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## **Pena-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War of Racial Bias**

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**Pena-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War of Racial Bias**

*PEÑA-RODRIGUEZ V. COLORADO: A CRITICAL, BUT  
INCOMPLETE, STEP IN THE NEVER-ENDING WAR ON  
RACIAL BIAS*

ABSTRACT

The realization of America's oft-cited promise of equality and justice for all has long been inhibited by the pervasive racism that permeates all aspects of American life. For centuries, courts and legislatures have worked to eliminate racial bias and its crippling effects from the nation's laws and courts. However, one place where racial bias has largely been left to flourish unchecked is within the realm of juries and their deliberations. Until quite recently, jurors nationwide were free to convict criminal defendants with near impunity based solely on prejudicial notions about who a defendant is because of the color of the defendant's skin.

Since the nation's earliest days, a legal principle called the "no-impeachment rule" largely barred using the content of jury deliberations to challenge a criminal conviction. In *Peña-Rodriguez v. Colorado*, the Supreme Court finally held that when a criminal defendant's guilty verdict is likely the result of a juror's overt racism, the Sixth Amendment supersedes the no-impeachment rule and allows defendants to challenge the validity of their guilty verdicts using that juror's racist comments. This was a groundbreaking and long overdue ruling. But the ruling was also reserved, modest, and incomplete.

This Case Comment first argues that the Supreme Court correctly decided *Peña-Rodriguez*. Statistics and the experiences of people of color show that racial bias within the criminal justice system is a massive, towering, and disruptive force. These same things also show that existing safeguards designed to protect criminal defendants from racism are exceptionally ineffective and that the critical importance of attacking racism from all angles ranks paramount to the policy goals underlying a strict no-impeachment rule. However, this Comment also argues that the Court's decision in *Peña-Rodriguez* will be largely meaningless without a corresponding mechanism that puts jurors on notice about the consequences of using racism to convict criminal defendants. To best maximize the impact of the no-impeachment rule's new racial bias exception, the exception should be coupled with jury instructions that let all within the courtroom know that basing a criminal conviction on racism is both forbidden and grounds for challenging a verdict.

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## INTRODUCTION

Three black defendants are convicted of drug trafficking.<sup>1</sup> Days after the conviction is entered, a juror comes forward with shocking news—while carpooling to the trial, a fellow juror remarked that “[t]he niggers<sup>2</sup> are guilty” and “[a]ll the niggers should hang.”<sup>3</sup> The trial court is aware of the allegations.<sup>4</sup> But the conviction stands.<sup>5</sup> A man of Middle Eastern descent is convicted on money laundering and wire fraud charges.<sup>6</sup> A week later, a juror runs into one of the lawyers at the grocery store and remarks that, while deliberating, another juror argued that the defendants were guilty because “[a]ll Arabs are liars, are thieves.”<sup>7</sup> This accusation too is

1. *United States v. Henley*, 238 F.3d 1111, 1112, 1119 (9th Cir. 2001).

2. While drafting this Comment, I went back and forth on whether writing out the racial slurs used by these jurors added anything of value to my work or whether including the actual slurs only added hurt without improving the substance. But one of the reasons that the United States still has such a large problem with racism is our collective refusal to have meaningful conversations about race because those conversations make us uncomfortable. Including the word “nigger” in this Comment makes me uncomfortable. And that’s precisely why I included it. If we, as a nation, truly want to eliminate racism, we must be willing to engage in conversations that make us uncomfortable. It would be hypocritical of me to not do the same here.

3. *Henley*, 238 F.3d at 1113–14.

4. *Id.* at 1113.

5. *Id.* at 1114.

6. *United States v. Shalhout*, 507 F. App’x 201, 202 (3d Cir. 2012).

7. *Id.* at 203.

brought to the trial court's attention.<sup>8</sup> The conviction stands.<sup>9</sup> A Hispanic defendant is convicted of sexual harassment.<sup>10</sup> Minutes later, a juror informs defense counsel that during jury deliberations, a juror stated that Mexican men "take whatever they want" and "believe they [can] do whatever they want[] with women."<sup>11</sup> Defense counsel informs the trial court about this alleged blatant racism.<sup>12</sup> Yet still the conviction stands.<sup>13</sup>

To the lay person, and even many lawyers, it would seem that statements as racist as these, made by a juror while deciding a defendant's fate, would be automatic grounds for reversal.<sup>14</sup> How could jurors possibly make such biased remarks about criminal defendants and not violate the right to an impartial jury?<sup>15</sup> But until March 2017, a juror could do exactly that without violating the Constitution in the slightest.<sup>16</sup>

Throughout history, the jury has been referred to as "a tangible implementation of the principle that the law comes from the people";<sup>17</sup> "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution";<sup>18</sup> and "[the most] gratuitous public school ever open, in which every juror learns to exercise [his or her] rights . . . and becomes practically acquainted" with the nation's laws.<sup>19</sup> But what all those glowing quotes gloss over is that, despite the constitutional guarantees of fairness and impartiality,<sup>20</sup> the system of trial by jury has never been fair or impartial, particularly when it comes to race.<sup>21</sup> And for more than 230 years, criminal verdicts that resulted from a juror's expressed racism could not be challenged because of a legal principle known as the no-impeachment rule.<sup>22</sup>

In *Peña-Rodriguez v. Colorado*,<sup>23</sup> the Supreme Court finally held that the Sixth Amendment mandates an exception to the no-impeachment rule when a criminal verdict is found to have been based strongly on a juror's racist beliefs.<sup>24</sup> But as monumental and critically important as this decision

8. *Id.*

9. *Id.* at 203–04.

10. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017).

11. *Id.* at 861–62.

12. *Id.*

13. *Id.* at 862.

14. Mark Joseph Stern, *Read Anthony Kennedy's Stirring Denunciation of Racially Biased Juries*, SLATE: THE SLATEST (Mar. 6, 2017, 2:49 PM), [http://www.slate.com/blogs/the\\_slatest/2017/03/06/read\\_anthony\\_kennedy\\_s\\_stirring\\_opinion\\_in\\_pe\\_a\\_rodriguez\\_v\\_colorado.html](http://www.slate.com/blogs/the_slatest/2017/03/06/read_anthony_kennedy_s_stirring_opinion_in_pe_a_rodriguez_v_colorado.html).

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

16. See *Peña-Rodriguez*, 137 S. Ct. at 855, 869.

17. *Id.* at 860.

18. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), <https://founders.archives.gov/documents/Jefferson/01-15-02-0259>.

19. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 315 (Henry Reeve trans., The Pa. State Univ. 2002) (1835).

20. U.S. CONST. amend. VI.

21. See *Peña-Rodriguez*, 137 S. Ct. at 868–69.

22. See *id.* at 863, 869.

23. 137 S. Ct. 855.

24. *Id.* at 869.

is, it may be just another ineffective step in the war on racial bias if the decision is not coupled with efforts to put jurors on notice that there is no place for racism in the black box.

The United States has a damaging and enduring history with racism that continues to prevent whole fulfillment of the nation's guarantees of a fair trial and due process for all.<sup>25</sup> Based strongly on that history, this Comment will argue that *Peña-Rodriguez* was correctly, if only modestly, decided. Part I of this Comment will review the legal background of the no-impeachment rule and its limited exceptions. Part II will examine and summarize the Court's decision in *Peña-Rodriguez*. Part III will discuss why a racial bias exception to the no-impeachment rule is necessary and suggest one way to maximize the exception's impact. Part III's analysis will proceed in several sections. It first discusses the entrenched racism that exists and flourishes throughout the criminal justice system. It then examines why existing safeguards against racial bias are ineffective and why the public policy behind a strict no-impeachment rule is misplaced in the face of overt racism. Last, it provides a set of model jury instructions that could be utilized by courts to deter juror racial bias and encourage jurors to report such bias when it seeps into their deliberations.

## I. BACKGROUND

The right to a fair and impartial jury is a critical piece of the U.S. criminal justice system.<sup>26</sup> It is a right that has long been considered "a fundamental safeguard of individual liberty" and a right that was deemed important enough by the framers to be one of a limited number enshrined in the Constitution.<sup>27</sup> And yet, for more than two centuries, there was no uniform legal remedy available to criminal defendants whose convictions resulted from a juror's racial bias.<sup>28</sup> This contradiction and grave injustice stemmed from an eighteenth century legal principle called the no-impeachment rule.<sup>29</sup>

The original no-impeachment rule holds that after a verdict has been entered, juror testimony about a jury's deliberations cannot be used to challenge the validity of a final verdict, even if that testimony alleges grave misconduct or blatant racial bias on the part of a juror.<sup>30</sup> This rule first emerged in the 1785 English case of *Vaise v. Delaval*,<sup>31</sup> where an English court refused to allow a verdict to be challenged based on juror affidavits

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25. See *id.* at 867–68.

26. *Id.* at 860.

27. *Id.*

28. See *id.* at 867.

29. *Id.* at 861.

30. See *Impeachment of Verdict*, BLACK'S LAW DICTIONARY (10th ed. 2014); Stern, *supra* note 14.

31. (1785) 99 Eng. Rep. 944 (KB).

alleging that the verdict was determined through a game of chance.<sup>32</sup> This ruling stemmed from a strong belief that jurors were not competent to testify about their own verdicts and deliberations because any testimony about juror misconduct that came from a juror would be unreliable.<sup>33</sup>

Following the ruling in *Vaise*, a strict ban on using any juror testimony to challenge the validity of jury verdicts took hold first in England and then in the United States.<sup>34</sup> However, by the mid-nineteenth century, various state and federal courts within the United States began to modify the *Vaise* rule's ultrastrict bar on postverdict testimony.<sup>35</sup> In 1852, in *United States v. Reid*,<sup>36</sup> the Supreme Court barred a verdict from being challenged after receiving juror testimony that a newspaper was sent to and read by a juror.<sup>37</sup> Yet in dicta the Court noted that there may be cases "in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice."<sup>38</sup> Less than twenty years later, in a direct rebuke of the English no-impeachment rule, the Supreme Court of Iowa held in *Wright v. Illinois & Mississippi Telegraph Co.*<sup>39</sup> that juror affidavits alleging that a damages award was calculated by averaging the individual suggestions of the jurors could be used to challenge the validity of the final verdict.<sup>40</sup>

The decision in *Wright* quickly became known as the "Iowa Rule."<sup>41</sup> Under the Iowa Rule, while jurors could not testify about "subjective beliefs, thoughts, or motives," they could testify about "objective facts and events" that occurred during deliberations.<sup>42</sup> The nation took a strong liking to the *Wright* approach, with a dozen states and several federal district

32. Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 880–81 (2009) (describing the facts and holding of *Vaise*, 99 Eng. Rep. at 944).

33. Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513 (1988); Miller, *supra* note 32. Before *Vaise*, courts in England had occasionally and very cautiously allowed post-trial juror testimony to challenge the validity of verdicts. Miller, *supra* note 32. The ruling in *Vaise* eliminated that practice. *Id.*

34. Miller, *supra* note 32, at 881.

35. *Id.* at 881–82.

36. 53 U.S. 361 (1851), *overruled in part by* *Rosen v. United States*, 245 U.S. 467 (1918).

