THE CONSTITUTIONAL RIGHT TO AN IMPLICIT BIAS JURY INSTRUCTION

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ABSTRACT

The Supreme Court has gone to great lengths to prevent jurors from holding defendants' silence against them. In a trilogy of opinions, the Court concluded that when a defendant refrains from testifying, (1) the prosecutor and judge cannot make adverse comments about that decision; (2) the judge can give a "no adverse inference" instruction even over a defense objection; and (3) the judge must give a "no adverse inference" instruction upon a defense request. Conversely, the Court has never ruled that jurors can impeach their verdict based upon jurors holding a defendant's silence against him, and lower courts have ruled against recognizing such a right to jury impeachment.

Meanwhile, the Supreme Court has addressed the issue of juror racial bias in reverse. In 2017, the Court ruled in Pena-Rodriguez v. Colorado *that jurors must be allowed to impeach their verdict based on jurors holding a defendant's race against him. But the Court has never held that there is a right to an implicit bias jury instruction, and no lower court has ever recognized such a right.*

In Pena-Rodriguez*, however, the Supreme Court recognized that the right to an impartial jury not only addresses "unique historical, constitutional, and institutional concerns," but also requires "[a] constitutional rule." Specifically, the Pena-Rodriguez Court concluded that "[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."*

This Article contends that this rule must go further and address juror racial bias on both the back end and the front end. For the same reasons that the Supreme Court created the right to a jury instruction that jurors must not hold a defendant's silence against him, it should recognize the constitutional right to a jury instruction that jurors must not hold a defendant's race against him.

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INTRODUCTION

Imagine you are a public defender representing a Black man who does not testify at his trial for allegedly sexually assaulting a white woman.[1] Which do you fear more: (1) that the jury will draw adverse inferences from your client's decision not to testify, or (2) that the jury will draw adverse inferences from your client's race? If you chose option two, your fear does not align with the Supreme Court's precedent regarding jury instructions on adverse inferences. While the Court has held that a defendant has the right to an instruction ordering jurors to avoid drawing adverse inferences from the defendant's silence, the vast majority of courts have held that a defendant does not have the right to an instruction advising jurors to avoid drawing adverse inferences based on the defendant's race.

Conversely, imagine you are a judge hearing an appeal based upon jury misconduct after the Black man is convicted of sexual assault. Which allegation do you

1. These facts are drawn from the case of Ronnie Long, which the author investigated for the *Undisclosed* podcast. *See State v. Ronnie Long, Episode 1: Brilliant Disguise*, UNDISCLOSED (March 12, 2018), https://undisclosed-podcast.com/episodes/ronnie-long/episode-1.html. In 1976, Long, a Black man, was convicted of sexually assaulting a white woman by an all-white jury in Concord, North Carolina. In 2020, he was exonerated. *See* Ken Otterbourg, *Ronnie Long*, NAT'L REGISTRY EXONERATIONS (last updated May 4, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5801.

think should provide a stronger basis for allowing jury impeachment: (1) that jurors drew adverse inferences from the defendant's decision not to testify, or (2) that jurors drew adverse inferences from the defendant's race? Here, if you chose option two, your choice would align with precedent regarding jury impeachment. While all courts have held that there cannot be jury impeachment based on allegations that jurors drew adverse inferences from a defendant's silence, the Supreme Court recently held that the Sixth Amendment right to an impartial jury requires jury impeachment based on allegations that a jury verdict was tainted by racial bias during deliberations.

This Article argues that there is an untenable disequilibrium in these two scenarios that should be corrected through courts concluding that the Sixth Amendment right to an impartial jury entitles defendants to implicit bias jury instructions. In other words, it contends that there is a constitutional right to an implicit bias jury instruction. Part I of this Article surveys the law surrounding the Sixth Amendment right to an impartial jury and implicit bias instructions. Part II analyzes the Fifth Amendment privilege against self-incrimination, including a defendant's entitlement to a "no adverse inference" instruction.

Part III makes the argument for a constitutional right to an implicit bias jury instruction. In Subsection B, the Article argues that the strongest support for such a right is the Supreme Court's recent holding in *Pena-Rodriguez v. Colorado* that defendants have a right to present post-verdict evidence of juror racial bias during deliberations. In Subsection C, it notes that the arguments that courts have made against the right to an implicit bias jury instruction are the same arguments that the Supreme Court rejected in recognizing the right to a "no adverse inference" instruction. Finally, in Subsection D, the Article addresses alternate grounds for a more limited Sixth Amendment right to an implicit bias jury instruction.

I. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND THE IMPLICIT BIAS INSTRUCTION

This Section explores both the Sixth Amendment right to an impartial jury and precedent regarding the possible existence of a constitutional right to an implicit bias jury instruction.

A. An Introduction to Implicit Bias

Explicit bias is bias that is "conscious, expressed, and often willingly embraced."[2] Specifically, someone with explicit racial bias is aware that they judge people by the color of their skin.[3] For example, a person who harbors explicit racial

2. Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 652 (2017) (citing Andrea D. Lyon, *Racial Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012)).

3. Michele Benedetto Neitz, *Pulling Back the Curtain: Implicit Bias in the Law School Dean Search Process*, 49 SETON HALL L. REV. 629, 655–56 (2019).

bias against Black people knows and maybe even embraces the fact that he believes "that Blacks are aggressive, lazy, and worthless, and Whites are virtuous, hard-working, and valuable."[4]

Conversely, "[i]mplicit bias differs from explicit bias because it is not as easily identifiable, even by the person holding the biased beliefs."[5] An implicit bias is "an association or preference that is not consciously generated and is experienced without awareness."[6] For instance, a person who watches distorted media depictions of Black people might unconsciously associate members of that racial group with traits such as violence and criminality.[7] Disturbingly, "[b]ecause these associations are unconscious, and are 'activated involuntarily,' they can 'affect our understanding, actions and decisions' even when we do not realize it."[8]

Empirical evidence from "social science studies show[s] that implicit bias is pervasive in our society."[9] With regard to attorneys, studies indicate that implicit "biases may affect our eye contact, seating distance, and how frequently we smile when interviewing clients and witnesses."[10] Moreover, "[b]oth jurors and judges appear to be as susceptible to implicit bias as others are."[11] Specifically, experiments show that implicit biases impact several key components of jury decision-making, including "evaluation of evidence; recall of facts; and the forming of decisions and judgments, including judgments of guilt."[12] In one experiment, "mock jurors remembered aggression-related case facts more accurately when faced with an aggressive [B]lack actor than when faced with an aggressive white actor."[13] As a result, many have noted the need to address implicit bias in the judicial system.[14]

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4. Justin D. Levinson, Robert J. Smith & Danielle M. Young, *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, 520–21 (2014).

5. Neitz, *supra* note 3, at 656.

6. *Id.* (quoting J. Bernice B. Donald & Sarah E. Redfield, *Framing the Discussion*, *in* ENHANCING JUSTICE: REDUCING BIAS 5, 14 (Sarah E. Redfield ed., 2017)).

7. Sonja C. Tonnesen, *"Hit it and Quit It": Responses to Black Girls' Victimization in School*, 28 BERKELEY J. GENDER L. & JUST. 1, 16–21 (2013).

8. Neitz, *supra* note 3, at 656 (quoting *Understanding Implicit Bias*, OHIO STATE U. KIRWAN INST., https://kirwaninstitute.osu.edu/article/understanding-implicit-bias (last visited Nov. 23, 2021)).

9. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 154–58 (2010).

10. Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 550–51 (2015).

11. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 862 (2016).

12. *Id.* at 867.

13. *Id.* at 867 n.204 (citing Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-Making and Misremembering*, 57 DUKE L.J. 345, 398–401 (2007)).

14. *See, e.g.*, Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1052 (2019).

B. The Sixth Amendment Right to an Impartial Jury

The Sixth Amendment to the United States Constitution provides one line of protection from both explicit and implicit bias. In pertinent part, the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[15] The Supreme Court has held that the Sixth Amendment grants defendants the right to trial by jury "in order to prevent oppression by the Government."[16] Specifically, the right to a jury trial provides the accused "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[17]

There are several protections in place to safeguard the Sixth Amendment right to an impartial jury. For example, in *Taylor v. Louisiana*, the Supreme Court held that the right to an impartial jury requires a jury that is selected from a jury pool that represents a fair cross-section of the community.[18] Furthermore, the Sixth Amendment requires that courts allow defendants to exercise unlimited "for cause" challenges to biased prospective jurors, including racist prospective jurors, to safeguard the right to an impartial jury.[19]

Although the Sixth Amendment only mentions an accused's right to an "impartial jury," the Supreme Court has held that the right also encompasses the right to a competent jury.[20] Therefore, if, for instance, a juror claims during trial that he was being "harassed" by voices in his head that might have been spying in favor of the defendant, a lack of inquiry into the juror's sanity would deprive the defendant of his right to a competent jury.[21]

C. The Implicit Bias Jury Instruction

This Section will review: (1) different proposed formulations of the implicit bias instruction; (2) courts' reluctance to recognize a constitutional right to an implicit bias jury instruction; and (3) courts' treatment of the somewhat similar sympathy/prejudice jury instructions.

1. Different Proposed Formulations of the Implicit Bias Instruction

In order to further safeguard the Sixth Amendment right to an impartial jury, some judges have begun giving jury instructions on implicit bias at the close of

15. U.S. CONST. amend. VI.

16. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

17. *Id.* at 156.

18. 419 U.S. 522, 530 (1975).

19. *See, e.g.*, State v. Urrea, 421 P.3d 153, 155 (Ariz. 2018) (interpreting United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000)) (noting that "for cause" challenges, unlike peremptory challenges, have a "constitutional dimension").

20. McIlwain v. United States, 464 U.S. 972, 975 (1983) (Marshall, J., dissenting).

21. *See* Sullivan v. Fogg, 613 F.2d 465, 466–67 (2d Cir. 1980).

criminal cases.[22] For instance, Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa gives the following instruction to jurors:

> As we discussed in jury selection, growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.[23]

Furthermore, Professor Cynthia Lee has proposed a "race-switching" instruction that asks jurors to consider whether their vote would be the same if the races of the victim and the defendant were switched.[24] California also has an "implicit bias" jury instruction in its "Forms of Jury Instruction."[25]

These three jury instructions are included as examples in the "Achieving an Impartial Jury (AIJ) Toolbox" published by the Section on Litigation of the American Bar Association.[26] The American Bar Association created the AIJ project to "focus[] on implicit bias in the context of the jury system and offer[] tools to

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22. Jennifer K. Elek & Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions following a Test of a Specialized Jury Instruction* at 4 (Nat'l Ctr. for State Courts, 2014), http://perma.cc/ZZD4-XD73.

23. Bennett, *supra* note 9, at 169 n.85.

24. CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 224–25 (2003).

25. The implicit bias jury intrusction is as follows:

> Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.
>
> Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.
>
> As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].
>
> Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

See Judicial Council of Ca. Civil Jury Instruc. § 113 (2012), https://www.justia.com/trials-litigation/docs/caci/100/113/.

26. AM. BAR ASS'N, ACHIEVING AN IMPARTIAL JURY (AIJ) TOOLBOX 20–22 (2017), https://assets.documentcloud.org/documents/3864904/Achieving-an-Impartial-Jury-Toolbox.pdf.

address its impact."[27] Among the tools are these three jury instructions as well as the AIJ's own "implicit bias" jury instruction.[28] While the ABA has recognized the importance of an implicit bias jury instruction, as will be seen in the next Subsection, courts have been reluctant to recognize a right to such an instruction.

