

The False Promise of *Peña-Rodriguez*

Daniel S. Harawa*

In Peña-Rodriguez v. Colorado, the Supreme Court recognized that racial bias influencing jury deliberations violates the Sixth Amendment’s impartial jury guarantee and is incompatible with the Fourteenth Amendment’s anti-discrimination principles. The Court therefore created a racial bias exception to the centuries-old no-impeachment rule, claiming the decision reflected “progress” in the effort to overcome race-based discrimination in the jury system.

This Article asserts that Peña-Rodriguez is full of false promise—that under the standard it sets, only the most egregious examples of juror racial bias will even be considered by a court. Subsequent cases reveal that, rather than protecting against racial bias, Peña-Rodriguez’s standard insulates most forms of racism from review. As society reckons with the ways in which race invidiously infects the criminal legal system, Peña-Rodriguez falls far short of its professed goal of eliminating bias from the jury box. Therefore, courts and jurisdictions committed to racial justice must consider other interventions.

| | |
|--|------|
| Introduction | 2122 |
| I. <i>Peña-Rodriguez</i> and the No-Impeachment Rule | 2126 |
| A. Deliberating Behind Closed Doors | 2127 |

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| | | |
|------|---|------|
| B. | The Peña-Rodriguez Racial Bias Exception | 2130 |
| II. | <i>Peña-Rodriguez</i> 's Insulation of Racism | 2133 |
| A. | The Troubling Standard Peña-Rodriguez Set | 2133 |
| B. | Peña-Rodriguez Further Erodes the Checks against Racist Jurors | 2136 |
| C. | Bias Flourishing Post-Peña-Rodriguez | 2143 |
| 1. | Courts Stonewall Inquiry into Racial Bias..... | 2143 |
| 2. | Courts Deny Juror-Bias Claims in the Face of Blatant Racism | 2146 |
| 3. | Courts Look Past Juror Expressions of Overt Racism Tied to Defendants' Guilt | 2148 |
| D. | The Supreme Bait and Switch | 2151 |
| III. | Addressing Juror-Bias Claims Post <i>Peña-Rodriguez</i> | 2153 |
| A. | Federal Solution: An Expansive View of Peña-Rodriguez..... | 2154 |
| B. | State Solution: A Reasonable Observer Standard..... | 2158 |
| 1. | The Case for an Objective Standard | 2161 |
| 2. | The Case against a Harm Analysis | 2163 |
| 3. | The Upsides of the Proposal | 2166 |
| 4. | Addressing Some Concerns..... | 2167 |
| | Conclusion | 2172 |

INTRODUCTION

In *Peña-Rodriguez v. Colorado*, the Supreme Court addressed whether a court can hear evidence of a juror making racially biased statements during deliberations in a criminal trial.¹ The Court held that, despite a general ban on courts receiving evidence of what transpired during jury deliberations, the Sixth and Fourteenth Amendments to the Constitution require courts to hear evidence of jurors making statements evincing racial bias.² The Court created this exception to the general ban known as the no-impeachment rule because “racial prejudice is antithetical to the functioning of the jury system.”³

When crafting this exception, the Court clarified that “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-

1. 137 S. Ct. 855 (2017).

2. *Id.* at 867–69. Because the Court’s holding is based on its reading of the Sixth Amendment, it only applies to criminal trials. *Peña-Rodriguez* left open whether the same exception must extend to civil trials. At least one federal appellate court has held that *Peña-Rodriguez* “applies equally to civil cases.” See *Harden v. Hillman*, 993 F.3d. 465, 479 (6th Cir. 2021); see Jarod S. Gonzalez, *The New Batson: Opening the Door of the Jury Deliberation Room after Peña-Rodriguez v. Colorado*, 62 ST. LOUIS U. L.J. 397, 398 (arguing that *Peña-Rodriguez* “is likely to extend to civil cases”). Whether *Peña-Rodriguez* should be extended to the civil context is beyond the scope of this Article and therefore is not addressed.

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

impeachment bar to allow further judicial inquiry.”⁴ Indeed, the Supreme Court set a high bar that defendants must clear before the exception applies: “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 and resulting verdict.”⁵ To satisfy this standard, “the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.”⁶ And even if a defendant makes this “threshold showing,” *Peña-Rodriguez* left open whether a court must grant a new trial.⁷

The *Peña-Rodriguez* majority claimed the decision marked significant “strides to overcome race-based discrimination” in the jury.⁸ However, subsequent history proves this narrative false. In the few years since the decision, lower courts have consistently refused to apply the exception it recognized, even when there are allegations of blatant racism. For example, one court held that the defendants had not satisfied the *Peña-Rodriguez* standard where a White foreperson referred to Black jurors who expressed doubts about the defendants’ guilt as “[Black] women” protecting their “[B]lack brothers.”⁹ Another court held that a Black defendant had not met the *Peña-Rodriguez* standard despite a juror calling a fellow juror who seemed sympathetic to the defendant a “n[*****] lover.”¹⁰ And yet another court concluded that *Peña-Rodriguez* did not compel a new trial in a case where a juror admitted that she thought the defendant was guilty of murder because he was Salvadoran.¹¹ In fact, in the four years *Peña-Rodriguez* has been on the books, only one court has applied it to order a new criminal trial based on juror racial bias.¹²

While at first blush *Peña-Rodriguez* appears to be a significant step in eliminating racial bias from the jury,¹³ the decision is hardly a boon for racial

4. *Id.* at 869.

5. *Id.*

6. *Id.*

7. *Id.* at 869, 870.

8. *Id.* at 871.

9. United States v. Robinson, 872 F.3d 760, 770–71 (6th Cir. 2017).

10. Williams v. Price, No. 98cv1320, 2017 WL 6729978, at *2, 8–10 (W.D. Pa. Dec. 29, 2017).

I have censored the most harmful racial slurs with asterisks. However, when the language used is not a slur but rather insensitive or ignorant language, I have left the quotation as is because, while censoring a slur still allows the reader to understand the point of the remark, changing insensitive language may work to obscure racism.

11. People v. Hernandez-Delgado, No. H043755, 2018 WL 6503340, at *15 (Cal. Ct. App. December 11, 2018).

12. See *infra* Part II.C.

13. See, e.g., Amanda L. B. Wineman, *The Invasion of Racial Bias into Jury Deliberations: Examining Peña-Rodriguez v. Colorado*, 41 AM. J. TRIAL ADVOC. 211, 237 (2017) (opining “*Peña-Rodriguez* demonstrates the Court moving forward, making strides to overcome race-based discrimination”); Robert I. Correales, *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?*, 21 HARV. LATINX L. REV. 1 (2018) (opining “*Peña-Rodriguez* represents an important step forward”); Natalie A. Spiess, *Peña-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809, 840 (2018) (opining the “Court’s decision in *Peña-*

justice. To the contrary, requiring proof of “overt racial bias” showing that “racial animus was a significant motivating factor in the juror’s vote to convict”¹⁴ to overcome an evidentiary rule ignores the reality that racism often manifests in subtle ways. It also elides the fact that it is hard, if not impossible, to know how racial bias motivates decision-making. As such, *Peña-Rodriguez* threatens to insulate the nuanced forms that racism most often takes from review.¹⁵

In a moment of national reckoning, where we are contemplating the ways racial bias permeates our social institutions,¹⁶ it is important that legal scholarship grapples with the Supreme Court’s complicity in allowing racism to persist in the criminal legal system.¹⁷ To date, when legal scholarship has discussed racism in the jury, it has often focused on the shortcomings of the jury selection process and proposed various interventions.¹⁸ Before *Peña-Rodriguez*, many discussed how the no-impeachment rule was in tension with the Sixth

Rodriguez was a vital step in acknowledging and combatting racism’s continued presence in and strong grip on the criminal justice system”); Cynthia Lee, *Peña-Rodriguez v. Colorado: The Court’s New Racial Bias Exception to the No Impeachment Rule*, GEO. WASH. L. REV. ON THE DOCKET (Mar. 19, 2017), <http://www.gwlr.org/peña-rodriguez-v-colorado-the-courts-new-racial-bias-exception-to-the-no-impeachment-rule/> [<https://perma.cc/S2XL-4UC9>] (calling *Peña-Rodriguez* a “positive step forward” as a “symbolic expression of the Court’s position that racial bias in the jury system must not be tolerated,” but noting that it “may be of limited value” as a “vehicle for minimizing racial bias”).

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

15. See Pat. K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183, 199–207 (2010) (surveying social science literature and discussing “modern racism,” which consists of “more subtle and implicit discrimination”); see also *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081–82 (3d Cir. 1996) (“[O]pen[] use [of] derogatory epithets . . . appear[s] to be declining,” but still, “[d]iscrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind.”).

16. See Jelani Cobb, *An American Spring of Reckoning*, NEW YORKER (June 14, 2020), <https://www.newyorker.com/magazine/2020/06/22/an-american-spring-of-reckoning> [<https://perma.cc/G5LF-XLLV>]; Ibram X. Kendi, *Is This the Beginning of the End of American Racism?*, ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/the-end-of-denial/614194/> [perma.cc/X65U-UAAJ]; Audra D. S. Burch, et al., *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [perma.cc/56DP-NGJ6].

17. Many scholars have taken up this cause. See, e.g., Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

18. See, e.g., Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843 (2015); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012); see also *infra* notes 130–33.

Amendment.¹⁹ And since *Peña-Rodriguez*, scholars have been discussing whether courts will expand its exception beyond claims of racial bias.²⁰ What scholarship has not adequately discussed is how unreasonably hard it is to prove a juror racial bias claim, and relatedly, how *Peña-Rodriguez* claimed to be a resounding win for racial justice, when in reality it was anything but.

