Notes

Will the Jury System Survive the *Peña-Rodriguez* Exception to Rule 606(b)?: The Court's Response to Racial Discrimination by a Juror Leaves the Future of the American Jury Trial System in Jeopardy

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INTRODUCTION 104

I. THE NO-IMPEACHMENT RULE 106
A. History of the No-Impeachment Rule 106
B. The Supreme Court Adopts the No-Impeachment Rule in 1915 107
C. Congress Adopts the No-Impeachment Rule in 1975 108
D. Jurisprudence that Followed the Enactment of Rule 606(b). 110
E. Congressional Amendments to Rule 606(b) 111

II. THE PEÑA-RODRIGUEZ DECISION 113
A. The Background and Facts of *Peña-Rodriguez* 113
B. Procedural History of *Peña-Rodriguez* 114
C. The United States Supreme Court's Decision 115
D. The Dissents in *Peña-Rodriguez* 116

III. THE FUTURE OF THE AMERICAN JURY TRIAL SYSTEM AFTER *PEÑA-RODRIGUEZ* 117
A. The New Exception to Rule 606(b) Raises Several Unanswered Questions 117
B. More Damaging to Free Debate Than Curative of Racial Discrimination 119
C. Implicit Bias is More Dangerous to a Defendant 121

D. A Recipe for Even More Litigation.....123

CONCLUSION.....124

INTRODUCTION

The jury room has been closely guarded as a "sacred" space throughout the history of the United States. The secretive nature of jury deliberations helps to ensure the jury functions properly in rendering a verdict.[1] The protection extended to jury deliberations is important to promoting finality in cases, while also deterring frivolous attempts at undermining a verdict rendered by ordinary persons with no interest in a case.[2] Additionally, the protection was designed to encourage free discussions during jury deliberations while preventing the harassment of jurors regarding those discussions.[3] It has long been considered more suitable to lose important evidence than to interfere with a "confidential communication" that is so valuable to our legal system.[4] Accordingly, jurors have generally not been allowed to testify to prove misconduct that occurred during jury deliberations "to impeach the verdict, particularly as to a juror's subjective decision-making process, motives, or intra-jury influences on the jury during its deliberative process."[5]

In March 2017, the Supreme Court changed course from centuries of jurisprudence and superseded the Federal Rules of Evidence with a new exception to Rule 606(b) in the Court's decision in *Peña-Rodriguez v. Colorado*.[6] Prior to *Peña-Rodriguez*, the only exceptions to Rule 606(b)

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1 Jacob J. Key, *Walking the Fine Line of Admissibility: Should Statements of Racial Bias Fall Under an Exception to Federal Rule of Evidence 606(b)?*, 39 AM. J. TRIAL ADVOC. 131, 133 (2015) (citing United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997)).

2 *See* Arizona v. Washington, 434 U.S. 497, 504 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'").

3 Terrence W. McCarthy & Callie D. Brister, *The Newly-Created Racial Bias Exception to the General Rule that Precludes Jurors from Offering Testimony to Impeach Their Own Verdict*, 78 ALA. LAW. 285, 286 (2017) (citing CHARLES W. GAMBLE & ROBERT J. GOODWIN, MCELROY'S ALABAMA EVIDENCE § 94.06(1) (6th ed. 2009)).

4 *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 874 (2017) (Alito, J., dissenting) (comparing the protection of jury deliberations to the confidentiality privileges extended to physicians, spouses, and clergy).

5 23A C.J.S. *Criminal Procedure and Rights of Accused* § 1979 (updated 2018).

6 *See Peña-Rodriguez*, 137 S. Ct. at 855 (finding an exception to Rule 606(b)); *see also* FED. R. EVID. 606(b) (preventing jurors from testifying about deliberations during an inquiry into the validity of a verdict or indictment).

allowed jurors to "testify about: (A) 'extraneous prejudicial information' improperly brought to their attention, (B) 'outside influences' improperly brought to bear on any juror, and (C) a mistake on the verdict form."[7] Notwithstanding the federal statutory rules, in *Peña-Rodriguez*, the Court held that when a "juror makes a clear statement that indicates the juror relied on racial stereotypes or animus to convict a criminal defendant," the trial court may consider evidence of the juror's statement.[8] There are legitimate arguments for wanting to curtail the no-impeachment rule, but those arguments are more appropriately made in the legislature.[9] Moreover, it is not yet clear if the American jury system will survive the Court's efforts to "perfect" it.[10]

While it is true that "racism has become more subtle and sophisticated,"[11] racism is not cured by prying open the doors of the jury room. In fact, the parade of post-verdict jury investigations that will result from the new exception to Rule 606(b) risks the intentional filtering of discussions during jury deliberations causing the racism to be even more clandestine.[12] Criminal defendants should not be nearly as concerned with the outspoken bigot that broadcasts hate as they should be concerned with the person who fails to recognize implicit racial biases that impact their decisions and highlights the individual's lack of intercultural competence.[13]

Part I of this Note explores the history of the no-impeachment rule as well as the codification of the rule in Rule 606(b).[14] This Note examines some of the Court's jurisprudence that involved racial discrimination in the context of how a jury operates. Part II of this Note explores the Court's decision in *Peña-Rodriguez* and the new exception that is created.[15] The *Peña-Rodriguez* exception is discussed in consideration of how it will affect the future of the American jury system in Part III.[16] This Note concludes with a discussion of how the Court's decision creates many possible outcomes that will prove dangerous to the survival of the American jury trial system.

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[7] McCarthy & Brister, *supra* note 3, at 286. *See* FED. R. EVID. 606(b) (referring to juror testimony and its exceptions); *Peña-Rodriguez*, 137 S. Ct. at 855.

[8] *Peña-Rodriguez*, 137 S. Ct. at 869.

[9] *Id.* at 874 (Thomas, J., dissenting).

[10] Tanner v. United States, 483 U.S. 107, 120 (1987).

[11] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2303–04 (2017).

[12] Although Rule 606(b) has not been statutorily amended, the Supreme Court's decision in *Peña-Rodriguez* created a new exception to the rule. *See Peña-Rodriguez*, 137 S. Ct. at 855 (discussing the new exception to Rule 606(b)); *see also* FED. R. EVID. 606(b) (preventing jurors from testifying about deliberations during an inquiry into the validity of a verdict or indictment).