2. Courts' Reluctance to Recognize a Right to an Implicit Bias Instruction

While Judge Bennett routinely uses his implicit bias jury instruction,[29] other judges have refused defendants' request for similar instructions. Indeed, many federal courts and the majority of state courts have found that a judge is not obligated to give an implicit bias instruction despite the defendants' request.[30] A recent opinion of the Supreme Court of Kansas provides a good illustration of this phenomenon.

In *State v. Nesbitt*, Kasey Nesbitt was charged with felony murder, rape, and related crimes based upon his alleged fatal attack upon a 100-year-old victim in her home.[31] The victim was white, and Nesbitt was Black.[32] At the close of the

27. *Id.* at 2.

28. The AIJ's proposed implicit bias instruction states:

> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
>
> - Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.
> - Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
> - Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?
> - You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.
>
> Working together will help achieve a fair result.

Id. at 17–20.

29. *See* Elek & Hannaford-Agor, *supra* note 19, at 4 ("Judge Mark Bennett . . . has already created and regularly uses his own implicit bias jury instructions.").

30. *See* State v. Nesbitt, 417 P.3d 1058, 1069. (Kan. 2018) ("The majority of state courts addressing the issue [of implicit bias jury instruction] have followed the same pattern. Some have reasoned that the instruction could inject racial bias into a proceeding where none existed before . . . . Others have rejected such instructions because there had been no indication a jury's verdict reflected racial bias or simply because the instructions were not required.") (citations omitted); *see, e.g.*, Jahagirdar v. United States, 597 F. Supp. 2d 198, 204 (D. Mass. 2009); United States v. Graham, 680 F. App'x 489, 492–93 (8th Cir. 2017).

31. 417 P.3d at 1061.

32. *Id.* at 1063.

case, Nesbitt asked for a version of the "race switching" instruction. This instruction would have told the jury:

> It is natural for human beings to make assumptions about the parties and witnesses in any case based on stereotypes. Often we may rely on stereotypes without even being aware that we are doing so. As a juror you must not make assumptions about the parties and witnesses based on their membership in a particular racial group. You must not assume that a particular interpretation of a person's behavior is more or less likely because the individual belongs to a particular racial group. Reliance on stereotypes in deciding real cases is prohibited because every accused is entitled to equal protection of the law, and because racial stereotypes are historically, and notoriously, inaccurate when applied to any particular member of a race.
>
> To ensure that you have not made any unfair assessments based on racial stereo types, you should apply a race-switching instruction exercise to test whether stereotypes have affected your evaluation of the case. 'Race Switching,' involves imagining the same events, the same circumstances, the same people, but switching the races of the particular witnesses. For example, if the accused is African-American and the accuser/victim is white, you should imagine a White accused and a black accuser/victim.
>
> If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then reevaluate the case from a neutral, unbiased perspective.[33]

The trial judge refused to give this instruction, and the jury ultimately convicted Nesbitt on all of the charges.[34] In addressing Nesbitt's ensuing appeal, the Supreme Court of Kansas began by noting that Nesbitt had not pointed to a "Kansas case in which the requested instruction has been given, and we have not found one."[35] That said, the court noted that there was ample state and federal precedent dealing with the issue of whether to use special jury instructions to combat racial bias.[36]

First, the Supreme Court of Kansas in *Nesbitt* observed that a federal statute, 18 U.S.C. § 3593(f), addresses juror bias in the sentencing phase of a capital case.[37] Under that statute, (1) the judge must instruct the jury that "it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim;" and (2) the jury must "return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual

33. *Id.*
34. *Id.* at 1064.
35. *Id.* at 1068.
36. *Id.* at 1068–69.
37. *Id.* at 1068.

decision."[38] The *Nesbitt* Court, however, pointed out that this statute *only* applies in the sentencing phase of a capital case and never applies at the guilt/innocence phase.[39]

Second, the *Nesbitt* Court found that "[o]utside the federal death penalty context, federal courts that have examined the issue of whether to give instructions that highlight possible racial prejudice have rejected them."[40] As support, the court cited to opinions by federal courts offering differing reasons for rejecting implicit bias jury instructions.[41] For example, in *Jahagirdar v. United States*, the United States District Court for the District of Massachusetts found that defense counsel's choice not to request instructions addressing specific prejudices was not unreasonable because it "might unnecessarily draw attention to the racial differences between the defendant and the alleged victim."[42] And, in *United States v. Graham*, the Eighth Circuit found that the district court did not have to give such an instruction because "[a] district court has broad discretion to formulate jury instructions."[43]

Third, the *Nesbitt* court noted that "[t]he majority of state courts addressing the issue have followed the same pattern."[44] Again, the court cited cases from different jurisdictions with different rationales for refusing to give implicit bias jury instructions, including (1) worrying about injecting racial bias into a proceeding where none existed before, (2) the lack of indication that the jury's verdict would reflect racial bias, and (3) the lack of a statutory or constitutional requirement to give such an instruction.[45]

The *Nesbitt* court was only able to find one case—*State v. Plain*—in which an appellate court found error in the failure to give an implicit bias jury instruction,[46] and even that case does not state that a court must give such an instruction upon request. In *State v. Plain*, Kelvin Plain was charged with first degree harassment.[47] At the close of the evidence, Plain requested the following jury instruction:

> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious belief, national origin, or sex.[48]

38. 18 U.S.C. § 3593(f).
39. *Nesbitt*, 417 P.3d at 1068.
40. *Id.*
41. *Id.*
42. 597 F. Supp. 2d 198, 204 (D. Mass. 2009).
43. 680 F. App'x 489, 492 (8th Cir. 2017).
44. *Nesbitt*, 417 P.3d at 1068.
45. *Id.* at 1068–69.
46. *Id.* at 1069.
47. 898 N.W.2d 801, 810 (Iowa 2017).
48. *Id.* at 816.

The trial judge refused to give this instruction because he believed that he lacked authority from the Supreme Court of Iowa to give it.[49] On appeal, the Supreme Court of Iowa noted that the trial judge was mistaken because "Iowa law permits —but does not require—cautionary instructions that mitigate the danger of unfair prejudice."[50] As a result, the Supreme Court of Iowa found that the trial judge abused his discretion, not because he was obligated to give the implicit bias instruction, but because he improperly believed he lacked the authority to give it.[51]

Ultimately, the Supreme Court of Kansas in *Nesbitt* did not agree with the Supreme Court of Iowa in *Plain* that an implicit bias instruction could be given. Instead, it rejected the instruction "suggested by Nesbitt because it c[ould not] be squared with Kansas law."[52]

3. The Sympathy/Prejudice Instruction

The conclusion in *Nesbitt* makes sense given a prior opinion of the Supreme Court of Kansas dealing with a more generic jury instruction that arguably covers implicit bias. In *State v. Sully*, James Sully was charged with second degree murder, and, over his objection, the prosecution introduced gruesome photos of the deceased.[53] Thereafter, the court denied the defendant's request for a sympathy/prejudice instruction, which would have instructed the jury to consider "the case without favoritism, sympathy or prejudice for or against a party."[54] In affirming this decision on appeal, the Supreme Court of Kansas held that:

> Our state committee on pattern jury instructions points out that a cautionary type instruction on consideration of the case without favoritism, sympathy or prejudice for or against a party is objectionable because it tells the jury what not to do rather than what to do and it recommends that none be given unless there are very unusual circumstances.[55]

The court did hold that granting such an instruction would not have been erroneous and added that such an instruction is simply not required.[56] The Supreme Court of Kansas, however, has since held that such an instruction should only be given in "very unusual circumstances," such as when the jurors could have been unduly

49. *Id.* at 817.
50. *Id.* at 816.
51. *Id.* at 817.
52. State v. Nesbitt, 417 P.3d 1058, 1069 (Kan. 2018). According to the court, jurors are to decide cases based upon the evidence and "are not to imagine another set of facts and then allow that imagination to affect their deliberations." *Id.*
53. 547 P.2d 344, 348 (Kan. 1976) ("One photo show[ed] the victim's bloody face with one eye shot out and his left upper chest; one depict[ed] the right side of the body and the right arm; the other [wa]s of the lower left part of the body.").
54. *Id.*
55. *Id.*
56. *Id.* at 348–49.

sympathetic to the victim because she "was too ill with cancer to testify in the courtroom."[57]

The authors of the *American Jurisprudence* chapter on "Instruction on disregarding emotions; sympathy" agree with the Kansas approach, stating that: (1) "[i]n criminal cases, where appropriate, the court should grant a request for an instruction warning the jury against allowing either sympathy or prejudice to influence the verdict, although the court has the discretion to refuse it"; but (2) "[t]he better practice is that a precautionary instruction regarding considering the case without sympathy should not be given unless there are unusual circumstances."[58]

Examples of courts exercising this discretion in both directions can be seen across the country. For example, a New Jersey judge refused to instruct the jury that they should decide a case without bias, prejudice, or sympathy after defense counsel informed the judge that the victim's daughter was crying loudly in the courtroom.[59] Similarly, an Indiana judge declined to give a similar instruction in a reckless homicide case in which the judge allowed the State to introduce a photo of the victim's body after a fatal car accident but did not allow the photograph to be published to the jury.[60] And a Texas judge rejected this type of instruction in a capital murder trial in which the State introduced medical records graphically detailing the victim's injuries.[61] Conversely, in a California case, the judge instructed the jury "not to let bias, sympathy, or prejudice influence its decision" after the prosecutor referenced the victim's pregnancy.[62]

Meanwhile, in some cases, judges have found that general sympathy/prejudice instructions obviate the need for specific implicit bias jury instructions.[63] For example, in *United States v. Diaz-Arias*, the defendant requested the following instruction: "It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race or ethnicity, or national origin, or his or any witness' immigration status."[64]

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57. State v. Williams, 329 P.3d 420, 425 (2014) (citing *State v. Rhone* 548 P.2d 752 (1976)).

58. 75A AM. JUR. 2D *Trial* § 1167, Westlaw (database updated 2019).

59. *See* State v. Pagan, No. 94-9-03084, 2009 WL 2743195, at *1 (N.J. Super. Ct. App. Div. Sept. 1, 2009).

60. *See* Brief of Appellee, Whitaker v. State, No. 26A04-0204-CR-164 (Ind. Ct. App. Aug. 26, 2002), 2002 WL 33935874, at *3. The Court of Appeals of Indiana later reversed the defendant's conviction on another ground, obviating the need to determine whether the failure to give the instruction was erroneous. *See* Whitaker v. State, 778 N.E.2d 423, 424 n.1 (Ind. Ct. App. 2002).

61. *See* Curtis v. State, 89 S.W.3d 163, 176 (Tex. Crim. App. 2002).

62. People v. Carroll, No. B251834, 2015 WL 1951894, at *3 (Cal. Ct. App. Apr. 30, 2015).

63. An early example of this can be seen in the 1963 opinion in *State v. Shepard*, 124 N.W.2d 712, 719–20 (Iowa 1963), in which the Supreme Court of Iowa found that the trial court properly denied the defendant's request for a race switching jury instruction because the trial judge gave a sympathy/prejudice instruction. The race switching instruction would have informed the jury that "[i]t is the duty of the jury to consider the defendant's case as if she were a white woman, for the law is the same as to both white and colored women, there being no distinction in principles in respect to color." *Id.* at 719.