This Article illuminates how *Peña-Rodriguez* will be ineffectual in the fight to eliminate racial bias from the jury system. The Article therefore poses two workarounds. First, the Article maintains that federal courts should interpret *Peña-Rodriguez* as permissively as possible, taking an expansive view of what constitutes “overt racism,” and should freely grant new trials once the *Peña-Rodriguez* standard is satisfied. Second, the Article urges state courts to adopt an objective standard for juror racial bias claims similar to that used to evaluate judicial bias claims under the Due Process Clause.²¹ Rather than adhere to the near-impossible *Peña-Rodriguez* standard, states should embrace a rule declaring that the no-impeachment rule gives way *and* that a new trial must be granted if a juror makes a statement that a reasonable observer could conclude reflected racial bias or animus. Even the perception of racial bias influencing a verdict undermines the verdict’s legitimacy and erodes the integrity of the criminal system more broadly. Therefore, state courts should make clear that once racism in the jury room is uncovered, a new trial is required—no matter the weight of the evidence, regardless of whether the racist statement appeared to be

19. See, e.g., Amanda R. Wolin, Note, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 275–81 (2012); Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 923–42 (2009).

20. See, e.g., Gonzalez, *supra* note 2; Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Peña-Rodriguez Exception Beyond Race*, 118 COLUM. L. REV. 1801, 1823–56 (2018); Chan Tov McNamarah, Note, *Sexuality on Trial: Expanding Peña-Rodriguez to Combat Juror Queerphobia*, 17 DUKEMINIER AWARDS J. SEXUAL ORIENTATION & GENDER IDENTITY L. 393 (2018); Jazmine Adams, Note, *The Intersectionality of Juries, Race, and Gender: Extending the Peña-Rodriguez v. Colorado Decision to Protect Against Gender Discrimination in Jury Deliberations*, 10 ALA. C.R. & C.L. L. REV. 95 (2019).

Whether the *Peña-Rodriguez* exception will extend beyond racial bias is critically important. Take, for example, the case of Charles Rhines. During deliberations in the sentencing phase of his capital trial, where the jury decided between life imprisonment or death, numerous jurors made comments indicating that they sentenced Mr. Rhines to die because he was gay. See *Petition for a Writ of Certiorari at 2–3, Rhines v. Young*, 139 S. Ct. 1567 (2019) (No. 18-8029). One juror stated that, as a gay man, Rhines “shouldn’t be able to spend his life with men in prison,” and another recalled a comment during deliberations that “we’d be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole].” *Id.* at 2. Mr. Rhines’ juror-bias claim was denied on procedural grounds, and thus no court explicitly ruled on the question of whether *Peña-Rodriguez* would extend to claims of anti-gay bias. He was executed on November 4, 2019. See Associated Press, *Convicted Killer Charles Rhines Executed in South Dakota for Stabbing Co-Worker in 1992*, CBS NEWS (Nov. 4, 2019), <https://www.cbsnews.com/news/south-dakota-execution-today-charles-rhines-executed-for-fatally-stabbing-co-worker-2019-11-04/> [<https://perma.cc/8DNG-AGA8>].

21. See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884, 887 (2009); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909–10 (2016).

fleeting, and even if the juror evinced non-biased reasons for voting for guilt. This would give teeth to the Sixth Amendment's guarantee of impartiality and breathe life into the Fourteenth Amendment's "central purpose" of "eliminat[ing] racial discrimination emanating from official sources in the States."²²

The Article proceeds in three sections. Part I explores the origins of the no-impeachment rule and the professed importance of secret deliberations to the jury system. It then explains how the Supreme Court nevertheless created a racial bias exception to the no-impeachment rule in *Peña-Rodriguez*. Part II highlights the shortcomings of *Peña-Rodriguez*, providing examples of how racial bias has flourished despite, or perhaps because of, the decision. This Section then explains that at best, *Peña-Rodriguez* is what Paul Butler calls "cheap racial justice"²³ and details how the decision could actually be harmful to a racial justice agenda. Finally, Part III calls for federal courts to stretch the *Peña-Rodriguez* standard as far as the words allow, also urging state courts to reject *Peña-Rodriguez* altogether and apply an objective standard to evaluate claims of juror racial bias. This Section then weighs the pros and cons of this proposed objective standard and asserts that, even given the downsides, the proposed standard would better protect the constitutional principles of impartiality and equality.

The Supreme Court has said time and again that racial bias has no place in the administration of justice.²⁴ *Peña-Rodriguez* pays mere lip service to this idea while barely mitigating, let alone eradicating, race-based discrimination in the jury system.²⁵

I.

PEÑA-RODRIGUEZ AND THE NO-IMPEACHMENT RULE

For as long as the American jury system has existed, juries have deliberated in secret. The secrecy shrouding jury deliberations means that there is no way to know what is said in the jury room, including whether jurors express racial bias during deliberations, absent a juror coming forward. The secrecy of the jury was

22. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (quoted in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017)); see *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (noting that "the central concern" of the Fourteenth Amendment "was to put an end to governmental discrimination on account of race" (citing *Strauder v. West Virginia*, 100 U.S. 303, 306-07)).

23. Paul Butler, *Mississippi Goddamn: Flowers v. Mississippi's Cheap Racial Justice*, 2019 SUP. CT. REV. 73 (2019).

24. See, e.g., *Buck v. Davis*, 137 S. Ct. 759, 778 (2015) ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015))); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

25. At the outset, I acknowledge that other types of biases may invidiously influence deliberations, including biases based on gender, religion, and sexual orientation. While I believe there are strong arguments in favor of extending the *Peña-Rodriguez* bias exception to all traits protected by the Fourteenth Amendment, this is beyond the scope of this Article.

enshrined by the evidentiary no-impeachment rule, which prohibits courts from receiving evidence of what transpired during deliberations. Until recently, it was unclear whether the no-impeachment rule stood strong even in the face of racial bias. Some courts, applying the rule, refused to consider evidence of jurors making racially biased statements, while other courts crafted a racial bias exception to the no-impeachment rule in light of the weighty interests at stake.

The Supreme Court resolved the split among the lower courts and opened the door to evidence of juror racial bias in *Peña-Rodriguez v. Colorado* when it held that the Sixth and Fourteenth Amendments compel a racial bias exception to the no-impeachment rule.²⁶ The Court concluded that this exception reflected its “insistence that blatant racial prejudice is antithetical to the functioning of the jury system.”²⁷ To fully understand just how ineffective *Peña-Rodriguez* will be at addressing racial bias in the jury, it is necessary to lay some groundwork. This Section briefly retraces the history of secret deliberations,²⁸ and recaps the *Peña-Rodriguez* opinion.

A. *Deliberating Behind Closed Doors*

The practice of juries deliberating in secret dates back to at least fourteenth-century England.²⁹ To protect jurors from outside influences, they were forced to remain in a room until they reached a verdict.³⁰ This practice transformed into the evidentiary no-impeachment rule, which prohibits courts from hearing evidence of what transpired during jury deliberations.³¹ The no-impeachment rule, also known as the Mansfield Rule, traces its roots to a decision by England’s Lord Mansfield, *Vaise v. Delaval*.³² In that case, two jurors came forward with evidence that they improperly flipped a coin to reach a verdict, but Lord Mansfield refused to hear it, reasoning that the jurors could not impeach their own verdict because “a person testifying to his own wrongdoing was, by definition, an unreliable witness.”³³ The decision was interpreted as a “blanket ban on jurors testifying against their own verdict.”³⁴

26. *Peña-Rodriguez*, 137 S. Ct. at 867–69.

27. *Id.* at 871.

28. For a more detailed discussion of the history of jury secrecy, see Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 600–23 (2021).

29. See Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 215 (2005).

30. *Id.* at 216 (citing PATRICK DEVLIN, TRIAL BY JURY 41–42 (1966)).

31. See *id.* at 218–19.

32. *Williams v. Price*, 343 F.3d 223, 232 (3rd Cir. 2003) (Alito, J.), *abrogated by Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); see Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 59 (1993).

33. Miller, *supra* note 19, at 881; see Cammack, *supra* note 32, at 59.

34. Miller, *supra* note 19, at 881 (quoting *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008)).

The practice of juries deliberating in secret and the complementary no-impeachment rule drew “an adherence almost unquestioned” in the United States, becoming a staple of the American jury.³⁵ In a handful of decisions over the past two centuries, the Supreme Court has extolled the importance of the no-impeachment rule and erected a strict line of what evidence trial courts can and cannot receive regarding jury deliberations.³⁶ If it is evidence of outside information influencing the jury, the Court said trial courts can receive such evidence.³⁷ However, evidence of “matters which essentially inhere in the verdict itself” was strictly off limits.³⁸ In 1975, Congress codified the no-impeachment rule as Federal Rule of Evidence 606(b), and today, all fifty states have adopted a version of the no-impeachment rule.³⁹

In the 1987 case *Tanner v. United States*, the Court had to decide whether the no-impeachment rule must yield in the face of a credible Sixth Amendment claim.⁴⁰ In *Tanner*, there were allegations that jurors were under the influence of drugs and alcohol throughout trial and during deliberations.⁴¹ The defendants argued that the jurors’ misconduct violated their Sixth Amendment rights, but the district court refused to consider testimony from jurors regarding the misconduct because of the no-impeachment rule.⁴²

In front of the Supreme Court, the defendants argued that the district court was “compelled by [the defendants’] Sixth Amendment right to trial by a competent jury” to consider the jurors’ testimony.⁴³ The Court rejected their plea. The Court seemed to concede that if the allegations proved true, then the defendants’ Sixth Amendment rights had been violated.⁴⁴ So the Court resorted to policy reasons to justify upholding the no-impeachment rule despite a potential constitutional violation. It reasoned that exposing jury deliberations would “seriously disrupt the finality of the process,” along with “full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict,

35. *Tanner v. United States*, 483 U.S. 107, 117 (1987) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2352, 696–97 (J. McNaughton rev. ed., 4th ed. 1961)).

36. The Court first discussed the no-impeachment rule in *United States v. Reid*, 53 U.S. 361 (1851), where a juror admitted to reading a newspaper that recounted the evidence in the case and testified it had no effect on the verdict, and the Court held that even assuming the trial court could consider the evidence, it would not warrant a new trial.

37. *See Mattox v. United States*, 146 U.S. 140, 142–44, 149 (1892) (where it was alleged that the bailiff made a number of inappropriate comments to the jury and that a newspaper with a negative story about the defendant was brought into the jury room).

