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## Removing Race From the Jury Deliberation Room: The Shortcomings of *Pena-Rodriguez v. Colorado* and How to Address Them

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# COMMENTS

## REMOVING RACE FROM THE JURY DELIBERATION ROOM: THE SHORTCOMINGS OF *PEÑA-RODRIGUEZ V. COLORADO* AND HOW TO ADDRESS THEM

### INTRODUCTION

Justice Kennedy began his recently decided *Peña-Rodriguez v. Colorado* majority opinion by saying, “The jury is a central foundation of our justice system and our democracy.”<sup>1</sup> The case grappled with the question of whether the long-standing federal rule that jury members cannot testify about any aspect of the deliberation process should give way in cases of racial bias.<sup>2</sup> In a 5-3 decision, the United States Supreme Court found that it should, thereby creating an exception to the commonly referred to “no-impeachment rule.”<sup>3</sup> This exception comes after many expressed concerns that allowing testimony about jury deliberations will undermine the criminal justice system.<sup>4</sup> Those opposed to the exception fear that this exception will remove finality from jury verdicts, dissuade jurors from engaging in “heated discussions” during deliberations and lead to harassment of jurors.<sup>5</sup> Notwithstanding these concerns, the Court ruled that ensuring the elimination of racial bias in jury deliberations was too important of a government objective to allow for the no-impeachment rule to remain undisturbed.<sup>6</sup>

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1. 580 U.S. \_\_, \_\_, 137 S. Ct. 855, 860 (2017).

2. *See id.* at \_\_, 137 S. Ct. at 862–63.

3. *Id.* at \_\_, 137 S. Ct. at 860, 869.

4. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 10, *Peña-Rodriguez v. Colorado*, 580 U.S. \_\_, 137 S. Ct. 855 (2017) (No. 15-606) [hereinafter Brief for the United States].

5. *See id.*

6. *See Peña-Rodriguez*, 580 U.S. at \_\_, 137 S. Ct. at 868–69.

Despite the Supreme Court's adoption of an exception, the ruling only goes so far. Justice Kennedy's opinion did not lay out any specific way for how the exception should be applied. Rather, the Court has left determination of whether racial bias was involved in jury deliberations to the "substantial discretion of the trial court"<sup>7</sup> and, in doing so, has created the possibility for substantially varied applications across the country. The variability of application for the racial bias exception, therefore, calls for more pre-deliberation safeguards in order to ensure that racial biases do not infiltrate the deliberation process.

This comment explores ways in which racial bias undermines the American jury system and argues that simply having a racial bias exception to the no-impeachment rule does not go far enough to guard against racially motivated jury verdicts. In order to guarantee the Sixth Amendment right to an impartial jury, defendants must always be able to question potential jurors about racial bias, and universal court policies need to be adopted across the country that allow for a consistent approach for investigating claims of racial bias in jury deliberations. Part I of this comment examines the history of American juries and the inception of the no-impeachment rule. Part II discusses the background that led to the *Peña-Rodriguez* decision, while Part III dissects the Court's decision of the case. Part IV argues that the exception created by the Court in *Peña-Rodriguez* does not go far enough to guard against racial biases in jury deliberations and proposes policy changes that would allow for incidents of racial bias to be addressed prior to the issuing of a verdict. Finally, Part V concludes this comment by reiterating the importance of having an impartial jury that is free from racial bias.

## I. AMERICAN JURIES AND FEDERAL RULE OF EVIDENCE 606

Since the founding of the United States, the jury has been considered a fundamental safeguard of individual liberty.<sup>8</sup> The Founders included the right to a jury trial in the Constitution in order to allow everyday citizens to serve as a check on government power by having the citizens make the final decision in

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7. See *id.* at \_\_\_, 137 S. Ct. at 869.

8. See THE FEDERALIST NO. 83, at 451 (Alexander Hamilton) (Benjamin Warner ed., 1818).

criminal prosecutions.<sup>9</sup> In other words, juries provide a “safeguard against the corrupt or overzealous prosecutor and against the compliant [or] biased . . . judge.”<sup>10</sup> Juries also serve the important function of keeping the law in the realm of public opinion.<sup>11</sup> For example, there are a significant number of cases where, despite strong evidence that the defendant was guilty, juries returned verdicts of not guilty because they did not agree with the application of the law.<sup>12</sup> This use of jury nullification may be rare, but it is just one example of the influential power that juries have over a trial.<sup>13</sup>

Despite the large responsibility that juries have, they are a man-made system and thereby have flaws. For instance, in a recent study, it was estimated that thirteen percent of cases studied had jury verdicts that were inaccurate.<sup>14</sup> Jury accuracy is another way of referring to the “average probability for a set of cases that the jury verdict is . . . correct.”<sup>15</sup> “Correct” is further defined as a case in which all of the legal standards were applied correctly.<sup>16</sup> For example, if a person had committed a crime but the evidence to such effect was lacking, the “correct” verdict would be to acquit.<sup>17</sup> Despite the imperfect verdicts juries return, the Supreme Court continues to hold the American jury system as “critically important” in criminal cases.<sup>18</sup>

The high respect that the Court and society have for American juries has led to a general rule that gives substantial protection to verdict finality. The Mansfield Rule, as it is known, “prohibit[s]

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9. See Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 4 (1966); see also NAT'L JUD. C., WHY JURY TRIALS ARE IMPORTANT TO A DEMOCRATIC SOCIETY, <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=3586&context=wlulr>.

10. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

11. Powell, *supra* note 9, at 7.

12. Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 L. & CONTEMP. PROBS. 51, 55 (1980).

13. Jury nullification has been formally rejected by the Supreme Court. The Court has stated that for a jury to ignore the judge's instructions and proceed on its own view about what the law should be would cause chaos. *Sparf v. United States*, 156 U.S. 51, 102–03 (1895). The Court went further in *Sparf*, stating that juries occasionally may refuse to convict guilty defendants, thereby allowing for the continuation of juror nullification. See *id.* at 90–91.

14. Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 305 (2007).

15. *Id.* at 306.

16. *Id.*

17. *Id.*

18. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 548 (2000).

jurors . . . from testifying either about their subjective mental processes or about objective events that occurred during deliberations.”<sup>19</sup> The Mansfield Rule originated from a 1785 English case, *Vaise v. Delaval*, which involved a group of jurors who decided a case by flipping a coin.<sup>20</sup> After the jury returned its verdict, one of the jurors submitted an affidavit informing the court about what had happened, at which time the defendant appealed.<sup>21</sup> Ruling against the defendant, Lord Mansfield wrote, “The Court cannot . . . receive such an affidavit from any of the jurymen themselves,” and in turn the Mansfield Rule was born.<sup>22</sup> Lord Mansfield justified his opinion based on the doctrine that a “witness shall not be heard to allege his own turpitude,” since the actions of the jury in *Vaise* constituted a misdemeanor.<sup>23</sup> Due to Lord Mansfield’s renown at the time, the Rule was vastly applied; but even after his fame began to decline, the Rule continued to be the norm.<sup>24</sup>

In 1915, the United States Supreme Court officially applied the Mansfield Rule to the American system.<sup>25</sup> *McDonald v. Pless* involved an action to recover damages for legal services.<sup>26</sup> When the jury retired to determine the correct amount to award, the jury foreman suggested that each jury member write down an amount and then the final award would be the average of all of the amounts.<sup>27</sup> The defendant appealed the verdict, but the Supreme Court held that no evidence of what happened in the jury room could be admitted to support the defendant’s assertion.<sup>28</sup> In so holding, the Court stated that the Mansfield Rule is based on “controlling considerations of a public policy,”<sup>29</sup> without which, there would be too much room for “fraud, corruption, and perjury.”<sup>30</sup> The Mansfield Rule, in other words, was designed to “protect the secrecy of the deliberations, to promote ‘free discussion

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19. Peña-Rodriguez v. Colorado, 580 U.S. \_\_\_, \_\_\_, 137 S. Ct. 855, 863 (2017).

20. (1785) 99 Eng. Rep. 944, 1 T.R. 11.

21. See *id.*

22. *Id.*

23. *Id.*; John L. Rosshirt, *Evidence—Assembly of Jurors’ Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME L. REV. 484, 484 (1956).

24. Rosshirt, *supra* note 23, at 484.

25. *McDonald v. Pless*, 238 U.S. 264, 269 (1915).

26. *Id.* at 265.

27. *Id.*

28. See *id.* at 269.

29. *Id.* at 267.

30. Rosshirt, *supra* note 23, at 485 (quoting *Johnson v. Davenport*, 26 Ky. (3 J.J. Marsh.) 390, 393 (1830)).

and interchange of opinion among jurors,’ and to lessen temptation to tamper with the jury after the verdict” and is, therefore, an important part of American jurisprudence.<sup>31</sup>

The Mansfield Rule has been adopted in a variety of ways in the state court systems, but the federal approach is remarkably similar to the original version.<sup>32</sup> This approach, also known as the no-impeachment rule, permitted an exception to jury testimony only for testimony about events irrelevant to the deliberative process, such as reliance on outside evidence<sup>33</sup> or personal investigation of the facts.<sup>34</sup> The common law rule was codified in the Federal Rules of Evidence in 1975 as Federal Rule of Evidence 606(b).<sup>35</sup> Originally, Rule 606(b) allowed for more exceptions to the no-impeachment rule; however, the Department of Justice expressed concern over the number of exceptions.<sup>36</sup> Therefore, the rule that was adopted prohibits all juror testimony with exceptions only where the jury has considered prejudicial and extraneous evidence or is subjected to other outside influence.<sup>37</sup>

Rule 606(b) provides jurors with considerable assurance that they will not be called back to court to discuss their verdicts or be harassed or annoyed by litigants seeking to challenge the verdict.<sup>38</sup> Advocates of Rule 606(b) maintain that because of the safeguards afforded under the rule, jury deliberations are able to be “full and frank” and thereby produce the most accurate and just result.<sup>39</sup> Rule 606(b) has long been considered an important part of the criminal justice system, and there are only a few cases where the Court has ruled that Rule 606(b) does not apply. For instance, Rule 606(b) allows for jurors to testify about what occurred in the jury room when “(1) the jury was given improper information from outside about the case; (2) someone tampered with the jury with bribes or threats; or (3) someone on the jury just wrote down the wrong verdict on the official form.”<sup>40</sup> The

31. *Id.* (quoting *Sandoval v. State*, 209 S.W.2d 188, 190 (Tex. Crim. App. 1948)).

