It can impact what we see and hear, how we remember what we see and hear, how we make important decisions, and may even cause us to make generalizations or to pre-judge.[133]

Jurors in Massachusetts are cautioned to avoid bias:

> I instruct you that a verdict must not be based on any such bias, including conscious or subconscious bias.
>
> While each of you brings your unique life experience with you to court today, as jurors, you must be alert to recognize whether any potential bias might impact your ability to fairly and impartially evaluate the evidence in this case, follow my instructions, and render a fair and just verdict that is based solely on the evidence presented in this case.[134]

C. The Efficacy of Jury Instructions Concerning Racial Bias

To date, only one study has examined the effectiveness of a specialized racial bias jury instruction, and it focused on implicit bias. Dr. Jennifer K. Elek and Paula Hannaford-Agor at the National Center for State Courts designed a mock trial study examining a specialized implicit bias instruction with three differing factors: race of the defendant, race of the victim, and use

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Instruction, available at https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJury Instructions-ImplicitBias.pdf (W.D. Washington); 1 CALIFORNIA FORMS OF JURY INSTRUCTION § 113 (2020) (California); HAW. CRIMINAL JURY INSTRUCTION §1.01; CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DIST. COURTS – MASS. INSTRUCTION §§ 1.100, 1.120; Pa. SSJI (Crim) § 2.02; Advance Oral Instruction—Beginning of Proceedings, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (4th Ed) (Washington).

133. CR Model Jury Instructions for use in the Dis Cts - Mass Instruction 1.100. A similar instruction is given before opening statements. CR Model Jury Instructions for use in the Dis Cts - Mass Instruction 1.120.

134. *Id.*

of a specialized jury instruction.[135] Elek and Hannaford-Agor found that isolated use of a specialized instruction failed to influence "judgments of guilt, confidence, strength of the prosecution's evidence, or sentence length" based on race.[136] The researchers did find, however, that mock jurors who received the specialized instruction evaluated the strength of the defendant's case differently than those who did not. In the control group, there was a racial disparity when the victim was Black; the defense case was stronger with a Black defendant versus a White defendant.[137] Elek and Hannaford-Agor found the implicit bias instruction "tempered" the racial disparity in mock juror evaluations when the victim was Black.[138] The researchers theorized that the different judgment pattern of juror judgments with regard to strength of the defendant's case could suggest, with further research, that a specialized instruction could influence juror decisions.[139]

Elek and Hannaford-Agor acknowledged an important limitation—the study did not replicate the baseline race bias found in other jury studies, and therefore could not fully evaluate whether an isolated specialized instruction could affect juror bias.[140] Elek and Hannaford-Agor hypothesized that the mock jurors participating in the study may have been influenced by increased societal awareness of racial inequality and implicit bias. The materials to measure the baseline racial bias of the mock jurors were over a decade old, and the study took place in the months preceding the trial of George Zimmerman for the death of Black high-school student Trayvon Martin.[141] Mock jurors may have had an increased sensitivity of racial disparities leading them to "self-correct" during the research study.[142] Elek and Hannaford-Agor cautioned against a conclusion that racial bias among jurors had been solved.[143]

Notably, use of the instruction did not produce a "backlash" effect; white jurors did not punish black defendants more harshly after hearing the instruction.[144] Critiques of discussing racial bias with juries argue it may reinforce racial stereotypes, create resentment in jurors, and result in jurors

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135. *Id.* at 6.

136. JENNIFER K. ELEK & PAULA HANNAFORD-AGOR, NAT'L CTR. FOR STATE. COURTS, CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS? NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION 14 (April 2014).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 15.

141. *Id.* at 16.

142. *Id.* ("The increased salience of race and race norms in routine media communications about the American justice system could have primed participants to spontaneously self-monitor and correct for possible bias.")

143. Elek & Hannaford-Agor, *supra* note 136, at 16.

144. *Id.* at 15.

treating black defendants more harshly.[145] These concerns seem overstated, especially when the jurors have received education on racial bias, strategies for reducing bias, and careful questioning during *voir dire*.[146]

More research is needed on how best to use jury instructions to mitigate juror bias. However, research trends support that the court should engage jurors more deeply with bias mitigating strategies.

D. Suggested Uses for AMI Crim. 2d 101

Jury instructions are an important step in reducing racial disparities in criminal convictions and sentencing. Yet, however expansively crafted, the use of jury instructions alone is not a panacea for juror racial bias. As the National Center for State Courts study by Ekel and Hannaford-Agor found, jury instructions may not be effective in combatting juror bias when used in isolation.[147] Additional research and scholarship suggests that jury instructions are an important, yet incomplete, solution.[148] Indeed, the holding of *Peña-Rodriguez* is predicated on the Court's recognition that existing safeguards, including jury instructions, are important tools yet are insufficient to satisfy the Sixth Amendment's right to an impartial jury.[149]

Put simply, the amendment to AMI Crim. 2d 101 is a start, not a finish. All actors in the criminal trial—judges, defense attorneys, and prosecutors—should unite in achieving a jury process as free from racial bias as possible. Below are recommendations outlining how courts and attorneys in Arkansas can leverage AMI Crim. 2d 101 to mitigate juror racial bias.

1. Take AMI Crim. 2d 101 to the Next Level

The passage of AMI Crim. 2d 101 is a critical measure for Arkansas courts. Arkansas is one of the first states to move towards impartial criminal trials by adopting a jury instruction about racial bias. The instruction is impactful because it is given in every civil and criminal trial, and offers a much more useful illustration of the range of juror bias by educating jurors to avoid "biases," "perceptions," or "stereotypes" based on "disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socio-

145. Jennifer K. Elek and Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190, 192–194 (2013) (surveying literature).

146. *Id.* at 195–197.

147. Elek & Hannaford-Agor, *supra* note 136, at 14.

148. Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias, in* ENHANCING JUSTICE: REDUCING BIAS 292 (Sarah Redfield ed., 2017).

149. 137 S. Ct. 855, 871 (2017).

economic status."[150] The new specificity is an improvement upon the general admonishment to avoid "sympathy, prejudice, or like or dislike" in the prior instruction. Further, the instruction acknowledges, albeit briefly, the operation of unconscious bias: "[w]e may be aware of some of our biases, but not fully aware of others."[151] Additionally, AMI Crim. 2d 101 is given at the beginning of a trial; there is empirical support that jury instructions are more effective when given at the beginning of the trial, rather than waiting until jurors have heard the evidence.[152]

Despite the importance of its amendment, AMI Crim. 2d 101 could go further in helping jurors understand the operation of bias and its deleterious effects. Arkansas is in the middle range of jurisdictional approaches to using jury instructions to mitigate juror racial bias.[153] The instruction could expand its explanation of implicit bias, better assist jurors in connecting the operation of bias to decisions about the case and admonish jurors to take extra care to avoid bias-based decisions.

For example, AMI Crim. 2d 101 needs more specificity to enhance its effectiveness. Judge Bennett's instruction and the instruction used by Massachusetts courts, discussed *supra*, are two examples. The ABA's proposed instruction is another example. The AIJ instruction provides:

> Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.[154]

Both the Ninth Circuit and the U.S. District Court for the Western District of Washington give jurors the following definition before opening statements:

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150. AMC Crim. 2d 101(d).

151. *Id.*

152. AMERICAN BAR ASSOCIATION, *supra* note 118, at 16 (reviewing research); Elizabeth Ingriselli, *Mitigating Jurors' Racial Bias: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1729–1730 (2015) (jury instructions should be given towards the beginning of trial); *see* also Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 ARIZ. ST. L.J. 481, 505–09 (2016) (jurors should be given individual sets of jury instructions in plain language before trial); Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 498 (2006) ("It would be useful for judges to give jurors 'preliminary jury instructions' in which they tell jurors about their role, the case, and the law so that jurors have some framework in which to place the trial that is about to unfold.").

153. *Supra* Section IV.B.

154. AMERICAN BAR ASSOCIATION, *supra* note 118, at 17–18.

> Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.[155]

Washington jurors are given the following instruction before jury selection:

> [In addition to conscious bias], 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.[156]

Another strategy would be to use a specialized jury instruction on implicit bias when race is a factor in the criminal trial. Arkansas courts interested in use of specialized jury instruction can look to the AIJ instruction for guidance. Law Professor Cynthia Lee proposed a "race-switching" jury instruction that may help jurors test their decisions for implicit bias:

> If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.[157]

At least one court has used a specialized instruction based on Professor Lee's model, with the trial judge noting he used a similar exercise during sentencing of any defendant of a different race.[158] Other courts have been

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155. NINTH CIRCUIT MANUAL OF MODERN CRIMINAL JURY INSTRUCTIONS, DUTY OF THE JURY, S3 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 1.1 (2019); W.D. Washington Implicit Bias Instruction, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJury Instructions-ImplicitBias.pdf.

156. ADVANCE ORAL INSTRUCTION—BEGINNING OF PROCEEDINGS, 11 WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC § 1.01 (4th Ed).

157. AMERICAN BAR ASSOCIATION, *supra* note 118, at 21–22.

158. James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, CHAMPION, August 1999, at 22, 24 (describing assault trial of black teen after teen subjected to repeated racialized bullying).

hesitant to use specialized implicit bias instructions.[159] These examples, as well as others in Appendix B., can guide Arkansas courts towards better defining implicit racial bias for jurors.