37. *Id.* at 361–62, 367. In *Reid*, the newspaper in question contained a report about the evidence in the case that the juror was deciding. *Id.* at 362. According to the juror, he only read the report to refresh his memory and the report had "no influence on his verdict" as "he had made up his mind before he read [the paper]." *Id.*

38. *Id.* at 366.

39. 20 Iowa 195 (1866).

40. Miller, *supra* note 32, at 881–82 (describing the facts and holding of *Wright*, 20 Iowa at 197, 210, 212, 215).

41. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

42. *Id.* The Iowa Rule as stated in *Wright* expressly allowed juror testimony to show that "a juror was approached by a party"; a verdict was reached by "the drawing of lots"; the verdict was a quotient verdict; and extraneous facts not in evidence were presented to the jury. Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 172 (2011) (citing *Wright*, 20 Iowa at 210). Not admissible was "any matter which does not essentially inhere in the verdict itself," including testimony that a juror did not agree with the verdict, had misunderstood the jury instructions, or was "unduly influenced" by other jurors' statements. *Id.* (quoting

courts adopting Iowa's loosened interpretation of the no-impeachment rule.<sup>43</sup> Another modification to the no-impeachment rule, coined as the "federal approach," emerged in the early twentieth century.<sup>44</sup> Under the federal approach, jurors were only allowed to testify about events that were "extraneous to the deliberative process" such as "reliance on outside evidence"<sup>45</sup> or personal investigation of the facts.<sup>46</sup> All testimony about deliberations, even if that testimony was about objective facts and events, was barred.<sup>47</sup>

The Supreme Court's early decisions failed to establish a clear preference for either version of the no-impeachment rule.<sup>48</sup> But in 1915, the Court explicitly rejected the Iowa Rule, holding in *McDonald v. Pless*<sup>49</sup> that "juror testimony about objective events in the jury room" could not be used to challenge a verdict.<sup>50</sup> However, the Court again qualified its ruling by reiterating that in the "gravest and most important cases" it may be impossible to exclude juror testimony "without 'violating the plainest principles of justice.'"<sup>51</sup>

The no-impeachment rule's development peaked in 1975 when Congress enacted the Federal Rules of Evidence.<sup>52</sup> Initially, the House of Representatives sought to adopt a no-impeachment rule similar to the Iowa Rule, fearing that a strict rule would promote injustice.<sup>53</sup> But the Senate disagreed due to concerns that adopting the Iowa Rule would destroy the

*Wright*, 20 Iowa at 210). "The line the court drew, essentially, was between evidence of 'the mental processes of jurors,' which was inadmissible, and of 'overt acts,' which was admissible." *Id.* (quoting Jack Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849, 851 (1962)).

43. Crump, *supra* note 33, at 516 n.51.

44. See *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014).

45. Outside evidence under the federal approach included newspapers, dictionaries, and statements made to or in the presence of jurors about facts not in evidence. See *Peña-Rodriguez*, 137 S. Ct. at 863; 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6071, 432-33 (2d ed. 2007).

46. *Peña-Rodriguez*, 137 S. Ct. at 863.

47. *Tanner v. United States*, 483 U.S. 107, 125 (1987). Under the federal approach, jurors were deemed incompetent to testify about "a compromise verdict, a quotient verdict, speculation as to insurance coverage, misinterpretation of instructions, misuse of evidence, mistake in returning a verdict, and misinterpretation of the guilty plea." 27 WRIGHT & GOLD, *supra* note 45.

48. Sometimes the Court endorsed the Iowa Rule. See *Mattox v. United States*, 146 U.S. 140, 148-49 (1892) (holding that juror testimony alleging that a prejudicial newspaper and a bailiff's comments about the defendant had influenced the jury could be admitted to challenge the verdict). Other times, the Court held more narrowly that juror testimony should rarely be admissible to challenge a verdict. See *United States v. Reid*, 53 U.S. 361, 366 (1851).

49. 238 U.S. 264 (1915).

50. *Peña-Rodriguez*, 137 S. Ct. at 864 (summarizing the facts of *McDonald*, wherein the Court held that evidence of a quotient verdict was inadmissible).

51. *Id.* (quoting *McDonald*, 238 U.S. at 269).

52. *Id.*

53. Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 290 (1969) ("The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. . . . [S]imply putting verdicts beyond effective reach can only promote irregularity and injustice."); Miller, *supra* note 32, at 887.



confidentiality of deliberations and encourage litigants to harass jurors.<sup>54</sup> Instead, the Senate proposed a narrower rule similar to the federal approach.<sup>55</sup> The Senate's version won and was signed into law becoming Federal Rule of Evidence 606(b).<sup>56</sup>

Rule 606(b) created a strict no-impeachment rule with very few exceptions.<sup>57</sup> Under Rule 606(b), jurors cannot testify about and the court cannot receive affidavits or evidence on "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror or another juror's vote; or any juror's mental processes concerning the verdict or indictment."<sup>58</sup> This strict bar on postverdict testimony is subject to three narrow exceptions.<sup>59</sup> These three exceptions allow jurors to testify about (1) extraneous prejudicial information, (2) outside influence, and (3) mistakes made in entering the verdict onto the verdict form.<sup>60</sup> Following the federal passage of Rule 606(b), most states followed suit by enacting their own no-impeachment rules that strongly mirrored the exact terms and exceptions of the federal rule.<sup>61</sup>

But something glaring was missing from this new rule. Despite the nation's evinced belief in and insistence on juries rendering fair and impartial verdicts, Rule 606(b) and its state counterparts had completely forgotten to account for allegations of juror racial bias in the text of their no-impeachment rules.<sup>62</sup> The legal precedent surrounding these codified no-impeachment rules also shied away from addressing the question of

54. See Crump, *supra* note 33, at 521 n.86; see also S. REP. NO. 93-1277, at 13-14 (1974), as reprinted in 1974 U.S.C.A.N. 7051, 7060 (quoting *McDonald*, 238 U.S. at 267) ("[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part . . . and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure . . . evidence of facts which might . . . set aside a verdict. If evidence thus secured could be thus used, the result would be to make . . . private deliberation[s] the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."); 117 CONG. REC. 33,645 (1971) (daily ed. Sept. 28, 1999) (statement of Sen. McClellan) ("The mischief in [the House rule] ought to be plain for all to see. . . . Were it possible to overturn a decision because . . . it was not based on precedent, but bias, and this was an issue that could be litigated, it would indeed be brought before the courts. . . . I do not believe it would be possible to conduct trials . . . if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations.").

55. *Peña-Rodriguez*, 137 S. Ct. at 864.

56. *Id.* at 864-65.

57. *Id.*

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

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

60. *Id.* Broadly speaking, Rule 606(b) bars the admission of juror testimony to demonstrate that jurors compromised, misunderstood the law or evidence, were strapped for time, were under the influence of drugs or alcohol, hurled expletives at each other, or threw chairs. THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 48 (5th ed. 2011). In contrast, Rule 606(b) does allow jurors to testify about statements made by bailiffs, prejudicial newspaper stories or unadmitted documents that found their way into the jury room, and whether jurors visited the crime scene or conducted experiments with the exhibits. *Id.*

61. See 27 WRIGHT & GOLD, *supra* note 45, at § 6071; Miller, *supra* note 32, at 890.

62. See 27 WRIGHT & GOLD, *supra* note 45, at § 6071 nn.60-75.

whether Rule 606(b) effectively allowed jury verdicts tainted by racism to stand.<sup>63</sup>

The Supreme Court's initial decisions about Rule 606(b) also failed to address this question.<sup>64</sup> After the rule's enactment, the Supreme Court interpreted its exceptions in two cases, repeatedly holding that Rule 606(b) prohibits challenging verdicts with juror testimony that relates to "the internal, mental processes by which the verdict was reached."<sup>65</sup> In *Tanner v. United States*,<sup>66</sup> the Court barred the use of juror testimony alleging jurors were drunk and high during the trial from challenging the final verdict, holding that voluntarily ingested substances were an internal, not external, influence.<sup>67</sup> And in *Warger v. Shauers*,<sup>68</sup> the Court held that juror testimony alleging that another juror lied during voir dire about improper sympathies towards a party was also barred because personal beliefs are internal, not external, information.<sup>69</sup>

While stating in *Warger* that "[t]here may be cases of juror bias so extreme that . . . the jury trial right has been abridged," the Court neglected to clarify what those cases might be and whether cases involving racist jurors were covered.<sup>70</sup> In fact, the Court almost implied the opposite by repeatedly holding in both *Tanner* and *Warger* that Rule 606(b)'s near-total ban on using juror testimony to challenge verdicts did not violate the Sixth Amendment right to an impartial jury<sup>71</sup> because preexisting safeguards—specifically voir dire and courtroom oversight—sufficiently protect that right.<sup>72</sup> Despite a history of confronting racial animus within the jury,<sup>73</sup> the Supreme Court had little to say about Rule 606(b) and its implied bar on challenging jury verdicts after learning of a juror's alleged racism.<sup>74</sup>

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63. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017). It was generally accepted by state and federal courts that racial bias was neither extraneous information nor outside influence and thus did not fit into one of the three exceptions written into Rule 606(b). See Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 581 (1998). And until the Supreme Court's decision in *Peña-Rodriguez*, the federal Courts of Appeal were split on whether the Constitution required a separate racial bias exception, while only sixteen states recognized such an exception. *Peña-Rodriguez*, 137 S. Ct. at 865.

64. *Peña-Rodriguez*, 137 S. Ct. at 866–67.

65. *Id.* at 866; STEPHEN GOODE & OLIN GUY WELLBORN III, COURTROOM HANDBOOK ON FEDERAL EVIDENCE 371 (2016).

66. 483 U.S. 107 (1987).

67. *Id.* at 116–17, 122.

68. 135 S. Ct. 521 (2014).

69. *Id.* at 529.

70. *Peña-Rodriguez*, 137 S. Ct. at 866–67.

71. U.S. CONST. amend. VI.

72. *Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127.

73. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986) (holding that litigants may not exclude a prospective juror because of race); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (holding that the Constitution sometimes requires defendants be allowed to voir dire on racial bias); *Strauder v. West Virginia*, 100 U.S. 303, 309–10 (1880) (holding that the Fourteenth Amendment prohibits excluding a juror because of his or her race), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

74. See *Peña-Rodriguez*, 137 S. Ct. at 867.

But perhaps it was just waiting for the right case. On April 4, 2016, the Supreme Court agreed to hear *Peña-Rodriguez*,<sup>75</sup> which asked the precise question that the courts had dodged for so many years: whether the no-impeachment rule could constitutionally bar “evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.”<sup>76</sup> The Court’s precedent on Rule 606(b) indicated the answer was likely yes because the Court strongly believed that existing safeguards were enough to guarantee impartiality, even in cases of racial bias.<sup>77</sup> However, the Court’s repeated insistence that in some cases it would be impossible to exclude certain juror testimony without “violating the plainest principles of justice” provided an opening for the Court to find a racial bias exception to the no-impeachment rule.<sup>78</sup> In *Peña-Rodriguez*, the Court finally embraced that dicta.<sup>79</sup>

## II. PEÑA-RODRIGUEZ V. COLORADO

### A. Facts

Miguel Peña-Rodriguez was charged with unlawful sexual contact and harassment after he allegedly sexually assaulted two young girls at a race track.<sup>80</sup> During voir dire, potential jurors were repeatedly asked if they could be impartial and not a single juror indicated any inability to be fair “based on rac[ial] or any other bias.”<sup>81</sup> But immediately following Peña-Rodriguez’s conviction, two jurors contacted defense counsel and alleged that another juror had expressed vitriolic anti-Hispanic sentiment towards Peña-Rodriguez.<sup>82</sup> According to sworn affidavits taken from both jurors,<sup>83</sup> during deliberations Juror H.C. commented that Peña-Rodriguez was guilty because “[Peña-Rodriguez was] Mexican and Mexican men take whatever they want”; “Mexican men had a bravado that caused them to believe they could do whatever they wanted with women”; and “nine times out of ten Mexicans were guilty of being aggressive towards women.”<sup>84</sup>

### B. Procedural History

Based on Juror H.C.’s statements, Peña-Rodriguez moved for a new trial.<sup>85</sup> The Colorado trial court denied the motion, holding that testimony

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75. *Peña-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2016) (granting petition for certiorari of the case of *Peña-Rodriguez v. People*, 350 P.3d 287, 297 (Colo. 2015)).