32. *See Peña-Rodriguez v. Colorado*, 580 U.S. \_\_\_, \_\_\_, 137 S. Ct. 855, 863 (2017).

33. *Id.* at \_\_\_, 137 S. Ct. at 863 (listing newspapers and dictionaries as examples).

34. *Id.* at \_\_\_, 137 S. Ct. at 863.

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

36. *See Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 865.

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

38. *See Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 865.

39. Brief for the United States, *supra* note 4, at 10.

40. Garrett Epps, *The Supreme Court Confronts Racism in the Jury Room*, ATLANTIC (Mar. 16, 2017) (discussing FED. R. EVID. 606(b)), <http://www.theatlantic.com/politics/arc>

Federal Rule did not allow for an exception for instances of deliberate racism until the Supreme Court decided *Peña-Rodriguez v. Colorado*.<sup>41</sup>

## II. THE HISTORY OF *PEÑA-RODRIGUEZ V. COLORADO*

Miguel Angel Peña-Rodriguez was arrested in 2007 for harassment, unlawful sexual contact and attempted sexual assault of a child.<sup>42</sup> The arrest was made after Peña-Rodriguez, a horse trainer at a Colorado racetrack, was accused of following two teenage sisters into a restroom at the barn where he worked.<sup>43</sup> According to the sisters' testimony, a man entered the bathroom and asked if the girls wanted to attend a party.<sup>44</sup> When the girls said no and tried to leave, they allege the man turned the lights off, grabbed them, and touched one of them on the breast and the other on the shoulder and buttocks.<sup>45</sup> The girls ran away and told their father what had happened, and based off of their description of the man, the father was able to identify Peña-Rodriguez.<sup>46</sup>

The three-day trial<sup>47</sup> of Peña-Rodriguez placed a lot of emphasis on the victims' identification.<sup>48</sup> The prosecution spent its time recounting testimony of the identification, while the defense highlighted the short time the victims actually saw their attacker and the presence of other workers in the area at the time of the attack.<sup>49</sup> The defense further presented an alibi witness who testified that Peña-Rodriguez was in another barn at the time of the attack.<sup>50</sup> The jurors were initially deadlocked, but the judge told them to try again to reach a verdict.<sup>51</sup> After twelve hours of continued deliberations, during which yelling could be heard from

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hive/2017/03/the-supreme-court-confronts-racism-in-the-jury-room/519747/.

41. See *Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 861.

42. *Id.* at \_\_\_, 137 S. Ct. at 861.

43. Nina Totenberg, *Supreme Court Hears Case on Racial Bias in Jury Deliberations*, NPR (Oct. 11, 2016, 4:39 AM), <http://www.npr.org/2016/10/11/497196091/top-court-hears-case-on-racial-bias-in-jury-deliberations>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 861.

48. Totenberg, *supra* note 43.

49. *Id.*

50. *Id.* (noting that the alibi witness was also Hispanic).

51. *Id.*

outside the jury room, the jury found the defendant guilty on the three misdemeanor charges, but not guilty on the felony charge.<sup>52</sup>

After rendering its verdict, the trial court read the jury the following instruction, as mandated by Colorado law:

The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision . . . . If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.<sup>53</sup>

Following the discharge of the jury, Peña-Rodriguez's attorney entered the jury room, and two jurors approached him to discuss the trial in private.<sup>54</sup> The jurors informed Peña-Rodriguez's attorney that during deliberations, another juror had expressed anti-Hispanic bias toward the defendant and the alibi witness.<sup>55</sup> Upon hearing this information, the defendant's attorney obtained the court's permission to take sworn affidavits from the two jurors.<sup>56</sup>

The affidavits "described a number of biased statements made by another juror, identified as Juror H.C."<sup>57</sup> Some of the racially biased statements by H.C. included, "I think he did it because he's Mexican and Mexican men take whatever they want," and that he believed the defendant was guilty because in his experience as an ex-law enforcement officer, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."<sup>58</sup> Additionally, H.C. stated that he did not believe the defendant's alibi witness because "among other things, the witness was 'an illegal.'"<sup>59</sup> However, contrary to H.C.'s claim, the alibi witness testified during the trial that he was a legal resident of the United States.<sup>60</sup>

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52. *Id.* Defendant was found guilty of unlawful sexual contact and harassment, but the jury could not agree on the attempted sexual assault charge. *Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 861.

53. *Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 861.

54. *Id.* at \_\_\_, 137 S. Ct. at 861.

55. *Id.* at \_\_\_, 137 S. Ct. at 861.

56. *Id.* at \_\_\_, 137 S. Ct. at 861.

57. *Id.* at \_\_\_, 137 S. Ct. at 862.

58. *Id.* at \_\_\_, 137 S. Ct. at 862.

59. *Id.* at \_\_\_, 137 S. Ct. at 862.

60. *Id.* at \_\_\_, 137 S. Ct. at 862.

