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### Is Pena-Rodriguez v. Colorado Just a Drop in the Bucket or a Catalyst for Improving a Jury System Still Plagued by Racial Bias, and Still Badly in Need of Repairs

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# IS *PEÑA-RODRIGUEZ V. COLORADO* JUST A DROP IN THE BUCKET OR A CATALYST FOR IMPROVING A JURY SYSTEM STILL PLAGUED BY RACIAL BIAS, AND STILL BADLY IN NEED OF REPAIRS?

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*Robert I. Correales\**

## INTRODUCTION

Historically, race-based jury bias has maintained the most prominent place in the hierarchy of social ills that have plagued the American Criminal Justice System. Relying on Due Process and Equal Protection principles, the United States Supreme Court and lower federal courts have chipped away at the problem with mixed results. State Courts have also served as laboratories, providing important lessons on the successes and failures of different approaches, often leading the way with their innovations. A formidable obstacle commonly referred to as a “black box,” better known as the no-impeachment rule, has made progress difficult. The no-impeachment rule was designed to protect the secrecy of jury deliberations from scrutiny by allowing only limited access to the content of jury deliberations. Its aim was to promote frank and open discussions during deliberations, protecting all communications with the exception of extraneous influences like newspapers, threats, and bribes. In *Peña-Rodriguez v. Colorado*<sup>1</sup> the U.S. Supreme Court finally broke through the black box and delivered on a long-held expectation that the no-impeachment rule would yield in cases involving overt statements of racial bias. *Peña-Rodriguez* represents an important step forward. Though the decision may not have a widespread impact in a system where implicit racial bias continues to be the much larger problem, the decision nonetheless can serve as a catalyst for a new discussion, this time led by the highest court in the land. And, as history has shown, the decision can also serve as the ever-important first step forward as the system struggles to improve its ability to eradicate biases that deny criminal defendants equal treatment under the law. This article attempts to begin a conversation about

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\* Professor of Law, William S. Boyd School of Law at the University of Nevada, Las Vegas. I wish to thank Professor Thomas McAfee for his many helpful comments on drafts of this article, and Brianne Perkins, Boyd class of 2017, for her research assistance and constant words of encouragement. I also wish to thank my research assistant Wesley Su for his hard work and dedication to this article.

<sup>1</sup> 137 S. Ct. 855 (2017).

the effect of racial and other biases that can work to deny criminal defendants a fair trial. Contrary to the Court's fears that the jury system cannot survive such attempts to perfect it, the article argues that the eradication of overt bias on the basis of Equal Protection and Due Process will produce a system better equipped to deliver equal justice for all, while improving its institutional standing among the American public. Tracing the Court's history in similar contexts, and examining the experiences of lower federal and State courts, the article takes the position that the issue of overt bias will inevitably be expanded beyond race to protect characteristics such as gender, religion, sexual orientation, and perhaps political affiliation. Lastly, taking lessons from the State and lower federal courts that have addressed this issue, the article attempts to lay out mechanisms that will assist Courts charged with implementing *Peña-Rodriguez*.

### BACKGROUND

The American criminal jury system is premised on the ideal of an impartial group of ordinary citizens who utilize their collective intelligence, wisdom, and common sense to engage in deliberations that are honest, candid, and robust to bring justice to the accused. The criminal jury, despite its imperfections, is considered a necessary check on governmental power. The right to a jury trial in criminal cases is guaranteed by the Sixth Amendment of the U.S. Constitution, which, by operation of the Fourteenth Amendment, is applicable to the States. Jury deliberations take place in what is commonly referred to as a "black box," which is designed to protect the secrecy of the deliberations to promote a frank and open discussion of the merits of the case free from scrutiny by outside forces. In addition to protecting the secrecy of deliberations, the "black box" is also said to promote respect for the institution, and public confidence in jury verdicts. Historically, the default rule has been that jurors cannot impeach a verdict with evidence of juror misconduct during deliberations absent the exceptions enumerated in Federal Rule of Evidence 606(b), which codified the no-impeachment rule of the common law, and its state counterparts. FRE 606(b) reads:

(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 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 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 on entering the verdict on the verdict form.<sup>2</sup>

As is the case with all similar state rules, R. 606(b) was designed to protect the secrecy of jury deliberations to promote an unfettered and frank discussion of the evidence at trial, and to protect the finality of jury verdicts. The rule was also designed to prevent jury harassment in the form of fishing expeditions intended to find reasons to challenge guilty verdicts.

Prior to *Peña-Rodriguez*, *Tanner v. United States*<sup>3</sup> posed the deepest constitutional challenge to the no-impeachment rule. In *Tanner*, the defendants were convicted of conspiracy to defraud the United States and several counts of mail fraud. After the verdict, a juror informed defense counsel of drug use and intoxication by other jurors. A second juror approached defense counsel, as the case went up on appeal, and made similar allegations. Both the district court and the appellate court found that R. 606(b) precluded evidence of jury intoxication to impeach the verdict after the verdict had been reached. The U.S. Supreme Court affirmed, holding that jury intoxication was an internal matter such as an illness, or improperly prepared food, that may impair a person's focus, or other physical or mental incompetence not prohibited by R. 606(b).<sup>4</sup> It also held that criminal defendants' Sixth Amendment rights to a trial by an impartial and mentally competent jury<sup>5</sup> were adequately protected by *voir dire*, observations of juror behavior during trial by court, counsel, court personnel and by other jurors themselves all of which can be reported before the jury reaches a verdict, or, post-trial, non-juror evidence of misconduct.<sup>6</sup> Indeed, the Court noted that the District Court held evidentiary proceedings on the possibility of juror impairment "giving the petitioners ample opportunity to produce non-juror evidence supporting their allegations,"<sup>7</sup> where no evidence of juror wrongdoing was produced. According to the Court, R. 606(b) has traditionally restricted verdict challenges to situations involving extraneous prejudicial information, such as newspaper or magazine articles bearing on the case,<sup>8</sup> and external influences such as threats to a juror or a juror's family members, or bribes.<sup>9</sup> Importantly, while a juror may testify as to any of the offending items post-verdict, the juror is prohibited from testifying about the thought processes or the manner in which the prohibited evidence affected the verdict.<sup>10</sup>

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<sup>2</sup> Fed. R. Evid. 606(b).

<sup>3</sup> 483 U.S. 107 (1987).

<sup>4</sup> *Id.* at 122 ("However severe their effect and improper their use, drugs, or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep.").

<sup>5</sup> *Id.* at 126 (citing *Jordan v. Com. of Massachusetts*, 225 U.S. 167 (1912)).

<sup>6</sup> *Id.* at 127.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 118.

<sup>9</sup> *Id.* at 117 (citing *Remmer v. United States*, 347 U.S. 227, 228–30 (1954)).

<sup>10</sup> *See id.*

Judicial concern over statements of racial bias made during jury deliberations and discovered post-verdict has a long history,<sup>11</sup> with the majority of courts that have considered this issue holding that R. 606(b) does not pose a bar to evidence of racial bias to impeach a verdict (though many have gone beyond racial bias), and a small number holding that it does. One side of the debate is represented by *U.S. v. Villar*<sup>12</sup> where the defendant, a Hispanic male, was convicted of bank robbery. After the trial, defense counsel received an e-mail from a juror (Juror 66), who stated: "I feel compelled to send this to you, I don't know if I should be doing this but I don't care. I know it's late but I want you to know that there were a least three people on the jury who actually listened to the testimony with an open mind . . . We finally decided to not prolong that young man's hope any longer. We could have stayed there for another week. Their minds were made up from the first day. Here is one example, a man said 'I guess we're profiling but they cause all the trouble.'"<sup>13</sup> Based on the affidavit, defense counsel moved to set aside the verdict on the basis of bias and prejudice on the part of at least one juror based on Villar's Hispanic ethnicity.<sup>14</sup> The trial court judge denied the motion. Relying on *U.S. v. Connolly*, 341 F.3d 16 (1st Cir. 2003), *Tanner v. U.S.*, and R. 606(b), the court held that, though it found racial bias reprehensible, damaging, and dangerous to the deliberative process, it had no discretion to grant the motion.<sup>15</sup> The First Circuit agreed with the trial court's assessment of the limits of its discretion, but reversed on the basis of a defendant's right to due process under the Fifth Amendment and a defendant's right to trial by an impartial jury as guaranteed by the Sixth Amendment.<sup>16</sup>

The First Circuit rejected the Eighth Circuit's reliance on the *Tanner* protections, holding that they do not provide adequate safeguards in the context of racially biased comments made during deliberations. The court stated:

While individual pre-trial voir dire of the jurors can help disclose prejudice, it has shortcomings because some jurors may be reluctant to disclose racial bias. In addition, visual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias. Likewise, non-jurors are more likely to report inappropriate conduct — such as alcohol and

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<sup>11</sup> Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 Syracuse L. Rev. 1, 4–7 (2010); 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, 133–137 (2015).

<sup>12</sup> 586 F.3d 76 (1st Cir. 2009).

<sup>13</sup> *Id.* at 81 (citing Appellee's Br.App. at 1).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 84.

drug use – among jurors than racial statements uttered during deliberations to which they are not privy.<sup>17</sup>

While concluding that the trial court had discretion to inquire into jury deliberations involving statements of racial bias, the court noted that the U.S. Supreme Court had long recognized that when questions of juror bias are raised “it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without ‘violating the plainest principles of justice.’”<sup>18</sup> Importantly, the trend among courts that had followed the principle cited in *Villar* far outnumbered the trend in those which had not.<sup>19</sup>

*U.S. v. Benally* represented the other side of the debate.<sup>20</sup> In *Benally*, the 10th Circuit held that R. 606(b) precludes an exception for racial bias.<sup>21</sup> Mr. Benally, a Native American, had been charged with assaulting a Bureau of Indian Affairs officer with a dangerous weapon; he was found guilty after a jury trial. After the verdict was announced, a juror, Juror K.C., approached defense counsel and informed him that jury deliberations had been improperly influenced by racist claims against Native Americans. According to K.C., the jury foreman had remarked during deliberations that he used to live on or near an Indian Reservation, and that “[w]hen Indians get alcohol, they all get drunk,” and that when they get drunk, they get violent.<sup>22</sup> K.C. also reported that another juror appeared to agree with the jury foreman. K.C. also revealed in a signed affidavit that some jurors had discussed “sending a message back to the reservation.”<sup>23</sup> A defense investigator uncovered another juror who appeared to corroborate K.C.’s testimony but had refused to sign an affidavit. The defense investigator signed an affidavit detailing his findings. Mr. Benally moved to vacate the verdict and petitioned for a new trial. The government opposed the motion, relying on R. 606(b). The trial court granted a new trial, finding that the jurors had lied on *voir dire* when they failed to reveal their experiences with and preconceptions of Native Americans, and that the jury had improperly considered extrinsic evidence when the juror, whose family was in law enforcement, related stories that showed a need to send a message.<sup>24</sup> Addressing the first point on appeal by the government, the Tenth Circuit followed the Third Circuit, which had held

<sup>17</sup> *Id.* at 87 (footnote omitted).

