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Mikah K. Thompson

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# BIAS ON TRIAL: TOWARD AN OPEN DISCUSSION OF RACIAL STEREOTYPES IN THE COURTROOM

(Forthcoming in 2019 MICH. ST. L. REV. \_\_\_\_)

Mikah K. Thompson\*

## INTRODUCTION

In the 2017 case *Pena-Rodriguez v. Colorado*,<sup>1</sup> the U.S. Supreme Court addressed the problem of racial bias in our justice system. The Court acknowledged that racial discrimination, “odious in all aspects, is especially pernicious in the administration of justice.”<sup>2</sup> The Court identified the jury as a criminal defendant’s primary protection against racial prejudice.<sup>3</sup> The Court stated that, based on this principle, the justice system must identify methods to ferret out racial prejudice among jurors. Otherwise, the integrity of the jury trial system will be compromised. The Court noted that racial bias is a “familiar and recurring evil” that, if left unchecked, “would risk systemic injury to the administration of justice.”<sup>4</sup>

The *Pena-Rodriguez* Court recognized several safeguards that are in place to assist the trial court in identifying racial bias among jurors. These safeguards include voir dire examination regarding racial bias, jury instructions addressing racial bias, observation of juror demeanor and conduct that might demonstrate racial bias, reports of racially biased comments or actions by jurors during trial, and non-juror evidence of racial bias after trial.<sup>5</sup> The Court acknowledged that these safeguards may be insufficient at times and therefore added an additional one, holding that the Sixth Amendment requires trial courts to review evidence suggesting that racial bias was a motivating factor in a juror’s decision to convict a criminal defendant even when the evidence of bias rears its head during otherwise non-impeachable jury deliberations.<sup>6</sup>

This Article will demonstrate that the safeguards identified by the Court must be improved if they are to assist trial courts in ferreting out juror bias. Social science research has made clear that a majority of Americans carry some level of subconscious or implicit bias against racial minorities and that this bias manifests

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\* Associate Professor of Law, University of Missouri-Kansas City. I would like to thank my colleagues at the UMKC School of Law for all of your support throughout the years. Additionally, I am grateful to the faculty at the Drake University School of Law for your very helpful feedback on this piece. Finally, I would like to thank my husband Brandon P. Thompson and our four children. You are my greatest blessings. Thank you for always being my champions.

<sup>1</sup> 137 S.Ct. 855 (2017). For a description of the facts of the case, see Section II., *infra*.

<sup>2</sup> *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 866, 871.

<sup>6</sup> *Id.* at 869.

itself in the application of racial stereotypes. These stereotypes can influence many aspects of the jury's functions. Until courts and legislatures are willing to craft safeguards that will address the impact of bias head-on, the jury system will continue to be infiltrated with bias.

I believe that the first step in ridding the jury system of racial bias is to tell the truth about the prevalence and effect of bias. This includes naming the stereotypes that are at play whenever a person of color enters a courtroom. Through honest, open dialogue, which is a hallmark of the truth and reconciliation process, we can begin to chip away at the justice system's tradition of discrimination. I acknowledge that these truths may make us uncomfortable, but the truth and reconciliation process tells us that we can heal only after we have sat in the discomfort.

Section I of this Article will explore the prevalence and impact of racial bias among jurors. This Section will review the social science research establishing that bias, whether conscious or unconscious, affects the way we perceive those who are different from us. This Section will also name many widely known stereotypes about minorities and discuss how those stereotypes affect the jury's core functions of character assessment, witness credibility assessment, and fact interpretation and recall. Section II will briefly review the facts of *Pena-Rodriguez* and discuss the two preemptive safeguards that purportedly protect minorities from racial discrimination in the courtroom. This Section will demonstrate that those two safeguards, voir dire and jury instructions, are not universally available to criminal defendants and, when used, are not always effective. Finally, Section III will detail my proposals for improving voir dire and jury instructions in a way that places the truth at the forefront and moves our system toward an open discussion of racial bias in the courtroom.

## I. THE PREVALENCE AND IMPACT OF RACIAL BIAS AMONG JURORS

Jurors, like other people,<sup>7</sup> sometimes harbor racial and ethnic biases. Social scientists and legal scholars have conducted research on the origins and implications of juror bias. Samuel Sommers and Phoebe Ellsworth have published several studies on race and juries.<sup>8</sup> In 2003, they summarized two decades of research on juror bias, finding that it supports the existence of White juror bias against Black defendants and that this bias impacts jury decisions regarding Black defendants' guilt as well as sentencing recommendations.<sup>9</sup> Sommers and Ellsworth

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<sup>7</sup> See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 739 (1995) ("Ethnic attitudes are a part of the social heritage of the developing child. They are transmitted across generations as a component of the accumulated knowledge of society. No person can grow up in a society without learning the prevailing attitudes concerning the major ethnic groups.").

<sup>8</sup> See generally Samuel R. Sommers and Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003) (citing previous studies).

<sup>9</sup> *Id.* at 1006.

also found that crime type impacts the likelihood of bias, concluding that jurors are more likely to show racial bias when defendants are accused of crimes stereotypically associated with their race.<sup>10</sup> They determined that “White jurors viewed white-collar crimes—such as counterfeiting and embezzlement—as consistent with a stereotype of White criminals. On the other hand, more violent crimes such as assault and robbery were associated with a Black criminal stereotype.”<sup>11</sup> Thus, a Black defendant who is accused of committing a stereotypically violent crime is more likely to face racial bias.<sup>12</sup> Importantly, Sommers and Ellsworth concluded that racial bias is not unique to White jurors. Their research revealed that Black jurors are also affected by the race of the defendant: “Compared to their judgments of the White defendant, Black jurors in our study gave lower guilt ratings, shorter sentence recommendations, and more positive personality evaluations to the Black defendant.”<sup>13</sup>

In 2015, Jennifer S. Hunt conducted a review of research dating back to 2005 and concluded that “the race and ethnicity of defendants, victims, and jurors can impact the outcomes of criminal trials.”<sup>14</sup> Hunt found that jurors in noncapital cases tend to judge more harshly defendants from other racial or ethnic groups.<sup>15</sup> Additionally, she found that the race of the victim was significant in capital cases, with jurors being more likely to recommend the death penalty when African-American or Latino defendants are accused of killing White victims.<sup>16</sup> Hunt theorized that victim race is significant in capital cases because jurors may reflect on the value of the victim’s life when determining whether the death penalty is appropriate.<sup>17</sup>

Racial bias among jurors may be explicit or implicit. Social scientists and legal scholars define explicit biases as “attitudes and stereotypes that are consciously accessible through introspection.”<sup>18</sup> Where explicit biases are socially accepted,

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<sup>10</sup> Id. at 1007-08.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id. at 1019-20. Sommers and Ellsworth theorize that the origins of White juror bias are quite different than the origins of Black juror bias. They have found that White jurors often rely on anti-Black stereotypes and long-held prejudicial attitudes when evaluating Black defendants while Black jurors’ concern about the fairness of the legal system might lead them to impose a higher burden of proof on the government when the defendant is African-American. Id. at 1011, 1020-21.

<sup>14</sup> Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 273 (2015).

<sup>15</sup> Id.

<sup>16</sup> Id. Hunt also found that White men are more likely to show bias against African-American defendants in capital cases. Id.

<sup>17</sup> Id. Hunt’s theory implies that jurors assess greater value to the lives of White victims as compared to the lives of Black victims.

<sup>18</sup> Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. REV. 1124, 1132 (2012). The authors define the term “attitude” as “an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.” Id. at 1128. They define a “stereotype” as “an association between a concept (again, in this case a social group) and a trait.” Id.

individuals are likely to share them; however, where these biases are socially unacceptable, they are more likely to remain hidden.<sup>19</sup> Implicit or unconscious biases, on the other hand, are “attitudes and stereotypes that are not consciously accessible through introspection.”<sup>20</sup>

Many legal scholars have focused their research on enlightening the legal community about the prevalence of implicit bias and offering solutions for how the justice system can reduce or eliminate the impact of implicit bias.<sup>21</sup> Michael Selmi argues that the legal academy’s tendency to label bias as implicit actually limits the liability of bad actors and gives them an excuse to continue their biased behavior.<sup>22</sup> He points out that many well-known examples of implicit bias, such as the hypothetical police officer who assumes that an African-American man is engaging in criminal activity or the school principal who punishes misbehaving Black children more harshly than similarly situated White students, actually demonstrate intentionally discriminatory conduct that may be motivated by implicit attitudes.<sup>23</sup> Selmi argues that legal scholars’ focus on the implicit nature of the attitudes rather than the intentional nature of the conduct has had the effect of limiting legal liability for intentional discrimination while also giving the biased actor an excuse of sorts.<sup>24</sup> After all, the actor may feel blameless if it is true that we are all impacted by subconscious biases that we cannot control.<sup>25</sup> For this reason, Selmi encourages scholars to adjust their narratives to a discussion of stereotypes rather than implicit bias.<sup>26</sup>

Regardless of the level of awareness individuals have concerning their bias, it is evident that racial and ethnic stereotypes are pervasive in American society. Stereotypes are defined as “well-learned sets of associations among groups and traits established in children’s memories at an early age, before they have the cognitive skills to decide rationally upon the personal acceptability of the stereotypes.”<sup>27</sup> For example, a child might learn at an early age that African-Americans are associated with crime or that Latinos are associated with illegal

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L. J. 193, 195 n.5 (2018) (citing studies and stating, “Implicit bias has had a particularly strong pull among legal academics, and in the last decade, articles espousing the prevalence of implicit bias have proliferated.”).

<sup>22</sup> *Id.* at 223.

<sup>23</sup> *Id.* at 199.

<sup>24</sup> *Id.* at 223.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 239-40 (noting that social scientists and legal scholars use the terms “implicit bias” and “stereotypes” interchangeably and stating, “[I]t is clear that, more often than not, what scholars mean by implicit bias is that an individual is acting on an ingrained stereotype – associating African Americans, for example, with criminality or women with children and a likelihood to leave the workplace when they have children.”).

<sup>27</sup> Armour, *supra* note 7, at 741.

immigration.<sup>28</sup> Although these associations develop when individuals are very young, researchers have determined that adults rely upon stereotypes in very specific situations. First, stereotypes significantly influence individuals who are not motivated to seek individuating information about members of stereotyped groups.<sup>29</sup> Additionally, individuals who are under stress or who are pressed for time are more likely to rely upon stereotypes.<sup>30</sup> Finally, as stated earlier, researchers have found that jurors tend to make decisions based on stereotypes where the defendant is accused of a crime that is “stereotypically associated” with the defendant’s racial group and that jurors will punish these defendants more severely.<sup>31</sup>

To fully understand racial stereotypes and their impact on jurors, it is necessary to identify some of the most common stereotypes that a defendant of color may be forced to contend with in court. In American society, race functions as a proxy for an extensive list of characteristics.<sup>32</sup> We tend to associate people of color with “undesirable personal qualities such as laziness, incompetence, and hostility, as well as disfavored political viewpoints such as lack of patriotism or disloyalty to the United States.”<sup>33</sup> Researchers have found that biased individuals rely upon two types of stereotypes: “They believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks), or they believe the out-group is pushy, ambitious, conniving, and in control of business, money, and industry (a typical accusation against Jews).”<sup>34</sup>

N. Jeremi Duru argues that stereotypes about Black men are a part of the

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<sup>28</sup> Charles Lawrence III has theorized that although stereotypes are “tacitly transmitted,” they nevertheless influence our decisions: “If an individual has never known a black doctor or lawyer or is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for certain roles. But the lesson is not explicit: It is learned, internalized, and used without an awareness of its source.” *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 343 (1987).

<sup>29</sup> Melinda Jones, *Preventing the Application of Stereotypic Biases in the Courtroom: The Role of Detailed Testimony*, 20 J. OF APP. SOC. PSY. 1767, 1768 (1997) (internal quotations and citations omitted) (stating that “stereotypes operate as simplifying heuristics that exert a greater influence when individuals are either insufficiently motivated to seek accurate impressions or when their information processing abilities are taxed.”).

<sup>30</sup> Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1071-72 (2004) (“[T]he perceiver may be under too much stress or too busy to do much more than rely on cognitive and behavioral shortcuts. People who are aroused or under greater cognitive load may rely more heavily on expectations and stereotypes. . . . Time pressures also limit the ability and motivation of both parties to avoid stereotype confirmation.”).

<sup>31</sup> Sommers and Ellsworth, *supra* note 8, at 1007-08. See also Jones, *supra* note 29, at 1768 (stating that “preexisting beliefs about the defendant’s social group may affect judgments of culpability and predictions of future criminal behavior, particularly if the crime is stereotypically linked to the defendant’s social group” and finding that jurors’ use of stereotypes resulted in more severe recommended sentences).

<sup>32</sup> Wang, *supra* note 30, at 1013.

<sup>33</sup> *Id.* at 1014.

<sup>34</sup> Lawrence, *supra* note 28, at 333 (citing studies).

American tradition.<sup>35</sup> He identifies a set of inter-related but unsubstantiated stereotypes as the myth of the Bestial Black Man, a myth “deeply imbedded in American culture, that black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape.”<sup>36</sup> Duru traces the origins of the myth to slavery. Slaveholders justified the institution of slavery by perpetuating a belief that Black slaves were nonhuman.<sup>37</sup> Additionally, Duru argues that slavery itself was the basis for the stereotype that Blacks are criminals because “the assertion of the most basic human right, liberty, was, for the slave, criminal.”<sup>38</sup> Indeed, he notes that slaveholders lived in constant fear of slave rebellions and that this fear caused them to heavily scrutinize the actions of slaves.<sup>39</sup> Duru theorizes that the stereotype concerning the super-sexuality of Black men also finds its origins in slavery. He notes that slaveholders feared the sexual potency of Black men and believed that Black men “would, whenever possible, rape white women.”<sup>40</sup> Duru argues that the myth of the Bestial Black Man survived the end of slavery and has continued to persevere in modern American life.<sup>41</sup>

Stereotypes concerning the characteristics and behavior of Black women similarly date back to slavery and continue to persist today. Scholars have identified (and named) a set of stereotypes traditionally attributed to African-American women:

First, Mammy, everyone's favorite aunt or grandmother, sometimes referred to as “Aunt Jemima,” is ready to soothe everyone's hurt, envelop them in her always ample bosom, and wipe away their tears. She is often even more nurturing to her white charges than to her

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<sup>35</sup> N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004).

<sup>36</sup> Id. at 1320. Accord Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 573 n.5 (1993) (“The unfortunate truth is that historically in our society, black men have been portrayed as a people to be feared; savages, unable to be tamed.”).

<sup>37</sup> Duru, *supra* note 35, at 1322. See also Montré D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 532 (2009) (“[T]o justify their enslavement of Blacks and the harsher treatment of Blacks in the criminal justice system, White slave owners and legislators constructed a mischaracterization of Blacks using multiple negative stereotypes. Among other things, Blacks were characterized as being lazy, unclean, dishonest, ignorant, and violent. The common denominator with all of the stereotypes was that they reinforced the idea of the Black person as inferior to the White person.”).

<sup>38</sup> Duru, *supra* note 35, at 1323. See also Cynthia K.Y. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 402-03 (1996) (describing the prevalence of the Black-as-criminal stereotype and stating, “One of the stereotypes most often applied to African American males is that they are more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society.”).

<sup>39</sup> Id.

<sup>40</sup> Id. at 1324. Duru notes that “[i]n the minds of many whites, the very existence of the black man in America, conceived to be animalistic, sexually predatory, and criminal by nature, presented a ubiquitous threat of rape.” Id.

<sup>41</sup> Id. at 1346.

own children. Next, there is Jezebel, the bad-black-girl, who is depicted as alluring and seductive as she either indiscriminately mesmerizes men and lures them into her bed, or very deliberately lures into her snares those who have something of value to offer her. Finally, Sapphire, the wise-cracking, balls-crushing, emasculating woman, is usually shown with her hands on her hips and her head thrown back as she lets everyone know she is in charge.<sup>42</sup>

In addition to these commonly known stereotypes of Black women, scholars have identified two others that are at play in contemporary American society: (1) the “Matriarch,” described as “the Mammy gone bad” who spends too much time away from the home, fails to properly supervise her children, emasculates the men in her life, and is overly aggressive;<sup>43</sup> and (2) the “Welfare Queen,” a woman who refuses gainful employment and bears several children who are “a threat to [the country’s] economic stability.”<sup>44</sup> These stereotypes contribute to a common perception that Black women are “untrustworthy, criminal, or dangerous.”<sup>45</sup>

Although the focus of much of this Article is racial bias against African-Americans, it is important to note that American society imposes stereotypes on other people of color and that the imposition of these stereotypes can impact their ability to receive a fair trial. Cynthia Lee identifies several commonly held stereotypes regarding Asian-American and Latino people, such as: (1) Asian as model minority stereotype, (2) Asian as foreigner stereotype, (3) Asian as martial artist stereotype, (4) Latino as foreigner stereotype, and (5) Latino as criminal stereotype.<sup>46</sup> Lee notes that while the Asian as model minority stereotype may be beneficial to Asians, “the positive attributes of the model minority stereotype (e.g., intelligent, hardworking, law-abiding) are linked with corresponding negative attributes (e.g., lacking personality, unfairly competitive, clannish, unwilling to assimilate, rigidly rule-bound).”<sup>47</sup> She argues that each of these stereotypes, including the model minority stereotype, can have a negative impact on jurors considering whether it was reasonable for a defendant to use deadly force against a person of color.<sup>48</sup> In post-9/11 America, Arab-Americans have been stereotyped as

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<sup>42</sup> Marilyn Yarbrough and Crystal Bennett, *Cassandra and the “Sistahs”*: *The Peculiar Treatment of African-American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 635-36 (2000).