64. 717 F.3d 1, 22–23 (1st Cir. 2013).

The trial judge rejected this specific instruction and instead gave a more general instruction, which included the following language:

> You should determine what facts have been shown or not based solely on a fair consideration of the evidence. That proposition means two things, of course. First of all, you'll be completely fair-minded and impartial, swayed neither by prejudice, nor sympathy, by personal likes or dislikes toward anybody involved in the case, but simply to fairly and impartially judge the evidence and what it means.[65]

In rejecting the defendant's ensuing appeal, the First Circuit found that the thrust of his requested instruction was substantially covered in the sympathy/prejudice instruction given by the trial judge.[66]

D. Conclusion

While some judges routinely give an implicit bias jury instruction, most federal and state courts have found that there is no constitutional right to such an instruction. Furthermore, while courts can give general sympathy/prejudice instructions, most courts refuse to give these instructions barring unusual circumstances. Finally, some courts have found that general sympathy/prejudice instructions obviate the need for specific implicit bias jury instructions.

II. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND "NO ADVERSE INFERENCE" INSTRUCTIONS

While courts consistently have held that there is no constitutional right to an implicit bias jury instruction, the Supreme Court has reached the opposite conclusion about the right to a jury instruction regarding a defendant's silence at trial. This Section deals with the Fifth Amendment privilege against self-incrimination and the constitutional right to a "no adverse inference" instruction for non-testifying defendants.

A. Introduction

In pertinent part, the Fifth Amendment to the United States Constitution states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[67] At a criminal trial, a defendant can invoke this privilege against self-incrimination and choose not to testify in his defense.

65. *Id.*
66. *Id.* at 23–24.
67. U.S. CONST. amend. V.

B. Griffin v. California: Can the Prosecutor or Judge Make Adverse Comments About the Defendant's Decision Not to Testify?

In its 1965 opinion in *Griffin v. California*, the United States Supreme Court had to decide whether an adverse comment by a judge or prosecutor on a defendant's failure to take the stand violates the Fifth Amendment.[68] Eddie Dean Griffin was charged with first degree murder in connection with the death of Essie Mae Hodson and chose not to testify in his defense.[69] Subsequently, during closing arguments, the prosecutor said, *inter alia*, "Essie Mae is dead, she can't tell you her side of the story. The defendant won't."[70]

The jury thereafter found Griffin guilty and gave him the death penalty.[71] Griffin then appealed, claiming the prosecutor's comment violated his Fifth Amendment privilege against self-incrimination.[72] His appeal later reached the United States Supreme Court, which noted that, had the case been heard in federal court, the prosecutor's comments would have violated a congressional statute stating that a defendant's silence at trial "shall not create any presumption against him."[73] This left the Court with the question of whether the prosecutor's comments also violated the Fifth Amendment in Griffin's state court prosecution.[74]

The Court answered this question in the affirmative, finding that an adverse comment on the defendant's decision not to testify is a vestige of the "'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws."[75] According to the Court, an adverse comment "is a penalty imposed by courts for exercising a constitutional privilege" that "cuts down on the privilege by making its assertion

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68. 380 U.S. 609 (1965).
69. *Id.* at 609.
70. *Id.* at 611. The prosecutor's full statement was:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.
>
> What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?
>
> He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.
>
> These things he has not seen fit to take the stand and deny or explain.
>
> And in the whole world, if anybody would know, this defendant would know.
>
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

Id. at 610–11.
71. *Id.* at 611.
72. *Id.*
73. *Id.* at 612.
74. *Id.* at 613.
75. *Id.* at 614 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

costly."[76] Furthermore, the Court rejected the State's accompanying arguments that (1) jurors would naturally and irresistibly draw an adverse inference from a defendant's refusal to testify; and (2) a prosecutor's "comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege."[77] Instead, the Court found a fundamental distinction between the jury possibly drawing such an inference on its own and "the court solemniz[ing] the silence of the accused into evidence against him."[78]

Finally, the Court "reserve[d] decision on whether an accused can require . . . that the jury be instructed that his silence must be disregarded."[79]

C. Lakeside v. Oregon: Over a Defense Objection, Can the Judge Instruct Jurors Not to Hold the Defendant's Refusal to Testify Against Him?

In the wake of *Griffin*, courts reached different conclusions on the question of whether, upon the request of a non-testifying defendant, a judge must give a cautionary instruction, often referred to as a "no adverse inference" instruction.[80] Before the Supreme Court resolved this split, however, it answered the inverse question: Can a court give a "no adverse inference" instruction over the defense's objection?

In *Lakeside v. Oregon*, Ensio Lakeside was charged with escape in the second degree after allegedly fleeing from a correctional institution.[81] Lakeside did not testify in his defense, and defense counsel asked the trial judge to refrain from giving a "no adverse inference" instruction.[82] Over this objection, the judge instructed the jury:

> Under the laws of this State a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence.[83]

After he was convicted, Lakeside appealed, claiming, *inter alia*, that the judge's actions violated his Fifth Amendment privilege against self-incrimination.[84] Lakeside's appeal eventually reached the United States Supreme Court. First, the Court held that the judge's cautionary instruction did not violate the holding in *Griffin*, which only dealt with *adverse* comments on a defendant's failure to

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 615 n.6 (citation omitted).
80. *See* Brief for Petitioner, Carter v. Kentucky, No. 80-5060 (1980), 1980 WL 339742, at *25–*29 (laying out the split among courts in the wake of *Griffin*).
81. 435 U.S. 333, 334 (1978).
82. *Id.* at 335.
83. *Id.*
84. *Id.* at 336.

testify.[85] According to the Court, "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect."[86]

Next, the Court addressed Lakeside's argument that the jury might not notice a defendant's refusal to take the stand, which would render a judge's curative instruction tantamount to "waving a red flag in front of the jury."[87] In turning aside this argument, the Court noted that it rested upon two dubious assumptions: "First, that the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own; second, that the jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all."[88] The Court then curtly concluded that "[f]ederal constitutional law cannot rest on speculative assumptions so dubious as these."[89]

Furthermore, the Court held that acceptance of Lakeside's argument still would not be enough to establish a constitutional violation.[90] Instead, the Court concluded that "[t]he very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof."[91]

Lakeside also argued that the judge's actions violated his Sixth Amendment right to counsel.[92] The Court quickly dispensed with this argument, rejecting "the proposition that the right to counsel, precious though it be, can operate to prevent a court from instructing a jury in the basic constitutional principles that govern the administration of criminal justice."[93] Therefore, even over a defense objection, a judge can issue a "no adverse inference" instruction after a defendant decides not to testify.

D. Carter v. Kentucky: Upon Request, Does a Judge Have to Issue a "No Adverse Inference" Instruction?

This still left the Supreme Court with the question it kept open in *Griffin*: upon the request of a non-testifying defendant, does the trial judge have to give a "no adverse inference" instruction? The Court finally answered this question in its 1981 opinion in *Carter v. Kentucky*.[94]

In *Carter*, Lonnie Joe Carter was charged with third-degree burglary of Young's Hardware Store.[95] Carter did not testify, and the defense asked the judge to give the following instruction to the jury: "The [defendant] is not compelled to testify

85. *Id.* at 338–39.
86. *Id.* at 339.
87. *Id.* at 339–41.
88. *Id.* at 340.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 341.
93. *Id.* at 342.
94. 450 U.S. 288 (1981).
95. *Id.* at 290–91.

and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."[96] The judge refused to give this instruction, and the jury returned a guilty verdict.[97]

Carter subsequently appealed, claiming that the refusal to give this "no adverse inference" instruction violated the Fifth Amendment.[98] That appeal eventually reached the United States Supreme Court, which began by construing *Lakeside* as holding that "[t]he salutary purpose of the instruction, 'to remove from the jury's deliberations any influence of unspoken adverse inferences,' was deemed so important that it there outweighed the defendant's own preferred tactics."[99]

The Court in *Carter* then observed that "[w]e have repeatedly recognized that 'instructing a jury in the basic constitutional principles that govern the administration of criminal justice' . . . is often necessary."[100] As an example, the Court cited to its prior holding in *Taylor v. Kentucky* that the Due Process Clause requires jury instructions on the presumption of innocence and the lack of evidentiary significance of an indictment.[101] The *Carter* Court then reached a similar conclusion, finding that "[a] trial judge has a powerful tool at his disposal to protect the constitutional privilege—the [no adverse inference] jury instruction—and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment."[102]

Finally, the Court rejected the State's argument that other jury instructions were sufficient for jurors to know that they could not draw adverse inferences from Carter's refusal to testify.[103] Even though the failure to testify is not evidence and the judge in Carter's case instructed the jurors to decide "from the evidence alone," the Court concluded that jurors are not lawyers who understand the meaning of "evidence;" rather, jurors "can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence."[104] Moreover, even though the judge instructed Carter's jury on the presumption of innocence, the Court held that while this presumption and the privilege against self-incrimination "are closely aligned," they also "serve different functions."[105] The Court thus concluded that the jury could have derived "significant additional guidance" from a "no adverse inference" instruction.[106]

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96. *Id.* at 294.
97. *Id.* at 294–95.
98. *Id.* at 295.
99. *Id.* at 301.
100. *Id.* at 302 (citing Lakeside v. Oregon, 435 US 333, 342 (1978)).
101. *Id.* at 302 n.19 (citing Taylor v. Kentucky, 436 U.S. 478 (1978)).
102. *Id.* at 303.
103. *Id.*
104. *Id.* at 303–04.
105. *Id.* at 304.
106. *Id.*

E. Conclusion

The Supreme Court has found that the Fifth Amendment precludes the judge and/or the prosecutor from asking jurors to draw adverse inferences from a defendant's decision not to testify. Moreover, the Court has concluded that, under the Amendment, (1) judges must give a "no adverse inference" instruction upon demand by the defense; and (2) judges can give such an instruction even over a defense objection to ensure that jurors understand the basic constitutional principle that is the privilege against self-incrimination.

III. THE CONSTITUTIONAL RIGHT TO AN IMPLICIT BIAS JURY INSTRUCTION

A. Introduction

This Section argues that the Supreme Court should recognize a Sixth Amendment right to an implicit bias jury instruction for the same reasons it found a Fifth Amendment right to a "no adverse inference" instruction. In Subsection B, it argues that the Supreme Court's recent opinion in *Pena-Rodriguez v. Colorado* supports the proposition that traditional rules regarding American juries must yield more to the Sixth Amendment right to an impartial jury than the Fifth Amendment privilege against self-incrimination. In Subsection C, it contends that the arguments against an implicit bias jury instruction are the same arguments against the "no adverse inference" instruction that the Supreme Court has rejected. Finally, in Subsection D, it concludes that, even if the Supreme Court declines to create a categorical right to an implicit bias jury instruction, it should at least create a more limited right based upon other Supreme Court precedent.