2. Structure the Jury Process to Value Racial Equity

Arkansas courts should leverage the ideals of *Peña-Rodriguez* and AMI Crim. 2d 101 in structuring criminal trials to mitigate racial bias and maximize the opportunity for racial equity. Below are recommendations for courts and attorneys.

a) Race salience

Making race salient, or illuminating the possible operation of racial bias, can move beyond the bias awareness achieved by jury instructions. The race-salience research suggests that juror awareness of implicit bias is a necessary, but not sufficient, bias-mitigation measure.[160] Some research suggests that White jurors are more conscious of the need to mitigate bias when racial issues are obvious, versus ambiguous, as in racially-charged cases.[161]

In a series of experiments, Samuel Sommers and Phoebe Ellsworth found that racially-salient facts affected decisions in mock jurors.[162] One experiment involved a hypothetical domestic assault trial where a boyfriend slapped his girlfriend in a bar, knocking her down.[163] The researchers provided mock jurors with an identical trial summary with one White boyfriend/Black girlfriend combination and one Black boyfriend/White girlfriend combination.[164] In the race-salient condition, the boyfriend yelled, "you know better than to talk that way about a *White man* (or *Black man*) in front of his friends."[165] In the non-race-salience condition, the boyfriend yelled, you know better than to talk that way about a *man* in front of his friends.[166] In the race-salient fact pattern, the jurors treated the Black and

159. *See* State v. Williams, 929 N.W.2d 621, 632–33 (Iowa 2019) (denying request to use AIJ instruction); State v. Nesbitt, 308 Kan. 45, 49–50, 60 (2018) (upholding denial of request to use race-switching instruction).

160. Lee, *Awareness as a First Step*, *supra* note 148, at 295.

161. Lee, *Making Race Salient*, *supra* note 71, at 1585–87 (discussing research); Lee, *Awareness as a First Step*, *supra* note 143, at 292–95 (same).

162. Lee, *Making Race Salient, supra* note 71, at 1586–89 (citing Sommers & Ellsworth, *supra* note 79, at 201–229).

163. Lee, *Awareness as a First Step*, *supra* note 148, at 293–294.

164. *Id*.; Sommers & Ellsworth, *supra* note 82, at 212.

165. Lee, *Awareness as a First Step, supra* note 148, at 294 (emphasis added).

166. *Id.* (emphasis added).

White defendants equally.[167] In the non-race-salient condition, jurors were more likely to convict the Black defendant.[168]

In another experiment Sommers and Ellsworth gave mock jurors a trial summary of an assault between two high school basketball teammates. [169] As before, they switched the race of the defendants.[170] In the race-salient condition, a witness testified the defendant was "the subject of *racial* remarks and unfair criticism."[171] In the non-race-salient condition, the witness testified the defendant experienced, "*obscene* remarks and unfair criticism."[172] When given the race-salient fact pattern, mock jurors treated the defendants equally.[173] In the non-race-salient condition, jurors were more willing to convict the Black defendant and recommended a harsher sentence.[174]

Courts and attorneys can make race salient during jury selection. In Arkansas, attorneys can ask potential jurors about racial prejudice during *voir dire*.[175] During jury selection, judges can explain AMI Crim. 2d 101 and can reflect on their own bias-mitigation efforts,[176] like retired Judge Bennett, or the judge who spoke to jurors about the race-switching exercise he performs before sentencing. Attorneys can reflect on their own experiences with bias mitigation, or use other examples that discuss racial bias.[177] The W.D. Washington instruction given before jury selection contemplates the use of demonstrative aids by attorneys to talk to jurors about bias.[178] Jury selection is an opportunity to talk about *Peña-Rodriguez* and the need to bring concerns about juror racial bias to the court's attention before the verdict when the court has broad discretion to address such issues.

Jury questionnaires about racial beliefs can both explore racial bias and make race salient.[179] Rule 32.1 of the Arkansas Rules of Criminal Procedure

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167. *Id.*
168. *Id.*
169. Lee, *Awareness as a First Step*, *supra* note 148, at 293.
170. *Id.*
171. *Id.* (emphasis added).
172. *Id.* (emphasis added).
173. *Id.*
174. *Id.*
175. Smith v. State, 33 Ark. App. 52, 53, 800 S.W.2d 440, 441 (1990).
176. Lee, *Making Race Salient*, *supra* note 71, at 1592–93.
177. *Id*. at 1592–94.
178. *Preliminary Instruction,* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASH., https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJury Instructions-ImplicitBias.pdf. (last visited Jul. 12, 2020). Jurors are informed " . . . during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias." (brackets in original).
179. *See* Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1299 (providing sample questions based on *U.S. v. Ortiz*, 315 F.3d 873 (8th Cir. 2002)). The results from the jury questionnaire in *Ortiz* revealed some jurors had "difficulty" with differently-raced persons, would

requires potential jurors to complete a questionnaire seeking the following basic information: (i) age, (ii) marital status, (iii) extent of education, (iv) occupation of juror and spouse, and (v) prior jury service. Upon good cause, potential jurors may be asked for additional information such as racial bias.[180] Courts can move beyond the standard jury questionnaire and ask potential jurors questions aimed at probing racial attitudes and prejudices.[181] Jurors may be more willing to admit to bias in an individual questionnaire, and courts should remove any jurors admitting to racial bias.[182]

The concept of race salience can inform arguments and witness testimony as well. Opening statements can highlight the potential for racial stereotyping.[183] Defense counsel can discuss stereotypes of Black defendants as more criminal, and prosecutors can use race salience during arguments to contextualize a self-defense argument when the victim is Black.[184] A lay witness can discuss pertinent facts about racial bias, or an expert witness can provide insight for the jury about the range of racial bias. [185] To make race salient, courts and attorneys need to move beyond educating about bias to demonstrating how race may affect juror decision-making.

b) Educate Jurors on De-biasing

Research supports the use of checklists as de-biasing technique.[186] The AIJ instruction proposed that jurors use de-biasing techniques supported by social science data:

> Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.

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not want a differently-raced neighbor, or believed certain races to be "more violent." 315 F.3d at 890. In reviewing the questionnaire responses with the jury, the judge asked whether anyone would be "less likely to believe" someone from another race. *Id.* at 890–92. Predictably, no juror was willing to admit to being prone to biased decision-making. *Id.*

180. Ark. R. Crim. P. 32.1.

181. Thompson, *supra* note 179, at 1298.

182. *Id*.

183. Lee, *Making Race Salient, supra* note 71, at 1594.

184. *See id*.

185. An expert witness can testify about the difficulties of cross-racial identification, or the tendency of witness to mistake facts based on race. Unfortunately, courts frequently exclude expert witness testimony about implicit bias. Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 87–88 (2020). Judges have broad discretion to admit expert testimony, and doing would be helpful for the jury in understanding racial bias and making race salient.

186. NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS G7-G9 (2012) (surveying studies), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/246.

- Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.

- Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?

- You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

Working together will help achieve a fair result.[187]

Courts may encourage jurors to take notes,[188] as research demonstrates that jurors "mis-remember" facts.[189] Law professor Justin Levinson's study of mock jurors found that, when given identical facts about an assault only varying the race of the defendant, jurors recalled the black defendant as acting more aggressively.[190] While courts may be concerned about jurors being distracted from the trial, taking notes may help jurors remember facts more accurately and enhance deliberations.

3. Update Arkansas's Jury Education

Jury orientation materials in Arkansas should be updated to better focus on racial bias. A critical way for Arkansas courts to better address juror bias is to update its current jury orientation materials to incorporate AMI Crim. 2d 101 and the Sixth Amendment protections recognized in *Peña-Rodriguez*. There are simple ways to improve juror orientation in Arkansas courts. Language based AMI Crim. 2d 101 can be added to what is currently the "Juror's Web Guide" section of the Arkansas Judiciary's website, cautioning jurors to avoid bias or favoritism on the basis of disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socio-economic status.[191] The language on the website can encourage jurors to

187. AMERICAN BAR ASSOCIATION, *supra* note 118, at 18–19.

188. NATIONAL CENTER FOR STATE COURTS, *supra* note 186, at G8 ("Judges and jurors should take notes as the case progresses so that they are not forced to rely on memory (which is easily biased) when reviewing the evidence and forming a decision.") *citing* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L. J. 345 (2007).

189. Smith, Levinson & Robinson, *supra* note 1, at 901–902.

190. *Id*.

191. Arkansas's "Juror's Web Guide" is available on the Arkansas Judiciary website at https://www.arcourts.gov/jury (last visited Jul. 12, 2020).

bring concerns about juror bias to the court at any point before the verdict, when the court has wide discretion to intervene.[192] The voice-over narration in Arkansas's jury orientation video educates jurors on a range of issues, including juror duties and what to expect during the trial.[193] With some editing, the narration could include a discussion about avoidance of bias. Arkansas could, of course, produce its own video on implicit bias, or add a more robust discussion of racial bias in its current video.

There are jury orientation materials from other jurisdictions are available to guide Arkansas courts. The United States District Court for the Western District of Washington released a brief and informative video entitled, *Understanding the Effects of Unconscious Bias*, to educate potential jurors on implicit bias.[194] The video pairs plain-language explanations about implicit bias with concrete examples—jurors engage in brief exercises to highlight the assumptions and stereotypes they might hold.[195] After the explanation and examples, jurors are given anti-biasing techniques; they are counseled to be aware of the operation of bias, carefully examine decisions, and re-consider their evaluation of the evidence if they notice bias informing conclusions.[196] Lower courts outside the Western District of Washington are beginning to use the video for jury orientation.[197] One court recently described the video as, "a welcome addition to the instructions jurors receive, as evidence supports that greater awareness of unconscious bias likely leads to fairer decisions."[198] Other courts have been hesitant to show the video, but have committed to using de-biasing methods during the trial, such as *voir dire* and jury instructions, to mitigate juror bias.[199]

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192. The Juror's Web Guide contains a wealth of educational resources for jurors about, *inter alia*, jury service, trial procedure, and evaluating evidence. A section on recognizing racial bias, and what to do if a juror believes racial bias is at play, could empower jurors to bring concerns to the judge before the verdict.