<sup>43</sup> Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1051 n.174.

<sup>44</sup> *Id.* at 1051 n.175.

<sup>45</sup> Lee, *supra* note 38, at 403.

<sup>46</sup> *Id.* at 423-52.

<sup>47</sup> *Id.* at 426.

<sup>48</sup> *Id.* at 499-500. Accord Jody D. Armour, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 3-4 (1997) (stating that a defendant in a self-defense case could argue that the victim’s race is relevant on the issue of reasonableness in that widely known racial stereotypes might influence a defendant’s belief that she is about to be attacked).



disloyal and imminently threatening terrorists.<sup>49</sup> As Ibrahim Hooper of the Council on American-Islamic Relations stated, “The common stereotypes are that we’re all Arabs, we’re all violent and we’re all conducting a holy war.”<sup>50</sup>

Because racial and ethnic stereotypes are part and parcel of American culture, our justice system must do more to ensure that jury verdicts are not influenced by stereotyped beliefs. The rules of evidence should recognize the value that jurors are very likely to place on the race of a party or witness.<sup>51</sup> Instead, they work in the opposite manner in that they “do not acknowledge the evidentiary value of race but at the same time often operate in a manner that perpetuates and increases the probative value and prejudicial effect of race.”<sup>52</sup>

Racial bias, through the application of stereotypes, can have a very practical impact on the way in which jurors view and assess evidence at trial. This Section will highlight studies addressing the impact of stereotypes on the following the following types of evidence: (1) character assessment, (2) witness credibility assessment, and (3) fact interpretation and recall.

#### A. Stereotypes and Character Assessment

*“I think he did it because he’s Mexican and Mexican men take whatever they want. Nine times out of ten Mexican men are guilty of being aggressive toward women and young girls.”<sup>53</sup>*

At trial, jurors are often called upon to assess character. While the Federal Rules of Evidence<sup>54</sup> generally prohibit parties from introducing character evidence to show propensity,<sup>55</sup> criminal defendants may introduce evidence of their own relevant character traits or the character traits of their alleged victim,<sup>56</sup> and the government may respond with its own evidence in rebuttal.<sup>57</sup> Additionally, in homicide cases, the government may offer evidence of an alleged victim’s character for peacefulness to rebut defendant’s claim that the alleged victim was the first

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<sup>49</sup> Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans As “Terrorists”*, 8 ASIAN L.J. 1, 12 (2001).

<sup>50</sup> Id. (internal quotations omitted). Saito notes that even though Arabs come from many different religious backgrounds and many members of the Muslim faith are not Arab, “these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.” Id.

<sup>51</sup> Carodine, *supra* note 37, at 536.

<sup>52</sup> Id.

<sup>53</sup> This statement was allegedly made by one juror during deliberations in the *Pena-Rodriguez* matter. *Pena-Rodriguez*, *supra* note 1, at 862.

<sup>54</sup> Forty-four states, Guam, Puerto Rico, the Virgin Islands, and the military have adopted codes modeled after the Federal Rules of Evidence. See 6 Jack B. Weinstein & Margaret A. Berger, *Notes, WEINSTEIN’S FEDERAL EVIDENCE* (2d ed. 2018).

<sup>55</sup> FED. R. EVID. 404(a) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”).

<sup>56</sup> Criminal defendants may offer evidence of an alleged victim’s character traits subject to the limitations of the rape shield law. Id.

<sup>57</sup> Id.

aggressor.<sup>58</sup> The Federal Rules of Evidence provide parties with greater leeway if their purpose for introducing character evidence is something other than to show that an individual has a propensity to behave in a certain way.<sup>59</sup> The Rules allow parties to civil and criminal actions to introduce evidence of a crime, wrong, or other act, often referred to as “prior bad acts” or “uncharged acts,” when offered for a purpose other than to show propensity.<sup>60</sup> A proper purpose for such evidence might include “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>61</sup>

The rules of evidence encourage trial courts to consider proffered character evidence with a heavy dose of skepticism, for, as the Federal Rules of Evidence Advisory Committee noted, placing character evidence before a jury is quite risky:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man [and] to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.<sup>62</sup>

Despite the Advisory Committee’s efforts to implement a process that would force trial courts to properly scrutinize character evidence before it is introduced to the jury, prosecutors and defense attorneys routinely place covert, implicit race-based character evidence before juries.<sup>63</sup> Because such evidence is subliminal, playing upon the jury’s most deep-seated prejudices, it escapes review from the trial court.<sup>64</sup>

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<sup>58</sup> Id.

<sup>59</sup> FED. R. EVID. 405(a).

<sup>60</sup> FED. R. EVID. 404(b).

<sup>61</sup> Id. The Federal Rules of Evidence also allow parties to offer evidence proving a witness’ character for truthfulness. These rules will be discussed in Section I.B., *infra*.

<sup>62</sup> FED. R. EVID. 404 advisory committee’s note (internal quotations omitted).

<sup>63</sup> See Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 334-35 (2015) (theorizing that implicit bias, white-specific behavioral expectations for people of color, and long-held racial stereotypes combine to create “affirmative character evidence that jurors will consider in criminal cases involving African-Americans”). See also Carodine, *supra* note 37, at 530 (“Though the rules of evidence have adopted a general policy against the use of character evidence, they do not really account for or address the more subtle ways that character evidence is introduced to the jury. . . . A particularly difficult and troubling subset of this issue of informal character assessment by the jury is how jurors perceive the race of parties and other participants in the trial. Jurors, of course, come from the real world where race does matter.”).

<sup>64</sup> *Blackness as Character Evidence*, *supra* note 63, at 335 (“This evidence of stereotypical Blackness is introduced to jurors outside the confines of Rule 404(a). Thus, courts are not required to engage in any analysis of whether the prejudice associated with the evidence, if any, might result in an unfair outcome.”).

Historically, trial courts sanctioned prosecutors' explicit attempts to introduce race-based character evidence as proof of a criminal defendant's guilt.<sup>65</sup> These explicit attempts to introduce race included arguments based on racial stereotypes.<sup>66</sup> Duru describes a 1919 Mississippi rape case involving a Black defendant where a prosecutor made the following statement during his closing argument: "Ah! It is nothing now days [sic] and not uncommon to pick up a paper and see where some brute has committed this crime. . . . You see it South, North, and East, where a brute of his race has committed this fiendish crime."<sup>67</sup> Although the defendant's attorney objected to this statement, the trial court failed to make a ruling, and the jury later convicted the defendant.<sup>68</sup>

In the modern era, the Supreme Court has explicitly stated that race-based prosecutorial arguments violate the Constitution;<sup>69</sup> however, many reported cases detail the practice.<sup>70</sup> Citing numerous federal cases published between 1968 and 2001, Demetria Frank has found that "prosecutors often make overt and improper racial references based on the victim or defendant's race, likely triggering juror racial biases and stereotypes."<sup>71</sup> Frank notes that while appellate courts generally find this prosecutorial conduct to be improper, they rarely overturn the defendant's conviction, often finding no prejudicial impact when the statement is balanced against the weight of the other evidence offered against the defendant.<sup>72</sup>

In the 2013 case *Calhoun v. United States*, the Supreme Court had an opportunity to weigh in on a prosecutor's inappropriate reference to race, but it failed to grant certiorari to the defendant who sought to have his conviction

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<sup>65</sup> Duru, *supra* note 35, at 1331 (quoting *Pumphrey v. State*, an Alabama Supreme Court case, which held that "social customs, founded on race differences," and the fact that an alleged rape victim was white and the defendant Black, could properly be considered when determining defendant's intent (156 Ala. 103, 107-08 (1908)). Accord *Jackson v. State*, 18 S.E. 132, 133 (Ga. 1893) ("Surely it was legitimate for the jury to note any departure from the customary modes of visiting which was involved in a nocturnal entrance by a negro man into the bedroom of a white woman during the hours usually devoted to sleep."); *Richardson v. State*, 123 So. 283, 284 (Ala. Ct. App. 1929) ("What would be a caress or a mere assault as between persons of the same or similar social standing would become of much graver moment as between persons of a different social status and of different races.").

<sup>66</sup> Duru, *supra* note 35, at 1332 (noting that, historically, attorneys' comments often reinforced the stereotype of Black men as inherently criminal).

<sup>67</sup> *Id.* (quoting *Garner v. State*, 83 So. 83, 83 (Miss. 1919)).

<sup>68</sup> *Id.* The Mississippi Supreme Court overturned defendant's conviction, finding that the prosecutor's statement "appealed to racial prejudice and Southern sentiment" and may have had a strong impact on the jury. *Id.* at 83-84.

<sup>69</sup> *McCleskey v. Kemp*, 481 U.S. 279, 310 n. 30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments.").

<sup>70</sup> See Demetria D. Frank, *The Proof is in the Prejudice: Implicit Bias, Uncharged Acts Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 24 (2016).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 25. Frank also notes that the abuse of discretion standard of review allows the appellate court to overturn a trial court's evidentiary ruling only where the ruling was "arbitrary and irrational." *Id.* Frank theorizes that appellate court judges are unlikely to make such a finding if they do not fully grasp that a prosecutor's improper reference to race can trigger juror bias. *Id.*

overturned because of the reference.<sup>73</sup> In *Calhoun*, an African-American defendant was charged with participating in a drug conspiracy.<sup>74</sup> Although Calhoun's friend testified that Calhoun was aware of a plan to complete a drug transaction, Calhoun testified that he had no knowledge of his friend's plan to purchase drugs.<sup>75</sup> During Calhoun's cross-examination, the prosecutor repeatedly questioned him regarding his intent.<sup>76</sup> At one point during cross-examination, the prosecutor stated, "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?"<sup>77</sup> Defense counsel did not object to the question but addressed the prosecutor's racial reference during closing arguments.<sup>78</sup> During the prosecutor's rebuttal argument, he stated to the jury:

I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African-American[s] and Hispanics, do you think it's a drug deal? But there's one element that's missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]? None of them are real estate investors.<sup>79</sup>

Although the Supreme Court refused to grant certiorari on Calhoun's petition, Justice Sotomayor, joined by Justice Breyer, published a statement that denounced the prosecutor's race-based references.<sup>80</sup> Sotomayor stated that the Court's denial of Calhoun's petition should not be read to indicate the Court's tolerance for the prosecutor's statements.<sup>81</sup> She indicated that the prosecutor's statements were obviously improper and at odds with Supreme Court precedent. According to Sotomayor, "[b]y suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation."<sup>82</sup> Indeed, Sotomayor identified the prosecutor's statements as an obvious attempt to convince jurors "to substitute racial stereotype for evidence, and racial prejudice for reason."<sup>83</sup>

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<sup>73</sup> 133 S.Ct. 1136 (2016).

<sup>74</sup> *Id.* at 1136.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (internal quotations omitted).

<sup>78</sup> *Id.* at 1137.

<sup>79</sup> *Id.* (internal quotations omitted).

<sup>80</sup> *Id.* at 1136.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1137.

<sup>83</sup> *Id.*

While courts have addressed the government's explicit attempts to introduce race-based character evidence to jurors, they have done little to eliminate implicit or subliminal race-based character evidence. Social science research has revealed that even the most basic racial cues during trial can trigger the application of stereotypes and impact how jurors assess the evidence before them.<sup>84</sup> On the basis of this research, legal scholars have theorized that when attorneys reference animal imagery in describing people of color and Black men in particular, they trigger commonly held stereotypes and prejudices.<sup>85</sup> Thus, referring to people of color as "animals in the jungle," "mad dogs," or "laughing hyenas" might impact a juror's assessment of a defendant's character.<sup>86</sup> Scholars have identified other "racial code words" that trigger stereotypes. Carodine argues that a prosecutor's references to Black defendants as "they" or "them" signal to jurors that Blacks are inherently different from Whites and "generally outliers in the moral, civilized, and law-abiding society to which the jurors themselves belong."<sup>87</sup> Carodine cites *State v. Henderson*,<sup>88</sup> a Minnesota case, as an example of a prosecutor's attempt to "other"<sup>89</sup> the Black defense witnesses who testified before the jury. In *Henderson*, the prosecution argued to the jury, "[T]he people that are involved in this world are not people from your world. Their experiences, their lifestyles are totally foreign to all of you. These are not your world. These are the Defendant's people. They are his friends."<sup>90</sup> On appeal, the defendant argued that this statement demonstrated the government's attempt to appeal to the jury's passions and prejudices, but the prosecution denied that the statement had anything to do with the race of the witnesses.<sup>91</sup> The Minnesota Supreme Court found that the prosecutor's statement did not constitute misconduct nor was the comment so prejudicial that it denied defendant his right to a fair trial.<sup>92</sup> It is important to note that defense attorneys also utilize racial code words and specific imagery in self-defense cases involving African-Americans.<sup>93</sup>

The subtle race-based references and imagery often introduced at trial are identical to the propensity evidence that courts routinely exclude pursuant to the

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<sup>84</sup> Justin D. Levinson and Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309-10 (2010). These researchers argue that stereotypes are activated "easily, automatically, and often unconsciously." *Id.* at 327.

<sup>85</sup> Duru, *supra* note 35, at 1342.

<sup>86</sup> *Id.* See also Vogelmann, *supra* note 36, at 573-74 (stating that trial attorneys often evoke stereotypes in order to "obtain an emotional response from the jurors."). Vogelmann notes that the attorneys representing the police officers charged with assaulting Rodney King used very specific words to describe King in their effort to obtain acquittals for their clients. According to Vogelmann, "[t]he defense, overtly and subliminally, portrayed Rodney King as a crazed savage on his way to do evil in the bedrooms of Simi Valley." *Id.* at 577.

<sup>87</sup> Carodine, *supra* note 37, at 570.

<sup>88</sup> 620 N.W.2d 688 (Minn. 2001).

<sup>89</sup> For more discussion on the concept of "othering," see text accompanying notes 126-137, *infra*.

<sup>90</sup> *Id.* at 702.

<sup>91</sup> *Id.* at 703.

<sup>92</sup> *Id.*

<sup>93</sup> NEGROPHOBIA, *supra* note 48, at 4.

rules of evidence. Just as propensity evidence might prime a jury to find that an individual acted in conformity with past behavior, race-coded language might prime a jury to find that an individual acted in conformity with widely known stereotypes about the individual's racial or ethnic group. Despite the obvious similarities between these two types of character evidence, the rules of evidence are only equipped to address the former.

## B. Stereotypes and Witness Credibility Assessment

*"I don't believe defendant's alibi witness. After all, he's an illegal."*<sup>94</sup>

As a part of their fact-finding role, jurors must assess whether witnesses are providing truthful testimony. As the Supreme Court has noted, one of the jury's core functions is to make credibility determinations, in essence operating as a lie detector.<sup>95</sup> The justice system leaves this important function to the jury based on the presumption that jurors are "fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."<sup>96</sup> Recognizing the importance of the jury's function as a "lie detector," several rules of evidence focus on witness credibility and impeachment. Federal Rules of Evidence 607, 609, and 613 address the manner in which witnesses may be impeached,<sup>97</sup> and Rule 608 regulates the manner in which evidence concerning a witness' character for truthfulness may be introduced to the jury.<sup>98</sup>

Although jurors serve as the chief lie detectors during trial, studies demonstrate that jurors, like other people, are not very good at lie detection. According to Joseph Rand, who reviewed more than thirty years of research on lie detection, "most observers in controlled studies detect deception about as well as a flipped coin, because they focus on 'cues' to deception derived from folklore and common sense—such as the speaker's inability to maintain a steady gaze—that are often more a sign of discomfort than deception."<sup>99</sup> Rand theorizes that jurors may be worse at lie detection than the subjects participating in the controlled studies because trial witnesses will likely be better prepared.<sup>100</sup> Rand concludes that jurors "are likely to be regularly misled by a deceitful witness or mistakenly distrustful of the truthful one."<sup>101</sup>

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<sup>94</sup> This statement was allegedly made by one juror during deliberations in the *Pena-Rodriguez* matter. *Pena-Rodriguez*, supra note 1, at 862.

