

UNCOVERING JUROR RACIAL BIAS

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ABSTRACT

The U.S. Supreme Court in *Peña-Rodriguez v. Colorado* recognized for the first time in this Nation's history that trial courts could consider post-verdict evidence of juror racial bias under the Sixth and Fourteenth Amendments, notwithstanding the common law no-impeachment rule and its federal counterpart (Federal Rule of Evidence 606). Trial courts have nonetheless struggled with applying the *Peña-Rodriguez* framework, leading to inconsistent rulings on the types of juror statements that amount to a "clear statement of racial bias" and when such racial bias amounts to a "significant motivating factor" in the juror's decision-making process. While legal scholars have recommended pre-verdict solutions such as modified jury instructions and voir dire questioning following *Peña-Rodriguez*, scholarly guidance has not yet been given to trial judges on how to identify juror racial bias in a post-verdict context.

This Article advances a post-verdict model for analyzing juror racial bias, based on sociological and psychological empirical findings on the nature of racism and the expression of cognitive biases. The model proposes a dynamic and flexible understanding of racial bias, while setting forth an evidentiary procedure for analyzing *Peña-Rodriguez* claims of juror misconduct.

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INTRODUCTION

The presence of racial bias in the courtroom has the potential to undermine public faith in the adversarial process, distort trial outcomes, and obfuscate the search for justice. In *Peña-Rodriguez v. Colorado*¹ the U.S. Supreme Court recently held for the first time that the Sixth and Fourteenth Amendments required post-verdict judicial inquiry in criminal cases where racial bias clearly served as a “significant motivating factor” in juror decision-making.² Courts nonetheless have struggled in interpreting what constitutes a “clear statement of racial bias” and whether such bias constituted a “significant motivating factor” in the jury’s verdict.³ This Article examines how courts have interpreted such bias in the year following *Peña-Rodriguez* while advancing a model for future judicial analysis of racial bias that is informed by sociological and psychological empirical findings on bias and group decision-making dynamics.

The Article begins by examining how racial bias historically has embedded itself in the American adversarial system and how modern-day race-based disparities in criminal justice are linked to this history. Part II of the Article examines the common law and statutory evolution of rules preventing impeachment of jury verdicts by extrinsic evidence, and analyzes the constitutional rationale for creating a “racial bias” exception to those limits set forth in *Peña-Rodriguez*. This Part also explores how state and federal courts both pre- and post-*Peña-Rodriguez* have applied racial-bias exceptions to the no-impeachment rule, concluding that courts are struggling to understand the nature of racial bias in their rulings. In particular, it finds that trial judges tasked with applying the newly identified racial-bias exception may not have the requisite training or knowledge to adequately identify when racial stereotypes are influencing jury behavior. The third Part of this Article provides guidance to courts applying *Peña-Rodriguez*, based on the empirical findings of sociological and psychological research on racial bias. This Part also sets forth practical suggestions for courts to follow to assist with the identification and interpretation of juror racial bias when faced with a post-verdict *Peña-Rodriguez* motion.

1. 137 S. Ct. 855 (2017).
 2. *Id.* at 869.
 3. See discussion *infra* Section II.B.

I. RACIAL BIAS IN THE COURTROOM

Racial inequality has long been a defining feature of the American adversarial system.⁴ Our system of laws developed during a time when the maintenance of chattel slavery was critical to the nascent country's continued economic development.⁵ Our Constitution, with its guarantees of "equality," "freedom," and the "pursuit of happiness," evolved at a moment when explicit race-based restrictions to such legal freedoms were upheld on the grounds of biological racial difference and denied personhood.⁶ Such naturalized racism—whereby differential legal treatment based on race was seen as both constitutional and reflective of the natural order of humankind—thus embedded racial bias in the most central structures of our adversarial trial system.⁷ The ability of nonwhite litigants to access state and federal courts was largely restricted prior to the end of chattel slavery, typically on the rationale that nonwhite persons were not full "persons" within the meaning of the Constitution and thus not entitled to the full array of legal rights attendant to persons deemed "white."⁸ Black and other nonwhite persons were similarly restricted from entering into binding contracts,⁹ from providing testimonial evidence in court,¹⁰ or from seeking damages for legal injuries in court during these formative years of America.¹¹ Prosecutorial, judicial, and juror racial bias was an expressly legitimated aspect of the American trial system during the era of chattel slavery.¹²

4. See A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 521 (1990).

5. See An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

6. See *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (affirming the refusal of the United States to allow the appellant to enter the United States because it was within the Legislature's authority under the Constitution to exclude foreigners). For a historical account of race and its relationship to "personhood," the notion of an individual as a member in a political community, see Christian B. Sundquist, *Genetics, Race and Substantive Due Process*, 20 WASH. & LEE J.C.R. & SOC. JUST. 341, 352 (2014).

7. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 187 (2012); DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3, 5 (1992); Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair*, 61 CALIF. L. REV. 165, 166 (1973).

8. See *Dred Scott v. Sandford*, 60 U.S. 393, 404, 411 (1857) (holding that because the petitioner was a slave of African descent, he was not considered a citizen and therefore could not bring an action in court), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

9. See Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 23–24 (1995).

10. See, e.g., SHERROW O. PINDER, *THE POLITICS OF RACE AND ETHNICITY IN THE UNITED STATES: AMERICANIZATION, DE-AMERICANIZATION, AND RACIALIZED ETHNIC GROUPS* 58 (2010) (explaining that the 1850 Act Concerning Civil Cases, a California statute, established that "[n]o Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man." (quoting *People v. Hall*, 4 Cal. 399, 399 (1854))).

11. See GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 52 (Negro Univ. Press 1968) (1856).

12. See *Dred Scott*, 60 U.S. at 407 ("In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."); see also *The Chinese Exclusion Case*, 130 U.S. 581,

The fall of chattel slavery in this Country gave rise to a series of constitutional amendments intended, ostensibly, to remove the stain of slavery from the Constitution and ensure equality under the law for all persons.¹³ The specific purpose of the “Reconstruction Amendments” was thus to remove de jure structures of racial oppression, including the elimination of “racial discrimination emanating from official sources in the States.”¹⁴ The entrenchment of racial discrimination in the adversarial system was of particular concern as states began to resist the promise of equality embedded in the Fourteenth Amendment by normalizing prosecutorial, judicial, and juror racial bias in the courtroom.¹⁵ The U.S. Su-

606–07 (1889) (“The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.”).

13. The Thirteenth Amendment was passed and ratified in 1865, abolishing slavery in the United States. *See* U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment, ratified three years later, established that “all persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside,” and as such, granted African-Americans citizenship. *See* U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment, ratified in 1870, codified the right to vote. *See* U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); *see* cases cited *supra* note 12. At the same time the amendments were enacted, a series of regulations known as the “Black Codes,” passed during the Presidency of Andrew Johnson, continued to “prevent[] blacks from sitting on juries, [to] prohibit[] blacks from voting, [to] limit[] blacks’ testimony against whites, [and to] den[y] blacks the right to work in certain occupations.” *See* John D. Bessler, *The Inequality of America’s Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 521 n.122 (2017) (quoting ENCYCLOPEDIA OF BLACK STUDIES 120 (Molefi Kete Asante & Ama Mazama eds., 2005)). While these amendments were intended, perhaps, to establish liberal equality in name, the overriding effect was nonetheless to maintain white supremacy through the implementation of race-neutral equality rights, without addressing the legacy of the social and economic inequality left by slavery. *See* Bessler, *supra*, at 532–33.

14. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) (“[The] imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. “[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”” (second alteration in original) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964)); *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970) (“[T]he Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.”); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (“[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975); *The Slaughter-House Cases*, 83 U.S. 36, 71–72 (1872) (“[N]o one can fail to be impressed with the one pervading purpose found in [the Civil War Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.”); *see also supra* note 13.

15. *See Peña-Rodriguez*, 137 S. Ct. at 867 (“In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial.”); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004) (“Almost immediately after the Civil War, the South began a practice that would continue for many decades: All-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks . . .”).

preme Court eventually interpreted the Fourteenth Amendment to disallow prosecutorial racial bias¹⁶ and judicial bias¹⁷ in the administration of justice, to varying degrees of success.¹⁸ The Court also addressed racial discrimination in the jury system in a series of important cases in an effort to preserve “the American belief that ‘the jury was a bulwark of liberty.’”¹⁹ For example, the Court responded to the widespread state practice of excluding nonwhite persons from serving on juries in *Strauder v. West Virginia*,²⁰ holding that such practices amounted to a denial of equal protection under the law.²¹ The Court also belatedly found, many decades after the passage of the Reconstruction Amendments, that prospective jurors could be “interrogated on the issue of racial bias” during the pretrial voir dire process.²² And more than one hundred years after the passage of the Fourteenth Amendment, the Court held in *Batson v. Kentucky*²³ that the exclusion of prospective jurors because of race—through peremptory challenges or other means—was unconstitutional.²⁴ It has taken another thirty-one years since *Batson* for the Court to recognize, in *Peña-Rodriguez*, that criminal defendants also have a constitutional right to examine whether juror racial bias infected a guilty verdict.²⁵

It has proven difficult to shed the racial bias ingrained in the American adversarial process.²⁶ Our laws are now largely race neutral in their

16. See *Strauder*, 100 U.S. at 310 (holding that a West Virginia statute that discriminated “in the selection of jurors . . . against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man”).

17. See *In re Murchison*, 349 U.S. 133, 136 (1955).

18. See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 34 (1994).

19. *Peña-Rodriguez*, 137 S. Ct. at 867–68 (quoting Forman, *supra* note 15, at 909).

20. 100 U.S. 303.

21. *Id.* at 310. Subsequent Supreme Court decisions further responded to patterns of juror exclusion based on race. The Court elaborated in *Smith v. Texas* that “[f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.” 311 U.S. 128, 130 (1940). See also *Castaneda v. Partida*, 430 U.S. 482, 492, 501 (1977); *Hernandez v. Texas*, 347 U.S. 475, 477, 479, 482 (1954); *Avery v. Georgia*, 345 U.S. 559, 561 (1953); *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (per curiam); *Neal v. Delaware*, 103 U.S. 370, 397 (1880).

22. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); see also *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (holding that a criminal defendant, in a capital murder case where the defendant and victim are of different races, has a right to question jurors about potential racial biases); *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (holding that a trial court must examine racial bias in certain criminal cases).

23. 476 U.S. 79 (1986).

24. *Id.* at 84–85 (stating that such a rule was part of the Court’s “unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn”); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618, 630–31 (1991) (extending the *Batson* rule to civil trials).

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

26. Racial bias continues to permeate all aspects of the adversarial process. Research has shown that “[j]udges detain black defendants at statistically higher rates than white defendants.” See Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 199 (2013). Criticism of the Federal Rules of Evidence has suggested that while the rules are race-neutral in operation, they can be applied in a racially biased manner, subsequently giving race evidentiary value. See Montré D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Con-*

language and application,²⁷ while incremental progress has been made in the identification of constitutional trial protections directed against racial discrimination.²⁸ And yet the fact that much of our law is no longer explicitly race regarding in its allocation of justice does not mean that racial bias no longer contributes to disparate outcomes.²⁹ African-American men receive federal prison sentences nearly 20% longer than white men for similar convictions,³⁰ 38% of prison inmates are African-American despite constituting only 13% of the overall population,³¹ and America now “imprisons a larger percentage of its black population than South Africa did at the height of apartheid.”³² The persistence, and at times growth, of race-based disparities in our criminal justice system has created a democratic crisis with profound societal consequences.³³

The Supreme Court in *Peña-Rodriguez* recognized the perilous threat that continued racial bias in the administration of justice poses to the perceived legitimacy of our criminal justice system.³⁴ In acknowledging the “unique historical, constitutional, and institutional concerns” raised by the presence of “systemic” racial bias at trial, the Court underscored that allowing juror racial bias to persist unchecked not only runs afoul of the trial rights guaranteed by the Sixth and Fourteenth Amendments but also undermines the “promise of equal treatment under the law that is so central to a functioning democracy.”³⁵

II. CONSTITUTIONAL LIMITATIONS ON JUROR RACIAL BIAS

Remarkably, evidence of juror racial bias has long been held to be inadmissible to impeach a jury’s verdict, even when there was reason to believe that such bias influenced jury deliberations in reaching a guilty

viction Impeachment Rule, 84 IND. L.J. 521, 536 (2009). Another study has found that defendants with “more Afrocentric features received harsher sentences than those with less Afrocentric features.” See Irene Blair et. al, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 674 (2004).

27. See Sundquist, *supra* note 6, at 369. For a comprehensive analysis and timeline of the evolution of race as it related to the creation and application of law, see Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History and the Law*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 231, 231–33 (2008).

28. See Nugent, *supra* note 18, at 45.

29. See generally ALEXANDER, *supra* note 7 (providing in-depth analysis of the role that the criminal justice system plays in perpetuating racial discrimination).

30. AM. CIVIL LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING 1 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

31. THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM 16–17 (2d ed. 2008), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>.

32. ALEXANDER, *supra* note 7, at 6.

33. See Jeff Guo, *America Has Locked up So Many Black People It Has Warped Our Sense of Reality*, WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/26/america-has-locked-up-so-many-black-people-it-has-warped-our-sense-of-reality>.

34. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867–68 (2017).

35. *Id.* at 867–69.

verdict (almost always rendered against nonwhite defendants).³⁶ The common law and statutory basis for the historical rejection of racial-bias evidence has its roots in the “no-impeachment” rule.³⁷ The common law no-impeachment rule provided that jury verdicts could not be impeached by extrinsic evidence, such as juror testimony, to preserve verdict finality and the confidentiality of jury deliberations.³⁸ Over time the common law no-impeachment rule, some version of which had been adopted by a majority of state courts, was codified as a matter of federal statutory law so as to prevent “inquiry into the jury’s deliberative process or the grounds for its decision.”³⁹ Congress adopted Rule 606(b) of the Federal Rules of Evidence in 1975, which reflected a broad view on the types of evidence that should be prohibited from impeaching a jury verdict.⁴⁰ The rule provides as follows:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.⁴¹

The rule also provides that a “court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters,”⁴² although it incorporates a handful of narrow—and narrowly construed—exceptions to this broad prohibition:

(2) Exceptions. A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.⁴³

While a number of minority state and federal courts construed these exceptions (in particular, focusing on the “extraneous prejudicial information” exception) to permit post-verdict evidence of juror racial bias,⁴⁴ the majority of jurisdictions excluded such evidence prior to the *Pe-*

36. See *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008), *reh’g denied*, 560 F.3d 1151 (10th Cir. 2009), *abrogated by Peña-Rodriguez*, 137 S. Ct. 855; *Williams v. Price*, 343 F.3d 223, 239 (3d Cir. 2003), *abrogated by Peña-Rodriguez*, 137 S. Ct. 855; *Smart v. Folino*, No. 3:CV-10-1447, 2015 U.S. Dist. LEXIS 43582, at *22–25 (M.D. Pa. Apr. 2, 2015).