Upon review of the affidavits, the trial court agreed that H.C. exhibited a racial bias; however, the court denied the defendant's motion for a new trial because "[t]he actual deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)."<sup>61</sup> The verdict was deemed final, and Peña-Rodriguez was sentenced to two years' probation and was required to register as a sex offender.<sup>62</sup> On appeal, the Colorado Court of Appeals was divided when it affirmed the defendant's conviction, agreeing that H.C.'s statements did not fall within an exception to Rule 606(b) and were therefore inadmissible to order a new trial.<sup>63</sup> The Colorado Supreme Court affirmed by a vote of 4-3, relying on past supreme court precedent that there was no "dividing line between different *types* of juror bias or misconduct," and therefore there was no basis for allowing the impeachment evidence of the deliberations.<sup>64</sup> The United States Supreme Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias.<sup>65</sup>

### III. THE COURT'S ACCEPTANCE OF A RACIAL BIAS EXCEPTION TO 606(B)

On March 6, 2017, the United States Supreme Court ruled 5-3 that "blatant racial prejudice" was so detrimental to the functioning of the jury system that there must be an exception to the "general bar of the no-impeachment rule" to address it.<sup>66</sup> In making its decision, the Court emphasized that this decision was necessary in order for the nation to continue to "make strides to overcome race-based discrimination."<sup>67</sup> Prior to issuing its ruling, the Court retraced the history of the no-impeachment rule and the Court's role in implementing the bar on jury testimony.<sup>68</sup>

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61. *Id.* at \_\_, 137 S. Ct. at 862. The Colorado Rule of Evidence 606(b) is the same as its federal counterpart. *Id.* at \_\_, 137 S. Ct. at 862.

62. *Id.* at \_\_, 137 S. Ct. at 862.

63. *Id.* at \_\_, 137 S. Ct. at 862.

64. Peña-Rodriguez v. People, 350 P.3d 287, 293 (Colo. 2015).

65. See generally Peña-Rodriguez, 580 U.S. at \_\_, 137 S. Ct. at 869 (holding where a juror makes a clear statement indicating that he or she relied on racial stereotypes to convict a criminal defendant, the no-impeachment rule must "give way in order to permit the trial court to consider the evidence of the juror's statement").

66. *Id.* at \_\_, 137 S. Ct. at 871.

67. *Id.* at \_\_, 137 S. Ct. at 871.

68. *Id.* at \_\_, 137 S. Ct. at 867-70.

Prior to the decision issued in *Peña-Rodriguez*, the Court had only addressed exceptions to Rule 606(b) in two instances.<sup>69</sup> The first instance was when the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during deliberations.<sup>70</sup> In *Tanner v. United States*, the Court reasoned that if it allowed juror testimony, the jurors would not only be “harassed . . . by the defeated party,” but attempts to impeach jurors would “disrupt the finality of the process.”<sup>71</sup>

The Court once again rejected an exception to the no-impeachment rule in *Warger v. Shauers*.<sup>72</sup> Although the Court rejected an exception, the opinion emphasized that there may be instances of juror bias that are so extreme “that, almost by definition, the jury trial right has been abridged.”<sup>73</sup> The *Peña-Rodriguez* decision relied substantially on these words of caution when determining that the racial biases of H.C. were so severe that Peña-Rodriguez’s constitutional rights had been violated.

The decision in *Peña-Rodriguez* was also based on the need to “purge racial prejudice[s] from the administration of justice.”<sup>74</sup> Justice Kennedy spent a significant portion of the opinion reiterating that the purpose of the Fourteenth Amendment was to “eliminate racial discrimination emanating from official sources in the States.”<sup>75</sup> The *Peña-Rodriguez* opinion further discusses previous ways the Court has interpreted the Fourteenth Amendment to protect the rights of defendants in the justice system. From ruling it unconstitutional to prohibit the exclusion of jurors on the basis of race, to allowing defendants to ask questions about racial bias during voir dire, the Court has a demonstrated history

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69. *Id.* at \_\_\_, 137 S. Ct. at 866.

70. *See id.* at \_\_\_, 137 S. Ct. at 866 (discussing the proceedings in *Tanner v. United States*, 483 U.S. 107 (1987)).

71. 483 U.S. at 120.

72. 574 U.S. \_\_\_, \_\_\_, 135 S. Ct. 521, 529 (2014). The case involved a civil action for negligence. The plaintiff, Warger, sought damages against Shauers for injuries sustained in a car accident. After the jury returned a verdict in favor of Shauers, it was revealed that the jury foreperson had revealed during deliberations that her daughter would have been at fault in a fatal car accident had there been a lawsuit. Warger brought suit alleging that the juror had lied about her impartiality. *See id.* at \_\_\_, 135 S. Ct. at 524–25.

73. *Id.* at \_\_\_, 135 S. Ct. at 529 n.3.

74. *Peña-Rodriguez*, 580 U.S. at \_\_\_, 137 S. Ct. at 867.