38. *See Hyde v. United States*, 225 U.S. 347, 382–84 (1912) (where it was alleged that the verdict was the product of a compromise between divided jurors); *McDonald v. Pless*, 238 U.S. 264, 265–69 (1915) (where it was alleged, in a civil case, that the jurors reached a compromise verdict).

39. *See* FED. R. EVID. 606(b); Harawa, *supra* note 28, at nn.129–31 and accompanying text.

40. *Tanner*, 483 U.S. 107.

41. *Id.* at 113, 115–16.

42. *Id.* at 113.

43. *Id.* at 117.

44. *Id.* at 127.

and the community's trust in a system that relies on the decisions of laypeople."⁴⁵ These concerns trumped the defendants' constitutional rights because the Court thought it not "at all clear . . . that the jury system could survive such efforts to perfect it."⁴⁶ The Court therefore concluded that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry."⁴⁷

Perhaps recognizing it was elevating public policy over the Constitution, the Court tried to tamp down the import of its decision by proclaiming that defendants' Sixth Amendment rights are "protected by several aspects of the trial process."⁴⁸ The Court pointed to the examination of potential jurors during *voir dire*; the fact that "during the trial the jury is observable by the court, by counsel, and by court personnel"; the fact that "jurors are observable by each other, and [jurors] may report inappropriate juror behavior to the court *before* they render a verdict"; and the fact that "after the trial a party may seek to impeach the verdict by non-juror evidence of misconduct."⁴⁹

In dissent, Justice Thurgood Marshall excoriated the majority's "denigrat[ion] [of] the precious right to a competent jury," dismissing as inadequate the "safeguards" the majority identified.⁵⁰ Justice Marshall explained that the defendants were only asking that "the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment."⁵¹ By "deny[ing] them this opportunity," Justice Marshall concluded, "the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."⁵²

Following *Tanner*, some lower courts held that the no-impeachment rule also does not give way in the face of racial bias. For example, the Tenth Circuit upheld the no-impeachment rule despite allegations that, after the prosecution of a member of the Ute Mountain Ute Tribe, one of the jurors "came forward of her own volition and alleged that two of the jurors, including the foreman, had made racist statements about Native Americans during deliberations."⁵³ The statements included the foreman saying "he used to live on or near an Indian Reservation, [and] that when Indians get alcohol, they all get drunk, and that when they get drunk, they get violent."⁵⁴ Similarly appalling, the Third Circuit (in an opinion by then-Judge Alito), held that it was not contrary to established

45. *Id.* at 120–21.

46. *Id.* at 120.

47. *Id.* at 127.

48. *Id.*

49. *Id.*

50. *Id.* at 134, 141–42 (Marshall, J., concurring in part and dissenting in part).

51. *Id.* at 142.

52. *Id.*

53. *See United States v. Benally*, 560 F.3d 1151, 1152 (10th Cir. 2009) (Briscoe, J., dissenting from denial of rehearing en banc).

54. *Id.* (internal brackets and quotation marks omitted).

federal law for a state court, following *Tanner*, to refuse to hear evidence from a juror stating that she “was called ‘a n[*****] lover’ and other derogatory names by other members of the jury” in a case involving a Black defendant.⁵⁵

These cases (and others like them)⁵⁶ were clear indications that Justice Marshall was right: *voir dire* and other aspects of trial were incapable of capturing all potential juror-biases. They were also proof that, following the Supreme Court’s lead, courts were willing to exalt an evidentiary rule over criminal defendants’ constitutional rights, even when it came to race-based discrimination. Eventually, a split developed among the lower federal courts and state courts of last resort on the issue of whether the Constitution compelled a racial bias exception to the no-impeachment rule.⁵⁷ The Court decided to resolve the question in *Peña-Rodriguez*.

B. *The Peña-Rodriguez Racial Bias Exception*

Miguel Peña-Rodriguez faced trial on sexual misconduct and harassment charges in Colorado state court.⁵⁸ After the jury returned a partial guilty verdict, Mr. Peña-Rodriguez’s counsel went back to the jury room to solicit feedback from the jurors.⁵⁹ Two jurors stayed behind and told counsel that “another juror had expressed anti-Hispanic bias toward [Peña-Rodriguez] and [his] alibi witness.”⁶⁰ The jurors submitted affidavits stating that during deliberations this juror said that he “believed [Peña-Rodriguez] was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”⁶¹ This juror said that “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”⁶² And this same juror who made these racist statements told his fellow jurors he did not believe Peña-Rodriguez’s alibi witness because the witness was “an illegal,” even though there was no evidence that the witness was undocumented,⁶³ and despite the fact that the witness’s immigration status had no bearing on his credibility.

55. *Williams v. Price*, 323 F.3d 223, 225–27, 236 (3d Cir. 2003). Notably, Justice Alito wrote the main dissent in *Peña-Rodriguez*. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 874–85 (Alito, J., dissenting).

56. See Harawa, *supra* note 28, at 602–05 (collecting other examples of jurors making biased statements during deliberations).

57. See Petition for a Writ of Certiorari at 9–16, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606) (explaining that the minority view held that excluding evidence of racially biased statements under the no-impeachment rule did not pose a constitutional problem, while the majority view held that the Sixth Amendment prevented courts from barring such evidence).

58. *Peña-Rodriguez*, 137 S. Ct. at 861.

59. *Id.*

60. *Id.*

61. *Id.* at 862 (quotation marks omitted).

62. *Id.* (quotation marks omitted).

63. *Id.* (quotation marks omitted). The witness had, in fact, testified that he was a legal resident of the United States. *Id.*

Mr. Peña-Rodriguez moved for a new trial, arguing his Sixth Amendment right to an impartial jury had been violated by this juror's racial bias.⁶⁴ The Colorado courts, faithfully applying the Supreme Court's decision in *Tanner*, ruled that the affidavits describing the juror's racial bias were prohibited by the no-impeachment rule and that the Sixth Amendment did not compel otherwise.⁶⁵

The Supreme Court reversed. Writing for a 5-3 majority, Justice Kennedy noted that this case stood "at the intersection" of two lines of precedent: "the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system."⁶⁶

On one side was the jury as a "central foundation of our justice system."⁶⁷ While "the jury system has its flaws," confessed the Court, "experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense."⁶⁸ According to the Court, the no-impeachment rule helps facilitate such deliberations because the rule "evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations."⁶⁹

On the other side was the "imperative to purge racial prejudice from the administration of justice."⁷⁰ This mandate flows directly from the Fourteenth Amendment given its central purpose "to eliminate racial discrimination emanating from official sources in the States."⁷¹ The jury is supposed to protect a defendant's "life and liberty against race or color prejudice."⁷² With this in mind, the Court opined that "[p]ermitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"⁷³

Weighing these principles, the Court 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."⁷⁴ The Court reasoned that this case "differ[ed] in critical ways" from its prior decisions in cases like *Tanner*, where the Court had upheld the no-impeachment rule in the face of a Sixth Amendment challenge.⁷⁵ Those cases

64. *Id.*; see Peña-Rodriguez v. People, 2015 CO 31, ¶¶ 6–7, 350 P.3d 287, 289, *rev'd*, Peña-Rodriguez, 137 S. Ct. 855 (2017).

65. *Peña-Rodriguez*, 2015 CO 31, ¶¶ 20–22, 350 P.3d at 291–93.

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

67. *Id.* at 860.

68. *Id.* at 861.

69. *Id.*

70. *Id.* at 867.

71. *Id.* (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

72. *Id.* at 868 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)).

73. *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

74. *Id.* at 869.

75. *Id.* at 868.

involved “anomalous behavior from a single jury—or juror—gone off course.”⁷⁶ “The same cannot be said about racial bias,” which “implicates unique historical, constitutional, and institutional concerns” and “if left unaddressed, would risk systemic injury to the administration of justice.”⁷⁷ A racial bias exception to the no-impeachment rule was therefore “necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.”⁷⁸ The Court thought a racial bias exception was also needed in “a pragmatic sense,” because while there are “safeguards” such as *voir dire* and in-court observation that can guard against most types of juror misconduct, the “stigma that attends racial bias may make it difficult to report inappropriate statements during the course of juror deliberations.”⁷⁹ In other words, it is hard to call someone a “bigot.”⁸⁰ The Court concluded that “blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule.”⁸¹

Before *Peña-Rodriguez*, the policy reasons supporting jury privacy trumped defendants’ Sixth Amendment rights. *Peña-Rodriguez* changed this by recognizing that racial bias during jury deliberations—which transgresses not just the Sixth Amendment, but also the Fourteenth Amendment—is of a different constitutional order. “For the first time, the Court . . . acknowledged an enforceable right to have the substance of juror deliberations conform to notions of impartiality.”⁸² This sharp break from past precedent was warranted, the *Peña-Rodriguez* Court declared, because “[a]n effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law.”⁸³

On its face, *Peña-Rodriguez* portrayed itself as a serious effort to eliminate racial bias from the jury system. The Court unabashedly viewed the decision as reflecting its “insistence that blatant racial prejudice is antithetical to the functioning of the jury system.”⁸⁴ As the next Section shows, the decision does not live up to its promise.

76. *Id.*

77. *Id.*

78. *Id.* at 869.

79. *Id.* at 868–69.

80. *See id.* at 869.

81. *Id.* at 871. As of this writing, the State never reinitiated prosecution against Mr. Peña-Rodriguez. There is no official docket entry reflecting this; however, the only official entries show the case being remanded back to state court.

82. Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 749 (2019).

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

84. *Id.* at 871.

II.

PEÑA-RODRIGUEZ'S INSULATION OF RACISM

Despite *Peña-Rodriguez*'s soaring rhetoric, a closer look reveals that the opinion is little more than table scraps dressed up as a meal.⁸⁵ This Section breaks down the *Peña-Rodriguez* standard. As a reminder, to invoke the racial bias exception to the no-impeachment rule under *Peña-Rodriguez*, a defendant must show that a juror made an "overt" statement evincing racial bias and that the juror's bias "significantly motivated" their vote to convict.⁸⁶ Once a defendant makes this showing, *Peña-Rodriguez* requires only that the no-impeachment rule give way; a new trial is not guaranteed.⁸⁷ This high standard further exacerbates the problem of racism influencing the jury system.