76. Petition for a Writ of Certiorari at 7–8, *Peña-Rodriguez*, 136 S. Ct. 1513 (No. 15-606), 2015 WL 7008801, at \*7–8.

77. See *Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127.

78. *United States v. Reid*, 53 U.S. 361, 366 (1851), *overruled in part by Rosen v. United States*, 245 U.S. 467 (1918).

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

80. *Id.* at 861.

81. *Id.*

82. *Id.* at 861–62.

83. *Id.* at 861.

84. *Id.* at 862.

85. *Id.*

about jury deliberations is inadmissible under Colorado Rule of Evidence 606(b) which, like its federal counterpart, bars the use of jury testimony to challenge a verdict unless the testimony is about extraneous information, outside influence, or a verdict form mistake.<sup>86</sup> The Colorado Court of Appeals affirmed, stating that Juror H.C.'s statements did not fall within an exception to Rule 606(b) and were inadmissible.<sup>87</sup> The Colorado Supreme Court also affirmed, relying heavily on the Court's decisions in both *Tanner* and *Warger*.<sup>88</sup> The United States Supreme Court then granted certiorari.<sup>89</sup>

### C. *Opinion of the Court*

Justice Kennedy authored the opinion of the Court.<sup>90</sup> Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Justice Kennedy's full opinion.<sup>91</sup> The Court reversed the Colorado Supreme Court's ruling, holding that the Sixth Amendment requires an exception to the no-impeachment rule when jurors overtly rely on racial bias to convict a criminal defendant.<sup>92</sup> Justice Kennedy began by discussing the vital importance of jury trials, as well as the important policy considerations behind the no-impeachment rule, reiterating the Court's long held belief that while juror misconduct is extremely troubling, the jury system would likely not survive efforts to eliminate every instance of improper behavior.<sup>93</sup> However, Justice Kennedy quickly noted that such policy concerns are not paramount in instances of racism, "a familiar and recurring evil that . . . risk[s] systematic injury to the administration of justice."<sup>94</sup>

Justice Kennedy then distinguished *Peña-Rodriguez* from *Tanner* and *Warger*, stating that racial bias within the jury system is different from mere juror misbehavior because the jury is "a criminal defendant's fundamental 'protection of life and liberty against' racial prejudice."<sup>95</sup> Although

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86. *Id.* Colorado Rule of Evidence 606(b) states that

[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

COLO. R. EVID. 606(b).

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

88. *Id.*

89. *Id.* at 862-63.

90. *Id.* at 860.

91. *Id.*

92. *Id.* at 869.

93. *Id.* at 860-61, 868.

94. *Id.* at 868.

95. *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)).

sympathetic to concerns about harming the jury system through efforts to make it infallible, Justice Kennedy dismissed those concerns, stating that efforts to eliminate racism from the black box were not efforts to perfect the jury but instead efforts to ensure that the jury comes “ever closer to the promise of equal treatment under the law.”<sup>96</sup>

The majority opinion then asserted that the existing safeguards cited to so vociferously in *Tanner* and *Warger*<sup>97</sup> are insufficient at preventing racial bias from infiltrating a jury.<sup>98</sup> General questions about a juror’s impartiality may fail to expose specific biases, while more targeted questions can exacerbate existing prejudices without exposing racist beliefs.<sup>99</sup> And the stigma attached to racial bias can make it difficult for jurors to report biased statements before rendering a verdict because it is hard to call a fellow juror a bigot.<sup>100</sup> While noting that this ineffectiveness alone is not dispositive, Justice Kennedy asserted that the nation’s long history with racism provided a sound basis to treat such bias with extra caution.<sup>101</sup>

Based solidly on the repeated and extremely damaging impact that racial bias has on the promise of equal treatment and impartial juries, the Court held that the Constitution requires a racial bias exception to the no-impeachment rule.<sup>102</sup> More specifically, when a juror evinces a reliance on racial bias in convicting a criminal defendant, the Sixth Amendment right to an impartial jury<sup>103</sup> requires that juror testimony about such alleged bias be admissible to challenge the validity of the resulting verdict and any denial of the defendant’s right to a jury trial.<sup>104</sup> However, for this exception to apply, a juror’s biased statement(s) must exhibit “overt racial bias that cast[s] serious doubt [up]on the fairness and impartiality of the jury’s deliberations and [final] verdict.”<sup>105</sup> And the statement must strongly show that racial bias was “a significant motivating factor in the juror’s vote to convict.”<sup>106</sup>

Justice Kennedy then concluded by acknowledging that the Court’s decision was merely a single stride in the nation’s ongoing efforts to “overcome race-based discrimination” and that much more would be required,

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96. *Id.*

97. The existing safeguards that the Court relied on when deciding both *Tanner* and *Warger* were voir dire, courtroom oversight, and preverdict juror reporting of racist statements. *Id.* at 866.

98. *Id.* at 868–69.

99. *Id.* at 869.

100. *Id.*

101. *Id.* at 868–69.

102. *Id.*

103. U.S. CONST. amend. VI.

104. *Peña-Rodriguez*, 137 S. Ct. at 868–69.

105. *Id.* at 869.

106. *Id.* How significant of a factor this bias must be was a question that the Supreme Court declined to answer, instead leaving the determination of when a statement is racist enough for the racial bias exception to apply to the discretion of the trial courts. *Id.* at 870. The Court also entrusted the trial courts with the development of the exact nuances of the racial bias exception, including any local rules or jury instructions that might be helpful or applicable. *Id.* at 870–71.

perhaps in the form of local rules or jury instructions,<sup>107</sup> to effectuate the decision's full potential.<sup>108</sup>

#### *D. Justice Alito's Dissenting Opinion*

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, authored the main dissent.<sup>109</sup> Justice Alito's dissent focused heavily on the public policy considerations surrounding the confidentiality of the jury process, asserting that such policy concerns outweighed the injury incurred by litigants whose convictions were the result of racial bias.<sup>110</sup> In addition to this balancing, Justice Alito also asserted that the Sixth Amendment and its corresponding precedent do not require a racial bias exception to the no-impeachment rule because nothing in the amendment's text or history suggests that the right to an impartial jury depends on the type of bias exhibited by a juror.<sup>111</sup>

To justify his balancing, Justice Alito asserted that juries "occupy a unique place in our justice system" because they—unlike judges and lawyers—deliberate in largely unregulated spaces and "debate, argue, and make decisions" as ordinary people do.<sup>112</sup> According to Justice Alito, allowing the jury room door to be pried open by a racial bias exception would destroy the confidentiality that jury deliberations thrive on and could easily lead to negative ramifications.<sup>113</sup> These ramifications, including unwilling and harassed jurors, are all consequences that could break the jury system beyond repair.<sup>114</sup>

Justice Alito also based his balancing on the belief that existing safeguards do adequately prevent racial bias from infiltrating juries because lawyers can carefully frame voir dire questions to elicit bias and use peremptory strikes to remove suspicious jurors.<sup>115</sup> And even if jurors are too hesitant to call out racism, Justice Alito argued that the policy supporting the no-impeachment rule still reigns supreme because postverdict reporting is particularly disruptive to the legal system.<sup>116</sup>

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107. *Id.* at 871. In his majority opinion, Justice Kennedy specifically stated that strategically crafted jury instructions can be vital in both explaining a juror's duty to deliberate in a bias-free manner and limiting the use of the racial bias exception to rare cases. *Id.* at 871. I agree and also believe that such instructions can best maximize the racial bias exception's impact on the jury trial system. *See infra* Section III.D.

108. *Peña-Rodriguez*, 137 S. Ct. at 871.

109. *Id.* at 874 (Alito, J., dissenting).

110. *Id.*; *see infra* Section III.C. for a broader discussion of these public policy concerns.

111. *Peña-Rodriguez*, 137 S. Ct. at 882–83 ("What the Sixth Amendment protects is the right to an 'impartial jury.' Nothing in the text or history of the Amendment . . . suggests that the extent of the protection provided . . . depends on the nature of a jury's partiality or bias. . . . Nor . . . [does] the Sixth Amendment recognize[] . . . [a] hierarchy of partiality or bias.").

112. *Id.* at 874.

113. *See id.* at 874–75, 884–85.

114. *See id.* at 884–85.

115. *Id.* at 878, 880.

116. *Id.* at 882.

### E. Justice Thomas's Dissenting Opinion

Justice Thomas authored a separate dissent to explain why an originalist reading of the Constitution bars finding a racial bias exception to the no-impeachment rule.<sup>117</sup> When the Sixth and Fourteenth Amendments were ratified, jurors were not allowed to supply any evidence of misconduct to challenge a verdict.<sup>118</sup> According to Justice Thomas, because common law held that criminal verdicts could not be challenged with juror testimony alleging juror misconduct, there was no legal basis for a racial bias exception to the rule.<sup>119</sup> While Justice Thomas noted that there may be valid reasons to modify or even eliminate the no-impeachment rule, he adamantly asserted that such a decision be left to the political process.<sup>120</sup>

### III. ANALYSIS

In *Peña-Rodriguez*, the Court finally gave teeth to its long line of dicta stating that there may be cases where juror testimony cannot be excluded “without violating the plainest principles of justice.”<sup>121</sup> By holding that the Constitution demands an exception to the no-impeachment rule when a juror’s overt racial bias influences a vote to convict,<sup>122</sup> the Court took a critically needed step towards further limiting the havoc that racial bias can wreak within the legal system. However, that step was incomplete.

This Part will first examine the intricate ways in which racial bias continues to permeate the criminal justice system and deeply inhibits the promise of “equal treatment under the law.”<sup>123</sup> This Part will then argue that the legal system’s current safeguards against racial bias are woefully ineffective at preventing jurors from relying on racism when convicting a criminal defendant. Next, this Part proposes that the public policy rationales frequently advanced in support of a strict no-impeachment rule pale in comparison to the need to limit racial bias’s devastating effects. Last, this Part acknowledges the limitations of *Peña-Rodriguez* and asserts that the racial bias exception’s maximum impact will only be realized if the exception is coupled with strategically crafted, race-conscious jury instructions.