<sup>95</sup> *U.S. v. Scheffer*, 523 U.S. 303, 312–13 (1998).

<sup>96</sup> *Id.* at 313 (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)).

<sup>97</sup> See FED. R. EVID. 607 ("Who May Impeach a Witness"), 609 ("Impeachment by Evidence of a Criminal Conviction"), and 613 ("Witness's Prior Statement").

<sup>98</sup> See FED. R. EVID. 608 ("A Witness's Character for Truthfulness or Untruthfulness").

<sup>99</sup> Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 *Conn. L. Rev.* 1, 3 (2000).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Racial bias and stereotypes create even more risk that jurors will make mistakes in their efforts to assess witness credibility. Rand argues that a “demeanor gap” exists when jurors of one race are called upon to assess the credibility and demeanor of a witness of a different race.<sup>102</sup> He posits that well-intentioned and low-prejudiced jurors “will be unable to dependably judge the demeanor of a witness of a different race because they are unable to accurately decipher the cues that the witness uses to communicate sincerity.”<sup>103</sup> Before reviewing the specific ways in which racial bias and stereotypes can impact credibility assessment in the modern American courtroom, it is important to consider the historical relevance of race on the question of a witness’ credibility.

Prior to the abolition of slavery, the law generally prohibited slaves from testifying against Whites.<sup>104</sup> This prohibition was enforced in southern and northern states alike.<sup>105</sup> Similarly, laws in states including New York, Pennsylvania, and Virginia precluded free Blacks from testifying against Whites.<sup>106</sup> Once the Civil War ended, Congress passed a law that forbade the state from depriving citizens of their right to file suit, act as parties to a suit, or provide evidence.<sup>107</sup> Even though this law ended the official exclusion of Black witnesses, for much of the twentieth century, attorneys frequently argued that juries should discount or ignore the testimony of Black witnesses. As a part of her research on the topic of race and witness credibility, Sheri Lynn Johnson reviewed several pre-Civil Rights Era prosecutorial misconduct cases and found two patterns of racially biased attorney arguments concerning credibility. In the first pattern, attorneys argued that Black witnesses were inherently less trustworthy because of their race while the second pattern involved attorneys arguing that Black witnesses should not be believed because Blacks are inclined to lie for each other.<sup>108</sup> Johnson also found a case where prosecutors made similar arguments about Chinese witnesses testifying on behalf of a Chinese-American defendant.<sup>109</sup> Importantly, Johnson found that these patterns have continued, and she cites to several modern cases where prosecutors have explicitly argued that a witness’ race should impact the jury’s assessment of

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<sup>102</sup> Id. at 4.

<sup>103</sup> Id. Rand’s argument regarding the “demeanor gap” is very similar to the argument, backed by empirical evidence, that eyewitnesses of one race are more likely to make mistakes when identifying persons of a different race. See American Bar Association, *American Bar Association Policy 104d: Cross-Racial Identification*, 37 SW. U. L. REV. 917, 918 (2008) (“Persons of one racial group may have greater difficulty distinguishing among individual faces of persons in another group than among faces of persons in [their] own group. Persons who primarily interact within their own racial group, especially if they are in the majority group, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups. In terms of personal experience, who has never heard the phrase, ‘they all look alike to me?’”).

<sup>104</sup> Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267 (1996).

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> See Act of April 9, 1866, ch. 31, s 1, 14 Stat. 27, 27 (1866).

<sup>108</sup> Johnson, *supra* note 103, at 274.

<sup>109</sup> Id.

his or her credibility.<sup>110</sup> These reported cases have led Johnson to conclude that race continues to serve as a proxy for credibility.<sup>111</sup>

To the extent race impacts credibility assessments, it often occurs in more subtle, subconscious ways. Indeed, well-intentioned jurors may be completely unaware that stereotypes and bias are at play as they judge the truthfulness of trial witnesses.<sup>112</sup> Many prosecutors have abandoned explicit race-based credibility arguments in light of appellate courts' disfavor for such arguments,<sup>113</sup> but they have replaced them with indirect jibes that chip away at the witness' credibility. Johnson notes that prosecutors use an array of tactics, including "racial epithets, animal imagery, and the practice of referring to a minority race witness by her first name," thereby triggering multiple racial stereotypes.<sup>114</sup>

Researchers have identified specific stereotypes that likely come into play when African-Americans serve as witnesses. They include:

- (1) the stereotype that African-Americans are less intelligent than Whites, which would be invoked if the Black witnesses were called upon to recall and describe events accurately;
- (2) the stereotype that African-Americans are not trustworthy and honest, which would have obvious implications for any sort of trial testimony; and
- (3) the stereotype that African-Americans are violent, such that any allegation regarding violence would be bolstered by its consistency with the stereotype.<sup>115</sup>

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<sup>110</sup> Id. at 305-06 (describing a modern case where prosecutors argued that an African-American prosecution witness should be believed because he or she was testifying against another African-American as well as a case where a prosecutor argued that a White male witness was credible because his testimony included an admission about having sex with a Black woman, and "[i]f he is going to lie about anything else, he wouldn't admit having intercourse with a black woman." (internal quotations omitted)).

<sup>111</sup> Johnson, *supra* note 103, at 269.

<sup>112</sup> Id. at 265 (stating that "racially biased assessments of credibility may occur in the absence of overt--or even covert-- racial animosity."). See also Rand, *supra* note 98, at 43 (citing to research establishing that White jurors who do not actually believe in racial stereotypes will still be influenced by them).

<sup>113</sup> Johnson, *supra* note 103, at 321 ("Modern courts have universally concluded that arguments that one race is more credible than another and arguments that members of one race are likely to lie for one another are racially inflammatory and therefore impermissible. Courts have also deemed impermissible arguments that an accusation is especially credible because the accuser, like the defendant, is Black.").

<sup>114</sup> Id. at 307.

<sup>115</sup> Rand, *supra* note 98, at 42. Accord Johnson, *supra* note 103, at 316 (stating that stereotypes about the intelligence of African-Americans as well as stereotypes about Black criminality and dishonesty could subconsciously affect a juror's credibility determinations). The research in the area is heavily focused on the Black-White binary. Much more research is needed regarding other people of color and what impact their race may have on a jury's lie detection capabilities.



These stereotypes impact jurors in various ways. Rand describes the first such phenomenon as “skepticism bias.”<sup>116</sup> According to Rand, jurors tend to be less suspicious and are willing to give the benefit of the doubt to witnesses who share their identity, but they are more suspicious of witnesses who do not share their identity.<sup>117</sup> White jurors in particular begin the credibility assessment process with an “innate suspicion” of Black witnesses.<sup>118</sup> Even Whites who have low levels of prejudice may see facts in a particular way because racial stereotypes have a strong, albeit subconscious, influence on how they perceive events.<sup>119</sup> Rand has found that jurors who are more influenced by racial stereotypes are likely to be more suspicious of African-American witnesses.<sup>120</sup> This higher level of skepticism will cause jurors to “focus more closely on certain deception cues and become more skeptical. They will skew their credibility determinations against not only deceptive African American witnesses, but honest ones as well.”<sup>121</sup>

Racial stereotypes also have greater influence over jurors when they hear stereotype-consistent testimony because individuals who are impacted by stereotypes do a better job of processing stereotype-consistent information as compared to stereotype-inconsistent information.<sup>122</sup> As Johnson explains, “To the extent that a witness—of any race—testifies to behavior that conforms to a racial stereotype of the purported actor, such conformity may enhance that witness’ credibility.”<sup>123</sup> Johnson notes that stereotypes concerning violence or sexual behavior are particularly corroborative of a witness’ testimony.<sup>124</sup> Thus, a racial stereotype regarding the sexual proclivities or super-sexuality of Black men might work to corroborate the testimony of a White woman who says a Black man raped her. Rand has found that the opposite is true as well—where witness testimony is stereotype-inconsistent, jurors who are impacted by racial stereotypes will find this testimony to be less credible. He posits that individuals will ignore information that is inconsistent with their expectations.<sup>125</sup> Therefore, “if a white juror has developed a [belief] that African-American men act a certain way, she will more easily process information that is consistent with that stereotype and disregard information that is inconsistent.”<sup>126</sup>

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<sup>116</sup> Rand, *supra* note 98, at 41.

<sup>117</sup> *Id.* at 44.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 45.

<sup>121</sup> *Id.*

<sup>122</sup> Johnson, *supra* note 103, at 315.

<sup>123</sup> *Id.* at 317.

<sup>124</sup> *Id.* at 317.

<sup>125</sup> Rand, *supra* note 98, at 41. According to Rand, “People design strategies for simplifying the world by categorizing information according to schemas that help explain and anticipate new information.” *Id.* While schemas allow us to process information more quickly, they also allow for errors where information does not fit into our preset patterns. *Id.*

<sup>126</sup> *Id.* Rand has found that jurors who engage in this practice may not be motivated by racial animus but instead by an adaptive cognitive process. *Id.*

Racial stereotypes also assist counsel in indirectly discrediting a witness by identifying the witness as the “other.” “Othering” is defined as “a process by which individuals and society view and label people who are different in a way that devalues them.”<sup>127</sup> When individuals engage in “othering,” they determine that certain people are “not us,” and that determination functions to create a devalued and dehumanized Other, and a distancing of the other from ourselves.”<sup>128</sup> Scholars theorize that lawyers who can successfully “other” a witness will be able to hurt the witness’ credibility. Carodine argues that Federal Rule of Evidence 609, which allows for the admission of prior criminal convictions to impeach the testimony of a witness,<sup>129</sup> is especially harmful to Black defendant-witnesses because it reinforces the widely known Blacks-as-criminals stereotype and allows for the “othering” of the defendant-witness.<sup>130</sup> She argues that a prosecutor can “other” the defendant-witness with a prior conviction by “draw[ing] a line around the defendant, locating both herself and her audience on the same opposite of that line—thereby defining the attorney as a trustworthy member of the jurors’ community.”<sup>131</sup>

The *State of Florida v. Zimmerman* trial offers a helpful example of an attorney’s attempt to “other” a witness using racial stereotypes. Zimmerman was charged with second-degree murder in the killing of a seventeen-year-old Black male named Trayvon Martin.<sup>132</sup> Zimmerman claimed that he killed Martin in self-defense.<sup>133</sup> The prosecution’s key witness was a nineteen-year-old Black woman named Rachel Jeantel. Jeantel was Martin’s friend and the last person to speak with

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<sup>127</sup> Susan J. Stabile, *Othering and the Law*, 12 U. ST. THOMAS L.J. 381, 382 (2016).

<sup>128</sup> Id. (internal quotations omitted). While the application of stereotypes can assist an individual in “othering” another person or group of people, othering and stereotyping are not identical: “Stereotyping involves making judgments about a person based on perceived characteristics of the particular group to which the person belongs rather than on an individual assessment of the person” while othering is a more broad judgment that the individual or group in question is “not me” or “not us.” Id. at 383. Although stereotyping and othering may happen subconsciously, stereotyping, unlike othering, “does not necessarily carry a judgment that the ‘other’ is less than oneself.” Id.

<sup>129</sup> FED. R. EVID. 609.

<sup>130</sup> Carodine, *supra* note 37, at 571. Carodine also argues that prior criminal convictions lack probative value on the issue of truthfulness and are terribly prejudicial to defendant-witnesses in that jurors are very likely to use the prior conviction for an impermissible purpose. Id. at 541-42 (arguing that prior criminal convictions are not predictive of who will likely lie under oath, and stating, “If jurors hear that the accused was previously convicted of a crime, even if the crime was completely unrelated to the current charges against the defendant, there is a substantial likelihood, indeed a substantial probability, that the jury will convict the defendant for being a ‘bad’ person generally.”).

<sup>131</sup> Id. (internal quotations omitted). Accord Andrew Elliot Carpenter, *Chambers v. Mississippi: The Hearsay Rule and Racial Evaluations of Credibility* (Student Article), 8 WASH. & LEE RACE & ETHNIC ANC. L.J. 15, 22 (2002) (“Lawyers may try to connect with the jurors based on race, subtly reinforcing the idea that the minority witness is part of the ‘other,’ and so should not be trusted.”).

<sup>132</sup> For a detailed re-telling of the facts leading up to the Zimmerman trial as well as an analysis of the impact that racial stereotypes had on the outcome, see *Blackness as Character Evidence*, *supra* note 63, at 335-343.

<sup>133</sup> Id. at 335.

him before his death.<sup>134</sup> Jeantel provided key testimony for the prosecution despite her reluctance to testify, but some commentators perceived defense counsel's cross-examination of Jeantel to be "abusive" because the attorney's tone was harsh and "the questioning at times, subtly (or not so subtly, depending on your viewpoint) implied that Ms. Jeantel was unintelligent and thus not credible."<sup>135</sup> Jeantel also struggled to read the transcript of her deposition testimony, which defense counsel provided to her during cross-examination, and she later admitted that she had some literacy difficulties.<sup>136</sup> Jeantel's testimony, like the entire Zimmerman trial, was televised, and social media reacted swiftly with criticism of Jeantel for being stereotypically Black—uneducated, hostile, inarticulate, angry toward Whites, lazy, and a thug.<sup>137</sup> Thus, Zimmerman's defense counsel was successful in "othering" Jeantel. As Carodine stated, "The message that Zimmerman's lawyer, Don West, sent the court, the jury, and the (white) public was that 'she looked different, sounded different, shit she must be lying because she sure as hell ain't one of us.'"<sup>138</sup>

Finally, racial stereotypes impact witness credibility where a party offers cross-racial corroborative testimony. This phenomenon is a corollary to the stereotype that people of color are willing to lie for each other. Where a party offers corroborating testimony from an individual of a different race, well-intentioned fact-finders may automatically determine that witness' testimony to be more credible. The Supreme Court fell victim to this phenomenon in *Schlup v. Delo*.<sup>139</sup> Schlup, a White man who was sentenced to death following a murder conviction, filed a federal habeas corpus petition, alleging that his constitutional rights were violated when certain evidence that would have proven his innocence was withheld from the jury.<sup>140</sup> At the time of the murder, Schlup was an inmate in a Missouri penitentiary, and he and two other inmates were charged with killing a Black inmate.<sup>141</sup> While the Supreme Court spent much of its time considering the appropriate review standard, Justice Stevens, writing for the majority, referenced some of the affidavits submitted by Schlup to establish his innocence.<sup>142</sup> The Court specifically quoted the affidavit of Lamont Griffin Bey and identified Bey as Black.<sup>143</sup> Bey's affidavit stated that Schlup was not involved in the murder.<sup>144</sup> Sheri Lynn Johnson argues that Stevens quoted Bey's affidavit because he found Bey to

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<sup>134</sup> Id. at 336.

<sup>135</sup> Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 687-88 (2014).

<sup>136</sup> *Blackness as Character Evidence*, supra note 63, at 338.

<sup>137</sup> Id.

<sup>138</sup> *Contemporary Issues in Critical Race Theory*, supra note 134, at 688.

<sup>139</sup> 513 U.S. 298 (1995).

<sup>140</sup> Id. at 301.

<sup>141</sup> Id. at 301-02.

<sup>142</sup> Id. at 308 n.18.

<sup>143</sup> Id.

<sup>144</sup> Id.

be especially credible due of his race:<sup>145</sup>

The Court may be implying that any time a Black person testifies for a white person, that testimony is more likely to be true. If so, then more likely than what? More likely than if a Black person testifies for a Black person? More likely than if a white person testifies for a white person? Perhaps the inference is narrower: when a Black prisoner testifies for a white prisoner, that testimony is more likely to be true. If so, again, more likely than what?<sup>146</sup>

If highly intelligent, well-trained jurists can fall prey to the stereotype that cross-racial corroborating testimony is more credible than intra-racial corroborating testimony, then jurors are very likely to buy into the same stereotype.

This Section has highlighted the various ways in which racial stereotypes can impact a jury's assessment of witness credibility often outside an individual juror's conscious awareness. What is missing from this discussion is a description of the tools available to address the problem. Because the phenomena described above are quite different from the explicit race-based credibility arguments of the past, our justice system is not equipped to address them. As Johnson notes, "The information that we have about racial stereotypes and about modern forms and manifestations of prejudice suggests that the silent—and sometimes even subconscious— inferences of jurors will often be tainted racial generalizations, yet the influence of such inferences on jurors is not subject to challenge through any existing legal mechanism."<sup>147</sup>

### C. Stereotypes, Fact Interpretation, and Recall

As fact-finders, jurors must go about interpreting the facts put before them, a task that is heavily influenced by each juror's life experiences. Lee has found that "decision-makers actively construct representations of the trial evidence based on their prior expectations about what constitutes an adequate explanation of the litigated event. These representations, rather than the original 'raw' evidence, form the basis of the juror's final decision."<sup>148</sup> The justice system encourages jurors to rely upon their personal experiences when weighing evidence and interpreting facts.<sup>149</sup> Moreover, the system acknowledges that allowing jurors to enter the deliberation room with their unique life experiences makes the fact-finding process

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<sup>145</sup> Johnson, *supra* note 103, at 311.