37. See Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 58 (1993).

38. See, e.g., *McDonald v. Pless*, 238 U.S. 264, 267–69 (1915); *Mattox v. United States*, 146 U.S. 140, 148–49 (1892).

39. Cammack, *supra* note 37.

40. See *Peña-Rodriguez*, 137 S. Ct. at 864.

41. FED. R. EVID. 606(b)(1).

42. *Id.*

43. *Id.* 606(b)(2).

44. See *United States v. Robinson*, 872 F.3d 760, 769–70 (6th Cir. 2017); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987); *Kittle v. United States*, 65 A.3d 1144, 1154–56 (D.C. 2013).

Peña-Rodriguez revolution.⁴⁵ Indeed, the U.S. Supreme Court had long narrowly interpreted when the Rule 606(b) exceptions applied, often leading to surprising results. In *Tanner v. United States*,⁴⁶ the Court affirmed the trial court's refusal to admit post-verdict juror testimony concerning alleged juror intoxication at trial.⁴⁷ While there was evidence that many of the jurors "drank alcohol," "smoked marijuana," "fell asleep," and even ingested cocaine during trial, the Court rejected the defendant's argument that the Sixth Amendment required an evidentiary hearing to determine whether he received his right to a competent jury.⁴⁸ The Court reasoned that allowing such evidence would undermine "all frankness and freedom of discussion and conference" and would "disrupt the finality of the process."⁴⁹ The *Tanner* Court also referenced existing trial safeguards, such as juror voir dire and the ability of jurors to report misconduct during trial, as sufficiently protecting criminal defendants' Sixth Amendment rights to a competent jury.⁵⁰

The Court again adopted a hardline interpretation of Rule 606(b) in *Warger v. Shauers*.⁵¹ The civil plaintiff in *Warger* argued that post-verdict juror evidence was permissible, notwithstanding the prohibition set forth by the no-impeachment rule and Rule 606(b), to probe whether one of the jurors concealed prodefendant bias during jury selection.⁵² The Court again held that the no-impeachment rule prevented such a post-verdict inquiry, providing that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."⁵³ The *Warger* Court at least recognized that an exception to the no-impeachment rule could exist in situations involving "juror bias so extreme that, almost by definition, the jury trial right has been abridged."⁵⁴

A number of state courts and federal circuits believed, pre-*Peña-Rodriguez*, that evidence of juror racial bias satisfied the *Warger* exception of "extreme bias," and thus allowed trial judges to consider such evidence to impeach otherwise final verdicts.⁵⁵ The ap-

45. See *Peña-Rodriguez*, 137 S. Ct. at 865.

46. 483 U.S. 107 (1987).

47. *Id.* at 110, 127.

48. *Id.* at 115, 125.

49. *Id.* at 120, 140.

50. *Id.* at 127.

51. 135 S. Ct. 521, 524 (2014).

52. *Id.* at 524, 528.

53. *Id.* at 529.

54. *Id.* at 529 n.3.

55. See, e.g., *United States v. Villar*, 586 F.3d 76, 87–88 (1st Cir. 2009); *Kittle v. United States*, 65 A.3d 1144, 1154–56 (D.C. 2013); *State v. Santiago*, 715 A.2d 1, 14–22 (Conn. 1998); *Fisher v. State*, 690 A.2d 917, 920–21, 920 n.4 (Del. 1996); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357–58 (Fla. 1995); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991); see also *United States v. Henley*, 238 F.3d 1111, 1119–21 (9th Cir. 2001) (finding "persuasive those cases

proach of these courts, however, conflicted with the strict interpretation of the no-impeachment rule adopted by many other state and federal courts, setting the stage for the U.S. Supreme Court to resolve the long-lasting circuit split.⁵⁶

A. Peña Rodriguez and the Juror Racial-Bias Exception

The Supreme Court finally addressed the circuit split by recognizing a narrow exception to the no-impeachment rule for cases involving juror racial bias.⁵⁷ In *Peña-Rodriguez*, the Court held—in a close 5–4 decision—that the Sixth and Fourteenth Amendments created a constitutional exception to the no-impeachment rule in cases involving “clear statement[s]” of juror racial bias where that bias was a “significant motivating factor” in the biased juror’s decision-making.⁵⁸

The case arose from the criminal prosecution of Miguel Angel Peña-Rodriguez on a variety of sexual assault and harassment charges brought in Colorado state court.⁵⁹ The Prosecution alleged that Peña-Rodriguez had “made sexual advances” towards two teenage sisters in a bathroom located at a horse-racing facility where Peña-Rodriguez was employed as a horsekeeper.⁶⁰ After reporting the incident to their father, the sisters then identified Peña-Rodriguez as the assailant to law enforcement authorities.⁶¹ Prosecutors thereafter charged Peña-Rodriguez with one count of unlawful sexual contact, one count of sexual assault on a child, and two counts of harassment.⁶² A jury was empaneled for the defendant’s criminal trial, with no evidence of juror racial bias apparent during voir dire questioning.⁶³ At trial, Peña-Rodriguez presented an alibi defense, with a friend testifying that Peña-Rodriguez was with him at the time of the incident and thus could not have been the person who assaulted the sisters in the bathroom.⁶⁴ The Prosecution did not present any physical evidence against Peña-Rodriguez at trial, but relied entirely on the victims’ pretrial and in-court identifications of Peña-Rodriguez as

that have exempted evidence of racial prejudice from Rule 606(b)’s juror competency doctrine” but not deciding in favor of or against the exemption); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158–60 (7th Cir. 1987) (stating that fairness may require a racial-bias exception on occasion).

56. See *United States v. Benally*, 546 F.3d 1230, 1239–41 (10th Cir. 2008), *reh’g denied*, 560 F.3d 1151 (10th Cir. 2009), *abrogated by* *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); *Williams v. Price*, 343 F.3d 223, 237–39 (3d Cir. 2003); *Martinez v. Food City, Inc.*, 658 F.2d 369, 373–74 (5th Cir. 1981).

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

58. *Id.* at 860, 869.

59. *Id.* at 861.

60. *Peña-Rodriguez v. People*, 350 P.3d 287, 288 (Colo. 2015), *rev’d*, 137 S. Ct. 855.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 295 n.3.

their assailant.⁶⁵ He was ultimately convicted on the unlawful sexual contact and harassment charges after a three-day jury trial.⁶⁶

Following the guilty verdict, two jurors remained in the courtroom to speak with Peña-Rodriguez's attorney in private.⁶⁷ The jurors revealed that one of the other jurors—Juror H.C.—had made a series of statements expressing racial bias against Peña-Rodriguez—who was of Mexican ancestry—during jury deliberations.⁶⁸ The jurors, through sworn testimony, attested that Juror H.C. had stated that:

- he “believed the defendant was guilty because, in [H.C.’s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women”;
- he believed that Mexican men were “physically controlling of women because they have a sense of entitlement”;
- he stated that the defendant “did it because he’s Mexican and Mexican men take whatever they want”;
- in his experience “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls”; and
- he found the defendant’s alibi witness to not be credible because the witness was “an illegal” (despite evidence that the witness was actually a legal resident of the United States).⁶⁹

Peña-Rodriguez moved for a new trial on the grounds that the statements by Juror H.C. evinced anti-Mexican racial bias that undermined his Sixth and Fourteenth Amendment right to an impartial jury.⁷⁰ The trial court, however, rejected his motion on the basis that statements made during jury deliberations were protected from post-verdict judicial inquiry by Colorado’s version of the no-impeachment rule.⁷¹ The trial

65. *People v. Peña-Rodriguez*, 412 P.3d 461, 465 (Colo. App. 2012), *aff’d*, 350 P.3d 287, *rev’d*, 137 S. Ct. 855.

66. *Id.*

67. *Id.*

68. *Id.* at 465–66.

69. *Id.* at 466.

70. *See id.*

71. *Id.* The Colorado no-impeachment rule is remarkably similar to Federal Rule of Evidence 606(b). Colorado Rule of Evidence 606(b) (2016) provides:

[I]nquiry into validity of verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (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. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

court's decision was upheld by both Colorado's Court of Appeals and Supreme Court.⁷² Notwithstanding that the statements made by Juror H.C. were recognized as “repugnant”⁷³ and “ideologically loathsome,”⁷⁴ the Colorado courts reasoned that they were prohibited from considering post-verdict evidence of juror racial bias given the need to “ensure that the privacy of jury deliberations remains sacrosanct” under the *Tanner* standard.⁷⁵ In particular, the Colorado Supreme Court felt as though *Tanner* and its progeny had not recognized a “dividing line between different types of juror bias or misconduct” in applying the no-impeachment rule.⁷⁶

In a majority opinion penned by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor and Kagan,⁷⁷ the U.S. Supreme Court reversed the decision of the Colorado Supreme Court, holding that a “racial-bias” constitutional exception to the no-impeachment rule should be recognized.⁷⁸ The majority's opinion relied heavily on the history and purpose of the Civil War Amendments, most notably the Fourteenth Amendment, to “purge racial prejudice from the administration of justice.”⁷⁹ The Court took stock of our Nation's long historical practice of jury discrimination against African-American and other nonwhite criminal defendants, detailing disparate, race-based criminal justice outcomes due to jury gerrymandering and blatant discrimination in the jury selection and voir dire process.⁸⁰ The Court thus rightly determined that the “unmistakable principle” underlying the Sixth and Fourteenth Amendments is that “[p]ermitt[ing] racial prejudice in the jury system” undermines both public faith in the jury system and a criminal defendant's constitutional “protection of life and liberty” by an impartial jury.⁸¹

COLO. R. EVID. 606(b).

72. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017).

73. Colorado v. Peña-Rodriguez, 412 P.3d at 470, *aff'd*, 350 P.3d 287 (Colo. 2015), *rev'd*, 137 S. Ct. 855 (2017).

74. Peña-Rodriguez, 350 P.3d at 291.

75. *Id.* at 293.

76. *Id.*

77. Peña-Rodriguez, 137 S. Ct. at 860. Justice Kennedy retired summer 2018. Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES, (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>. Justice Kennedy's replacement, Justice Kavanaugh, could potentially give the Court reason to revisit its ruling in Peña-Rodriguez. See Jess Bravin, *Brett Kavanaugh's Complicated History with Racial Preferences*, WALL ST. J. (Sept. 4, 2018, 11:00 AM), <https://www.wsj.com/articles/brett-kavanaughs-complicated-history-with-racial-preferences-1536073245>.

78. Peña-Rodriguez, 137 S. Ct. at 870–71.

79. *Id.* at 867 (observing that “the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States” (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))).

80. *Id.* at 867–68 (citing seminal Fourteenth Amendment cases such as *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986); *McLaughlin*, 379 U.S. at 192; and *Strauder v. West Virginia*, 100 U.S. 303, 305–09 (1880)).

81. *Id.* at 868 (quoting *McCleskey*, 481 U.S. at 310).

The Court, nonetheless, felt the need to balance the constitutional protections provided to criminal defendants by the Sixth and Fourteenth Amendments for an impartial jury free from racial bias against its long-standing commitment to the no-impeachment rule as embodied by the *Tanner* and *Warger* precedents.⁸² The Court did so by distinguishing such precedents as involving anomalous instances of egregious behavior, such as juror drug and alcohol use in *Tanner* and prodefendant bias in *Warger*, whereas juror racial bias involved “a familiar and recurring evil” that risked “systemic injury to the administration of justice.”⁸³ The traditional trial safeguards for an impartial jury, such as voir dire questioning and pre-verdict juror reports, were found to be inadequate to root out juror racial bias given, in part, the stigma that attaches in reporting racism.⁸⁴ The disagreement between the slim majority of five and the dissenters can be partly traced to competing worldviews concerning the prevalence of systemic racism. While the majority views juror racial bias as a “recurring” and “systemic” problem that therefore cannot be ameliorated by traditional ad hoc trial mechanisms,⁸⁵ the dissenters are more prone to view racial bias as aberrational and individualized.⁸⁶ The persistence of juror racial bias in the criminal justice system, however, has been substantially demonstrated and calls into question the very possibility of “equal treatment under the law” in a “functioning democracy.”⁸⁷

According to the majority in *Peña-Rodriguez*, not all evidence of juror racial bias would necessarily implicate the Constitution. Only a demonstration that “one or more jurors made statements exhibiting overt racial bias,” such as evidence that a juror made a “clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant,” would permit a court to engage in a post-verdict inquiry into the fairness of the verdict.⁸⁸ Even if defendants were able to discover evidence that one or more jurors made a “clear” or “overt” statement of racial bias under this test, they would still be required to demonstrate that the juror’s racial bias “was a significant motivating factor in the juror’s vote to convict”⁸⁹—that is, that the existence of the statement(s) “cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”⁹⁰ As such, the Court estab-

82. *Id.*

83. *Id.*

84. *Id.* at 868–69 (noting that juror reporting of racial bias may be inhibited by concerns of stigma and that directed voir dire questioning of racial bias could be ineffective at discovering juror biases due to stigma or may even exacerbate such bias).

85. *See id.*

86. *See id.* at 882–83 (Alito, J., dissenting).

87. *Id.* at 868 (majority opinion).

88. *Id.* at 869. A discussion concerning the processes social scientists use to identify racial bias will take place *infra* at Part III of this Article. This Part will also describe the various types of racial bias identified in the literature and the controversy concerning whether “unconscious bias” has been empirically validated.