B. Pena-Rodriguez v. Colorado

Generally, judges have discretion over whether to give jury instructions requested by criminal defendants.[107] In *Carter v. Kentucky* and *Lakeside v. Oregon*, however, the Supreme Court concluded that: (1) "'instructing a jury in the basic constitutional principles that govern the administration of criminal justice' . . . is often necessary," and (2) the Fifth Amendment privilege against self-incrimination is a basic and important enough constitutional principle to require judicial issuance of a "no adverse inference" instruction if requested by a non-testifying defendant.[108]

Therefore, if the Sixth Amendment right to an impartial jury is as basic and important as the Fifth Amendment privilege against self-incrimination, *Carter* would suggest that courts must similarly grant implicit bias jury instructions upon request.

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107. *See, e.g.*, State v. Richardson, 467 S.E.2d 685, 696 (N.C. 1996) ("*Turner* is not authority for the proposition that a trial court in the trial of an interracial crime must instruct the jury to disregard racial considerations where defendant requests such an instruction."); *see also* Thomas R. Ascik, *For the Criminal Practitioner*, 53 WASH. & LEE L. REV. 465, 537 (1996).

108. Carter v. Kentucky, 450 U.S. 288, 298, 302 (citing Lakeside v. Oregon, 435 U.S. 333, 342 (1978)).

This prompts the question of whether these constitutional protections are of equal importance.

1. *Pena-Rodriguez* and the Elevation of the Sixth Amendment Right to an Impartial Jury

One argument against a constitutional right to an implicit bias jury instruction could be that the Sixth Amendment right to an impartial jury is not as important as the Fifth Amendment privilege against self-incrimination. The strongest rejoinder to this argument is the United States Supreme Court's 2017 opinion in *Pena-Rodriguez*,[109] which dealt with jury impeachment, i.e., jurors testifying that their verdict was tainted by misconduct. This Section will discuss the anti-jury impeachment rule of evidence and the Supreme Court's key opinions finding that the rule is not trumped by the Sixth Amendment right to a competent jury but is trumped by the right to an impartial jury.

a. Rule 606(b)(1) and the General Prohibition on Jury Impeachment

The Federal Rule of Evidence 606(b), Juror's Comptenecy as Witness ("Rule 606(b)"), and its state counterparts govern jury impeachment.[110] Federal Rule 606 (b)(1) states in pertinent part that: "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."[111]

So, for instance, Rule 606(b)(1) would prevent jurors from impeaching their verdict by testifying that they violated the district court's instruction not to discuss the case among themselves prior to deliberations[112] or considered testimony that the judge struck from the record.[113] The purposes of this Rule and its state counterparts are to promote the "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[114]

b. Rule 606(b)(2) and the Exceptions to the Anti-Jury Impeachment Rule

Federal Rule 606(b)(2) contains exceptions to this anti-jury impeachment rule for extraneous prejudicial information, improper outside influences, and mistakes

109. 137 S. Ct. 855, 861 (2017).

110. 44 states have adopted the Federal Rules of Evidence in whole or great part. *See, e.g.*, Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 38 n.186 (2014) (citing GEORGE FISHER, EVIDENCE 2-3 (3d ed. 2013)).

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

112. *See* United States v. Morales, 655 F.3d 608, 629–32 (7th Cir. 2011).

113. *See* Bradford v. City of Los Angeles, No. CV 90-0128, 1994 WL 118091 at *5 (9th Cir. 1994).

114. FED. R. EVID. 606(b) advisory committee's note (citing McDonald v. Pless 238 U.S. 264 (1915)).

in entering the verdict on the verdict form.[115] These exceptions allow for jury impeachment in cases in which, for example, (1) jurors looked up information about a case online (the "Google mistrial");[116] (2) the victim's brother bribed jurors so that they would find the defendant guilty;[117] or (3) the jury meant to award the plaintiff $500, but the foreperson accidentally wrote $5,000 on the verdict form.[118]

c. *Tanner* and the Sixth Amendment Right to a Competent Jury

In cases in which these Rules-based exceptions do not apply, parties have sometimes tried to claim that their constitutional rights trump Rule 606(b), thereby requiring jury impeachment. Such arguments usually fall on deaf ears. The classic example of this futility can be found in the Supreme Court's opinion in *Tanner v. United States*.[119] In *Tanner*, Anthony Tanner and William Conover were convicted of conspiring to defraud the United States and mail fraud.[120] After they were convicted, the defendants appealed, claiming that their Sixth Amendment right to a competent jury was violated because (1) there was rampant alcohol and drug abuse by jurors during trial; and (2) some jurors slept during trial.[121]

When the case reached the United States Supreme Court, the Justices quickly concluded that these allegations were covered by Rule 606(b)(1) and were not a proper predicate for jury impeachment.[122] This left the defendants' argument that this rule of evidence had to yield to their Sixth Amendment right to a competent jury.[123]

The Court turned this argument aside, noting that there were several safeguards protecting the Sixth Amendment right to a competent jury.[124] First, defense counsel can assess the competence of prospective jurors and use peremptory challenges during jury selection.[125] Second, the Court, court personnel, and counsel can observe the jury during trial and report to the judge if a juror appears impaired.[126] Third, jurors can observe their fellow jurors during trial and report misconduct during, but not after, trial.[127] Finally, if a non-juror observes jury misconduct during

115. FED. R. EVID. 606(b)(2).

116. *See* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 18, 2009), https://www.nytimes.com/2009/03/18/us/18juries.html ("It might be called a Google mistrial.").

117. *See, e.g.*, State v. Domabyl, 272 N.W.2d 745, 747 (Minn. 1978) (noting that "Rule 606(b) would not render a witness incompetent to testify to juror irregularities such as . . . acceptance of bribes") (quoting 3 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE *United States Rules* § 606(04) (1985)).

118. *See* Kennedy v. Stocker, 70 A.2d 587, 587–88 (Vt. 1950).

119. 483 U.S. 107 (1987).

120. *Id.* at 109–10.

121. *Id.* at 113.

122. *Id.* at 121–22.

123. *Id.* at 126.

124. *Id.* at 127.

125. *Id.*

126. *Id.*

127. *Id.*

trial (e.g., a spectator sees a juror snorting a line of cocaine in the courthouse bathroom), that non-juror can report the misconduct during trial and testify to the misconduct after trial.[128] The *Tanner* Court thus held that "[i]n light of these other sources of protection of petitioners' right to a competent jury," the right to a competent jury did not trump Rule 606(b) and allow jury impeachment.[129]

d. Lower Court Extensions of *Tanner*

Courts have since applied *Tanner* to a variety of cases in which defendants have claimed that their constitutional rights trump Rule 606(b). For instance, federal courts have virtually unanimously held that the right to due process does not trump Rule 606(b) when defendants seek to present evidence that jurors improperly discussed the merits of the case before the close of the evidence and the start of formal deliberations.[130]

For purposes of this Article, the most salient extension of *Tanner* can be found in cases in which a defendant seeks to present evidence that jurors drew adverse inferences from the defendant's decision not to testify. Courts have categorically rejected such claims.[131] For example, in *State v. DeGrat*, Robert DeGrat was convicted of sexual abuse of a minor child and lewd conduct with a minor child.[132] DeGrat subsequently appealed and sought to have a juror testify "that the jury had considered the fact that DeGrat had not testified at trial."[133]

In rejecting this appeal, the Supreme Court of Idaho noted that "[a]lthough *Tanner* is not directly on point because it considers the Sixth Amendment and not the Fifth Amendment, it gives us a framework within which to analyze DeGrat's constitutional claim in this case."[134] Under this framework, "[i]f DeGrat's Fifth Amendment privilege [wa]s protected by other aspects of the trial process," the application of Idaho Rule of Evidence 606(b) to preclude jury testimony was constitutional.[135] The court then found this to be the case, "conclud[ing] that the jury instruction not to consider a defendant's failure to testify was sufficient to protect DeGrat's constitutional privilege not to testify."[136]

128. *Id.*
129. *Id.*
130. *See* Larson v. State, 79 P.3d 650, 656-57 (Alaska Ct. App. 2003).
131. *See, e.g.*, United States v. Torres-Chavez, 744 F.3d 988, 997–98 (7th Cir. 2014); United States v. Rodriguez, 116 F.3d 1225, 1226–27 (8th Cir. 1997); Gleeton v. State, 716 So. 2d 1083, 1088–89 (Miss. 1998).
132. 913 P.2d 568, 569 (Idaho 1996).
133. *Id.* at 570.
134. *Id.* at 571.
135. *Id.*
136. *Id.*

e. *Pena-Rodriguez* and the Elevation of the Sixth Amendment Right to an Impartial Jury

There is, however, one situation in which the Supreme Court has held that a constitutional right trumps the anti-jury impeachment rule. In *Pena-Rodriguez v. Colorado*, Miguel Angel Pena-Rodriguez was convicted of unlawful sexual contact after a jury trial.[137] Subsequently, defense counsel spoke to two jurors who stated that, "during deliberations, another juror had expressed anti-Hispanic bias toward [Pena-Rodriguez] and [Pena-Rodriguez's] alibi witness."[138] These jurors later submitted affidavits stating that another juror made statements such as, (1) "I think he did it because he's Mexican and Mexican men take whatever they want"; (2) in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls"; and (3) he did not find Pena-Rodriguez's alibi witness credible because he was "an illegal."[139] The trial court, however, found these affidavits inadmissible under Colorado Rule of Evidence 606(b), and the Supreme Court of Colorado later affirmed that opinion.[140]

In 2017, the United States Supreme Court reversed, holding that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."[141] The Court reached this conclusion by surveying its prior precedent dealing with racial animus, leading it to hold "that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'"[142] Specifically, "[p]ermitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"[143]

The *Pena-Rodriguez* Court then distinguished the racial prejudice in the case at hand with the jury misconduct in *Tanner*, finding that:

> "[R]acial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."[144]

The Court thus held that "[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been

137. 137 S. Ct. 855, 861 (2017).
138. *Id.*
139. *Id.* at 862. The alibi witness had "testified during trial that he was a legal resident of the United States." *Id.*
140. *Id.*
141. *Id.* at 867.
142. *Id.* at 868. (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).
143. *Id.* (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)).
144. *Id.*

entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[145] Consequently, the Court concluded "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way."[146]

Pena-Rodriguez thus stands for the proposition that traditional rules regarding American juries must yield more to the Sixth Amendment right to an impartial jury than the Fifth Amendment privilege against self-incrimination. While courts have held that the preservation of a defendant's Fifth Amendment privilege does not trump Rule 606(b) and the sanctity and secrecy of jury deliberations, the *Pena-Rodriguez* Court concluded that the defendant's right to an impartial jury is so important that it must trump the anti-jury impeachment rule when there is evidence that racial bias impacted deliberations.

Of course, it is possible to make the inverse argument. Perhaps it is precisely because defendants have the right to "no adverse inference" instructions that the Fifth Amendment does not trump Rule 606(b). In other words, the right to this instruction is arguably enough to safeguard the Fifth Amendment privilege, and the lack of a right to an implicit bias instruction is why there needs to be an exception to the anti-jury impeachment rule when there is evidence of juror racial bias.