<sup>18</sup> *Id.* at 84 (citing *McDonald v. Pless*, 238 U.S. 264, 268–69 (1915)).

<sup>19</sup> *Id.* at 84–86 (citing, *United States v. Dioguardi*, 492 F.2d 70, 79 n. 12 (2d Cir.1974); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir.1986); *United States v. McClinton*, 135 F.3d 1178, 1185 (7th Cir.1998); *Anderson v. Miller*, 346 F.3d 315, 327–29 (2d Cir.2003); *Williams v. Price*, 343 F.3d 223, 225–35 (3d Cir.2003); *Wright v. United States*, 559 F.Supp. 1139, 1151 (E.D.N.Y.1983); *Tobias v. Smith*, 468 F.Supp. 1287, 1289–90 (W.D.N.Y.1979); *Smith v. Brewer*, 444 F.Supp. 482, 490 (S.D. Iowa 1978); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991)).

<sup>20</sup> 546 F.3d 1230 (10th Cir. 2008).

<sup>21</sup> *Id.* at 1241.

<sup>22</sup> *Id.* at 1231.

<sup>23</sup> *Id.* at 1232.

<sup>24</sup> *Id.*

that R. 606(b) “categorically bar[s] juror testimony ‘as to any matter or statement occurring during the course of the jury’s deliberations’ even if the testimony is not offered to explore the jury’s decision-making process in reaching the verdict.”<sup>25</sup> On the second point, the Court held that none of the statements alleged to have been made constituted “specific extra-record facts relating to the defendant.”<sup>26</sup> Though the statements were deemed improper by the Court, “impropriety alone,” the Court observed, did not make them extraneous. The Court therefore ruled that the trial court judge had abused his discretion when he admitted that testimony under R. 606(b).<sup>27</sup>

On the question of whether the statements evincing racial bias should fall under an implicit exception to R. 606(b), the Court held that the *Tanner* factors already protect the Sixth Amendment interests raised by the respondent.<sup>28</sup> Importantly, in response to the argument that *Tanner* is distinguishable because racial bias is a more serious and fundamental danger to the justice system than intoxicated jurors, the Court worried that, once that avenue is opened, there would be no principled way to confine inquiries only to “the most serious” violations.<sup>29</sup>

The Court’s longstanding concern over statements of racial bias uttered during jury deliberations was again highlighted in *Warger v. Shauers*.<sup>30</sup> That case, (a personal injury claim) involved a statement made by the jury foreperson during deliberations that her daughter had been involved in an auto accident for which she had been at fault, and that, if a trial had been held, her niece would have gone broke as a result.<sup>31</sup> The Court held that the foreperson’s statements were internal to her and thus precluded by 606(b).<sup>32</sup> However, the Court revealed that under the proper circumstances, it would be willing to consider the matter in the future. In footnote three of the opinion the court stated:

There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process. We need not consider that question, however, for those facts are not presented here.<sup>33</sup>

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<sup>25</sup> *Id.* at 1236 (citing *Williams v. Price*, 343 F.3d 223, 235 (3d Cir. 2003) (Alito, J.)).

<sup>26</sup> *Id.* at 1237.

<sup>27</sup> *See id.* at 1241–42.

<sup>28</sup> *See id.* at 1238–39.

<sup>29</sup> *Id.* at 1241.

<sup>30</sup> 135 S. Ct. 521 (2014).

<sup>31</sup> *See id.* at 524 (citing App. to Pet. for Cert. 40a–41a).

<sup>32</sup> *Id.* at 529.

<sup>33</sup> *Id.* at 529 n.3.

## THE PEÑA-RODRIGUEZ DECISION

In *Peña-Rodriguez v. Colorado*, the U.S. Supreme Court reversed the Colorado Supreme Court's denial of a challenge to Colorado Rule of Evidence 606(b) where the defendant had alleged that the jury verdict in his case was illegally influenced by racial bias. Peña-Rodriguez had been charged with criminal harassment, unlawful sexual contact, and attempted sexual assault on a child.<sup>34</sup> The defendant claimed that he had been misidentified.<sup>35</sup>

Reflecting the nature of the charges, the trial court and attorneys for the defendant took significant precautions as the jury was being empaneled. Prospective jurors were asked about their capacity for impartiality and fairness.<sup>36</sup> In a written questionnaire, prospective jurors were also asked to disclose whether there was "anything about you that you feel would make it difficult for you to be a fair juror."<sup>37</sup> The same question was read to the panel and jurors were invited to speak privately with the court if they had concerns about their impartiality.<sup>38</sup> Defense counsel also asked whether anyone felt that this "[was] simply not a good case" for them to be a fair juror.<sup>39</sup> None of the jurors expressed any reservations based on racial and other bias, and none asked to speak privately with the judge.<sup>40</sup> Peña-Rodriguez was found guilty of unlawful sexual contact and harassment, but the jury failed to reach a verdict on the sexual assault charge.<sup>41</sup> Upon discharging the jury, the court issued an instruction as required by Colorado law:

The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk with anyone is entirely your own decision. . . . If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.<sup>42</sup>

## EVIDENCE OF RACIAL BIAS IN PEÑA-RODRIGUEZ

After a discussion with jurors and with the court's permission, defense counsel obtained sworn affidavits from two jurors describing a number of racially biased statements made by a third juror, identified as Juror H.C.<sup>43</sup>

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<sup>34</sup> *Peña-Rodriguez*, 137 S. Ct. at 861.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (internal quotations omitted).

<sup>43</sup> *Id.* at 861–62.



According to the affiants, H.C. had said that he (H.C.) “believed that the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe that they could do whatever they wanted with women.”<sup>44</sup> According to the two jurors, H.C. believed that Mexican men are physically controlling of women because of their sense of entitlement.<sup>45</sup> The two jurors also reported that H.C. had further stated that “I think he did it because he’s Mexican and Mexican men take whatever they want.”<sup>46</sup> The two jurors added that H.C. had also asserted that: “Nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”<sup>47</sup> The defendant’s alibi witness was not believable, according to H.C., because “the witness was an illegal” (ignoring the fact that the witness testified during trial that he was a legal resident, and, more significantly, confirming that the juror was negatively predisposed to judge Hispanics harshly because of their race, national origin or ethnicity).<sup>48</sup>

The trial court acknowledged H.C.’s apparent bias, but denied Peña-Rodriguez’s motion for a new trial.<sup>49</sup> Relying on R. 606(b), the court ruled that, “[t]he actual deliberations that occur among the jurors are protected from inquiry under that rule.”<sup>50</sup> The trial court’s decision was affirmed by a divided panel of the Colorado Court of Appeals, which held that H.C.’s alleged statements were inadmissible to undermine the validity of the verdict.<sup>51</sup> A divided Colorado Supreme Court affirmed by a 4 to 3 vote relying on *Tanner v. United States*, 483 U.S. 107 (1987) and *Warger v. Shavers*, 135 S.Ct. 521 (2014), finding “no dividing line between different types of juror bias or misconduct.”<sup>52</sup> The U.S. Supreme Court granted certiorari.

The Supreme Court reversed, finally fulfilling the long held expectation that in certain cases an exception to the no-impeachment rule may be adopted.<sup>53</sup> The Court focused on the “imperative to purge racial prejudice from the administration of justice.”<sup>54</sup> Noting the especially pernicious nature of racial discrimination in the American South after the Civil War,<sup>55</sup> the Court traced jurisprudential advances designed to integrate the jury system

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<sup>44</sup> *Id.* at 862 (quoting Brief of Appellant at 110).

<sup>45</sup> *Id.* (quoting Brief of Appellant at 109).

<sup>46</sup> *Id.* (quoting Brief of Appellant at 110).

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting App. 90).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting *Peña-Rodriguez v. People*, 350 P.3d 287, 293 (Colo. 2015)).

<sup>53</sup> *Id.* at 863 (“The Reid Court warned that juror testimony ‘ought always to be received with great caution.’ . . . Yet it added an important admonition: ‘cases might arise in which it would be impossible to refuse’ juror testimony ‘without violating the plainest principles of justice’” (quoting *U.S. v. Reid*, 12 How. 361, 366 (1852))). That sentiment was reiterated later in *Mattox v. United States*, 146 U.S. 140 (1892), *Hyde v. United States*, 225 U.S. 347 (1912), and *McDonald v. Pless*, 238 U.S. 264 (1915).

<sup>54</sup> *Id.* at 867.

<sup>55</sup> *Id.* (noting that in Texas in the years 1865–1866 the State decided 500 cases involving prosecutions of white defendants charged with killing African-Americans and all 500 defend-

to “preserve the right to a fair trial and to guarantee the equal protection of the law.” Highlighting its role in the eradication of racial bias in the justice system, the Court cited its rulings to: 1) prohibit the exclusion of jurors on the basis of race;<sup>56</sup> 2) strike down laws and practices that systematically exclude racial minorities from juries;<sup>57</sup> 3) prohibit litigants from excluding prospective jurors on the basis of race; and, 4) permit individuals to ask questions about racial bias during *voir dire*.<sup>58</sup> All of those cases, the Court asserted, demonstrate that “discrimination on the basis of race, “odious in all aspects, is especially pernicious in the administration of justice.”<sup>59</sup> Unlike the case of a compromised verdict in *McDonald*, drug and alcohol abuse in *Tanner*, and a pro-defendant bias in *Warger*, where each case involved anomalous behavior by one juror, the Court stated that racial bias is “a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.”<sup>60</sup>

#### JUSTICE ALITO’S DISSSENT – FORETELLING THE FUTURE?

In dissent, Justice Alito made several important observations. Though agreeing with the court that “even a tincture of racial bias” can inflict a great deal of harm to the criminal justice system,<sup>61</sup> Alito strongly objected to the adoption of a constitutional exception that, as he saw it, would overturn the no-impeachment rule, undermining centuries of jury secrecy, which, in his opinion, had crucially protected the integrity of the jury system.<sup>62</sup> Alito argued that the majority undersold the effectiveness of the *Tanner* protections when it comes to protecting against racial bias.<sup>63</sup> Alito objected most vehemently to the idea that the new constitutional exception could be limited to racial bias, stressing that no principled distinction could be made between a rule targeting racial bias and one targeting other forms of bias.<sup>64</sup> Alito accused the court of declaring that “the Constitution is less tolerant of racial bias than other forms of juror misconduct,” a conclusion that cannot be squared with the nature of the Sixth Amendment, which protects the right to an “impartial jury.”<sup>65</sup>

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ants were acquitted) (citing *Juries and Race in the 19th Century*, 113 YALE. L. J. 895, 916 (2004)).