75. *See, e.g., id.* at \_\_\_, 137 S. Ct. at 867 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

of ensuring that a criminal defendant is protected against instances of race or color prejudice when it comes to the jury.<sup>76</sup>

The majority distinguished *Peña-Rodriguez* from its past cases upholding the no-impeachment rule and its decisions seeking to eliminate racial bias by stating that racial biases undermine the criminal justice system in a more severe way than instances of jurors being intoxicated or not being completely truthful in voir dire.<sup>77</sup> Although attempting to address every nuanced difference in jury deliberations would subject every jury trial to "unrelenting scrutiny," addressing instances of racial bias would not surmount to such scrutiny.<sup>78</sup> Rather, the failure to address instances of racial bias would risk "systemic injury to the administration of justice," and therefore, must be addressed.<sup>79</sup> The Court justified the new racial-bias exception by saying that its purpose is not to perfect the jury system, but is instead to further advance the goal of the legal system treating all defendants equally under the law.<sup>80</sup>

The official holding of *Peña-Rodriguez v. Colorado* is:

[W]here 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 in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.<sup>81</sup>

Despite its holding, the Court made clear that not every off-hand comment will give rise to the level of racial bias that justifies removing the bar on no-impeachment evidence.<sup>82</sup> Rather, the Court held that for an inquiry to proceed, there must be a showing that statements were made with such an overt racial bias that they cast "serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."<sup>83</sup> In other words,

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76. *Id.* at \_\_\_, 137 S. Ct. at 867-68 (citing *Strauder v. West Virginia*, 100 U.S. 303, 305-09 (1880) (holding that prohibiting jurors on the basis of race violates the Fourteenth Amendment); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (holding that based on the particular facts of the case, the Fourteenth Amendment requires that the jurors are interrogated on the issue of racial bias)).

77. *Id.* at \_\_\_, 137 S. Ct. at 868.

78. *Id.* at \_\_\_, 137 S. Ct. at 868.

79. *Id.* at \_\_\_, 137 S. Ct. at 868.

80. *Id.* at \_\_\_, 137 S. Ct. at 868.

81. *Id.* at \_\_\_, 137 S. Ct. at 869.

82. *Id.* at \_\_\_, 137 S. Ct. at 869.

83. *Id.* at \_\_\_, 137 S. Ct. at 869 (emphasis added).

for there to be a ruling as to whether or not Rule 606(b)'s exception applies, there needs to be a showing that the racial bias was "a significant motivating factor in the juror's vote to convict."<sup>84</sup> Rather than setting a clear standard for what would qualify as a "significant motivating factor," the Court assigned this distinction to the trial courts where there would be "substantial discretion" in light of all of the circumstances.<sup>85</sup>

The failure of the Court to set a clear precedent about what is considered a "significant motivating factor" is problematic and will lead to inconsistent results unless other safeguards to prevent racially motivated jury verdicts are implemented.

#### IV. ADDITIONAL SAFEGUARDS TO PROTECT THE RIGHT TO A FAIR TRIAL

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a "public trial, by an impartial jury."<sup>86</sup> As defined, an impartial jury is one in which the members of the jury set aside their own personal beliefs and decide the case based solely on the evidence presented at trial.<sup>87</sup> The holding in *Peña-Rodriguez* added further protection to this right by allowing for a bar on no-impeachment evidence in cases where significant racial bias impacted the verdict.<sup>88</sup> Although a substantial step towards guaranteeing the Sixth Amendment protection, the broad discretion trial courts are now afforded under *Peña-Rodriguez* in making their determination if racial biases occurred in a jury proceeding will cause widespread discrepancies in application of the exception across the country. Rather than relying on the *possibility* that the exception will be applied, the Supreme Court should have established more specific safeguards that minimize the risk of racial bias ever being a factor in the jury deliberation process.

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84. *Id.* at \_\_, 137 S. Ct. at 869.

85. *Id.* at \_\_, 137 S. Ct. at 869.

86. U.S. CONST. amend. VI (emphasis added).

87. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

88. *See generally Peña-Rodriguez*, 580 U.S. at \_\_, 137 S. Ct. at 869 (holding that where a juror makes a clear statement indicating that he or she relied on racial stereotypes to convict a criminal defendant, the no-impeachment rule must give way in order to permit the trial court to consider the evidence of the juror's statement).

The first change the Supreme Court should have implemented was reversing their 1981 decision in *Rosales-Lopez v. United States*.<sup>89</sup> In *Rosales-Lopez*, the Court held that defendants are only able to question prospective jurors about racial biases when there are "special circumstances."<sup>90</sup> The Court elaborated that "special circumstances" exist only when racial issues are "inextricably bound up with the conduct of the trial" and when there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case."<sup>91</sup> The Court based its opinion on the precedent it set in *Ristaino v. Ross*, which held there is "no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups."<sup>92</sup> The problem with the Court's reasoning in *Rosales-Lopez* and *Ristaino* is that it is more important to do a racial-bias examination of prospective jurors when race is not an important issue in the case.

According to research, race-relevant voir dire is an essential component of jury trials.<sup>93</sup> Additionally, the research indicates that jurors are less likely to consider the possibility of their racial bias in instances when race is an obvious issue in a case.<sup>94</sup> Put another way, if issues of race are obvious in a case, there is less of a necessity to do a race-relevant voir dire.<sup>95</sup> The reason why there is less of a need to do a race-relevant voir dire in racially charged trials is credited to jurors not wanting to seem prejudiced.<sup>96</sup> However, when race was not at the forefront of the case, there was

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89. 451 U.S. 182 (1981). The case involved a Mexican defendant who was arrested for his participation in bringing three Mexican aliens into the United States illegally. *Id.* at 184. Prior to trial, the defendant submitted the following questions to be used at voir dire: "Would you consider the race or Mexican descent of [defendant] in your evaluation of this case? How would it affect you?" *Id.* at 185. The trial judge refused to ask the requested questions and instead asked generally if the jurors could remain impartial. *Id.* at 186.