The *Pena-Rodriguez* opinion, however, belies such an argument. At the end of its opinion, the *Pena-Rodriguez* Court observed that there were "standard and existing processes designed to prevent racial bias in jury deliberations" that "can help ensure that the [new] exception is limited to rare cases."[147] The example given by the Court was that "[t]rial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind."[148] The *Pena-Rodriguez* Court then noted that judges sometimes draft these instructions based upon their personal experiences and that "[m]odel jury instructions likely take into account . . . continuing developments and are common across jurisdictions."[149]

Clearly, then, the *Pena-Rodriguez* Court did not view implicit bias jury instructions and the Sixth Amendment exception to Rule 606(b) for racial bias as mutually exclusive. Instead, the Court concluded that evolving jury instructions about impartiality and bias can work symbiotically to prevent verdicts based on racial bias on both the front and back ends. Of course, this ultimate conclusion means that the Supreme Court must have made the intermediate conclusion that implicit bias jury instructions do decrease racial bias during jury deliberations. Thus, the

145. *Id.* at 869.
146. *Id.*
147. *Id.* at 871.
148. *Id.*
149. *Id.*

Supreme Court's opinion in *Pena-Rodriguez* can almost be seen as an endorsement of the argument in this Article for a constitutional right to an implicit bias jury instruction.

C. In Recognizing the Right to a "No Adverse Inference" Instruction, the Supreme Court Rejected the Arguments Made Against an Implicit Bias Instruction

In recognizing the right to a "no adverse inference" instruction in *Carter* and finding that a judge can give this instruction even over defense counsel's objection in *Lakeside*, the Supreme Court rejected a number of arguments against such an instruction. This Subsection will argue that the arguments made against the right to an implicit bias instruction are the same arguments that were made against a "no adverse inference" instruction and that they should be rejected for similar reasons. Specifically, it will argue against courts claiming that (1) there is no constitutional obligation to give such an instruction; (2) existing jury instructions are adequate to address implicit bias; and (3) such an instruction might inject racial bias into a proceeding where none existed before and unnecessarily draw attention to the racial differences between the defendant and the alleged victim.

1. No Constitutional Obligation to Give the Instruction

Some courts rejecting a constitutional right to an implicit bias jury instruction have observed that judges generally have discretion over whether to give jury instructions.[150] The *Carter* Court addressed and rejected a similar argument leveled against the right to a "no adverse inference" instruction. As noted, the Court in *Carter* held that some constitutional principles, such as the presumption of innocence, are so basic and important as to require jury instructions.[151] The *Carter* Court then held that the Fifth Amendment privilege against self-incrimination is a basic and important enough constitutional principle to require judicial issuance of a "no adverse inference" instruction if requested by a non-testifying defendant.[152]

For the reasons stated in Section III.B.1, the Supreme Court should similarly find that the Sixth Amendment right to an impartial jury is a basic and important enough constitutional principle to require judicial issuance of an implicit bias jury instruction. As the Court in *Pena-Rodriguez* held, the right to an impartial jury is a basic and important enough constitutional principle to require impeachment of a jury's verdict if there is evidence it was tainted by racial bias.[153] Conversely, as noted, courts consistently have held that evidence that jurors used a non-testifying defendant's silence against him is not a sufficient basis for jury impeachment.[154]

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150. *See* State v. Sully, 547 P.2d 344, 348–49 (Kan. 1976).
151. Carter v. Kentucky, 450 U.S. 288, 302 (1981).
152. *Id.* at 302–03.
153. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).
154. *See supra* Section IIIB1.iv.

Courts have reached similar conclusions about jurors failing to apply the presumption of innocence during deliberations.[155] For instance, in *Pederson v. Fabian*, a juror typed up a statement after finding Ryan Pederson guilty of second-degree murder and related crimes; the juror stated, *inter alia*,

> I wanted more from him presenting a defense. I know a person is supposed to be innocent until proven guilty, but in reality it didn't work that way. The prosecutor presented overwhelming evidence that someone died. The defense needed to present much more evidence that it wasn't [Pederson] that caused the death.[156]

Both the Eighth Circuit and the Supreme Court of Minnesota found that this evidence that a juror ignored or misunderstood the presumption of innocence was not a proper factual predicate for jury impeachment under Rule 606(b).[157] Specifically, the Supreme Court of Minnesota held that the juror's statement was insufficient for jury impeachment because it did "not indicate that she concealed a prejudice or bias on *voir dire*."[158]

In the wake of *Pena-Rodriguez*, courts have drawn an even sharper line between biased jurors and jurors who ignore or misapply the presumption of innocence. In *United States v. Ewing*, the foreperson came forward after the jury found the defendant guilty of a drug-related offense and stated that it was "'very clear' that 'the group as a whole did not presume the defendant was innocent until proven guilty.'"[159] After the district court found that the foreperson's statement was inadmissible under Rule 606(b), the defendant appealed, claiming, *inter alia*, that application of this rule violated his right to the presumption of innocence.[160]

The Sixth Circuit cited *Pena-Rodriguez* to find that the allegations of jury misconduct by the foreperson were "troubling and unacceptable."[161] But ultimately, the court found that application of Rule 606(b) to preclude jury impeachment regarding the presumption of innocence was constitutional because the foreperson's allegations did "not fall into the exception for racial bias" recognized in *Pena-Rodriguez*.[162]

In summation, it appears clear that in *Pena-Rodriguez* the Supreme Court elevated the Sixth Amendment right to an impartial jury above other constitutional principles such as the presumption of innocence and the privilege against self-

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155. *See, e.g.*, Gleeton v. State, 716 So. 2d 1083, 1088–89 (Miss. 1998) ("The court also instructed the jury on its duty to carefully weigh the evidence in reaching a verdict and on the presumption of innocence. Gleeton's contention that the jury failed to follow these instructions does not fall under the exceptions for investigating 'extraneous prejudicial information' or 'outside influence' on the jury under Rule 606(b).").

156. 491 F.3d 816, 821 (8th Cir. 2007).

157. *Id.* at 821–22; State v. Pederson, 614 N.W.2d 724, 731 (Minn. 2000).

158. *Pederson*, 614 N.W.2d at 731.

159. 749 F. App'x 317, 321 (6th Cir. 2018).

160. *Id.* at 324–25.

161. *Id.* at 326.

162. *Id.*

incrimination. While each of these latter two protections are significant, courts have found that they are not important enough to allow for jury impeachment when jurors have ignored or misunderstood them. Conversely, in *Pena-Rodriguez*, the Supreme Court singled out the right to an impartial jury as a special right that uniquely requires repudiation of a jury verdict tainted by racial bias. Therefore, the right to an impartial jury is certainly basic and important enough to require an implicit bias jury instruction as a matter of constitutional law.

2. The Sufficiency of Existing Jury Instructions

Some courts rejecting a constitutional right to an implicit bias jury instruction have observed that such an instruction is unnecessary in cases in which some version of the sympathy/prejudice instruction referenced in Section III.B.1 is issued. As noted in that Section, most courts only give this sympathy/prejudice instruction in cases involving unusual circumstances.[163] That said, if a court does give a sympathy/prejudice instruction, could that justify the non-issuance of an implicit bias jury instruction?

As noted, the Supreme Court addressed a similar argument in *Carter v. Kentucky*.[164] In *Carter*, the State claimed that existing jury instructions on topics such as the presumption of innocence and the lack of evidentiary significance of an indictment obviated the need for a "no adverse inference" instruction.[165] The Supreme Court disagreed, finding that "[t]he other trial instructions and arguments of counsel that the petitioner's jurors heard at the trial of this case were no substitute for the explicit [no adverse inference] instruction that the petitioner's lawyer requested."[166] Specifically, the *Carter* Court concluded that "the Fifth Amendment privilege and the presumption of innocence are closely aligned . . . [b]ut these principles serve different functions, and we cannot say that the jury would not have derived 'significant additional guidance' . . . from the instruction requested."[167]

While the Court did not spell out its reasoning, its logic seems clear. Here is one typical formulation of the jury instructions on the lack of evidentiary significance of an indictment and the presumption of innocence:

> The defendant has been charged by the government with violation of a federal law. He is charged with _____. The indictment is simply the description of the charge made by the Government against the defendant; it is not evidence of his guilt. The law presumes the defendant innocent. The presumption of innocence means that the defendant starts the trial with a clean slate. In other words, I instruct you that the defendant is presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are

163. *See supra* Section III.B.1.
164. 450 U.S. 288 (1981).
165. *Id.* at 302 n.19 (citing Taylor v. Kentucky, 436 U.S. 478, 484-86 (1978)).
166. *Id.* at 304.
167. *Id.*

> satisfied that the government has proven him guilty beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the defendant is guilty, the presumption alone is sufficient to find the defendant not guilty.[168]

These instructions indirectly advise jurors about the privilege against self-incrimination. In other words, if jurors are told that they must begin deliberations with a presumption of innocence, jurors could infer that they cannot draw an adverse inference, or presumption of guilt, from the defendant's refusal to testify. Indeed, some versions of the "no adverse inference" instruction tell jurors that they cannot draw an adverse inference or "presumption of guilt" from the fact that a defendant refrained from testifying.[169] But while a jury instruction on the presumption of innocence *implies* that jurors cannot draw adverse inferences from a defendant's refusal to testify, such an instruction is, in the words of the *Carter* Court, "no substitute for the *explicit* [no adverse inference] instruction."[170]

This takes us to the question of whether the sympathy/prejudice instruction is a pale substitute for an implicit bias instruction. As previously noted, one typical version of the sympathy/prejudice instruction informs jurors to consider "the case without favoritism, sympathy or prejudice for or against a party."[171] Such an instruction is generally given in the case of a sympathetic victim and/or an unsympathetic defendant,[172] but the use of the word "prejudice" in the instruction could be construed to cover any type of prejudice, including racial bias.

That said, as will be noted in more detail in *infra* Section III.D.1, the Supreme Court itself has recognized a constitutionally meaningful difference between general questions about prejudice/bias and specific questions about racial bias in the context of *voir dire* questions to prospective jurors before trial.[173] Assuming the same analysis that applies to the questioning of prospective jurors applies to the instructing of trial jurors, then those trial jurors would, in the words of the *Carter* Court, derive "significant additional guidance" from an implicit bias jury instruction.[174]

3. The *Lakeside* Court's Rejection of Two Assumptions About Jury Conduct

In rejecting a constitutional right to an implicit bias jury instruction, courts have concluded that such an instruction might (1) inject racial bias into a proceeding

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168. United States v. Walker, 861 F.2d 810, 813 n.14 (5th Cir. 1988).

169. *See, e.g.*, State v. Morgan, 797 A.2d 616, 643 n.23 (Conn. App. Ct. 2002) ("And no presumption of guilt may be raised, and no adverse inference of any kind may be drawn from the fact that the defendant did not testify."); State v. Kempker, 824 S.W.2d 909, 911 (Mo. Ct. App. 1992) ("The jury, at the defendant's request, was instructed in accordance with MAI-CR 3d 308.14, which makes it clear that no presumption of guilt arises and no adverse inference may be drawn if the defendant does not take the stand.").

170. *Carter*, 450 U.S. at 304 (emphasis added).

171. State v. Sully, 547 P.2d 344, 348–49 (Kan. 1976)

172. *See supra* Section I.C.3.

173. *See* Ham v. South Carolina, 409 U.S. 524, 526–27 (1973).

174. *Carter*, 450 U.S. at 304 (quoting Taylor v. Kentucky, 436 U.S. 478, 484 (1978)).

where none existed before,[175] and (2) "unnecessarily draw attention to the racial differences between the defendant and the alleged victim."[176] In other words, these courts have assumed that there could be cases in which jurors do not notice and consider the respective races of the defendant and the victim and where issuing an implicit bias jury instruction might therefore have a "boomerang effect," whereby these same jurors end up improperly considering race in rendering a verdict.