193. *Arkansas Jury Service,* ARKANSAS JUDICIARY, https://www.arcourts.gov/jury (last visited Sept. 4, 2020).

194. *Unconscious Bias Juror Video,* UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias. (last visited Jul. 12, 2020) (providing instructions on how to request use of the video are available on the court's website).

195. *Id*.

196. *Id*.

197. *See United States v. Lawrence*, No. 1:18-cr-527 (E.D.N.Y Nov. 6, 2019) (order granting request to show video and noting use of video in the Northern District of California).

198. *Id*. at *2.

199. *See e.g.*, *United States v. Covarrubias*, 2020 U.S.Dist. LEXIS 42496, at *1–2 (D. Nevada, 2020) (denying request to show video used by W.D. Washington but expressing intention to use Ninth Circuit implicit-bias instruction during *voir dire* and throughout the trial); *United States v. Jessamy*, 2020 U.S. Dist. LEXIS 95172, at *15–16 (M.D. Pa 2020) (declining to show video but including implicit bias jury instructions).

The ABA Section of Litigation has produced a video as well – *The Science and Implications of Implicit Bias*.[200] While the ABA video is lengthier at twenty-five minutes, it might be useful in some cases. Another example is Minnesota's recently amended jury handbook and orientation video.[201] While neither reference racial bias explicitly, both caution that human "brains are hardwired to make unconscious decisions."[202] Jurors are then asked to be "self-aware about [] biases" during deliberations.[203]

Arkansas judges can be proactive in educating jurors from the bench about racial bias. Arkansas Circuit Judge Wendell L. Griffen educates jurors in his courtroom on racial bias.[204] While on the bench, now-retired Judge Mark Bennett spent about twenty-five minutes discussing implicit bias with potential jurors.[205] He gave a lengthy explanation of the presumption of innocence and the prosecution's burden of proof.[206] Judge Bennett then played a video demonstrating how racial bias and stereotypes, as well as in-group favoritism, can affect decision-making. [207] The AIJ Toolbox contains several resources for courts in developing bias-reduction jury orientation materials.[208]

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200. *Implicit Bias Initiative,* AMERICAN BAR ASSOCATION, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/ (last visited Jul. 12, 2020).

201. *Jury Handbook*, *All Rise: Jury Service in Minnesota,* MINNESOTA JUDICIAL BRANCH (2019), http://www.mncourts.gov/mncourtsgov/media/scao_library/Jury/Juror-Handbook.pdf (last visited Jul. 12, 2020) [hereinafter *Jury Handbook*]; *Jury Service,* MINNESOTA JUDICIAL BRANCH, http://www.mncourts.gov/Jurors.aspx#tab06Orientation (last visited Jul. 12, 2020) (showing orientation video).

202. *Jury Handbook, supra* note 201, at 9.

203. *Id*.

204. *Unconscious Bias Can Lead to Wrongful Convictions, Local Judge Says*, THV11, February 6, 2020, https://www.thv11.com/article/news/crime/pulaski-county-judge-explains-how-unconscious-bias-can-lead-to-wrongful-convictions/91-fb486f72-3e83-4173-945e-ae0c83cf6237.

205. Kang et al., *Implicit Bias in the Courtroom*, *supra* note 72, at 1182.

206. Bennett, *Manifestations of Implicit Bias in the Courts*, *supra* note 1, at 78–79 (describing explanation).

207. Judge Bennett showed jurors a brief video clip from the ABC show "What Would You Do?" The clip depicts three people attempting to "steal" a bike in a park. The young white male attracts some suspicion, but no one intervenes; despite obvious efforts to break the chain with tools, on-lookers give him the benefit of the doubt. When a young White woman tries to steal the bike, several people stop to help her, even when she jokes about stealing the bike. However, when a young Black man (dressed similarly to the young White man) attempts to steal the bike, an angry crowd gathers. Several people yell, one man decides to take away his tools, and another calls the police. The video offers a powerful portrayal of the role stereotypes play in decision making – the Black man was the only one of the three presumed to be a criminal. The video clip is just under 5 minutes. The video can be found at: VladCantSleep, *What Would You Do? Bike Theft (White Guy, Black Guy, Pretty Girl),* YOUTUBE (May 27, 2010), https://www.youtube.com/watch?v=ge7i60GuNRg.

208. AMERICAN BAR ASSOCIATION, *supra* note 118.

The Western District of Washington has received positive initial feedback on its implicit bias jury orientation efforts. The court surveyed past jurors regarding their reactions to the video and whether it affected their decision-making.[209] Of the 125 jurors who responded, the majority reported a low level of knowledge about implicit bias before the video.[210] About 30% reported being "not familiar at all" while 31% reported being "somewhat familiar" with implicit bias.[211] Ninety-two percent of the jurors found the video "educational on the concept of implicit bias."[212] Approximately 38% reported it influenced, apparently in a positive way, the way the jurors answered questions during jury selection.[213] Fifty-one percent reported that the video influenced how they considered testimony and evidence during deliberation, with a few jurors commenting "I gave everything a second thought," and "maintained [an] open mind."[214] Sixty-six percent of jurors surveyed rejected the idea that that video influenced their decision-making.[215] Educating jurors about racial bias may have a positive impact beyond the courtroom – an overwhelming 98% of jurors surveyed recommended continued use of the video.[216] Jury education materials, combined with enhanced jury education materials, may have educational and societal benefits beyond the courtroom.

V. AFTER THE VERDICT: EVIDENCE OF JUROR BIAS DURING DELIBERATIONS

Even when jurors have the benefit of jury instructions concerning racial bias, a trial structured to mitigate bias, and focused jury education about bias, some jurors will bring racial bias into juror deliberations. As discussed above, each actor in the criminal justice system acts from some level of ra-

209. Memorandum from Jeff Humenik, Jury Administrator, to Judge John C. Coughenour, *Summary Report – Implicit Bias Questionnaire for Jurors*, (Apr. 16, 2019), https://civiljuryproject.law.nyu.edu/wp-content/uploads/2019/04/Implicit-Bias-Summary-Report-Judge-Coughenour.pdf.

210. *Id*. The jury administrator provided "notable comments" from the questionnaire. While jurors offered criticism in other areas (e,g. the video needed "concrete visual examples," "was a bit dull," and was "weak"), juror comments about the impact on jury instruction were positive. *Id.* Jurors stated the video helped "understand" bias, was a "good refresher," served as a reminder to evaluate "internal reactions/feelings" and be "more conscious of my biases" during jury selection. *Id.*

211. *Id*.

212. *Id*. A few jurors commented that the video should have provided more, not less, information about implicit bias.

213. *Id*.

214. *Id*.

215. *See* Humenik, *supra* note 209. This sentiment is not surprising given societal unwillingness to admit bias and individual overestimation of objectivity. Rachlinksi, *supra* note 4.

216. *Id*.

cial bias. It is not surprising that isolating and divorcing racial prejudice and favoritism from juror decision-making has been a challenge.

To understand the significance of the *Peña-Rodriguez* decision, it is useful to examine the history of the no-impeachment rule. Common law courts were staunchly protective of discussions during jury deliberation. English courts forbade jurors from testifying about their jury verdict. In 1785, influential Judge Lord Mansfield excluded juror testimony that the jury decided the case based on a coin toss.[217] American courts adopted the "Mansfield Rule" and excluded juror testimony on both "subjective mental processes" and "objective events" occurring during deliberations.[218] Some jurisdictions adopted the "Iowa rule," a more flexible approach that allowed a juror to testify about objective events during deliberations since those events could be corroborated by other jurors.[219] While less protective than the Mansfield rule, the Iowa rule still excluded testimony about a juror's subjective thought process.[220] Federal courts later recognized an exception for testimony about extraneous information during deliberations, such as the use of newspaper articles.[221] Federal Rule 606 was part of the original codification of the Federal Rules of Evidence in 1975.[222]

In passing Federal Rule 606, Congress rejected the Iowa rule, effectively codifying the common-law "no impeachment" rule with limited exceptions. When evaluating "the validity of a verdict or indictment," Federal Rule 606 prohibits the consideration of almost all evidence (be it from a juror's testimony, affidavit, or other "evidence of a juror's statement") of what occurred during a jury's deliberations.[223] Specifically, "a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[224] Post-verdict, the no-impeachment rule in Rule 606 places a "black box" over jury deliberations: "[j]uries provide no reasons, only verdicts."[225]

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217. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). For history of the common law rule, *see* Andrew J. Hull, *Unearthing Mansfield's Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of the Common Law Tradition*, 38 S. Ill. U. L.J. 403, 409 (2014).

218. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017). *See* Michael Heister, *State v. Cherry: The Lone Juror Forces Arkansas to Confront Pre-Delibrative Juror Misconduct and Rule of Evidence 606(b),* 54 Ark. L. Rev. 823, 827–28 (2002).

219. Peña-Rodriguez, 137 S. Ct. at 863.

220. *Id*.