[13] *See* Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.").

[14] FED. R. EVID. 606(b).

[15] *Peña-Rodriguez*, 137 S. Ct. at 855.

[16] *Id.*

I. THE NO-IMPEACHMENT RULE

A. History of the No-Impeachment Rule

The birth of the no-impeachment rule occurred in 1785 in the opinion of a case decided by Lord Mansfield in England.[17] In *Vaise v. Delaval*, Lord Mansfield, the Chief Justice, was confronted by the affidavits of two jurors who claimed the verdict had been reached by a "tossup" rather than deliberation.[18] Lord Mansfield refused to receive the affidavits or set aside the verdict even though it may have been reached by casting lots.[19] In the *Vaise* opinion, Lord Mansfield stated:

> The Court cannot (a) receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor (b): but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.[20]

The decision was not only an affirmation of Lord Mansfield's previous decision in *Rex v. Almon*,[21] but also affirmed the doctrine of *nemo turpitudiem suam alligans audietu*—i.e., a witness shall not be heard to allege his own turpitude.[22] Other courts in England began following Lord Mansfield's lead in changing course to the new standard of no-impeachment. *Straker v. Graham* held that it would be "most dangerous" to set aside verdicts that have been openly concurred upon by the jury by allowing a juror's testimony about the jury's misconduct.[23] The *Vaise* decision marked a clear change in course from the previous practice of courts receiving testimony from jurors in similarly situated cases. However, even though some courts received testimony from jurors prior to 1785, those affidavits were always received with great caution.[24]

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[17] *See* Vaise v. Delaval, 99 Eng. Rep. 944, 944 (K.B. 1785) (announcing the no-impeachment rule).

[18] *Id.*

[19] *Id.; see* Renee B. Lettlow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 532 (1996) ("After the jury gave its verdict, the losing party might canvass the jurors, questioning them as to what occurred during deliberations or elsewhere. If some impropriety or mistake emerged, the losing party could ask if the juror or jurors would be willing to give an affidavit. Alternatively, one or more members of the jury might seek out the losing party to offer their support. The losing party would then move for a new trial and offer to support the motion with juror affidavits. In most of the reported cases, the court found out about the jurors' affidavits or offers to give affidavits through one of the parties.").

[20] *Vaise*, 99 Eng. Rep. at 944.

[21] Rex v. Almon, 98 Eng. Rep. 411, 411 (K.B. 1770) (finding that a court cannot read a juror's affidavit to impeach the verdict).

[22] John L. Rosshirt, *Evidence: Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME L. REV. 484, 484 (1956).

[23] Straker v. Graham, 150 Eng. Rep. 1612, 1614 (Ex. 1839); Rosshirt, *supra* note 22, at 485.

[24] McDonald v. Pless, 238 U.S. 264, 268 (1915).

In the United States, Lord Mansfield's no-impeachment rule was followed by many of the states.[25] In fact, no-impeachment rules "pre-date the ratification of the Constitution."[26] The no-impeachment rule was eventually adopted by all of the states in some form[27] even though the approaches by the states were mixed.[28] The common law rule prohibiting "the admission of juror testimony to impeach a jury verdict" was firmly established in the United States "by the beginning of the 20th century."[29] Even though a few jurisdictions allowed the affidavit of a juror to be received to prove juror misconduct, some by statute and others by court decisions, "the weight of authority is that a juror cannot impeach [the jury's] own verdict."[30]

B. The Supreme Court Adopts the No-Impeachment Rule in 1915

The well-established no-impeachment rule was also adopted by the United States Supreme Court in 1915 when the Court decided *McDonald v. Pless*.[31] Although the subject matter was before the Court in three prior instances, the question of whether a juror may testify to impeach their own verdict had not been decided prior to *McDonald*.[32] In *McDonald*, the jurors agreed, among themselves, to write down an amount individually and to divide the aggregated sum by twelve as a means of reaching the verdict.[33] Some of the jurors were dissatisfied with the amount being much larger than expected, but the protesting jurors eventually conceded because of their agreement.[34] After doing so, the jury returned the verdict to the court.[35] The defendant moved to set aside the verdict alleging misconduct by the jury.[36] The trial court did not allow the testimony by the willing jurors on the ground that the jurors were not competent to testify.[37]

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[25] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 872–73 (2017) (Thomas, J., dissenting). *See, e.g.*, State v. Freeman, 5 Conn. 348, 350–52 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations.").

[26] *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

[27] McCarthy & Brister, *supra* note 3, at 286.

[28] *Peña-Rodriguez*, 137 S. Ct. at 872 (Thomas, J., dissenting).

[29] *Id.* at 875 (Alito, J., dissenting) (citing Tanner v. United States, 483 U.S. 107, 117 (1987)).

[30] McDonald v. Pless, 238 U.S. 264, 267 (1915). *See Tanner*, 483 U.S. at 117 (stating that the rule prohibiting the admission of juror testimony to impeach a jury verdict is "firmly established"); *see id.* at 875 (Thomas, J., dissenting) (citing 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6071 (2d ed. 2007) (discussing how Lord Mansfield's approach "came to be accepted by almost all states")).

[31] *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

[32] *McDonald*, 238 U.S. at 268–69 (citing United States v. Reid, 53 U.S. 361 (1851); Mattox v. United States, 146 U.S. 140 (1892); Hyde v. United States, 225 U.S. 347 (1912)).

[33] *See id.* at 265 (holding that a juror's testimony could not be used to impeach the verdict).

[34] *Id.*

[35] *Id.* at 266.

[36] *Id.* at 265.