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

90. *Id.*

lished a relatively high bar for defendants to pursue post-conviction investigations into juror racial bias: they must (1) produce evidence that a juror or jurors made a clear statement of racial bias and (2) that said statement was a significant motivating factor in that juror's decision to convict.⁹¹ As applied to the facts in *Peña-Rodriguez*, the Court held that the juror statements “were egregious and unmistakable in their reliance on racial bias,” thus justifying post-verdict judicial inquiry.⁹²

The recognition by the U.S. Supreme Court in *Peña-Rodriguez* that criminal defendants, at the very least,⁹³ have a limited right to post-verdict examination of evidence of juror racial bias was not only long overdue but also frustratingly incomplete. Given the pervasiveness of racial bias in society,⁹⁴ as well as of that amongst jurors,⁹⁵ it was unfortunate that the majority in *Peña-Rodriguez* left the process for determining the presence of “clear” racial bias undefined and subject to the discretion of the trial court.⁹⁶ As others have observed, the failure to include specific procedural mechanisms by which to apply the newly found racial-bias exception will likely lead to variability in both trial court rulings and just outcomes.⁹⁷

One question that arose immediately after *Peña-Rodriguez* was whether the racial-bias exception to the no-impeachment rule was retroactive. The Court has indicated that evidence of juror racial bias could serve as a basis for collateral review in the habeas context in *Tharpe v. Sellers*,⁹⁸ and that introducing evidence tinged with racial stereotypes could lead to an ineffective assistance of counsel claim under the Sixth Amendment when seeking post-conviction relief in *Buck v. Davis*.⁹⁹ The petitioner in *Tharpe* cited the Court's recent decisions in both *Peña-Rodriguez* and *Buck* as “new law” to support a motion to reopen his

91. *See id.*

92. *Id.* at 870.

93. At least one federal court has also applied the *Peña-Rodriguez* racial-bias exception to the civil context. *See Patton v. First Light Prop. Mgmt., Inc.*, No. 14-CV-1489-AJB-WVG, 2017 WL 5495104, at *7 (S.D. Cal. Nov. 15, 2017), *appeal filed*, No. 17-56861 (9th Cir. Dec. 13, 2017). While the *Peña-Rodriguez* holding is rooted partly in the Sixth Amendment's guarantee to an “impartial jury” in “all criminal proceedings,” it is also supported by the Fourteenth Amendment's promise that no State shall “deny to any person within its jurisdiction the equal protection of its laws”—which applies equally in both civil and criminal trials.

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

95. *See id.* at 867–68.

96. *Id.* at 869.

97. *See, e.g.*, Lauren Crump, Comment, *Removing Race from the Jury Deliberation Room: The Shortcomings of Peña-Rodriguez v. Colorado and How to Address Them*, 52 U. RICH. L. REV. 475, 476 (2018) (arguing for more “pre-deliberation safeguards” to prevent racial bias from seeping into jury deliberations); Natalie A. Spiess, Comment, *Peña-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809, 840 (2018) (suggesting that modified jury instructions be implemented post-*Peña-Rodriguez* to guard against juror racial bias).

98. 138 S. Ct. 545, 546 (2018) (per curiam).

99. 137 S. Ct. 759, 775–76 (2017).

claim for post-conviction habeas corpus relief.¹⁰⁰ Tharpe, an African-American man who was convicted of murder and sentenced to death in Georgia state court, introduced evidence that at least one of the white jurors was racially biased during jury deliberations.¹⁰¹ In particular, Tharpe introduced a sworn affidavit signed by the allegedly biased juror that provided:

- “there are two types of black people: 1. Black folks and 2. Niggers;”
- the juror’s statement that Tharpe “wasn’t in the ‘good’ black folks category in my book, [and] should get the electric chair for what he did;”
- “[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn’t my reason;” and
- “[a]fter studying the Bible, I have wondered if black people even have souls.”¹⁰²

A lower federal district court dismissed Tharpe’s motion on the ground that it was procedurally defaulted because it failed to demonstrate that he was prejudiced by the juror’s bias,¹⁰³ in other words, Tharpe had “failed to demonstrate that [the juror’s] behavior ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”¹⁰⁴ In a per curiam decision, the Supreme Court disagreed, finding that the above statements presented “a strong factual basis” that racial bias influenced the juror’s verdict.¹⁰⁵ The Court rejected the Eleventh Circuit’s conclusion that it “was indisputable among reasonable jurists” that the juror’s racial bias did not prejudice Tharpe, finding instead that “[a]t the very least, jurists of reason could debate” whether such bias had substantially influenced the jury’s verdict.¹⁰⁶ In so holding, the Court provided guidance to lower courts as to when statements of racial bias could reasonably be found to have influenced a jury’s verdict: clear and explicit juror statements of bias, which rely on racial stereotypes or slurs, should be found by lower courts to “[a]t the very least” create a reasonable possibility that racial bias influenced jury decision-making.¹⁰⁷

100. *Tharpe*, 138 S. Ct. at 549 (Thomas, J., dissenting).

101. *Id.* at 545–46 (majority opinion).

102. *Id.* at 546.

103. *Id.* at 545.

104. *Id.* at 546 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

105. *Id.*

106. *Id.*

107. *See id.*

While it is unclear whether *Peña-Rodriguez* will be deemed by courts to be retroactive under the *Teague v. Lane*¹⁰⁸ standard,¹⁰⁹ the *Tharpe* decision nonetheless indicates that evidence of juror racial bias can be relied on in seeking post-conviction relief on habeas.

Another critical issue that arose following *Peña-Rodriguez* concerned the procedures that state and federal courts should use to determine whether a juror had made a “clear statement [of racial bias]” that constituted a “significant motivating factor in the juror’s vote to convict.”¹¹⁰ Justice Alito, in particular, argued in his dissent that “it will be difficult for judges to discern the dividing line between those that are ‘clear[ly]’ based on racial or ethnic bias and those that are at least somewhat ambiguous.”¹¹¹ Notwithstanding Justice Alito’s dubious equating of racial bias with sports-team bias in his dissent,¹¹² it remains unclear following *Peña-Rodriguez* just how trial judges are supposed to determine the presence of juror racial bias that implicates the constitutional guarantee of an impartial jury.

In its majority opinion, the Court alluded that such a determination should be “committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.”¹¹³ The Court further provided that the “experience of [the seventeen ‘jurisdictions that have recognized a racial-bias exception’] . . . [should] inform the proper exercise of trial judge discretion” as to whether the racial-bias

108. 489 U.S. 288 (1989).

109. *Id.* at 305–10 (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” The two exceptions are (1) if the new rule places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” and (2) “if [the new rule] requires the observance of ‘those procedures that . . . are “implicit in the concept of ordered liberty.”” (quoting *Mackey v. United States*, 401 U.S. 667, 692–93 (Harlan, J., concurring and dissenting)). A decision in the Eleventh Circuit, *Tharpe v. Warden*, recently held that the *Peña-Rodriguez* standard was not retroactive under the *Teague* standard. *Tharpe v. Warden*, 898 F.3d 1342, 1346 (11th Cir. 2018) (finding that *Peña-Rodriguez* announced a procedural rather than substantive rule, and thus did not satisfy the first retroactivity exception carved out in *Teague*). However, the court in *Tharpe v. Warden* did not engage the second *Teague* exception—which allows for retroactivity in cases announcing a “watershed rule of criminal procedure”—noting that the petitioner did not make such an argument given that it is an “exceedingly high bar.” *See id.* at 1345–46.

110. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). Justice Alito, in dissent, criticized the “racial bias” test. *Id.* at 884 (Alito, J., dissenting).

111. *Id.* at 884 (Alito, J., dissenting) Justice Alito used the curious example of a juror making a reference to a Latino defendant as a “macho type,” and remarking that “men of this kind felt that they could get their way with women” as a potentially “ambiguous” statement. *Id.*

112. Justice Alito stated that allowing post-verdict inquiry for situations involving juror racial bias but disallowing such inquiry for other types of bias—such as “sports rivalries” where “a juror . . . expressed animosity toward the defendant because he was wearing the jersey of a hated football team”—is “unsupportable under the Sixth Amendment.” *Id.* at 883.

113. *Id.* at 869 (majority opinion). The Court also indicated that the process of acquiring such evidence of bias should be determined by both professional ethics and local court rules for juror contact. *Id.*

exception applies in a particular case.¹¹⁴ The Court nonetheless refused to adopt a particular standard for determining whether its newly articulated racial-bias exception has been satisfied, indicating that findings adopted by other courts may well be sufficient: for example, whether racial bias “pervaded the jury room”¹¹⁵ or that the presence of “[o]ne racist juror would be enough.”¹¹⁶ However, the Court did provide that “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar.”¹¹⁷ A brief review of the state and federal decisions cited favorably by the Court may identify some clues as to how courts should apply the racial-bias exception.

B. *Judicial Application of Peña-Rodriguez*

The Court sided with decisions from the First, Seventh, and Ninth Circuits, as well as those from a scattering of lower state and federal courts throughout the nation, in recognizing a constitutionally mandated racial-bias exception to the no-impeachment rule.¹¹⁸ A review of those cases, as well as of cases decided in the wake of *Peña-Rodriguez*, indicates that courts are nonetheless struggling to identify: (1) the evidentiary procedures that should apply to flesh out alleged statements of racial bias; (2) the appropriate standard of appellate review; (3) the types of juror statements that trigger the juror racial-bias exception (e.g., which statements evince racial bias?); and (4) when such statements of racial bias likely significantly motivated juror decision-making.

1. The Process of Determining Juror Racial Bias

The *Peña-Rodriguez* majority provided that the processes that could be used by courts to rule upon a motion for a new trial based on alleged juror racial bias should be left to the “substantial discretion” of trial judges.¹¹⁹ The Court did, however, note that such a post-verdict inquiry should consider the statement “in light of all the circumstances,” which should include the “content and timing” of the statement(s) as well as an assessment of the “reliability” of evidence of juror racial bias, acknowledging that such evidentiary practices will be shaped by local ethical and court rules concerning post-verdict juror contact.¹²⁰

Courts applying a juror racial-bias exception to the no-impeachment rule, both pre- and post-*Peña-Rodriguez*, have utilized devices such as

114. *Id.* at 870.

115. *Id.* at 871 (quoting *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987)).

116. *Id.* (quoting *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001)).

117. *Id.* at 869.

118. *See id.* at 865, 869. The Court went so far as to attach an Appendix to its majority opinion, which listed judicial decisions, as of the publication of its opinion, that recognized some form of a racial-bias exception. *Id.* at 886.

119. *Id.* at 869.

120. *Id.*

evidentiary hearings,¹²¹ witness examination,¹²² deposition testimony,¹²³ and affidavits¹²⁴ to examine the presence of juror racial bias. The significant majority of state and federal courts that have conducted post-verdict inquiries into juror racial bias have at the very least permitted a judicial interview with the juror(s) reporting alleged racial bias,¹²⁵ while a smaller number of courts have also required witness examination of the juror that allegedly made biased statements during deliberations.¹²⁶ At least two courts have recommended that the trial court conduct a witness examination of all empaneled jurors upon a sufficient allegation of racial bias,¹²⁷ while other courts have resolved claims of juror bias based on juror affidavits alone.¹²⁸

The procedures adopted by courts, of course, are influenced greatly by the internal rules governing the granting of new trials, post-verdict evidentiary hearings, or both.¹²⁹ For example, federal courts entertaining a motion for a new trial based on alleged juror racial bias in criminal cases will be guided by Federal Rule of Criminal Procedure 33.¹³⁰ This

121. See *United States v. Henley*, 238 F.3d at 1113; *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987); *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *5 (D. Minn. Apr. 24, 2018); *Williams v. Price*, No. 2:98cv1320, 2017 U.S. Dist. LEXIS 213087, at *2–3 (W.D. Pa. Dec. 29, 2017); *Fisher v. State*, 690 A.2d 917, 919–20 (Del. 1996).

122. *United States v. Robinson*, 872 F.3d 760, 767–78 (6th Cir. 2017); *Shillcutt*, 827 F.2d at 1159; *Smith*, 2018 WL 1924454, at *7; *State v. Brown*, 62 A.3d 1099, 1110 (R.I. 2013).

123. See *Henley*, 238 F.3d at 1113.

124. See *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018); *Shillcutt*, 827 F.2d at 1156–61; *Smith*, 2018 WL 1924454, at *9; *Commonwealth v. Laguer*, 44 N.E.3d 869, 872–76 (Mass. App. Ct. 2016); *Brown*, 62 A.3d at 1110.

125. See *Fisher*, 690 A.2d at 920; *United States v. Villar*, 586 F.3d 76, 88 (1st Cir. 2009); *Henley*, 238 F.3d at 1120; *Shillcutt*, 827 F.2d at 1159; *Smith*, 2018 WL 1924454, at *12–13; *Williams*, 2017 U.S. Dist. LEXIS 213087, at *3–4; *State v. Santiago*, 715 A.2d 1, 36–42 (Conn. 1998); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357–58 (Fla. 1995).

126. See, e.g., *Fisher*, 690 A.2d at 918.

127. See *id.*; *Powell*, 652 So. 2d at 355–56; see also *United States v. Parker*, 872 F.3d 1, 12 (1st Cir. 2017) (holding that group voir dire of the jury was permissible, and individual questioning of each juror was not necessary).

128. See *Shillcutt*, 827 F.2d at 1157; *Patton v. First Light Prop. Mgmt., Inc.*, No. 14-CV-1489-AJB-WVG, 2017 WL 5495104, at *4–5 (S.D. Cal. Nov. 15, 2017), *appeal filed*, No. 17-56861 (9th Cir. Dec. 13, 2017); *Laguer*, 44 N.E.3d at 872; *Brown*, 62 A.3d at 1105.

129. See generally FED. R. CIV. P. 59(a)(1)(A) (Upon motion, a court may grant a new trial on either all of the issues or only some of the issues to any party after a jury trial or nonjury trial for any reason for “which a new trial [or rehearing] has . . . been granted.”); TEX. R. CIV. P. 320 (“New trials may be granted and judgment set aside for good cause, on motion or on the court’s own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large.”).

130. Fewer civil cases will likely find it necessary to apply the *Peña-Rodriguez* standard given its Sixth and Fourteenth Amendment focus on preserving the rights of criminal defendants. Civil claims based on racial discrimination, however, may find *Peña-Rodriguez* instructive as to whether an exception to FED. R. EVID. 606(b) should be granted. In *Patton v. First Light Prop. Mgmt., Inc.*, the Southern District of California applied *Peña-Rodriguez* to a civil housing discrimination claim and therefore applied FED. R. CIV. P. 59(a) in determining whether to grant the defendants’ motion for a new trial. 2017 WL 5495104, at *2, *6–7. FED. R. CIV. P. 59(a) provides that a “court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reasons for which a new trial has heretofore been granted.” The Ninth Circuit, similar to other federal circuits, interprets this standard to mean that “the trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage

procedural rule requires the trial court to determine whether such movants have carried their burden in overcoming the no-impeachment rule by considering “all [of] the circumstances” and facts at hand, including witness credibility, the reliability of the evidence, and the “content and timing” of the alleged statements.¹³¹ Given the evidentiary difficulty that courts have experienced applying the *Peña-Rodriguez* racial-bias exception, it seems the wisest course for courts is to conduct complete evidentiary hearings in cases involving substantiated claims of juror racial bias.¹³²

2. The Appropriate Standard of Review

The Court in *Peña-Rodriguez* further left unresolved the appellate standard of review that should apply in cases involving juror racial bias. While the Court provided that the quantum of proof necessary to invoke the exception may be satisfied by a trial court finding that racial bias “pervaded the room”¹³³ or even by the presence of “[o]ne racist juror,”¹³⁴ it declined to articulate the amount of deference that appellate courts should provide trial court findings in this context.¹³⁵ The vast majority of appellate courts following *Peña-Rodriguez*, however, have applied the highly deferential “abuse of discretion” standard in cases involving allegations of juror racial bias.¹³⁶ Perhaps not surprisingly, no trial court de-

of justice.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)).

131. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017); *Williams v. Price*, No. 2:98cv1320, 2017 U.S. Dist. LEXIS 213087, at *21 (W.D. Pa. Dec. 29, 2017).

132. See *infra* Section III.D.1. The *Smith* court, for instance, observed that “[i]n cases involving claims of improper racial bias by members of the jury, one procedure that courts have utilized is to hold an evidentiary hearing regarding the purported racially biased statements.” *United States v. Smith, Crim. No. 12-183*, 2018 WL 1924454, at *9 (D. Minn. Apr. 24, 2018); see, e.g., *Williams*, 2017 U.S. Dist. LEXIS 213088, at *2–3 (noting that an evidentiary hearing was held); *Commonwealth v. McCowen*, 939 N.E.2d 735, 764 (Mass. 2010) (stating that the trial court should conduct an evidentiary hearing when a defendant files an affidavit from a juror alleging that another juror’s comments reasonably demonstrated racial bias, and the credibility of the affidavit is in issue).

133. *Peña-Rodriguez*, 137 S. Ct. at 870–71 (quoting *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987)).

134. *Id.* (quoting *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001)).

135. See *id.*

136. See, e.g., *United States v. Baker*, 899 F.3d 123, 130–34 (2d Cir. 2018) (applying the abuse of discretion standard to the trial judge’s handling of allegations of juror misconduct); *United States v. Robinson*, 872 F.3d 760, 770 (6th Cir. 2017) (holding that there was no abuse of discretion when the trial court denied a motion for a new trial based on a jury foreperson’s racist comments). A number of cases invoking the *Peña-Rodriguez* exception involve petitions on habeas seeking collateral review of a state criminal conviction. See, e.g., *Shillcutt*, 827 F.2d at 1158. The habeas process of review is guided by statute, allowing a federal court to overturn a state conviction only upon a finding, *inter alia*, of a “substantial likelihood of prejudice” or an “obvious default of justice” caused by juror racial bias. See *id.* at 1159. 29 U.S.C. § 2254(d) provides that a writ of habeas corpus cannot be granted by a federal court unless it is found that the state court adjudication: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” The Supreme Court in *Williams v. Taylor* clarified that unreasonableness can be satisfied by a finding that the state court decision was “simply ‘erroneous’ or wrong,” thus amounting to a standard akin to *de novo* review. 529 U.S. 362, 388–89 (2000).

cisions involving the *Peña-Rodriguez* exception have yet been overturned by an appellate court.¹³⁷

Appellate review of trial court decisions on the racial-bias exception should nonetheless be subjected to a less deferential standard of review, given that such determinations often involve mixed questions of law and fact. A mixed question of law and fact is present when the facts of an issue are not in dispute, and yet the inferences to be made from those facts are subject to differing interpretations.¹³⁸ Therefore, it may be appropriate for an appellate court to review such mixed questions under the less deferential *de novo* or substantial evidence standard if it becomes apparent that the “primary facts are undisputed and ultimate inferences and legal consequences are in dispute.”¹³⁹ Similarly, the content and existence of the allegedly racially biased statement(s) in cases invoking the *Peña-Rodriguez* exception have rarely been in dispute.¹⁴⁰ Rather, the central issue in *Peña-Rodriguez* cases is almost never whether the allegedly biased statements were in fact made by a juror, but the meaning and interpretation that the trial court should give to those statements.¹⁴¹ Indeed, courts engaging in an analysis of juror statements alleged to be racially biased are struggling less with whether those statements were actually made by a juror and more with whether the inferences that flow from those statements indicate racial bias.¹⁴²

In *United States v. Smith*,¹⁴³ for example, the trial court was primarily concerned with determining whether race-neutral juror statements could nonetheless be inferred as reflecting racial bias.¹⁴⁴ One of the jurors in the defendant’s trial apparently stated that (1) the defendant “[is] a black man from North Minneapolis with a previous criminal history[.]” and (2) “[y]ou know, he’s just a banger from the hood, so he’s got to be guilty.”¹⁴⁵ The court, armed with sworn affidavits from two jurors from the trial, did not seriously question whether the statements were made but

137. *But see* *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (finding in a *per curiam* decision that the trial and appellate courts erred in failing to find that evidence of juror racial bias created “a strong factual basis for the argument that [the defendant’s] race affected” the jury’s vote for the death penalty).

138. *Khan v. Holder*, 584 F.3d 773, 780 (9th Cir. 2009); *Suzy’s Zoo v. Comm’r*, 273 F.3d 875, 878 (9th Cir. 2001).

139. *See Suzy’s Zoo*, 273 F.3d at 878. Notably, there remains a difference of opinion as to whether mixed questions of law and fact should be subjected to strict *de novo* review or a similar animal of review that requires a showing of *substantial evidence*. Compare, e.g., *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004) (holding that review of mixed questions of law and fact is subject to the *de novo* standard), with *Haile v. Holder*, 658 F.3d 1122, 1125 (9th Cir. 2011) (holding that review of “determinations of mixed questions of law and fact” are to be done “for substantial evidence”).

140. *See, e.g., Robinson*, 872 F.3d at 770–71; *Shillcutt*, 827 F.2d at 1159; *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *9–12 (D. Minn. Apr. 24, 2018).

141. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

142. *See Smith*, 2018 WL 1924454, at *9–12.

143. *Id.*

144. *Id.* at *10.

145. *Id.* at *4–5.

rather focused on the racialized meaning to give those statements.¹⁴⁶ The trial court ultimately held that while the statements do “not explicitly invoke race,” the “banger” statement nonetheless relied on a “racially biased stereotype” which indicated that “racial animus was a significant motivating factor in the juror’s vote to convict.”¹⁴⁷ Similarly, the Seventh Circuit in *Shillcutt v. Gagnon*¹⁴⁸ did not seriously doubt that two of the jurors actually made statements alleged by the defendant to reflect racial bias.¹⁴⁹ The question for the court, rather, was whether a racist inference could be reasonably reached from those statements: “let’s be logical; he’s a black, and he sees a seventeen year old white girl—I know the type” and in response, “[a] man like that isn’t capable of loving anybody.”¹⁵⁰ The court ultimately held that there was not a substantial likelihood that the first statement had prejudiced the defendant, and interpreted the second statement in response as being “patently non-racial.”¹⁵¹ The primary concern for the Sixth Circuit in *United States v. Robinson*,¹⁵² likewise, was not whether the alleged statement had been made by a juror but how to interpret the statement in light of the *Peña-Rodriguez* standard.¹⁵³ The court eventually held that the juror’s statement of “[I] found it strange that the colored women are the only two that can’t see [that the African-American defendants were guilty],” was a “mere offhand comment” rather than “clear statement[s]” of racial bias.¹⁵⁴ The determination of whether a juror statement involved (1) racial animus such that it was (2) a significant motivating factor in the juror’s decision-making, is a classic mixed question of law and fact, making a less deferential standard of review appropriate.¹⁵⁵

146. *Id.* at *7–13.

147. *Id.* at *10.

148. 827 F.2d 1155 (7th Cir. 1987).

149. *Id.* at 1159–60.

150. *Id.* at 1159.

151. *Id.* at 1159–60.

152. 872 F.3d 760 (6th Cir. 2017).

153. *Id.* at 767–72.

154. *Id.* at 770–71; see also *Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991). In *Laguer* the court did not genuinely question that a juror made the following statements during jury deliberations: “the goddamned spic is guilty just sitting there; look at him. Why bother having the trial”; “spics screw all day and night”; and other “bigoted invectives.” *Id.* Rather, the court held that the statements did not justify the granting of a new trial as they “did not relate specific factual information that might influence the fact-finding of reasonable jurors.” *Id.* at 376. The court reasoned, somehow, that the statements were “more indicative . . . of the juror’s ethnic bias, a matter of attitude, than of purported authoritative information unfavorable to the defendant.” *Id.*

155. See *State v. Monday*, 257 P.3d 551, 679 (Wash. 2011). While the majority held that only evidence of flagrant prosecutorial racial bias was sufficient to overturn a verdict, *id.* at 679, the concurrence argued that *any* evidence of prosecutorial racial bias was sufficient to vacate a criminal conviction, *id.* at 682–85 (Madsen, C.J., concurring). The prosecutorial racial bias in this case involved the prosecutor’s pronunciation of police as “po-leese” to mimic black vernacular and repeated references to the code whereby “black folk don’t testify against black folk” to the police. *Id.* at 679 (majority opinion). Notably, the concurrence’s approach would provide no appellate discretion to determinations of racial bias. If a finding of racial bias is made, then a reversal of the conviction is required. *Id.* at 558–60 (Madsen, C.J., concurring).

3. Defining Racial Bias

State and federal courts have perhaps been struggling the most with ascertaining whether a juror statement supports a reasonable inference of racial bias following *Peña-Rodriguez*—particularly if the statement is seen as race neutral¹⁵⁶ or “non-racial”,¹⁵⁷ as ambiguous or “capable of different interpretations”,¹⁵⁸ as not explicitly invoking a racial slur or stereotype,¹⁵⁹ or as a mere “offhand comment” which nonetheless “indicat[es] racial bias or hostility.”¹⁶⁰ The majority opinion in *Peña-Rodriguez* provided little guidance to lower courts on how to determine whether a juror statement constituted a “clear statement of racial bias”—such as looking at whether the statement “relied on racial stereotypes”¹⁶¹ or constituted “overt racial bias.”¹⁶² On the facts in the *Peña-Rodriguez* case itself, the Court held that the statements by Juror H.C. “were egregious and unmistakable in their reliance on racial bias” because they relied on “dangerous racial stereotype(s).”¹⁶³ Interestingly, the Court did not explicitly analyze how the juror’s statements relied upon specific “anti-Hispanic” racial stereotypes.¹⁶⁴ The statements made by Juror H.C.—which included remarks that “Mexican men are physically controlling of women” and “I think he did it because he’s Mexican and Mexican men take whatever they want” and that “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls” and that the defendant’s alibi witness was not credible because he was “an illegal”¹⁶⁵—were perhaps viewed by the Court as so plainly invoking anti-Mexican racial stereotypes as to not warrant an analysis.

156. *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *10–12 (D. Minn. Apr. 24, 2018).

157. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159–60 (7th Cir. 1987) (finding one of the juror comments to be “patently non-racial” in upholding the trial court decision to deny the defendant’s motion for a new trial on the grounds that the defendant was unable to demonstrate that there was “a substantial likelihood that a racial slur, if it occurred, would have prejudiced” the defendant); *see also State v. Jackson*, 81 Haw. 39, 45 (Haw. 1996) (denying a motion for a new trial based on a juror statement regarding the defendant’s use of alcohol (“[t]hat’s the way they are”) because the juror making the statement denied that it had racial overtones).

158. *State v. Brown*, 62 A.3d 1099, 1110–11 (R.I. 2013) (finding that juror statements and actions did not constitute clear statements of racial bias since they were “ambiguous” and “capable of different interpretations”).

159. *Patton v. First Light Prop. Mgmt., Inc.*, No. 14-CV-1489-AJB-WVG, 2017 WL 5495104, at *6–7 (S.D. Cal. Nov. 15, 2017) (holding that it was not established that the jurors “depended on a racial stereotype” and that the “statements [were not racial bias, but reflected] preconceived notions about . . . Native Americans generally”), *appeal filed*, No. 17-56861 (9th Cir. Dec. 13, 2017).

160. *United States v. Robinson*, 872 F.3d 760, 770–71 (6th Cir. 2017) (interpreting a juror statement about “the colored women” on the jury a “mere ‘offhand comment’” rather than a “clear statement” of bias (quoting *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017))).

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

162. *Id.*; *see also Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356 n.2 (Fla. 1995) (finding in a civil case that juror statements using racial slurs (“nigger”) and relying on racial stereotypes (statement that defendants’ children were “probably drug dealers”) constituted overt acts of racial bias and granting a new trial).

163. *Peña-Rodriguez*, 137 S. Ct. at 870.

164. *Id.* at 861.

165. *Id.* at 862.

While this was likely the case in *Peña-Rodriguez*, it is not at all clear that the thousands of trial judges applying the newly identified racial-bias exception have the requisite training or knowledge to adequately identify when racial stereotypes are influencing juror behavior.¹⁶⁶

The few cases that have allowed post-verdict inquiry or granted new trials based on juror racial bias, whether pre- or post-*Peña-Rodriguez*, have largely involved juror statements which invoked either explicit racial slurs (e.g., “niggers”¹⁶⁷ or “spic”¹⁶⁸) or well-known racial stereotypes (e.g., “[gang] banger from the hood”).¹⁶⁹ The Ninth Circuit in the pre-*Peña-Rodriguez* decision *United States v. Henley*,¹⁷⁰ for example, wasted little time determining that juror statements such as “[a]ll the niggers should hang” and “[n]iggers are guilty” constituted racial bias.¹⁷¹ The Ninth Circuit noted, given the statements reference to vulgar racial slurs, that it “ha[s] considerable difficulty accepting the government’s assumption that, at this time in our history, people who use the word ‘nigger’ are not racially biased.”¹⁷² Similarly, the U.S. Supreme Court in *Tharpe* (its only case to date applying *Peña-Rodriguez*, albeit in a brief per curiam decision on a habeas petition) held that juror statements referencing racial slurs and relying on explicit racial stereotypes provided a “strong factual basis” for deciding whether racial bias impacted the juror’s guilty vote.¹⁷³ The juror in this case apparently remarked during deliberations that “there are two types of black people: 1. Black folks and 2. Niggers” and that the defendant (who was African-American) “wasn’t in the ‘good’ black folks category” and “should get the electric chair for what he did.”¹⁷⁴

166. See *State v. Plain*, 898 N.W.2d 801, 841 (Iowa 2017) (explaining that all Iowa judges are required to “undergo implicit-bias training and testing”); see also *State v. Rashad*, 484 S.W.3d 849, 860 (Mo. Ct. App. 2016) (Van Amburg, C.J., concurring) (indicating that the judicial education curriculum in Missouri now includes implicit bias training); see also Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1242–43 (explaining that, as of 2016, all judges, prosecutors, and public defenders in Dane County, Wisconsin, receive implicit bias training).