221. *Id*.

222. Federal Rules of Evidence, Pub. L. No. 93–595, 88 Stat 1926, 1934 (1975).

223. FED. R. EVID. 606(b).

224. *Id*.

225. United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008), *abrogated by* Peña-Rodriguez, 137 S. Ct. 855.

Prior to the adoption of what is now Arkansas Rule 606, Arkansas precedent closely aligned with the common law's shielding of jury deliberations.[226] The Arkansas Supreme Court formally adopted the Uniform Rules of Evidence, including Rule 606, in 1986, although it had been in use as part of the Uniform Rules of Evidence since 1976.[227] While the text of Arkansas Rule of Evidence 606(b) and Federal Rule of Evidence 606(b) differ slightly, the content is substantially similar.[228] Arkansas courts have often looked to federal precedent in construing Arkansas Rule 606.[229]

There are few circumstances where evidence of jury deliberations can be used to impeach a jury verdict.[230] Federal Rule 606 articulates three narrow exceptions to Federal Rule 606's broad protection of jury deliberations; a juror may testify about: (1) extraneous prejudicial information, (2) improper outside influences, and (3) a mistake made in entering the verdict form.[231] Arkansas Rule 606 similarly recognizes exceptions for extraneous information and outside influences.[232] Additionally, Arkansas Code § 16-89-130(c)(3) allows granting of a new trial when a jury verdict has been decided by lot.[233] Even when there is extraneous evidence or outside influence, courts will examine whether there is prejudice before granting a new trial.

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226. Heister, *supra* note 218, at 828 ("Arkansas statutes and case law relating to the impeachment of jury verdicts have not significantly changed since 1947").

227. Ricarte v. State, 290 Ark. 100, 103–04, 717 S.W.2d 488, 489 (1986). The Arkansas legislature adopted the Uniform Rules of Evidence in January 1976, but the *Ricarte* court held the January 1976 session was an unconstitutional extension of a prior legislative session and adopted the Uniform Rules of Evidence under the court's rule-making power. *Id*. at 103.

228. *See* Witherspoon v. State, 322 Ark. 376, 382, 909 S.W.2d 314, 317 (1995) (describing Ark. R. Evid. 606(b) and Fed. R. Evid. 606(b) as "nearly identical"). The current text of Arkansas Rule 606 almost exactly matches the 2005 version of Federal Rule 606. While Arkansas Rule 606(b) does not incorporate the 2006 amendment to Fed. R. Evid. 606, which added an exception for a mistake on the verdict form, a mistake on a jury form is grounds for a new trial under AR Code § 16-89-130 (2012). Additionally, Ark. Rule 606(b) does not reflect the 2011 "restyling" of the Federal Rules of Evidence, meant to clarify the text of the rules and not change the substance.

229. Heister, *supra* note 218, at n. 52 (citing as examples *Davis v. State*, 330 Ark. 501, 511, 956 S.W.2d 163, 168 (1997) (Eighth Circuit); Watkins v. Taylor Seed Farm, Inc., 295 Ark. 291, 293, 748 S.W.2d 143, 144 (1988) (comparing Arkansas rule and federal rule and citing to legislative history of Federal Rule 606); B. & J. Byers Trucking, Inc. v. Robinson, 281 Ark. 442, 447–48, 665 S.W.2d 258, 262 (1984) (citing to Federal Rule 606's legislative history)).

230. ARK. R. EVID. 606. This rule only applies to jurors; non-juror testimony, such as from the court, court personnel, or the parties' attorneys, can provide evidence of juror racial bias after a verdict.

231. FED. R. EVID. 606.

232. ARK. R. EVID. 606.

233. ARK. CODE ANN. § 16-89-130 (2012).

Arkansas courts have routinely shielded evidence of extraneous information absent a showing of prejudice.[234]

Several ideals undergird the protection Rule 606 affords jury deliberation. In short, "[t]he rule gives stability and finality to verdicts."[235] The no-impeachment doctrine encourages the frank and open discussions jurors need during deliberation to make hard, and sometimes unpopular, decisions.[236] The protections of the rule assure jurors that they will not be summoned back to the court to discuss deliberation.[237] Finally, the no-impeachment rule avoids juror harassment after the verdict; attorneys representing disgruntled litigants cannot seek out evidence of conversations during jury deliberation to attack the verdict.[238] The Arkansas Supreme Court has observed the goal of Rule 606 is to, "balance the freedom of secret jury deliberations with the ability to correct an irregularity in those deliberations."[239]

Two Supreme Court decisions prior to *Peña-Rodriguez* demonstrate the wide breadth of the no-impeachment doctrine. In *Tanner v. United States*, the Supreme Court found no violation of the Sixth Amendment when jurors fell asleep during parts of the criminal trial, consumed alcohol at recess and seemed intoxicated, and ingested marijuana and cocaine.[240] One juror provided a sworn interview that he felt "the jury was one big party."[241]

In rejecting the former juror's evidence of jury deliberations, the court in *Tanner* found that juror intoxication is not an "outside influence" under Federal Rule 606.[242] The criminal defendants' Sixth Amendment rights, rea-

234. *Compare* Borden v. St. Louis Sw. Ry. Co., 287 Ark. 316, 320, 698 S.W.2d 795, 797 (1985) (finding prejudice when two jurors visited scene and described scene to other jurors during deliberation), and Sunrise Enterprises, Inc. v. Mid-S. Rd. Builders, Inc., 337 Ark. 6, 11, 987 S.W.2d 674, 677 (1999) (finding prejudice when a juror brought extraneous legal material that was examined and discussed during deliberations) *with* B. & J. Byers Trucking, Inc. v. Robinson, 281 Ark. 442, 448, 665 S.W.2d 258, 262 (1984) (finding that extraneous information provided by juror who visited scene that was "a public highway that was open to inspection" was not prejudicial), Safeco Ins. Co. of Illinois v. S. Farm Bureau Cas. Ins. Co., 2013 Ark. App. 696, 13, 430 S.W.3d 815, 824 (2013) (finding that a juror's google search of the meaning "intentional act" during jury deliberations in insurance action was extraneous information but not prejudicial), and Finch v. State, 2018 Ark. 111, 10, 542 S.W.3d 143, 149 (2018) (finding no prejudice when juror looked up phrase "hung jury" on mobile phone during deliberations).

235. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 865 (2017).

236. *Id.* (stating Rule 606 "promotes full and vigorous discussion" among jurors); Tanner v. United States, 483 U.S. 107, 120 (1987).

237. Peña-Rodriguez*,* 137 S. Ct. at 865.

238. *Id*. *See also* McDonald v. Pless, 238 U.S. 264, 267 (1915) (holding that the no-impeachment doctrine prevents harassment).

239. Finch, 2018 Ark. at 12., 542 S.W.3d at 148.

240. Tanner, 483 U.S. at 115–17.

241. *Id*.

242. *Id*. at 125.

soned the court, were protected by several pre-verdict safeguards.[243] First, attorneys and the court can examine potential jurors during *voir dire* about racial bias.[244] Second, jurors are subject to observation before the verdict by the trial judge, court personnel, and the parties.[245] Third, jurors can articulate concerns, including about a fellow juror's racial bias, to the court before the verdict.[246] Finally, after the verdict, non-juror evidence of any misconduct is admissible to impeach the verdict. While the *Tanner* court acknowledged the tension between Rule 606's deference to jury deliberation and the defendant's right to an impartial jury under the Sixth Amendment, the court in *Tanner* remained concerned that allowing juror-provided evidence of deliberations would be too "intrusive" and cripple the jury system:

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it.[247]

The second Supreme Court case articulating the breadth of the no-impeachment doctrine, *Warger v. Shauers*, was a civil negligence action arising out of an accident between a motorcyclist and a truck driver.[248] During jury selection in *Warger*, plaintiff's counsel asked about awarding damages for pain and suffering, and whether any juror agreed with the statement: "I don't think I could be a fair and impartial juror on this kind of case."[249] The juror at issue, who served as the jury's foreperson, answered no, expressing that she could be impartial.[250] The jury found in favor of the defendant.[251] One of the jurors contacted plaintiff's counsel to express concern about the foreperson's statement during deliberations. In the jury room, the foreperson revealed her daughter had been at fault in a car accident, and it would have "ruined her daughter's life" had she been sued.[252] Plaintiff moved for a new trial, arguing that the foreperson "deliberately lied during *voir dire* about her impartiality and ability to award damages."[253] In rejecting an exception to the no-impeachment rule for failure to disclose pro-

243. *Id*. at 127.
244. *Id*.
245. *Id*.
246. Tanner v. United States, 483 U.S. 107, 127 (1987).
247. *Id.* at 115–17.
248. Warger v. Shauers, 574 U.S. 40, 42 (2014).
249. *Id*. at 42–43.
250. *Id.*
251. *Id.*
252. *Id*.
253. *Id*.

defendant bias during jury selection, the *Warger* court re-affirmed the restrictive nature of Rule 606.[254]

Before *Peña-Rodriguez*, federal circuits had split on whether to recognize a racial-bias exception to Rule 606.[255] [256] A minority of states also recognized an exception to the no-impeachment rule for juror statements demonstrating racial bias, or that racially biased statements during jury deliberations violated the Sixth Amendment.[257] For example, in *United States v. Benally*, a juror made several biased statements against Native Americans, including, "[w]hen Indians get alcohol, they all get drunk" and become violent.[258] Other jurors expressed the desire to "send a message back to the res-

254. Warger, 574 U.S. at 45.

255. *Compare* United States v. Villar, 586 F.3d 76 (1st. Cir. 2009) (recognizing racial bias exception and remanding for further findings), United States v. Henley, 238 F.3d 1111, 1122 (9th Cir. 2001) (during habeas challenge, finding line of cases recognizing a racial bias exception "persuasive" and remanding for further findings) *and* Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (analyzing "whether prejudice pervaded the jury room" despite no-impeachment bar) *with* United States v. Benally, 546 F.3d 1230 (10th Cir. 2008) (holding that racially-biased statements by juror did not violated the Sixth Amendment nor warrant an exception to the no-impeachment bar) *and* Williams v. Price, 343 F.3d 223, 233 (3d Cir. 2003), *abrogated by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (rejecting racial-bias exception in denying habeas).