[37] *Id.*

The *McDonald* Court affirmed the trial court's decision in holding that jurors may not testify as to impeach their own verdict.[38] The Court reasoned that, although the method used by the jury was unjust, the defendant could have obtained relief only if the facts could have been proven by a witness who was competent to testify as to set aside a verdict.[39] The Court also reasoned that changing the rule "would open the door to the most pernicious arts and tampering with jurors."[40] Further, "[t]he practice would be replete with dangerous consequences," it "would lead to the grossest fraud and abuse," and "no verdict would be safe."[41]

C. Congress Adopts the No-Impeachment Rule in 1975

The no-impeachment rule was codified as Rule 606(b) of the Federal Rules of Evidence.[42] The "process that culminated in the adoption" of Rule 606(b) "was the epitome of reasoned democratic rulemaking."[43] The "Advisory Committee went through a 7-year drafting process, 'produced two well-circulated drafts,' and 'considered numerous comments from persons involved in nearly every area of the court-related law.'"[44] The debate centered around whether to adopt the "firm no-impeachment approach [that] came to be known as 'the federal rule,'" or the more permissive "Iowa rule."[45] The Iowa rule allowed jurors to "testify about any subject except their 'subjective intentions and thought processes in reaching a verdict.'"[46] The Advisory Committee on the Federal Rules of Evidence included the Iowa rule in an early draft, but after forceful criticism, the Committee retained the more stricter federal rule.[47] The revised draft of the rule—the version sent to Congress—expressly repudiated the Iowa rule in providing that jurors, generally, "could not testify 'as to any matter or statement occurring during the course of the

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[38] *Id.* at 269.

[39] *Id.* at 267 (citing Cluggage v. Swan, 4 Binn. 150, 155 (1811) (finding that "the testimony of jurors ought not to
be admitted to invalidate their verdicts" when there was a claim that "the jury decided the cause by drawing lots"); Straker v. Graham, 150 Eng. Rep. 1612 (Ex. 1839) (refusing to "receive an affidavit by the attorney of an admission made to him by one of the jurymen, that the verdict was decided by lot")).

[40] *Id.* at 268.

[41] *Id.* (internal quotation marks omitted).

[42] *See* FED. R. EVID. 606(b) (referring to juror testimony and its exceptions).

[43] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 877 (2017) (Alito, J., dissenting).

[44] *Id.* (citing Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973)).

[45] *Id.* at 876.

[46] *Id.* (citing Warger v. Shauers, 135 S. Ct. 521, 526 (2014)).

[47] *Peña-Rodriguez*, 137 S. Ct. at 876 (citing Tanner v. United States, 483 U.S. 107, 122 (1987)); *see id.* at n.3 (discussing a letter from Deputy Attorney General Kliendienst explaining that "recent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations").

jury's deliberations.'"[48]

The debate continued after the rule was adopted by the Court and sent to Congress.[49] Only this time, the split was between the House of Representatives, which preferred the more permissive draft, and the Senate, which favored the Court's stricter rule.[50] The Senate rejected the House rule suggesting that the permissive rule "would have undermined the finality of verdicts" and "violated 'common fairness.'"[51] Likewise, the Senate also suggested that the permissive rule would have "permitted the harassment of former jurors as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors."[52] The strict Senate version of the rule, which was adopted by the Conference Committee, was passed by both the House and the Senate and signed into law.[53] The final version signed into law read:

> Rule 606. Competency of juror as witness
>
> (a) At the Trial.—a member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> (b) Inquiry Into Validity Of Verdict Or Indictment.—upon 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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.[54]

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[48] *Id.* at 877.

[49] *Id.*

[50] *Id.*

[51] Peña-Rodriguez, 137 S. Ct. at 877 (Alito, J., dissenting) (citing S. REP. NO. 93-1277, at 760 (1974)).

[52] *Id.* (internal quotation marks omitted).

[53] *Id.*

[54] Pub. L. No. 93–595, 88 Stat. 1926 (1975).

D. Jurisprudence that Followed the Enactment of Rule 606(b)

After the enactment of Rule 606(b) of the Federal Rules of Evidence, the debate shifted to whether the Constitution mandated an exception to the rule.[55] The Court addressed that precise question in two instances prior to *Peña-Rodriguez*.[56] The first instance was *Tanner v. United States* in 1987 and the second instance was *Warger v. Shauers* in 2014.[57] In both cases, the Court affirmed the long-standing practice of not allowing a juror to testify in order to impeach the jury's verdict.

The *Tanner* Court rejected the proposition that the Sixth Amendment required an exception to Rule 606(b) to allow jurors to provide testimony as "evidence that some jurors were under the influence of drugs and alcohol during the trial."[58] The Court reasoned that the long-standing, serious concerns for allowing "intrusive inquiry" into jury deliberations warranted that no exception be given.[59] The Court also considered the influences on the jury to be internal rather than external.[60] In the Court's view, the voluntary ingestion of drugs and alcohol by a juror is no more external "than a virus, poorly prepared food, or a lack of sleep."[61] The *Tanner* Court emphasized that Congress considered and rejected whether such a case requires an exception and further stated:

> Thus, the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication. This legislative history provides strong support for the most reasonable reading of the language of Rule 606(b)—that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.[62]

Most notably, the *Tanner* Court emphasized that there were four safeguards in place during the trial that protected the defendant's Sixth Amendment right to an "unimpaired" jury.[63] The first safeguard was the *voir dire* examination which is designed to ensure the prospective juror is suitable to carry out the responsibility of serving in the jury.[64] The second safeguard was the opportunity for the court, counsel, and court personnel

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[55] *Peña-Rodriguez*, 137 S. Ct. at 866; *see* FED. R. EVID. 606(b) (referring to juror testimony and its exceptions).

[56] *Peña-Rodriguez*, 137 S. Ct. at 866.

[57] Tanner v. United States, 483 U.S. 107 (1987); Warger v. Shauers, 135 S. Ct. 521 (2014).

[58] *Peña-Rodriguez*, 137 S. Ct. at 866 (citing *Tanner*, 483 U.S. at 107). *See also* U.S. CONST. amend VI (guaranteeing a criminal defendant the right to speedy and public trial before an impartial jury).

[59] *Tanner*, 483 U.S. at 127.

[60] *Id.* at 122.

[61] *Id.*

[62] *Id.* at 125.

[63] *Id.* at 127.