Ultimately, because the standard set in *Peña-Rodriguez* is so hard to satisfy, this Section then demonstrates that in the few years since the Court decided the case, rather than serving as a tool to ferret out racial bias, the decision has worked to insulate racial bias from review. Many courts have used *Peña-Rodriguez* as a guide for what constitutes "sufficient" racism necessary to inquire into potential claims of juror bias, and they have rejected bias claims when the racism does not meet *Peña-Rodriguez*'s high mark. The Section closes by exploring why the Supreme Court set such an ineffectual standard.

A. *The Troubling Standard Peña-Rodriguez Set*

Before diving deeper, it is important to remember what the Court in *Peña-Rodriguez* was and was not deciding. There are two hurdles a defendant must clear before receiving a new trial based on a juror expressing racial bias during deliberations. First, a defendant must overcome the no-impeachment rule in order to introduce evidence of what was allegedly said during deliberations. Then, the defendant still must satisfy the standard necessary to grant a new trial, which varies by jurisdiction. In *Peña-Rodriguez*, the Court was expounding only on what showing is necessary to overcome the evidentiary no-impeachment rule; it did not speak to the new trial standard, and in fact, it left this question open despite noting a circuit split on the issue.⁸⁸ This distinction matters, because even if a defendant clears the bar set in *Peña-Rodriguez*, they are not necessarily guaranteed a new trial.

85. This critique in many ways mirrors Melissa Murray's criticism of Justice Kennedy's opinion in *Obergefell v. Hodges*, the case that held the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples. Murray explained that putting aside *Obergefell*'s "flowery rhetoric," "Kennedy's rationale for marriage equality rests, perhaps ironically, on the fundamental *inequality* of non-marital relationships and kinship forms." Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L.J. 1263, 1265 (2019). As Murray plainly puts it, "if winning cases is important, it is surely as important to win them in the right way. And on this point, *Obergefell* fails." *Id.* at 1263.

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

87. *Id.*

88. *Id.* at 870–71.

Few defendants will satisfy *Peña-Rodriguez*'s arduous standard. Under *Peña-Rodriguez*, to overcome the no-impeachment rule, "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 and resulting verdict."⁸⁹ Furthermore, "the statement must tend to show that racial animus was a *significant motivating factor in the juror's vote to convict*."⁹⁰ Thus, not only does racial bias have to be explicit to satisfy *Peña-Rodriguez*, the bias must also bear directly on a juror's vote to convict the defendant.

The standard is wrongheaded for three primary reasons. First, by requiring racial bias to be overt, the decision ignores the reality that most racism today is subtle.⁹¹ We have largely moved away from explicit epithets. Now, when racial bias is expressed, it is often in the form of coded language and dog whistles. There has been a shift from "old-fashioned racism, classical racism, redneck racism, and blatant racism" to more nuanced "symbolic racism, subtle racism, ambivalent racism, laissez faire racism, aversive racism, and modern racism."⁹² As Ian Haney López explained, "[t]he once pervasive use of epithets has morphed into the coded transmission of racial messages through references to culture, behavior, and class. We live in a political milieu saturated with ugly racial innuendo."⁹³ In other words, racism is more covert than it once was.

Given this reality, an "overt" racial bias requirement is out of step with the facts on the ground. It is not as if the Supreme Court was unaware of the fact that subtle racism exists. *Forty years ago*, the Court recognized in *Rose v. Mitchell* that "discrimination takes a form more subtle than before."⁹⁴ Moreover, during oral argument in *Peña-Rodriguez*, Chief Justice Roberts recognized that this case dealt with "a very obviously offensive and direct appeal to – to race."⁹⁵ The Chief Justice asked counsel for Mr. Peña-Rodriguez whether a jury's verdict could be impeached with statements like, "you know, he's from that neighborhood; I know people . . . from that neighborhood always commit crimes like this."⁹⁶ Implicit in the Chief Justice's question was a recognition that racial bias will not always take the form of "a very obviously offensive and direct appeal."⁹⁷ Yet

89. *Id.* at 869 (emphasis added).

90. *Id.* (emphasis added).

91. This is not to say that there has not been a rise in overt racism recently. The number of hate crimes in the United States is higher than it has been for at least a decade. See Michael Balsamo, *Hate Crimes in the US Reach Highest Level in More than a Decade*, ASSOCIATED PRESS (Nov. 16, 2020), <https://apnews.com/article/hate-crimes-rise-fbi-data-ebbcadca8458aba96575da905650120d> [<https://perma.cc/XJK5-P7BG>].

92. William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015).

93. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 129 (2015).

94. 443 U.S. 545, 559 (1979).

95. Transcript of Oral Argument at 17, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

96. *Id.*

97. *Id.*

Peña-Rodriguez, rather than articulating a standard that would capture subtle or coded racial bias, limited its decision to obvious and direct statements of racial animus.

The second major flaw of the *Peña-Rodriguez* standard is that any statement evincing racial bias must be tied to the juror's vote for guilt. If, as the Court said, "[p]ermitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role 'as a vital check against the wrongful exercise of power by the State,'"⁹⁸ it is hard to see why a defendant would need to prove that the bias influenced the juror's vote. Any bias, and especially "overt" bias, expressed during deliberations undermines "the fact and perception" of fairness, regardless of whether the juror who expressed the bias tied it directly to the defendant's guilt. A fellow juror who hears the biased statement will wonder if the decision reached by that juror was fair. When the public learns that racial bias was expressed in the jury room, it will likely question whether justice was truly served. And what it means for racial bias to be a "significant motivating factor" in this context is far from clear.⁹⁹ What *is* clear, however, is that the pejorative use of epithets alone will not necessarily satisfy the standard set in *Peña-Rodriguez*, as demonstrated in Part II.C.

Relatedly, it is near impossible to know how racial bias may have tainted the jury as a body once the bias has been openly expressed. It is unlikely that a juror will causally connect their bias to the defendant's guilt. Thus, proving that bias significantly motivated the juror's vote to convict will be an exceedingly difficult task. This task becomes even more complicated considering that, once expressed aloud, the racial bias may influence *other* jurors' votes. In the social sciences, "group dynamics" theory describes "how specific individuals' interactions and characteristics influence how other individuals behave within a group."¹⁰⁰ The role that group dynamics theory plays in jury deliberations is

98. *Peña-Rodriguez*, 137 S. Ct. at 868 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Ultimately this distinction did not matter to the Chief Justice, as he joined Justice Alito's dissent.

99. Some scholars have criticized *Peña-Rodriguez* for its lack of clarity. See, e.g., Correales, *supra* note 13, at 20–21 (noting 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"). Others have discussed the ways in which the decision can be operationalized. See, e.g., Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 347–48 (2019) (envisioning what evidentiary hearings under *Peña-Rodriguez* should look like, including these elements: "testimony from both the juror(s) reporting the allegedly biased statement(s) and the juror(s) that allegedly made such statements," "pre-hearing briefings on the issues by parties," "the presentation of relevant secondary evidence (including scientific evidence on racial bias), and an allowance for expert evidence when necessary"); R. Jannell Granger, Comment, *Justice for All: The Sixth Amendment Mandates Purging All Racial Prejudice from the Black Box*, 63 HOW. L.J. 57, 78–81 (2019) (prescribing a series of questions that courts should ask when deciding whether the *Peña-Rodriguez* exception applies). My issues with *Peña-Rodriguez* are more foundational; the standard set by the decision was wrong from the start, and therefore courts should avoid the *Peña-Rodriguez* framework altogether.

100. Ted A. Donner & Melissa M. Piwowar, *Appendix G-4. The Role of Group Dynamics in Jury Selection Deliberations*, in 2 BLUE'S GUIDE TO JURY SELECTION (Lisa Blue & Robert B. Hirschhorn

ultimately unknowable given that jury deliberations are a black box and that there is thus no way of discerning the influence of certain jurors over the jury as a whole.¹⁰¹ But this much is true: if a juror felt comfortable expressing “overt” racial bias in a room full of strangers, there is no reason to think that their bias did *not* hamper at least *that* juror’s overall ability to impartially consider the case.

Third, the fact that a defendant is not automatically guaranteed a new trial once they satisfy the standard set in *Peña-Rodriguez* is mystifying. If a defendant already proved that a juror made an overt statement evincing racial bias, and also proved that the bias was a “significant motivating factor in the juror’s vote to convict,”¹⁰² at that point, what else is left to show? Once a defendant makes this showing through credible evidence, the court should automatically grant a new trial. Given the high bar *Peña-Rodriguez* set to overcome the no-impeachment rule, the Court should have taken the opportunity to make clear, or at least to strongly imply, that once the standard is satisfied, the Constitution demands a new trial before an impartial jury.¹⁰³ But the Court expressly left this question open, in the process noting a circuit split on the issue.¹⁰⁴

B. *Peña-Rodriguez Further Erodes the Checks against Racist Jurors*

Beyond the problems with the standard itself, *Peña-Rodriguez* fails to grapple with or even acknowledge other flaws in the jury system that allow racial bias to seep into deliberations in the first place.

Practically speaking, the most basic way that racism in the jury room is permitted to exist is by the custom of secret deliberations. We have no way of knowing what jurors say behind closed doors. While the Supreme Court claimed that “substantial policy considerations” support the practice of secret deliberations,¹⁰⁵ neither the Court nor legal scholarship has interrogated the

eds. 2004), Westlaw (database updated Dec. 2020) (describing the role of group dynamics in jury selection deliberations).

101. See Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549, 575–79 (1992).

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

103. At least one legal blog has stated that it “seems clear” that the Court thought Mr. Peña-Rodriguez was owed a new trial. See Colin Miller, *Court of Appeals of Iowa Creates Objective Juror Test for When Racist Jurors Comments Require a New Trial*, EVIDENCEPROF BLOG (Dec. 13, 2020), <https://lawprofessors.typepad.com/evidenceprof/2020/12/in-pena-rodriguez-v-colorado-the-supreme-court-held-that-where-a-juror-makes-a-clear-statement-that-indicates-he-or-she.html> [<https://perma.cc/7SRA-W3JV>]. But as explained in Part II.C., *infra*, courts applying the standard have not viewed *Peña-Rodriguez* as generously.