256. This Article focuses on *Peña-Rodriguez*'s conclusion that statements of juror racial bias violate the Sixth Amendment and therefore necessitate a departure from the no-impeachment rule. The *Peña -Rodriguez* decision is often cited as recognizing an "exception" to Rule 606. Prior to *Peña -Rodriguez*, courts deployed a variety of analytical frameworks to evaluate statements of juror bias, including questioning whether racial bias can fit within Rule 606's existing exceptions for extraneous evidence or outside influence. An evaluation of this history is outside the scope of this Article.

257. The *Peña -Rodriguez* court listed sixteen jurisdictions (eleven of which follow Federal Rule 606) recognizing a racial bias exception to the no-impeachment rule prior to its decision—Connecticut, Delaware, Florida, Georgia, Hawai'i, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Carolina, Washington, Wisconsin, and the U.S. District Court for the District of Columbia. 137 S. Ct. 855, 865 (2017)., (Appendix to majority opinion) (*citing* State v. Santiago, 245 Conn. 301, 323–340, 715 A.2d 1, 14–22 (1998); Kittle v. United States, 65 A.3d 1144, 1154–1156 (D.C. 2013); Fisher v. State, 690 A.2d 917, 919–921, and n. 4 (Del. 1996) (Appendix to opinion), Powell v. Allstate Ins. Co., 652 So.2d 354, 357–358 (Fla.1995); Spencer v. State, 260 Ga. 640, 643–644, 398 S.E.2d 179, 184–185 (1990); State v. Jackson, 81 Hawai'i 39, 48–49, 912 P.2d 71, 80–81 (1996); Commonwealth v. Laguer, 410 Mass. 89, 97–98, 571 N.E.2d 371, 376 (1991); State v. Callender, 297 N.W.2d 744, 746 (Minn.1980); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87–90 (Mo.2010); State v. Levitt, 36 N.J. 266, 271–273, 176 A.2d 465, 467–468 (1961); People v. Rukaj, 123 App.Div.2d 277, 280–281, 506 N.Y.S.2d 677, 679–680 (1986); State v. Hidanovic, 2008 ND 66, ¶¶ 21–26, 747 N.W.2d 463, 472–474; State v. Brown, 62 A.3d 1099, 1110 (R.I.2013); State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995); Seattle v. Jackson, 70 Wash.2d 733, 738, 425 P.2d 385, 389 (1967); After Hour Welding, Inc. v. Laneil Mgmt. Co., 108 Wis.2d 734, 739–740, 324 N.W.2d 686, 690 (1982)).

258. Benally, 546 F.3d at 1231 (brackets in original).

ervation."[259] Relying on *Tanner*, the Tenth Circuit court rejected a racial-bias exception to Rule 606, and found *Tanner*'s endorsement of pre-verdict protections sufficient to satisfy the Sixth Amendment.[260]

The First Circuit rejected the *Benally* court's approach in *United States v. Villar*, finding a defendant's right to an impartial jury under the Sixth Amendment mandated an exception to the no-impeachment rule when a juror acts from racial bias.[261] In *Villlar*, which involved the trial of a Hispanic defendant, a juror alleged in an email to defense counsel that the majority of the jury failed to consider the evidence and did not pay attention during trial.[262] One juror stated, "I guess we're profiling but they cause all the trouble."[263] While the trial judge found the juror's biased statement "reprehensible," the judge believed precedent prohibited intrusion into the juror's statements.[264] The First Circuit remanded, finding the no-impeachment rule must yield to a defendant's constitutional right to an impartial jury when racial bias may have affected a juror's vote to convict.[265] The *Villar* court was skeptical that the *Tanner* pre-verdict protections provided "adequate safeguards" against juror racial bias.[266]

A. The *Peña-Rodriguez* Decision

The Supreme Court resolved the jurisdiction split in *Peña-Rodriguez v. Colorado*, when it recognized that juror statements made during jury deliberations that indicate a reliance on racial stereotypes or racial animus violate the Sixth Amendment.[267] *Peña-Rodriguez* involved a sexual assault trial with a Hispanic defendant. During jury selection, potential jurors responded to a written questionnaire asking them to identify, "anything about you that you feel would make it difficult for you to be a fair juror."[268] The court asked the jurors a similar question, and encouraged the potential jurors to raise concerns about impartiality privately with the court.[269] Defense counsel also inquired about impartiality.[270] None of the jurors articulated concerns about impartiality or racial bias.[271] None asked to speak with the court.[272]

259. *Id*.
260. *Id*. at 1239–40.
261. United States v. Villar, 586 F.3d 76, 87 (1st. Cir. 2009).
262. *Id*. at 81.
263. *Id*.
264. *Id*.
265. *Id*. at 87.
266. *Id*.
267. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 879 (2017).
268. *Id*. at 861.
269. *Id*.
270. *Id*.
271. *Id*.

The jury found Peña-Rodriguez guilty of unlawful sexual contact and harassment.[273]

After the jury was discharged, two jurors remained in the jury room to speak with defense counsel in private.[274] Both jurors reported that another juror, H.C., expressed "anti-Hispanic bias"[275] towards Peña-Rodriguez and one of the defense witnesses.[276] The jurors then provided sworn affidavits describing H.C.'s statements during deliberations.[277] According to the affidavits, H.C. stated he "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."[278] H.C described Mexican men as "physically controlling of women," and having a "sense of entitlement."[279] He also stated, "I think he did it because he's Mexican and Mexican men take whatever they want," and "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[280] Despite the defense's alibi witness testifying that he was a legal resident of the United States, H.C. discounted the witness's testimony because he was "an illegal."[281]

Relying on Colorado's version of Rule 606(b), the trial court denied Peña-Rodriguez's motion for a new trial.[282] The Colorado Court of Appeals and Colorado Supreme Court affirmed the trial court's denial of a new trial.[283] Eleven states, including Arkansas, joined an amicus brief opposing a racial bias exception.[284] Citing *Tanner* and *Warger*, the Colorado Supreme Court affirmed, finding no "dividing line between types of juror bias or mis-

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272. *Id*.

273. Peña-Rodriguez, 137 S. Ct. at 861. Peña-Rodriguez was also charged with attempted sexual assault on a child; the jury did not reach a verdict on the sexual assault charge.

274. *Id*.

275. *Id.* at 861–63. The Court engaged in a brief discussion about whether the anti-Hispanic bias against Peña-Rodriguez should be evaluated based on race or ethnicity. In deciding to treat juror H.C.'s statements as "racial bias," the Court noted the parties referred to both racial and ethnic bias as an "expansive concept" in the briefing. The Court cited prior precedent, including *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013), in support of treating Hispanic ethnicity in the same way as race under the equal protection clause of the Constitution.

276. *Peña-Rodriguez,* 137 S. Ct. at 861.

277. *Id*.

278. *Id*. at 862 (brackets in original).

279. *Id*.

280. *Id*.

281. *Id*.

282. *Peña-Rodriguez,* 137 S. Ct. at 862.

283. *Id*.

284. Brief for Indiana, Alabama, Arkansas, Georgia, Idaho, Louisiana, Maine, Nevada, Pennsylvania, South Dakota, Texas, and Wyoming as Amici Curiae, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 4709482.

conduct."[285] The United States Supreme Court granted *certiori* to decide "whether there is a constitutional exception to the no-impeachment rule for instances of racial bias."

Colorado and the amici states made three basic arguments against an exception to Rule 606(b) for juror statements of racial bias. The first argument was that a racial bias exception would create ambiguity and open the door to other types of bias. The Colorado Supreme Court's opinion typifies this view, voicing skepticism that there exists a "dividing line between types of juror bias or misconduct." Second, Colorado and the amici states asserted the traditional justifications for the no-impeachment rule – Rule 606(b) provides finality to verdicts, encourages open discussions among jurors, and prevents juror harassment. Finally, citing *Tanner*, Colorado and the amici states argued that the existing procedural safeguards, such as jury selection and the ability of jurors to report concerns before the verdict, were sufficient to guard against racial bias.

Writing for the majority, Justice Kennedy disagreed, holding the Sixth Amendment is violated "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant . . . ." The court articulated a two-part test. First, the juror's statement must show "overt racial bias." Second, "racial animus" must have been a "significant motivating factor" in the juror's vote to convict. Thus, *Peña-Rodriguez* created a racial bias exception, mandated by the Sixth Amendment, to Rule 606's no-impeachment rule.[286]

In refuting the arguments against a racial bias exception, Justice Kennedy repeatedly emphasized that racial bias and discrimination are different, structural and insidious when compared to other forms of juror misconduct protected by Rule 606. Racial bias is a "familiar and recurring evil" that implicates "unique historical, constitutional, and institutional concerns."[287] Racial prejudice is "odious in all aspects" and is "especially pernicious" in disrupting the justice system.[288] Finally, racial bias is "distinct," and "pos[es] a particular threat both to the promise of the [Sixth and Fourteenth] Amendment[s] and to the integrity of the jury trial."[289] Courts, Justice Kennedy reasoned, should treat juror racial bias with "added precaution."[290]

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285. *Id*.