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117. *Id.* at 871 (Thomas, J., dissenting).

118. *Id.* at 872–74 (“Our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or in 1868 (when the Fourteenth Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct. In fact, it strongly suggests that such evidence was prohibited.”).

119. *Id.* at 874.

120. *Id.*

121. *United States v. Reid*, 53 U.S. 361, 366 (1851), *overruled in part by* *Rosen v. United States*, 245 U.S. 467 (1918).

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

123. *Id.* at 868.

*A. Despite the Judiciary's Many Efforts, the Criminal Justice and Jury Trial Systems Remain Deeply Racist Institutions*

In *Peña-Rodriguez*, Justice Kennedy remarked on the criminal justice system's long history with racism and the Court's perennial role in trying to eradicate that bias.<sup>124</sup> In enacting the Civil War Amendments, the nation sought to "purge racial prejudice from the administration of justice."<sup>125</sup> And by continually ruling that racial discrimination in all areas of public life is impermissible, the judicial system worked to advance this same goal.<sup>126</sup> But history has deftly shown that adding a bar on racial discrimination to the Constitution and using the legal system to enforce that bar has not been enough to eliminate racial bias.<sup>127</sup>

Immediately after the passage of the Civil War Amendments, states across the nation sought to circumvent those amendments, and the jurisprudence accompanying them, by passing laws and enacting practices that relegated racial minorities to a permanent status as second-class citizens.<sup>128</sup> These actions extended to the jury system with many Southern states refusing to select minorities as jurors, a practice that soon led to all-white juries overwhelmingly voting to convict people of color while simultaneously voting to acquit white defendants charged with crimes against minorities.<sup>129</sup> "Whether it was freeing the white defendants who murdered Emmett Till<sup>130</sup> or convicting black defendants who were falsely accused,<sup>131</sup> history is littered with ugly incidents of juries using their power

124. *Id.* at 867.

125. *Id.*

126. *See* *Batson v. Kentucky*, 476 U.S. 79, 84–85 (1986) (holding that excluding a prospective juror from the jury solely because of race violates the equal protection clause of the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that statutes that prohibit interracial marriage violate the equal protection and due process clauses of the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racial segregation within public schools violates the equal protection clause of the Fourteenth Amendment).

127. *See* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1323–29 (1991) (describing the Fourteenth Amendment's legal ineffectiveness in eliminating racial bias from the nation's laws and policies).

128. *See id.* at 1326–28.

129. *Peña-Rodriguez*, 137 S. Ct. at 867 (describing a year in Texas where all-white juries decided 500 prosecutions of white defendants who had been charged with murdering black people and acquitted every single white defendant); *see also, e.g., Batson*, 476 U.S. at 84–85 (1986) (holding that litigants may not exclude a prospective juror because of race); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (holding that the Constitution sometimes requires defendants be allowed to voir dire on racial bias); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that the Fourteenth Amendment prohibits excluding a juror because of his or her race), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

130. *See The Murder of Emmitt Till*, LIBR. CONGRESS: C.R. HIST. PROJECT, <https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/murder-of-emmett-till> (last visited Dec. 28, 2017).

131. *See* Jacey Fortin, *Florida Apologizes for 'Gross Injustices' to Four Black Men, Decades Later*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/us/groveland-four-apology-florida.html>; *see also* GILBERT KING, *DEVIL IN THE GROVE* (2012) (recounting the wrongful convictions of the Groveland Boys, a group of four black men falsely accused of rape by a white woman).



to disadvantage minorities.”<sup>132</sup> While Congress<sup>133</sup> and the Court<sup>134</sup> have both spent decades trying to confront and minimize racial bias within the legal system, such bias—including within the jury trial system—still exists.<sup>135</sup>

The criminal justice system thrives on discretion.<sup>136</sup> Police cannot arrest everyone who breaks the law.<sup>137</sup> Prosecutors have “enormous leeway in deciding whom and what to charge,” as well as immense control over plea bargaining.<sup>138</sup> And juries have near total discretion in reaching verdicts, the review of which is often highly deferential to the jury’s initial finding.<sup>139</sup> Discretion allows the criminal justice system to best use and prioritize its limited resources, while giving its actors—jurors included—the power to make sure that the punishment fits the crime.<sup>140</sup> It is highly unlikely that the criminal justice system would remain workable without this discretion and the flexibility and resourcefulness it provides.<sup>141</sup>

However, racial bias also thrives on this same discretion.<sup>142</sup> Despite its benefits, discretion within the criminal justice system is arbitrary and lacks a mechanism for public accountability.<sup>143</sup> These flaws give racism a friendly place to breed, develop, and grow.<sup>144</sup> Racial bias within the legal system effectively “hides behind discretion” and since every part of the legal process incorporates discretion to some extent, opportunities for racism to alter a defendant’s life exist at every stage.<sup>145</sup> Minorities are more likely to be stopped by the police than whites.<sup>146</sup> Minorities are also arrested and incarcerated at numbers highly disproportionate to their percentage of the population.<sup>147</sup> And minorities are overwhelmingly underrepresented in jury pools.<sup>148</sup>

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132. Leipold, *supra* note 63, at 579 (footnote omitted).

133. Peña-Rodriguez, 137 S. Ct. at 867.

134. *Id.*; see also *supra* notes 73, 126 and accompanying text.

135. See Peña-Rodriguez, 137 S. Ct. at 861–62.

136. Leipold, *supra* note 63, at 564.

137. *Id.*

138. *Id.*

139. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 20, 27 (1998).

140. See *id.* at 20.

141. *Id.*

142. See *id.* at 21; Leipold, *supra* note 63, at 564.

143. See Davis, *supra* note 139, at 20–21.

144. See *id.* at 21.

145. Leipold, *supra* note 63, at 564.

146. See *id.* at 565.

147. See THE SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC JUSTICE IN STATE PRISONS 4* (2016); *Arrests by Race 2014*, FBI: UNIFORM CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-43> (last visited Sept. 11, 2017).

148. Leipold, *supra* note 63, at 579 n.82.

Studies continually show that black, Latino, and Hispanic drivers are more likely to be stopped and searched by police than their white counterparts.<sup>149</sup> A 2011 Bureau of Justice Statistics study found that thirteen percent of black drivers were stopped by police, compared to only ten percent of white drivers.<sup>150</sup> And a 2017 study by Stanford University found strikingly similar results: black and Latino drivers were stopped and searched at least twice as frequently as whites.<sup>151</sup> That same study also concluded that black and Latino drivers were stopped and searched “on the basis of far less evidence” than white drivers,<sup>152</sup> and that those same minority drivers were over twenty percent more likely than whites to receive a ticket.<sup>153</sup>

Statistics also repeatedly show that people of color are arrested at percentages highly disproportionate to their total population.<sup>154</sup> According to the 2010 U.S. Census, black people make up 13.6% of the U.S. population,<sup>155</sup> Hispanics and Latinos 16.3%,<sup>156</sup> and whites 74.8%.<sup>157</sup> But somehow, in 2014, black people were nearly twenty-eight percent of those arrested for crimes, while another eighteen percent of those arrested were Hispanics and Latinos.<sup>158</sup> In addition to being arrested at higher percentages, people of color are also incarcerated at greater rates than whites.<sup>159</sup> A 2016 report by the Sentencing Project found that black people were “incarcerated in state prisons at a rate . . . 5.1 times the imprisonment of whites.”<sup>160</sup> And despite making up barely sixteen percent of the U.S. population, twenty-one percent of those incarcerated in state prisons were Hispanic.<sup>161</sup> Despite the benefits that discretion provides to the criminal justice system, these statistics vividly demonstrate that this broad discretion

149. *Traffic Stops*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=702> (last visited Sept. 11, 2017); Richard Winton, *Black and Latino Drivers Are Searched Based on Less Evidence and Are More Likely to Be Arrested*, *Stanford Researchers Find*, L.A. TIMES (June 19, 2017, 11:25 PM), <http://www.latimes.com/local/lanow/la-me-ln-stanford-minority-drive-disparties-20170619-story.html>.

150. *Traffic Stops*, *supra* note 149; see also Winton, *supra* note 149 (describing the results of a 2017 study which found that “[f]or every 100 black drivers, about 15 were pulled over, compared with 10 stops for every 100 white and Latino driver[s]”).

151. Winton, *supra* note 149. Specifically, this study found that for every one hundred stops, black drivers were searched six times, Latino drivers were searched four times, and white drivers were only searched two times. *Id.*

152. *Id.*

153. *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> (last visited Sept. 11, 2017).

154. Leipold, *supra* note 63, at 561 n.9.

155. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011).

156. SHARON R. ENNIS ET AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010, at 3 (2011).

157. LINDSAY HIXSON ET AL., U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010, at 3 (2011).

158. See *Arrests by Race 2014*, *supra* note 147.

159. See THE SENTENCING PROJECT, *supra* note 147, at 3.

160. *Id.*

161. ENNIS ET AL., *supra* note 156; THE SENTENCING PROJECT, *supra* note 147.

also provides state actors with “a nearly uninterrupted chance to make illegitimate judgments based on race.”<sup>162</sup>

Trial by jury also thrives on discretion, allowing the influence of racial bias to further seep into the legal system’s decision-making process.<sup>163</sup> State- and city-level studies show that people of color are frequently underrepresented on juries, even in cities where minorities make up large chunks of the total population.<sup>164</sup> In Caddo Parish, Louisiana, a 2015 study found that while forty-eight percent of the parish’s population was black, “the typical 12-member criminal jury [often] had fewer than four blacks on it.”<sup>165</sup> In 2011, a study of juries in New York state found nearly identical results: People of color were continually “underrepresented in many counties where they constitute[d] more than 10 percent of the adult over-18 population.”<sup>166</sup> And during a six-month span in 2016, public defenders in San Francisco, California, “counted at least six trials in which not one prospective juror was African American.”<sup>167</sup>

A wealth of research has also found that juries are more likely to convict people of color than whites, even when the facts in two separate cases are identical.<sup>168</sup> In a 1982 mock juror study, white students read transcripts of four different crimes (rape, murder, drug sale, and burglary) and then rated a hypothetical defendant’s likelihood of guilt.<sup>169</sup> The race of the defendant was systematically varied while the facts of the case remained static.<sup>170</sup> In seven out of eight instances, the participants’ “estimated probability of guilt was higher for the black defendant than the white defendant.”<sup>171</sup> A 1983 study involving Hispanic defendants came to the same conclusion: white jurors were more likely than their Hispanic counterparts

162. Leipold, *supra* note 63, at 564.

163. *See id.*

164. *See, e.g.,* Vivian Ho, *For SF’s Black Defendants, It’s Hard to Find Jury of Peers*, S.F. CHRON. (Mar. 4, 2015, 5:07 PM), <http://www.sfchronicle.com/crime/article/For-SF-s-black-defendants-it-s-hard-to-find-10977625.php>; Adam Liptak, *Exclusion of Blacks From Juries Raises Renewed Scrutiny*, N.Y. TIMES, (Aug. 16, 2015), <https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html>; Dan Rivoli, *In N.Y. Jury Pools, Blacks and Hispanics Underrepresented: Report*, INT’L BUS. TIMES (Dec. 8, 2011, 6:34 PM), <http://www.ibtimes.com/ny-jury-pools-blacks-hispanics-underrepresented-report-380828>.