167. *United States v. Henley*, 238 F.3d 1111, 1113–14 (9th Cir. 2001); see also *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). While *Tharpe* involved a habeas petition, the Court noted that evidence of overt racist statements by a juror presented “a strong factual basis” for deciding whether racial bias influenced the juror’s guilty vote. *Id.*; see also *Powell*, 652 So. 2d at 356 n.2 (in which a juror stated, “There’s a saying in North Carolina, hit a nigger and get ten points, hit him when he’s moving, get fifteen.”).

168. *Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991) (in which a juror remarked, “[T]he goddamned spic is guilty just sitting there . . . Why bother having the trial,” among other biased comments).

169. *United States v. Villar*, 586 F.3d 76, 81 (1st Cir. 2009); *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *5 (D. Minn. Apr. 24, 2018) (finding that the juror statement reflects a racially biased stereotype).

170. 238 F.3d 1111.

171. *Id.* at 1113–14.

172. *Id.* at 1121.

173. *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018).

174. *Id.*

Cases involving juror statements which invoke “explicit” or obvious racial stereotypes were also more likely to permit post-verdict inquiry or grant a new trial because of juror racial bias.¹⁷⁵ The *Peña-Rodriguez* Court cited the First Circuit decision in *United States v. Villar*¹⁷⁶ as an example of a federal circuit that had recognized a racial-bias exception to the no-impeachment rule rooted in the Sixth Amendment.¹⁷⁷ The court in *Villar* held that the Sixth Amendment required post-verdict judicial inquiry when “ethnically biased statements were made during jury deliberations.”¹⁷⁸ The juror statement at issue involved a broad racialization about the “Hispanic” defendant, where a “white” juror remarked during deliberations that “I guess we’re profiling but they all cause trouble.”¹⁷⁹ The First Circuit found that this was sufficient to permit further post-verdict examination of juror racial bias.¹⁸⁰

A recent case applying the *Peña-Rodriguez* racial-bias exception from the District Court of Minnesota, *Smith*, provides a good example of how the use of an explicit racial stereotype by a juror during deliberations can serve as a basis for permitting post-verdict review.¹⁸¹ In *Smith*, the trial court was presented with evidence—based on juror affidavits and testimony during a post-verdict evidentiary hearing—that a “white” juror had made concerning statements about the “African-American” defendant during deliberations, such as: “he’s a black man from North Minneapolis with a previous criminal history” and “you know, he’s just a banger from the hood, so he’s got to be guilty.”¹⁸² The court noted that some of the juror statements did “not explicitly invoke race,” but nonetheless relied upon “a racially biased stereotype.”¹⁸³ The court utilized secondary sources such as a dictionary and demographic data reported by the local newspaper to find that such statements were based on a racial stereotype: that “a black man from a majority-black neighborhood of Minneapolis—was a gang member, should be disbelieved, and was guilty.”¹⁸⁴ The court noted that the statements constituted racial bias under *Peña-Rodriguez* because they “employed the racist stereotype that black men from the inner city are gang members” and used “racially-charged language [‘]banger from the hood[’] . . . coupled with views on [the defendant’s] guilt.”¹⁸⁵

175. See *United States v. Villar*, 586 F.3d 76, 88–89 (1st Cir. 2009); see also *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *10 (D. Minn. Apr. 24, 2018).

176. 586 F.3d 76.

177. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017).

178. *Villar*, 586 F.3d at 87.

179. *Id.* at 78, 79.

180. See *id.* at 87–88.

181. Crim. No. 12-183 (SRN), 2018 WL 1924454, at *5, *15 (D. Minn. Apr. 24, 2018).

182. *Id.* at *4–5.

183. *Id.* at *10.

184. *Id.*

185. *Id.*

A handful of courts have also examined when supposedly “race neutral,” “non-racial,” or “off-hand” juror statements amount to “racial bias.”¹⁸⁶ The Supreme Court in *Peña-Rodriguez* provided that “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry,”¹⁸⁷ and made references to “overt”¹⁸⁸ and “clear and explicit statements indicating . . . racial animus”¹⁸⁹ as examples of statements that would satisfy the newfound test. Indeed, a few courts have relied heavily on the distinction between “overt”¹⁹⁰ or “clear”¹⁹¹ statements of racial bias as opposed to “non-racial,”¹⁹² “race-neutral,”¹⁹³ or “ambiguous”¹⁹⁴ juror statements in deciding whether post-verdict examination is appropriate. Utilizing this distinction, a few courts have mechanically rejected claims of juror racial bias when the alleged juror statements were either facially neutral or subject to a nonracial interpretation.¹⁹⁵ A recent federal court decision applying the *Peña-Rodriguez* racial-bias exception, for example, was faced with determining whether race-neutral statements made by several jurors could establish racial bias under the test.¹⁹⁶ In *Patton v. First Light Property Management, Inc.*,¹⁹⁷ the Southern District Court of California analyzed whether race-neutral juror statements directed towards the “Native American” defendant amounted to racial bias.¹⁹⁸ The statements, which included references that the defendant “would receive services from the government,” was a “registered tribal member,” and “collects casino money,” were held by the court to not “rise[] to the level of ‘racial prejudice’ to warrant admission” in a post-verdict context.¹⁹⁹ The trial court reasoned that the *Peña-Rodriguez* exception applied only to statements of “overt racial bias,” and that the statements in the case at hand did “not display a blatant racial bias . . . similar to the racial stereotypes in *Peña-Rodriguez*.”²⁰⁰ The court was apparently not swayed by the fact that the statements nonetheless relied upon base racial stereotypes about

186. *United States v. Robinson*, 872 F.3d 760, 769–71 (6th Cir. 2017); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1160 (7th Cir. 1987); *Smith*, 2018 WL 1924454, at *10; *Powell v. Allstate Ins. Co.*, 652 So. 2d 355, 357–58 (Fla. 1995); *State v. Brown*, 62 A.3d 1099, 1110 (R.I. 2013).

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

188. *Id.*

189. *Id.* at 861.

190. *Powell*, 652 So. 2d at 357–58.

191. *Robinson*, 872 F.3d at 769–71.

192. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1160 (7th Cir. 1987).

193. *State v. Brown*, 62 A.3d 1099, 1112 (R.I. 2013).

194. *Id.* at 1111.

195. *See Robinson*, 872 F.3d at 769–71; *Shillcutt*, 827 F.2d at 1160; *Williams v. Price*, No. 2:98CV1320, 2017 WL 6729978, at *10 (W.D. Pa. Dec. 29, 2017); *Patton v. First Light Prop. Mgmt., Inc.*, No. 14-CV-1489-AJB-WVG, 2017 WL 5495104, at *1, *6 (S.D. Cal. Nov. 15, 2017), *appeal filed*, No. 17-56861 (9th Cir. Dec. 13, 2017).

196. *Patton*, 2017 WL 5495104, at *6.

197. *Id.*

198. *Id.* at *6.

199. *Id.* at *4, *6.

200. *Id.* at *7.

Native-Americans generally.²⁰¹ Similarly, another pre-*Peña-Rodriguez* case rejected claims of juror racial bias on the grounds that the juror statements were “non-rac[ial]” or ambiguous with respect to racial bias.²⁰² In *State v. Brown*,²⁰³ the Rhode Island Supreme Court rejected a post-verdict motion for a new trial based on allegations of juror racial bias.²⁰⁴ Following the Native-American defendants’ conviction, a juror contacted the trial court out of concern that at least two other jurors had been racially biased against the defendants.²⁰⁵ The juror eventually attested that one of the jurors had referred to the Native-American defendants as “those people” during deliberations, and that once a verdict was reached another juror had “banged two water bottles together like he was playing a tom-tom drum.”²⁰⁶ While the court held that it was permissible for the trial court to consider post-verdict evidence of juror racial bias (notwithstanding the no-impeachment rule), it nonetheless held that the statements and actions were “ambiguous, innocuous, and capable of different interpretations.”²⁰⁷ As such, the court found that “none of these . . . statements or acts is overtly racist” and that they “did not necessarily have a racist undertone.”²⁰⁸ The court therefore affirmed that no new trial was necessary as “none of the jurors had made clear statements evidencing racial bias”—notwithstanding that the jurors clearly had relied on racial stereotypes in making their statements.²⁰⁹

The mechanical distinction between “race neutral” and “overt” statements is a poor and misleading judicial shortcut, however, for ascertaining whether a juror statement amounts to racial bias pursuant to *Peña-Rodriguez*. Modern manifestations of racism are now typically covert rather than overt, implicit rather than explicit, and facially neutral rather than plainly explicit.²¹⁰

201. See Brian Bull, *For Native Americans, Old Stereotypes Die Hard*, NPR (May 4, 2009, 12:56 AM), <https://www.npr.org/templates/story/story.php?storyId=103711756> (“Native Americans have a long history of one-sided portrayals in Hollywood, including such stereotypical characters as the war-whooping savage or the grunting tribesman.”); see also Lucy A. Ganje, *Marketing the Sacred: Commodifying Native-American Cultural Images*, in *IMAGES THAT INJURE: PICTORIAL STEREOTYPES IN THE MEDIA* 91–93 (Susan Dente Ross & Paul Martin Lester eds., 3d ed. 2011).

202. *State v. Brown*, 62 A.3d 1099, 1111 (R.I. 2013).

203. *Id.*

204. *Id.* at 1111, 1113.

205. *Id.* at 1105.

206. *Id.* at 1106. Notably, these allegations were verified by two other jurors. *Id.*

207. *Id.* at 1111.

208. *Id.* at 1110.

209. *Id.* at 1106–07.

210. See *State v. Saintcalle*, 309 P.3d 326, 335 (Wash. 2013) (“In part, the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.”), *abrogated by* *Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017); see also *infra* Part III for a more detailed discussion of modern racism and its many iterations.

4. The Impact of Racial Bias on Juror Decision-Making

In addition to demonstrating that a juror statement was racially biased, *Peña-Rodriguez* requires a showing that such “racial animus was a significant motivating factor in the juror’s vote to convict” before making an exception to the no-impeachment rule.²¹¹ The *Peña-Rodriguez* Court, again, did not provide clear guidance for trial courts to follow in terms of determining the impact of racial bias on juror decision-making.²¹² Nonetheless, the Court did find that the statements by the *Peña-Rodriguez* juror were “egregious and unmistakable in their reliance on racial bias” in that they demonstrated that the juror “deploy[ed] a dangerous racial stereotype to conclude [the defendant] was guilty . . . [and] encouraged other jurors to join him in convicting on that basis.”²¹³

There have only been a handful of decisions applying this prong of the *Peña-Rodriguez* racial-bias test.²¹⁴ In the already discussed case of *Smith*, the district court found that juror statements indicating that the African-American defendant was a “banger from the hood” was sufficient evidence that “racial animus was a significant motivating factor in the juror’s vote to convict.”²¹⁵ The district court reached this conclusion because juror’s statement “directly ties a race-based stereotype to . . . [the] conclusion of guilt” and was made while jury deliberations were ongoing.²¹⁶ The *Smith* approach to divining the impact of a racially biased statement on juror decision-making fulfills the spirit of *Pe-*

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

212. *Id.* at 869–70 (“This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias.”).

213. *Id.* at 870.

214. Most of the decisions applying *Peña-Rodriguez* have found that the complained-of juror statements did not amount to racial bias and thus did not engage in an analysis of whether those statements “significantly motivated” the juror’s decision to convict. *See, e.g.*, *United States v. Robinson*, 872 F.3d 760, 771 (6th Cir. 2017); *Kittle v. United States*, 65 A.3d 1144, 1156–57 (D.C. Cir. 2013); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159–60 (7th Cir. 1987); *Patton v. First Light Prop. Mgmt., Inc.*, No. 14-CV-1489-AJB-WVG, 2017 WL 5495104, at *6 (S.D. Cal. Nov. 15, 2017), *appeal filed*, No. 17-56861 (9th Cir. Dec. 13, 2017); *State v. Brown*, 62 A.3d 1099, 1110–11 (R.I. 2013). There have also been pre-*Peña-Rodriguez* cases that touched upon this issue. *See, e.g.*, *Fisher v. State*, 690 A.2d 917, 920 (Del. 1996) (finding that a juror’s racially biased comment played a role in her decision-making since “[s]he injected into the deliberations her own prejudice that any African-American who would be in the area is guilty”); *Commonwealth v. Laguer*, 571 N.E.2d 371, 375–76 (Mass. 1991) (finding, incredibly, that juror statements using the racial slurs “the god-damned spic is guilty” during deliberations “did not relate specific factual information that might influence the fact-finding of reasonable jurors”).

215. *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *10 (D. Minn. Apr. 24, 2018). *But see Williams v. Price*, No. 2:98cv1320, 2017 WL 6729978, at *9 (W.D. Pa. Dec. 29, 2017). In *Williams*, the Western District of Pennsylvania was asked to rule on the African-American’s motion for a new trial pursuant to *Peña-Rodriguez* on the basis of evidence that one of the jurors had called a defense witness “a nigger lover.” *Id.* at *7. While the court acknowledged that the statement amounted to a “racial slur,” it nonetheless held that statement did “not show that racial animus was a significant motivating factor in the vote to convict.” *Id.* at *9. Central to the court’s analysis was the fact that the slur was directed toward the defendant’s witness during deliberations, rather than toward the defendant. *Id.*

216. *Smith*, 2018 WL 1924454, at *10.

Peña-Rodriguez in recognizing that racially biased statements made as part of jury deliberations on guilt necessarily significantly motivated that juror's decision-making.

III. THE SCIENCE OF JUROR RACIAL BIAS

Trial courts have been struggling to apply the racial-bias exception to the no-impeachment rule set forth in *Peña-Rodriguez* in a uniform and consistent manner, increasing the possibility that juror racial bias will continue to seep into the jury room.²¹⁷ The difficulty with applying *Peña-Rodriguez* lies principally in the problems that trial judges experience in attempting to identify whether juror statements are “racist”—much less whether such statements influenced juror decision-making—given the lack of a clear definition for “racism.” This Part of the Article surveys the sociological and psychological literature on racism and its impact on group decision-making in an attempt to identify useful guidelines to assist courts in the *Peña-Rodriguez* analysis.