[64] *Id.* at 127.

to observe the jurors during the trial.[65] The third safeguard was the opportunity for jurors to observe each other and report any "inappropriate behavior" before the jury returns a verdict to the court.[66] The fourth safeguard was the opportunity for either party to impeach the verdict by evidence of juror misconduct so long as the evidence is not offered by a juror.[67] The *Tanner* Court concluded that those protections rendered an exception to Rule 606(b) unnecessary.[68]

Similarly, the *Warger* Court rejected the proposition that the Sixth Amendment required an exception to Rule 606(b) to allow jurors to provide testimony that a juror was dishonest during the *voir dire* examination to impeach the jury's verdict.[69] In *Warger*, the Court held that Rule 606(b) precluded the use of an affidavit by a juror that discussed statements by another juror during deliberations to prove the juror's dishonesty during *voir dire*.[70] The Court reasoned that since the alleged dishonesty during *voir dire* would have resulted in the juror being dismissed for cause, the challenge made was clearly inquiring into the validity of the verdict.[71] Accordingly, the Court concluded that Rule 606(b) did not allow juror testimony to pursue that inquiry during the post-verdict stage.[72] Further, the *Warger* Court reasoned that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."[73]

E. Congressional Amendments to Rule 606(b)

There were no substantive changes made to Rule 606(b) until the rule was amended in 2006.[74] The amended rule allowed jurors to provide testimony in order "to prove that the verdict reported was the result of a

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[65] *Id.* (citing United States v. Provenzano, 620 F.2d 985, 996–97 (3d Cir. 1980) (discussing incident where a marshal discovered a sequestered juror and two alternate jurors smoking marijuana at about 3:00 a.m.)).

[66] *Id.* (citing Lee v. United States, 454 A.2d 770, 772 (D.C. Cir. 1982), *cert. denied sub nom.* McIlwain v. United States, 464 U.S. 972 (1983) (describing how jurors sent a trial judge a note on the second day of deliberations requesting a different foreperson when there was a question about whether that person was intoxicated)).

[67] *Id.* (citing United States v. Taliaferro, 558 F.2d 724, 725–26 (4th Cir. 1977) (noting that defendant had not shown that any jurors became intoxicated during dinner so as to prejudice the defendant)).

[68] *Id.*

[69] Warger v. Shauers, 135 S. Ct. 521, 524 (2014).

[70] *Id.*

[71] *Id.* at 525 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555–56 (1984)).

[72] *Id.* at 524.

[73] *Id.* at 529.

[74] FED. R. EVID. 606 advisory committee's note to 2006 amendments (stating that the 1987 amendments were technical and the Committee did not intend any substantive changes).

mistake in entering the verdict on the verdict form."[75] A growing number of U.S. Courts of Appeals were in agreement that allowing juror testimony regarding a clerical error in announcing a verdict that was different than the verdict the jury agreed upon was not an attempt to impeach the verdict.[76] Accordingly, such testimony was not subject to the exclusionary rule.[77] The amendment rejected the practice by some courts of allowing juror testimony to prove that the jury misunderstood the consequences of the verdict it consented to or misapplied the instructions it was given.[78] The Advisory Committee's notes assert that the practice improperly allowed an inquiry into the mental processes of the deliberators.[79]

The rule was stylistically amended in 2011, along with other rules in the Federal Rules of Evidence, in order to make the rule more easily understood and to ensure the terminology was consistent throughout the rules.[80] The 2011 amendment provided a clearer statement of the exceptions to Rule 606, which read in relevant part:

> (b) During an Inquiry Into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these

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[75] *Id.*

[76] *Id.* (citing Plummer v. Springfield Terminal Ry., 5 F.3d 1, 3 (1st Cir. 1993) (stating that a number of circuits hold that juror testimony regarding an alleged clerical error does not challenge the validity of the verdict or the deliberation of mental processes and therefore not subject to the exclusionary rule)). *See* Karl v. Burlington Northern Ry. Co., 880 F.2d 68, 73–74 (8th Cir. 1989) (explaining that it was error to receive juror testimony on whether the verdict was the result of the jurors' misunderstanding of the instructions); Eastridge Dev. Co. v. Halpert Assocs., 853 F.2d 772, 783 (10th Cir. 1988) (noting that the trial court "found that Rule 606(b) did not preclude the court from interrogating the jury concerning its verdict for the possibility of discovering clerical errors, and the Rule did not prevent a juror from testifying that the verdict did not accurately reflect the decision of the jury" and approving a verdict amended to "reflect the jury's true decision"); Robles v. Exxon Corp., 862 F.2d 1201, 1207–08 (5th Cir. 1989) ("The district court was correct when it noted that we have held that rule 606(b) does not bar juror testimony as to whether the verdict delivered in open court was actually that agreed upon by the jury.").

[77] FED. R. EVID. 606 advisory committee notes to 2006 amendments.

[78] *Id. See also* Davis v. United States, 47 F.2d 1071, 1071–72 (5th Cir. 1931) (rejecting the testimony of two jurors offered as evidence that the jurors did not hear the court's instruction not to consider the failure of the defendant to testify); Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987) (rejecting the appellants' argument that the post-trial interviews induced the jurors to impeach their original verdict in violation of Rule 606(b)); *Karl*, 880 F.2d at 74 (explaining that it was error to receive juror testimony on whether the verdict was the result of the jurors' misunderstanding of the instructions because the "the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule").

[79] FED. R. EVID. 606 advisory committee's notes to 2006 amendments.

[80] *Id.*

matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.[81]

The most drastic change to Rule 606 and the no-impeachment rule occurred when the Court delivered the *Peña-Rodriguez* decision.[82] The Court's jurisprudence added a new exception beyond the amendments to Rule 606(b).[83]

II. THE PEÑA-RODRIGUEZ DECISION

A. The Background and Facts of *Peña-Rodriguez*

The *Peña-Rodriguez* case presented the Court with a challenge to Rule 606(b) of the Colorado Rules of Evidence that, like the corresponding federal rule, generally prohibits jurors from testifying about matters or statements made in the course of the jury's deliberations.[84] At the trial court level, the State of Colorado charged Miguel Angel Peña-Rodriguez with harassment, unlawful sexual contact, and attempted sexual assault on a child.[85] The charges were based upon allegations that stemmed from a 2007 incident in a bathroom at a horse racing facility where a man sexually assaulted two teenage sisters.[86] Both girls identified the man as an employee of the facility and they separately identified Peña-Rodriguez as the assailant.[87] The jury found Peña-Rodriguez guilty of unlawful sexual

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[81] FED. R. EVID. 606(b).

[82] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (holding that where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider evidence of the juror's statement any resulting denial of the jury trial guarantee).

[83] *Id.*

[84] COLO. R. EVID. 606(b); *Id.* at 862. *Compare* COLO. R. EVID. 606(b), *with* FED. R. EVID. 606(b).