104. *Peña-Rodriguez*, 137 S. Ct. at 870–71 (“The Court . . . does 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.” (citations omitted)).

105. According to the Court in *Tanner*, the “substantial policy considerations” that support the secrecy of deliberations include the “full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople.” *Tanner v. United States*, 483 U.S. 107, 119–21 (1987). Moreover, the Court was concerned that “postverdict investigation into juror misconduct” would “seriously disrupt the finality of the process.” *Id.* at 120.

implications of secret jury deliberations for racial minorities and the perpetuation of racial bias.¹⁰⁶ It makes little sense to automatically assume that a jury system that was developed in medieval England¹⁰⁷ translates well to our pluralistic society. This is especially so given America's history of racism and its racial hierarchy. There is reason to be skeptical about jury secrecy serving racial minorities who have been forced to the bottom of that hierarchy when the criminal legal system has been critical to their subordination.¹⁰⁸

The legal profession's reticence to critically evaluate the worth of a secret jury system is worrying given the system's antiquity and the fact that it was adopted under circumstances that look nothing like today. This lack of critical evaluation is even more concerning when you factor in race and the fact that America has never fully reckoned with its racist history or addressed the ways racism permeates all of its institutions,¹⁰⁹ including the jury system that historically has been a key situs for racial subordination.¹¹⁰ This refusal to revisit

106. I started this discussion in *Sacrificing Secrecy*, 55 GA. L. REV. 593 (2021). As I explained there, while secret deliberations were originally conceived to protect jury impartiality, today, secret deliberations can work to “frustrate, rather than promote, defendants’ fair trial rights.” Harawa, *supra* note 28, at 593.

107. *See id.*

108. *See, e.g.*, Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3 (Angela J. Davis ed., 2017); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

109. *See, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 1, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/QBT3-XZXH>] (“To ignore the fact that one of the oldest republics in the world was erected on a foundation of white supremacy, to pretend that the problems of a dual society are the same as the problems of unregulated capitalism, is to cover the sin of national plunder with the sin of national lying.”).

110. *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 934 (2004) (“[T]he unwillingness of many all-[W]hite Southern juries to punish crimes against [B]lacks and Republicans directly challenged the Reconstruction Republicans’ faith in the jury. In response, rather than abandon the jury, congressional Republicans had attempted to perfect it by providing for full [B]lack participation. Despite these efforts, juries remained largely all-[W]hite, violence against [B]lacks in the South continued at an alarming rate, and punishment was the exception.”).

The evolution of non-unanimous jury verdicts is a perfect example of how juries were used to perpetuate white supremacy. Louisiana adopted a non-unanimous jury provision at a constitutional convention whose “mission,” according to a committee chairman, “was to establish the supremacy of the [W]hite race . . . to the extent to which it could be legally and constitutionally done.” *See* OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 375 (1898), <https://babel.hathitrust.org/cgi/pt?id=npj.32101065310607> [<https://perma.cc/3NUG-JZUL>]. The non-unanimous jury provision was important to fulfilling the convention’s goal because it allowed White jurors the ability to convict Black defendants over the dissent of Black jurors. *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374–76 (2012). The provision worked as intended: Black jurors’ votes were more likely to be overridden, and Black defendants were more likely to be convicted by non-unanimous juries. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1636–37 (2018). After recounting this history (much to the chagrin of Justice Alito), the Supreme Court held that the Sixth Amendment, as incorporated by the Fourteenth Amendment, requires unanimity in criminal trials. *See* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394–95 (2020). Oregon’s non-unanimous jury provision, the only one adopted by a state other than Louisiana, “can be similarly traced to the rise

the wisdom of the secret system becomes all the more suspicious given that the limited data available shows that racial bias influences jury decision-making.¹¹¹ It could well be that jurors say racist things all the time during deliberations, but because we indiscriminately adopted a practice of secrecy from fourteenth-century England, we will likely never know.¹¹²

It is not as if the Supreme Court was unaware of the fact that secret deliberations make it exceedingly hard to uncover juror racism. *Peña-Rodriguez* expressly acknowledged that because juries deliberate in secret, the “practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel’s post-trial contact with jurors.”¹¹³ Many states and federal courts highly restrict defense counsel’s contact with jurors.¹¹⁴ The Court said nothing about how these local rules are possibly in tension with Sixth Amendment rights¹¹⁵ and made no effort to make clear that defendants should have the chance to interview jurors to explore issues of bias, despite recognizing

of the Ku Klux Klan and efforts to dilute the influence of racial, ethnic, and religious minorities on Oregon juries.” *Id.* at 1394 (quotation marks omitted).

111. See Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 CORNELL J.L. & PUB. POL’Y 57, 68 (1997) (“Studies of the influence of race in jury decision making . . . have found that, in most cases, race has some influence on both [B]lack and [W]hite research participants. In many instances, racial prejudice is the only explanation for disparities in [W]hite jurors’ readiness to convict, impose harsher sentences, predict recidivism, or take into account evidence that they have been told to ignore when considering the fate of minority-race defendants.” (footnotes omitted)); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71–73 (1993) (looking at trial data, death penalty studies, and mock jury studies demonstrating that race is a factor in the determination of guilt for many White jurors).

112. In *Sacrificing Secrecy*, 55 GA. L. REV. 593 (2021), I ultimately concluded that there could be ways in which jury deliberations can be recorded and transcribed in a manner that preserves the asserted values of secret deliberations while protecting defendants’ Sixth Amendment rights. See Harawa, *supra* note 28, at 640–51.

113. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 859–60 (2017).

114. See Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 148–50 (2018) (discussing state restrictions on post-verdict contact with jurors); Benjamin M. Lawskey, Note, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1955–56 (1994) (documenting that approximately fifty-one of the ninety-four federal districts “have adopted local rules governing whether and how attorneys may obtain postverdict interviews with jurors”).

115. Cf. *Peña-Rodriguez*, 137 S. Ct. at 884 (Alito, J., dissenting) (“Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today’s decision is an open question.”). As a result, defendants are left to litigate whether they can contact jurors to uncover racial bias. See, e.g., *United States v. Davis*, No. 94-cr-00381 (E.D. La. May 12, 2014) (order granting motion to interview jurors); *United States v. Taylor*, No. 04-CR-160 (E.D. Tenn. Apr. 15, 2019) (same). And courts have denied motions to interview jurors absent egregious evidence of bias. See, e.g., *United States v. Birchette*, 908 F.3d 50, 59–60 (4th Cir. 2018) (holding that the district court correctly denied defense counsel’s request to interview jurors despite evidence that a White juror told the Black jurors that “the two of you are only doing this because of race” and that “it’s a race thing for you” because they, according to the court, could have been “reasonably interpreted” as nothing more than “offhand comments”).

in the past that “[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant’s right to an impartial jury.”¹¹⁶ Adding to this challenge is the fact that there is a self-reporting issue, where racial bias will never be uncovered unless a juror comes forward and reports a fellow juror. This is a fairly dubious prospect given that jurors are admonished not to reveal what was discussed during deliberations.¹¹⁷ Moreover, the reality is that it is difficult to call someone else a bigot, an actuality that the Court in *Peña-Rodriguez* claimed to understand.¹¹⁸ All of this is to say that because juries decide cases in private, there is no guarantee that racial bias expressed during deliberations will ever come to light.

The Supreme Court has tried to ameliorate this concern by proclaiming that other trial mechanisms sufficiently weed out biased jurors. In particular, the Court has pointed to *voir dire* as an important means of rooting out jurors who harbor impermissible biases.¹¹⁹ But *voir dire* is particularly ineffective at rooting out racists. To start, in most circumstances, it is not even constitutionally required for jurors to be questioned on issues of racial bias.¹²⁰ According to the Supreme Court, as far as the Constitution is concerned, it is up to defense counsel to affirmatively *voir dire* (or request *voir dire*) about jurors’ potential bias, and a court is largely free to deny or to greatly limit the inquiry.¹²¹ In fact, some experts caution against defense attorneys asking about racial bias during *voir dire* absent some express reason directly related to the case.¹²²

116. *Dennis v. United States*, 339 U.S. 162, 171–72 (1950).

117. *See, e.g.*, FED. JUD. CTR., PATTERN CRIMINAL JURY INSTRUCTIONS nos. 1, 9 (1987) (instructing the jury before both trial and the start of deliberations that what is said during deliberations will remain secret and admonishing the jury not to discuss the case with anyone).

118. *See Peña-Rodriguez*, 137 S. Ct. at 869 (“The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations.”).

119. *See, e.g.*, *Warger v. Shauers*, 574 U.S. 40, 50 (2014) (“The Constitution guarantees both criminal and civil litigants a right to an impartial jury. . . . And we have made clear that *voir dire* can be an essential means of protecting this right.”).

120. *See Lee, supra* note 18, at 858–59 (The “Supreme Court’s jurisprudence on *voir dire* into racial bias leaves us with the following general rules. A capital defendant charged with an interracial crime of violence in either state or federal court has a due process right to have prospective jurors questioned on racial bias, but the defendant must specifically request such *voir dire* in order to trigger the constitutional right. A noncapital defendant has a constitutional right to have prospective jurors questioned on racial bias only if the circumstances of the case suggest a significant likelihood of prejudice by the jurors.”).

121. *See Turner v. Murray*, 476 U.S. 28, 36–37 (1986); *Ristaino v. Ross*, 424 U.S. 589, 595–98 (1976).

122. *See* TED A. DONNER & RICHARD K. GABRIEL, *JURY SELECTION STRATEGY AND SCIENCE* § 32:2 (3d ed. 2014), Westlaw (database updated Nov. 2020) (recommending that racial bias “should probably not be specifically addressed, in any *voir dire*, unless the facts of the case suggest that racism could be a dispositive factor” because “the fact that some of the witnesses may be of different genders or racial backgrounds shouldn’t matter (and attorneys should avoid asking questions which dignify that such concerns do matter to some people)”). *But see* Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 186 (2015) (“Given the importance that race and racial bias may play in certain cases, defense counsel has an obligation to determine when and how to discuss race and racial bias during jury selection in order to be effective.”).