<sup>146</sup> *Id.* at 312.

<sup>147</sup> *Id.* at 342. Accord Carodine, *supra* note 37, at 567 ("[G]enerally, the rules of evidence do nothing to ameliorate the potential prejudice that might result from the evidence of a person's race.").

<sup>148</sup> Lee, *supra* note 38, at 400.

<sup>149</sup> See, e.g., 1.1700 – *Credibility of Witnesses - Weighing Evidence*, IND. PATTERN CRIM. JURY INST. (2016) (instructing jurors to rely on their "knowledge, common sense, and life experience" when weighing witness testimony).

both human and imperfect.<sup>150</sup> As the New York Court of Appeals has described, jurors bring very valuable experiences to the process: “Nor would we want a jury devoid of life experience, even if that were possible, because it is precisely such experience that enables a jury to evaluate the credibility of witnesses and the strength of arguments.”<sup>151</sup>

While I agree that jurors’ individual life experiences certainly provide them with helpful insight at times, I am troubled by the possibility that one’s life experiences and understanding of the world may include some racial and ethnic stereotypes. This Section will explore two distinct but related areas where the jury’s fact-finding function can be influenced by racial bias and stereotypes: the interpretation of ambiguous facts and fact recall.

### 1. *Ambiguous Facts*

At the outset, it is important to explain what I mean by “ambiguous facts.” A fact scenario is ambiguous when the participants’ intentions are not obvious and their actions can be interpreted in multiple, divergent ways. Legal scholars have argued that where holes exist in the prosecution’s case, jurors tend to “fill in the gaps” or “complete the story” by turning to racial stereotypes.<sup>152</sup> In fact, where the prosecution’s case is especially weak, jurors are more likely to rely on their life experiences, including their racial biases, to make their decisions.<sup>153</sup> Jurors’ inclination to interpret ambiguous behavior in this manner results from “the general tendency of observers to interpret the ambiguous behavior of another person in accordance with the observer’s expectations.”<sup>154</sup>

Legal scholars can find support for their arguments in the social science literature. In one study, Patricia Devine presented a set of ambiguous facts to participants after priming them with stereotypes of African-Americans.<sup>155</sup> She quickly flashed words to study participants, including “poor,” “athletic,” and “Black,” and then asked them to read a story about a Black person who “demands his money back from a store clerk immediately after a purchase and refuses to pay his rent until his apartment is repainted.”<sup>156</sup> Once the participants completed the story, Devin asked them to make judgments about the person. She found that the priming had a direct impact on the participant’s judgments. Participants who were

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<sup>150</sup> See *People v. Arnold*, 753 N.E.2d 846, 850 (2001).

<sup>151</sup> *Id.*

<sup>152</sup> See Frank, *supra* note 70, at 27 (arguing that evidence of non-White defendants’ prior bad acts invite jurors to fill evidentiary gaps with implicit race-based associations).

<sup>153</sup> *Id.* at 27, n.157 (“[I]n cases where the prosecution’s evidence is particularly weak, jurors are more likely to rely on what they knew about the world before entering the courtroom and will impose their own racial biases, whether consciously or subconsciously, to the detriment of the Black defendant.”).

<sup>154</sup> Wang, *supra* note 30, at 1069-70.

<sup>155</sup> Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5 (1989) (cited in *Different Shades*, *supra* note 83, at 329).

<sup>156</sup> *Different Shades*, *supra* note 83, at 329.

primed with more stereotypes judged the person's ambiguous behavior more harshly than participants who were primed with fewer stereotypes.<sup>157</sup> The study demonstrated that subliminal priming "affected the way participants later judged the hostility of African-Americans in racially stereotyped ways."<sup>158</sup> Other researchers have found that the Blacks-as-criminals stereotype caused study participants to see weapons where none actually existed and to classify identical facial expressions as more hostile or threatening on Black faces as compared to White faces.<sup>159</sup>

In the 1970s, Birt Duncan conducted a study to test his theory that study subjects would interpret ambiguously hostile behavior differently based on the race of the actor. The participants, who were all White, observed a scenario where two people, either Black or White, got into a heated argument that resulted in Actor A shoving Actor B. Participants were asked to rate the behavior of Actor A.<sup>160</sup> Duncan found that the participants judged Actor A much more harshly depending on his race:

White university subjects perceived the "somewhat ambiguous," certainly less than blatant shove as violent (and labeled it thusly) for all conditions in which the black was the harm-doer, to a greater extent when the victim is white, but also when the victim was another black. Aggressive behavior, dramatizing, playing around, and so on (any category but violent behavior) were the labels applied when the harm-doer was white, even if the victim was a black or another white. Support was found for the hypothesis that the threshold for labeling an act as violent is lower when viewing a black committing the same act.<sup>161</sup>

Duncan concluded that his findings could have real-world consequences for Blacks who have been accused of violence and whose fate could be decided by eyewitness testimony.<sup>162</sup>

In a more recent study, Laurie Rudman and Matthew Lee tested whether violent, misogynistic rap lyrics would have an impact on study participants' interpretation of Black and White actors.<sup>163</sup> Study subjects, who were told they

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<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> See Ariela Rutbeck-Goldman and L. Song Richardson, *Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science*, 8 ALA. C.R. & C.L. L. REV. 145, 152 (2017) (citing studies).

<sup>160</sup> Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 4 J. PERSONALITY & SOC. PSYCHOL. 590, 593 (1976).

<sup>161</sup> Id. at 596.

<sup>162</sup> Id. at 597 ("One may be tempted to ask, in the real world where violence is a fact of life, have blacks been the victims of mislabeling or errors, in cases where there was a "reasonable doubt" (i.e., low perceptual threshold acts)? In court testimonies, this could have grave consequences.").

<sup>163</sup> Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent*

were participating in a marketing study, listened to rap music for the first part of the study. Researchers caused the audio player to stop working during the sixth rap song. Participants were then told that the study had been discontinued due to the player's malfunction but that they could satisfy their obligation to participate in a study by completing a questionnaire on "person perception."<sup>164</sup> Study subjects then read a story about a man engaging in ambiguously sexist behavior such as refusing to tip a female server or refusing to let a female door-to-door salesperson inside his house. In half of the stories, the man's name was Donald and in the other half the man's name was Kareem.<sup>165</sup> Rudman and Lee theorized that the participants would assume Donald to be White and Kareem to be Black. Participants were asked to rate the man's level of hostility, sexism, and intelligence.<sup>166</sup> Rudman and Lee found that subjects who were primed with rap music were more likely to judge Kareem as more hostile, more sexist, and less intelligent than Donald and that these judgments did not correlate with the participants' prejudice levels.<sup>167</sup> The researchers' finding regarding prejudice levels suggests that even low-prejudiced and non-prejudiced individuals "may succumb to the influence of implicit stereotypes and prejudice when they interpret and judge social behavior."<sup>168</sup> Moreover, if jurors' racial stereotypes are triggered, perhaps even en route to the courthouse,<sup>169</sup> then African-American defendants could suffer the consequences.

Finally, in a study conducted by Justin Levinson and Danielle Young, participants read a one-paragraph description of an armed robbery and then viewed five photographs of the crime and crime scene.<sup>170</sup> One of the photos showed an armed gunman who was wearing a mask but whose forearms were exposed. The skin tone of the gunman was manipulated, with some participants viewing a photo of a dark-skinned gunman while others viewed a photo of a lighter-skinned gunman.<sup>171</sup> The photos were identical other than the difference in skin tone. The participants then evaluated twenty pieces of evidence. Some of the evidence suggested that the defendant charged in the case may be innocent (e.g., the defendant had a used movie ticket stub for a show that started twenty minutes before the robbery occurred), while other evidence suggested that defendant was

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*and Misogynous Rap Music*, 4 GROUP PROCESSES & INTERGROUP RELATIONS 133, 133 (2002).

<sup>164</sup> Id. at 140-41.

<sup>165</sup> Id. at 140.

<sup>166</sup> Id.

<sup>167</sup> Id. at 142.

<sup>168</sup> Id. at 145.

<sup>169</sup> Rudman and Lee begin their article by posing a hypothetical where a manager, headed to work, is stopped at a red light and exposed to violent, misogynistic rap music blaring from car stopped next to her. When she arrives at the office, the manager interviews a Black male job applicant. Ultimately she rejects him because he is not a good fit. Rudman and Lee theorize that the racial stereotypes triggered by the rap music could influence the manager's assessment of the applicant. Id. at 133.

<sup>170</sup> *Different Shades*, supra note 83, at 332.

<sup>171</sup> Id.

guilty (e.g., the store owner identified defendant's voice in an audio line-up).<sup>172</sup> The participants also reviewed some ambiguous evidence (e.g., defendant was seen shopping at the store two days prior to the robbery).<sup>173</sup> After evaluating the evidence, participants were asked to determine whether the defendant was guilty or not guilty on a 100-point scale.<sup>174</sup> Levinson and Young found that the skin tone of the defendant "significantly affected" the evidence judgments.<sup>175</sup> They determined that "[p]articipants who saw the photo of the perpetrator with a dark skin tone judged ambiguous evidence to be significantly more indicative of guilt than participants who saw the photo of a perpetrator with a lighter skin tone."<sup>176</sup> Additionally, the study subjects who saw a darker-skinned perpetrator judged the defendant to be more guilty on the 100-point scale than study subjects who saw a lighter-skinned perpetrator.<sup>177</sup> Levinson and Young concluded that simply showing study subjects a photo of a darker-skinner perpetrator triggered racial bias that could impact a jury's evaluation of ambiguous trial evidence as well as jurors' decisions concerning guilt or innocence.<sup>178</sup> They also determined that racial stereotypes activated by the photo likely operated outside the participants' awareness.<sup>179</sup>

## 2. Fact Recall

During deliberations, jurors will be called upon to discuss the facts they have learned. Even the most well-intentioned jurors are likely to experience some routine memory errors. These errors fall into two categories: forgotten information and distorted recollections or false memories.<sup>180</sup> While memory errors are normal, they are also "predictable" and "meaningful."<sup>181</sup> A review of relevant research offers some insight into the predictability and meaningfulness of memory errors where racial stereotypes are at play.

Just as jurors sometimes fill gaps in the prosecution's case with stereotyped fact interpretations, they also tend to fill their own memory gaps with stereotypes.<sup>182</sup> In particular, stereotype consistency plays a significant role in an individual's ability to recall information. Researchers have found that people have

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<sup>172</sup> Id. at 333.

<sup>173</sup> Id. at 334.

<sup>174</sup> Id.

<sup>175</sup> Id. at 337.

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id. at 338-39.

<sup>179</sup> Id. at 339.

<sup>180</sup> Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 374-75 (2007).

<sup>181</sup> Id. at 375.

<sup>182</sup> *Forgotten Racial Equality*, supra note 178, at 376 ("[W]hen people attempt to recall information that is somewhat hazy in their memories, they generally rely on familiarity and expectations to help fill in the content of those memories. But familiarity and expectations can be code for stereotypes.").



less trouble recalling stereotype-consistent information as compared to stereotype-inconsistent information.<sup>183</sup> Thus, jurors in a criminal case may have an easier time remembering a Black defendant's prior conviction for a violent crime. Levinson references a study where participants were given scenarios about two stereotypically White crimes (identity fraud and ecstasy usage), two stereotypically Black crimes (crack cocaine usage and shoplifting), and two stereotypically neutral crimes (marijuana usage and joyriding).<sup>184</sup> The researchers manipulated the race of the perpetrator in the scenarios. After reviewing the stories, participants were asked to recall information about the scenarios and match the race of the perpetrator with each crime.<sup>185</sup> The researchers found that participants had an easier time recalling the race of the perpetrator when the crime matched the stereotypes associated with the perpetrator's racial identity.<sup>186</sup> The results showed that "racial stereotypes can systematically affect jurors['] (implicit) recollections in the legal setting, and that jurors may exhibit better recall of information about stereotypical criminals and crimes."<sup>187</sup>

Stereotypes not only affect the facts that jurors recall, but they also play a role in the development of false memories. Again, stereotype consistency is a major factor: "Memory scholars have explained that people are more likely to generate false memories when the contents of these memories are consistent with stereotypes they have about the subject, actor, and situation of the memory."<sup>188</sup> In the context of eyewitness identification, the Blacks-as-criminals stereotype causes White witnesses to expect Black criminality, and this expectation is so strong that "whites may observe an interracial scene in which a white person is the aggressor, yet remember the black person as the aggressor."<sup>189</sup>

Levinson conducted a study to test his hypothesis that racial stereotypes can cause individuals to make memory errors.<sup>190</sup> Study participants were presented with two unrelated stories. One story described a fistfight and the other described an employee's termination.<sup>191</sup> The protagonist in each story was White, African-American, or Hawaiian.<sup>192</sup> After the participants finished their review of the stories, they completed a questionnaire that was unrelated to the stories. The questionnaire was intended to eliminate any immediate memories of the stories. After finishing the questionnaire, study participants answered questions about the stories.<sup>193</sup> The

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<sup>183</sup> Id. at 376-77.

<sup>184</sup> Id. at 378.

<sup>185</sup> Id.

<sup>186</sup> Id.

<sup>187</sup> Id.

<sup>188</sup> Id. at 377.

<sup>189</sup> Sheri Lynn Johnson, *Cross-Racial Identification Error in Criminal Cases*, 69 CORNELL L. REV. 934, 950 (1984).

<sup>190</sup> *Forgotten Racial Equality*, supra note 178, at 390.

<sup>191</sup> Id. at 391.

<sup>192</sup> Id. at 394.

<sup>193</sup> Id. at 391.

questions required study subjects to recall aggressive facts, mitigating facts,<sup>194</sup> and neutral facts from the stories. The questionnaire also asked participants about facts that were not actually included in the stories.<sup>195</sup> Levinson found that participants misremembered certain facts in racially biased ways.<sup>196</sup> In relation to the fistfight story, he found that participants had an easier time recalling aggressive facts when the protagonist was African-American as compared to the White protagonist.<sup>197</sup> He also found that participants were more likely to recall false memories of aggressive action taken by the African-American and Hawaiian protagonists even though the story did not include these facts.<sup>198</sup> Levinson concluded that implicit memory biases have a tangible impact on jurors' decision-making.<sup>199</sup>

Before turning away from the topic of memory errors, it is important to consider whether the deliberation process works to solve the problems associated with forgotten facts and false memories. One might argue that the putting jurors into a room at the end of trial and allowing them to discuss the facts will cure any memory errors an individual juror might experience as a result of racial stereotypes.<sup>200</sup> While the deliberation process would likely correct some memory errors, the effectiveness of process may depend on the jury's motivations. Nancy Pennington and Reid Hastie have identified two styles of juries: evidence-driven juries and verdict-driven juries.<sup>201</sup> Evidence-driven juries make an effort to come to agreement about the facts of the case while verdict-driven juries move directly to a discussion of the verdict.<sup>202</sup> Pennington and Hastie theorize that evidence-driven juries have a greater opportunity to correct memory errors because they actually engage in a discussion of the facts. Because verdict-driven juries move directly to the verdict stage, they are unlikely to identify and correct memory

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<sup>194</sup> Id. at 393 (stating that mitigating facts “would potentially justify the actor’s action or lessen his legal or moral responsibility.”).

<sup>195</sup> Id. at 393-94.

<sup>196</sup> Id. at 397.

<sup>197</sup> Id. at 398-99.

<sup>198</sup> Id. at 400-01.

<sup>199</sup> Id. at 406. This risk of memory error suggests that courts should allow jurors to take notes. See Craig Thorley, *Note Taking and Note Reviewing Enhance Jurors' Recall of Information*, 30 APPL. COGNIT. PSYCHOL. 655, 660 (2016) (describing research which found that “note taking alone enhanced jurors['] correct recall of trial information” while jurors who were allowed to review their notes prior to deliberation recalled more correct information). Despite the obvious benefits of note taking and note review by jurors, few jurisdictions mandate that trial courts allow jurors to take notes. See *Price v. State*, 887 S.W.2d 949, 952, 954 (Tex. 1994) (holding that trial courts have the discretion to allow juror note-taking if it would be beneficial in light of the issues presented at trial and noting that just five states – Illinois, Arizona, California, Florida and Tennessee - allow note taking in every trial).