<sup>56</sup> *Id.* (citing *Strauder v. West Virginia*, 100 U.S. 303, 305–09 (1880)).

<sup>57</sup> *Id.* (citing *Neal v. Delaware*, 103 U.S. 370 (1881); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (*per curiam*); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Castaneda v. Partida*, 430 U.S. 482 (1977)).

<sup>58</sup> *Id.* (citing *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez*, 451 U.S. 182 (1981); *Turner v. Murray*, 476 U.S. 28 (1986)).

<sup>59</sup> *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 875 (Alito, J., dissenting).

<sup>62</sup> *Id.* (Alito, J., dissenting).

<sup>63</sup> *Id.* at 880–81 (Alito, J., dissenting).

<sup>64</sup> *Id.* at 883 (Alito, J., dissenting).

<sup>65</sup> *Id.* at 882 (Alito, J., dissenting).

Regarding the Court's apparent invocation of equal protection values under the Fourteenth Amendment, Alito noted that "[r]ecasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias."<sup>66</sup> "At a minimum," Alito stated, "cases involving bias based on any suspect classification such as national origin or religion – would merit equal treatment. So, I think would bias based on sex, or the exercise of the First Amendment right to freedom of expression or association. Indeed, convicting a defendant on the basis of any irrational classification would violate the equal protection clause."<sup>67</sup>

#### ANALYSIS

##### *The Exception Cannot be Contained to Racial Bias*

Though racial bias retains the highest standing in the historical hierarchy of social ills that must be eradicated from the justice system, history shows that concern over other forms of bias such as gender, sexual orientation, and disability usually follow the progress made in the area of race, as courts inevitably recognize that those biases can also have a profound negative impact on participants in legal proceedings who may be just as vulnerable to the whims of a bigoted juror as would a racial minority. The difficulty of drawing a line that would provide a basis for the distinction between racial and other types of bias was evident at oral argument of *Peña-Rodriguez*.<sup>68</sup> In fact, the Court implicitly recognized that difficulty when it conceded that race and ethnicity are often conflated into racial categories,<sup>69</sup> as was the case in *Peña-Rodriguez*.

Here it is important to note that the Supreme Court relied heavily on the experiences of state courts to craft its racial bias exception. During oral argument, seeking support from the experiences of eighteen state and two federal jurisdictions that had confronted the question, Justice Breyer asked petitioner's counsel to explain the approaches taken by the State and lower federal courts that had considered the matter.<sup>70</sup> In response, counsel asserted that all twenty jurisdictions had limited their exception to race.<sup>71</sup> This point was later reinforced by counsel for the State,<sup>72</sup> and included in the Court's final opinion.<sup>73</sup>

Despite lengthy exchanges between justices and counsel for the parties, a justification for the distinction never emerged during oral argument. In

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<sup>66</sup> *Id.* at 883 (Alito, J., dissenting).

<sup>67</sup> *Id.* at 883–84. (Alito, J., dissenting).

<sup>68</sup> Transcript of Oral Argument at 4, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

<sup>69</sup> *See id.* at 9–10.

<sup>70</sup> *Id.* at 14.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 29.

<sup>73</sup> *See Peña-Rodriguez*, 137 S. Ct. at 868.

their attempt to establish a rationale for limiting the exception to race-based bias, the Justices borrowed from, but did not commit to, Fourteenth Amendment Equal Protection doctrine,<sup>74</sup> leaving several important questions unanswered. Though counsel attempted to argue that race-based bias may require that the Court view the Sixth Amendment through the prism of Equal Protection,<sup>75</sup> counsel never explained why the entirety of equal protection analysis should not apply to other forms of bias, other than to assert that racial bias is different because of its uniquely pernicious nature.<sup>76</sup>

Similarly, while asserting that the Sixth Amendment can be animated through Fourteenth Amendment Equal Protection values, drawing a parallel to the Court's analysis in *Bolling v. Sharpe*, where, according to counsel, the Court said that the Fifth Amendment's Due Process Clause should be infused with the values of Equal Protection,<sup>77</sup> counsel declined to argue for a full commitment to Equal Protection. Inevitably, the question remaining was, if Equal Protection values can animate the right to trial by an impartial jury of a racial minority, why shouldn't they animate the right to trial of other classes? And, to further develop the analysis along parallel lines, why shouldn't the First Amendment religious clause animate an individual's Sixth Amendment right to an impartial jury to protect against religious bias, or its freedom of association clause not animate a similar analysis for political or other forms of affiliation?<sup>78</sup> Answering these questions in the affirmative, as would have been the case had the court committed to Equal Protection doctrine, would have expanded the exception, while not affecting very many cases. However, the Court's anxiety over protecting the secrecy and frankness of jury deliberations from a supposedly unmanageable expansion of those rights prevailed. Not surprisingly, the rationale for recognizing racial bias while purposely ignoring other forms of bias such as gender, religion, disability or sexual orientation was never made clear. Time will tell whether the Court's reluctance to fully deploy Equal Protection was an oversight or perhaps an intentional and strategic move to lay the first stone in the foundation of a more expansive doctrine.

Pushing petitioner's counsel for an explanation or rationale, Justice Alito asked at oral argument:

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<sup>74</sup> See Transcript of Oral Argument at 6, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

<sup>75</sup> *Id.* at 9.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.* at 16. When responding to Justice Alito's question about how the issue of racial bias connects with the right to an impartial jury, Petitioner's Counsel responded, "Because the values of the Fourteenth Amendment are read into the sixth amendment as well. And if I can give the Court an analogy, think of *Bolling v. Sharpe*, where the Court asked whether the Due Process clause applies to the Federal government – I'm sorry – the Equal Protection Clause applies to the Federal Government, which it doesn't by its terms, But the Court said, you know what, the Due Process Clause in the Fifth Amendment does, and that should be infused with the values of the Equal Protection. And the particular harms of racial discrimination should be read into that amendment as well." *Id.*

<sup>78</sup> Note. Alito made a similar point at oral argument and in the opinion.

Race is – race is different for some purposes. But why is it different from other things for Sixth Amendment purposes? What the sixth amendment protects is the right to a fair trial – to an impartial jury. And if we allow the exception that you are advocating, what do you say to the defendant who – the prisoner who is going to be spending the rest of his life in prison as a result of the jury verdict that was determined by flipping a coin?<sup>79</sup>

Justice Alito may have raised the issue more effectively had he used categories such as gender, disability, sexual orientation or religion to make his point, rather than an example involving a coin flip which raised the issue at the extreme end of Equal Protection analysis. However, Alito did manage to make the point emphatically in his dissenting opinion.

In response to Alito, petitioner's counsel hinted at the possibility of other exceptions but never committed to that line of analysis. Instead, counsel and other justices continued to develop the idea that race-based bias is so especially pernicious that it deserves separate treatment even in a non-Equal Protection context, as, according to them, has been the case in jurisdictions that have limited the scope of the exception to racial bias.<sup>80</sup> However, a review of the cases cited for support by petitioner reveals that his answer was mistaken. As this article shows, State and federal courts have been far more active and successful laboratories for the exploration of the question before the court, and can therefore assist to identify possible answers to the questions left unresolved by *Peña-Rodriguez*.

#### WHAT HAVE STATE AND LOWER FEDERAL COURTS DONE WHEN FACED WITH THIS PROBLEM?

The experiences of state and federal trial courts that have dealt with overt biases during jury deliberations will be essential to determining the answers to the questions left unanswered by *Peña-Rodriguez*. Contrary to assertions by petitioner's counsel during oral argument that other federal and state jurisdictions have restricted the constitutional exception to the no-impeachment rule to racial bias, examples abound of federal and state courts' doing far more, often quite successfully. Importantly, the assertion by petitioner's counsel that other jurisdictions have made the change without experiencing a loss of public confidence in the jury, a loss of privacy in the jury system, or an increase in harassment of juries by losing sides,<sup>81</sup> though not based on fact, is nonetheless quite helpful as a baseline for an important observation. Accepting the proposition that the public's confidence in the jury has only improved in those jurisdictions that have recognized an exception for racial bias, an interesting question arises: how much better would the

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<sup>79</sup> *Id.* at 15.

<sup>80</sup> *See id.* at 9.

<sup>81</sup> *Peña-Rodriguez*, 137 S. Ct. at 870.

public's confidence in the jury system be if other forms of overt bias were also eliminated or at least minimized? And, how would it serve the public confidence in the jury if, upon multiple juror reports of anti-woman, or anti-religious statements made during deliberations, the judge responded with, "well, these statements, though bigoted and indicative of a juror's inability to judge the case on its facts but rather on odious preconceptions about the individual's membership in a particular group, are nonetheless protected under R. 606 (b) because they are not about race." Now, what if the bigoted statements were about a particular religion, which may be fused with a person's ethnicity or national origin, and the juror asserted during a conference with the judge, "I did not mean the statements as racism, I just did not like the defendant's religion." Under *Peña-Rodriguez*, the judge may be justified in finding that the explanation suffices to protect the juror's statement from further scrutiny, to deny a motion for a new trial. Of course, a judge may also decide, correctly in many cases, that the explanation is simply a proxy for ethnic or national origin discrimination, which, as courts have noted,<sup>82</sup> are often conflated into race, and decide the opposite. However, how would that reasoning square with the Court's requirement that trial courts focus on statements of "overt racial bias?" Lastly, why put the judge into that predicament, when the principled approach would be to eliminate all three forms of bias that have been revealed?<sup>83</sup>

An important example and an illustration of the often impossible task of distinguishing between the interlocking characteristics of race, religion, national origin, and gender was offered by the Missouri Supreme Court in *Fleshner v. Pepose Vision Inst., P.C.*<sup>84</sup> *Fleshner* not only teaches about biases beyond race, but also shows that jurors may sometimes turn against the defendant on the basis of their prejudgment of a witness (of course, in some cases, even the state's case may be prejudiced if the jury turns against a witness on the basis of an impermissible form of bias,<sup>85</sup> and, in some cases, both parties may be prejudiced if the jury turns against either counsel on that basis<sup>86</sup>).