As noted, in *Lakeside v. Oregon*, the Supreme Court addressed and rejected the defendant's similar argument that a "no adverse inference" instruction would be like "'waving a red flag in front of the jury'" for two reasons.[177] First, the *Lakeside* Court held that the defendant's argument was counterproductive because "[t]he very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof."[178] If, as argued above,[179] the right to an impartial jury is a concept that similarly must not be misunderstood, courts should be required on request to issue an implicit bias jury instruction.

Second, the *Lakeside* Court concluded that it could turn aside the defendant's "red flag" argument because it rested upon two untenable assumptions: (1) that jurors did not already notice the lack of testimony by the defendant and would not draw adverse inferences on their own, and (2) that jurors would disregard the "no adverse inference" instruction and "affirmatively give weight to what they have been told not to consider at all."[180]

But were the two assumptions in *Lakeside* really untenable? And are the two assumptions leveled against the implicit bias instruction even less tenable than the *Lakeside* assumptions, providing an even stronger justification for a constitutional right to an implicit bias jury instruction?

a. Assumptions About Jury Conduct Related to Defendants Not Testifying

i. Do Jurors Notice and Hold Defendants' Decisions Not to Testify Against Them?

The first assumption to test from *Lakeside* is whether jurors hold defendants' decisions not to testify against them. And the best answer is: probably. In his article *The Silence Penalty*, Professor Jeffrey Bellin notes that "[t]he social science literature, and particularly research by psychology professor David R. Shaffer, supports the conclusion that jurors punish defendants for refusing to testify."[181] In one

175. *See, e.g.*, Smith v. State, 296 So. 2d 678, 682 (Miss. 1974) ("Obviously this instruction was calculated to inject an issue related to race.").

176. *See* State v. Nesbitt, 417 P.3d 1058, 1069 (Kan. 2018).

177. 435 U.S. 333, 339–40 (1978).

178. *Id.* at 340.

179. *See supra* Section I.

180. *Lakeside*, 435 U.S. at 340.

181. Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 408 (2018).

experiment, Professor Shaffer staged a trial simulation in which "jurors" were presented with either: (1) a defendant who did not testify; (2) a defendant who testified, but refused to answer a potentially incriminating question during cross-examination; or (3) a defendant who testified normally without refusing to answer any questions.[182] Two-thirds of the jurors in groups 1 and 2 found the defendant guilty, whereas "there were *no* guilty verdicts" in group 3.[183]

This result is facially compelling evidence of a "silence penalty," but the defendant's testimony was favorable to him in group 3 in Professor Shaffer's study.[184] Therefore, it is impossible to tell whether jurors were *punishing* the defendant in group 1 for remaining silent or *rewarding* the defendant in group 3 for his favorable testimony (or some combination of both).

To test whether there is truly a "silence penalty," Professor Bellin conducted a more nuanced experiment, giving "jurors" trial scenarios in which (1) the defendant did not testify, or (2) the defendant testified but added "no new information" and gave testimony that was merely "consistent with that of" an alibi witness who said he was watching a baseball game with the defendant at the time of the crime.[185] The result was that "jurors" found 76% of the non-testifying defendants guilty but only 62% of the testifying defendants guilty, a statistically significant result.[186]

That said, it still would be difficult to characterize the defendant's alibi testimony in Professor Bellin's study as anything other than favorable. First, the defendant's testimony provided corroboration for his alibi witness.[187] Second, and maybe more importantly, participants were not told that the prosecution undermined the defendant's testimony during cross-examination,[188] which would imply that the State had nothing to challenge the defense's corroborated alibi narrative. Therefore, again, it is still impossible to say whether the participants in Professor Bellin's study were punishing the one defendant's silence or rewarding the other defendant's testimony (or, again, some combination of both).

Professor Bellin also analyzed data collected from a 2000-2001 National Center for State Courts ("NCSC") survey of "attorneys, judges and jurors participating in felony cases at four sites: Los Angeles, Phoenix, the District of Columbia, and the

182. *Id.* at 408 (construing David R. Shaffer & Thomas Case, *On the Decision to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism on Juridic Decisions*, 42 J. PERSONALITY & SOC. PSYCHOL. 335, 339 (1982)).

183. *Id.* at 409.

184. *Id.*

185. *Id.* at 412–13.

186. *Id.* The 62% conviction rate was for defendants who were not impeached with evidence of prior convictions. *Id.* The conviction rates were 82% for a testifying defendant who was impeached with a prior robbery conviction and 73% for a testifying defendant who was impeached with a prior criminal fraud conviction. *Id.*

187. *See id.*

188. *See id.*

Bronx."[189] The data revealed that, for defendants without prior convictions, 41% of testifying defendants were found guilty while 70% of non-testifying defendants were found guilty.[190]

Again, this data tends to support the existence of a "silence penalty" but with caveats. First, like the Professor Shaffer and Bellin studies show, it is unclear whether or to what extent jurors were punishing defendants who did not testify as opposed to rewarding defendants who did testify. Second, in these real-world cases, there could be any number of variables that might explain the differences in conviction rates between testifying and non-testifying defendants. For example, it would be unsurprising if, in the NCSC cases, defendants testified *more* in cases in which the State had *weaker* evidence of guilt while defendants testified *less* in cases in which the State had *stronger* evidence of guilt. If this were true, it would be an example of correlation rather than causation and would not establish a "silence penalty." Of course, it is entirely possible that the NCSC cases do show a "silence penalty," but there is simply no way to reach such a conclusion definitively.

Finally, Professor Bellin cited to a public opinion poll asking whether a defendant who invokes his Fifth Amendment privilege against self-incrimination is probably guilty or simply exercising a right.[191] 50% of those surveyed responded "probably guilty," 36% responded "simply exercising a right," and 14% responded "not sure."[192] Again, this squares with the general supposition that there probably is a "silence penalty" but does not definitively tell us how these respondents would deliberate or reach a verdict in an actual trial.

ii. Does the "No Adverse Inference" Instruction Help or Hurt Defendants?

The second assumption to test, and the question at the heart of *Lakeside v. Oregon*, is whether "no adverse inference" instructions help or hurt defendants. As is clear from both *Lakeside* and *Carter*, "the tool courts consider the most effective to prevent prejudice resulting from the absence of a defendant's testimony at trial is an instruction to the jury that it should not draw an adverse inference therefrom."[193] Conversely, "attorneys often decide not to request such an instruction because [they think] it calls attention to the defendant's silence."[194] Given that roughly 50% of criminal defendants do not testify,[195] one might imagine that there

189. *Id.* at 415.

190. *Id.* at 420–21.

191. *Id.* at 407–8.

192. *Id.* at 408.

193. Sarah E. West, *"The Blindfold on Justice is Not a Gag": The Case for Allowing Controlled Questioning of Witnesses by Jurors*, 38 TULSA L. REV. 529, 547 (2003).

194. Coleman v. Brown, 802 F.2d 1227, 1235 (10th Cir. 1986); *see also* Michaelwicz v. State, 186 S.W.3d 601, 624 n.12 (Tex. App. 2006).

195. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1371 (2009) (finding that 49.4% of defendants in the same NCSC study cited by Professor Bellin testified); *see also* Jeffrey

are a number of experiments testing whether a "no adverse inference" instruction is helpful or harmful to these non-testifying defendants.

Surprisingly, however, there are no experiments to date actually testing the efficacy of the "no adverse inference" instruction. In *The Defendant's Testimony*, Professor Shaffer purports to cite to a study that found that "juries instructed not to draw adverse inferences from a defendant's Fifth Amendment plea were no more likely to convict the accused than were juries receiving no judicial commentary on the meaning and use of the privilege."[196] That study, however, was actually an unpublished thesis by a University of Georgia graduate student in which "jurors" in an experiment either were or were not given a jury instruction when a defendant testified on direct examination and then sought to invoke his Fifth Amendment privilege against self-incrimination on cross-examination.[197] The study therefore cannot tell us anything about the effectiveness of a "no adverse inference" instruction when a defendant does not take the witness stand at all.

b. Assumptions About Jury Conduct Related to Implicit Bias

There are two corollary assumptions to test in the context of juror implicit bias: (1) whether jurors draw adverse inferences based on the races of the defendant and/or the victim; and (2) whether an implicit bias jury instruction would mitigate this bias, or, conversely, cause a "boomerang effect."

i. Do Jurors Notice and Hold Race Against Defendants?

There is robust evidence that jurors draw adverse inferences based on the defendant's race. Numerous experiments have shown "that the race of the defendant significantly and directly affects the determination of guilt," with white "jurors" in these experiments being "more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty."[198]

One particularly strong experiment shows the bilateral nature of bias based on the respective races of the "jurors" and "defendants." In this experiment, Professor Denis Chimaeze E. Ugwuegbu conducted two trials, one with white "jurors" and one with Black "jurors."[199] These "jurors" read the transcript of a simulated rape case, and two of the variables in the study were (1) the race of the defendant; and

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Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 852 n.1 (2008).

196. David R. Shaffer, *The Defendant's Testimony*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 124, 147 n.1 (Saul M. Kassim & Lawrence S. Wrightsman eds., 1985).

197. E.G. Clary, *The effects of a defendant's prior record and evidence withholding on juridic judgments* (1978) (Master's thesis, Univ. of Georgia).

198. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH L. REV. 1611, 1626 (1985) (citing nine such studies).

199. Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 136, 141 (1979).

(2) the amount of evidence pointing toward guilt (near-zero, marginal, or strong).[200]

For the white "jurors," "[w]hen the evidence was [either] strong or near-zero the subjects rated the defendants, irrespective of race, as equally culpable."[201] Conversely, "when the evidence was marginal a [B]lack defendant was rated as significantly more culpable by the subject-jurors than a white defendant."[202] Meanwhile, the Black "jurors" rated the defendants as equally culpable in the condition where there was near-zero evidence of guilt.[203] On the other hand, the Black "jurors" rated the white defendants as significantly more culpable than their Black counterparts in both the marginal and strong evidence scenarios.[204]

Professor Ugwuegbu concluded that:

> The bias effects found for the marginal evidence are particularly very significant because it is exactly these middling cases that get to the courts. Cases where the evidence is weak are likely to be dropped by the prosecution, while cases where the evidence is very strong are likely to be plea-bargained by the defense. Kalven and Zeisel (1966) noted the bias effect of middling cases in their field work. They concluded that when there was doubt as to evidence the juror was liberated from factual constraints and as a result more likely to be influenced by affective factors. The present data supported Kalven and Zeisel's liberation hypothesis.[205]

This liberation hypothesis posits "that when cases are close on the evidence, juries are 'liberated' from the dictates of the law and use extralegal factors, like criminal and gender stereotypes, in arriving at verdicts."[206] This hypothesis is also consistent with the "modern racism perspective, which suggests that discriminatory behavior will only occur when it can be justified on nonracial grounds."[207]

To test this modern racism perspective, Professor James D. Johnson conducted an experiment with primarily white students from southeastern North Carolina.[208] Professor Johnson gave the students a fictional case in which a robber stole $650 from a bank, with the police soon thereafter arresting a defendant with $630 in

200. *Id*. at 136–37.