<sup>200</sup> See *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) (noting the importance of memory in jury deliberations and stating that juries of a certain size are necessary so that each member can recall important pieces of evidence).

<sup>201</sup> Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decision Making*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 99 (1990).

<sup>202</sup> Id.

errors.<sup>203</sup> Other studies have shown that even evidence-driven juries are not particularly effective at correcting memory errors. These researchers have concluded that there is very little support for the assumption that deliberation improves memory.<sup>204</sup> Indeed, several studies have found that “the best predictor of post-deliberation verdicts is individual jurors’ pre-deliberation verdicts.”<sup>205</sup>

This Section has described the various ways in which racial stereotypes can affect jurors’ assessments of trial evidence, including character assessment, credibility assessment, and fact interpretation and recall. The impact of racial stereotypes is often automatic and subtle, and it may quite difficult to correct the errors that will result. Because of the significant harm associated with the application of racial stereotypes, it is imperative that the justice system provide what George Fisher has deemed front-end quality control to protect against racial bias.<sup>206</sup> I will now turn to a review of the safeguards, as identified by the Supreme Court, that exist to protect parties, and criminal defendants in particular, from racial prejudice that is “odious in all respects” and “especially pernicious in the administration of justice.”<sup>207</sup>

## II. CURRENT METHODS FOR IDENTIFYING AND ADDRESSING RACIAL BIAS AMONG JURORS

In early 2017, the Supreme Court reaffirmed previously recognized methods for identifying racially biased jurors and added a new one. In *Pena-Rodriguez v. Colorado*, two teenage sisters accused the defendant of sexual assault.<sup>208</sup> The state charged the defendant with harassment, unlawful sexual contact, and attempted sexual assault of a child.<sup>209</sup> Prior to the start of the trial, prospective jurors were asked if they believed they could be fair and impartial in the case. Additionally, they were provided with a written questionnaire, which asked if there was “anything about you that you feel would make it difficult for you to be a fair juror.”<sup>210</sup> The trial judge and defense counsel asked the prospective jurors whether they could be fair and impartial, and the court encouraged jurors to request a private meeting if they had any concerns about their impartiality.<sup>211</sup> None of the jurors expressed concerns or reported that they could not be fair and impartial, and no jurors mentioned that racial bias might impact them.<sup>212</sup> After a three-day trial, the jury

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<sup>203</sup> Id.

<sup>204</sup> *Forgotten Racial Equality*, supra note 178, at 388-89 (describing studies).

<sup>205</sup> Lora M. Levett et al., *The Psychology of Juror and Juror Decision-Making*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 365, 370 (Neil Brewer & Kipling D. Williams eds. 2005).

<sup>206</sup> George Fisher, *EVIDENCE* 16 (2002).

<sup>207</sup> *Pena-Rodriguez*, supra note 1, at 868.

<sup>208</sup> Id. at 861.

<sup>209</sup> Id.

<sup>210</sup> Id.

<sup>211</sup> Id.

<sup>212</sup> Id.

found defendant guilty of harassment and unlawful sexual contact, but it did not reach a verdict on the charge of attempted sexual assault.<sup>213</sup>

After the trial court discharged the jury, defendant's counsel met with the jurors to discuss the trial with them. Once the meeting was over, two jurors remained in the room to speak privately with defendant's counsel.<sup>214</sup> The two jurors reported that, during deliberations, another juror had expressed anti-Hispanic bias toward defendant and his alibi witness.<sup>215</sup> With the trial court's permission, defendant's counsel obtained sworn affidavits from the two jurors. They stated that the juror, identified as Juror H.C., told other jurors that he "believed 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."<sup>216</sup> The jurors also reported that Juror H.C. stated, "I think he did it because he's Mexican and Mexican men take whatever they want," and that, in his experience, "nine times out of ten Mexican men are guilty of being aggressive toward women and young girls."<sup>217</sup> The jurors also attested that Juror H.C. said that he did not believe defendant's alibi witness because he was "an illegal."<sup>218</sup>

Based on the jurors' affidavits, defendant moved for a new trial. The trial court denied defendant's motion, finding that Colorado Rule of Evidence 606(b) prohibited the jurors from testifying regarding the statements that Juror H.C. made during deliberations.<sup>219</sup> Like Federal Rule of Evidence 606(b), Colorado Rule 606(b) limits juror testimony to the following matters: "(1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form."<sup>220</sup> The trial court reasoned that the two jurors' affidavits failed to satisfy any of these exceptions. The Colorado Court of Appeals and Colorado Supreme Court affirmed.<sup>221</sup> The U.S. Supreme Court granted certiorari to decide whether evidence of racial bias should qualify as an additional exception to Rule 606(b)'s no-impeach rule.<sup>222</sup>

The Court began its analysis by discussing the origins of the no-impeachment rule;<sup>223</sup> however, for purposes of this Article, the most relevant portion of the opinion is the Court's discussion of the five safeguards that are currently in place to protect against racially biased jury verdicts: (1) voir dire regarding racial bias; (2) jury instructions on racial bias; (3) observation of juror demeanor and conduct showing racial bias; (4) juror reports of racially biased comments or conduct during

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<sup>213</sup> Id.

<sup>214</sup> Id.

<sup>215</sup> Id.

<sup>216</sup> Id. at 862 (internal quotations omitted).

<sup>217</sup> Id. (internal quotations omitted).

<sup>218</sup> Id. (internal quotations omitted).

<sup>219</sup> Id.

<sup>220</sup> Id. (quoting COLO. R. EVID. 606(b)).

<sup>221</sup> Id.

<sup>222</sup> Id.

<sup>223</sup> Id. at 863.

trial and prior to the start of deliberations; and (5) non-juror reports of racially biased comments or conduct after trial.<sup>224</sup> The Court reviewed these safeguards in an effort to determine whether they adequately protect a defendant’s right to a fair and impartial jury, which the Court has recognized as a constitutional guarantee for both criminal and civil litigants.<sup>225</sup> Ultimately, the Court would determine that the Constitution requires the addition of a sixth safeguard—namely, an additional exception to Rule 606(b)’s no-impeachment rule that allows trial courts to consider juror reports of racially biased comments or conduct after trial.<sup>226</sup>

This Section will focus on voir dire and jury instructions, the two preemptive safeguards identified by the Court.<sup>227</sup> Despite the Court’s suggestion that these tools are widely available, an exploration of the relevant case law reveals that federal and state courts disfavor the use of voir dire and jury instructions to ferret out racial bias and that, when these tools are used, they are often ineffective.

#### A. Voir Dire Regarding Racial Bias

The Court has long recognized voir dire as an effective method for protecting the right to an impartial jury.<sup>228</sup> In its 1895 opinion on *Connors v. United States*, the Court stated that the questioning of prospective jurors “is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.”<sup>229</sup> Several of the Court’s opinions have explored whether it is permissible to question prospective jurors regarding potential racial bias, and a review of those opinions reveals that voir dire is not always available to parties concerned about potential racial bias among jurors.

In the 1931 case *Aldridge v. United States*,<sup>230</sup> the defendant, a black man, was accused of murdering a white police officer and tried in federal district court.<sup>231</sup> During voir dire, the defendant’s attorney approached the bench and requested that the trial judge question the prospective jurors, who were all White, regarding potential racial prejudice.<sup>232</sup> Defendant’s attorney indicated that he believed the question to be necessary because during the defendant’s first trial on the murder

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<sup>224</sup> Id. at 866, 871.

<sup>225</sup> Id. at 866. See also *Warger v. Shauers*, 135 S.Ct. 521, 528 (2014) (“The Constitution guarantees both criminal and civil litigants a right to an impartial jury.”).

<sup>226</sup> *Pena-Rodriguez*, supra note 1, at 870.

<sup>227</sup> By “preemptive,” I mean that parties can utilize these two safeguards prior to any expression of racial bias by a juror. The other safeguards identified by the Court can only be used when a juror has made a racially biased comment or engaged in racially biased conduct.

<sup>228</sup> See, e.g., *Warger*, supra note 223, at 528-29 (stating that voir dire can be an essential means of protecting the right to an impartial jury); *Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973).

<sup>229</sup> 158 U.S. 408, 413 (1895).

<sup>230</sup> 283 U.S. 308 (1931).

<sup>231</sup> Id. at 309.

<sup>232</sup> Id. at 310.

charge, one juror indicated that she was influenced by the fact the defendant was black and the victim white.<sup>233</sup> The trial judge refused to ask any questions related to potential racial bias or prejudice, and ultimately the defendant was convicted.<sup>234</sup> The Court found that the trial court erred when it refused to question potential jurors regarding racial prejudice.<sup>235</sup> After noting that several state courts had already recognized the propriety of such questions with respect to religion and race, the Court ruled that it would be a gross injustice to allow an individual to sit on a jury if his prejudice would prevent him from rendering a fair verdict.<sup>236</sup> Although the Court acknowledged the government's argument that allowing voir dire regarding racial bias would be disruptive to the court system, it stated that "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."<sup>237</sup>

The Court addressed the constitutionality of a trial court's refusal to allow voir dire concerning racial bias in *Ham v. South Carolina*.<sup>238</sup> In *Ham*, the state charged a black civil rights activist with possession of marijuana.<sup>239</sup> At trial, defendant requested that the judge conduct voir dire related to the potential jurors' racial bias against Blacks.<sup>240</sup> The trial court refused to ask these questions.<sup>241</sup> The jury convicted the defendant, and the trial court sentenced him to eighteen months' confinement.<sup>242</sup> On appeal, the defendant argued that the trial court's refusal to ask the racial bias questions resulted in a violation of his constitutional rights, and the Supreme Court agreed.<sup>243</sup> First, the Court distinguished *Aldridge* because it addressed voir dire inquiry in the federal court system rather than the state court system.<sup>244</sup> In *Aldridge*, the Court relied upon its supervisory authority over the federal courts, rather than the Constitution, in finding that the trial court should have conducted voir dire inquiry regarding racial bias.<sup>245</sup> In spite of this distinction, the *Ham* Court found that the Fourteenth Amendment's Due Process Clause

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<sup>233</sup> Id. According to the Court, the jurors could not come to an agreement following the first trial. Id. at 311.

<sup>234</sup> Id. at 309-310.

<sup>235</sup> Id. at 315.

<sup>236</sup> Id. at 314.

<sup>237</sup> Id. at 314-15.

<sup>238</sup> 409 U.S. 524 (1973).

<sup>239</sup> Id. at 524.

<sup>240</sup> Id. at 525. The defendant also requested that the trial judge inquire about the jurors' potential bias against men with beards, but the judge refused to make this inquiry. The Supreme Court determined that the trial court's refusal to make this inquiry did not rise to the level of a constitutional violation. Id. at 525, 528.

<sup>241</sup> Id. at 526.

<sup>242</sup> Id. at 524, 525.

<sup>243</sup> Id. at 525, 527.

<sup>244</sup> Id. at 526.

<sup>245</sup> Id. at 526 ("The [Aldridge] Court's opinion relied upon a number of state court holdings throughout the country to the same effect, but it was not expressly grounded upon any constitutional requirement.").

required the trial court to make an inquiry concerning racial bias once the defendant raised the issue.<sup>246</sup> The Court noted that the trial court maintains discretion as to the form and number of the questions.<sup>247</sup> While the holdings of *Aldridge* and *Ham* appear to answer the question of whether voir dire inquiry regarding racial bias is not only permissible but required pursuant to the Constitution, the Court would narrow the applicability of these rulings over the next several years.

About three years after its decision in *Ham*, the Court limited its applicability in *Ristaino, et al., v. Ross*.<sup>248</sup> The Commonwealth of Massachusetts charged James Ross, Jr. and two other African-Americans with armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder.<sup>249</sup> The victim of Ross' alleged crimes was a white security guard employed by Boston University.<sup>250</sup> During voir dire, all three defendants requested that the trial judge ask potential jurors about racial prejudice as well as their affiliations with law enforcement agencies.<sup>251</sup> When the judge inquired about why such questions were necessary, counsel for one of Ross' co-defendants stated that inquiry concerning racial bias was necessary because the defendants were Black and the victim White.<sup>252</sup> The trial judge denied the defendants' request that he question the potential jurors regarding racial prejudice but agreed to question them regarding any affiliation with law enforcement.<sup>253</sup> The judge also individually questioned potential jurors about their impartiality. The trial court excused eighteen individuals based on their responses, including one potential juror who admitted a racial bias.<sup>254</sup> Following trial, all three defendants were convicted on all counts, and Ross argued on appeal that the trial court violated his constitutional rights by failing to question the venire regarding racial prejudice.<sup>255</sup> The Court found no error in the trial court's decision, holding that *Ham* did not establish a blanket constitutional requirement that trial courts allow voir dire regarding racial bias in all criminal cases involving Black defendants.<sup>256</sup> Instead, the *Ristaino* Court ruled that the trial court's decision must be based on facts specific to the case. It noted that in *Ham*, the defendant's argument that he was framed as a result of his work as a civil rights activist as well as his reputation as a civil rights activist demonstrated that the issue of race was "inextricably bound up with the conduct of the trial."<sup>257</sup> The Court found that these "special factors" or "racial factors" were not present in Ross' case, stating that "[t]he circumstances [ ] did not suggest a significant likelihood that racial prejudice

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<sup>246</sup> Id. at 527.

<sup>247</sup> Id.

<sup>248</sup> 424 U.S. 589 (1976).

<sup>249</sup> Id. at 589-90.

<sup>250</sup> Id.

<sup>251</sup> Id. at 590.

<sup>252</sup> Id. at 591.

<sup>253</sup> Id. at 591-92.

<sup>254</sup> Id. at 592-93.

<sup>255</sup> Id. at 593.

<sup>256</sup> Id. at 596.

<sup>257</sup> Id. at 596-97.

might infect Ross' trial."<sup>258</sup> Justice Marshall dissented, arguing that the majority opinion in *Ristaino* left *Ham* "stillborn" and demonstrated that the promises of *Ham* and *Aldridge* would remain unfulfilled.<sup>259</sup>

The Court would go on to establish additional limitations on a criminal defendant's right to request or conduct voir dire regarding racial bias. For example, in *Turner v. Murray*, the Court echoed the holding of *Ristaino* in finding that interracial violence on its own is not a "special circumstance" that would trigger a state trial court's obligation to permit voir dire regarding potential jurors' racial bias;<sup>260</sup> however, the Court found that where the defendant has been accused of a capital offense against a member of another race, the defendant has the right to request that prospective jurors be informed of the race of the victim and questioned regarding their potential racial biases.<sup>261</sup> The Court reasoned that capital defendants are entitled to this additional constitutional protection due to the jury's role in capital sentencing:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.<sup>262</sup>

The *Turner* Court was quite insightful in that it recognized the risk that implicit racial bias could impact jurors' decisions; however, the majority's focus on the sentencing phase of capital cases confirmed that voir dire may not be available to other criminal defendants who are concerned about the impact of jurors' racial biases.<sup>263</sup> In his partial concurrence and dissent, Justice Brennan argued that "the constitutional right of a defendant to have a trial judge ask the members of the venire questions concerning possible racial bias is triggered whenever a violent

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<sup>258</sup> *Id.* at 598.

<sup>259</sup> *Id.* at 599.

<sup>260</sup> 476 U.S. 28, 33 (1986) (plurality opinion).

<sup>261</sup> *Id.* at 36-37.

<sup>262</sup> *Id.* at 35.

<sup>263</sup> The *Turner* Court noted that although voir dire regarding racial bias is not constitutionally required in cases where "special circumstances" are absent, the trial court maintains discretion to allow such inquiry. *Id.* at 50, n.7 (stating that *Ristaino* "leaves it to the trial judge's discretion to decide what measures to take in screening out racial bias absent a showing of 'significant likelihood that racial prejudice might infect [the] trial.'" (citing *Ristaino*, 424 U.S. at 598)).



interracial crime has been committed.”<sup>264</sup> Although the Court recognized the value of voir dire under such circumstances in *Rosales-Lopez v. United States*, it limited its ruling to the federal courts, finding that the Court’s supervisory authority over the federal courts, rather than the Constitution, called for federal trial courts to inquire about racial bias when a defendant is accused of committing a violent crime against a member of another race.<sup>265</sup>

The Court’s stated limitations on the use of voir dire concerning racial bias have left many criminal defendants unprotected. For example, in *Rosales-Lopez*, the Court found no reversible error in the trial judge’s decision to disallow voir dire concerning racial bias even though a Mexican defendant was accused of helping three other Mexican immigrants gain illegal entry into the United States.<sup>266</sup> Counsel for *Rosales-Lopez* requested that the trial judge allow him to pose the following question to the venire: “Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?”<sup>267</sup> The trial judge refused to ask this question and instead posed the following two questions to the venire: “Do any of you have any feelings about the alien problem at all?” and “Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?”<sup>268</sup> The difference between the question proposed by counsel for *Rosales-Lopez* and the questions asked by the trial judge is significant. While the questions asked by the judge explicitly mention “aliens” and the “alien problem,” the question proposed by counsel squarely identified *Rosales-Lopez*’s race and ethnicity and asked potential jurors to consider whether racial or ethnic bias against individuals of Mexican descent might impact them. The Supreme Court ruled that the defendant’s constitutional rights were not violated by the trial judge’s decision because there were no “special circumstances” present that would require voir dire regarding racial bias.<sup>269</sup> Moreover, the Court found that it need not exercise its supervisory authority over the federal trial court to require voir dire in this case because the crime was victimless and nonviolent.<sup>270</sup> The *Rosales-Lopez* analysis was a significant departure from *Ham*, when the Court found that voir dire on racial

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<sup>264</sup> Id. at 38-39 (citing *Ross v. Massachusetts*, 414 U.S. 1080 (1973) (Marshall, J., dissenting from denial of certiorari)). Brennan reasoned that “[t]he reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent.” Id. at 39.