After a jury verdict in favor of the plaintiff, the corporate defendant moved for a new trial because a juror allegedly made anti-Semitic comments about one of its witnesses during deliberations. The defendant alleged that a juror, when speaking about the wife of the President of the defendant com-

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<sup>82</sup> *Id.* at 884 (Alito, J., dissenting) (recognizing challenge of dividing racial and non-racial statements).

<sup>83</sup> *United States v. Hamilton*, 850 F.2d 1038, 1042–43 (4th Cir. 1988), abrogated by *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (2007) (holding that peremptory challenges based on gender were racially neutral when the Government exercised peremptory challenges against three black, female jurors in a case with a black defendant).

<sup>84</sup> *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (M.O. 2010).

<sup>85</sup> *Peña-Rodriguez*, 137 S. Ct. at 870 (finding that a juror had encouraged other jurors to disbelieve an alibi witness based on "dangerous racial stereotype").

<sup>86</sup> A juror in a criminal case testified that other members of the jury expressed prejudice against defense counsel's race with comments including, "I won't let a white man [defense counsel] influence or manipulate me and I won't do it," and, "We as blacks should not allow 'whitey' to win out." *People v. Rukaj*, 123 A.D.2d 277, 279 (N.Y. 1986).

pany, stated: "she's a Jewish witch." "She's a Jewish bitch." "She's a penny-pinching Jew."<sup>87</sup> "She was such a cheap Jew that she did not want to pay plaintiff's unemployment compensation."<sup>88</sup> According to the defendant, those comments demonstrated that it did not receive a fair trial by a fair and impartial jury.<sup>89</sup> Noting the general prohibition to juror testimony regarding mental processes and innermost thoughts or beliefs, the court looked for guidance to jurisdictions that had recognized a constitutional exception to the non-impeachment rule. Citing the Wisconsin Supreme Court in *After Hour Welding, Inc., v. Laneil Management Co.*,<sup>90</sup> which had recognized an exception to racial, national origin, religious or gender bias, the Court held that, if, after a motion by a party followed by an evidentiary hearing the trial court finds that statements reflecting racial or religious bias have been made during deliberations, a motion for a new trial should be granted.<sup>91</sup> Importantly, that court's focus was simply on whether the alleged statements were made. The court did not hold a hearing to determine the effect the statements had on the trial, but held that the trial court abused its discretion by not conducting a hearing to determine whether the alleged comments were made.<sup>92</sup>

Another powerful example of the alternatives to the restrictive *Peña-Rodriguez* ruling is presented in *United States v. Heller*,<sup>93</sup> where the defendant, who had been accused of tax evasion and making false statements on tax returns, was the target of discriminatory statements before, and during, trial proceedings, including jury deliberations. According to a reporting juror, the jury room during deliberations was "a circus" where derogatory statements that had been made about the defendant's Jewishness before and during the trial were repeated during deliberations.<sup>94</sup> According to the juror, during testimony one of the jurors had remarked with a smirk, "[h]ey, how many Kaplans are we going to have here?" In reference to the fact that the defendant was Jewish. In addition, as reported, another juror mockingly remarked that the defendant's Rabbi "came to bless him" (the defendant).<sup>95</sup> Both of those statements were made, according to the reporting juror, "to Gales of laughter," as if the speakers were enjoying seeing the defendant in such a predicament.<sup>96</sup>

In a conversation with the trial court judge, another juror admitted making an anti-Semitic slur before trial that he later repeated to several other jurors during the case.<sup>97</sup> Relating the conversation he had with a friend about the defendant, the juror recalled the following: [friend] "Oh, the Jew-

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<sup>87</sup> *Fleshner*, 304 S.W.3d at 88.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *After Hour Welding, Inc., v. Laneil Management Co.*, 108 Wis.2d 734 (1982).

<sup>91</sup> *Id.* at 742-43.

<sup>92</sup> *Id.* at 739.

<sup>93</sup> *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986).

<sup>94</sup> *Id.* at 1526.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

ish lawyer? I said, “yes.” He said, ‘Well, how do you feel?’ I said, ‘the case hasn’t been said, but he’s Jewish. We are just going to hang him.’”<sup>98</sup>

Despite the juror’s assertion that he had made the remarks “jokingly” and assertions by other jurors during interviews that they could nonetheless be impartial, the Eleventh Circuit reversed the conviction and remanded for a new trial.<sup>99</sup> The court found that,

Despite longstanding and consistent efforts . . . to purge our society of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country . . . must remain ever-vigilant in its responsibility.<sup>100</sup>

In addressing the manner in which religious bigotry can do damage to the judicial system, the court stressed, “The religious prejudice displayed by the jurors in the case . . . is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any harmful effects on this appellant.”<sup>101</sup> Addressing the juror’s explanation that he had simply meant the anti-Semitic remarks in a joking manner, the court noted that, “in a society in which anti-Semitism is condemned, those harboring such thoughts often attempt to mask them by cloaking them in a ‘teasing’ garb. A wolf in sheep’s clothing is, despite clever disguise, still a wolf.”<sup>102</sup>

*State v. Levitt*, another case involving religious bias during jury deliberations, shows the way in which jury bias toward defendants and witnesses can infect jury deliberations to the detriment of the defense.<sup>103</sup> The defendant, a physician, had been charged with performing an indecent act upon a patient.<sup>104</sup> There having been no witnesses to the event, the case turned on the credibility of the alleged victim and that of the accused, who denied the event ever took place. After the jury returned a guilty verdict, one of the jurors informed the judge that, during deliberations, other jurors had made a number of prejudicial statements against the defendant and his character witnesses, of which there were twenty-five.<sup>105</sup> The juror’s affidavit stated that one of the jurors commented on the defendant’s appearance, stating: “How could anyone go to him because just a look at him leads to the conclusion that he is a person capable of doing the things that he is charged with.”<sup>106</sup> According to the affiant, another woman on the jury agreed with that re-

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1528.

<sup>100</sup> *Id.* at 1527.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *State v. Levitt*, 36 N.J. 266 (1961).

<sup>104</sup> *Id.* at 268.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 269.



mark.<sup>107</sup> In addition, when the discussion turned to the character witnesses, the affiant reported that a woman juror remarked, "Did you notice the character witnesses?" To which a male juror responded: "Yes, characters!" Then the same woman said, "Did you notice most of them were Jews and even one of them was from the Synagogue."<sup>108</sup> Importantly, character witnesses take on added significance in cases where the credibility of the defendant can be dispositive. The trial judge ordered a new trial after concluding that, "[t]here seems to be little doubt that at least one person on that jury was affected (by religious prejudice), and it seems prejudicially so and it makes little difference that the infection was only slight so long as it is present."<sup>109</sup> In fact, the court concluded by noting that "[i]f the trial judge found *even one juror* to be so biased as to prevent him from objectively weighing the evidence, it was sufficient to set the verdict aside."<sup>110</sup>

A similar exception was invoked in *Powell v. Allstate Insurance Company*,<sup>111</sup> a case that dealt with the issue of racial bias but relied on a broader rule to reach a decision. *Powell* involved a personal injury claim by a married couple who had sued their insurance company under their underinsured motorist coverage for \$200,000.<sup>112</sup> The couple were black Jamaicans.<sup>113</sup> The jury returned a verdict of \$29,320 for Mr. Powell, while Mrs. Powell received nothing.<sup>114</sup> Following the trial one juror contacted the plaintiff's attorney and the trial judge to inform them that some jurors had made racial jokes and statements about the plaintiffs throughout the trial.<sup>115</sup> All the jurors were white.<sup>116</sup> One juror told an "old saw" of a joke that said: "There is a saying in North Carolina, hit a n\*\*\*\*r and get ten points, hit him while he's moving and get fifteen."<sup>117</sup> An alternative juror characterized the plaintiffs as "probably drug dealers," while others laughed, and a witness was mocked for carrying a book by Jane Woodall that had a chimpanzee on the cover.<sup>118</sup> In apparent reaction to the book one said, "[a]nd Mr. Johnson [the witness] got out of the car and laid down on the pavement," after which several jurors went into hysterics.<sup>119</sup> Powell's loss of wages and earning power were an issue at trial. Another juror concluded, "he just wants to retire."<sup>120</sup>

Stressing that "the issue of racial, ethnic, and religious bias in the courts is not imply a matter of 'political correctness' to be brushed aside by a

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 467.

<sup>110</sup> *Id.* at 468 (emphasis added).

<sup>111</sup> *Powell v. Allstate Ins. Co.*, 652 So.2d 354 (Fla. 1995).

<sup>112</sup> *Id.* at 355.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Powell*, 652 So.2d at n.2.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

thick-skinned judiciary,”<sup>121</sup> the Court followed the lead of the Fifth Circuit which had held in a similar case:

Despite longstanding and continual efforts. . .to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. . . . A racially and religiously biased individual harbors certain negative stereotypes which . . . may well prevent him or her from making decisions based solely on the facts and law that our jury system requires. . . .<sup>122</sup>

Noting the persistence of racial bigotry after over two hundred years of declaring to the world that “all persons were initially created equal and are entitled to have their individual human dignity respected,”<sup>123</sup> the court declared that “[t]he justice system, and the courts especially, must jealously guard our sacred trust to ensure equal treatment before the law.”<sup>124</sup>

As the above cases demonstrate, concerns about overt expressions of racial and other biases made during deliberations has a long history in the lower federal and state courts, many of which have expanded the exception beyond race to include characteristics such as religion, national origin, race, color, and gender relying on Equal Protection and Due Process analysis. Though the state courts and lower federal courts have seldom discussed the reasons for the expansion of the doctrine beyond race, their opinions demonstrate the difficulty of confining people and biases to discreet categories. The decisions also show that by adopting a broad exception courts can prevent cases where permitted forms of discrimination can mask impermissible discrimination, frustrating the spirit of the exception. Lastly, the decisions show that protecting broad categories of people who may experience a form of bias can only increase the public’s confidence in a jury system that is more often criticized for its shortcomings than praised for its effectiveness.