165. Liptak, *supra* note 164. The article also noted that “[m]uch of the gap had nothing to do with peremptory strikes. Of the 8,318 potential jurors in the study, which reviewed 332 trials from 2003 to 2012, only 35 percent were black.” *Id.*

166. Rivoli, *supra* note 164. More specifically, black residents in Erie County (home to Buffalo, NY) made up twelve percent of the population but only seven percent of jurors; black people were underrepresented by thirty percent in Staten Island juries; and Hispanics were unrepresented in jury pools for every single borough of New York City. *Id.*

167. Ho, *supra* note 164.

168. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625–26 (1985).

169. *Id.* at 1629–30.

170. *Id.*

171. *Id.*

to attribute guilt to a hypothetical Hispanic defendant.<sup>172</sup> And more recently, a 2012 empirical study of Florida juries found that when no black jurors were in a case's jury pool, "black defendants [were] convicted at an 81 percent rate" compared to white defendants, who were only convicted at a 66 percent rate.<sup>173</sup> In the same study, the researchers also found that the conviction rate equalizes—seventy-one percent conviction rate for black defendants, compared to a seventy-three percent conviction rate for whites—when the jury pool includes at least one black potential juror.<sup>174</sup>

As this data demonstrates, the jury system is a very effective conduit for racism, allowing it to flow into and throughout voir dire, deliberations, and the final verdict. Again, one of the key reasons for this is the immense amount of discretion invested in the jury system.<sup>175</sup> The potential for racial bias to tinge a decision is strongly exacerbated when "decisions are made outside [of] the public eye."<sup>176</sup> This is precisely where juries deliberate.<sup>177</sup> And much of that deliberation occurs without oversight, allowing a juror's racial bias to easily stay secret.<sup>178</sup> Moreover, racism's ability to co-opt the jury—in addition to its effects on the criminal defendant in question—further compounds the impact that racial bias exerts at the earlier stages of the criminal justice process.<sup>179</sup>

While allowing jurors to deliberate in private and express candid views is important, so is preventing criminal defendants from being convicted because of their race. And failing to provide defendants with a remedy when their conviction is based on blatant racial bias is antithetical to the criminal justice system's basic guarantees of fairness and impartiality.<sup>180</sup> Our current system of trial by jury provides jurors with a nearly unfettered ability to convict defendants based on racist beliefs, which jurors routinely do.<sup>181</sup> Such a fallacy sharply demonstrates why the Court's decision in *Peña-Rodriguez* was a necessary step in the nation's continual efforts to "overcome race-based discrimination."<sup>182</sup> And the correctness of this decision is further evidenced by the fact that existing safeguards alone

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172. *Id.* at 1629. These same white jurors were also more likely to think that the Hispanic defendant was unintelligent and dishonest. *Id.*

173. Shamina Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012).

174. *Id.*

175. Leipold, *supra* note 63, at 564.

176. *Id.*

177. *See id.*

178. *See id.*

179. *Id.* at 582.

180. *See Turner v. Louisiana*, 379 U.S. 466, 471–72 (1965) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961))).

181. *See generally id.*

182. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

are never enough to bar racial bias's entrance into the black box and instead often further insulate racism from attack.<sup>183</sup>

*B. The Existing Safeguards Provided by Voir Dire and Courtroom Oversight Are Not Enough to Protect Criminal Defendants from Juror Racial Bias*

The legal system relies on “juries to be the primary backstop against race-based behavior.”<sup>184</sup> But current safeguards designed to ensure that racial bias cannot infiltrate the jury, including voir dire and courtroom oversight, are extremely ineffective at keeping racism out of the courtroom and evince the need for something more.<sup>185</sup> In no place can the woeful inadequacy of these safeguards be seen more intensely than in the experiences of many criminal defendants of color, whose guilty verdicts were irreparably tainted by a juror's overt racial bias.

*Peña-Rodriguez* is but a single example of how existing safeguards routinely fail to weed out racially biased jurors.<sup>186</sup> In *United States v. Henley*,<sup>187</sup> a jury convicted three black men on drug trafficking charges.<sup>188</sup> During voir dire, the jurors were directly asked if racial bias would affect their ability to be impartial.<sup>189</sup> No jurors indicated any concerns about possible bias.<sup>190</sup> Yet after the defendants were convicted, it came to the court's attention that while carpooling to the courthouse a juror had allegedly remarked to his fellow jurors that “[a]ll the niggers should hang” and “[t]he niggers are guilty.”<sup>191</sup>

In *Benally v. United States*,<sup>192</sup> a jury convicted an American Indian man of assault with a deadly weapon.<sup>193</sup> A day after the verdict was rendered, a juror came forward alleging that during deliberations the jury foreman had said that “[w]hen Indians get alcohol, they all get drunk” and that “when they get drunk, they get violent.”<sup>194</sup> These comments were accompanied by a larger group sentiment of needing to convict the defendant to “send a message back to the reservation.”<sup>195</sup> Again, the jurors in *Benally* were asked about their ability to be impartial on race and not a single juror raised any concerns of bias.<sup>196</sup>

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183. *Id.* at 868–69.

184. Leipold, *supra* note 63, at 588.

185. *Peña-Rodriguez*, 137 S. Ct. at 868–69.

186. *Id.* at 861–62.

187. 238 F.3d 1111, 1112 (9th Cir. 2001).

188. *Id.*

189. *Id.* at 1121.

190. *Id.*

191. *Id.* at 1113–14.

192. 546 F.3d 1230, 1231 (10th Cir. 2008), *abrogated by Peña-Rodriguez*, 137 S. Ct. 855.

193. *Id.*

194. *Id.* (alteration in original).

195. *Id.* at 1231–32.

196. *Id.* at 1231.

Finally, in *United States v. Shalhout*,<sup>197</sup> two men of Middle Eastern descent were convicted on wire fraud and money laundering charges.<sup>198</sup> At trial the defendants sought to voir dire potential jurors on racial bias, only to have that request denied by the trial court judge who was “not convinced that the questions were necessary.”<sup>199</sup> But a week after the guilty verdict was entered an alternate juror came forward alleging that during deliberations the other alternate juror had stated “[y]ou know they [sic] guilty, right? They [sic] lying. All Arabs are liars, are thieves[,]” a sentiment reportedly shared by the jurors responsible for deciding the case.<sup>200</sup>

In *Henley*, *Benally*, and *Shalhout*, neither voir dire nor courtroom oversight could catch the racial bias pervading the jury until a verdict had been entered and it was too late to stop the conviction.<sup>201</sup> And not a single juror in any of these three cases disclosed this bias until after the trial was over.<sup>202</sup>

In all three cases, the existing safeguards cited to so enthusiastically in the Court’s previous decisions on the no-impeachment rule did nothing to prevent racial bias from effortlessly sauntering into the jury room and influencing the conviction of numerous criminal defendants of color. And these few examples are but a small sampling of the many cases where existing safeguards failed to uncover racial bias.<sup>203</sup> Courts rely on juries to serve as the legal system’s final barrier against racism.<sup>204</sup> Yet as the above examples demonstrate, voir dire and courtroom oversight alone are routinely incapable of ensuring that jurors do not make illegitimate judgments based on race, thereby denying criminal defendants the right to a fair trial and an impartial jury.<sup>205</sup>

The above examples also show that it is far too easy for jurors to lie about and hide their racial bias, even when directly asked about those biases. Unlike intoxication or falling asleep, overt bias is nearly impossible

197. 507 F. App’x 201 (3d Cir. 2012).

198. *Id.*

199. *Id.* (quoting the district court).

200. *Id.*

201. *Id.* at 202–04; *Benally*, 546 F.3d at 1231–32; *United States v. Henley*, 238 F.3d 1111, 1111–12 (9th Cir. 2001).

202. *Shalhout*, 507 F. App’x at 202–04; *Benally*, 546 F.3d at 1231–32; *Henley*, 238 F.3d at 1112. In *Henley*, a juror did go to the defendant’s house while the trial was ongoing to tell him about the alleged misconduct, as part of a ploy to acquire a job with the Los Angeles Rams. *Henley*, 238 F.3d at 1112–13. However, the facts of the case do not indicate that either defense counsel or the judge knew about the misconduct until that same juror was deposed by defense counsel after the trial. *Id.* at 1113.

203. *See, e.g.*, *Leipold*, *supra* note 63, at 579–81; *Miller*, *supra* note 32, at 876–77, 897; *see also* *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009) (juror remarked during deliberations that “I guess we’re profiling but [Hispanics] cause all the trouble”); *Shilcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (juror stated during deliberations, “[l]et’s be logical. He’s black and he sees a seven-year-old white girl—I know the type.”); *Martinez v. Food City, Inc.*, 658 F.2d 369, 372 (5th Cir. 1981) (juror commented during deliberations that the appellant “‘should be taught a lesson’ for hiring Mexican nationals”).

204. *Leipold*, *supra* note 63, at 588.

205. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868–69 (2017).

for judges, attorneys, and others to catch during a trial because such bias cannot be readily detected through silent observation.<sup>206</sup> Voir dire is also highly ineffective at eliciting implicit bias, which research shows is now racism's most prevalent form.<sup>207</sup> And although a juror's bias may not play a role in the actual trial, once jurors have made their way to the jury room and begun engaging in deliberations it becomes easy for both implicit and explicit biases to creep out and direct a juror's vote.<sup>208</sup> These biases, uncaught by either voir dire or courtroom oversight, are then allowed to drastically influence and undermine the jury's final verdict.<sup>209</sup>

Additionally, "the Supreme Court has virtually eliminated any constitutional right to question jurors [about] racial prejudice."<sup>210</sup> Defendants are only entitled to voir dire on racial bias in two narrow instances: when a "capital defendant is accused of an interracial crime" and "when the facts in a case are such that it would be a violation of due process to deny questioning on the issue of racial bias."<sup>211</sup> In all other cases, allowing race-relevant voir dire is left to the discretion of the judge, who may easily fail to realize when such voir dire is needed.<sup>212</sup> The purposes of voir dire—to elicit bias and strike biased jurors for cause—cannot be fulfilled if most defendants of color are not allowed to conduct effective voir dire.<sup>213</sup> And if the purposes of voir dire are so limited in the majority of cases involving nonwhite defendants, then it is undeniable that voir dire alone cannot prevent racial bias from slipping into the jury room.

The cases cited above also give credence to Justice Kennedy's argument that jurors are unlikely to come forward during a trial with allegations of racial bias,<sup>214</sup> as not a single juror addressed the racial bias on their

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206. Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It? A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 282 (2012).

207. Johnson, *supra* note 168, at 1675. ("[S]uperficial questions concerning whether the jurors harbor prejudice against blacks that would prevent them from being impartial are extremely unlikely to provoke disclosure of such bias. General questions do not reach hidden inconsistent attitudes. . . . Asking a general question about impartiality and race is like asking whether one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence.")

208. *See id.* at 1675–76.

209. *Id.*; Wolin, *supra* note 206, at 288.