201. *Id*. at 139.

202. *Id*.

203. *Id*. at 142.

204. *Id*. at 141–42 ("In other words, the [B]lack subjects tended to grant the [B]lack defendant the benefit of the doubt not only when the evidence was doubtful but even when there was strong evidence against him.").

205. *Id*. at 143.

206. *See* Valerie Gray Hardcastle, M.K. Kitzmiller & Shelby Lahey, *The Impact of Neuroscience Data in Criminal Cases: Female Defendants and the Double-Edged Sword*, 21 NEW CRIM. L. REV. 291, 293 (Spring 2018) (summarizing Kalven and Zeisel's theory); *see also* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 164-66 (1996).

207. James D. Johnson, Erik Whitestone, Lee Anderson Jackson & Leslie Gatto, *Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893, 896 (1995).

208. *Id*. at 894–95.

cash who explained that he got the money from a loan shark.[209] One of the variables in the experiment was the defendant's race.[210] The other variable involved a wiretap recording in which the loan shark said he would never loan money to the defendant.[211] The students either (1) were not told about the recording, (2) were told about the recording, or (3) were told about the recording and also told that the wiretap was illegal and to ignore the recording as evidence.[212] Finally, Professor Johnson asked the students to rate the defendant's culpability on a 9-point scale, with 1 representing "definitely innocent" and 9 representing "definitely guilty."[213]

There was no statistically significant difference in the level of culpability that the students assigned to the defendants as a function of race in the conditions in which they were merely told or not told about the wiretap recording.[214] But there was a statistically significant difference in the average culpability score when students were told about the wiretap recording but also told to ignore it as evidence: 6.1 for the Black defendant versus 5.1 for the white defendant.[215] Professor Johnson concluded that these results confirmed the modern racism perspective, with the students in the illegal wiretap condition able to "justify the high verdict scores given to the Black defendant on nonracial grounds (*i.e.,* not allowing a guilty person to go free, etc.)."[216]

Furthermore, decades of trial data suggests that jurors draw adverse inferences from a defendant's race. Specifically, "[s]everal studies of conviction rate data find that [B]lack defendants are significantly more likely to be found guilty than are white defendants charged with the same crime."[217] Moreover, as compared to conviction rates for white defendants, "[c]onviction rates of African American defendants are higher, particularly when the victim is white."[218]

Experiments have also shown that the victim's race (and the respective races of the defendant and the victim) impacts the determination of guilt, at least in certain cases. For example, in the aforementioned experiment by Professor Ugwuegbu involving the rape "trial," another variable was the victim's race.[219] For white "jurors," "[w]hen the rape involved a white victim, the subjects rated the offense

209. *Id*. at 895.
210. *Id*.
211. *Id*.
212. *Id*.
213. *Id*.
214. *Id*. at 896.
215. *Id*.
216. *Id*.
217. Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71 (1993) (citing Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1615–50 (1985)).
218. MINN. SUP. CT. TASK FORCE ON RACIAL BIAS IN THE JUD. SYS., FINAL REPORT 34 (1993) (citing Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985); David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 661-703 (1983)).
219. Ugwuegbu, *supra* note 199, at 139.

as more culpable;" for Black "jurors," "[w]hen the victim of the rape was white the subjects rated the offense as less culpable."[220]

Meanwhile, in another experiment, Professors Kitty Klein and Blanche Creech conducted an experiment in which they told students that, *inter alia*, (1) a male defendant was charged with rape, murder, burglary, or the sale of drugs; and (2) the female victim was either Black or white.[221] For the rape, murder, and burglary conditions, the students thought that the defendant was more likely to be guilty when the victim was a white woman; for the drug crime, the race of the victim did not have a significant impact on the students' guilt ratings.[222]

Overall, then, there appears to be relatively conclusive evidence that jurors do draw adverse inferences based on the respective races of the defendant and the victim.

ii. Do Implicit Bias Jury Instructions Help or Hurt Defendants?

Unlike with the "no adverse inference" instruction, there is some evidence about the possible effect of jury instructions on racial bias, but it is sparse. To date, there has been (a) one experiment about whether a sympathy/prejudice instruction helps or hurts defendants and (b) one similar experiment about an implicit bias jury instruction.

(a) The Sympathy/Prejudice Instruction Experiment

In 1991, Professors Jeffrey E. Pfeifer and James R.P. Ogloff conducted the first of these experiments.[223] They had 257 white students from a large midwestern university read a nine-page transcript of a rape trial.[224] These students were then assigned to groups with different variables. One of these variables was the race of the defendant and the race of the victim. The possibilities of this variable were: (1) Black defendant/Black victim, (2) white defendant/Black victim, (3) Black defendant/white victim, and (4) white defendant/white victim.[225]

Another variable was that some students received no jury instructions while other students received jury instructions about the presumption of innocence, reasonable doubt, and sympathy/prejudice, including the following admonition: "You will allow no sympathy or prejudice to influence you in arriving at your verdict. The law demands of you a just verdict uninfluenced by sympathy or prejudice or

220. *Id.* at 139, 141.

221. Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 23–24 (1982).

222. *Id.* at 24.

223. Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713 (1991).

224. *Id.* at 1717.

225. *Id.* at 1718–19.

any considerations outside the evidence and the law as given you in these instructions."[226]

This admonition is similar to the general sympathy/prejudice instruction that has largely been rejected by Kansas courts and used intermittently by other courts.

Pfeifer and Ogloff then asked the students about guilt using (1) a 7-point bipolar rating, with 1 representing "not guilty" and 7 representing "extremely guilty," and (2) a "guilty"/"not guilty" dichotomy.[227] The results of the 7-point bipolar rating can be seen in the table below:

Mean Bipolar Ratings of Defendant Guilt		
Defendant/Victim Race	**No Instructions**	**Instructions**
Black/Black	4.61 (1.70)	3.33 (1.95)
White/Black	4.47 (1.65)	3.63 (2.25)
Black/White	6.00 (0.63)*	3.94 (1.21)
White/White	4.18 (1.33)	3.50 (1.40)
*The guilt rating for the Black defendant/white victim racial combination is significantly higher than all other combinations in the no-instruction cell. Ratings are based on a 7-point scale with 1 representing "not guilty" and 7 representing "extremely guilty." Standard deviations are in parentheses.		

As the authors noted, their study "replicate[d] earlier studies in which the highest guilt ratings were found in Black defendant/white victim racial combination": 6.00 vs. 4.18, 4.47, and 4.61 for the other three conditions, a statistically significant result.[228] However, "the addition of jury instructions play[ed] a significant role in dissipating differential guilt ratings based on the race of the defendant and the victim."[229] Namely, the instructions significantly lowered the guilt rating in the Black defendant/white victim condition to 3.94, which was still higher than the rating in the other three conditions but not to a statistically significant degree.[230]

Meanwhile, here were the results of the dichotomous "guilty"/"not guilty" rating:

226. *See id.* at 1718. The full instructions are on file with the author.
227. *Id.*
228. *Id.* at 1719.
229. *Id.*
230. *Id.*

Dichotomous Ratings of Defendant Guilt		
Defendant/Victim Race	**No Instructions Guilty/Not Guilty**	**Instructions Guilty/Not Guilty**
Black/Black	9 (50%)/9 (50%)	6 (60%)/9 (40%)
White/Black	6 (46%)/7 (54%)	7 (47%)/8 (53%)
Black/White	15 (83%)/3 (17%)*	6 (38%)/10 (62%)
White/White	7 (44%)/9 (56%)	6 (54%)/5 (46%)
*The guilt rating for the Black defendant/white victim racial combination, when no instructions are given, is significantly different from all other combinations at the .05 level of significance.		

The authors again noted that their study "replicate[d] earlier studies in which the highest guilt ratings were found in the Black defendant/white victim racial combination."[231] And they again observed that "the addition of jury instructions play[ed] a significant role in dissipating differential guilt ratings based on the race of the defendant and the victim."[232] Specifically, while the highest percentage of uninstructed jurors "convicted" the "defendant" in the Black defendant/white victim condition (83%), the lowest percentage of instructed "jurors" convicted the "defendant" in that same condition (38%).[233]

The authors speculated that "these differential guilt ratings may be due to the fact that instructions remove much of the ambiguity from a participant's decision on guilt."[234] Specifically, the instructions possibly "provide[d] participants with guidelines that enable[d] them to focus on legally relevant information such as the elements of the crime rather than on their prejudicial attitudes when evaluating the guilt of the defendant."[235] The authors then concluded that this result would be "clearly consistent with the theory of modern racism which asserts that expressions of racism are most likely to be exhibited in ambiguous situations."[236]

Of course, this experiment has an important limitation: the differential guilt ratings were given by subjects who (1) on the one hand were given *no* jury instructions; and (2) on the other hand, were given a sympathy/prejudice instruction *and* presumption of innocence and reasonable doubt instructions. Therefore, it is

231. *Id.* at 1720.
232. *Id.*
233. *Id.*
234. *Id.* at 1720–21.
235. *Id.* at 1721.
236. *Id.*

impossible to say whether the differential guilt ratings were based on the sympathy/prejudice instruction, the other instructions, or some combination. That said, the sympathy/prejudice instruction was the only instruction having an arguable bearing on the races of the defendant and victim while the other two jury instructions were generic instructions with no obvious racial overtones. As a result, it seems likely, but not definitive, that the sympathy/prejudice instruction mitigated racial prejudice in some meaningful sense.

(b) The Implicit Bias Instruction Experiment

The second experiment tested the efficacy of an implicit bias jury instruction. In 2015, Dr. Jennifer K. Elek and Paula Hannaford-Agor worked with the National Center for State Courts to recruit a participant group that "reflected the demographic and attitudinal characteristics of the broader national population."[237] The researchers then had participants read a mock trial scenario involving a defendant charged with assault and battery with intent to cause serious bodily injury after a locker room fight with his college basketball teammate.[238] Those participants were assigned to conditions where (1) the race of the defendant and victim varied, and (2) the jury instructions were either generic or included an implicit bias instruction.[239]

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237. Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV 116, 120 (2015).

238. *Id*. at 118.

239. *Id*. at 120. The implicit bias jury instruction stated:

> Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions. What we are asked to do is difficult because of a universal challenge: We all have biases. We each make assumptions and have our own stereotypes, prejudices, and fears. These biases can influence how we categorize the information we take in. They can influence the evidence we see and hear, and how we perceive a person or a situation. They can affect the evidence we remember and how we remember it. And they can influence the "gut feelings" and conclusions we form about people and events. When we are aware of these biases, we can at least try to fight them. But we are often not aware that they exist.
>
> We can only correct for hidden biases when we recognize them and how they affect us. For this reason, you are encouraged to thoroughly and carefully examine your decision-making process to ensure that the conclusions you draw are a fair reflection of the law and the evidence. Please examine your reasoning for possible bias by reconsidering your first impressions of the people and evidence in this case. Is it easier to believe statements or evidence when presented by people who are more like you? If you or the people involved in this case were from different backgrounds—richer or poorer, more or less educated, older or younger, or of a different gender, race, religion, or sexual orientation—would you still view them, and the evidence, the same way?
>
> Please also listen to the other jurors during deliberations, who may be from different backgrounds and who will be viewing this case in light of their own insights, assumptions, and even biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.
>
> Our system of justice relies on each of us to contribute toward a fair and informed verdict in this case. Working together, we can reach a fair result.