THE SUPREME COURT’S HISTORY OF COMBATING BIASES IN THE JURY  
SYSTEM PROVIDES SOME EVIDENCE THAT *PEÑA-RODRIGUEZ*  
MAY JUST BE JUST THE FIRST STEP IN A MUCH  
LONGER JOURNEY

As explained above, to support its decision to tackle the question of overt evidence of racial bias during jury deliberations the Court traced its long line of holdings designed to eliminate racial bias in the criminal justice system. To highlight its role in the eradication of racial bias in the justice system, the Court cited rulings to: 1) prohibit the exclusion of jurors on the

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<sup>121</sup> *Id.* at 358.

<sup>122</sup> *Id.* (quoting *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

basis of race;<sup>125</sup> 2) strike down laws and practices that systematically exclude racial minorities from juries;<sup>126</sup> 3) prohibit litigants from excluding prospective jurors on the basis of race;<sup>127</sup> and, 4) permit individuals to ask questions about racial bias during *voir dire*.<sup>128</sup> However, for purposes of this article, just as important as its observation about what the Court said it did to help eradicate racial bias is what the Court did not say about its efforts to eradicate other forms of bias, along sometimes parallel lines.

In *Batson v. Kentucky*,<sup>129</sup> the Supreme Court invalidated the practice of using peremptory challenges to disqualify jurors on the basis of race. The defendant, a black man, had been accused of second-degree burglary and receipt of stolen goods.<sup>130</sup> After *voir dire* examination, the prosecutor used peremptory challenges to excuse all four of the black persons on the venire, leaving a jury composed of all white persons.<sup>131</sup> Defense counsel moved to discharge the jury before it was sworn, asserting that removing all the black people from the venire violated the defendant's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment right to Equal Protection of the laws.<sup>132</sup> The trial court denied the motion, observing that the parties were entitled to use their peremptory challenges to "strike anyone they want to."<sup>133</sup> The defendant was convicted of all counts.<sup>134</sup> The Supreme Court of Kentucky upheld the conviction, holding that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire, affirming its reliance on *Swain v. Alabama*.<sup>135</sup> Focusing its analysis on Fourteenth Amendment Equal Protection, while virtually ignoring petitioner's Sixth Amendment argument, the U.S. Supreme Court reversed. Overruling *Swain* to the extent that it could be read to require "that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause,"<sup>136</sup> the Court held that, "[j]ust as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, . . . so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."<sup>137</sup> The Court then emphasized, "The core guarantee of equal protection, ensuring citizens that their *State* will not

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<sup>125</sup> *Peña-Rodriguez*, 137 S. Ct. at 859 (citing *Strauder v. West Virginia*, 100 U.S. 303, 305-09 (1880)).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>130</sup> *Id.* at 82.

<sup>131</sup> *Id.* at 83.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 83-84 (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

<sup>136</sup> *Id.* at 92.

<sup>137</sup> *Id.* at 97.

discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race."<sup>138</sup>

Inevitably, the Court extended its holding in *Batson* to gender in *J.E.B. v. Alabama*,<sup>139</sup> a paternity case in which the state had used all of its peremptory challenges to remove males, ending in an all-female jury.<sup>140</sup> Writing for the majority, Justice Blackmun declared that "since *Batson*. . . We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes that are rooted in, and reflective of, historical prejudice."<sup>141</sup> The Court thus held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."<sup>142</sup>

Importantly, though the Court analyzed the discrimination in the case through the historical experiences of women in the jury system, it made no distinction between the histories of men and women, concluding that discrimination in jury selection cannot be condoned against either gender, thereby targeting for elimination two distinct, and arguably very different, types of harmful biases from the system of jury selection.<sup>143</sup> The respondent in the case had argued that unlike women, men deserved no protection from discrimination in the selection of the jury because they were not victims of historical discrimination.<sup>144</sup> It had also argued that male jurors were more likely to favor the man alleged to be the father in a paternity action, while women might be more receptive to the arguments of the woman who bore the child. Unpersuaded by the arguments, the Court held that, "[s]triking individual jurors on the assumptions that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'"<sup>145</sup> The Court worried that exclusion on the basis of gender "denigrates the dignity of the excluded juror," and then, distinguishing that type of discrimination from the historical exclusion experienced by women stated, "and, for a woman, reinvokes a history of exclusion from political participation."<sup>146</sup> Lastly, noting that its holding possessed the added benefit of eliminating a proxy for racial discrimination, the Court noted that, "[b]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination."<sup>147</sup>

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<sup>138</sup> *Id.* at 97–98.

<sup>139</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

<sup>140</sup> *Id.* at 129.

<sup>141</sup> *Id.* at 128 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

<sup>142</sup> *Id.* at 129.

<sup>143</sup> The Court's approach has been criticized for failing to recognize the differences between men and women and for failing to recognize the distinction between race and gender. See Roberta K. Flowers, *Does it Cost Too Much? A 'Difference' Look at J.E.B. v. Alabama*, 64 FORDHAM L. REV. 491.

<sup>144</sup> *J.E.B.*, 511 U.S. at 141.

<sup>145</sup> *Id.* at 142 (quoting *Strauder v. West Virginia*, 100 U.S. 308 (1880)).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 145.

It is important to note that the fight for gender equality in jury selection did not originate in *J.E.B. v. Alabama*. As other scholars have documented, gender equality in jury selection was first hatched in lower courts, which had recognized the importance of the issue following *Batson*, and well before *J.E.B.*<sup>148</sup> *Batson* and *J.E.B.* were expanded to include sexual orientation in *SmithKline Beecham Corporation v. Abbott Laboratories*,<sup>149</sup> where the Ninth Circuit relied on heightened scrutiny after *U.S. v. Windsor*,<sup>150</sup> to hold that Equal Protection prohibits peremptory challenges based on sexual orientation.<sup>151</sup> The state of California has accomplished the same result through legislation, as other jurisdictions have continued to expand *Batson* consistent with the Due Process and Equal Protection doctrines.<sup>152</sup>

#### LIFE AFTER PEÑA-RODRIGUEZ, AND FURTHER LESSONS FROM OTHER COURTS

While *Peña-Rodriguez* stressed the importance of eradicating overt racial bias from the criminal justice system, it did not provide much guidance to implement its mandate in the context of jury deliberations. In fact, what may be construed as the Court's guidance may create as much confusion as it resolves. *Peña-Rodriguez* seems to suggest a mechanism involving two levels of inquiry at any post-trial proceeding dealing with juror allegations of racial bias in deliberations. The first level of inquiry would require the judge to ascertain whether statements evidencing racial bias were made, and the second would require the judge to determine whether the communications had a negative effect on the jury's decision to convict. The Court's analysis is nothing new. State and lower federal courts have followed a similar path with a few variations for years. Though some courts have proceeded to a hearing upon finding evidence of overt statements of racial bias, some have ordered a new trial when the evidence is sufficiently strong, bypassing a hearing altogether.

The Court's discussion of the types of proof necessary to hold a hearing and the strength of the evidence a trial judge should consider to determine the effect of racial bias during jury deliberations was far less clear. Addressing the first level of inquiry, *Peña-Rodriguez* first warned that "[n]ot every

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<sup>148</sup> See Anna M. Scruggs, *J.E.B. v. Alabama ex rel. T.B.: Strike Two for the Peremptory Challenge*, 26 LOY. U. L. J. 549, 564 n. 143 (tracing development of *Batson* doctrine as it applied to gender in the states).

<sup>149</sup> *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471 (2014).

<sup>150</sup> *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>151</sup> *But see U.S. v. Blaylock*, 421 F.3d 758 (8th Cir. 2005) (declining to expand *Batson* to cases involving the sexual orientation of jurors).

<sup>152</sup> See *Brown v. Kinney Shoe Corporation*, 237 F.3d 556, 562–63 (5th Cir. 2001) (*Batson* challenge to exclusion of white jurors); *Powers v. Ohio*, 499 U.S. 400, 411–17 (1991) (white male defendant successfully challenged the exclusion of seven African-American jurors); *U.S. v. Mensah*, 737 F.3d 787, 797 (1st Cir. 2013) cert. denied, U.S. 134 S.Ct. 1912 (2014) (black defendant challenged exclusion of Asian Americans from jury); *U.S. v. Brown*, 352 F.3d 654 (2d Cir. 2003) (expanding *Batson* to religion); *U.S. v. Stafford*, 136 F.3d 1109 (7th Cir. 1998).

offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry,”<sup>153</sup> indicating that in some cases even statements indicating racial bias or hostility will have a harmless effect. The Court then held that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way on order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee,”<sup>154</sup> appearing to focus strictly on unambiguous statements of racial bias. However, the Court tempered the reference to clear statements when it stated, “[f]or the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations.”<sup>155</sup> While the Court’s use of the term “overt racial bias”<sup>156</sup> seems to limit its focus to unambiguous violations, the use of the modifier “exhibiting,” seems to allow for an examination of content as well as context, and not just shock value, of the offending statements. Similarly, by alerting trial courts that such statements “must TEND TO SHOW that racial animus was a significant motivating factor in the juror’s vote to convict”<sup>157</sup> the Court indicated that even a small quantum of evidence may be significant enough to justify setting aside a verdict and ordering a new trial under the proper circumstances. The term “tend[s] to show” in reference to evidentiary proof generally denotes a very low threshold, and its use is inconsistent with the Court’s use of more demanding terminology earlier in the opinion. The Court’s final word on the matter only added to the confusion, as it held that, despite its apparent attempts to provide guidance, it “[did] not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.”<sup>158</sup>

#### WHEN DOES A STATEMENT EXHIBIT “OVERT RACIAL BIAS?”

To keep from opening a wider door, the *Peña-Rodriguez* Court focused the constitutional exception to the no-impeachment rule on statements exhibiting “overt racial bias,” while managing not to define those terms. Whether a statement reveals, or exhibits, racial bias, such that a trial court should be

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<sup>153</sup> *Peña-Rodriguez*, 137 S. Ct. at 869.

<sup>154</sup> *Id.* (emphasis added).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 859.

<sup>157</sup> *Id.* (emphasis added). Significantly, the statement must “tend to show, that racial animus was a significant motivating factor in the jury’s vote to convict” unnecessarily ignores the situation where the jury may choose not to convict because of racism. For example, when the jury turns against an unsympathetic victim on the basis of racial bias, prejudicing the State’s case. Such a case would be a natural offshoot of *Peña-Rodriguez*.