286. The Advisory Committee on Evidence Rules declined to amend Rule 606(b) in response to *Peña-Rodriguez*. Memorandum from Hon. David G. Campbell, Chair of committee on Rules of Practice and Procedure to Hon. Debra Ann Livingston, Chair of Advisory Committee on Evidence Rules (May 14, 2018), https://www.uscourts.gov/sites/default/files/ev_report_1.pdf.

287. Peña-Rodriguez, 137 S. Ct. at 859.

288. *Id.*

289. *Id*. at 867.

290. *Id*. at 859.

The court carefully distinguished the structural operation of racial bias from what it called "anomalous" juror misconduct in *Tanner* and *Warger*.[291] The court acknowledged the problematic nature of juror alcohol and drug use, as was the case in *Tanner*. However, the Court was unconvinced juror "mischief" was a common occurrence.[292] In distinguishing a juror's racial bias from prior precedent excluding juror evidence of misconduct, the Court explained,

> The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, and neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny.[293]

Recognizing a racial bias exception, the court reasoned, would not eviscerate the protections of the no-impeachment rule.[294]

The *Peña-Rodriguez* holding aligned with the First Circuit's holding in *Villar*, finding the procedural safeguards idealized by *Tanner* and *Warger* were sufficient to prevent racism during jury deliberations. General questions about impartiality during *voir dire* are inadequate to expose "specific attitudes or biases that can poison" jury deliberations, while specific questions may exacerbate prejudice.[295] None of the jurors in *Peña-Rodriguez* reported racial bias during jury selection.[296] Similarly, in *Benally*, the trial judge asked two questions concerning potential racial bias, yet none of the *Benally* jurors reported bias.[297] Juror racial bias is usually not obvious to non-jurors such as judges, court personnel, parties, and attorneys observing juror behavior before the verdict.[298] Finally, the *Peña-Rodriguez* court found it unlikely that a juror would report a concern about another juror's racial bias before the verdict.[299] Reporting a concern about racial bias during trial

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291. *Id.* at 868.

292. *Id.*

293. Peña-Rodriguez*,* 137 S. Ct at 868 (citing *Tanner v. United States*, 483 U.S. 107, 120 (1987)) (other citations omitted).

294. *Id.* at 869.

295. *Id.*

296. *Id.*

297. United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008), *abrogated by* Pena Rodriguez, 137 S. Ct. 855 (2017). During voir dire, the trial judge in *Benally* asked, "[w]ould the fact that the defendant is a Native American affect your evaluation of the case?" and "[h]ave you ever had a negative experience with any individuals of Native American descent? And, if so, would that experience affect your evaluation of the facts of this case?"

298. Peña-Rodriguez, 137 S. Ct. at 868–869.

299. *Id*. at 869.

is difficult for a juror—stigma makes it difficult to call a fellow juror a "bigot."[300]

B. Recommendations for Leveraging *Peña-Rodriguez*[301]

The *Peña-Rodriguez* case has yet to be analyzed by Arkansas state courts or the Eighth Circuit. Below are recommendations for how to leverage *Peña-Rodriguez* in the effort to remediate the racial disparity in Arkansas criminal sentencing.

1. Recognize How Bias Degrades Jury Deliberations

The *Peña-Rodriguez* court left open the question of what types of statements satisfy the "overt racial bias" standard: "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[302] The Court's failure to distinguish between which types of statements demonstrate "overt racial bias" and which are considered "offhand comments," has created doctrinal confusion in the lower courts. Scholarship analyzing court decisions in the wake of *Peña-Rodriguez* has been critical of the void left by the Supreme Court and the inconsistent treatment by the lower courts.[303] One scholar commented that the recognition of a racial-bias exception is, "long overdue but also frustratingly incomplete."[304]

Some courts are affirming lower court judgments about the range of racial bias due to the deferential abuse of discretion standard.[305] Other courts are construing *Peña-Rodriguez* broadly, recognizing that overt statements include juror statements that rely on negative stereotypes based on race. For example, in *United States v. Smith*, the defendant's conviction was overturned because juror stated, "[y]ou know he's just a banger from the hood,

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300. *Id*.

301. The Author's recommendations focus on how courts may interpret the *Peña-Rodriguez* decision and engage in investigating a claim of juror racial bias. Beyond the scope of these recommendations are very important considerations that relate to post-conviction procedures in Arkansas, such as the narrow scope of a post-conviction remedy, the short time limits for seeking review, and the limited access to counsel in Ark. R. Crim. P. 37.1 – 37.5. Future scholarship can explore these considerations.

302. Peña-Rodriguez, 137 S. Ct. at 869.

303. R. Jannell Granger, *Justice for All: The Sixth Amendment Mandates Purging All Racial Prejudice From the Black Box*, 63 HOW. L. J. 57, 75 (2019) ("Courts cannot agree on what racist statements are racist enough to violate the Constitution's requirement of an impartial jury.")

304. Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 321 (2019).

305. *See Id*. at 329–331.

so he's got to be guilty."[306] The court found that "banger from the hood" was a racial stereotype.[307] Courts applying *Peña-Rodriguez* have also struggled with whether racially-biased juror statements were prejudicial.[308] In reality, it is unclear how broadly or narrowly lower courts are applying *Peña-Rodriguez* since most new trial motions are rarely published or reviewed.[309]

Peña-Rodriguez offered little guidance on how courts should determine when a racially-biased juror statement becomes a "significant motivating factor" in a juror's decision to convict.[310] The Supreme Court left the determination to the discretion of trial court judges:

> Whether [the significant motivating factor] threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.[311]

The Sixth Circuit provides a cautionary tale of narrowly defining when racial bias motivates a juror's vote. *United States v. Robinson* involved the trial of three black defendants in 2015, before the *Peña-Rodriguez* decision.[312] After the guilty verdict, the trial judge admonished the attorneys not to contact any jurors. However, defense counsel suspected there had been racial tension during deliberations.[313] The attorneys hired an investigator to interview the two Black jurors, who confirmed the racially-charged nature of the deliberations.[314] Apparently, the Black jurors had a conflict between the jury forewoman, a White woman.[315] Court personnel intervened twice in the racialized disputes during deliberations.[316] Hours after the confrontation,

306. United States v. Smith, No. 12-183, 2018 WL 1924454, at *11 (D. Minn. 2018).

307. *Id.* at *30.

308. *See, e.g.*, Williams v. Price, No. 2:98cv1320, 2017 WL 6729978, at *16–26 (W.D. Pa. 2017) (finding that a juror using the N-word during deliberations insufficient to find prejudice to defendant).

309. *See, e.g.* State v. Hills, No. 2019 KW 0466, 2019 WL 3024107 (La. Ct. App. Jul. 9, 2019) (unpublished case holding that the trial court abused its discretion in granting a new trial after a juror made allegations of racial bias).

310. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

311. *Id*.

312. United States v. Robinson, 872 F.3d 760 (6th Cir. 2017).

313. *Id*. at 767–68.

314. *Id*. at 768.

315. *Id*. The Black jurors alleged that on the last day of deliberations, the jury forewoman, a White woman, accused the women of "trying to hang" the jury. *Id*. The forewoman stated she found it, "strange that the colored women are the only two that can't see" the defendants were guilty. *Id*. Angry at the forewoman's racial remark, the three got in a "verbal confrontation," requiring the intervention of the court marshal. *Id*. While the forewoman purported to apologize, she later expressed her belief that the Black women jurors felt they "owed something" to their "[B]lack brothers," resulting in another confrontation, and another intervention by court personnel. *Id*.

316. *Id*.

the jury found the defendants guilty.[317] Despite the racial tension, both Black jurors affirmed their decision to convict in the interview with the investigator.[318] Without interviewing the White forewoman, or other jurors witnessing the racial tension, the trial court denied defendants' motion for a new trial.[319]

The Sixth Circuit analyzed *Peña-Rodriguez* and concluded, despite the trial court's failure to hold a hearing, that the jury forewoman's statements did not evidence that racial animus motivated her decision to convict.[320] While the *Robinson* court conceded the forewoman's comments "clearly indicated racial bias," the court made a dubious distinction between the racial hostility directed at Black jurors, versus racial bias directed at the Black defendants.[321] The Robinson court took an unduly narrow (and strikingly superficial) view of the forewoman's conduct, one that contravenes the very spirit of *Peña-Rodriguez*.