90. *Id.* at 189. In its opinion, the Court provided an example of what "special circumstances" might be for purposes of questioning about racial biases. The most common example would be when the defendant is accused of a violent crime and the defendant and victim are "members of different racial or ethnic groups." *Id.* at 192.

91. *Id.* at 189–90 (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 (1976)).

92. *See id.* at 190 (citing *Ristaino*, 424 U.S. at 596 n.8).

93. *See* Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. L. REV. 180, 182 (2015).

94. *See id.*

95. *Id.* A 1997 study found that when mock jurors are given a trial scenario with salient racial issues, prejudices among jurors of a different race are unlikely to come to light. For example, when white mock jurors were given facts substantially similar to the O.J. Simpson case—the most infamous race-salient trial in United States history—there was no evidence of racism. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 210 (2001).

96. *See* Sommers & Ellsworth, *supra* note 95, at 220.

less motivation to avoid prejudice, and studies have indicated that jurors will become more racially biased.<sup>97</sup> Given this evidence, the Court's decision in *Rosales-Lopez* to forbid questioning prospective jury members about potential racial biases is misguided. Until the Supreme Court overturns its opinion in *Rosales-Lopez*, there cannot be adequate protection against the influence of racial bias in jury verdicts.

The need to overturn *Rosales-Lopez* is further supported by research that shows the benefits of questioning prospective jury members about race during voir dire. The research asserts that when the race of the defendant is the only "racial dimension" of the case, talking about race during voir dire would be beneficial.<sup>98</sup> Although the need to discuss race during voir dire is great, the logistics of such a discussion can at times be problematic. When people are asked directly if they are racist, they most likely are going to deny it because "bigoted jurors will rarely admit they hold socially and legally repugnant views."<sup>99</sup> Moreover, an individual may not be cognizant of the fact that he or she possesses certain biases and is, therefore, unable to answer truthfully during voir dire. There have been several studies that demonstrate bias is largely unconscious and often in conflict with an individual's conscious beliefs.<sup>100</sup> Therefore, even though one may genuinely believe that all people should be treated equally, regardless of race, and answer as such during voir dire, he or she may have an implicit preference for another race.<sup>101</sup>

Despite the prevalence of racial bias, social scientists have found that by asking certain questions during voir dire, parties are able to uncover any biases that may arise during trial. Rather than asking directly if a prospective juror is racially prejudiced, the Court should allow for attorneys to ask targeted questions with the purpose of uncovering hidden biases. As a general rule, open-ended questions that encourage reflection are better than simple closed-ended questions that encourage prospective jurors

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97. See *id.*

98. See Joy, *supra* note 93, at 182.

99. Brief for Petitioner at 14, *Peña-Rodriguez v. Colorado*, 580 U.S. \_\_\_, 137 S. Ct. 855 (2017) (No. 15-606) [hereinafter Brief for Petitioner].

100. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 860 (2015) (citing Laurie A. Rudman et al., "Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001)).

101. See *id.*

to answer in a politically correct manner.<sup>102</sup> Moreover, open-ended questions allow for the attorney to learn more information about a particular juror than a simple “yes” or “no” question.<sup>103</sup> For instance, open-ended questions allow for the attorney to gauge whether the prospective juror is willing to overcome their implicit biases for the sake of the trial.<sup>104</sup>

It is suggested that rather than asking a juror, “How do you feel about racism?” better results would yield from the attorney asking, “Describe [your] most significant interaction(s) with a member of another race.”<sup>105</sup> The importance of asking about past interactions is that the “best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past.”<sup>106</sup> Allowing attorneys to question prospective jurors about racial bias in any situation would help to eliminate racial biases from ever being a factor in the deliberation process. To best uphold the promise of the Sixth Amendment’s right to an impartial jury, the Court should have reversed their position in *Rosales-Lopez* and allowed for questions of racial bias to always be admissible, regardless of whether or not there are “obvious” special circumstances.

In addition to overturning the decision in *Rosales-Lopez*, the Court should have created a unified system for inquiring about racial bias in jury proceedings prior to the issuing of a verdict. Using Massachusetts and Minnesota as guides, the Court should have put in place a unified set of procedures that would enable trial courts to clearly ascertain if racial bias played a role in the jury’s verdict. Creating unified procedures would help to minimize the disparities between different trial courts in making racial bias determinations that would warrant application of the no-impeachment rule exception.

The first procedure the Court should have set in place would address attorney-juror conduct. The Court should have adopted the rule several other states have already adopted that forbids

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102. See *id.* at 867.

103. See *id.* at 868.

104. *Id.*

105. *Id.* (quoting Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U.J. LEGIS. & PUB. POL’Y 999, 1034 (2013)).