<sup>158</sup> *Id.* at 870–71, comparing *Shillcutt*, 827 F.2d at 1159 (inquiring whether racial bias “pervaded the jury room”), with e.g., *Henley*, 238 F.3d at 1120 (“one racist juror would be enough”).

concerned about the speaker's potential to judge a criminal defendant on the basis of that bias, escapes an easy answer. To determine whether juror statements provide the evidence of racial bias required by the court, trial judges must analyze not just the content of the statements, but also the context in which they were delivered. An effective understanding of communications in their full context requires that the judge be mindful not just of their common meaning, but also their colloquial meaning, and, at times even their use as "slang." Simplifying or reducing the statements to their most basic components and ascertaining their meaning in isolation will often rob them of their significance and impact. Instead, the judge should assess the statements in their entirety, as they were originally uttered, preserving the proper context.

*State v. Brown*,<sup>159</sup> demonstrates the importance of context. In that case, the defendant appealed a conviction for simple assault and disorderly conduct based on the trial court's refusal to hold a post-trial evidentiary hearing to determine if the jury was racially biased.<sup>160</sup> The charges against Brown arose from a confrontation between several members of the Narragansett Indian Tribe and the Rhode Island State Police.<sup>161</sup> Brown, a member of the Indian group involved in the incident, was alleged to have slammed a state trooper's arm in a door.<sup>162</sup> He was also accused of pushing, choking, and being physically combative with other state troopers and flailing his limbs as troopers attempted to handcuff him.<sup>163</sup> There were six co-defendants in this case.<sup>164</sup>

In a note to the judge during deliberations, the jury's agitated discussions appeared to center on the tactics by the police, with one juror refusing to convict because of the conduct by the state troopers.<sup>165</sup> A second note asked for clarification on the issue of self-defense, and a third note declared a "complete impasse" on all charges.<sup>166</sup> Significantly, four of the six co-defendants were acquitted of all charges.<sup>167</sup>

In support of his appeal, Brown cited affidavits from three jurors, one of which, Juror A, identified herself as "the lone minority juror," and stated that she was "deeply concerned about the bias and conduct" of two other jurors, Jurors 1 and 2, who, according to her, "appeared to have a joint agenda."<sup>168</sup> In one incident she described, observing Brown and other co-defendants rise when the Tribal Chief Sachem testified at trial, Juror 1 remarked, "why did they stand up? He's nothing."<sup>169</sup> In addition, Juror A

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<sup>159</sup> *State v. Brown*, 62 A.3d 1099 (R.I. 2013).

<sup>160</sup> *Id.* at 1101-02.

<sup>161</sup> *Id.* at 1102.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1103.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1105.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1106.

reported that Juror 2 stated during deliberations, “who are those people to touch a police officer?”<sup>170</sup> Jurors 1 and 2 were also subjects of a second affidavit, this time by a juror referred as Juror B who corroborated the “who are those people” response by Juror 2 during the discussions about touching a police officer.<sup>171</sup> Juror B added that Juror 2 had banged two water bottles like a tom-tom drum when the verdict was finally reached.<sup>172</sup> The banging of the two bottles like a tom-tom drum was also reported in a third affidavit by another juror who termed the behavior of Jurors 1 and 2 “disrespectful” toward the defendants, but never heard racial epithets.<sup>173</sup> The trial court denied defendant’s motion for a new trial, finding the proffered statements to be “impressions of opinions or conclusions” based on ambiguous conduct.<sup>174</sup> The trial judge found that “none of the jurors had made clear statements evidencing racial bias.”<sup>175</sup> Instead, according to the judge, the affidavits demonstrated statements or conduct that was “ambiguous, innocuous,” and “capable of different interpretations.”<sup>176</sup>

On appeal, the State Supreme Court held that a juror’s racial bias is not “extraneous prejudicial information” or an “outside influence” within R. 606(b), but it agreed with the First Circuit that R. 606(b) does not preclude the admission of such testimony where necessary to protect a defendant’s right to a fair trial by an impartial jury—a right guaranteed by the federal and state constitutions.<sup>177</sup>

In upholding the trial court’s decision to deny the motion for a new trial, the Supreme Court analyzed each statement included in the affidavits from the three jurors. In concluding that no racial epithets were uttered the court oversimplified the conduct, and the words, of the jurors. The court’s analysis reduced each statement to its simplest meaning, took each statement in isolation, and ignored the context of their occurrence. The statement from Juror 1 was reduced to, “the Tribe’s Chief Sachem was ‘nothing.’”<sup>178</sup> Juror 2’s statement was reduced to, “Juror 2’s use of the term ‘those people’ in describing Brown and his co-defendants.”<sup>179</sup> And Jurors B and C’s observations that Juror 2 had banged the water bottles like a tom-tom drum when the verdict was reached was presented as a mere physical act.<sup>180</sup> The court seemed unwilling or unable to consider evidence of racial bias in a contextual manner, ruling that “according to the affiants, none of the jurors uttered racial slurs, and none explicitly or impliedly suggested that Brown’s racial or ethnic background should factor into the jury’s decision-making process,”<sup>181</sup> distin-

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1107.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1110.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See id.* at 1111.

<sup>181</sup> *Id.*



guishing the case from instances where courts found clear and unambiguous statements of racial bias.<sup>182</sup> Finally, while expressing some confusion about the meaning of the banging of the water bottles as tom-tom drums, the court nonetheless agreed with the trial court's characterization of the conduct as "ambiguous," "innocuous," and "capable of different interpretations."<sup>183</sup>

The court's analysis of the statements revealed a high level of ignorance of the context under which they were made. The court's simplified reference to Juror 1's statement that the Tribe's Chief Sachem was "nothing" ignored the fact that the Juror's disdainful statement was made following a show of respect and reverence from the defendant toward their social and spiritual leader under very difficult circumstances. The juror's statement was not simply "he's nothing," but rather, "Why did they stand up? He's nothing."<sup>184</sup> As such, the statement revealed Juror 1's disrespect of the tribal leader's status and disrespect of the Tribe's cultural customs. Reducing the tribal leader to a "nothing" in the solemnity of a legal tribunal denied his followers their basic legitimacy by identifying them as followers of a non-entity, perhaps deserving of punishment for who they were, not what they were accused of having done. Similarly, the court's characterization of Juror 2's reference to the defendants as "those people," presented in isolation, ignored the context, and possible effect, of the disrespect that was shown the tribal leader and the Tribe's custom when the leader testified at trial. The court's conclusion that "those people" could be taken as "an acceptance of the state's argument that defendants had no legal entitlement to lay hands on the officers during the confrontation,"<sup>185</sup> first ignores the rest of the statement, which was not simply "those people," but included "who are those people to touch a police officer?"<sup>186</sup> The term "those people" can be perfectly innocent in some contexts, but, in the context of the case, the term continued the theme that the Native American defendants were somehow 'the other' who, unlike the preferred group, were not permitted to touch a police officer, even when the officer was believed by other jurors to have been the aggressor. Here it is important to note that other members of the jury resisted convicting some of the defendants based on the conduct by the police.<sup>187</sup> Similarly, in the context of the case, the tapping of the water bottles as tom-tom drums is but another example of disdain for Native Americans. By tapping the water bottles like a tom-tom drum, the juror did not engage in "innocuous conduct" but rather caricatured and mocked an important Native American tradition, revealing a cultural bias against its practitioners. Contrary to the court's analysis, indirect communications about groups that share the defendant's characteristics such as race, ethnicity or national origin, while not directed at the defendant specifically, will nonetheless reveal biases that may drive the de-

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<sup>182</sup> *Id.*

<sup>183</sup> *Brown*, 62 A.3d at 1111.

<sup>184</sup> *Id.* at 1106.

<sup>185</sup> *Id.* at 1110.

<sup>186</sup> *Id.*

<sup>187</sup> *See id.* at 1105.

cision of the speaker, or that will prompt a discriminatory impulse by the recipients. At times, even an apparently minor or innocuous reference to the community where the defendant or a witness lives,<sup>188</sup> or their preferred non-English language,<sup>189</sup> may lead the judge to discover more severely offending statements when an inquiry is made.

#### IMPACT ON THE JURY

The discussion at oral argument of *Peña-Rodriguez* regarding the impact of statements exhibiting overt racial bias on a jury did little to clarify the matter. The Court's opinion similarly was void of guidance in that area. At oral argument, counsel for the petitioner made several attempts to respond to the Justices' questions regarding the degree of impact on the jury by referring to the "hypothetical average juror" doctrine, which, according to counsel, is followed by several state jurisdictions.<sup>190</sup> Counsel referred to the doctrine several times, but omitted the fact that the doctrine usually applies to cases of extraneous evidence, not cases of racial bias. Regarding the distinction between statements that would support an inquiry and others that would not, such as "you know, he's from the neighborhood; I know people from that – people from that neighborhood would always commit crimes like that,"<sup>191</sup> that could well be challenged as based on race, counsel stated; "[w]ell, I think the analysis would be similar to what you do under the Equal Protection Clause, but it wouldn't have to be lockstep. So the question that is asked in the 20 jurisdictions that already do this is, would a *reasonable juror* have understood the comments to be about race?"<sup>192</sup> Later in the argument, speaking about the possible impact of the statement on the jury, petitioner's counsel added, "[at the second step] the judge asks the same question the judge would ask about other jury misconduct, like extraneous evidence, the judge asks, is there a reasonable possibility that the verdict was influenced by the bias?"<sup>193</sup> However, when pressed by Justice Roberts with a hypothetical where all jurors agreed on a defendant's guilt despite acknowledging the racially offensive comments, counsel stated, "[s]o I think you've asked two questions here, the first is, is one juror enough, and the second is, do you look at the strength of the government's case?"<sup>194</sup> Citing *Parker v. Gladden*, Counsel stated, "whether one juror is enough," the Court has

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<sup>188</sup> For example, sometimes a reference to a place like Watts, or the barrio may be used as a proxy for racial bias.

<sup>189</sup> See *Hernandez v. New York*, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.")

<sup>190</sup> See Transcript of Oral Argument at 21–25, *Peña-Rodriguez*, 137 S.Ct. 855 (2017) (No. 15-606).

<sup>191</sup> *Id.* at 17.

<sup>192</sup> *Id.* at 17–18 (emphasis added).

<sup>193</sup> *Id.* at 22.