A. Defining Racism in a Post-Racism World

Any definition of “racism” necessarily must first take account of the shifting nature of “race.” The concept of race has no scientific or biological meaning, developing over time as a social and political method to legitimize the unequal legal treatment of groups of people.²¹⁸ The definition of race thus shifts in subtle ways depending on the society in question and on the sociopolitical needs of that society to rationalize inequality on the grounds of supposed racial difference.²¹⁹ The malleability of the race concept is perhaps best illustrated by the vast array of often-conflicting racial categories that have developed around the world.²²⁰ The determination of an individual's race is thus impacted by a confluence of

217. See, e.g., *id.* at *13.

218. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994) (perhaps the seminal historical analysis of the social construction of “race”). Notwithstanding the advent of DNA ancestry testing or racialized genetic databases, which has resurrected notions of biological race, the artifice of “race” remains at its core devoid of genetic meaning. For a more detailed examination of race theory and its relationship to modern biotechnology and population genetics, please see Sundquist, *supra* note 6; see also DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 7–8 (2011).

219. The sociologist Howard Winant puts it thusly: “Although the concept of race appeals to biologically based human characteristics (phenotypes), selection of these particular human features for purposes of racial signification is always and necessarily a social and historical process. There is no biological basis for distinguishing human groups along the lines of race, and the sociohistorical categories employed to differentiate among these groups reveal themselves, upon serious examination, to be imprecise if not completely arbitrary.” Howard Winant, *Race and Race Theory*, 26 ANN. REV. SOC. 169, 172 (2000).

220. See Lorena Madrigal & Guido Barbujani, *Partitioning of Genetic Variation in Human Populations and the Concept of Race*, in *ANTHROPOLOGICAL GENETICS: THEORY, METHODS AND APPLICATIONS* 19, 27 (Michael Crawford ed. 2007) (“If races are biological realities, they must be the same everywhere, whereas forensic race catalogues differ across countries.”).

factors, which may include prevailing social norms, self-identification, outsider identification, phenotype, dress, accent, and behavior.²²¹

If race is scientifically meaningless from a biological perspective, then racism similarly cannot be identified from discrete biomarkers or technological testing.²²² This partly explains why no clear definition of racism, capable of mechanically identifying statements or behaviors as “racist,” exists. Despite the absence of a scientific test of racism, empirical research from the sociological and psychological fields may be helpful to trial judges in better understanding the nature of racism as well as how racial bias can impact juror decision-making.

B. *The Sociology of Racism*

Any definition of racism should therefore take into account that it is a distinctly structural phenomenon embedded in the legal, social, and cultural systems of a society.²²³ While such systemic racism may well manifest in individual and group expressions of racial bias, it is defined at its core as a set of social, economic, psychological, and legal systems that promote white superiority and nonwhite inferiority.²²⁴ There have been a number of sociological attempts to understand and delimit the nature of racism, but perhaps the most concise summary of a sociological theory of racism is as follows:

[Racism is defined by:] (1) Signifying practice that essentializes or naturalizes human identities based on racial categories or concepts; (2) Social action that produces unjust allocation of socially valued resources, based on such significations; (3) Social structure that reproduces such allocations.²²⁵

While structural theories of racism share a common focus on locating the heart of racism in systemic practices that promote or preserve white privilege,²²⁶ there are some differences amongst the principal sociological models. The racial formation model, advanced by Michael Omi and Howard Winant, stresses the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed” in understanding racism.²²⁷ This perspective was informed by an older sociological perspective that conceived of racism as “a combination of prejudice

221. See, e.g., Christian B. Sundquist, *Science Fictions and Racial Fables: Navigating the Final Frontier of Genetic Interpretation*, 25 HARV. BLACKLETTER L.J. 57, 90 (2009).

222. See JONATHAN KAHN, RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE 207 (2018) (observing that no technical or scientific methods exist to test “racism,” given that race itself is socially constructed).

223. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

224. See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS 9 (3d ed. 2010).

225. HOWARD WINANT, THE NEW POLITICS OF RACE: GLOBALISM, DIFFERENCE, JUSTICE 220 n.6 (2004).

226. See Sundquist, *supra* note 6, at 373–74.

227. OMI & WINANT, *supra* note 218, at 55.

and power that allows the dominant race to institutionalize its dominance at all levels in a society.”²²⁸ The sociologist Eduardo Bonilla-Silva concludes that racism cannot be understood narrowly as individual racial bias, but rather as an “ideological structure of a social system that crystallizes racial notions and stereotypes” by rationalizing the “social, political and economic interactions between the races.”²²⁹ At other times Bonilla-Silva has restated his perspective of racism as reflecting “racially biased frameworks used by actors to explain and justify (dominant race) or challenge (subordinate race or races) the racial status quo.”²³⁰

The focus on “stereotypes” and “frameworks” by Bonilla-Silva and other sociologists is perhaps most relevant to a better understanding of how to identify racially biased juror statements under *Peña-Rodriguez*. From a sociological perspective, stereotypes can be understood as over-generalizations about a group of persons that exist to perpetuate racial ideology.²³¹ Structural racism can manifest itself in society in a variety of ways, from “Jim Crow” racism based on explicit racial stereotypes and slurs linked to claims of nonwhite biological inferiority to modern forms of “colorblind” and “post-racial” racism based on race-neutral statements sounding in economic liberalism and cultural deficiency.²³² The latter forms of racism can be especially difficult for judges to identify given that they often utilized race-neutral or coded language to nonetheless convey a view of nonwhite racial inferiority.²³³ As I have summarized previously, such race-neutral ideologies tend to rationalize the persistence of the racial status quo (and thus inequality) by advancing:

- (1) cultural explanations for inequality, (2) the rhetoric of liberal concepts of the free market, individualism and equal opportunity, (3) the tools of colorblind constitutionalism, and (4) the politics of post-racialism.²³⁴

Colorblind and post-racial ideologies are thus racist under a structural understanding of racism because they operate to preserve the existing racial hierarchy.²³⁵ Bonilla-Silva posits that a colorblind (and by ex-

228. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 466 (1997).

229. *Id.* at 474.

230. BONILLA-SILVA, *supra* note 224.

231. See James L. Hilton & William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCHOL. 237, 243 (1996).

232. BONILLA-SILVA, *supra* note 224, at 2.

233. *Id.* at 3.

234. Sundquist, *supra* note 6, at 370. Post-racialism has been described as the “liberal embrace of colorblindness.” Ian F. Haney Lopez, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011). Professor Sumi Cho defines post-racialism as “a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.” Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009).

235. BONILLA-SILVA, *supra* note 224, at 3.

tension, post-racial) racial ideology consists of four pathways for “interpreting information”: abstract liberalism, cultural racism, naturalization, and the minimization of racism.²³⁶ He argues that the framing of racial issues in terms of liberalism—with its focus on individualism, equal opportunity, universalism, and classic market economics—allows people to ignore the reality of structural inequality in favor of seemingly race-neutral explanations that nonetheless rely on race-based stereotypes.²³⁷ Naturalization is defined as a frame that allows people to rationalize racial disparities as “natural occurrences.”²³⁸ Similarly, “cultural racism” within the colorblind, post-racial ideology is present when people rely on “culturally based arguments” to rationalize racial inequality.²³⁹ And finally, minimization occurs when one claims that racial discrimination is aberrational and cannot explain the persistence of race-based disparities.²⁴⁰ Notably, the sociological frames of colorblind racial ideology resemble the psychological findings on “symbolic racism” and “implicit bias” in that both fields recognize that racism can be perpetuated through seemingly nonracial statements and actions.²⁴¹

A new racial phenomenon is arguably occurring following the election of Donald Trump to the presidency, which I tend to refer to as either “post-racism” or “racial relativism.” I conceive of post-racism as the modern social trend to rationalize even overt and explicitly racist statements and ideas as reflecting facts.²⁴² Racism is increasingly being seen in society as “relative,” with white nationalists and members of the alt-Right defining their views on white racial superiority as “not racist” because they reflect supposed biological realities, cultural realities, or both.²⁴³ This attempt to redefine racism is, of course, an attempt to reduce racism to a meaningless concept while normalizing racial inequality.

The structural conception of racism is often contrasted with individualist or idealist models or prejudice, which tend to define racism narrowly as “a set of ideas or beliefs” held by individuals which can develop

236. *Id.* at 74.

237. *Id.* at 76. Bonilla-Silva uses the example of opposition to affirmative-action policies on the grounds that they violate liberal norms of “equal opportunity.” *Id.*

238. *Id.* Bonilla-Silva provides the following as an example of naturalization: white people defending racial segregation on the grounds that it is natural for people to prefer to live with others of the same race. *Id.*

239. *Id.* Bonilla-Silva uses as examples the following statements (which rely on stereotypes): “Mexicans do not put much emphasis on education” and “blacks have too many babies.” *Id.*

240. *Id.* at 77.

241. *See infra* Section III.C of this Article for an analysis of the social psychological research in these areas.

242. *See* BONILLA-SILVA, *supra* note 224, at 96.

243. *See, e.g., id.* at 77; Gavin Evans, *The Unwelcome Revival of “Race Science,”* GUARDIAN (Mar. 2, 2018, 1:00 AM), <https://www.theguardian.com/news/2018/mar/02/the-unwelcome-revival-of-race-science>; Andrew Sullivan, *Denying Genetics Isn’t Shutting Down Racism, It’s Fueling It*, N.Y. MAG.: INTELLIGENCER (Mar. 30, 2018), <http://nymag.com/intelligencer/2018/03/denying-genetics-isnt-shutting-down-racism-its-fueling-it.html>.

into “negative attitudes towards an entire group of people” (e.g., prejudice).²⁴⁴ Such interpretations of racism have principally been made in the field of social psychology, creating tension with structuralist theories rooted in sociological research.²⁴⁵ A common sociological objection to psychological theories of racism (i.e., prejudice) is that they tend to reduce racism to a “psychological phenomenon to be examined at the individual level.”²⁴⁶ The criticism of the individualistic focus of psychological theory on racism is well-deserved, given its tendency to promote an understanding of racism as an aberrational phenomenon existing solely in individual cognitive biases rather than in the legal and political systems of social control.²⁴⁷ However, there may yet be some value to the psychological examination of racial bias. Modern psychological interpretations of racism do not necessarily need to conflict with sociological theory. Whereas structuralist definitions of racism provide a categorical understanding of how racism operates in society, psychological theory can help us understand how systemic racism is thereafter expressed in society. Indeed, many social psychologists agree that racism is systemic in nature, but that it also “involves mental structures and psychodynamic processes that operate in both the perpetrator of such social actions and the victim.”²⁴⁸ An understanding of both the sociological and psychological roots of racism can thus better aid judicial application of the *Peña-Rodriguez* racial-bias exception.

C. *The Psychology of Racism*

The field of social psychology has long examined the manner in which racial prejudice can develop in individuals, how that cognitive bias may thereafter be expressed, and when bias can impact decision-making.²⁴⁹ While psychology perhaps lacks the tools to describe the systemic nature of racism, it has striven to empirically examine the impact that such systemic racism can have on individual and group thought processes—especially through the reliance on stereotypes.²⁵⁰ The social-cognition model in psychology views stereotypes as “mental representations of . . . differences between groups . . . allowing easier and more efficient processing of information.”²⁵¹ Such “cognitive schemas” or generalizations are utilized by individuals on a regular basis as mental

244. Bonilla-Silva, *supra* note 228 (citing scholarly works in the social psychology field).

245. *See id.* (critiquing empirical findings in social psychology for being narrowly focused on individual bias).

246. *Id.* at 467.

247. *See id.* at 466–67.

248. Brian Rasmussen & Daniel Salhani, *A Contemporary Kleinian Contribution to Understanding Racism*, 84 SOC. SERV. REV. 491, 493 (2010).

249. *See generally* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION (John F. Dovidio et al. eds., 2010) [hereinafter THE SAGE HANDBOOK].

250. *See, e.g.*, Susan T. Fiske & Ann Marie Russell, *Cognitive Processes*, in THE SAGE Handbook, *supra* note 249, at 115, 115–17.

251. Hilton & von Hippel, *supra* note 231, at 240–41.

heuristics.²⁵² This approach is oversimplistic, and a bit misleading, when applied to the racial context in that it defines stereotypes solely at an individual level without taking into account the broader social forces that incentivize the use of stereotypes to preserve racial hierarchy.²⁵³ A more basic definition of stereotypes appearing in the literature is a bit more useful: “[a] social stereotype is a mental association between a social group or category and a trait.”²⁵⁴ That said, modern psychological empirical findings are nonetheless useful to understanding juror racial bias under the individualized *Peña-Rodriguez* framework.²⁵⁵

Psychological research recognizes five principal models of racial prejudice: dominative racism, *laissez-faire* racism, aversive racism, symbolic racism, and unconscious racism (or “implicit bias”).²⁵⁶ Dominative racism refers to “old-fashioned” or traditional forms of racial bias, whereby a dominative racist is the “type who acts out bigoted beliefs . . . [H]e represents the open flame of racial hatred.”²⁵⁷ Sociologists, in turn, similarly refer to dominative racism as “Jim Crow” or “old-fashioned” forms of direct and explicit racial bias typically rooted in “beliefs about . . . mental, moral and intellectual inferiority” based on claimed biological difference.²⁵⁸ Racial statements made by the classic bigot, white nationalist, or Ku Klux Klan member would undoubtedly fit within this model.

Racism, as Justice Blackmun observed some time ago, is “not less real or pernicious” even though it now may “take[] a form more subtle

252. E.g., Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 267 (1985).

253. See Bonilla-Silva, *supra* note 228, at 467.

254. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

255. *Peña-Rodriguez* asks courts to determine whether an individual juror statement amounts to “racial bias,” taking into account the timing and content of the statement and whether other racially biased statements were made by jurors. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). If an individual juror is found to have made a racially biased statement, the court must then determine whether it is reasonable to infer that the juror’s decision to convict was influenced by racial bias. *Id.* Even the sociologist Eduardo Bonilla-Silva, who is often critical of the individualized nature of psychological research on racism, acknowledges that social psychology can help society better understand how racist attitudes are expressed. BONILLA-SILVA, *supra* note 224, at 7 (noting that “despite its limitations, the symbolic racism tradition [in psychology] has brought attention to key elements of how whites explain racial inequality today”).