[85] *Peña-Rodriguez*, 137 S. Ct. at 861.

[86] *Id.*

[87] *Id.*

contact and harassment.[88]

After the jury was discharged, Peña-Rodriguez's counsel "entered the jury room to discuss the trial with the jurors."[89] As the jury was leaving, two jurors stayed behind to speak with the counsel privately, stating that another juror expressed anti-Hispanic bias toward Peña-Rodriguez and one of his witnesses during the deliberations.[90] The two jurors provided affidavits describing racially-biased statements by another juror referred to as Juror H.C.[91]

"According to the two jurors, H.C. told the other jurors that he 'believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.'"[92] The jurors also discussed that "H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement and further stated, 'I think he did it because he's Mexican and Mexican men take whatever they want.'"[93] Among other reported statements, the jurors discussed that H.C. stated he did not believe Peña-Rodriguez's alibi witness because the witness was "an illegal."[94]

B. Procedural History of *Peña-Rodriguez*

The trial court recognized that H.C. was biased after reviewing the affidavits of the two jurors.[95] However, the trial court held that Rule 606(b) of the Colorado Rules of Evidence protected jury deliberations from the type of inquiry sought.[96] The court also held that the verdict was final, and Peña-Rodriguez was sentenced to two years of probation and was required to register as a sex offender.[97] The trial court reasoned that during the extensive *voir dire*, there was no mention of race, national origin, or immigration status.[98] Moreover, there were no questions asked about

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[88] *Id.* (discussing how the jurors were asked about whether they could be impartial as members of the venire and during *voir dire*, and none of them expressed they could not be impartial because of racial bias).

[89] *Id.*

[90] *Peña-Rodriguez*, 137 S. Ct. at 861.

[91] *Id.* at 862.

[92] *Id.*

[93] *Id.*

[94] *Id. Cf. id.* ("In fact, the witness testified during trial that he was a legal resident of the United States.").

[95] *Peña-Rodriguez*, 137 S. Ct. at 862.

[96] *Id.* (comparing COLO. R. EVID. 606(b) with FED. R. EVID. 606(b)).

[97] *Id.*

[98] People v. Peña-Rodriguez, No. 11CA0034, 2012 WL 5457362, at *4 (Colo. App. Nov. 8, 2012), *aff'd*, 350 P.3d 287 (Colo. 2015), *rev'd and remanded sub nom.* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017); *see id.* (discussing how the trial court judge who conducted *voir dire* instructed defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. I don't know if that's an issue for your or your client, but you may want to address it," although the defense counsel never mentioned race, national origin, or immigration

Peña-Rodriguez's ethnicity or whether H.C. harbored racial bias.[99] Accordingly, the questions "were not specific enough to find that [H.C.] had misrepresented information about his possible bias in *voir dire*."[100]

The Colorado Court of Appeals affirmed the trial court's decision, holding that the alleged statements were inadmissible in an inquiry into the validity of the verdict because the statements were barred under Rule 606(b).[101] The appellate court refused to disturb the trial court's ruling that the questions were not specific enough to determine whether H.C. harbored racial bias.[102] The court also held that the alleged statements of bias were not an external influence on the jury deliberations.[103] Rather, the alleged statements were illustrations of a belief about a particular ethnic group based on the individual's experiences.[104]

In the same way, the Colorado Supreme Court affirmed the decision of the appellate court, holding that there was no basis to allow impeachment of the verdict rendered by the jury.[105] The Colorado Supreme Court rejected the proposition that enforcement of Rule 606(b) of the Colorado Rules of Evidence violated Peña-Rodriguez's Sixth Amendment rights.[106] The court concluded that the rule clearly precluded the admission of the affidavits provided by the two jurors regarding H.C.'s alleged statements of racial bias during deliberations.[107] The court further reasoned that Rule 606(b) "promote[s] finality of verdicts, shield[s] verdicts from impeachment, and protect[s] jurors from harassment and coercion."[108]

C. The United States Supreme Court's Decision

The Supreme Court of the United States granted certiorari on the issue of whether the Constitution requires an exception to the no-impeachment rule for instances of racial bias.[109] The Court held that:

[W]here a juror makes a clear statement that indicates he or she

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status).

[99] *Id.*

[100] *Id. See also* Seventh Day Adventist Ass'n of Colo. v. Underwood, 99 Colo. 139, 141–42 (Colo. 1936) (refusing to address in a motion for new trial the assertion that potentially biased jurors prevented a fair trial, as no "specific questions" were asked about this bias in *voir dire*).

[101] *Peña-Rodriguez*, 2012 WL 5457362, at *1.

[102] *Id.* at *4.

[103] *Id.* at *7.

[104] *Id.*

[105] Peña-Rodriguez v. People, 350 P.3d 287, 289 (Colo. 2015), *reh'g denied* (June 15, 2015), *cert. granted sub nom.* Peña-Rodriguez v. Colorado, 136 S. Ct. 1513 (2016), and *rev'd and remanded sub nom.* Peña-Rodriguez v. Colorado, 137 S. Ct. at 855.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 290 (citing People v. Harlan, 109 P.3d 616, 624 (Colo. 2015)).

[109] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

> relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[110]

The Court reasoned that the safeguards discussed in *Tanner* may not be as effective as they are necessary in "rooting out" racial bias.[111] The Court further reasoned that "[t]he duty to confront racial animus in the justice system is not the legislature's alone."[112] Justice Kennedy, writing for the majority, referred to the no-impeachment rule as a centuries-old principle.[113] Justice Kennedy went on to say that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."[114] The Court also reasoned that the racial bias in *Peña-Rodriguez* was different "in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*."[115]

D. The Dissents in *Peña-Rodriguez*

Justice Thomas argued the Court's holding was incompatible with both the Sixth Amendment and the Court's precedents.[116] Justice Thomas continued that the common law right to a jury trial did not include the right to impeach the verdict with testimony from one of the jurors regarding juror misconduct.[117] Accordingly, the no-impeachment rule is well-established and any abandonment or curtailment of the rule "should be left to the political process. . . ."[118] As such, Justice Thomas disagreed with the holding of the Court allowing an exception to Rule 606(b).[119]