<sup>194</sup> *Id.* at 23.

clearly answered yes.<sup>195</sup> But then he went on to say that whether courts should look at the strength of the government's case is an issue on which the twenty jurisdictions across the country are divided.<sup>196</sup> A close look at the jurisdictions that follow the hypothetical average juror standard reveals that the vast majority of courts to consider the issue agree with *Parker v. Gladden* on the issue of racial bias, while those that have applied the reasonable or average juror doctrine to racial bias may have misapplied a doctrine formulated for an entirely different purpose, and inadequate for cases involving race.<sup>197</sup> The "hypothetical average juror" doctrine was designed to assess the impact of extraneous evidence on a jury.<sup>198</sup> Though it has been applied (or rather misapplied) to racial bias,<sup>199</sup> it was not designed for that purpose.

*State v. Hidanovic*<sup>200</sup> demonstrates the ineffectiveness of the "hypothetical average juror" doctrine when applied to cases involving racial bias. In *Hidanovic*, a Bosnian defendant was convicted of engaging in a riot when armed for allegedly using a baseball bat during a fight involving several people.<sup>201</sup> After the verdict, a juror self-reported in an affidavit that she had bought up the issue of ethnicity when she told jurors during deliberations that she had experienced negative interactions with Bosnians who had stolen from her business,<sup>202</sup> adding that the defendant's and the witnesses' race was discussed in a negative way.<sup>203</sup> The trial court rejected affidavits from the 11 other jurors relating their recollection of the racial discussions during deliberations, pursuant to N.D.R.Ev. 606(b).<sup>204</sup> The court characterized the reporting juror's statements as "a change of heart" that went to the jury's mental or thought processes during deliberations, and as "extraneous and general and not specific about Hidanovic."<sup>205</sup> The trial court deemed the statements were "not prejudicial, because they would not have affected the verdict of a hypothetical average juror."<sup>206</sup>

After concluding that evidence of racial or ethnic bias was not reviewable under the state's no-impeachment rule, the State Supreme Court nonetheless analyzed the matter under rules designed to assess the effect of extraneous information on a deliberating jury.<sup>207</sup> The Court recognized the "hypothetical average juror" doctrine, citing the criteria developed in

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See, e.g., *State v. Santiago*, 715 A.2d 1, 19–20 (Conn. 1998); *Fisher v. State*, 690 A.2d 917, 920–21 (Del. 1996); *Powell v. Allstate Insurance Company*, 652 So.2d 354, 358 (Fla. 1995).

<sup>198</sup> E.g., *United States v. Lloyd*, 269 F.3d 228, 238 (3rd Cir. 2001); *State v. Eison*, 533 N.W.2d 738, 745 (Wis. 1995); *Zana v. State*, 216 P.3d 244, 248 (Nev. 2009).

<sup>199</sup> *Commonwealth v. McCowen*, 939 N.E.2d 735, 766 (Mass. 2010) (holding that a judge must focus on the probable effect a juror's racial bias had on a hypothetical average jury).

<sup>200</sup> 747 N.W.2d 463 (N.D. 2008).

<sup>201</sup> *Id.* at 466.

<sup>202</sup> *Id.* at 467.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 469.

*Brooks* for cases involving extraneous information.<sup>208</sup> The court then discussed the different approaches followed by state courts when statements of racial bias are a factor in jury deliberations, appearing to agree with courts that have found an exception for racial bias.<sup>209</sup> Nonetheless, ignoring its own conclusion that racial bias does not represent extraneous information, the court deferred to the trial court, which had applied the *Brooks* factors to the case, and had found no racial bias.<sup>210</sup>

The trial court judge had characterized the comments made by the juror as “of general nature,” not specifically related to the defendant, or to Roma Bosnians.<sup>211</sup> Citing his faith in the citizens of the state, the judge asserted that he did not believe that, “a hypothetical average juror would buy into such type of misstatements of prejudice, race or otherwise.”<sup>212</sup> Significantly, the trial court had also noted that, though several individuals had confirmed that the ethnicity of the defendant was brought up, it was brought up only for a short period of time, and it did not relate to the charge of engaging in a riot when armed.<sup>213</sup>

Unfortunately, by resting his analysis on the generalized notion of “faith in the citizens of the state” the trial judge unjustifiably declared his state, and, by association, all jurors within it, free of bigotry and beyond scrutiny. Moreover, relying on the “hypothetical average juror” as the judge constructed him, ignored the fact that an actual juror confessed in this case to having uttered the racially or ethnically-charged statements.

As many courts have held, given the high burden placed on the state in criminal cases, even one juror may be enough to make the difference between a guilty or not guilty verdict.<sup>214</sup> In addition, the duration of the offending statements often has nothing to do with their impact, and the association of the statement with the charged crime misses the fact that what matters in the context of a trial is the credibility of the parties and witnesses. Once the credibility of the parties or their witnesses has been undermined by negative references to their ethnic or racial identity the party’s ability to mount a defense may be hopelessly damaged. Importantly, though the trial court seemed to admit that the credibility of the defendant can be a factor in a criminal proceeding, it also argued that it would take a leap of logic to conclude that the reporting juror believed in general that Bosnians are not truthful, when, in fact, what is at stake is the credibility of the individual defendant. The court alluded to the fact that the other 11 jurors had stated in their affidavits that they had followed the law and analyzed the evidence

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<sup>208</sup> *Id.* at 468.

<sup>209</sup> *Id.* at 474.

<sup>210</sup> *Id.* at 474–76.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 475. See also, *U.S. v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1886) (“It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have expunged themselves of the pernicious taint of anti-Semitism”).

<sup>214</sup> *U.S. v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001).

before them when reaching the verdict.<sup>215</sup> However, jurors, and people in general, when confronted with the issue publicly, are very unlikely to recognize their own racial prejudices.<sup>216</sup> Important to this analysis is that the proceedings in the case had been racially and ethnically charged. During an exchange with a witness, the prosecutor, over the objection of defense counsel, referred several times to a derogatory term used for Roma Gypsies in Germany, needlessly introducing the matter of the race of the defendant in a negative context into the proceedings.<sup>217</sup> Curiously, one of the factors in the “hypothetical juror standard” is an assessment of “how the information is associated with the crime” which, with the exception of crimes involving a race component would appear to be irrelevant in all cases where juror racial bias is uncovered.

Perhaps most importantly, to determine the impact of a statement of overt racial bias on a jury, judges must first consider the small burden faced by a criminal defendant when meeting the state’s proof, which is simply to make a case for reasonable doubt.<sup>218</sup> Indeed, courts have rightly held that, perhaps because of such a small burden, a defendant’s case can be completely undermined by even one juror, whose deeply-held biases render him incapable of assessing a case on the merits. In *After Hour Welding v. Laneil Management*,<sup>219</sup> a civil case, Sydney Eisenberg, an officer for the defendant corporations, which lost the case, had testified at trial. The defendant moved for a new trial supported by an affidavit from a dissenting juror which stated that, during the course of the trial and his service on the jury other jurors had said: “Mr. Eisenberg is ‘A Cheap Jew.’”<sup>220</sup> Another statement, “Alan Eisenberg, Mr. Sydney [sic] Eisenberg’s son, defended the outlaws” was said with a derogatory tone and attitude toward Alan Eisenberg.<sup>221</sup> A third statement reported by the dissenting juror was that “[t]hey (Alan and Sydney [sic] were involved in the suicide of Judge Krueger,” as if they had done something bad.<sup>222</sup>

Observing that “whenever it comes to a trial court’s attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender, or national origin, judges should be especially sensitive to such allegations and conduct an investigation to “ferret out the truth.”<sup>223</sup> The court ruled that “[f]or even if one member of a jury harbors a material prejudice, the right to a trial by an impartial jury is impaired.”<sup>224</sup> Just as significantly, the court noted that discrimination can come in many forms

<sup>215</sup> See *Hidanovic*, 747 N.W.2d at 476.

<sup>216</sup> Bryan H. Bornstein & Edie Greene, *The Jury Under Fire: Myth, Controversy, and Reform* 45–47 (Oxford University Press 2017).

<sup>217</sup> See *Hidanovic*, 747 N.W.2d at 477.

<sup>218</sup> E.g., *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>219</sup> 324 N.W.2d 686 (Wis. 1982).

<sup>220</sup> *Id.* at 688.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 690 (citing *Morgan v. United States*, 399 F.2d 93–97 (5th Cir. 1968), cert. denied 393 U.S. 1025, (1969).

<sup>224</sup> *Id.*

when it cited the long history of discrimination against Jews, reasoning that, though laws have prevented many forms of discriminatory practices against Jews and other minorities, subtler forms of such practices still persist, concluding that the negative stereotyping as “evidenced by the juror’s affidavit has no place in our system of justice.”<sup>225</sup>

*Commonwealth v. Laguer*,<sup>226</sup> shows how the biased attitude of one or more jurors can end up infecting other members of the jury, leading to unjust results. The *Laguer* defendant was convicted of aggravated rape, robbery, breaking and entering, and assault and battery.<sup>227</sup> In an affidavit written four-and-a-half years after the defendant’s convictions, a juror stated that he had voted “with reservation” to convict the defendant.<sup>228</sup> According to the juror, right after the jury was impaneled, another juror stated, “the god-damned spic is guilty just sitting there; look at him. Why bother having the trial.”<sup>229</sup> According to the affiant, the juror made specific racial comments and went from one juror to another using racial overtones to discuss the defendant’s guilt.<sup>230</sup> In addition, two other jurors engaged relentlessly in similar conduct.<sup>231</sup> The defendant’s discharge from the Army drew a great deal of speculation during jury deliberations, with some jurors guessing, without any evidence having being presented at trial, that sexual misconduct had caused the discharge.<sup>232</sup> The juror’s wrath was also directed at the defendant’s alibi witness Miguel Gonzalez, a Hispanic male, who was called a “goddamned fool” and a “lying son of a bitch.”<sup>233</sup> The affiant concluded by saying, “Had the jury deliberated with all of the evidence, I believe the result would have been different.”<sup>234</sup>

Though the court agreed with the trial judge that the evidence of juror bias did not relate to “specific, readily identifiable facts or actions as opposed to evidence of subjective mental attitudes on the part of a juror,” it nonetheless noted that racial bias in the jury room might well offend fundamental fairness.<sup>235</sup> On remand, the court ordered that a hearing be held to determine whether the revelations in the affidavit were true.<sup>236</sup> If the contents of the affidavit were proved to be essentially true, the court mandated that the defendant shall be entitled to a new trial.<sup>237</sup>

A similar effect was discussed in *Connecticut v. Santiago*,<sup>238</sup> a murder case in which a juror offered two versions of a statement containing a racial refer-

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<sup>225</sup> *Id.*

<sup>226</sup> 571 N.E.2d 371 (Mass. 1991).