<sup>265</sup> 451 U.S. 182, 191-92 (1981) (plurality) (“*Aldridge* and *Ristaino* together, fairly imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups.”).

<sup>266</sup> *Rosales-Lopez*, supra note 262, at 193.

<sup>267</sup> Id. at 185.

<sup>268</sup> Id. at 185-86.

<sup>269</sup> Id. 192.

<sup>270</sup> Id. at 192-93.

bias with constitutionally required in a non-violent, victimless marijuana possession case simply because the defendant was a civil rights activist.<sup>271</sup>

Federal and state courts have imposed limitations on voir dire concerning racial bias in accordance with Supreme Court precedent. While courts have required such inquiry in cases involving interracial violence,<sup>272</sup> they have not required voir dire regarding racial bias in cases of intraracial violence, including capital cases, despite the risk that jurors could rely upon racial stereotypes in making their decision.<sup>273</sup> Indeed, even when the Eighth Circuit acknowledged that it could not understand a trial judge's reasons for not allowing a very brief inquiry regarding a predominantly white venire's racial bias in a federal case when a black defendant was charged with conspiracy to distribute cocaine (a non-violent, victimless crime according to the court),<sup>274</sup> the court found no error in the trial judge's decision.<sup>275</sup>

Arguably, the most alarming aspect of the courts' jurisprudence on voir dire is the way in which courts handle a venire person who has expressed racial bias. The Eighth Circuit case of *United States v. Ortiz* provides an instructive example.<sup>276</sup> In *Ortiz*, the federal government charged three Black Colombian defendants with murder, drug trafficking, and traveling in interstate commerce with the intent to commit murder for hire.<sup>277</sup> The murder victim in the case was of Hispanic heritage.<sup>278</sup> The trial judge asked potential jurors five questions concerning racial and/or ethnic bias:

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<sup>271</sup> Ham, *supra* note 236, at 526-27.

<sup>272</sup> See, e.g., *Commonwealth v. DiRusso*, 800 N.E.2d 1067, 1069 (Mass. App. Ct. 2003) (stating that "certain types of cases are thought categorically to present sufficiently high potential for extraneous influence that trial judges are required to conduct individual voir dire upon the defendant's request" and citing *Commonwealth v. Young*, 517 N.E.2d 130, 135-36 (1987) (interracial murder); *Commonwealth v. Hobbs*, 434 N.E.2d 633, 641 (1982) (interracial sexual offenses against children); *Commonwealth v. Sanders*, 421 N.E.2d 436, 438-39 (Mass. 1981) (interracial rape)). Cf. *U.S. v. Kyles*, 40 F.3d 519, 525-26 (2d Cir. 1994) (finding no requirement that the trial court conduct voir dire regarding racial bias where a black defendant was accused of armed bank robbery because the white tellers were not victims in that they were not physically harmed, making the only victim the bank itself).

<sup>273</sup> See, e.g., *Goins v. Angelone*, 226 F.3d 312 (4<sup>th</sup> Cir. 2000), abrogated on other grounds by *Bell v. Jarvis*, 236 F.3d 149, 160 (4<sup>th</sup> Cir. 2000) (finding no constitutional guarantee of voir dire regarding prospective jurors' racial biases in a state capital murder case involving an African-American defendant and African-American victims even though the jury pool was predominantly White).

<sup>274</sup> *U.S. v. Borders*, 270 F.3d 1180, 1184 n. 2 (8<sup>th</sup> Cir. 2001) (noting that "no victim of the ravages of drug commerce was before the jury during the selection process.").

<sup>275</sup> *Id.* at 1184 ("Instead of resolutely adhering to its procedural template, we think the court would have been prudent to specifically inquire into the issue of prejudice, thus averting this issue for appeal. All the same, given its general inquiries and the circumstances of the case, we cannot say that its refusal to honor Borders' request created a reasonable possibility that the jury's decision might be influenced by prejudice, or that the court abused its discretion in failing to do so.").

<sup>276</sup> 315 F.3d 873, 889 (8<sup>th</sup> Cir. 2002).

<sup>277</sup> *Id.* at 878, 890.

<sup>278</sup> *Id.* at 890.

1. “Do you believe that certain races or ethnic groups tend to be more violent than others? If your answer is yes, please indicate which races and ethnic groups you believe to be more violent.”
2. “Have you ever had a bad experience involving a person whose race is different from yours? If your answer is yes, please describe any such experience.”
3. “How would you feel if a family of a different race moved next door to you?” Options for answering included “I would favor it,” “I would be indifferent because the race of my neighbors makes no difference to me,” and “I would oppose it.”
4. “The defendants in this case are Black and are accused of killing a Hispanic person. Would the race or ethnicity of the defendants or the victim be important to you in deciding between a life sentence and the death penalty?”
5. “Do you have any feelings toward any racial or ethnic group which would cause you to judge a member of that group differently than you would judge a member of your own racial or ethnic group?”<sup>279</sup>

After reviewing the venire’s responses to the questionnaire, the trial court addressed the panel, informing them that some potential jurors had indicated that they have had difficulty with people of different races, would oppose having someone of a different race as a neighbor, and believed that certain races are more violent than others.<sup>280</sup> In an effort to rehabilitate these individuals, the court asked, “Is there anyone here who expressed such a belief and because of your belief, or for any other reason, feels that you would be less likely to believe the position of a black person, or a person from Colombia, as opposed to anyone else merely because of their race or nationality?”<sup>281</sup> None of the panel members responded to this question.<sup>282</sup> Later, during the death-penalty qualification for the jurors, the trial court individually questioned several potential jurors who had made concerning statements on their questionnaires, but the court did not strike any of them for cause.<sup>283</sup> Thus, even though certain jurors stated that they believed Hispanics and African-Americans to be more violent than others, they were allowed to remain on the jury because they stated that the race of the defendants would not affect their decision.<sup>284</sup> The trial court also allowed a juror to remain who indicated that he believed certain races to be more violent but did not identify any particular race.<sup>285</sup> Another juror failed to respond to each of the racial bias questions included in the

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<sup>279</sup> Id. at 889-90.

<sup>280</sup> Id. at 890.

<sup>281</sup> Id.

<sup>282</sup> Id.

<sup>283</sup> Id. at 890-92.

<sup>284</sup> Id. at 890-91.

<sup>285</sup> Id. 891.

questionnaire.<sup>286</sup> The trial court denied defense counsel's request that these jurors be subject to additional questioning.<sup>287</sup> The Eighth Circuit found no abuse of discretion in the trial court's handling of these potential jurors.<sup>288</sup> Additionally, because defense counsel used their peremptory strikes to remove several of these potential jurors, the court determined that the defendants suffered no actual prejudice.<sup>289</sup>

The effectiveness of voir dire concerning racial bias, where allowed, varies depending on the questions that are posed to potential jurors as well as the courts' willingness to remove those venire persons who express racial bias. If one considers federal and state courts' reluctance to allow voir dire regarding racial bias together with some courts' refusal to strike potential jurors who admit their prejudices, it certainly appears that voir dire is not a particularly strong method for ridding juries of racial bias.

## B. Jury Instructions

The *Pena-Rodriguez* Court identified courts' instructions to jurors as another safeguard that protects against racial bias.<sup>290</sup> The Court noted jury instructions reminding jurors of their duty to make decisions without bias or prejudice are fairly common as are instructions encouraging jurors to engage in active deliberation and consultation with their fellow jurors.<sup>291</sup> In his dissent to the majority opinion, Justice Alito expressed his belief that jury instructions can effectively prevent bias from impacting a jury's verdict.<sup>292</sup>

Although the *Pena-Rodriguez* Court found value in jury instructions that mention bias generally,<sup>293</sup> lower courts are quite reluctant to allow instructions that specifically mention racial bias or provide guidance to jurors on the ways in which they can avoid making a racially biased decision. In *United States v. Diaz-Arias*, the First Circuit Court of Appeals found no error in the trial court's refusal to allow the defendant's proposed racial bias instruction.<sup>294</sup> There, the defendant was

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<sup>286</sup> Id.

<sup>287</sup> Id.

<sup>288</sup> Id. at 891-92.

<sup>289</sup> Id. at 892.

<sup>290</sup> *Pena-Rodriguez*, supra note 1, at 871.

<sup>291</sup> Id. (stating that "[p]robing and thoughtful deliberation improves the likelihood that other jurors can confront the flawed nature of reasoning that is prompted or influenced by improper biases, whether racial or otherwise.").

<sup>292</sup> Id. at 880 (Alito, J., dissenting).

<sup>293</sup> The *Pena-Rodriguez* majority quoted with approval the following instruction that mentions bias but does not address race specifically: "Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way." (quoting 1A K. O'Malley, J. Grenig, & W. Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Criminal § 10:01, p. 22 (6th ed. 2008)).

<sup>294</sup> 717 F.3d 1, 24 (1<sup>st</sup> Cir. 2013).

charged with conspiracy to distribute cocaine.<sup>295</sup> At trial, he requested that the trial judge provide the jury with the following instruction: “It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may about the defendant’s race or ethnicity, or national origin, or his or any witness’ immigration status.”<sup>296</sup> The trial judge refused to give defendant’s proposed instruction and instead opted to give a more general instruction concerning bias:

You should determine what facts have been shown or not based solely on a fair consideration of the evidence. That proposition means two things, of course. First of all, you’ll be completely fair-minded and impartial, swayed neither by prejudice, nor sympathy, by personal likes or dislikes toward anybody involved in the case, but simply to fairly and impartially judge the evidence and what it means.<sup>297</sup>

On appeal, the defendant argued that the trial court’s instruction was inadequate in that it did not address the prevalence of stereotypes linking Hispanics with drug trafficking.<sup>298</sup> Defendant also argued that an instruction specifically mentioning race or ethnicity was necessary given that Blacks and Hispanics are more likely than Whites to be imprisoned for drug-related crimes. Defendant claimed that an instruction specifically mentioning race or ethnicity was necessary “to dispel any notion among the jurors that being Hispanic in and of itself is evidence of guilt in a drug crime.”<sup>299</sup> The First Circuit disagreed, finding that the trial judge’s general instruction on prejudice and impartiality sufficiently addressed the concerns raised by the defendant.<sup>300</sup> The court noted that defendant offered no evidence that the jurors hearing his case harbored any sort of bias against him, and the court refused to presume that racial bias exists generally.<sup>301</sup> The court also noted that the defendant was allowed to address his concerns by conducting voir dire regarding race, ethnicity, national origin, and immigration status.<sup>302</sup> Because Diaz-Arias did not uncover evidence of actual bias among his jurors, the court ruled that he was not entitled to a jury instruction specifically addressing racial and ethnic bias.<sup>303</sup> In

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<sup>295</sup> Id. at 6.

<sup>296</sup> Id. at 22.

<sup>297</sup> Id. at 23.

<sup>298</sup> Id. (noting defendant’s argument that “the correlation between race and drug activity is a popular misconception.”).

<sup>299</sup> Id.

<sup>300</sup> Id. at 23-24 (“[T]he district court’s decision to use a general term such as ‘prejudice’, without listing the examples of concern to Diaz-Arias, does not constitute reversible error.”).

<sup>301</sup> Id. at 24 (stating that, according to the U.S. Supreme Court, “[t]here is no constitutional presumption of juror bias either for or against members of any particular racial or ethnic groups.”) (quoting Rosales-Lopez, supra note 262, at 190)).

<sup>302</sup> Id.

<sup>303</sup> Id. Accord U.S. v. Graham, No. 16-1423, 680 Fed.Appx. 489, 492-93 (8<sup>th</sup> Cir. Feb. 22, 2017) (unpublished) (holding that trial judge did not err in refusing to instruct jury on implicit racial bias

essence, the First Circuit did not allow the defendant to utilize the safeguard of juror instruction because he did not already possess evidence of racial bias among his jurors.

The *Diaz-Arias* outcome is not limited to federal courts. Two recent state supreme court cases highlight the difficulties defendants face when they attempt to introduce race-specific instructions to jurors in an effort to educate them regarding the prevalence of racial bias. In *State v. Plain*, the defendant, an African-American, was charged with one count of harassment in the first degree.<sup>304</sup> The alleged victims of the defendant's crime were his two Caucasian neighbors.<sup>305</sup> At trial, the defendant requested that the trial judge provide the following instruction to the jury:

Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious belief, national origin, or sex.<sup>306</sup>

The trial court refused to give defendant's proposed instruction because it was not included in the Iowa State Bar Associations' model instructions.<sup>307</sup> Even though the Iowa Supreme Court found that defendant's proposed instruction correctly stated the law, it found no prejudicial error the trial court's refusal to utilize the instruction.<sup>308</sup> The court found that the instruction would have been permitted under Iowa law even though it was not included in the model instructions; however, the trial court was not required to give the instruction.<sup>309</sup> Moreover, because the government offered strong evidence of defendant's guilt, the court found that he was not prejudiced by the trial court's refusal to give the instruction.<sup>310</sup> The court acknowledged that judges must play a role in eradicating implicit bias in the justice system and encouraged lower courts to give instructions like the one proposed by defendant, but the court rejected the idea that it should order a specific process for addressing implicit bias.<sup>311</sup>

The Kansas Supreme Court came to a similar conclusion in *State v. Nesbitt*.<sup>312</sup> Nesbitt, an African-American man, was charged with felony murder, rape, and

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where he directed jury that it should "not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you." (internal quotations omitted)).

<sup>304</sup> 898 N.W.2d 801, 809 (Iowa 2017).

<sup>305</sup> Id.

<sup>306</sup> Id. at 816.

<sup>307</sup> Id. at 817.

<sup>308</sup> Id.

<sup>309</sup> Id. at 816-17.

<sup>310</sup> Id. at 817.

<sup>311</sup> Id. ("We strongly encourage district courts to be proactive about addressing implicit bias; however, we do not mandate a singular method for doing so.")

<sup>312</sup> 417 P.3d 1058 (Kan. 2018).

aggravated battery, and his alleged victim was a 100-year-old White woman.<sup>313</sup> At the close of all evidence at trial, the defendant requested that the trial judge give a “race switching” instruction to the jury. The proposed instruction cautioned the jurors against relying on racial stereotypes when making their decision and stated that doing so would violate the defendant’s rights.<sup>314</sup> The instruction also directed the jury to engage in a race-switching exercise to determine whether their analysis of the case was impacted by implicit bias:

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching instruction exercise to test whether stereotypes have affected your evaluation of the case. “Race Switching” involves imagining the same events, the same circumstances, the same people, but switching the races of the particular witnesses. For example if the accused is African-American and the accuser/victim is white, you should imagine a White accused and a black accuser/victim.

If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.<sup>315</sup>

The trial court refused to provide the instruction to the jury.<sup>316</sup> Ultimately, the jury found defendant guilty on all three counts.<sup>317</sup> On appeal, defendant argued that the trial court erred in refusing to give the race-switching instruction.<sup>318</sup> The Kansas Supreme Court noted that federal law requires that the trial judge provide a racial bias instruction to capital sentencing juries.<sup>319</sup> The Court stated, however, that outside the context of federal death penalty cases, state and federal courts have been very reluctant to instruct juries concerning racial bias.<sup>320</sup> In the end, the Court affirmed the trial court’s refusal to give the instruction to the jury because it unlawfully called for the jury to imagine a hypothetical set of facts that was not before the jury.<sup>321</sup> According to the Court, “Kansas juries have a singular function: Deciding cases only on evidence actually and validly presented to them. They are

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<sup>313</sup> Id. at 1061.