Justice Alito also dissented from the Court's holding in *Peña-Rodriguez*, arguing that the no-impeachment rule advances crucial interests.[120] Justice Alito compared the protections that have been extended to jury deliberations by the no-impeachment rule to the protections extended in other areas of confidentiality, such as statements made by a client to an attorney, statements made by a patient to a treating

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[110] *Id.* at 869.
[111] *Id.*
[112] *Id.* at 867.
[113] *Id.* at 861.
[114] *Peña-Rodriguez*, 137 S. Ct. at 867.
[115] *Id.* at 868.
[116] *Id.* at 871 (Thomas, J., dissenting) (asserting that the right to a trial by an impartial jury is limited to the common law protections that existed during ratification of the Sixth Amendment).
[117] *Id.* at 872.
[118] *Id.* at 874.
[119] *Id.*
[120] *Id.* at 879 (Alito, J., dissenting).

physician, and statements made by an individual to a spouse.[121] "Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way."[122] Justice Alito reasoned that the Court has repeatedly recognized the importance of the no-impeachment rule in rebuffing efforts to create a Sixth Amendment exception to Rule 606(b) in *Tanner* and *Warger*. Further, Justice Alito suggested the Sixth Amendment rights of a defendant are "adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations."[123]

III. THE FUTURE OF THE AMERICAN JURY TRIAL SYSTEM AFTER *PEÑA-RODRIGUEZ*

A. The New Exception to Rule 606(b) Raises Several Unanswered Questions

Like many other tests arising out of the Court's jurisprudence, the ambiguity in the new standard—"clear signs of racial animus"—abandons any concept of sovereign authority[124] creating a test that will require constant litigation to glean what is meant by the Court's decision.[125] This is a recurring problem when new standards are drawn out of the Court's effort to reach "fairness" rather than committing to the fundamental nature of judicial review.[126] The Court's decision settling one question raises several others for lower courts, practitioners, and litigants who may find themselves on either side of the courtroom.[127] A few issues raised are: (1) how severe the racially biased statement must be before the exception is triggered, (2) whether the holding applies to other types of bias (such as religious or gender-based bias), and (3) whether the holding applies to civil cases.[128]

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[121] *Id.* at 874 (Alito, J., dissenting).

[122] *Id.* (Alito, J., dissenting).

[123] *Id.* at 879 (Alito, J., dissenting).

[124] *See* J. McIntrye Machinery, Ltd. v. Nicastro, 564 U.S. 873, 882 (2011) (citing Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 117 (1987) and discussing how the *Asahi* Court "discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability").

[125] *See Peña-Rodriguez*, 137 S. Ct. at 867 (discussing the need for racial animus to be a "significant motivating factor").

[126] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) (discussing his contempt for the "practice of constitutional revision by an unelected committee of nine," which is "always accompanied . . . by extravagant praise of liberty, [robbing] the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves").

[127] McCarthy & Brister, *supra* note 3, at 288–90.

[128] *Id.*

To be sure, there is no bright-line rule developed in *Peña-Rodriguez* as to how severe the racially biased statements must be to meet the threshold created by the exception. Although the Court notes that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar . . . ," the decision leaves trial judges with a substantial amount of discretion in deciding whether the statements made meet the new standard.[129] There are instances where increased judicial discretion leads to increased disparities among racial and ethnic minorities.[130] This reality undermines the Court's expressed goal of fulfilling a duty to confront racial animus in the justice system.[131] Indeed, the discretion held by a trial judge can be a much more dangerous tool.[132] This Note does not suggest that the danger is the intentional exploitation of the discretion by trial judges. Rather, the danger lies in the cultural barriers,[133] such as language, that may exist between the trial judge and a defendant, and any implicit bias held by the judge that may negatively impact the outcome of the defendant's case.

Moreover, the Court's specific application of the exception to racial animus is not likely to restrict courts from seeking to apply the same test to other classes of individuals. Even more, why should they? Other forms of discrimination are just as harmful as discrimination against racial and ethnic minorities in violating the constitutional rights guaranteed to criminal defendants. For instance, severe gender bias toward a female defendant may produce the same result as a minority defendant facing severe bias based on race or ethnicity. "While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'"[134] Prejudicial views regarding gender and gender stereotypes lead to disparate outcomes for female defendants. "The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or

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[129] *Id.* at 288 (quoting *Peña-Rodriguez*, 137 S. Ct. at 869).

[130] *See, e.g.*, Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 FED. SENT. R. 311, 311 (2013).

[131] *Peña-Rodriguez*, 137 S. Ct. at 867.

[132] *See* Amber Hall, *Using Legal Ethics to Improve Implicit Bias in Prosecutorial Discretion*, 42 J. LEGAL PROF. 111, 111–12 (2017) (discussing how prosecutorial discretion facilitates mass incarceration in the United States).

[133] Even language may be a cultural barrier between a defendant and the trial judge or law enforcement. *See, e.g.*, State v. Demesme, 228 So.3d 1206, 1206–07 (La. 2017). This case involved an arrestee who stated during his police interrogation, "I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up." *Id.* at 1206. The Louisiana Supreme Court agreed with the trial court that the defendant had not invoked his right to counsel, *id.*, and a concurring judge noted that "the defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview." *Id.* at 1207. However, the use of the slang word "dawg" is very commonly used to refer to another person. *See Dawg*, MERRIAM-WEBSTER DICTIONARY (2016 ed). Thus, it is much more likely that Demesme was requesting a lawyer rather than asking for a non-existent "lawyer dog."

[134] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135–36 (1994) (quoting Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)).

paternity."[135]

Furthermore, the Court's decision leaves, unanswered, the question of whether the new exception will eventually be applied to civil cases.[136] Notwithstanding the Court's expressed language applying the holding to criminal cases, the expansion of *Peña-Rodriguez* into civil cases is not impossible.[137] Merely five years after the Court's decision in *Batson v. Kentucky*, the Court's holding in that criminal case was expanded to civil cases in *Edmonson v. Leesville Concrete Company*.[138] In *Edmonson*, the Court's "determination that a civil litigant's use of peremptory strikes was state action was based on the legal formality of the jury selection process and the fact that struck jurors are discharged by the judge, who thus becomes a party to discrimination if a strike was race-motivated."[139] The import of *Batson* into civil cases rested on the Sixth Amendment's application to the states by way of the Fourteenth Amendment.[140] Admittedly, the import of *Peña-Rodriguez* into civil cases would be more difficult considering the Seventh Amendment has not been applied to the states.[141] However, the uncertainty of how the new exception will be applied in the future will undoubtedly keep practitioners and litigants on guard for future changes to the *Peña-Rodriguez* exception to Rule 606(b).