Arkansas courts should recognize the broad and deleterious impact of any racially biased statement during jury deliberations. While Arkansas has yet to apply *Peña-Rodriguez,* the Arkansas Supreme Court's decision in *State v. Cherry* can provide guidance.[322] In *Cherry*, an alternate juror overheard other jurors discussing the trial during breaks, and reported that some of the jurors had "made up their minds" before deliberations.[323] The trial court granted a new trial, and the state appealed, arguing in part that the discussions during trial were not prejudicial.[324]

The Arkansas Supreme Court affirmed the trial court, holding an Arkansas defendant is not "required to demonstrate exactly how he was prejudiced; rather, he only needed to prove that there was a reasonable possibility of prejudice."[325] A "reasonable possibility of prejudice" exists when a juror makes a decision before deliberations:

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317. *Id*.
318. *Robinson*, 872 F.3d at 768–769.
319. *Id.* at 767.
320. *Id*. at 767–68, 772. *See also* Commonwealth v. Rosenthal, 2020 Pa. Super. 136, *4 (June 8, 2020) (holding that the trial court did not abuse discretion in denying motion for a new trial without a hearing when Juror offered testimony about racially-biased remarks of other groups) (" . . . Juror Number 5 do not 'show that racial animus was a significant motivating factor in the juror[s'] vote to convict.'")
321. *Id.* at 771.
322. State v. Cherry, 341 Ark. 924, 931, 20 S.W.3d 354, 359 (2000).
323. *Id*. at 927, 20 S.W.3d at 356.
324. *Id*. at 928, 20 S.W.3d at 357.
325. *Id.* at 931, 20 S.W.3d at 359.

> For even one juror to prematurely decide a defendant's guilt before hearing all the evidence and being instructed on the law, deprives that criminal defendant of his right to a fair and impartial jury.[326]

Cherry is factually distinct from *Peña-Rodriguez* – the juror comments were before trial and did not concern racial bias. However, the logical extension of *Cherry* is that evidence of "even one juror" prejudging a result based on biased views and not evidence creates a "reasonable possibility of prejudice."[327]

Arkansas has already recognized that derogatory racial remarks and engaging negative stereotypes based on race can be prejudicial to jury deliberations, albeit in a different context. *Lewis v. Pearson* involved liability for an automobile accident.[328] The plaintiff was Black and the defendant was White.[329] There were no Black jurors; three potential Black jurors were struck by the defendant after *voir dire*.[330] An investigator overhead a conversation between a bailiff and a juror.[331] The conversation concerned, at least in part, the bailiff's handling of eviction notices.[332] During the conversation, the bailiff said "[y]es, most of them were black, it seems they all feel like the world owes them something."[333] At the hearing on plaintiff's motion for a mistrial, the bailiff denied making the racist remark.[334] The juror confirmed the bailiff made the statement but denied that it influenced his jury deliberations.[335] Despite the public denials by the bailiff and juror that racial prejudice did not affect the verdict, the court reversed and remanded for a new trial.[336]

At first glance, the *Lewis* court's examination of race and the jury process is cursory. The court subjected the bailiff's conduct to "close scrutiny" because the bailiff was the court's representative, and held, with little explanation, that "the derogatory reference to black persons was such that the possibility of prejudice was so great that the entire deliberations were tainted."[337] Implicit in the *Lewis* holding, however, is the recognition that the bailiff's statements engaged negative stereotypes of Black people. The con-

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326. *Id*.
327. *Id*.
328. Lewis v. Pearson, 262 Ark. 350, 351, 556 S.W.2d 661, 664 (1977).
329. *Id*. at 351.
330. *Id*. at 352, S.W.2d at 664. *Lewis* was decided in 1977, almost a decade before the *Batson v. Kennedy* decision in 1986 articulating the unconstitutionality of race-based peremptory challenges.
331. *Id*. at 353–354, S.W.2d at 662.
332. *Id*. at 354 n. 2, S.W.3d at 663 n. 2.
333. *Id*. at 353–54, 556 S.W.2d at 663.
334. Lewis, 262 Ark. at 354, 556 S.W.2d at 663.
335. *Id*.
336. *Id*. at 354, 556 S.W.3d at 664
337. *Id*.

versation between the bailiff and the juror connected Blacks to high rates of eviction and engaged stereotypes of Black people as financially irresponsible and willing to engage in unlawful conduct. The bailiff began his racially biased remark with the word "yes," suggesting he was agreeing with a similarly derogatory statement made by the juror. The court's opinion supports the recognition of racial bias and its negative effect on jury deliberations.

2. Implement Clear Court Oversight of Post-Verdict Inquiry

The *Peña-Rodriguez* court declined to address "procedures" a trial court must follow when deciding a motion for a new trial based on an allegation of juror racial bias.[338] Therefore, lower courts have taken diverging approaches when confronted with a post-verdict allegation of juror bias during deliberations.[339]

In *State v. Berhe*, the Washington Supreme Court provided clear parameters for court oversight that can guide courts in Arkansas.[340] In *Berhe*, a juror contacted defense counsel after a Black defendant was convicted of murder and assault.[341] Juror 6, the only Black juror, alleged she was subjected to racial harassment, taunted, accused of being partial to the Black defendant, "loudly mocked" when she offered alternative views of the evidence, and "personally ridiculed in a way the other dissenting jurors were not."[342] In a declaration supporting the defendant's motion for a new trial, Juror 6 described herself as being in emotional distress during deliberation, and felt pressured to convict the defendant:

> I felt like they were animals and I was their prey. I can only describe it as feeling emotionally and mentally attacked. I felt emotionally abused; so much so that it became debilitating . . . [I] couldn't handle the pressure of being a hold-out anymore.[343]

The prosecution's response contained declarations from six jurors who responded to direct questions drafted by the attorneys: (1) "Did you personally do anything to Juror #6 which was motivated by racial bias during deliberations?" and (2) "Did you observe any other juror do anything to Juror

338. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 870 (2017).

339. *Compare* United States v. Smith, No. 12-183, 2018 WL 1924454, at *9–10 (D. Minn. 2018) (evidentiary hearing contextualized with historical information) and Williams v. Price, No. 2:98cv1320, 2017 WL 6729978, at *2 (noting trial court held evidentiary hearing) *with* Patton v. First Light Property Mgmt., Inc., No. 14cv1489, 2017 WL 5495104, at *4 (S.D. Cal. 2017) (no evidentiary hearing).

340. State v. Berhe, 193 Wash. 2d 647, 144 P.3d 1172, 1174 (2019).

341. *Id*. at 1175.

342. *Id*. at 1176–77.

343. *Id*. at 1177.

#6 which appeared to be motivated by racial bias during deliberations?"[344] While one juror was "uncomfortable by the frustration expressed" towards Juror 6, all six jurors denied being motivated by racial bias, or witnessing racial bias.[345] After reviewing the declarations, the trial court denied the defense's request for an evidentiary hearing and a new trial.[346] The Washington Court of Appeals affirmed, labeling Juror 6's declaration "conclusory," "subjective," and "lacking particularlized factual support."[347]

The Washington Supreme Court vacated the trial court's decision and remanded for further findings.[348] In doing so, the Washington Supreme Court set clear parameters for lower courts applying *Peña-Rodriguez* – the need for court oversight, and the need to conduct a "sufficient inquiry" recognizing the operation of implicit bias before denying a request for an evidentiary hearing.[349] The parameters from *Berhe* can guide courts in Arkansas.

a) Court supervision

On the issue of oversight, the *Berhe* court was frustrated by both sides' contact with past jurors, and the prosecution's formulation of targeted questions to the six jurors providing declarations: "[i]t is far too easy for counsel, in their role as advocates, to taint the jurors and impede the fact-finding process."[350] After *Berhe*, once a juror in Washington alleges racial bias, all counsel are notified and Washington courts supervise the process, conducting the inquiry on the record.[351] In Arkansas, where attorneys often interview jurors after deliberations, Arkansas courts should supervise allegations of juror racial bias to guarantee the fact-finding process is robust.

Court oversight when presented with an allegation of juror misconduct can help prevent harassment of jurors after the verdict. A key part of the Sixth Circuit's holding in *Robinson,* for example, was defense counsel's hiring of an investigator to seek out the two Black jurors who appeared upset during announcement of the verdict despite the trial court's admonishment and local rules prohibiting post-verdict contact.[352] The district court refused to consider the interview in defendants' motion for a new trial because, *inter alia*, it was gathered in violation of the local rules and court's

344. *Id*.
345. *Id*.
346. Berhe, 144 P.3d at 1177.
347. *Id*.
348. *Id*. at 1182.
349. *Id*. at 1174.
350. *Id*. at 1180.
351. *Id*.
352. United States v. Robinson, 872 F.3d 760, 770 (2017).

admonishment not to contact jurors, and due to Rule 606's no-impeachment bar.[353] During the trial, both the marshal and the clerk intervened in racialized confrontations during deliberations between a White forewoman who made racially-biased remarks and two Black jurors.[354] Had there been clear procedures guiding the trial court, the jurors may have reported the forewoman's remarks during deliberations, or, court personnel may have elevated the concern about racial bias before the verdict. Once counsel reported concerns about racial tension, the court could have held an evidentiary hearing with jurors providing testimony under oath, prevent defense-initiated contact of the Black jurors after the verdict. A lack of procedures to root out juror bias potentially increases concerns about the finality of the jury verdict.

b) Sufficient inquiry informed by implicit bias

The *Berhe* court found error in the trial court's failure to hold an evidentiary hearing.[355] The court emphasized that lower court's inquiry into allegations of juror bias must incorporate a recognition of how implicit racial bias operates. Asking a past juror whether a decision was influenced by bias is "insufficient" because "people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it."[356] Therefore, courts must ignore "equally plausible, race-neutral explanations" and instead determine "whether the evidence, taken as true, permits an inference that an objective observer who is aware of the influence of implicit bias could view race as a factor in the jury's verdict."[357] If so, the court should hold an evidentiary hearing.

In 2018, the Arkansas Supreme Court addressed the scope and procedure of Arkansas Rule 606 in *Finch v. Arkansas*. Finch did not address *Peña-Rodriguez*, as it did not involve an allegation of racial bias.[358] *Finch* is

353. *Id*.