256. Lawrence Bobo & James R. Kluegel, *Status, Ideology, and Dimensions of Whites’ Racial Beliefs and Attitudes: Progress and Stagnation*, in RACIAL ATTITUDES IN THE 1990S, at 93, 95 (Steven A. Tuch & Jack K. Martin eds., 1997); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 6 (2004); Greenwald & Krieger, *supra* note 254, at 946. Another model of racism that will not be discussed at length in this article is Modern Racism Theory. Modern Racism Theory focuses on the connection between conservative political beliefs and racially discriminatory behaviors. See Dovidio & Gaertner, *supra*, at 6–7. Later in this Article, however, various psychometric tools that have developed to measure racism, including the “Modern Racism Scale,” will be discussed. See *infra* notes 276–97 and accompanying text.

257. JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 54 (1970); Dovidio & Gaertner, *supra* note 256, at 3.

258. See BONILLA-SILVA, *supra* note 224, at 25; Dovidio & Gaertner, *supra* note 256, at 3.

than before.”²⁵⁹ The other main psychological models thus focus on more indirect forms of racial bias to describe “modern racism.”²⁶⁰ The justification-suppression model explains why many people tend to express racial bias in nuanced and facially neutral ways as opposed to explicit demonstrations of racism.²⁶¹ According to this model, “genuine prejudices” are often not explicitly expressed as they are “restrained by beliefs, values and norms that suppress” such expression in modern society.²⁶² Rather, racial prejudices are often only “expressed when justifications (e.g., attributions, ideologies, stereotypes) release suppressed prejudices.”²⁶³

The concept of *laissez-faire* racism, by its terms, rationalizes racial inequality as reflecting natural economic forces in a free-market system.²⁶⁴ As such, *laissez-faire* racism “encompasses an ideology that blames blacks themselves for their poorer relative economic standing, seeing it as a function of perceived cultural inferiority.”²⁶⁵ This conceptualization of racism connects well with the sociological model of “cultural racism” discussed earlier,²⁶⁶ in that it rationalizes racial inequality on the grounds of “deficient personal choices” or supposed cultural depravity.²⁶⁷

The aversive model of racism, related in many ways to conceptions of “symbolic” and “implicit” racism, was one of the earliest alternative understandings of “indirect and subtle” forms of racial bias.²⁶⁸ Aversive racism is described as reflecting “the conflict between whites’ denial of personal prejudice and underlying unconscious negative feelings toward and beliefs about [nonwhite persons].”²⁶⁹ The aversive-racism model thus presumes that some white individuals may support racial equality in theory, yet nonetheless be influenced by “unconscious” psychological processes to express racial bias.²⁷⁰ As such, the model holds that since “aversive racists consciously recognize and endorse egalitarian values and because they truly aspire to be non-prejudiced, they will not discriminate in situations with strong social norms when discrimination would

259. *Rose v. Mitchell*, 443 U.S. 545, 559 (1979).

260. Dovidio & Gaertner, *supra* note 256.

261. Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414, 414 (2003).

262. *Id.*

263. *Id.*

264. See Ross L. Matsueda & Kevin Drakulich, *Perceptions of Criminal Injustice, Symbolic Racism, and Racial Politics*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 166–67 (2009).

265. Bobo & Kluegel, *supra* note 256.

266. See *supra* note 239 and accompanying text.

267. Christian Sundquist, *Equal Opportunity, Individual Liberty, and Meritocracy in Education: Reinforcing Structures of Privilege and Inequality*, 9 GEO. J. ON POVERTY L. & POL’Y 227, 236 (2002).

268. See Dovidio & Gaertner, *supra* note 256, at 3, 6.

269. *Id.* at 4.

270. *Id.* at 4–5.

be obvious to others and to themselves” to “avoid the attribution of racist intent.”²⁷¹

Symbolic racism is arguably slightly different from aversive racism in that it incorporates political beliefs based in liberalism to explain the expression of racial bias.²⁷² A summary definition of symbolic racism likely would include the following claims:

(1) Racial discrimination is no longer a serious obstacle to blacks’ prospects for a good life, so that (2) blacks’ continuing disadvantages are largely due to their unwillingness to work hard enough . . . [and] [a]s a result, both their (3) continuing demands and (4) increased advantages are unwarranted.²⁷³

Symbolic racist attitudes thus tend to focus on beliefs that nonwhite persons are lazy, have a poor work ethic, and receive unearned benefits in violation of traditional American values.²⁷⁴ Symbolic racism is thus “preoccupied with matters of moral character, informed by the virtues associated with the traditions of individualism . . . [and at] its center are the contentions that blacks do not try hard enough to overcome the difficulties they face and that they take what they have not earned.”²⁷⁵

Growing out of psychological research on the expression of indirect or nontraditional forms of racism, such as aversive and symbolic racism, the implicit-bias theory purports to be able to measure unconscious in-group and outgroup “discriminatory bias[] based on implicit attitudes or implicit stereotypes.”²⁷⁶ The model posits that unconscious bias can be tested in individuals through a variety of tests—one of the more prominent being the Implicit Association Test (IAT).²⁷⁷ Implicit-bias testing has revealed the presence of widespread racial prejudice in America, notwithstanding the decrease in expressions of overt (or dominative) racial bias.²⁷⁸ The IAT operates by “measuring the strength of the association between social categories (e.g., Blacks or Whites) and positive and negative attributes (e.g., ‘joy’ and ‘love’ versus ‘agony’ and ‘evil’).”²⁷⁹ The racial version of the IAT (black–white) requires subjects to quickly

271. *Id.* at 7.

272. *Id.* at 6 (“Symbolic Racism Theory emphasizes that beliefs about individualism and meritocracy that become racialized motivate opposition to policies designed to benefit racial and ethnic minorities.”).

273. Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. POL. 731, 733 (2005).

274. *See id.*

275. DAVID R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 105–06 (1996).

276. Greenwald & Krieger, *supra* note 254, at 951.

277. *Id.* at 954.

278. *See, e.g.*, John F. Dovidio, *Racial Bias, Unspoken but Heard*, 326 SCIENCE 1641, 1641 (2009); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006).

279. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1182 (2006).

make associations of images or words that appear on a computer screen with positive or negative evaluative descriptors.²⁸⁰ The theory is that having participants make such fast associations between race and value judgments can reveal hidden and unconscious bias.²⁸¹ Indeed, studies have found that perhaps 90% to 95% of white Americans are racially biased in some way, providing valuable empirical evidence that our society is far from “post-racial.”²⁸²

The implicit-bias model has received significant popular attention, and controversy, during the last few decades.²⁸³ Scores of law review articles have been written on how law can respond to ameliorate implicit bias,²⁸⁴ extensive empirical research has been conducted on unconscious bias,²⁸⁵ and implicit-bias testing and education has become a profitable cornerstone of diversity and inclusion training for universities, police departments, and workplaces.²⁸⁶ However, the soundness of implicit-bias findings have recently been called into question by both new empirical findings and critical analyses. A recent meta-analysis of implicit bias research has found that implicit-bias testing was not correlated with external or explicit measures of behavior.²⁸⁷ As such, the researchers determined that “current interventions that attempt to change implicit measures will not consistently change behavior in these domains,”²⁸⁸ undermining the value of implicit-bias training in predicting actual behavior. In short, the study indicates that “the correlation between implicit bias and discriminatory behavior appear weaker than previously thought” and that “there is very little evidence that changes in implicit bias have

280. See, e.g., About the IAT, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html>.

281. Anthony G. Greenwald & Shelly D. Farnham, *Using the Implicit Association Test to Measure Self-Esteem and Self-Concept*, 79 J. PERSONALITY & SOC. PSYCHOL. 1022, 1023 (2000).

282. Jeff Nesbit, *America, Racial Bias Does Exist*, U.S. NEWS & WORLD REP.: AT THE EDGE (Jan 13, 2015, 11:36 AM), <https://www.usnews.com/news/blogs/at-the-edge/2015/01/13/america-racial-bias-does-exist>.

283. CHERYL STAATS ET AL., KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, OHIO STATE UNIV., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 8–9 (2017); Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, COLO. LAW., May 2016, at 45, 45.

284. See, e.g., Greenwald & Krieger, *supra* note 254, at 962–63; Jolls & Sunstein, *supra* note 278 at 976–80; Lawrence, *supra* note 223, at 326; Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350–51 (2007). A Westlaw search taking place on October 13, 2018 found that the term “implicit bias” appeared 2,743 times in its “law reviews and journals” database.

285. See, e.g., STAATS ET AL., *supra* note 283.

286. Valerie Bolden-Barrett, *Demand for Diversity and Inclusion Experts Is on the Rise*, HR DIVE (Apr. 2, 2018), <https://www.hrdiver.com/news/demand-for-diversity-and-inclusion-experts-is-on-the-rise/520131>; see also Karsten Strauss, *More Evidence that Company Diversity Leads to Better Profits*, FORBES (Jan. 25, 2018, 3:59 PM), <https://www.forbes.com/sites/karstenstrauss/2018/01/25/more-evidence-that-company-diversity-leads-to-better-profits>; Valentina Zarya, *I Failed this Test on Racism and Sexism—and So Will You*, FORTUNE (Nov. 10, 2015), <http://fortune.com/2015/11/10/test-racism-sexism-unconscious-bias>.

287. Patrick S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures 45* (Aug. 13, 2018) (unpublished manuscript).

288. *Id.*

anything to do with changes in a person's behavior."²⁸⁹ Even the founders of the implicit-bias field have acknowledged the test's difficulty with reliability and replicability of results.²⁹⁰ Other studies have suggested that implicit-bias testing does not actually measure unconscious racism, finding that participants are "consciously aware" of their "implicit" prejudices when taking the test.²⁹¹ While these findings call into question the utility of pretrial strategies to reduce implicit juror racial bias, the use of jury instructions and other predeliberation strategies to blunt racial bias should continue to be explored.

The assumptions underlying implicit-bias research have also been recently critiqued for obscuring the nature of systemic racism by allowing people to shed moral and legal responsibility for their own racism due to its "hidden" and "unconscious" basis.²⁹² Indeed, if racial prejudice is seen as largely subconscious and uncontrollable, then it follows that individuals may feel as though they lack a moral and legal responsibility to eradicate racial inequality. Michael Selmi similarly argues that conceiving of racism as implicit bias has made it more difficult for the law to respond to racial discrimination: "[d]efining contemporary discrimination as unconscious and beyond one's control is not just inaccurate descriptively, but it makes such bias more difficult to prove."²⁹³ Professor Tryon P. Woods further argues that implicit bias "presents us with a superficial understanding of racism . . . [in that it presumes] that racism *should have gone away* with the eradication of explicit discrimination, that the civil rights gains would not have stalled, become eviscerated, or undergone a reversal, but for this nagging little problem of people's cognitive processes."²⁹⁴

289. Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, CHRON. REV. (Jan. 5, 2017) ("[T]he link between unconscious bias, as measured by the test, and biased behavior has long been debated among scholars.").

290. Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 559–60 (2015).

291. Adam Hahn & Betram Gawronski, *Do Implicit Evaluations Reflect Unconscious Attitudes?*, 37 BEHAV. & BRAIN SCI. 28, 29 (2014); see also Lawrence T. White, *Is Implicit Bias a Useful Scientific Concept?*, PSYCHOL. TODAY (June 23, 2017), <https://www.psychologytoday.com/us/blog/culture-conscious/201706/is-implicit-bias-useful-scientific-concept> (arguing that IAT testing has "limited ability to predict actual behavior").

292. Olivia Goldhill, *The World Is Relying on a Flawed Psychological Test to Fight Racism*, QUARTZ (Dec. 3, 2017), <https://qz.com/1144504/the-world-is-relying-on-a-flawed-psychological-test-to-fight-racism> ("The implicit bias narrative also lets us off the hook. We can't feel as guilty or be held to account for racism that isn't conscious. The forgiving notion of unconscious prejudice has become the go-to explanation for all manner of discrimination, but the shaky science behind the IAT suggests this theory isn't simply easy, but false. And if implicit bias is a weak scapegoat, we must confront the troubling reality that society is still, disturbingly, all too consciously racist and sexist.").

293. Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 197 (2018).

294. Tryon P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 DREXEL L. REV. 631, 640 (2018). Professor Woods further posits that "[i]mplicit bias theory's underlying assumptions, distinct from its cognitive science conclusions, reveal the ongoing hegemony of liberalism, generally, and of colorblindness ideology, specifically." *Id.* at 634.

The empirical and theoretical difficulties with implicit bias-research, unfortunately, complicate the attempt to identify guidelines on implicit bias that could aid judicial application of the *Peña-Rodriguez* exception. Notably, psychological research has developed a number of empirical methods to measure racial prejudice: the Modern Racism Scale, the Old Fashioned Racism Scale, the Blatant Prejudice Scale, the Subtle Prejudice Scale, and, of course, the IAT.²⁹⁵ While each of these measures have been empirically demonstrated to some degree in the past, they largely rely on survey instruments based on participant self-reporting to identify prejudice.²⁹⁶ These measures, nonetheless, could be used as examples of statements empirically found to be associated with racial bias in determining whether a juror statement constitutes racial bias.²⁹⁷

The existence of racial bias on the jury has long been found to be clearly associated with distorted trial outcomes.²⁹⁸ A meta-analysis of juror racial bias found that “[r]esearch on race and legal decision making has provided compelling evidence that race can exert a causal effect on trial outcomes in some cases.”²⁹⁹ In particular, the study noted that research had shown that white mock jurors were “harsher in their judgments of out-group vs. in-group defendants” as well as in their “sentencing recommendations for Black vs. White defendants.”³⁰⁰ The study analyzed widespread research findings that the racial composition of a jury can influence its decision-making, concluding that the explicit and implicit biases of jurors most likely caused such distorted trial outcomes.³⁰¹

Additional empirical studies have similarly found that juror racial bias can impact decision-making with regard to guilt and the interpretation of ambiguous evidence.³⁰² One such study found that people “im-

295. THE SAGE HANDBOOK, *supra* note 249, at 50, 318, 322–23 (describing the implicit association test and modern and old-fashioned racism); Dovidio & Gaertner, *supra* note 256 at 6–7 (describing modern and old-fashioned racism); T.F. Pettigrew & R.W. Meertens, *Subtle and Blatant Prejudice in Western Europe*, 25 EUR. J. SOC. PSYCHOL. 57, 57–58 (1995) (describing blatant and subtle prejudice); *see also* B. Zeus Simeoni, Testing Tests: Determination of the Efficacy of Prejudice Measures 1 (Spring 2005) (unpublished M.S. thesis, Georgia Southern University), <https://digitalcommons.georgiasouthern.edu/etd/434>.