210. Johnson, *supra* note 168, at 1670.

211. Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 182–83 (2015); *see, e.g.*, *Ham v. South Carolina*, 409 U.S. 524, 525, 527 (1973) (holding that the Fourteenth Amendment required the trial court to voir dire on racial bias in a case where a well-known black civil rights activist who was charged with possession of marijuana asserted that law enforcement officials had framed him to deter his civil rights work).

212. *United States v. Shalhout*, 507 F. App'x 201, 202–05 (3d Cir. 2012); Joy, *supra* note 211, at 183.

213. Johnson, *supra* note 168, at 1670.

214. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868–69 (2017).

respective juries until the trial was over.<sup>215</sup> This may be, as Justice Kennedy stated in *Peña-Rodriguez*, because jurors are afraid to call fellow jurors racist.<sup>216</sup> But the failure of other jurors to tell the court about a fellow juror's racism may also stem from the legal system's own hesitancy to talk about racial bias. If the topic of racial bias is not sufficiently addressed during voir dire, or jurors are not instructed on it prior to deliberations, jurors may not know that they can, and should, report a fellow juror's bias.<sup>217</sup> Without hearing or knowing anything to the contrary, some jurors may even assume racial bias is allowed since any biased jurors who make it to deliberations were deemed acceptable to the court during voir dire.<sup>218</sup>

Even in *Benally*, where the Tenth Circuit held that the right to a jury trial was not infringed by a juror's alleged racism, the court noted that existing safeguards are fallible in cases of racial bias because "[t]he judge will probably not be able to identify racist jurors based on trial conduct . . . and voir dire might be a feeble protection if a juror is determined to lie."<sup>219</sup> Because precedent and history show that current safeguards are an ineffective way to limit racial bias's influence on a jury's verdict,<sup>220</sup> an additional safeguard is necessary to provide defendants with a remedy when their guilt is determined by such bias. The racial bias exception to the no-impeachment rule is an effective first step in doing just that. But unless jurors know about the exception and are encouraged to report racially charged misconduct, it is dangerously likely that *Peña-Rodriguez*'s racial bias exception may merely be an exception in name and not in practice.

### *C. The Severe Effects of Racial Bias Supersede the Public Policy Arguments Advanced in Support a Strict No-Impeachment Rule*

Despite the high prevalence and devastating effects of racial bias within the criminal justice system, the mere existence of racism on its own is not enough to justify a complete upheaval of the no-impeachment rule. The strict no-impeachment rule that existed pre-*Peña-Rodriguez* (without any exceptions for a juror's racial bias) is supported by many public policy arguments that courts have long found convincing and that the creation of a new exception to the rule must be balanced against. However, despite the validity of these policy goals, a thorough analysis of what the goals really mean and do reveals that modifying the no-impeachment rule to include a racial bias exception would barely change the way that the rule

215. *Shalhout*, 507 F. App'x at 203; *United States v. Benally*, 546 F.3d 1230, 1231–32 (10th Cir. 2008), *abrogated by Peña-Rodriguez*, 137 S. Ct. 855; *United States v. Henley*, 238 F.3d 1111, 1112 (9th Cir. 2001).

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

217. Wolin, *supra* note 206, at 282–83.

218. *Id.*

219. *Benally*, 546 F.3d at 1240.

220. If racial bias is ever to be fully eliminated from the criminal justice system, voir dire also must be modified to better elicit racial bias from potential jurors. *See infra* note 283.



operates. And the ever-existing concerns of racial bias, as well as the danger of denying access to a fair trial, provide an additional rationale for finding that adding a racial bias exception to the no-impeachment rule outweighs the rule's general policy objectives.

Three main policy rationales for a strict no-impeachment rule are continually advanced by the rule's supporters and have been repeatedly relied on and endorsed by the Supreme Court.<sup>221</sup> According to those who support a strict no-impeachment rule, a strict rule is necessary because it (1) prevents jurors from being harassed by limiting exposure to postverdict pressure;<sup>222</sup> (2) encourages free and open jury deliberation because jurors need not worry about reprisal;<sup>223</sup> and (3) promotes the need for finality by giving legal matters an end point.<sup>224</sup>

These policy goals do have a degree of validity. A strict no-impeachment rule—with very few exceptions—would, at least minimally, prevent jurors from being harassed about verdicts and deliberations following a trial.<sup>225</sup> By making almost any information learned from jurors about their deliberations inadmissible, litigants are likely to be deterred from wasting valuable time obtaining essentially worthless testimony.<sup>226</sup> A strict no-impeachment rule also encourages free and open jury deliberations, a critical piece of the jury trial.<sup>227</sup> Keeping deliberations confidential allows jurors to candidly express their views, “without fear of embarrassment or reprisal,”<sup>228</sup> which in turn permits ideas to be freely exchanged, prejudices to be revealed, and well-reasoned arguments to prevail.<sup>229</sup> It is not unfounded to say that allowing jurors to be questioned about their deliberations could chill the conversations jurors have<sup>230</sup> and cause them to become overly concerned with public reprisal.<sup>231</sup> Last, a strict no-impeachment

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221. James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 394–95 (1991); see, e.g., *Tanner v. United States*, 483 U.S. 107, 124 (1987) (“Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation.” (quoting S. REP. NO. 93-1277, at 13–14 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7060)); *McDonald v. Pless*, 238 U.S. 264, 268 (1915) (stating that allowing jurors to impeach verdicts through testimony about deliberations “would open the door to the most pernicious arts and tampering with jurors,” that “[i]t would lead to the grossest fraud and abuse,” and that “no verdict would be safe”).

222. Diehm, *supra* note 221.

223. *Id.* at 399–400.

224. *Id.* at 402.

225. *Id.* at 395.

226. *Id.*

227. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 874–75 (2017) (Alito, J., dissenting).

228. Diehm, *supra* note 221, at 399.

229. *Id.* at 399–400.

230. *Id.* at 400.

231. *Id.* Diehm goes on to argue that, were jury deliberations not protected from public scrutiny, “meritorious, but unpopular, views would be repressed, the timid would not speak, and . . . the parties would not have the benefit of open deliberations. Even worse, jurors may feel pressured to render popular, rather than fair, verdicts.” *Id.*

rule supports the need for a verdict to be the final say in a trial.<sup>232</sup> By preventing juror testimony from challenging verdicts, the legal system's interest in finality is promoted,<sup>233</sup> cases are decided when evidence is still fresh and witnesses are readily available,<sup>234</sup> and public confidence in the legal system is maintained.<sup>235</sup> But despite the validity of these policy rationales, they are still an insufficient basis for justifying a total bar on the use of juror testimony to challenge verdicts tainted in blatant racism.

Protecting jurors from postverdict harassment is a noble goal. But concerns over jurors being harassed are misplaced.<sup>236</sup> This is because Rule 606(b)'s exceptions for outside influence and extraneous information already allow jurors to be harassed and pressured after a trial.<sup>237</sup> The vagueness surrounding exactly what either of those exceptions mean has "provided losing counsel ample room to fish for potentially admissible testimony concerning juror misconduct."<sup>238</sup> And with high hopes that they might uncover information that falls within an exception and allows a verdict to be challenged, litigants eagerly take advantage of this freedom to talk with jurors about their deliberations.<sup>239</sup> Because Rule 606(b) already allows parties to harass jurors, using that same concern to argue against a racial bias exception to the rule makes little sense.<sup>240</sup> Such an exception merely creates one more topic of conversation for litigants to probe jurors on, who are already questioned with gusto after most trials.<sup>241</sup>

Encouraging free and open jury deliberations is also an important goal. But this goal too falters in the face of racial bias. First, to some degree, jurors already expect that the statements they make during deliberations will be disclosed to others outside of the courtroom.<sup>242</sup> Rule 606(b)

232. *Id.* at 402.

233. Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Decision Making*, 64 U. COLO. L. REV. 57, 77 (1993); Diehm, *supra* note 221, at 402.

234. Diehm, *supra* note 221, at 402 ("It is well recognized that, unlike fine wine, steaks, and cheeses, lawsuits do not improve with age.")

235. *Id.* ("[A]t some point, litigation must end, and . . . the community must be able to rely on court decisions as final. Destructive uncertainty may develop if courts are viewed as indecisive, and verdicts can be attacked months or even years after the litigation has ended.")

236. Peña-Rodriguez v. People, 350 P.3d 287, 297 (Colo. 2015) (Márquez, J., dissenting), *rev'd*, 137 S. Ct. 855 (2017).

237. *Id.*

238. Victor Gold, *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENT. 125, 131 (1993).

239. See Peña-Rodriguez, 350 P.3d at 297 (Márquez, J., dissenting); Gold, *supra* note 238, at 131, 131 n.28 ("Since the [no-impeachment] rule has numerous exceptions, and in criminal cases inquiries into constitutional violations might be appropriate despite the language of the rule, the rule does not eliminate the need for the conscientious lawyer to interview jurors to assess whether the jurors have committed misconduct and whether this particular type of misconduct is susceptible to juror testimony.")

240. See Peña-Rodriguez, 350 P.3d at 297 (Márquez, J., dissenting).

241. See *id.*; Gold, *supra* note 238, at 131 n.28.

242. Peña-Rodriguez, 350 P.3d at 297 (Márquez, J., dissenting); see Wolin, *supra* note 206, at 294-95 (explaining that it is known to many jurors that other jurors often conduct postverdict interviews with the press and even write books about their jury experiences, leading to an implied understanding that juror statements made during deliberations are not confidential).

does not prohibit jurors from talking about their verdicts, it only bars using that testimony to challenge verdicts.<sup>243</sup> And jurors routinely and voluntarily reveal details of their deliberations to friends, family, and even the media.<sup>244</sup> Knowing that the contents of jury deliberations may become public knowledge does not appear to overly chill deliberations, and it is unlikely that deliberations would be hampered any further if allegations of racial bias were admissible to challenge verdicts.<sup>245</sup>

Moreover, even if allowing testimony about juror racism to challenge verdicts does chill some deliberations, that is not enough to justify the total lack of a racial bias exception to the no-impachment rule. While chilling jury deliberations even a little is an extraordinary measure, racism is an extraordinary problem that has done anything but fade over time.<sup>246</sup> Racism within the criminal justice and jury trial systems is a stark and severe problem<sup>247</sup> that requires an extreme solution, and we should be willing to chill jury deliberations slightly to prevent criminal defendants from being convicted largely or solely on the basis of race.

We expect jurors to be neutral decision makers and even use jury instructions to tell jurors that racial bias has no place in the courtroom.<sup>248</sup>

243. Wolin, *supra* note 206, at 294–95.

244. *Id.* at 295.

245. *Id.*

246. See, e.g., Justin Jouvenal, *Third Noose in a Week Found in the District, This Time in Southeast*, WASH. POST (June 3, 2017), [https://www.washingtonpost.com/local/public-safety/third-noose-in-a-week-found-in-dc-this-time-in-southeast/2017/06/03/e79fdc2a-4868-11e7-98cd-af64b4fe2dfc\\_story.html](https://www.washingtonpost.com/local/public-safety/third-noose-in-a-week-found-in-dc-this-time-in-southeast/2017/06/03/e79fdc2a-4868-11e7-98cd-af64b4fe2dfc_story.html) (describing a span of time where multiple nooses were found throughout Washington, D.C., including near an elementary school and outside of the National Museum of African American History and Culture); Sarah Posner, *After Charlottesville Rally Ends in Violence, Alt-Right Vows to Return*, ROLLING STONE (Aug. 13, 2017), <https://www.rollingstone.com/politics/news/charlottesville-white-supremacist-rally-erupts-in-violence-w497446> (recounting a day in August 2017, where white supremacists rioted in Charlottesville, Virginia and chanted various racially charged phrases including “white lives matter,” “you will not replace us,” and the Nazi slogan “blood and soil”); Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments> (noting that during then-candidate Donald Trump’s presidential announcement speech he stated that “[w]hen Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”).