Even when potential jurors are asked about racial bias during *voir dire*, the questions often fail to illuminate which jurors harbor racial animus.¹²³ Most *voir dire* questions that touch on racial bias have obvious right and wrong answers.¹²⁴ We would like to think that most would agree that it is unacceptable to be openly racist and therefore that it is unlikely potential jurors will admit their racism in front of judges, lawyers, or their peers.¹²⁵ Anna Roberts explained this point: “While potential jurors may harbor bias of which they are aware, taboos are likely to prohibit its disclosure, however skillful the questioning. Jurors will often give the answer that seems acceptable.”¹²⁶

Another check against racism influencing deliberations is the very presence of racial minorities in the jury room. As Nancy Marder posited: “A racially diverse jury allows jurors to challenge each other’s biases.”¹²⁷ When the jury is racially diverse, the jurors “can correct each other’s mistaken notions, broaden each other’s perspectives, and suggest different ways of looking at the evidence.”¹²⁸ Under this theory, the presence of racial minorities in the jury room may “trigger normative pressures regarding race by activating jurors’ motivation to avoid prejudice.”¹²⁹ The very presence of racial minorities in the jury room may inhibit bias, and to the extent that it does not, there are people in the room

123. See Roberts, *supra* note 18, at 840 (“The process of *voir dire*, the dialog with jurors during jury selection, has proven largely unable to detect or correct implicit bias in jurors.”).

124. See, e.g., John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1233 (2001) (noting that in capital cases, the “perverse effect of capital case *voir dire* stems from the way in which the judge’s initial questioning, rather than illuminating the juror’s beliefs, often suggests desired answers”); Pam Frasher, Note, *Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L. REV. 1327, 1349 (1995) (“Judges routinely ask questions such as, ‘Can you be fair and impartial?’ for which the ‘correct’ answer is obvious to a veniremember. Those veniremembers who want to be on the jury respond ‘correctly,’ and judges generally believe their unrevealing answers.”).

125. See Charles R. Lawrence III, *Forbidden Conversation: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1391 (2005) (“[W]e restrict our own speech because we cannot bear admitting our own racism.”).

126. Roberts, *supra* note 18, at 844 (quotation omitted); see JAMES J. GOBERT, ELLEN KREITZBERG & CHARLES H. ROSE III, *JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY* § 7:41, Westlaw (database updated Nov. 2020) (“[I]t will rarely be productive to ask jurors directly if they will be prejudiced because of the party’s race, as a negative answer will virtually always be forthcoming.”); THOMAS A. MAUET & STEPHEN D. EASTON, *TRIAL TECHNIQUES AND TRIALS* 41 (11th ed. 2021) (“Jurors frequently do not disclose their true attitudes about a given subject when asked about them directly. . . . The reason is emotional. Most jurors want to be accepted by and fit in with others, particularly if the others are strangers. The need to be accepted and the internal pressure to hide or distort true attitudes are strong.”). And even when potential jurors admit their racial biases, it is not guaranteed that they will be excluded from the jury. See, e.g., *Thomas v. Lumpkin*, 995 F.3d 432, 442–43 (5th Cir. Apr. 23, 2021) (where a Black defendant was accused of killing his White wife and multiple jurors were sat on the jury despite admitting that they opposed interracial marriage).

127. Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1604 (2012).

128. *Id.*

129. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1024 (2003).

who are more likely to be sensitive to bias and attempt to correct it should it be expressed.

But racial minorities, particularly Black people, are disproportionately excluded at every stage of the jury formation and selection process. From juror qualifications statutes¹³⁰ and procedures used to compose the *venire*,¹³¹ to the prosecution's use of for-cause challenges¹³² and peremptory strikes,¹³³ racial

130. For example, many states and the federal government prohibit people with felony convictions from jury service for life, with a vast majority of states restricting the ability of people to serve on juries if they have a criminal record. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 157 (2003) (“Thus the clear majority rule, used by the federal government and thirty-one states, is to exclude felons from juries for life, unless their rights have been restored pursuant to discretionary clemency rules.”); James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1379 (2010) (“Currently, in twenty-nine states and the federal court system, a convicted felon can practice law, but cannot serve on a jury.”); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595–99 (2013) (“Colorado and Maine are the only two states without any statutory policies permitting the exclusion of potential jurors on the basis of criminal convictions.”). The resulting disenfranchisement is massive. In the United States, there are roughly nineteen million people with a felony conviction—8 percent of the total population, and studies estimate that close to a quarter of the Black population has a felony conviction, including one-third of Black men. Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), <https://news.uga.edu/total-us-population-with-felony-convictions/> [<https://perma.cc/762L-WUSY>].

131. Many states and the federal government rely on voter registration lists to comprise jury pools. See, e.g., Alexander E. Preller, *Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 2 (2012) (conducting a fifty-state survey and finding that “[c]ompiling names from voter registration records is the near-universal method of creating a jury list; forty-two out of fifty states use voter registration lists to form jury lists”). Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 42 (1994) (“While many jurisdictions rely exclusively on voter registration lists as the source for potential jurors, these lists are neither inclusive nor representative because they reduce minority participation at a critical stage of the jury process.”); see also Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 117 (2019) (“In many cases, the racial disparity in the jury system is allegedly or demonstrably caused by the jury system's use of voter registration rolls as a source list for juror names. Voter registration rolls typically underrepresent African-Americans and [Latinx individuals].”). For the November 2018 election cycle, data shows that 68.5 percent of White people were registered to vote, compared to 53 percent of Asian people, 63.9 percent of Black people, and 53.7 of Latinx people. See *Voting and Registration in the Election of November 2018*, U.S. CENSUS BUREAU (Apr. 22, 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> [<https://perma.cc/H8DB-L2GE>].

132. Thomas Frampton recently analyzed the prosecution's use of for-cause challenges in Louisiana and Mississippi. See Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020). Frampton found that Black jurors were 3.24 times more likely to be struck for cause in Louisiana; in Mississippi, prosecutors were 6.8 times more likely to initiate a for-cause challenge for a prospective Black juror than a prospective White juror. *Id.* at 793–97.

133. The discriminatory use of peremptory strikes is a well-worn topic in legal scholarship. See, e.g., Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1505 (2015); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011); Scott W. Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 289, 289, 292 (2015). Therefore, scholars and judges alike question whether the practice should be abolished. See, e.g., Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 371 (1992);

minorities are systematically picked off. By the time the jury is sitting around the table deliberating, in many jurisdictions, there are few, if any, Black or Brown faces at the table—they certainly are not present at a representative rate.¹³⁴ Moreover, for racial minorities to truly have a voice during deliberations, they must make up a critical mass, given that “field studies show that without a minority of at least three jurors, group pressure is simply too overwhelming: one or two dissenting jurors eventually and inevitably accede to the majority view.”¹³⁵ Thus, to the extent the mere presence of racial minorities in the jury room is seen as an important guard against racial bias, that guard is also inadequate. And the lack of an adequate check should alarm us when studies show that “racial bias often affects the determination of guilt.”¹³⁶

In short, the systemic guardrails against racist jurors are lacking. The Supreme Court has told us that it’s okay for juries to deliberate in secret because there are other trial mechanisms that are designed to prevent racially biased people from serving on juries. And even if bigots make it onto the jury, the presence of racial minorities in the jury room will inhibit their bias. Yet we know that these “protective” mechanisms are riddled with racism and do not work. If racial bias in the criminal legal system is truly “odious in all aspects,”¹³⁷ and given all of the barriers to raising juror racial bias claims, one would think that the Supreme Court would set a low standard to overcome the evidentiary no-

Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 811 (1997); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1713–14 (2006) (noting the “chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing,” and providing examples); see also *Miller-El v. Dretke*, 545 U.S. 231, 267, 273 (2005) (Breyer, J., concurring) (“I believe it necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”); *People v. Miles*, 464 P.3d 611, 687 (Cal. 2020) (Liu, J., dissenting) (“It is past time to ask whether the *Batson* framework, as applied by this court, must be rethought in order to fulfill the constitutional mandate of eliminating racial discrimination in jury selection.”).

134. See Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 145 (2012) (noting “that African-Americans and [Latinx individuals] are underrepresented in jury systems across the county”).

135. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698 (1985). More to the point, diverse juries are critical to better decision-making because studies show that “White jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group” and were less likely to believe the Black defendants were guilty. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 607 (2006).

136. See Johnson, *supra* note 111, at 72; see also Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1019 (2012) (“The evidence regarding the impact of the jury pool on conviction rates is straightforward and striking: the presence of even one or two [B]lacks in the jury pool results in significantly *higher* conviction rates for [W]hite defendants and *lower* conviction rates for [B]lack defendants.”); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 5 (1990) (“Historical evidence and recent sociological data show that all-[W]hite juries are unable to be impartial in cases involving the rights of African-American defendants or crime victims.”).

137. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

impeachment rule, ensuring the ability to address any racial bias that may creep into deliberations. The Court did the opposite. Now, given *Peña-Rodriguez*'s high bar for juror racial bias claims, there is little room to address bigots, to the extent they are even unmasked, in the jury box.¹³⁸

C. Bias Flourishing Post-Peña-Rodriguez

These concerns about *Peña-Rodriguez* are not hypothetical. In the four years since *Peña-Rodriguez* has been on the books,¹³⁹ courts have cited the decision to stonewall inquiry into whether racial bias influenced deliberations even when there was evidence that jurors may have expressed racism in the jury room. Courts have held that *Peña-Rodriguez*'s standard was not met even when faced with overtly racist comments because the comments were not directed at the defendant or tied to the juror's vote to convict. And because *Peña-Rodriguez* did not expound on the showing necessary to grant a new trial, courts have even held that overtly racist statements that were about the defendants *and* tied to their guilt did not require a new trial. As the examples below demonstrate, rather than eradicating bias from the jury box, *Peña-Rodriguez* has allowed racial bias claims to go underexplored, which in turn has allowed racial bias to flourish.