296. Simeoni, *supra* note 295, at 46–47. For example, the “Old Fashioned Racism Scale” may include questions such as “Black people are generally not as smart as whites” and “It is a bad idea for blacks and whites to marry one another.” *Id.* at 64–65.

297. *Id.* at 54–75.

298. *See* Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 171 (2007) (collecting studies).

299. *Id.* at 183.

300. *Id.* at 172–73 (collecting studies).

301. *Id.* at 179–80.

302. *See* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*]; *see also* Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 548–49 (2014) [hereinafter Levinson et al., *Devaluing Death*].

PLICITLY associated Black with guilty and White with not guilty”³⁰³ in a judicial setting, while another study concluded that juror interpretations of ambiguous evidence “varied based upon whether they had been exposed to a photo of a darker- or lighter-skinned perpetrator” due to implicit racial-bias schemas.³⁰⁴ Professor Jennifer Eberhardt has similarly discovered that defendants with more “afro-centric” features were more than twice as likely to receive the death penalty.³⁰⁵ The study reasoned that it was possible that “jurors use[d] the degree to which... defendants appear stereotypically black as a proxy for criminality, and then punish accordingly.”³⁰⁶ These findings indicate that the mere presence of juror racial bias—whether explicit or implied—will likely serve as a significant motivating factor in a juror’s decision to convict.

D. A Model for the Judicial Interpretation of Racial Bias

The relevance of sociological and psychological research for understanding juror racial bias cannot be overstated, given that the widespread existence of racial bias almost certainly skews juror decision-making.³⁰⁷ If nearly all people are racially biased in ways that can influence jury verdicts, then what becomes of the Sixth Amendment’s guarantee of fairness and an impartial jury in light of *Peña-Rodriguez*?³⁰⁸

One solution may be that judges must take affirmative steps to ameliorate the impact of racial bias at trial via modified voir dire questioning, jury orientation materials,³⁰⁹ jury instructions, “observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial.”³¹⁰ Indeed, the majority in *Peña-Rodriguez*

303. Levinson et al., *Devaluing Death*, *supra* note 302, at 550.

304. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 337 (2010).

305. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385–86 (2006).

306. Lisa Trei, “Black” Features Can Sway in Favor of Death Penalty, *According to Study*, STAN. REP. (May 3, 2006), <https://news.stanford.edu/news/2006/may3/deathworthy-050306.html>.

307. See Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 406 (2017).

308. *United States v. Robinson*, 872 F.3d 760, 785 (6th Cir. 2017) (Donald, J., dissenting) (“Implicit biases threaten the very foundation of our criminal justice system. Our system is one that is built on fairness. The right to a fair trial. The right to a trial by jury of one’s peers. The right to be assumed innocent until proven guilty. The prevalence of these biases that are so pervasive and involuntary erodes the rights that our Constitution aims to protect, and undermines the advances that our society has made towards eliminating the role that race plays in our criminal justice system.”).

309. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 831 (2012) (using empirical research to argue that a discussion of implicit bias in juror orientation materials can reduce the impact of such bias).

310. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017); see also Levinson & Young, *supra* note 304, at 309; Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621, 627–29 (2005) (finding that racial bias impacted juror decision-making, which could be blunted by the type of juror instructions provided); Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 L. & HUM. BEHAV. 320, 320, 323 (2009) (finding an anti-black bias in juror judgments of guilt, which could be lessened by use of reflective juror instructions that made racial bias salient); Spiess, *supra* note 97, at 836–38.

acknowledged that such trial safeguards can help prevent racial bias from influencing jury decision-making.³¹¹ However, the Court also held that traditional safeguards may be “insufficient” to prevent juror racial bias, and in some situations may exacerbate the expression of bias.³¹² An exception to the no-impeachment rule, the Court held, must thus be made to allow trial judges to consider post-verdict evidence of juror racial bias.³¹³ But how should trial judges determine when jurors’ statements amount to racial bias and whether those statements were a “significant motivating factor” in their decision to convict? The sociological and psychological research on racial bias provide a few guidelines for trial judges tasked with applying the *Peña-Rodriguez* racial-bias exception:

1. Post-Verdict Procedure for Applying *Peña-Rodriguez*

A thorough and informed evidentiary hearing, considering not only juror testimony but also scientific and specialized evidence on the nature of racism and stereotyping,³¹⁴ is the best way to uphold the constitutional trial rights protected by *Peña-Rodriguez*. The sociological and psychological literature on racial bias supports this conclusion, given the complex ways in which such bias can be expressed.³¹⁵ The procedure adopted by the District Court of Minnesota in *Smith* is a step in the right direction.³¹⁶ The *Smith* court found that juror statements that did not explicitly invoke race were nonetheless racially biased given their historical connection to anti-African-American racial stereotypes.³¹⁷ In making this determination, the *Smith* court rightly held an evidentiary hearing during which juror testimony was elicited and secondary evidence (such as historical and demographic data) was considered.³¹⁸

Evidentiary hearings should involve, at a minimum, testimony from both the juror(s) reporting the allegedly biased statement(s) and the juror(s) that allegedly made such statements.³¹⁹ Courts should nonetheless strive to interview all empaneled jurors when possible, such as when

311. 137 S. Ct. at 869.

312. *Id.* at 868.

313. *Id.* at 869.

314. See *infra* notes 319–23 and accompanying text.

315. See *supra* Sections III.B–C.

316. See *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *9 (D. Minn. Apr. 24, 2018).

317. *Id.*

318. *Id.*

319. *United States v. Henley*, 238 F.3d 1111, 1112–13 (9th Cir. 2001) (noting that the trial court conducted an evidentiary hearing on the defendant’s motion for a new trial, with the reporting juror and the juror that made the allegedly biased statements testifying); *Fisher v. State*, 690 A.2d 917, 920 (Del. 1996) (“At the remand hearing each juror who deliberated in this case testified *in camera* with full right of examination and cross-examination by defense counsel and the prosecuting attorney” when conducting post-verdict review of juror racial bias.). When appropriate, *in camera* questioning of all empaneled jurors should take place to better promote the full sharing of information with the court.

context is necessary to interpret an ambiguous juror statement.³²⁰ Given the difficulty trial courts have experienced in their attempt to identify “clear statement(s) of racial bias,” especially when confronted with seemingly race-neutral juror statements, *Peña-Rodriguez* evidentiary hearings moving forward should also encourage pre-hearing briefings on the issues by parties,³²¹ the presentation of relevant secondary evidence (including scientific evidence on racial bias),³²² and an allowance for expert evidence when necessary.³²³ Given the empirical evidence that juror decision-making is already negatively impacted by racial bias, defendants should only need to demonstrate that a fair or reasonable inference of racial bias can be made from a juror statement to invoke the *Peña-Rodriguez* exception.

2. When Statements Clearly Indicate Racial Bias

The vast majority of courts applying *Peña-Rodriguez* failed to thoroughly analyze whether a particular statement constituted a racial “slur” or relied upon a racial stereotype.³²⁴ Rather, the courts largely seemed to reach a conclusion about whether a juror’s statement was racially biased with little to no analysis or reference to external evidence.³²⁵ Allowing courts to make such critical determinations on no more than a gut feeling runs afoul of the evidentiary expectations of *Peña-Rodriguez* and the demands of the Sixth and Fourteenth Amendments. Trial judges should not rely on their *ipse dixit* about the presence or absence of racial bias, but rather make an evidence-based finding within the context of a broad post-verdict evidentiary hearing—relying on relevant social-science evi-

320. See *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987); *Commonwealth v. Laguer*, 44 N.E.3d 869, 872 (Mass. App. Ct. 2016); *State v. Brown*, 62 A.3d 1099, 1110–11 (R.I. 2013). *But see Patton v. First Light Prop. Mgmt., Inc.*, No. 14-CV-1489-AJB-WVG, 2017 WL 5495104, at *7 (S.D. Cal. Nov. 15, 2017) (holding that an evidentiary hearing in response to a juror affidavit was not necessary), *appeal filed*, No. 17-56861 (9th Cir. Dec. 13, 2017).

321. See, e.g., *Smith*, 2018 WL 1924454, at *4–5 (allowing parties to submit proposed findings of fact and law prior to an evidentiary hearing featuring juror testimony).

322. A handful of courts, like the majority in *Peña-Rodriguez*, engaged in historical analysis while attempting to determine whether juror statements portrayed racial bias. See *Henley*, 238 F.3d at 1120 (stating that courts “have considerable difficulty accepting the government’s assumption that, at this time in our history, people who use the word ‘nigger’ are not racially biased.”); *Smith*, 2018 WL 1924454, at *10; *State v. Johnson*, 630 N.W.2d 79, 85 (S.D. 2001) (finding the trial court abused its discretion in denying the defendant’s motion for a new trial based on juror racial bias, as “the prejudicial remarks were of a severe nature that indirectly classified [the defendant] by his race and invoked the prejudice associated with the historical treatment of African-American males who have allegedly committed sexual improprieties with young Caucasian girls.”).

323. Expert testimony or reports may be especially helpful to the racial-bias analysis when seemingly race-neutral or “non-racial” juror statements are at issue, as experts would be able to call upon a “specialized body of knowledge” to educate the court about the non-obvious ways in which modern racism may manifest. See *supra* Sections III.B–C; see also FED. R. EVID. 702.

324. See, e.g., *Shillcutt*, 827 F.2d at 1158–59 (holding that without substantial likelihood of prejudice, the court will confirm the findings of the state court without assessing existence of racial stereotypes and stressing that the limited, proper role of federal courts is to question whether the state court violated law). *But see, e.g., Smith*, 2018 WL 1924454, at *10 (utilizing secondary sources and an appeal to history to analyze the presence of racial bias).

325. See, e.g., *Shillcutt*, 827 F.2d at 1156–60 (neglecting to evaluate external or secondary sources to confirm the likelihood of prejudice resulting from the juror statements at issue).

dence—upon a plausible allegation of juror racial bias. In so doing, courts should heed the lessons of sociological and psychological research on racial bias, taking into account the structural and systemic nature of racism.

The social science research also demonstrates that juror statements that are race neutral or ambiguous can still constitute racial bias, contrary to the holdings of the few courts that have rejected *Peña-Rodriguez* requests on the grounds that the statements were “non-racial,”³²⁶ “race neutral,”³²⁷ or “ambiguous.”³²⁸ Juror statements that lead to a “clear” inference of racial bias should be allowed to trigger post-verdict review, whether they are race regarding or race neutral on their face, since they still amount to cultural, aversive, or symbolic racism. Judges should make generous use of psychometric racism “scales,” such as the aforementioned Modern Racism Scale, Old Fashioned Racism Scale, Blatant Prejudice Scale, and Subtle Prejudice Scale,³²⁹ to glean examples of biased statements to use during their analysis. Based on the existing sociological and psychological research on racial bias, judges should consider asking the following questions when analyzing claims of juror racial bias:

- Does the statement invoke a blatant or explicit racial slur or stereotype?
- Does the statement otherwise rely on or promote a race-based stereotype?
- Does statement permit an inference of white superiority or nonwhite inferiority?
- Does the statement permit an inference of racial biological difference?
- Does the statement rationalize racial inequality or view it as a natural occurrence?
- Does the statement promote the idea that racial differences can be attributed to a poor work ethic, laziness, or other “cultural” factors?
- Does the statement refer to the race of the defendant, victim or a witness in a nondescriptive fashion?

326. *Id.* at 1160.

327. *State v. Brown*, 62 A.3d 1099, 1112 (R.I. 2013).

328. *See id.* at 1107, 1110–11 (confirming the trial court’s conclusion that the statements at issue are not racist and describing the behavior at issue as “ambiguous”).

329. *See supra* note 295.

3. When Racial Bias Is a Significant Motivating Factor in Decision-Making

The *Peña-Rodriguez* Court did not set forth any guidelines for deciding when a statement of juror racial bias should be viewed as supporting an inference that such bias influenced the juror's vote to convict. The Court did, however, provide that the issue of whether a statement of racial bias "was a significant motivating factor in the juror's vote to convict" depended on whether the statement "cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."³³⁰ The Court also provided some clues based on its own holding on the case facts by finding that the mere fact that the juror statements espoused racial stereotypes meant that they were necessarily "egregious and unmistakable in their reliance on racial bias."³³¹ The Court further noted that it was permissible for courts to find the racial-bias exception satisfied if there were findings that racial bias "pervaded the . . . room"³³² or based on the presence of just "[o]ne racist juror."³³³ The sociological and psychological research on racial bias support this conclusion, as empirical studies have found that the mere presence of individual racial bias invariably influences juror decision-making.³³⁴

Trial courts should thus find that racially biased statements significantly motivated a juror's vote to convict if the statement involves racial bias and it either was made (1) during an effort to deliberate on the defendant's guilt or (2) as part of an effort to influence the vote of other jurors. Arguably, the simple making of a racially biased statement within the context of (and related to) juror deliberations should satisfy this standard.³³⁵

CONCLUSION

The presence of racial bias in the jury room not only violates core trial rights contained in our Constitution but undermines public faith in the continued democratic functioning of our society. The Supreme Court's identification of a racial-bias exception to the no-impeachment rule represents an important step in restoring trust in a broken criminal justice system by upholding the defendant's constitutional right to a fair and impartial jury. Due to the pervasiveness of racism in society, it may

330. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017).

331. *Id.* at 870.

332. *Id.* at 871 (quoting *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987)).

333. *Id.* (quoting *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2013)).

334. *See, e.g.*, Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 302, at 188–90; Levinson et al., *Devaluing Death*, *supra* note 302, at 549–50; Levinson & Young, *supra* note 304, at 309–10.

335. *See United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454, at *10 (D. Minn. Apr. 24, 2018) (finding juror statements indicating that the African-American defendant was a "banger from the hood" were sufficient evidence that "racial animus was a significant motivating factor in the juror's vote to convict" . . . because . . . it directly ties a race-based stereotype to . . . the [juror's] conclusion of guilt" and was made while jury deliberations were ongoing).

take some time to fulfill the promise of *Peña-Rodriguez* to a jury free from racial bias. Courts can hasten the process of removing racial bias from juries, however, by (1) incorporating the lessons of sociological and psychological research in their rulings on *Peña-Rodriguez* post-verdict motions and (2) conducting thorough evidentiary hearings when confronted with claims of juror racial bias. The judicial recognition that racism is multivariied in expression and systemic in nature is critical to future progress in removing “the taint of racism” from our courtrooms.