247. In their respective dissents in *Peña-Rodriguez*, Justices Thomas and Alito assert that the majority’s concerns about racial bias are admirable but overstated, particularly when weighed against public policy concerns. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 874 (2017) (Thomas, J., dissenting) (“In its attempt to stimulate a ‘thoughtful, rational dialogue’ on race relations, the Court today . . . imposes a uniform, national rule. The Constitution does not require such a rule.” (citation omitted) (quoting *id.* at 871 (majority opinion))); *id.* at 875 (Alito, J., dissenting) (“[T]he Court is surely correct that even a tincture of racial bias can inflict great damage on [the jury] system . . . . But until today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules . . . .”). However, as this Comment demonstrates throughout, racial bias is still very much a problem and by minimizing its impact on the judicial system, the dissenting justices merely demonstrate a failure to see racial bias’s true specter. See *supra* notes 126–32 and accompanying text.

248. See CRIMINAL PATTERN JURY INSTRUCTIONS: TENTH CIRCUIT § 1.04 (2011) (“It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.”).

Enforcing this expectation through the racial bias exception simply makes logical sense. And while allowing jurors to deliberate without fear of reproach is important, freedom to deliberate in a manner that effectively allows "the majority [to use] its values to demean the rights of minorities" should not be given carte blanche.<sup>249</sup> Racial bias, both generally and more specifically within the judicial system, is widespread and devastating enough to sacrifice some modicum of free deliberation to better ensure that criminal defendants are not convicted because of immutable characteristics.

Finally, while the interest in finality is another important goal, this interest too is not enough to justify a no-impeachment rule without a racial bias exception. The interest in finality and verdict stability has long been weighed against competing interests of fairness and accuracy, and the interest in finality has not always been deemed more important.<sup>250</sup> This is particularly true in the case of jury deliberations.<sup>251</sup> When juries reach verdicts by way of an improper procedure—such as racial bias—the resulting verdict can easily be one that is "so fundamentally unfair . . . [that] there is little reason to protect [it]" simply because of the interest in finality.<sup>252</sup> And due process "contemplates that [jury] decisions be based on a rational evaluation of the evidence," meaning that "where [a] jury employs an irrational procedure to reach a verdict" finality can easily be outweighed by the competing value of fairness.<sup>253</sup> While ensuring an end to litigation is crucial to the stability of the judicial system, ensuring that that end point is reached at the expense of a fair and accurate verdict, including verdicts that were the result of racial bias, can do just as much (if not more) to damage the judicial system as allowing verdicts to be challenged can.<sup>254</sup>

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249. 27 WRIGHT & GOLD, *supra* note 45, § 6072. Allowing jurors to use racial bias to decide cases also arguably allows verdicts to be decided based on facts not in evidence, thus violating a basic tenet of the right to a fair trial. See *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) ("The requirement that a jury's verdict 'must be based upon the evidence developed at trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of conform, of cross-examination, and of counsel."); Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 331 (2005).

250. 27 WRIGHT & GOLD, *supra* note 45, § 6072; Gold, *supra* note 238, at 131–32. In fact, recent Supreme Court decisions even suggest "a trend focusing on truth and accuracy as the predominant considerations in evaluating the role of the jury." 27 WRIGHT & GOLD, *supra* note 45, § 6072 n.54; see, e.g., *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) ("The basic purpose of a trial is the determination of truth," and it is the jury to whom we have entrusted the responsibility for making this determination. . . . Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself." (citation omitted) (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)); *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (holding that a five-person jury was unconstitutional because such a small jury could promote "inaccurate and possibly biased decision making").

251. 27 WRIGHT & GOLD, *supra* note 45, § 6072 n.54.

252. *Id.* § 6072.

253. *Id.*

254. See *id.*

Moreover, the importance of finality has been superseded by concerns for accuracy and due process in the past, most notably when it comes to the use of newly acquired DNA evidence to overturn criminal verdicts.<sup>255</sup> In the case of DNA, interests of fairness and accuracy, specifically the use of accurate evidence and a desire to protect innocent defendants from a prison sentence, were held to be more important than the competing interest in finality.<sup>256</sup> Similarly, when it comes to racial bias, the interest of finality within the judicial system “does not outweigh the more important goal” of ensuring that criminal defendants are convicted based on the evidence, not the racially charged feelings of jurors.<sup>257</sup>

As with the other public policy reasons underlying a strict no-impeachment rule, the interest in finality does not justify allowing verdicts based in racial bias to be unimpeachable. However, just because the interests in fairness and accuracy are more important than finality here does not mean that jurors should be able to challenge verdicts years or decades after they were rendered. Unlike DNA evidence, juror testimony about deliberations loses accuracy over time, thus allowing concerns of finality to weigh more heavily against those of accuracy as the months and years pass.<sup>258</sup> But the solution to this problem is simple: impose a reasonable statute of limitations on when jurors can come forward with evidence to impeach a verdict.<sup>259</sup>

The public policy behind the no-impeachment rule provides valid and compelling arguments for the rule’s application. But those rationales are not expansive enough to justify a bar on using juror testimony to challenge racist verdicts. The “cumulative effect” of a strict no-impeachment rule—without an exception for racial bias—is that a defendant can be arrested, charged, convicted, and sentenced directly because of racism and without a single inquiry into the decision maker’s state of mind.<sup>260</sup> Encouraging free deliberation, promoting finality, and limiting juror harassment are all important policy goals. But because of the nation’s long and ongoing battle with racism and the critical importance of fairness and accuracy, minimizing racial bias’s impact on judicial decision making is paramount to the admirable policy goals behind a strict no-impeachment rule.

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255. See Sophia S. Chang, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 HASTINGS CONST. L.Q. 285, 300 (2009); Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2952–53 (2010).

256. Chang, *supra* note 255; Garret, *supra* note 255.

257. Chang, *supra* note 255.

258. Diehm, *supra* note 221, at 402.

259. See *infra* Section III.D.

260. Leipold, *supra* note 63, at 582.

*D. To Truly Limit Racial Bias's Influence on Jury Verdicts, the Racial Bias Exception Must Be Coupled with Improved Jury Instructions*

In *Peña-Rodriguez*, the Court took an important step forward in the fight against racism when it ruled that the Constitution mandates an exception to the no-impeachment rule in cases of juror racial bias.<sup>261</sup> However, in making that decision the Court declined to establish procedural rules for handling accusations of a juror's racial bias or draw a dividing line for when racially charged comments are offensive enough to mandate impeachment.<sup>262</sup> Leaving these decisions to the discretion of the trial courts was a wise choice.<sup>263</sup> Prior to the decision in *Peña-Rodriguez*, barely a third of states recognized a racial bias exception to their no-impeachment rules.<sup>264</sup> Formulating broad rules on the procedural requirements or the right amount of racism based on the experiences of so few states may well have been a foolhardy endeavor carrying with it a large risk of getting the rules wrong. Before such rules can be crafted, a strong line of precedent on the racial bias exception, at both the state and federal level, must develop.<sup>265</sup>

But this line of precedent will never develop if jurors are unsure about whether they should speak out when racial bias finds its way into jury deliberations. Implementing universal jury instructions that encourage jurors to report instances of bias after the conclusion of a trial is one way to ensure that this critical line of precedent develops. As Justice Kennedy noted, it can be hard to call someone out, particularly a stranger, for displaying racial bias.<sup>266</sup> But if jurors knew that they could do just that after the con-

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

262. *Id.* at 870.

263. *Id.*

264. *Id.*

265. To date, only a handful of cases have relied on *Peña-Rodriguez* in determining whether a verdict should be impeached because of a juror's racial bias. *See, e.g.*, *Richardson v. Kornegay*, No. 5:16-HC-2115-FL, 2017 WL 1133289, at \*10 (E.D.N.C. Mar. 4, 2017) (finding that *Peña-Rodriguez* was inapplicable when a black male juror was asked by another juror whether the black juror was voting not guilty because the juror was a black man like the defendant); *see also, e.g.*, *Tharpe v. Warden*, No. 17-14027-P, 2017 WL 4250413, at \*3 (11th Cir. Sept. 21, 2017) (holding that *Peña-Rodriguez* did not mandate a stay of the defendant's execution even though a juror later made racially charged statements about the defendant in a postverdict affidavit), *vacated and remanded sub nom. Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curium) (holding that the juror's statement "presents a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict"). More specifically, the juror in *Tharpe* stated in an affidavit taken several years after the verdict was rendered that "I felt [the defendant], who wasn't in the good black folks category in my book, should get the electric chair" and "[a]fter studying the Bible, I have wondered if black people even have souls." Dakin Andone, *Questions of Racial Bias Surround Black Man's Imminent Execution*, CNN (Sept. 25, 2017), <http://www.cnn.com/2017/09/24/us/keith-tharpe-georgia-execution/index.html>. Despite the judicial system's slow application of *Peña-Rodriguez*, instances of juror racial bias impacting verdicts continue to come to light. *See* Mike Mullen, *Juror: St. Paul Man's 'Got to Be Guilty' Because He's a 'Banger from the Hood,' CITY PAGES* (Dec. 21, 2017), <http://www.citypages.com/news/juror-st-paul-mans-got-to-be-guilty-because-hes-a-banger-from-the-hood/465660583>.

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

clusion of a trial and with a guarantee of secrecy, more jurors may be willing to come forward with such allegations. In the short-term, this would allow the criminal justice system to ensure that defendants are not being convicted simply because of their race or ethnicity. And in the long-term, this would allow a critical line of precedent to develop, which would then aid the judicial system in formulating the narrowly tailored procedural and substantive rules that the Supreme Court declined to create.

“For a juror to affirmatively report . . . biased statements requires that [he or she] recognize the expression of bias, believe the expression is inappropriate, and be sufficiently motivated to report the incident.”<sup>267</sup> While helping one recognize the expression of bias is not something strategically crafted jury instructions can do, such instructions can inform jurors that the expression of overt racial bias is improper and that jurors who hear fellow jurors make racist remarks in connection with a trial have a positive obligation to report that information.

The success of the Court’s newly crafted racial bias exception depends in part on jurors knowing that they can, and should, report instances of bias that occur during deliberations. Jury instructions should be crafted to tell jurors just that. While instructing jurors about the bar on using racial bias to reach a verdict and the ability to later impeach racist verdicts is a “minimal gesture,”<sup>268</sup> it is a gesture that would do more to combat racial bias in jury deliberations than most courts do now.<sup>269</sup> Furthermore, jury instructions put more than just jurors on notice that racial bias will not be tolerated. Parties, attorneys, and even lay people merely observing a trial will all hear these instructions and become aware of the new racial bias

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267. West, *supra* note 42, at 186.