1. Courts Stonewall Inquiry into Racial Bias

In many jurisdictions, lawyers need permission to interview jurors, which, absent a juror coming forward of their own volition, is the only way a defendant can uncover juror bias.¹⁴⁰ *Peña-Rodriguez* recognized that juror contact is dictated by local rules and customs yet did not contemplate how these rules can

138. Racial minorities serving on juries is important not only because it can potentially counteract jurors expressing bias during deliberations. Data show that a racially diverse jury ensures robust and impartial decision-making. The limited research that is available on the effects of racial heterogeneity on jury decision-making shows that "racially heterogeneous juries might be exposed to a wider range of viewpoints and interpretations than jurors on homogenous juries." Sommers & Ellsworth, *supra* note 129, at 1024. In one study examining the effects of racial composition on jury deliberations, a researcher found that the presence of racial minorities in the jury room impacted the exchange of information, with heterogeneous juries "deliberat[ing] longer and consider[ing] a wider range of information than did homogenous groups." Sommers, *supra* note 135, at 606. When the juries in the study were racially diverse, they "raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues." *Id.* The presence of Black jurors "not only affected Whites' information-processing style but also led to a significant shift in how they interpreted and weighed the evidence." *Id.* at 607 (further noting that White jurors "processed the trial information more systematically when they expected to deliberate with a heterogeneous group").

139. According to a Westlaw search conducted April 27, 2021, courts have cited *Peña-Rodriguez* 236 times since. Of those cases, only one court has granted a new trial in a criminal case based on juror bias. *See* *United States v. Smith*, No. 12-183, 2018 WL 1924454 (D. Minn. Apr. 24, 2018) (discussed below in Part III.A). A handful of courts have held that further inquiry was necessary based on the information of racial bias presented to the court. *See* *State v. Spates*, 953 N.W.2d 372, 2020 WL 6156739 (Iowa Ct. App. Oct. 21, 2020); *Commonwealth v. McCalop*, 152 N.E.3d 1114, 1125 (Mass. 2020); *State v. Berhe*, 444 P.3d 1172, 1182 (Wash. 2019); *People v. Thompson*, 2018 IL App (3d) 160604-U, 2018 WL 2073465. These cases are discussed in more detail in Part III.

140. *See supra* note 114 and accompanying text.

wholly frustrate a defendant's ability to bring a juror-bias claim.¹⁴¹ As such, *Peña-Rodriguez* creates a permission structure by which lower courts are free to limit inquiry into potential bias claims if the defendant does not already have proof of bias that will satisfy *Peña-Rodriguez*'s high standard.

An example comes courtesy of the Fourth Circuit. In *United States v. Birchette*, a Black defendant faced a number of drug-related charges.¹⁴² After deliberating for over four hours, the jury returned a guilty verdict on one charge but was deadlocked on the other charges; the district court ordered the jury to keep deliberating.¹⁴³ Within 30 minutes of the district court telling the jury to keep going, a Black female juror asked to be removed from the jury without explaining why, and the court denied the request. The jury returned its verdict 11 minutes later.¹⁴⁴ After the verdict, a Black male juror approached defense counsel and told him that a White juror had said to him and the Black woman juror—the only two Black people on the jury—that “the two of you are only doing this because of race,” that “it’s a race thing for you,” and that the rest of the jury had “worked it all out.”¹⁴⁵ Counsel did not ask any follow up questions due to the local rules prohibiting juror contact, instead asking the court for leave to interview the jurors.¹⁴⁶ The district court denied the defendant's request.¹⁴⁷

The Fourth Circuit affirmed. The court reasoned that *Peña-Rodriguez* “did not . . . say when parties must be able to interview jurors in search of such evidence” of racial bias.¹⁴⁸ To the contrary, *Peña-Rodriguez* said that the “practical mechanics of acquiring . . . such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules.”¹⁴⁹ The Fourth Circuit concluded that the district court “properly related” the good cause showing necessary under the local rule to contact jurors to the standard set by *Peña-Rodriguez*.¹⁵⁰ Applying the *Peña-Rodriguez* standard, the court held that the statements identified by the defense “need not suggest that the speaker's racial animus in any way impacted her vote to convict,” and can instead be interpreted “as the sort of ‘offhand comment[s]’ that the Supreme Court held are insufficient to overcome the no-impeachment rule.”¹⁵¹ Therefore, according to the Fourth Circuit, in order to even *investigate* claims of juror bias, a defendant must produce evidence of racial bias sufficient to satisfy *Peña-Rodriguez*'s high

141. See, e.g., *Mitchell v. United States*, 958 F.3d 775, 790 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 216 (2020) (“Although *Peña-Rodriguez* established a new exception to [the no-impeachment rule], this change in law left untouched the law governing investigating and interviewing jurors.”).

142. 908 F.3d 50, 53–54 (4th Cir. 2018).

143. *Id.* at 55.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 57.

149. *Id.* at 58.

150. *Id.*

151. *Id.* at 59 (quoting *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017)).

standard. How a defendant can make this showing when local rules prohibit juror contact is anyone's guess.

In *Richardson v. Kornegay*, the defendant was found guilty of first-degree murder and sentenced to life in prison.¹⁵² In federal post-conviction proceedings, habeas counsel introduced an affidavit after a member of the team had interviewed several jurors.¹⁵³ One juror attested “that he felt being [B]lack made other jurors think he initially voted to acquit petitioner because he and petitioner were both [B]lack.”¹⁵⁴ Specifically, White jurors asked the Black juror whether he knew the defendant because he was also Black and whether he was voting “not guilty because [he was] a [B]lack male around [the defendant’s] age.”¹⁵⁵ Counsel asked for an evidentiary hearing, but the district court denied it, reasoning that no evidentiary hearing was necessary because the comments identified “do not pertain to any racial bias against the petitioner.”¹⁵⁶ Incredibly, the court flipped the comments on their head, explaining that, in its view, the White jurors were asking the Black juror “whether [he] himself held any racial biases,” and thus the statements “are not reviewable.”¹⁵⁷

These cases reveal the often-impossible position defense counsel are in when it comes to uncovering racial bias in jury deliberations. Even though counsel had some evidence that racism may have tainted the jury's verdict, counsel needed to further explore the issue to get to the bottom of what happened. But *Peña-Rodriguez* stood in the way. *Peña-Rodriguez* is silent on the constitutional status of rules prohibiting post-verdict juror contact, and it says nothing about what a defendant must show in order to even probe the issue of racial bias. Courts have therefore felt free to deny defendants access to jurors or to hold hearings so that defendants can get the evidence of “overt” bias necessary to satisfy the *Peña-Rodriguez* standard. These examples prove just how difficult it will be for defendants to *raise* a juror-bias claim before they face the daunting task of satisfying *Peña-Rodriguez*'s arduous standard.¹⁵⁸

152. No. 16-HC-2115-FL, 2017 WL 1133289, at *1 (E.D.N.C. Mar. 24, 2017).

153. *Id.* at *8.

154. *Id.* at *10.

155. *Id.*

156. *Id.*

157. *Id.*

158. Another example: Lezmond Mitchell was convicted of capital murder, and he asked for permission to interview jurors to uncover potential racial bias. *Mitchell v. United States*, 958 F.3d 775, 779 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 216 (2020). Mitchell specifically argued that because of a local rule prohibiting juror contact, *Peña-Rodriguez* “would have no practical effect if defendants could not acquire evidence of juror bias.” *Id.* at 790. The Ninth Circuit disagreed, holding that “*Peña-Rodriguez* does not override local court rules or compel access to jurors.” *Id.* Mitchell was never able to explore his juror bias claim before the federal government executed him on August 26, 2020. Hailey Fuchs, *Justice Dept. Executes Native American Man Convicted of Murder*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html> [<https://perma.cc/W3RF-KPQQ>]. Mitchell was a member of the Navajo Nation and the only Indigenous man on federal death row. *Id.* The government executed him despite Navajo Nation leaders objecting to his execution. Camila Domonoske, *Navajo Nation Asks Trump to Commute Death Sentence of Native*

2. Courts Deny Juror-Bias Claims in the Face of Blatant Racism

Then, when it comes to trying to overcome the no-impeachment rule, courts have rejected juror-bias claims even when faced with the obvious and “overt” racism that *Peña-Rodriguez* requires because the racism was not directed at the defendant or because the comment was not clearly tied to the juror’s vote for guilt.

First, take the Sixth Circuit’s decision in *United States v. Robinson*. In *Robinson*, three Black men were tried for allegedly participating in a fraudulent kickback scheme.¹⁵⁹ The jury deliberated for three days. During deliberations, the jury sent multiple notes indicating they could not reach a unanimous verdict.¹⁶⁰ After the trial court admonished the jury to keep deliberating, they finally reached a verdict finding the defendants guilty.¹⁶¹ The trial court discharged the jury and ordered counsel not to contact the jurors, consistent with a local court rule.¹⁶² Defense counsel nevertheless hired an investigator to interview the two Black women jurors because they “looked uncomfortable during the verdict and polling.”¹⁶³ The two women told the investigator “that they were initially unconvinced by the evidence of the defendants’ guilt,” and that the “jury foreperson—a [W]hite woman—reportedly told [them] that she found it strange that the colored women are the only two that can’t see that the defendants were guilty.”¹⁶⁴ This caused a “verbal confrontation,” which required the marshal to intervene and then the deputy clerk to ask the foreperson to apologize, which she did.¹⁶⁵ This did not stop the foreperson, however, as she then told the two Black jurors that “they were protecting the defendants because they felt they owed something to their [B]lack brothers.”¹⁶⁶ This prompted another confrontation, and again the clerk intervened.¹⁶⁷ The defendants filed a motion for a new trial based on this evidence of juror bias, which the district court denied, ruling that the evidence was inadmissible under the no-impeachment rule.¹⁶⁸

While the appeal was pending before the Sixth Circuit, the Supreme Court decided *Peña-Rodriguez*. Therefore, defendants included an argument that the no-impeachment rule had to give way because the foreperson’s statements

Man Facing Execution, NPR (Aug. 11, 2020), <https://www.npr.org/2020/08/11/901337273/navajonation-asks-trump-to-commute-death-sentence-of-native-man-facing-execution> [<https://perma.cc/9YV6-JKFF>].