354. *Id*. at 768. Sixth Circuit Judge Bernice B. Donald was troubled by the *Robinson* majority's focus on procedural rules: "Unfortunately, the majority scants the serious constitutional implications of the problems affecting the jury deliberations in the present case, instead privileging an overly rigid adherence to local rules." *Id*. at 782 (Donald, J. , dissenting).

355. Behre, 144 P.3d at 1183.

356. *Id.* at 1182.

357. *Id.*

358. Finch v. State, 2018 Ark. 111, *4–6, 542 S.W.3d 143, 146–48 (2018). In *Finch*, a juror looked up the definition of "hung jury" during deliberations. *Id*. at 146–147. The court learned about the incident after receiving a note from the jury. *Id*. at 147. After questioning the juror under oath, the trial court dismissed the juror and replaced him with an alternate. *Id*. at 148. The trial court denied defense counsel's request to question the other jurors about what information they received, did not provide a curative instruction (none was requested), and denied a motion for a mistrial. *Id*. On the defense motions for a new trial, the trial court

useful here, however, because it illustrates a starting point for how Arkansas courts should proceed in evaluating claims of jury misconduct based on racial bias. *Finch* encouraged trial courts to engage in a "proper inquiry" of the juror misconduct. The court contemplated that 606(b) allows inquiry into both the information and its effect on the jury.

VI. CONCLUSION

The racial disparities in the Arkansas criminal justice system are deeply troubling evidence of the role of racial bias in the criminal justice system. It will take a focused effort by actors at every level of the system, from law enforcement through incarceration, to achieve racial equity in the criminal process. The statistics demonstrating racialized sentencing in Arkansas are sobering, and the task of dismantling the structural inequities in criminal sentencing can seem daunting. This Article has focused on one piece of the racial equity puzzle – the jury process in Arkansas.

Despite the challenges, Arkansas is uniquely positioned to lead the country towards mitigating the intrusion of racial bias in jury trials. The amendment of AMI Crim. 2d 101 to address racial bias empowers Arkansas courts and attorneys to structure criminal trials to ferret racial bias out of the jury process before a defendant is unfairly subjected to a racially-biased verdict. After a verdict, the *Peña-Rodriguez* decision makes clear that racial bias during jury deliberations is a violation of the Sixth Amendment. These tools, used together, can be part of moving the needle towards racial equity in Arkansas criminal sentencing.

APPENDIX A

AMI Crim. 2d 101

RESPECTIVE DUTIES OF JUDGE AND JURY—CAUTIONARY INSTRUCTIONS

(a) The faithful performance of your duties as jurors is essential to the administration of justice.

(b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.

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held a hearing but did not hear additional questioning of the juror or allow evidence from other jurors.

(c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. Do not do any research on the internet or otherwise; or any investigation about the case or the parties on your own. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.

(d) Many of us have biases about, or certain perceptions, or stereotypes of other people. We may be aware of some of our biases, but not fully aware of others. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party, witness, or attorney because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socio-economic status.

(e) In deciding the issues you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.

(f) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you.

(g) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

(h) You cannot use cell phones and other communication devices for any purpose when in the jury room during deliberations.

NOTE ON USE

This instruction is taken from AMI Civil 3d, 101. The court has held that it is the better practice to give this instruction when requested or to recite into the record the reasons for not giving it in the exceptional cases when a refusal to give it is justified.[359]

359. Smith v. Alexander, 245 Ark. 567, 433 S.W.2d 157 (1968); McDaniel Bros. Constr. Co. v. Mid-State Constr. Co., 252 Ark. 1223, 1235, 482 S.W.2d 825, 831 (1972).

APPENDIX B

Example Criminal Jury Instructions Regarding Unconscious Racial Bias

ABA, Achieving an Impartial Jury Proposed Instruction	
American Bar Association, Criminal Justice Section, *Achieving an Impartial Jury: Addressing Bias in Voir Dire and Deliberations*, Toolbox Toolbox available at: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf	Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence. Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case: • Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence. • Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations. • Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group? • You must each reach your own

	conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours. Working together will help achieve a fair result.
Federal – Ninth Circuit	
<u>After Jury Empaneled, Before Opening Statements</u> Ninth Circuit Manual of Modern Criminal Jury Instructions, *Duty of the Jury*, S3 Modern Federal Jury Instructions-Criminal 1.1 (2019)	Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you. Perform these duties fairly and impartially. You should not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.

United States District Court for the W. D. Washington	
Before Jury Selection *Preliminary Instruction*, available at https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf	It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. Accordingly, during this voir dire and jury selection process, I [the lawyers] may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.
Before Opening Statements (excerpted) (this instruction is modified from the Ninth Circuit's)	Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.
Before Deliberation	I want to remind you about your duties

	as jurors. When you deliberate, it will be your duty to weigh and evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.
Hon. Mark W. Bennett (now retired), United States District Court for the N. D. Iowa	
Before Jury Selection	Retired Judge Bennett spent considerable time with potential jurors describing the presumption of the presumption of innocence. During his explanation, he shakes the hand of the criminal defendant, and states the defendant is innocent "unless and until the prosecution can establish guilt beyond a reasonable doubt." Judge Bennett then offers the potential jurors a "free pass" off the jury if any feel unable to give the defendant the presumption of innocence.[360]
After Jury Empaneled, Before Opening Statements	Congratulations on your selection as a juror! . . . You must decide during your deliberations whether or not the prosecution has proved the defendant's guilt on the offense charged beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide

360. Retired Judge Bennett describes his work approach with potential jurors in Bennett, *Manifestations of Implicit Bias in the Courts*, *supra* note 1.

	this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions.
Additional Instruction	Do not decide the case based on "implicit biases." As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
California	
1 California Forms of Jury Instruction 113 (2020)	Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we

	believe or disbelieve, and how we make important decisions. As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]]. Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.
Hawai'i	
<u>After Jury Empaneled, Before Opening Statements</u> HA.CR. JI INSTRUCTION NO. 1.01 (excerpted)	Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, what we see, hear and remember, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of the person's actual or perceived race, color, ancestry, national origin, ethnicity, sex, gender, gender identity, sexual orientation, marital status, age, disability, religion, socioeconomic status, or political affiliation.

Massachusetts	
Before Jury Selection CR Model Jur Instructions for use in the Dis Cts - Mass Instruction 1.100 (excerpted)	At the outset, I instruct you that all parties stand as equals before the bar of justice. All parties are entitled to a fair and impartial jury, that is, jurors who will: (1) fairly evaluate the evidence; (2) follow the law as instructed; and (3) render a fair and just verdict based solely on the evidence presented at this trial. Jurors, of course, are expected to bring their own life experiences, thoughts, opinions, beliefs, and common sense to this court and the deliberation room. Everyone, including me, makes assumptions and forms opinions arising from our own personal backgrounds and experiences. These biases or assumptions may have to do with any number of things, including an individual's race, color, nationality, ethnicity, age, disability, socioeconomic status, religious beliefs, gender, or sexual orientation. I instruct you that a verdict must not be based on any such bias, including conscious or subconscious bias. Bias, whether it is conscious or subconscious, can affect how we evaluate information and make decisions. It can impact what we see and hear, how we remember what we see and hear, how we make important decisions, and may even cause us to make generalizations or to pre-judge. While each of you brings your unique life experience with you to court today, as jurors, you must be alert to recognize whether any potential bias might impact your ability to fairly and impartially evaluate the evidence in this case, follow my instructions, and render a fair and just verdict that is based solely on the evidence presented in this case.
After Jury Empaneled, Before	*Jury charge*. After the closing arguments, I

Opening Statements CR Model Jur Instructions for use in the Dis Cts - Mass Instruction 1.120 (excerpted)	will instruct you in detail on the law that you must apply during your deliberations. *Jury's function.* Your function as the jury is to determine what evidence to believe, how important any evidence is that you do believe, and what conclusions all the believable evidence leads you to. You are the sole and exclusive judges of the facts, and in determining what those facts are, you should draw on your own common-sense and life experience. Our system of justice requires you to render a fair decision based on the evidence, not on biases. In evaluating the evidence and determining the facts, keep in mind that everyone, myself included, makes assumptions and forms opinions based in part upon likes or dislikes, opinions, stereotypes, perceptions, and prejudices arising from our own personal backgrounds and experiences of which we may not be aware. These assumptions and opinions can impact what we see and hear, how we remember what we see and hear, and may cause us to draw generalizations or to pre-judge. Because you are making very important decisions in this case, you must be alert to recognize any potential biases that might affect your view of the evidence in this case. You must not allow bias – conscious or subconscious – to interfere with your ability to fairly evaluate the evidence, apply the law as I instruct you, and render a fair and impartial verdict based on the evidence presented at this trial.
Pennsylvania	
After Jury Empaneled, Before Trial Pa. SSJI (Crim) 2.02	Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some

	of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions. As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [*or*] socioeconomic status[, *or* [*any other impermissible form of bias*]]. Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.
Washington	
Before Jury Selection Advance Oral Instruction—Beginning of Proceedings, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (4th Ed)	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. 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.
WPIC1.02Conclusion of Trial—Introductory Instruction, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (4th Ed)	You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.
Race-Switching Instruction, Professor Cynthia Lee	
	It is natural to make assumptions about the parties and witnesses based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group. If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you would imagine a Latino defendant and a White victim. If your evaluation of the case before

	you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.

Example Criminal Jury Instructions Regarding Unconscious Racial Bias