<sup>314</sup> Id. at 1063 (“As a juror you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. . . . Reliance on stereotypes in deciding real causes is prohibited because every accused is entitled to equal protection of the law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.”).

<sup>315</sup> Id.

<sup>316</sup> Id.

<sup>317</sup> Id. at 1063, 1064.

<sup>318</sup> Id. at 1068.

<sup>319</sup> Id. (citing 18 U.S.C. § 3593(f)).

<sup>320</sup> Id. at 1068-69.

<sup>321</sup> Id. at 1069 (“We [ ] reject the instruction suggested by Nesbitt because it cannot be squared with Kansas law”).

not to imagine another set of facts and then allow that imagination to affect their deliberations.”<sup>322</sup> Finally, the *Nesbitt* Court noted that voir dire provides an opportunity for both parties to explore potential jurors’ racial biases and encourage them to consider the possibility that they might harbor subconscious biases.<sup>323</sup>

Despite many courts’ reluctance to instruct juries on racial bias, some state courts or court-commissioned committees have published model jury instructions that caution jurors to avoid identity-based bias, including racial bias, in making their decisions.<sup>324</sup> Interestingly, some jurisdictions offer civil jury instructions that address racial bias but have not crafted equivalent instructions for criminal cases where a defendant’s freedom is a stake.<sup>325</sup>

As attorneys and judges have become more familiar with the concept of implicit bias and way in which it could impact jurors, some states have developed jury instructions that specifically address implicit bias. For example, the Pennsylvania Bar Institute’s model civil jury instruction on bias states:

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.<sup>326</sup>

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.* (“Counsel may use their opportunity [during voir dire] to encourage potential jurors to examine their consciences and their consciousness, including the possibility of the existence of implicit bias and its unjust effects.”).

<sup>324</sup> See, e.g., *2.1 Nature of Hearing and Duties of Jury*, RAJI (CRIMINAL) CCSI (2016) (Arizona) (“You must not be influenced by your personal feelings of bias or prejudice for or against the defendant or any person involved in this case on the basis of anyone’s race, color, religion, national ancestry, gender or sexual orientation.”); *17.50 Concluding Instruction*, CAL. JURY INSTR.-CRIM. (2018) (“Do not let bias, prejudice, or public opinion influence your decision. Bias includes bias against the alleged victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.”).

<sup>325</sup> Compare *OUI-CR 1-4 Fair and Impartial Jury*, VERNON’S OKLA. FORMS 2D (2015) (cautioning criminal jurors that they “must be as free as humanly possible from bias, prejudice, or sympathy” but failing to list specific types of bias) with *OUI-CIV 1.5 Jury’s Duties – Cautionary Instruction – Bias on Account of Race, Religion, etc.*, VERNON’S OKLA. FORMS 2D (2015) (“Remember that under our justice system the race, religion, national origin, or social status of a party or [his/her] attorney must not be considered by you in the discharge of your sworn duty as a juror.”).

<sup>326</sup> *Pa. SSJI (Civ)*, § 1.140 *Bias*, PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS (2014). Accord *CACI 113 Bias*, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2018 edition).



The instruction goes on to instruct jurors that they must not allow bias to influence their decision.<sup>327</sup> Like Oklahoma, Pennsylvania does not offer an equivalent bias instruction for criminal cases.<sup>328</sup>

Washington State’s pattern civil instructions also address implicit bias. After directing jurors to make their decision without relying on “conscious biases” and listing the various types of biases that might impact jurors,<sup>329</sup> Washington’s pattern introductory instruction to juries states:

[T]here 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.<sup>330</sup>

In the comments following this instruction, the drafters acknowledge the detrimental impact that racial bias can have on the administration of justice and indicate their intention to define both conscious and unconscious bias for Washington State juries.<sup>331</sup> While the drafters’ goal is laudable, the pattern of addressing implicit bias solely in civil jury instructions continues. Washington

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<sup>327</sup> Id. (“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]*].”).

<sup>328</sup> See generally PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS, PA. SSJI (CRIM) (2016). Arkansas’ Criminal Jury Instruction Committee has proposed significant modifications to existing model instructions that would define implicit bias for criminal juries and explain how bias can impact the decision-making process. See AMCI PROPOSED JURY INSTRUCTIONS ON IMPLICIT BIAS, found at <https://courts.arkansas.gov/sites/default/files/tree/implicit%20bias%20w%20att.pdf> (last visited June 21, 2018) (“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. Witnesses can have the same implicit biases.”).

<sup>329</sup> *WPI 1.01 Advance Oral Instruction – Beginning of Proceedings*, 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. (6<sup>th</sup> ed. 2017) (“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.”).

<sup>330</sup> Id.

<sup>331</sup> *WPI 1.01 Advance Oral Instruction – Beginning of Proceedings, Comment*, 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. (6<sup>th</sup> ed. 2017).

State's pattern criminal instructions provide no information on conscious versus subconscious bias, and no instructions list the types of biases a juror might harbor unknowingly.<sup>332</sup>

At the federal level, the availability of racial bias or implicit bias instructions varies by jurisdiction. In the federal district court for the Western District of Washington, parties to criminal actions have access to a set of instructions that define conscious and unconscious bias in various model instructions, including a preliminary instruction, a witness credibility instruction, and a closing instruction.<sup>333</sup> The district court also produced a ten minute video that educates jurors on unconscious bias.<sup>334</sup> Similarly, the Honorable Mark W. Bennett, a judge in the Northern District of Iowa and a preeminent scholar on the topic of implicit bias in the courtroom,<sup>335</sup> provides the following implicit bias instruction to each of his juries:

Do not decide the case based on “implicit biases.” As we discussed in 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.<sup>336</sup>

While Judge Bennett and other federal judges should be commended for their efforts to raise jurors' awareness on the issue of implicit bias, jurors' accessibility to this information is very dependent upon the trial judge's willingness to mention

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<sup>332</sup> See generally 11 WASH. PRAC. WASH. PATTERN JURY INST. CRIM. WPIC (4<sup>th</sup> ed. 2016).

<sup>333</sup> W.D. WASH. CRIMINAL JURY INSTRUCTION – UNCONSCIOUS BIAS, found at <http://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf> (last visited June 21, 2018).

<sup>334</sup> W.D. Wash. Unconscious Bias (video), found at <http://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited June 21, 2018).

<sup>335</sup> See generally Mark W. Bennett, *Implicit Bias in Sentencing: The Next Frontier*, 126 YALE L.J. FORUM 391 (2017); Justin Levinson, Mark W. Bennett, and Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); 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).

<sup>336</sup> Jury Instructions from Mark W. Bennett, found at <http://federalevidence.com/pdf/JuryInst/SocMed.Bennett.pdf> (last visited June 21, 2018).

bias. The model criminal jury instructions published by the federal circuit courts mention bias briefly if at all and do not mention implicit bias or stereotypes, thus leaving to trial judges the discretion to introduce these topics to jurors.<sup>337</sup>

In this Section, I have explored the barriers that will welcome any criminal defendant who seeks to ferret out racial bias by utilizing the two preemptive safeguards identified by the *Pena-Rodriguez* Court. The tools of voir dire and jury instructions are available to most defendants only at the whim of the trial judge, and the trial court's denial of the defendant's request will be largely insulated from appellate review. In order for these safeguards to provide the protection described in *Pena-Rodriguez*, trial courts must demonstrate more openness to the possibility that most jurors enter the courtroom with some sort of bias. Additionally, courts must adopt a new way of educating jurors about their biases. To be effective, these changes must be grounded in the truth.

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<sup>337</sup> See generally PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT, found at <http://www.med.uscourts.gov/pdf/crpfjlinks.pdf> (2017) (no mention of bias). Accord PATTERN JURY INSTRUCTIONS, FIFTH CIRCUIT (CRIMINAL) found at <http://www.lb5.uscourts.gov/juryinstructions/> (2015); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, found at [http://www.juryinstructions.ca8.uscourts.gov/criminal\\_instructions.htm](http://www.juryinstructions.ca8.uscourts.gov/criminal_instructions.htm) (2014); CRIMINAL PATTERN JURY INSTRUCTIONS, TENTH CIRCUIT, found at <https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202018.pdf> (2011) (failing to mention bias and only mentioning race in the context of capital sentencing as required by 18 U.S.C. § 3593(f)); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL), found at <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf> (2016); See also *Instruction 1.02 Role of the Jury*, MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT, found at <http://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions> (2012) (instructing jurors that they “should not be influenced by any person’s race, color, religion, national ancestry, or gender [, *sexual orientation, profession, occupation, celebrity, economic circumstances or position in life or in the community*]” but failing to mention implicit or unconscious bias); *Instruction 1.02 Jurors’ Duties*, PATTERN CRIMINAL JURY INSTRUCTIONS, SIXTH CIRCUIT, found at [http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern\\_jury/pdf/crmpattjur\\_full.pdf](http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/crmpattjur_full.pdf) (2017) (stating “Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way” but failing to mention racial or implicit bias); *Instruction 1.01 Functions of Court and Jury*, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, found at [http://www.ca7.uscourts.gov/pattern-jury-instructions/7th\\_criminal\\_jury\\_instr.pdf](http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf) (2012) (failing to mention implicit bias but stating “Do not let sympathy, prejudice, fear, or public opinion influence you. [In addition, do not let any person’s race, color, religion, national ancestry, or gender influence you.]”); *Instruction 7.1 Duty to Deliberate*, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT, found at [http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal\\_Instructions\\_2018\\_6.pdf](http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2018_6.pdf) (2010) (cautioning jurors to avoid prejudice based on various identities, including race, but failing to mention implicit bias). It appears that the Second, Fourth, and Federal Circuits have not published model jury instructions. See *Jury Instructions Research Guide*, Marquette University Law School, found at <http://libraryguides.law.marquette.edu/c.php?g=318617&p=3680634> (last visited June 22, 2018).

### III. HOW TO TELL THE TRUTH IN THE COURTROOM

The process of truth and reconciliation can help us tell the truth in the American courtroom. Truth and reconciliation commissions assist communities in raising awareness of past injustices, providing recognition and closure for victims and other community members.<sup>338</sup> Truth and reconciliation commissions engage in community healing by exposing facts and acknowledging past wrongs.<sup>339</sup> Additionally, these commissions sometimes “assist in the creation of well-informed policies and can provide a step towards social equity for previously victimized populations.”<sup>340</sup> Comparing the truths exposed during South Africa’s Truth and Reconciliation process with the truths exposed during court proceedings, Albie Sachs, a Justice of the Constitutional Court of South Africa opined that the truth and reconciliation process was far superior:

So little truth comes out of court hearings—truth on which you can confidently rely. So much truth came pouring out of the Truth Commission, you would think due process of law is a greater guarantee of truth than the very open proceedings of the TRC, but it was the other way around. There was a veracity, an honesty, an integrity when you just heard the people speaking, and they weren't speaking to denounce somebody in the defendant's dock, or to get more money; they were speaking simply to relieve themselves of the pain. But also there was the corroboration from the mouths of the perpetrators themselves, truth from two sides. And it worried me at first, as a lawyer, a judge, that due process seemed to reveal so little truth while these other processes without strict regulation were so productive of truth.<sup>341</sup>

Justice Sachs’ description of the truth and reconciliation process, a process where participants are driven by their desire for acknowledgment and healing, leaves me wondering how we can bring the same sense of righteousness to our adversarial justice system, where the desire, even the need, to win will certainly discourage the telling of the truth.

I believe that the best way to introduce the American courtroom to the truth about our tendency to traffic in racial bias is to make race salient at trial. For many years, social scientists and legal scholars have argued that the open acknowledgement of race at trial can reduce the likelihood of racial bias. In one study, Sommers and Ellsworth found that an explicit mention of race significantly impacted White mock jurors in that they were equally likely to vote to convict the

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<sup>338</sup> Heather Parker, *Truth and Reconciliation Commissions: A Needed Force in Alaska?*, 34 ALASKA L. REV. 27, 28 (2017).

<sup>339</sup> *Id.* at 32.

<sup>340</sup> *Id.* at 33-34.

<sup>341</sup> Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563, 1571 (1999)

mock defendant regardless of race.<sup>342</sup> On the other hand, when race was not mentioned, the White mock jurors were more likely to convict and give longer sentence recommendations to the Black defendant.<sup>343</sup> Sommers and Ellsworth found that White jurors in non-race-salient situations are also more likely to perceive Black defendants as more violent as compared to White defendants and to perceive White defendants as more honest and moral.<sup>344</sup> These differences in perception disappeared when race was made salient.<sup>345</sup> Sommers and Ellsworth concluded that there is sufficient support for their theory that White juror bias is more likely to occur in trials where racial issues are not salient.<sup>346</sup> Lee argues that race salience impacts jurors because “most Americans will try to avoid appearing racist in situations when it would be obvious to others that they are acting in a racially biased manner.”<sup>347</sup> When race is made salient, jurors are reminded that they could be perceived as racist, and they are more likely to make decisions in accordance with their principles.<sup>348</sup> Lee notes that making race salient is doing something more than identifying the races of the parties: “Race salience means making jurors aware of racial issues that can bias their decisionmaking, like the operation of racial stereotypes.”<sup>349</sup>

If race salience can move us toward the truth described by Justice Sachs, what practical changes must our justice system make to allow for an open discussion of racial bias and stereotypes in the courtroom? First and foremost, trial judges must better educate themselves on the prevalence and impact of racial bias and stereotypes among jurors. As Section II describes, a trial judge can choose to shut down all discussion of racial bias, and appellate courts will overturn that decision only in very limited circumstances. The move toward mentioning implicit or unconscious bias in jury instructions signals that courts are willing to allow for more discussion of racial bias in the courtroom; however, until access to the

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<sup>342</sup> Sommers and Ellsworth, *supra* note 8, at 1015.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* In 2001, Sommers and Ellsworth conducted a race salience study based on a fact pattern of an assault involving members of a basketball team. The mock jurors knew the races of the defendants in each scenario, but in the race-salient scenario, the facts stated that the team had been dealing with racial tension for the entire season and that the defendant (either Black or White) was the only member of his race who was on the team. In the race-salient scenario, jurors’ decisions were not impacted by the defendant’s race; however, in the non-race-salient scenario, where the assault was the result of social tension, not racial tension, jurors were more likely to convict the Black defendant. *Id.* at 1016.

<sup>346</sup> *Id.*

<sup>347</sup> Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1573 (2013).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 1586. Lee argues that making race salient does not give an advantage to people of color. Rather it “evens the scales,” causing jurors to treat White defendants and defendants of color equally. She notes that “[f]ailing to make race salient, however, seems to lead to unequal treatment of similarly situated defendants, with the Black defendants receiving the short end of the stick.” *Id.* at 1588.

safeguards of voir dire and jury instructions does not vary depending on the individual judge, we will not see a system-wide reduction in jurors' reliance on racial stereotypes.

Looking to specific methods for raising the topic of racial bias during trial, trial courts must also consider allowing for an open discussion of racial stereotypes by attorneys. I am not proposing attorney argument similar to the explicit appeals to racial prejudice that were common in the past.<sup>350</sup> Instead, attorneys would have leeway to discuss stereotypes with the jury subject to the objections of opposing counsel. Allowing for counsel to speak openly about stereotypes in court will give defendants some recourse when prosecutors engage in subtle, subconscious priming of jurors.<sup>351</sup> Additionally, in cases where race should be made salient in the trial or where a race-switching exercise might change the jury's assessment of the case, attorneys should be allowed to discuss racial bias during opening statements and closing arguments. Legal scholars have explored very detailed methods for countering implicit bias through narrative,<sup>352</sup> so I will not spend more time on this method. Instead, this Section will explore my ideas for changes that could occur during voir dire and in jury instructions.

#### A. An Open Discussion of Racial Stereotypes During Voir Dire

In Section II.A., I discussed the courts' reluctance to allow voir dire regarding racial bias as well as some courts' unwillingness to dismiss potential jurors who express racial bias. I disagree with the constraints the courts have placed on minority defendants in criminal cases<sup>353</sup> and believe these defendants should have the ability to pose voir dire questions regarding racial bias even if the special circumstances described by the Supreme Court have not been met.<sup>354</sup> Because the Court has not ruled that criminal defendants of color have a blanket right to conduct voir dire regarding racial bias, we are left with a hit or miss system that may or may not allow for such inquiry. To be sure, there are risks associated with conducting voir dire regarding racial bias. An attorney may determine that not inquiring about racial bias is the best plan of action for his or her client.<sup>355</sup> Thus, the decision should lie with defendants and their counsel.

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<sup>350</sup> See Section I., *supra*.

<sup>351</sup> Some skilled advocates who are aware of the power of subtle stereotype priming have attempted to turn the tables on prosecutors by subtly priming the jury with principles of fairness and justice and counter-stereotypes that portray the defendant in a positive light. See Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 351-358 (2012).