106. Rapping, *supra* note 105, at 1034 (quoting Ira Mickenberg, N.C. OFFICE OF INDIGENT DEF. SERVS., VOIR DIRE AND JURY SELECTION 6 (2011), <http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf>).

lawyers from engaging in post-verdict communications with jurors for purposes of racial bias information *unless* the juror has expressed a desire to communicate with the lawyer.<sup>107</sup> Currently, the ABA Model Rules of Professional Conduct allow for attorneys or their agent to approach jurors after the trial to learn information.<sup>108</sup> The only ethical limits placed on these conversations are that the lawyer and/or their agent must expressly identify themselves to the juror, and if the juror refuses to speak to the lawyer, that decision must be respected.<sup>109</sup> The Model Rules further emphasize the importance of attorney-juror communication by saying such communication allows for “extremely informative feedback about all aspects of the presentation of the case,” as well as serves as an important tool for self-education.<sup>110</sup>

The Model Rules regarding communications between attorneys and jurors need to be reined in when it comes to inquiries about the influence of race during deliberations. Implementing such a rule would speak to the concerns of some of the opponents of the no-impeachment rule, mainly that of finality.<sup>111</sup> The State of Colorado argued in *Peña-Rodriguez* that allowing for allegations of racial bias would severely delay criminal proceedings.<sup>112</sup> Using the facts of *Peña-Rodriguez*, seven months passed between the issuing of the verdict and the final resolution of the claim.<sup>113</sup> Opponents fear that allowing inquiries into the influence of racial bias in deliberations would create a systemic delay across the board in both criminal and civil trials.<sup>114</sup> Allowing a bar on attorneys from approaching jurors about such an influence would help to minimize the delay of cases. Explained in another way, inquiries into racial bias allegations would only arise when jurors themselves came forward, rather than attorneys deliberately looking to find

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107. See, e.g., MASS. RULES PROF'L CONDUCT r. 3.5(c)(2); *Olberg v. Minneapolis Gas Co.*, 191 N.W.2d 418, 424–25 (Minn. 1971) (holding that “[a] defeated litigant’s attorney should never interrogate a juror”).

108. See MODEL RULES OF PROF'L CONDUCT r. 3.5(c) (AM. BAR ASS'N 2016).

109. *Id.* r. 3.5(c), cmt. 3.

110. J. Vincent Aprile II, *Post-Trial Contact with Jurors: Ethical Dimensions*, 19 CRIM. JUST. MAG. (2004) (citing PROSECUTION FUNCTION Standard 3-5.4(c) (AM. BAR ASS'N 1992); DEF. FUNCTION Standard 4-7.3(c) (AM. BAR ASS'N 1992)), [http://www.americanbar.org/publications/criminal\\_justice\\_magazine\\_home/crimjust\\_cjmag\\_19\\_1\\_cj matters.html](http://www.americanbar.org/publications/criminal_justice_magazine_home/crimjust_cjmag_19_1_cj matters.html).

111. See Brief for Respondent at 14, *Peña-Rodriguez v. Colorado*, 580 U.S. \_\_\_, 137 S. Ct. 855 (2017) (No. 15-606).

112. See *id.* at 46.

113. See *id.*

114. See *id.*

such allegations. The same thought process would also go towards combatting fears of juror harassment. Inquiries would only be made when and if one of the jurors came forward.

A similar rule has already been implemented in several jurisdictions in a variety of ways. For example, this rule, which prohibits lawyers from engaging in post-verdict communications with jurors for purposes of obtaining racial bias information, is part of Massachusetts's code of ethics, while Minnesota's rule was derived from common law.<sup>115</sup> However, Minnesota goes further than Massachusetts by encouraging trial courts to deny petitions for a hearing if the defeated party's counsel obtained information from jurors in violation of the rule.<sup>116</sup> In addition, jurisdictions that have adopted rules prohibiting attorneys from approaching jurors about deliberations communicate those rules to the jurors before and after trial.<sup>117</sup> In other words, jurors are explicitly told that they are under no obligation to disclose anything about what occurred during deliberations. Implementation of this rule in every jurisdiction would help to combat the fear of juror harassment and guard against any delays in finalizing the case.

The third change the Court should have set in place in *Peña-Rodriguez* to help prevent racial bias in deliberations addresses the jury deliberation process directly. In order to guard against racial bias, the Court should require juries to articulate their reasoning for issuing a guilty verdict. Prior to entering the verdict into record, the judge should review the jury's reasoning for the limited purpose of evaluating if improper racial bias affected the decision. If the judge determines that there was no racial bias behind the verdict, the verdict should be entered. This proposal, although a major shift in how American juries currently operate, is not a novel idea. Courts in Europe have long recognized that juries should give reasons for their judgments. Spain, Switzerland, Belgium, and the European Court of Human Rights ("ECtHR") all require juries to give reasons for their verdicts.<sup>118</sup>

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115. Brief of Amici Curiae Retired Judges in Support of Petition for a Writ of Certiorari at 4–5, *Peña-Rodriguez v. Colorado*, 580 U.S. \_\_\_, 137 S. Ct. 855 (2017) (No. 15-606).

116. *See id.* at 5.

117. *See id.* at 4.

118. *See generally* Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613 (2011) (discussing various jurisdictions' requirement for juries giving reasons for their verdicts).