B. More Damaging to Free Debate Than Curative of Racial Discrimination

The roots of racism run too wide and too deep to somehow be "cured" by creating a racial animus exception to the no-impeachment rule. Americans "share a common historical and cultural heritage in which racism has played and still plays a dominant role."[142] Racism has pervaded

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[135] *Id.* at 140.

[136] *See Peña-Rodriguez*, 137 S. Ct. at 869 (holding that the opinion is limited to criminal cases).

[137] McCarthy & Brister, *supra* note 3, at 289–90.

[138] *See id.* (citing Edmondson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (applying the holding in *Batson* to civil cases); Batson v. Kentucky, 476 U.S. 79, 79 (1986) (holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

[139] M. Christian King & Wesley B. Gilchrist, *Will* Pena-Rodriguez v. Colorado *Apply to Civil Cases?*, LAW 360 (Mar. 13, 2017), https://www.law360.com/articles/900903/will-penarodriguez-v-colorado-apply-to-civil-cases [https://perma.cc/ZBU5-TS22].

[140] *Id.*

[141] *See id.* (noting that the right to trial by jury "in civil cases in state courts is governed by state constitutions or statutes"); *see also* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

[142] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). *See generally* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); LERONE BENNETT, BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (5th ed. 1982); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (5th ed. 1980); VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1981); A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978); JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970);

American culture, including institutions of justice, since the founding of our Nation.[143] America's "schizophrenic personality" has often resulted in the pronouncement of "the great principles of democracy" on one hand, while also practicing "the very antithesis of those principles" on the other hand.[144] Our Nation claimed a self-evident truth that "all men are created equal," yet resolved the conflict between human property and human liberty by positing that blacks are less than human.[145] Racism has been so deeply ingrained in American culture that it has been transmitted by tacit understandings.[146]

Professor Charles Lawrence III suggests that "[e]ven if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others."[147] "These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level."[148]

> Furthermore, because children learn lessons about race at this early stage, most of the lessons are tacit rather than explicit. Children learn not so much through an intellectual understanding of what their parents tell them about race as through an emotional identification with who their parents are and what they see and feel their parents do. Small children will adopt their parents' beliefs because they experience them as their own. If we do learn lessons about race in this way, we are not likely to be aware that the lessons have even taken place. If we are unaware that we have been taught to be afraid of blacks or to think of them as lazy or stupid, then we may not be conscious of our internalization of those feelings and beliefs.[149]
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> . . . .
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> . . . If an individual has never known a black doctor or lawyer or is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for

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MANNING MARABLE, BLACK AMERICAN POLITICS: FROM THE WASHINGTON MARCHES TO JESSE JACKSON (1985); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135–43 (1982).

[143] *See* Martin Luther King, Jr., Guest Speaker, Drew University: The American Dream (Feb. 5, 1964) (speaking on civil rights issues in the United States based on his personal experiences).

[144] *Id.*

[145] *See id.* (discussing Thomas Jefferson); Charles R. Lawrence III, Georgetown University Law Center Commencement Address: Don't Go Back to Egypt After God Done Took You Out of There: Reconciliation, Reparations, and the New Abolitionists 56, 57 (May 21, 2017).

[146] Lawrence III, *supra* note 143, at 323.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 338.

certain roles.[150]

Moreover, the political process should always be the preferred venue for lawmaking. This Note does not suggest that the aim should not be ensuring every individual receives a fair and impartial trial that is free from racial animus. However, the benefit gained from prying open the doors of jury deliberations does little for reaching that goal. In fact, the damage to the jury system may prove to be more harmful to individuals who identify as a racial or ethnic minority than those who identify as non-minorities. Courts must resist the temptation to confuse personal preferences with what is required by law.[151] This is not to say that racial animus should be tolerated; rather, that courts must acknowledge the "restrained conception of the judicial role."[152] The courts have "neither force nor will, but merely judgment . . . ."[153] In order for liberty to truly exist, the power of judging must be separated from the power to legislate.[154] For that reason, courts must embrace the text of the Constitution in judging what the Constitution requires.

C. Implicit Bias is More Dangerous to a Defendant

In *A Time To Kill*, the fictional defense attorney in a vigilante murder trial, Jake Brigance, wrestled with the issue of implicit bias while offering his closing argument to the jury. Brigance stated:

> I set out to prove a Black man could receive a fair trial in the South, that we are all equal in the eyes of the law. That's not the truth, because the eyes of the law are human eyes—yours and mine—and until we can see each other as equals, justice is never going to be evenhanded. It will remain nothing more than a reflection of our own prejudices, so until that day, we have a duty under God to seek the truth. Not with our eyes and not with our minds where fear and hate turn commonality into prejudice, but with our hearts—where we don't know better.[155]

The fictional attorney, speaking to a panel of white jurors, continued to provoke their self-examination by describing the horrible details of the rape and assault of the black defendant's young daughter.[156] Brigance finished his closing argument with the words, "[n]ow imagine she's

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[150] *Id.* at 343.
[151] Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).
[152] *Id.*
[153] THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis omitted).
[154] *Id.*
[155] A TIME TO KILL (Warner Bros. 1996).
[156] *Id.*

white."[157] The defense strategy was developed with a clear recognition of the added challenge imposed on the defendant of having to deal with the implicit biases held by some, or all, of the jurors.[158]

Psychological and social science research suggest that an individual's perception is often defined and limited by the individual's personal background and experience.[159] Personal background and experience not only help to shape implicit attitudes, but also contribute to the development of "thin slice judgments" that are both unconscious and are made at a glance.[160] "These thoughts give support to racial and gender bias, even when an individual truly believes they are unbiased and do not hold prejudicial beliefs."[161] An individual's inability to identify racial discrimination when it is seen mostly results from a failure to recognize that discrimination is "both a crime and a disease":[162]

> This failure is compounded by a reluctance to admit that the illness of [discrimination] infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.[163]

Hence, the challenge of eliminating the impact of racial animus during jury deliberations requires a different remedy than the new exception provided by the Court in *Peña-Rodriguez*. The pervasiveness of implicit biases held by jurors poses the most dangerous threat to defendants that are susceptible to racial or gender discrimination. Accordingly, any remedy must effectively address implicit racial biases of jurors and the effects of the same on the American system of justice.