<sup>352</sup> See generally Wilkins, *supra* note 346.

<sup>353</sup> I believe that civil litigants should also have the freedom to address racial bias and stereotypes; however, a discussion of the civil justice system is outside the scope of this Article.

<sup>354</sup> See Section II.A., *supra*.

<sup>355</sup> See *Pena-Rodriguez v. People*, 350 P.3d 287, 291 (2015), *rev'd and remanded on other grounds by Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (“[A] defense attorney's decision *not* to ask about racial bias—and to instead attempt to root out prejudice through generalized questioning—is

If a defendant decides to conduct voir dire regarding racial bias, then defense counsel must proceed carefully. Asking the jurors if they are racists in open court is likely to backfire.<sup>356</sup> Inquiry through individual questionnaires is likely a better method. The questionnaire that the trial court provided to the venire in *United States v. Ortiz* included questions that made race salient while also demanding that potential jurors do more than merely deny that they are racists.<sup>357</sup> The questionnaire included the following helpful questions:

1. “Do you believe that certain races or ethnic groups tend to be more violent than others? If your answer is yes, please indicate which races and ethnic groups you believe to be more violent.”
2. “Have you ever had a bad experience involving a person whose race is different from yours? If your answer is yes, please describe any such experience.”
3. “How would you feel if a family of a different race moved next door to you?” Options for answering included “I would favor it,” “I would be indifferent because the race of my neighbors makes no difference to me,” and “I would oppose it.”<sup>358</sup>

I believe this questionnaire can be expanded to include questions that inquire about stereotypes commonly attributed to the parties in the case. For example, in a rape case where a Black defendant is accused of raping a White woman and the defendant asserts consent as his defense, it would appropriate to inquire regarding the venire’s beliefs about interracial sex:

“How would you feel if one of your female family members married [or had sex with] an individual of a different race?” Options for answering would include “I would favor it,” “I would be indifferent because the race of family member’s spouse [sexual partner] makes no difference to me,” and “I would oppose it.”

Another appropriate question for the rape case would be:

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entirely defensible as a matter of strategy.”). See also *U.S. v. Villar*, 586 F.3d 76, 87 n. 5 (1st Cir. 2009) (“[M]any defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias because it might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight.”).

<sup>356</sup> See *Making Race Salient*, supra note 347, at 1592 (“If permitted to engage in voir dire into racial bias, an attorney would be wise not to start by asking prospective jurors whether any of them are racially biased. A question like this is likely to offend the prospective juror who may interpret such a question as an inquiry into whether the prospective juror is a racist.”).

<sup>357</sup> See *Ortiz*, supra note 273, at 889-90.

<sup>358</sup> *Id.* at 889-90.

“Do you believe that certain races or ethnic groups tend to be more likely to commit rape? If your answer is yes, please indicate which races and ethnic groups you believe more likely to commit rape.”

In a case where an individual of Arab descent is charged with criminal terrorist activity, an appropriate question would be:

“Do you believe that certain races or ethnic groups tend to be more likely to engage in terrorism? If your answer is yes, please indicate which races and ethnic groups you believe more likely to engage in terrorism.”

These questions are valuable not only because they may assist the court in identifying biased jurors but also because they will remind low-prejudiced or non-prejudiced individuals of their values, thereby reducing the likelihood that those jurors will rely on racial stereotypes.<sup>359</sup>

The most important aspect of my proposal on voir dire concerns the trial judge’s approach for handling a prospective juror who openly admits bias. The trial judge in *Ortiz* did not require all potential jurors to complete the questionnaire and attempted to rehabilitate the individuals who disclosed their bias by asking the entire panel whether their beliefs would impact their ability to “believe the position” of a person because of their race.<sup>360</sup> None of the panelists responded to this question. During the death penalty phase of the trial, the trial judge met with several potential jurors who had disclosed their biases, but the judge did not strike any of them from the panel.<sup>361</sup> To make matters worse, the judge did not allow defense counsel to conduct follow-up inquiry with the panelists who disclosed their biases or failed to complete the questionnaire.<sup>362</sup> Ultimately, defense counsel was forced to use peremptory strikes to remove several of these potential jurors.

Under my proposal, potential jurors who disclose their belief in racial stereotypes would be struck for cause unless they can properly rehabilitate themselves. The trial judge in *Ortiz* attempted to rehabilitate biased jurors with a single question about their ability to be fair, but no “magic question” can ensure that biased jurors will not rely on their biases.<sup>363</sup> While I am not opposed to the trial judge and counsel engaging in further inquiry with such jurors, the trial court should

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<sup>359</sup> See *Making Race Salient*, *supra* note 347, at 1573.

<sup>360</sup> *Id.* at 890.

<sup>361</sup> *Id.* at 890-92.

<sup>362</sup> *Id.*

<sup>363</sup> See *Gamble v. Comm.*, 68 S.W.3d 367, 373 (Ky. 2002) (“One of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court’s instruction.” (internal quotations omitted)). The Kentucky Supreme Court noted that this “magic question”, on its own, cannot rehabilitate a biased juror. *Id.*



presume that they will be struck for cause unless they are able to rehabilitate themselves to the satisfaction of the court and counsel.

## B. An Open Discussion of Racial Stereotypes in Jury Instructions

Like voir dire questioning, jury instructions on racial bias and stereotypes should be available whenever requested by minority defendants in criminal cases. Additionally, I disagree with the Kansas Supreme Court's determination that a race-switching instruction, which asks jurors to switch the races of the parties to ensure that bias has not affected their decision, is an improper hypothetical.<sup>364</sup> My proposals regarding jury instructions build upon the work of courts and jury instruction committees who routinely educate jurors about the prevalence of implicit bias.<sup>365</sup> While some of these proposed instructions do not mention race specifically,<sup>366</sup> others make race salient by explicitly identifying widely known stereotypes and educating jurors on the specific ways in which stereotypes can impact their work as jurors.

### 1. *Life Experiences Instruction*

Current instructions encourage jurors to use their life experiences and common sense to assess trial evidence, but doing so may necessarily involve the application of stereotypes.<sup>367</sup> Modeled after New York's Pattern Civil Instruction on jurors' use of professional expertise,<sup>368</sup> my proposed instruction states:

Although as jurors you are encouraged to use all of your life experiences and common sense when analyzing trial evidence and reaching a fair verdict, you must understand that it is unfair to make decisions based on assumptions or stereotypes about people who are different from you. If your life experiences include stereotypes about people who are different from you, you must not rely on those experiences.

Even though this instruction is brief and does not specifically address racial bias, it

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<sup>364</sup> See text accompanying notes 308-318. See also Lee, *supra* note 38, at 482 (proposing a race-switching jury instruction).

<sup>365</sup> *Id.*

<sup>366</sup> The Life Experiences and Stereotypes Instructions educate jurors on the impact of stereotypes generally and will be applicable in any case where defendants are concerned that jurors may make stereotypic judgments.

<sup>367</sup> *Forgotten Racial Equality*, *supra* note 178, at 376 (“[W]hen people attempt to recall information that is somewhat hazy in their memories, they generally rely on familiarity and expectations to help fill in the content of those memories. But familiarity and expectations can be code for stereotypes.”).

<sup>368</sup> *Juror's Use of Professional Expertise*, N.Y. PATTERN JURY INSTR.--CIVIL 1:25A (2017). The instruction encourages jurors to rely on their life experiences but prohibits them from communicating any personal professional expertise to other jurors during deliberations.

provides an important reminder that jurors should not rely too heavily on their personal experiences.

## 2. *Instruction on Stereotypes*

My proposed instruction on stereotypes reflects well-settled research on the impact that racial bias can have on jurors. It incorporates the Pennsylvania Bar Institute's model civil jury instruction on bias and provides more information on stereotypes:<sup>369</sup>

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. Bias and stereotypes can cause us: (1) to be skeptical of people who are different from us; (2) to remember information that is consistent with stereotypes and forget information that is inconsistent with stereotypes; and (3) to fill any evidence gaps with stereotypes. Stereotypes can also cause us to more easily believe witnesses who are like us.

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 not use stereotypes as evidence. 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.

This instruction builds upon a very effective instruction on bias and provides jurors with some additional education regarding stereotypes. Unlike the Pennsylvania instruction, this proposed instruction would be available to all criminal defendants who seek an instruction on bias.

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<sup>369</sup> *Pa. SSJI (Civ)*, § 1.140, PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS, (2014). Accord *CACI 113 Bias*, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2018 edition).

### 3. Instruction on Specific Racial Stereotypes

It is quite risky to introduce specific racial stereotypes to jurors who would have been unaware of them otherwise. One might argue that planting the seeds of prejudice where they do not already exist would be incredibly harmful to my ultimate goal of eliminating racial bias in the justice system. The decision to introduce specific stereotypes to the jury in an effort to make them salient must rest with defendants and defense counsel. In making this decision, they should consider whether the jury has already been primed with racial stereotypes.<sup>370</sup> Carodine argues that whenever a Black defendant enter the courtroom, his or her race will be relevant: “[T]hat is, race has a tendency to prove or disprove something in the American justice system just as it does in society at large. Race is indeed evidence and is automatically admissible, as we do not shield a person's race from the jury.”<sup>371</sup>

This Article has identified many commonly held stereotypes that could come into play during a criminal trial, but the list is certainly not exhaustive.<sup>372</sup> Attempting to draft a list of stereotypes is risky as well, for “jurors might think it appropriate to rely on [any] omitted stereotype.”<sup>373</sup> Nevertheless, I believe that openly identifying certain widely known stereotypes will help jurors who want to identify and reject racial stereotypes. Where an attorney is concerned that certain stereotypes might impact the jury, he or she would identify the stereotypes of concern and draft an instruction using the model proposed below.

The first example of the Specific Racial Stereotypes Instruction utilizes the stereotype concerns present in *Pena-Rodriguez*. Defendant, a Latino man, was on trial for sexual assault of a child.<sup>374</sup> As Pena-Rodriguez’s attorney, I would have been concerned about the Latinos as criminally inclined and Latinos as violent stereotypes. Another stereotype about Latino “machismo” would have been relevant as well.<sup>375</sup> The proposed instruction states:

Defendant, a Latino man [or man of Mexican heritage], has been charged with harassment, unlawful sexual contact, and attempted

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<sup>370</sup> Levinson and Young, *supra* note 83, at 327 (stating that stereotypes are activated “easily, automatically, and often unconsciously”).

<sup>371</sup> Carodine, *supra* note 37, at 567.

<sup>372</sup> See Section I, *supra* (identifying the following stereotypes: Blacks as criminally inclined, animalistic, violent, sexually unrestrained, dishonest, hostile, angry, and unintelligent; Latinos as undocumented, foreign, criminally inclined, and violent; Arabs as terrorists; Asians as foreigners, martial artists, and model minorities; and people of color in general as lazy, incompetent, disloyal, unpatriotic, and willing to lie for each other).

<sup>373</sup> Lee, *supra* note 38, at 482.

<sup>374</sup> Pena-Rodriguez, *supra* note 1, at 861.

<sup>375</sup> See Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CALIF. L. REV. 1509, 1571 (1997) (describing the stereotype of Latin “machismo” or hyper-masculinity and its impact on domestic violence in Latin communities).

sexual assault of a child. One of the unfortunate truths about our great country is that many of us make unfair judgments about others, especially people who do not share our race or ethnicity. In this case, there is a risk that you will assess the evidence offered in this case and make your decision based on widely known but untrue stereotypes about Latino men and criminal or violent conduct. It would violate the core principles of our justice system to allow these stereotypes to impact you. I implore you to resist any urge to reach a verdict that is influenced by bias for or against any party or witness and to make your decision based solely on the evidence presented.

This proposed instruction truthfully explains individuals' tendency to rely on stereotypes, informs jurors of the risk that stereotypes could impact them, and urges them to avoid applying the stereotypes. This instruction explicitly identifies the stereotypes but moves quickly to a firm statement that they are untrue. This instruction makes race and the relevant stereotypes salient for jury but leaves no room for them to assume that the court supports any sort of reliance on the stereotypes.

The second example of the Specific Racial Stereotypes Instruction uses the same form as the first but the statement is modified based on the stereotype of concern. The second example uses a different stereotype concern from *Pena-Rodriguez* that relates to defendant's alibi witness, who was Latino and purportedly undocumented.<sup>376</sup> As *Pena-Rodriguez*'s attorney, I would be concerned that the jury would apply certain stereotypes when assessing the witness' credibility, including the stereotype that people of color are willing to lie for each other and the stereotype that undocumented immigrants are dishonest. Even though the concern regarding immigration status does not explicitly implicate race, our country has made Latin ethnicity a proxy for undocumented immigration status.<sup>377</sup> The instruction states:

One of Defendant's witnesses, [insert name] is also a Latino man [or man of Mexican heritage], and he is an undocumented immigrant. One of the unfortunate truths about our great country is that many of us make unfair judgments about others, especially people who do not share our race or ethnicity. In this case, there is a risk that you will assess this witness' testimony based on widely known but untrue stereotypes about Latino immigrants [or undocumented immigrants] and dishonesty as well as untrue stereotypes about the willingness of people of color to lie for each other. It would violate

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<sup>376</sup> *Pena-Rodriguez*, supra note 1, at 861.

<sup>377</sup> See, e.g., *U.S. v. Brigoni-Ponce*, 422 U.S. 873, 886-87 (1975) (finding that Mexican heritage, together with other factors, would satisfy the Fourth Amendment's reasonable suspicion requirement such that a border patrol officer could lawfully stop a motorist who appears to be Mexican and determine his or her immigration status).

the core principles of our justice system to allow these stereotypes to impact you. I implore you to resist any urge to assess testimony or reach a verdict that is influenced by bias for or against any party or witness and to make your decision based solely on the evidence presented.

This proposed instruction focuses specifically on witness credibility and the impact of racial stereotypes in this area. The final two sentences of the instruction are nearly identical to the first example.

The final example of the Specific Racial Stereotype Instruction would have been helpful for the prosecution in *State v. Zimmerman* trial.<sup>378</sup> While this Article has focused exclusively on criminal defendants' right to question and educate jurors on racial bias and stereotypes, the *Zimmerman* trial reminds us that racial stereotypes can run rampant in self-defense cases involving victims of color. An instruction regarding the stereotypes of concern would have been helpful for the *Zimmerman* jury in light of the testimony of Rachel Jeantel. The stereotypes at play were the Blacks as unintelligent, Blacks as hostile, and Blacks as liars stereotypes. The instruction states:

One of prosecution's witnesses, Rachel Jeantel, is a Black woman of Haitian descent.<sup>379</sup> One of the unfortunate truths about our great country is that many of us make unfair judgments about others, especially people who do not share our race or ethnicity. In this case, there is a risk that you will assess this witness' testimony based on widely known but untrue stereotypes about Blacks as being dishonest, Blacks as being less intelligent than Whites, and Blacks as being hostile toward others. It would violate the core principles of our justice system to allow these stereotypes to impact you. I implore you to resist any urge to assess testimony or reach a verdict that is influenced by bias for or against any party or witness and to make your decision based solely on the evidence presented.

This instruction would be most helpful to the jury at the close of all evidence as the issues concerning Ms. Jeantel's intelligence and purported hostility did not come to light until her testimony was complete. This instruction explicitly states the stereotypes at play, making them salient for the jury and discourages the jury from relying on them.

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<sup>378</sup> For a description of the case facts, see text accompanying notes 131-137.

<sup>379</sup> *Blackness as Character Evidence*, supra note 63, at 341.

## CONCLUSION

The proposals contained in this Article are not a magic bullet for the racial bias problem that has plagued our justice system for years, but as all good Evidence professors likely remind their students, a brick is not a wall. As McCormick explains, “Under our system, molded by the tradition of jury trial and predominantly oral proof, a party offers his evidence not *en masse*, but item by item. An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered.”<sup>380</sup> Thus, the solutions proposed in this Article cannot fully solve a problem that has been institutionalized for centuries. Instead, each scholar, researcher, jurist, and attorney must stand on the shoulders of the ones who came before them, hoping that they are able to place a brick in the wall of justice.

To achieve the promises of our great country, it is imperative that we begin by being honest about our imperfect tendencies. Through truthful acknowledgement of the ills of the past and the impact those harms continue to have on our country, we can become the nation described by the majority in *Pena-Rodriguez*—a nation that can only move forward by confronting the prejudices that threaten our way of life.<sup>381</sup>

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<sup>380</sup> 1 MCCORMICK, EVIDENCE § 185 (4th ed) (cited in *People v. Brooks*, 557 N.W.2d 106, 109–10 (Mich. 1996)).

<sup>381</sup> *Pena-Rodriguez*, supra note 1, at 871.