In 2010, the Grand Chamber of the ECtHR held in one of its opinions that for a fair trial to be satisfied, “the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.”<sup>119</sup> This idea has been interpreted in different ways depending on the jurisdiction. For instance, in Switzerland, the jury must state “the reasons for taking into account or disregarding the main items of evidence and the legal reasons for the jury’s verdict.”<sup>120</sup> Spain, on the other hand, requires juries to list in the first paragraph “the propositions or questions it has found to be proved,” and the last paragraph must provide a list of evidence that the jury used in making their decision.<sup>121</sup> Furthermore, the jury must “articulate a ‘succinct explanation of the reasons why they have declared, or refused to declare, certain facts as having been proved.’”<sup>122</sup> Even though the approaches differ from jurisdiction to jurisdiction, there is a common understanding that jurors need to justify their verdicts to ensure that a fair verdict was reached. In these jurisdictions, if a satisfactory reason is not provided for why a defendant was convicted, the judge has the authority to set aside the verdict.<sup>123</sup> All of these rather stringent requirements placed on juries ensure that the defendant is convicted because of the evidence presented rather than a juror’s outside perspective.

American juries should be required to articulate their verdicts in a fashion substantially similar to the juries in Switzerland, Spain, and Belgium; however, the use of these articulated responses should differ. The need to articulate reasoning for reaching a particular verdict is necessary for the reasons discussed above and also because having jurors document the reasoning behind their verdict would allow the jurors to review their decision with a critical eye before making it public.<sup>124</sup> Such documentation could allow the jurors to recognize the implicit bias they used in crafting their decision and enable them to change their decision.<sup>125</sup>

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119. *Id.* at 625 (quoting *Taxquet v. Belgium*, 2010-VI Eur. Ct. H.R. 26).

120. *Id.* at 627 (quoting *Taxquet*, 2010-VI Eur. Ct. H.R. 18).

121. *Id.* at 629 (citing L.O.T.J., B.O.E. n.122, 1995 at art. 61(1)(d)).

122. *Id.* (citing L.O.T.J., B.O.E. n.122, 1995 at art. 61(1)(d)).

123. *See id.* at 624.

124. NAT’L CTR. FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 11 (2012), <http://www.alaskabar.org/servlet/download?id=3752>.

125. *See id.*

Requiring juries to think through their decisions will produce more accurate verdicts. Rather than a judge setting aside a verdict because he or she was not satisfied with the reasons for the verdict, the judge should inquire whether racial bias played a significant role in the decision. As described previously, American juries have broad liberties in how they reach their verdicts, and those decisions are meant to be kept confidential. However, relying on the holding in *Peña-Rodriguez*, verdicts that were reached based on racial biases are not constitutionally protected, and courts should be able to set aside those verdicts before they are ever formally entered.

Applying this proposed rule to the facts of *Peña-Rodriguez*, if the jurors were required to explain their guilty verdict, they would likely write that they did not believe the defendant's alibi witness because he was "an illegal," even though evidence presented supported that the witness was a lawful United States citizen.<sup>126</sup> Communicating to the court that this was one of the reasons for conviction would have alerted the trial judge that the verdict may have been influenced by racial bias and, an inquiry could have been made. Discovering the influence of racial bias prior to entering the verdict would have eliminated the need for the implementation of the no-impeachment exception, and there would be no risk as to the unequal application of the exception among differing trial courts.

### CONCLUSION

The creation of a racial bias exception to the no-impeachment rule was "necessary to prevent a systemic loss of confidence in jury verdicts," as Justice Kennedy wrote in *Peña-Rodriguez v. Colorado*.<sup>127</sup> The ability of jurors to now testify about the influence race had during deliberations is of vital importance to ensure that the Constitution's promise of a fair and impartial trial is honored. However, using the words of Justice Kennedy, "The Nation must continue to make strides to overcome race-based discrimination."<sup>128</sup> The holding in *Peña-Rodriguez* did not go far enough to protect defendants from race playing a role in their convictions. Allowing trial courts to make case-by-case determinations as to

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126. Brief for Petitioner, *supra* note 99, at 8.

127. 580 U.S. \_\_\_, \_\_\_, 137 S. Ct. 855, 869 (2017).

128. *Id.* at \_\_\_, 137 S. Ct. at 871.

whether racial bias occurred will lead to wide-spread disparities in the application of the no-impeachment rule exception, and instances of racial bias will inevitably creep into jury verdicts. In addition to allowing for a racial bias exception, the Court should have also overturned *Rosales-Lopez* and held that questions about racial biases are always allowed during voir dire. Restricting parties from inquiring about any possible racial biases prospective jurors might have caused racial biases to be a factor in deliberations. Allowing parties to question jurors about racial biases in any case, regardless of the presence of special circumstances, will reduce the possibility that the no-impeachment exception would ever need to be applied. Moreover, in order to address the concerns that opponents have to the new exception, the Court should have clearly laid out a set of procedures to protect jurors from any possible harassment, avoiding possible delay in the trial process. Finally, the Court should have issued a requirement that jurors must explain their reasoning for convicting an individual. These explanations would only be viewed by the judge for the purposes of determining if race played a factor in the verdict. The implementation of these three policies would create a systematic way for courts to detect racial biases so that each criminal defendant receives the fair trial to which he or she is entitled.

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