At the outset, this Note discussed the contention that political processes are the most appropriate venues for crafting remedies to the problems created by showings of racial animus during jury deliberations. The Congress, the state legislatures, and, most importantly, the people must recognize the task of addressing the impact of implicit racial bias in the judicial system as one of the most immediate and necessary priorities. It has been more than forty-six years since an amendment to the

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[157] *Id.*

[158] *See id.* (addressing representing an African-American defendant in a predominantly white southern town).

[159] Hall, *supra* note 133, at 115.

[160] *Id.* (citing Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities? The Perils of "Doing" Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164, 171 (Gabriella Gutierrez y Muhs ed. 2012)).

[161] *Id.* at 115 (citing Eisenhower Foundation, *What Together We Can Do: A Forty Year Update of the National Advisory Commission on Civil Disorder: Executive Summary, Preliminary Findings, and Recommendations* (Washington, DC: Eisenhower Foundation, 2008)).

[162] Lawrence III, *supra* note 143, at 321.

[163] *Id.*

Constitution has been submitted for ratification.[164] Considering the number of problems that have plagued American institutions of justice over the past fifty years, as well as the general society, the lack of submissions is startling. Perhaps the no-impeachment rule offers the American people a unique opportunity to remind the courts and themselves that the future of the jury trial system should depend on political processes rather than the jurisprudence of nine justices.

D. A Recipe for Even More Litigation

Another troubling, but likely outcome that may follow the Court's decision in *Peña-Rodriguez* is seemingly endless litigation by unsatisfied litigants seeking to undermine the jury's verdict. Rule 606(b) has served a door-keeping function protecting verdicts from being followed by a regular practice of "searching for any and all evidence of jury misconduct that could invalidate the [] verdict."[165]

Jurors "will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation."[166] Rule 606(b) of the Federal Rules of Evidence was enacted, in part, to protect the interest of jurors in shielding the internal deliberations from scrutiny after the trial has ended.[167] The finality of the verdict is important for both the defendant and the court to know that the verdict will not be reopened.[168] Post-trial investigations gathering testimony from jurors regarding deliberations will have a severely negative impact on future trials as it relates to open debate and free discussion among jurors during deliberations.

"If what went on in the jury room were judicially reviewable for reasonableness and fairness, trials would no longer truly be by jury, as the Constitution commands."[169] Having jurors that fear having to provide testimony or having another juror provide a written account of their statements would undermine the goal of fruitful debate and the sharing of ideas among ordinary citizens. The *Peña-Rodriguez* exception opens the door to the very post-trial investigations that the no-impeachment rule was developed to prevent.

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[164] *See* BRITANNICA EDUCATIONAL PUBLISHING, THE UNITED STATES CONSTITUTION AND CONSTITUTIONAL LAW 105–08 (2012) (explaining that the Twenty-Sixth Amendment was submitted for ratification on March 23, 1971, and the Twenty-Seventh Amendment was first submitted September 25, 1789, but the latter was not ratified until more than 200 years after the original proposal).

[165] Lindsey Y. Rogers, *Rule 606(b) and the Sixth Amendment: The Impracticalities of a Structural Conflict*, 6 WAKE FOREST J.L. & POL'Y 19, 21 (2015).

[166] S. REP. NO. 93–1277, at 14 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

[167] *See id.* (asserting that "rule 606 should not permit any inquiry into the internal deliberation of the jurors").

[168] Rogers, *supra* note 166, at 21.

[169] United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008).

CONCLUSION

"No verdict would be safe."[170] Those words are as true today as they were in *McDonald*. The Court's creation of a new exception to Rule 606(b) poses a real threat to the survival of the American jury system. The risk is too great, especially considering that the new policy has little to no chance at accomplishing the goal of curing the effects of racial animus. This Note does not attempt to ignore the damaging effects of discrimination in the American legal system; however, prying open the door to jury deliberations is not the answer. The new exception does little toward achieving the goal of dealing with implicit biases of jurors that may impact jury verdicts.

Moreover, the *Tanner* safeguards provide an effective tool for dealing with issues related to jurors.[171] Indeed, the safeguards were more than sufficient to ensure the adequate protection of the defendant's Sixth Amendment rights in *Peña-Rodriguez*.[172] First, the defendant had every opportunity to question Juror H.C. regarding any racial bias during *voir dire*. The defendant's failure to question H.C. regarding the defendant's race, national origin, or immigration status during *voir dire* effectively waived any claim for such bias as well as undermines the Court's reasoning that an exception is necessary. Second, the jurors, including H.C., were observed throughout the course of the trial by the court, the court's staff, and the attorneys. The likelihood that an individual who harbored such extreme racial bias toward the defendant waited until jury deliberations before making any statements or expressions that indicated his racial bias is close to naught. Third, H.C. was observed by the other jurors, making it even more probable that H.C. made some observable statement or expression before jury deliberations began. Finally, the Court's decision would not offend the no-impeachment rule, if the evidence offered was from a source other than a juror. The constitutional protections extended by the Sixth Amendment were not designed to usurp the long-standing no-impeachment rule.[173]

What is more, Congress debated the no-impeachment rule and codified the same.[174] The rejection of a permissive no-impeachment rule was clear.[175] The Court's creation of a new exception is not a result of a new area of law not yet considered by the legislature. Rather, the Court's decision runs contrary to the promulgated no-impeachment rule that was established by the very body the Constitution empowered to make law, which is undisputedly Congress. The new exception is not only

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[170] McDonald v. Pless, 238 U.S. 264, 268 (1915) (quoting Straker v. Graham, 150 Eng. Rep. 1612 (Ex. 1839)).

[171] *See* Tanner v. United States, 483 U.S. 107, 116–27 (1987) (reciting the history of the safeguards).

[172] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 879 (2017) (Alito, J., dissenting).

[173] *See id.* (noting that this is the first exception to the no-impeachment rules).

[174] *Id.* at 877 (Alito, J., dissenting).

[175] *Id.* (Alito, J., dissenting).

unnecessary but risks damaging the American jury trial system for many years to come.