Id. at 119–20.

The researchers, however, were not able to replicate "the traditional baseline pattern of 'white juror bias' (i.e., the higher rate of guilty verdicts and harsher sentences for Black defendants in control conditions) observed in prior similar studies, which precluded a complete test of the value of the specialized instruction."[240] Instead, "white participants across all conditions . . . convicted white defendants at a slightly higher rate (65%) than [B]lack defendants (59%), although this difference was not statistically significant."[241] Notably, the researchers "also did not observe any clear evidence of 'backlash effects' (in which mock jurors might seem to treat [B]lack defendants more harshly) after hearing an implicit-bias instruction, but small sample sizes limited these analyses."[242]

Some evidence suggests that jurors draw adverse inferences based on a defendant's silence, and comparatively stronger evidence suggests that jurors draw adverse inferences based upon the races of the defendant and victim. Meanwhile, there have been no experiments testing the efficacy of the accepted "no adverse inference" instruction, while two experiments provide some proof that jury instructions can reduce implicit bias by jurors or at least not have a boomerang effect on jurors. While *Lakeside* stands for the proposition that assumptions about jury behavior should not be the basis for decisions about constitutional law, a test of these respective assumptions supplies stronger support for an implicit bias jury instruction than a "no adverse inference" instruction.

D. The Possibility of a More Limited Right to an Implicit Bias Jury Instruction

If courts were to accept the logic of this Article, judges would need to issue implicit bias jury instructions on demand, just as they need to issue a "no adverse inference" instruction whenever a non-testifying defendant requests one. A defendant would have a constitutional right to such an instruction without needing to show a specific reason to believe that racial bias would infect his trial.

Alternatively, if courts were to reject a categorical right to an implicit bias jury instruction, they should still acknowledge a limited right to such an instruction in certain cases. Support for this more limited right can be found in a line of Supreme Court cases dealing with the right to question prospective jurors about racial bias during voir dire.

1. *Ham v. South Carolina* and the Due Process Right to Special Voir Dire Questioning Regarding Racial Bias

The first of these cases is *Ham v. South Carolina*.[243] In *Ham*, Gene Ham, a bearded Black civil rights activist, was charged with possession of marijuana in

240. *Id.* at 120.
241. *Id.*
242. *Id.* at 121.
243. 409 U.S. 524 (1973).

Florence, South Carolina.[244] Before the judge's voir dire examination of prospective jurors, defense counsel requested that the judge ask them questions, such as (1) "Would you fairly try this case on the basis of the evidence and disregarding the defendant's race," (2) "You have no prejudice against . . . [B]lack people? You would not be influenced by the use of the term '[B]lack,'" and (3) "Would you disregard the fact that this defendant wears a beard in deciding this case?"[245] The judge declined to ask these questions but did ask jurors:

> 1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?
> 2. Are you conscious of any bias or prejudice for or against him?
> 3. Can you give the State and the defendant a fair and impartial trial?[246]

After Ham was convicted, he appealed, claiming that these general questions were insufficient and that he had a constitutional right to more specific questions about racial (and beard) bias.[247] The State countered by contending:

> The general statutory inquiries made by the Trial Judge sufficiently covered those specific inquiries sought by the defense. The defendant was in Court, within sight of the jury, when the statutory inquiries were made. It was obvious to the jury and all present that the defendant was black and bearded. The redundancy of asking a prospective juror on his *voir dire*, "Are you conscious of any bias or prejudice for or against him?," "him" being the black, bearded defendant at whom the juror is looking; then to ask, "Are you conscious of any bias or prejudice against black people who wear beards?" would appear to be not only unnecessary but ridiculous.[248]

The Supreme Court sided with Ham on the questions regarding racial bias,[249] finding that the purposes of the Fourteenth Amendment were to ensure the "essential demands of fairness" and "prohibit the States from invidiously discriminating on the basis of race."[250] Based on these twin purposes, the Court was able to conclude "that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice."[251] And while the Court did not find that the trial judge needed to use the specific questions proposed by defense counsel, it found that the general question that the judge asked about bias or prejudice

244. *Id.* at 524–25.
245. *Id.* at 525 n.2.
246. *Id.* at 526 & n.3.
247. *Id.* at 526–27.
248. Brief of Respondent at 3–4, Ham v. South Carolina, 409 U.S. 524 (1973) (No. 71-5139), 1972 WL 135829, at *3–4.
249. *Ham*, 409 U.S. at 527–28.
250. *Id.* at 526–27.
251. *Id.* at 527.

against the defendant was insufficient to survive scrutiny under the Due Process Clause.[252]

Ham thus stands for two propositions: (1) there is a constitutionally meaningful difference between general questions about bias/prejudice and specific questions about racial bias, and (2) there are some cases in which a defendant has a due process right to specific voir dire questions about racial bias. This first proposition relates back to the argument some courts have advanced that the issuance of a sympathy/prejudice jury instruction obviates the need for an implicit bias instruction.[253] Unless there is reason to believe that it is more important to question prospective jurors about racial bias than it is to instruct actual jurors about such bias, *Ham* should be extended to require implicit bias jury instructions in certain cases. But which cases?

2. *Ristaino v. Ross* and the "Inextricably Bound" Test

The Supreme Court answered this question regarding the breadth of *Ham* in its subsequent opinion in *Ristaino v. Ross*.[254] In *Ristaino*, three Black defendants unsuccessfully sought voir dire questioning of prospective jurors about racial bias at their trial for violent crimes against a white security guard.[255] The Supreme Court ultimately affirmed the decision to preclude such questioning, concluding that "*Ham* did not announce a requirement of universal applicability."[256]

Instead, the *Ristaino* Court construed *Ham* as "reflect[ing] an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne.'"[257] Specifically, special jury questioning was required "to meet the constitutional requirement that an impartial jury be impaneled" in *Ham*, because the defendant claimed he was framed based on his civil rights activities, meaning "[r]acial issues . . . were inextricably bound up with the conduct of the trial."[258] Conversely, the *Ristaino* Court held that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were [Black]" was not enough to require special jury questioning.[259]

Since *Ham* and *Ristaino*, courts have focused upon the question of whether issues of race are "inextricably bound up with the conduct of the trial" to decide whether the Due Process Clause mandates special voir dire questions about racial bias. For example, in *People v. Wilborn*, a Black defendant charged with cocaine possession claimed that the white officers who seized the cocaine "fabricated the

252. *Id.* at 526–27, 529.
253. *See* Section I.C.3.
254. 424 U.S. 589 (1976).
255. *Id.* at 590–92.
256. *Id.* at 596.
257. *Id.*
258. *Id.* at 597.
259. *Id.*

basis for their traffic stop and detention."[260] In finding that the trial judge's refusal to allow specific questions about racial bias during voir dire violated the Due Process Clause, the Court of Appeal of California concluded that "where the defense by a [Black] defendant rested entirely on a credibility challenge to the white police officers, the court had an obligation to make *some* inquiry as to racial bias of the prospective jurors."[261]

Conversely, in *United States v. Brown*, a defendant convicted of uttering and passing an altered note claimed a due process violation because (1) he was denied special voir dire questioning regarding racial bias, and (2) he was "a young [B]lack male whereas all of the government's witnesses and all of the jurors were white."[262] While the United States Court of Appeals for the First Circuit noted that, "[u]nder such circumstances, we recognize that voir dire on the issue of race may be advisable," it did not find that such questioning was constitutionally mandated.[263] Instead, the court concluded that "[t]he mere fact that a defendant is [B]lack does not alone trigger the special questioning requirement found in *Ham* and *Turner*."[264]

3. *Turner v. Murray* and Interracial Capital Cases

The *Turner* opinion referenced by the court in *Brown* involves the one situation in which special voir dire questioning about racial bias is constitutionally required without delving into the details of the case. In *Turner v. Murray*, a Black man was charged with the capital murder of a white storekeeper and unsuccessfully sought special voir dire, including the following question: "Will these facts [about the defendant's and victim's respective races] prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?"[265]

After the jury convicted and sentenced Turner to death, the defendant appealed, and eventually his case reached the United States Supreme Court.[266] In concluding "that a capital defendant accused of an interracial crime is [per se] entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias," the Court focused on the potential for implicit racial bias in a capital case.[267] According to the Court:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but

260. 82 Cal. Rptr. 2d 583, 585, 588 (Cal. Ct. App. 1999).
261. *Id.* at 589.
262. 938 F.2d 1482, 14885 (1st Cir. 1991).
263. *Id* at 1485.
264. *Id.*
265. 476 U.S. 28, 29–31 (1986).
266. *Id.* at 31–33.
267. *Id.* at 36–37.

> remain undetected. On the facts of this case, a juror who believes that [Black people] are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of [Black people], which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[268]

Notably, the *Turner* holding partially mirrors the previously mentioned federal statute—18 U.S.C. § 3593(f)—which requires a jury instruction regarding racial and other biases during the sentencing phase of a capital case.[269]

Even if the courts do not accept the argument for a categorical right to an implicit bias jury instruction, they should recognize a more limited right to such an instruction based on the *Ham* line of cases. Under this more limited right, a defendant would have the right to an implicit bias jury instruction in the same cases in which he would have the right to special voir dire questioning of prospective jurors about racial bias. Specifically, this more limited right would allow for a jury instruction on implicit bias in (1) cases in which racial issues are inextricably bound up with the conduct of the trial, and (2) interracial capital cases.

CONCLUSION

The Supreme Court has gone to great lengths to prevent jurors from holding defendants' silence against them. In a trilogy of opinions, the Court concluded that when a defendant refrains from testifying, (1) the prosecutor and judge cannot make adverse comments about that decision; (2) the judge can give a "no adverse inference" instruction even over a defense objection; and (3) the judge must give a "no adverse inference" instruction upon a defense request. Conversely, the Court has never ruled that jurors can impeach their verdict based upon jurors holding a defendant's silence against him, and lower courts have ruled against recognizing such a right to jury impeachment.

Meanwhile, the Supreme Court has addressed the issue of juror racial bias in reverse. In 2017, the Court ruled in *Pena-Rodriguez v. Colorado* that jurors must be allowed to impeach their verdict based on jurors holding a defendant's race against him.[270] But the Court has never held that there is a right to an implicit bias jury instruction, and no lower court has ever recognized such a right.

In *Pena-Rodriguez*, however, the Supreme Court clearly recognized that the right to an impartial jury not only addresses "unique historical, constitutional, and

268. *Id.* at 35.
269. *See* 18 U.S.C. § 3593(f).
270. 137 S. Ct. 855, 868 (2017).

institutional concerns," but also requires "[a] constitutional rule."[271] Specifically, the *Pena-Rodriguez* Court concluded that "[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[272]

This Article contends that this rule must go further and address juror racial bias on both the back end and the front end. For the same reasons that the Supreme Court created the right to a jury instruction that jurors must not hold a defendant's silence against him, it should recognize the right to a jury instruction that jurors must not hold a defendant's race against him.[273] Moreover, even if the courts do not recognize a categorical right to an implicit bias jury instruction, they should recognize a more limited right to such an instruction based on *Ham* and its progeny.

271. *Id.* at 868–69.
272. *Id.* at 869.
273. *See* Section I.C.1.