268. Edward Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 201 (1988).

269. See *id.* at 202 (“Not only does the bulk of jury instruction occur after trial, but it tends to pay little attention to the prospect of juror misconduct, particularly misconduct which does not involve extraneous information or outside influences.” (footnote omitted)). Race-conscious jury instructions have also been shown to result in fairer verdicts. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI-KENT L. REV. 997, 1015–16 (2003). Studies have repeatedly shown that individuals are less likely to exhibit racial bias when race is made a salient issue in a case. *Id.* at 1012–16 (describing several studies where, once white mock jurors were made aware of the racial dynamics at play, those same mock jurors then rendered unbiased decisions). And at least one study has shown that jury instructions can help create this racial salience. *Id.* at 1007 (summarizing a study where mock jurors who received jury instructions about racial prejudice evinced no racial bias when assigning guilt ratings to hypothetical black and white defendants). But see JENNIFER K. ELEK & PAULA HANNAFORD-AGOR, NAT’L CTR. FOR STATE COURTS, CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS? (2014) (finding that specialized jury instructions about race did not appear to significantly influence the mock jurors’ preference, confidence, or sentence severity).

Based on these studies, it is possible that using race conscious jury instructions to encourage jurors to report racial bias might also stop jurors from relying on bias in the first place. See Peña-Rodriguez, 137 S. Ct. at 871 (noting the role that jury instructions can play in limiting the use of the racial bias exception to rare cases by encouraging jurors to confront “the flawed nature of reasoning that is prompted or influenced by improper biases”); West, *supra* note 42, at 193. But see Johnson, *supra* note 168, at 1678–79 (arguing that jury instructions would do little to limit racial bias because jurors often do not understand jury instructions, racial bias is too subconscious, and drawing attention to bias can place even greater emphasis on that characteristic).

exception, as well as the more general prohibition on determining a defendant's guilt based on race. The more people who are aware of and understand the racial bias exception, the broader and stronger the exception's impact on decreasing juror racial bias will be.

Support for informing jurors about their ability to report instances of misconduct dates all the way back to the codification of Rule 606(b) in 1975.<sup>270</sup> Although the Advisory Conference chose the Senate's broader no-impeachment rule over the House's narrow option, in doing so, the Advisory Conference also remarked that "[t]he Conferees believe that jurors should be *encouraged* to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations."<sup>271</sup> Although this comment was likely directed at encouraging jurors to report instances of misconduct prior to returning a verdict,<sup>272</sup> as the rule that the Advisory Conference was adopting would effectively bar most post-deliberation reporting,<sup>273</sup> this comment can still be read as giving support for the broader proposition that juries should be informed about their ability and duty to report instances of juror misbehavior, including racial bias.

Many state and federal courts already include a line about bias in their model jury instructions.<sup>274</sup> The Criminal Pattern Jury Instructions promulgated for the District Courts within the Tenth Circuit inform jurors that "[i]t is . . . your duty to base your verdict solely upon the evidence, without prejudice or sympathy."<sup>275</sup> The Ninth Circuit goes further by telling jurors that "[y]ou must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy."<sup>276</sup> And the model jury instructions for the trial courts within the Seventh Circuit go further yet by encouraging judges to add a line to their instructions telling jurors not to "let any person's race, color, religion, national ancestry, or gender influence you," when the facts of a case make such an instruction appropriate.<sup>277</sup>

Some states are even more explicit.<sup>278</sup> California's model jury instructions make a specific reference to racial bias, stating, "[d]o not let bias, sympathy, prejudice, or public opinion influence your decision. Bias

270. 27 WRIGHT & GOLD, *supra* note 45, § 6074.

271. H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7102, 1974 WL 11681, at \*7102 (emphasis added).

272. *Peña-Rodriguez*, 137 S. Ct. at 885 (Alito, J., dissenting).

273. H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7102, 1974 WL 11681, at \*7102.

274. *See, e.g.*, 9TH CIR. MANUAL MODEL JURY INSTR. CRIM. § 3.1 (2010); 10TH CIR. CRIM. PATTERN JURY INSTR. § 1.04 (2011); ILL. PATTERN JURY INSTR. CRIMINAL § 1.01 (2018); MASS. CRIM. MODEL JURY INSTR. § 2.200 (2009).

275. 10TH CIR. CRIM. PATTERN JURY INSTR. § 1.04 (2011).

276. 9TH CIR. MANUAL MODEL JURY INSTR. CRIM. § 3.1 (2010).

277. 7TH CIR. FED. CRIM. JURY INSTR. § 1.01 (2012).

278. *See, e.g.*, JUD. COUNCIL CAL. CRIM. JURY INSTR. § 200 (2017); 1-II CRIM. JURY INSTR. FOR D.C., INSTRUCTION 2.102 (2017); *see also infra* note 280 and accompanying text.



includes, but is not limited to, bias . . . based on disability, gender, nationality, national origin, *race or ethnicity*, religion, gender identity, sexual orientation, age, [or] socioeconomic status.<sup>279</sup> And Washington, D.C.'s Pattern Criminal Jury Instructions also warn jurors about reaching a verdict based on race: "You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's *race, ethnic origin, or gender.*"<sup>280</sup>

It is clear from the model jury instructions relied on by legal professionals nationwide that many courts have concluded that instructing juries on racial bias is entirely acceptable and even encouraged. Based on this, modifying jury instructions to inform jurors that they are forbidden from relying on racial bias when convicting a criminal defendant seems easily achievable. So does informing jurors that a verdict can be overturned if a juror relies on overt racial bias in voting to convict a criminal defendant. A jury instruction informing jurors about the racial bias exception will also need to stress that any reporting will be entirely confidential so that jurors need not worry about harassment that might result from their decision to come forward. And to best protect the legal system's interest in finality, this jury instruction should be coupled with a statute of limitations on when juror racial bias can be reported.<sup>281</sup>

A model jury instruction considering these various dynamics might look like this:

#### Juror Misconduct

It is your duty to base your verdict solely upon the evidence, without relying on prejudice or bias. You should not allow bias or any kind of prejudice based upon race or ethnicity to influence your decision. If you find that another juror is relying on racial bias to determine

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279. JUD. COUNCIL CAL. CRIM. JURY INSTR. § 200 (2017) (emphasis added). California's Model Criminal Jury Instructions also allow the judge to "insert any other impermissible basis for bias as appropriate," in the event that the listed bases are insufficient. *Id.*

280. I-II CRIM. JURY INSTR. FOR D.C. INSTRUCTION 2.102 (2017) (emphasis added); *see also* ARIZ. PATTERN JURY INSTR. CRIM., PCI 2 (4th ed. 2016) ("In deciding this case, you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Race, color, religion, national ancestry, gender or sexual orientation should not influence you."); MASS. CRIM. MODEL JURY INSTR. § 2.200 (2009) ("Your verdict must be based solely on the evidence developed at trial. It would be improper for you to consider any personal feelings about the defendant's race, religion, national origin, sex or age." (supplemental instruction for relevant cases)); ILL. PATTERN JURY INSTR. CRIMINAL § 1.01 (2018) ("You should not be influenced by any person's race, color, religion, national ancestry, gender, or sexual orientation." (supplemental instruction for relevant cases)).

281. This reasonable statute of limitations could be quite short. In most cases where jurors have reported racial bias, that reporting happened within days or, at the most, a few weeks after the conclusion of the trial. *See, e.g.,* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) (jurors mentioned racist statements to defense counsel minutes after trial ended); United States v. Shalhout, 507 F. App'x 201, 203 (3d Cir. 2012) (juror contacted defense counsel one week after verdict was entered); United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008) (juror contacted defense counsel one day after verdict was entered), *abrogated by* Peña-Rodriguez, 137 S. Ct. 855. Based on this, a reasonable statute of limitations need not be any longer a few months.

whether the defendant is guilty, you are obligated to report that misconduct to either the judge or an attorney. If you report another juror for this misconduct, your identity and what you said will remain confidential.

This misconduct can be reported after a verdict has been entered, so long as it is reported within a reasonable time. If, after further evaluation, the racial bias in question is found to be both severe enough and directly linked to the juror's vote to convict, the verdict can be challenged and even overturned.

An instruction like the one proposed here could be invaluable in both helping jurors check their racial bias at the courtroom door<sup>282</sup> and ensuring that the racial bias exception has the furthest reaching and greatest impact possible. And while jury instructions alone will not solve the problem of racial bias,<sup>283</sup> notifying jurors that the sanctity of the nation's legal system depends on them saying something when racial bias becomes the thirteenth juror could be an effective way to continue marching towards a more racially just legal system.

#### CONCLUSION

In *Peña-Rodriguez v. Colorado*, the Court held that the Sixth Amendment requires an exception to the no-impeachment rule when a criminal defendant's verdict is the result of overt racial bias.<sup>284</sup> Although modest, this was the correct ruling, both because racial bias remains incredibly entrenched in our nation and because existing safeguards of voir dire and courtroom oversight alone are not enough to prevent racial bias from infiltrating a jury.

"Race is an issue . . . this nation cannot afford to ignore right now."<sup>285</sup> The Court's decision in *Peña-Rodriguez* was a vital step in acknowledging and combatting racism's continued presence in and strong grip on the criminal justice system. But this new racial bias exception will remain as ineffective a safeguard as voir dire and courtroom oversight are if jurors do not know that the use of racial bias in convicting a criminal defendant is barred *and* that jurors have an obligation to report such misconduct, even

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282. See *Peña-Rodriguez*, 137 S. Ct. at 868.

283. As briefly mentioned above, *see supra* note 220 and accompanying text, the current safeguards that exist to uncover racial bias before a trial begins, specifically voir dire, need to be modified to better elicit bias from potential jurors. Modifying how we draw jury pools, and ensuring that juries are representative of the communities they adjudicate, could also help eliminate racial bias's impact on jury verdicts. If jury instructions like the one proposed here were implemented nationwide and coupled with race-conscious voir dire and venire selection, racism within the criminal justice system could be strategically attacked from a variety of angles. Such a multi-faceted approach would help mitigate the effects of racial bias on the judicial system much faster and more aggressively than any of these single approaches could do alone.

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

285. Ta-Nehisi Coates, *Fear of a Black President*, ATLANTIC (Sept. 2012), <https://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064> (quoting a speech by then-presidential candidate Barack Obama about race-relations in the United States).

after a trial has ended. If the racial bias exception is coupled with jury instructions encouraging jurors to report racial bias when it enters their deliberations, the exception could have a real, measurable impact on the eradication of racial bias from both our legal system and our nation.

While racism will likely “never be solved, only managed,”<sup>286</sup> that does not mean that we should not strive for a nation wholly free from the ills of racial animus. The racial bias exception and a set of corresponding jury instructions could be instrumental in doing just that.

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286. Leipold, *supra* note 63, at 603.

\* *Denver Law Review* Editor and 2019 J.D. Candidate at the University of Denver Sturm College of Law. I would like to thank Professor Rashmi Goel for her time, guidance, and insight, and for challenging me to think bigger while still retaining this Comment’s emphasis on social justice and racial equality. I would also like to thank the *Denver Law Review* Executive Board Members, Associate Editors, and Staff Editors for their long and hard work on this Comment. And to my mother: thank you for instilling in me a love of learning, reading, and writing that still persists to this day.