<sup>227</sup> *Id.* at 372.

<sup>228</sup> *Id.* at 375.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *See id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 376.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> 715 A.2d 1 (Conn. 1998).

ence made about the defendant. In one version, given to the clerk of the court, the juror (Brier) stated that: “. . . (3) she had been pressured by the other jurors to find the defendant guilty; and, (4) on one occasion one of the jurors returned from lunch and reported conversations that he had heard in a restaurant in which the defendant was referred to as a ‘spic.’ ”<sup>239</sup> In the other version, presented by the defendant’s attorney, Brier, who had contacted the attorney a week before, stated:

[T]hat one of the jurors in deliberation, a male juror that she didn’t know the name of, had said, in an attempt to convince the other jurors as to [the defendant’s] guilt, the following statements: ‘What do you care about a spic? Let’s get one more spic off the streets of Willimantic,’ and ‘Of course he’s guilty, he’s a spic.’ . . . And also, He’s a spic. He’s guilty. One less spic on the street.’<sup>240</sup>

Upon questioning by the court, the juror stated, “we went back into jury deliberations that day . . . that was the first thing out of that guy’s mouth. . . He’s a spic and he’s guilty.”<sup>241</sup> The trial court summoned the jury foreman and asked him whether he had heard any of the statements alleged by the reporting juror.<sup>242</sup> The foreman responded that he had not heard any of the statements alleged.<sup>243</sup> On the basis of the foreperson’s testimony and the behavior of the reporting juror,<sup>244</sup> the trial court determined that the allegations merited no further inquiry.<sup>245</sup> However, relying on its supervisory capacity, the Connecticut Supreme Court issued guidelines to lower courts for cases in which jurors report that racial bias was introduced into jury deliberations by a fellow juror.<sup>246</sup>

Noting that the trial court’s singular focus on the jury foreperson assumed that the statements had been made to the entire jury and were therefore audible to the foreperson, the court indicated that the record did not mention that the foreperson had been present, nor that there was any connection between the reporting juror and the foreperson.<sup>247</sup> Therefore, the court concluded that the trial court’s decision to treat the foreperson’s testimony as

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<sup>239</sup> *Id.* at 14.

<sup>240</sup> *Id.* at 326.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 16.

<sup>243</sup> *Id.*

<sup>244</sup> In a letter to the court, sent one month after the jury reached a verdict, the reporting juror expressed regret for the verdict but did not report any juror misconduct. Instead, the reporting juror asked for leniency on behalf of the defendant. The reporting juror felt that the city was better off without the murder victim because the victim had been a drug dealer, and the reporting juror also indicated that she was close to the defendant’s family. *Id.* at 24. (Callahan, R., concurring in part and dissenting in part).

<sup>245</sup> *Id.* at 17.

<sup>246</sup> *See id.* at 18–19.

<sup>247</sup> *Id.* at 21.

dispositive was not supported by the content or the context of the reporting juror's testimony.<sup>248</sup>

The court's guidelines for future cases suggested a more thorough investigation of the context under which the allegations of bias arise. Simply focusing on the reporter or the jury foreperson will not yield the full context of the offending remarks. The court therefore suggested that the trial court's inquiry include enough interviews to produce not only the reported remarks but also corroboration from different sources.<sup>249</sup> The court also suggested that the court's inquiry should include cross-examination of the juror alleged to have made the remarks, to enable it "to observe the juror's demeanor under cross-examination, and to evaluated his answers in light of the particular circumstances of the case."<sup>250</sup>

*Fisher v. Delaware*,<sup>251</sup> shows how a small quantity of information can sometimes lead to the discovery of evidence sufficient to justify ordering a new trial. In *Fisher*, the defendant was convicted by a jury of possession with intent to deliver cocaine.<sup>252</sup> Four days after the verdict, the court received a letter from the jury foreman in which he stated that two jurors had said: "this defendant does not have a chance with this jury look there are no Blacks in it."<sup>253</sup> The court found no evidence of racial bias in that statement.<sup>254</sup> But, during the remand hearing where all the jurors were examined individually by defense and prosecution counsel, the jury foreman for the first time recounted having heard other racial references by a female juror during deliberations.<sup>255</sup> He said: "every once in a while I heard the one lady discuss the black guy, get him off the street, he's a drug dealer. *Any black guy who would be in an area at that time with this, he's guilty* (emphasis added)."<sup>256</sup> Though no other juror recalled these remarks being made during deliberations, one juror expressed her surprise when the jury foreman posed the question: "do you feel he's guilty because he's black?"<sup>257</sup> Taking that statement as corroboration, the court ruled that the female juror had injected her own prejudice into the deliberations that any African American who would be in the area is guilty, and ordered a new trial.<sup>258</sup> (Note – implicit in this court's decision is the strong possibility that the female juror's statement was audible only to the jury foreperson).

The Hawaii Supreme Court in *State v. Jackson*<sup>259</sup> managed to keep the delicate issue of racially-charged statements in their proper context. The case also shows that curative steps such as a show of contriteness, a retrac-

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<sup>248</sup> *Id.*

<sup>249</sup> *See id.* at 22.

<sup>250</sup> *Id.* at 21.

<sup>251</sup> 690 A.2d 917 (1996).

<sup>252</sup> *Id.* at 919.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *See id.* at 920.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> 912 P.2d 71 (Haw. 1996).



tion, or an explanation should also be taken into consideration as the judge develops a full contextual understanding of communications among jurors. In that case, the defendant, an African-American who was charged with sexual assault, filed a motion for a new trial based on post-verdict revelations by the jury foreperson about comments by jurors that focused on the defendant's racial identity.<sup>260</sup> Those statements led her to believe that he "did not receive a fair and impartial trial in this matter."<sup>261</sup> The court quickly dismissed a statement by a Japanese woman juror who had referred to the defendant as "colored," and remarked that he had such a "pretty" and "non-Black" wife, because the statements were made after deliberations were over.<sup>262</sup> Taking a closer look at the statement, "That's the way they are" when discussing the effects of alcohol, the court nonetheless concluded that the juryperson's immediate challenge to the statement, the denial by the speaker that she had meant any racial overtone, the negative reaction to the statement by the other jurors, the foreperson's caution to the jury not to consider race in jury deliberations, the fact that no other racially tinged statements were made, and the compelling evidence of guilt meant that the trial court did not abuse its discretion when it found that the statement could not have affected the verdict.<sup>263</sup>

*State v. Hunter*<sup>264</sup> shows another court's sensitivity in addressing the difficult issue of race. The *Hunter* defendant was convicted of kidnapping and armed robbery.<sup>265</sup> One week after the trial, the defense attorney contacted the only black person on the jury and filed a motion for a new trial alleging juror misconduct during deliberations, based on information given by her.<sup>266</sup> In an *in camera* hearing, a juror named Richardson told the judge about three incidents that occurred during deliberations.<sup>267</sup> According to Richardson, a juror named Christine used the word "n\*\*\*\*r" when referring to some testimony given at trial.<sup>268</sup> However, the court determined that Christine had misquoted a statement a witness had made during testimony.<sup>269</sup> Instead of referring to the statement, "We'll let the black boys work this weekend," Christine had misquoted this witness, saying, "Let the n\*\*\*\*s work."<sup>270</sup> After making that statement, Christine appeared to catch herself, covered her mouth with her hand and said "Oop[s]."<sup>271</sup> Nonetheless, Richardson testified that this upset her.<sup>272</sup> The second statement also involved Christine and Richardson who appeared to know each other. Apparently

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<sup>260</sup> *Id.* at 74.

<sup>261</sup> *Id.* at 76.

<sup>262</sup> *See id.* at 80.

<sup>263</sup> *Id.* at 81-88.

<sup>264</sup> 463 S.E.2d 314 (S.C. 1995).

<sup>265</sup> *Id.* at 315.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

two of their nieces were planning to move to Columbia, South Carolina to live together.<sup>273</sup> During deliberations, Christine said, “if [the defendant] got out, supposing he got out and killed some of your family, your niece might be killed.”<sup>274</sup> Richardson perceived the statement as a threat to her family’s safety.<sup>275</sup> The third allegation involved statements by jurors who gathered around Richardson and told her, “you know he’s guilty, you know he’s guilty.”<sup>276</sup> Richardson testified that throughout the deliberations she thought the defendant was innocent.<sup>277</sup>

According to the South Carolina Supreme Court, neither the statements uttered nor the conduct revealed racial bias toward the defendant. The use of the word “n\*\*\*\*r” did not refer to the defendant nor Richardson when they were made, Christine was immediately aware of its inappropriateness, and no evidence that other jurors agree with any racially impermissible sentiment was produced.<sup>278</sup> Regarding the perceived threat to Richardson’s family, the court ruled that what was said could not have fairly be interpreted as a threat.<sup>279</sup> And, finally, the court ruled that Richardson’s claim that she was “touched on the shoulders” by other jurors was insufficient to show that she was coerced into changing her vote.<sup>280</sup> The court also noted that Richardson never contacted the judge during proceedings about any of those things, despite the fact that she was familiar with the court system, and that, when polled, she indicated that guilty was her verdict.<sup>281</sup>

### CONCLUSION

Jury bias against racial, gender, ethnic, religious, and other minorities has existed throughout the Nation’s history. Though the criminal justice system has come a long way from the days when 500 out of 500 white defendants were acquitted of killing black people by all-white juries, the system continues to be plagued by racial and other biases. The *Peña-Rodriguez* decision represents a significant step forward, as the system strives to provide equal treatment to all. While it may affect a comparatively small number of cases at the onset<sup>282</sup>, *Peña-Rodriguez* may nonetheless provide the all-important first step as the courts work to improve the process of jury deliber-

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<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 315–16.

<sup>277</sup> *Id.* at 316.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> An electronic search of cases from all state and federal jurisdictions of keywords pertinent to *Peña-Rodriguez* (606(b), overt, racial, and bias) yields only forty-one relevant cases. Search was performed on January 27, 2018, using the Thomson Reuters Westlaw online legal database.

ations. Whether intended or not, the Court's timely decision in *Peña-Rodriguez* may be the catalyst for a broader and more effective discussion of bias in a jury system still badly in need of repairs.