159. *United States v. Robinson*, 872 F.3d 760, 764–66 (6th Cir. 2017).

160. *Id.* at 766–67.

161. *Id.*

162. *Id.* at 767.

163. *Id.*

164. *Id.* at 768 (internal quotation marks and brackets omitted).

165. *Id.*

166. *Id.* at 771 (quotation marks omitted).

167. *Id.* at 767.

168. *Id.* The district court also based its ruling on its belief that the motion was untimely and that defendants violated the court’s rules by contacting the jurors. *Id.*

evinced unconstitutional racial animus.¹⁶⁹ The Sixth Circuit disagreed. First, the court noted that, unlike the lawyers in *Peña-Rodriguez*, defense counsel here violated local court rules by contacting the jurors.¹⁷⁰ More importantly, the Sixth Circuit held that “even if the defendants had not violated a local court rule and their evidence was properly before the district court,” *Peña-Rodriguez* did not apply because the jury foreperson did not make a “‘clear statement’ . . . showing that animus was a ‘significant motivating factor’ in her own vote to convict. She never suggested that she voted to convict [the defendants] because they were African American.”¹⁷¹ The Sixth Circuit concluded that “none of the foreperson’s remarks here come close to the *Peña-Rodriguez* juror’s level of stereotyping or animus, and the foreperson’s remarks were not directed against [the defendants] in the same way that the *Peña-Rodriguez* juror’s remarks were directed against the defendant in that case.”¹⁷²

Another example is *Williams v. Price*. In this case, a Pennsylvania district court, relying on *Robinson*, reached a similar outcome under similarly egregious facts.¹⁷³ There, where the defendant was a Black man facing a first-degree murder charge, a juror called a sympathetic fellow juror, who was White, a “n[*****] lover.”¹⁷⁴ The district court held that an affidavit attesting to this was inadmissible under *Peña-Rodriguez* because the juror directed the racial slur at a fellow juror and not at the defendant.¹⁷⁵ According to the court, that “significant fact distinguishes this case from *Peña-Rodriguez*” because the affidavit does “not show that racial animus was a significant motivating factor in the vote to convict.”¹⁷⁶ The court concluded that the juror’s “claim that she was called a ‘n[*****] lover,’ while reprehensible and abhorrent, did not qualify under *Peña-Rodriguez*.”¹⁷⁷

169. *Id.* at 767–68.

170. *Id.* at 770.

171. *Id.* at 770–71.

172. *Id.* at 771.

173. *Williams v. Price*, No. 98cv1320, 2017 WL 6729978 (W.D. Pa. Dec. 29, 2017). The procedure of this case is complex. *Williams* was convicted of murder and sentenced to life in prison by a Pennsylvania court in 1985. *Id.* *1. The issues surrounding juror bias as detailed in the Article come from *Williams*’s federal habeas proceedings.

174. *Id.* at *7. Although this fact did not make it into the district court’s opinion, a defense witness came forward and said that she ran into a juror in the courthouse hallway and heard him say “all n[*****]s do is cause trouble,” further establishing juror racial bias. *Williams v. Price*, 343 F.3d 223, 227 (3d Cir. 2003) (Alito, J.), *abrogated by Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

175. *Williams*, 2017 WL6729978 at *9.

176. *Id.*

177. *Id.* The district court’s decision was appealed to the Third Circuit, but before the court could issue an opinion, the parties jointly moved for summary reversal, which the Third Circuit granted. *See Williams v. Superintendent Greene SCI*, No. 18-1175 (3d Cir. Apr. 5, 2021) (order granting summary reversal).

The district court’s decision also perfectly illustrates how *Peña-Rodriguez* is an insufficient fix to the problem of juror bias. Before *Peña-Rodriguez*, this was the same case where then-Judge Alito held that it was not contrary to clearly established law for the state court to refuse to consider the evidence of racial bias. *See Williams v. Price*, 343 F.3d 223 (3d Cir. 2003). Now post *Peña-Rodriguez*, the court

Robinson and *Williams* both involve statements of overt racial bias but expose the issue of requiring the bias to be directly tied to the defendant's guilt. It is undeniable that the jurors in those cases expressed clear racial animus. However, because they did not explicitly link their animus to their votes to convict, those courts held that *Peña-Rodriguez*'s racial bias exception to the no-impeachment rule did not apply. Thus, because the statements were not sufficient to overcome the no-impeachment rule, the courts did not have to decide whether the defendants were entitled to a new trial.

3. *Courts Look Past Juror Expressions of Overt Racism Tied to Defendants' Guilt*

Finally, courts have denied new trials even when faced with evidence that jurors made overtly racist statements and tied their racism to their perception of the defendant's guilt or their vote to convict. These cases exacerbate the loophole *Peña-Rodriguez* created by not expounding on the showing necessary for a new trial in the face of juror racial bias.

In *People v. Hernandez-Delgado*, the defendant was on trial for first-degree murder.¹⁷⁸ During deliberations, a juror "mentioned [the] fact that [the] defendant was from El Salvador," which "made her feel he was more guilty" because "so many murderers come from El Salvador."¹⁷⁹ Immediately after the juror made the statement, other jurors responded, "You can't use that," and the juror did not make any more racist comments.¹⁸⁰ The trial court ruled that evidence of the juror's statement was inadmissible under California's no-impeachment rule.¹⁸¹ On appeal, the defendant argued that *Peña-Rodriguez* required the trial court to consider the evidence.¹⁸²

The California Court of Appeal affirmed. The court expressed skepticism that the statement would be admissible under *Peña-Rodriguez*, pointing out that, in "contrast to the statements made in *Peña-Rodriguez*, the challenged statement here was made at the outset of deliberations, and the juror was immediately admonished about the statement."¹⁸³ But the court held that even if the statement was admissible, a new trial was not warranted.¹⁸⁴ The court reasoned that there was not a "substantial likelihood that defendant suffered actual harm" because, while "improper, the El Salvador comment was brief, and the juror was immediately reprimanded by other jurors. . . . There was apparently no further discussion about the issue, and [the juror] indicated that lengthy deliberations

held that the bias did not satisfy the high bar *Peña-Rodriguez* set. See *Williams*, 2017 WL6729978 at *9. Thus, despite there being unmistakable racism infecting this case, no court granted a remedy.

178. No. H043755, 2018 WL 6503340, at *1 (Cal. Ct. App. 2018).

179. *Id.* at *16.

180. *Id.*

181. *Id.*

182. *Id.* at *16–17.

183. *Id.* at *17.

184. *Id.* at *17–18.

followed that focused on the legal concepts of reasonable doubt and circumstantial evidence.”¹⁸⁵

A striking example is *State v. Hills*, a Louisiana case where a Black man was convicted of rape by a non-unanimous jury.¹⁸⁶ After trial, a Black juror sent an affidavit to Hills’s lawyer “alleging that two [W]hite male jurors made racially-charged comments about Hills during a lunch break the day before the jury deliberated and convicted him.”¹⁸⁷ Specifically, one White juror said to another, “Let’s convict this n***** already, I am ready to go play golf,” and the other White juror replied, “The n***** should have just taken a plea deal anyway.”¹⁸⁸ The trial judge found the Black juror who relayed these statements to be credible and granted a new trial.¹⁸⁹

The Louisiana Court of Appeal reversed the trial court’s ruling granting a new trial and, notably, failed to include the facts of the jurors’ racial bias in its opinion.¹⁹⁰ The appellate court found that “[t]he trial court did not err in concluding that the alleged statements attributed to the juror were sufficient to set aside the ‘no-impeachment bar’ to allow further judicial inquiry.”¹⁹¹ However, the court found that the trial court erred in granting a new trial by “relying solely on the statements of the complaining juror,” and therefore the court “remanded for a hearing to determine whether the alleged statements played a role in reaching the verdict and, if so, whether the effect was so prejudicial as to require a new trial.”¹⁹² A different judge presided over this hearing and denied a new trial after no other juror corroborated the statements.¹⁹³

Hernandez-Delgado and *Hills* evince yet a different issue: because *Peña-Rodriguez* did not decide the standard necessary for granting a new trial, a juror

185. *Id.* at *18 (brackets omitted).

186. Joe Gyan Jr., *Convicted Rapist Granted New Trial; Baton Rouge Judge Cites Racial Animus Among Some Jurors*, ADVOCATE (Feb. 1, 2019), https://www.theadvocate.com/baton_rouge/news/courts/article_e124bf3c-e380-11e8-ad29-af274dd7986e.html [<https://perma.cc/SF7H-JS9V>].

187. *Id.*

188. *Id.*

189. *Id.*

190. *See* *State v. Hills*, 2019-0466 (La. App. 1 Cir. 7/9/19); 2019 WL 3024107.

191. *Id.* at *1.

192. *Id.*

193. Joe Gyan Jr., *No New Trial for Convicted Baton Rouge Rapist After Alleged Racist Remarks by Jurors*, ADVOCATE (Oct. 4, 2019), https://www.theadvocate.com/baton_rouge/news/courts/article_20754176-e46a-11e9-abd4-07cfcdeaeaff.html [<https://perma.cc/LYA4-HTEU>]. The same judge who denied the new trial said that he would reduce Hills’s prison sentence if he paid \$150,000 to the victim. Joe Gyan Jr., *Convicted Baton Rouge Rapist Granted New Trial Due to Non-Unanimous Verdicts*, ADVOCATE (Nov. 23, 2020), https://www.theadvocate.com/baton_rouge/news/courts/article_d320b67e-2ae7-11eb-90ca-dfad7fe99bf8.html [<https://perma.cc/HK92-U87E>]. Mr. Hills was ultimately granted a new trial after the Supreme Court decided that non-unanimous convictions violate the Sixth Amendment in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). *See* *State v. Hills*, 2020-0392 (La. App. 1 Cir. 11/12/20); 2020 WL 6624967.

can make an overtly racially biased statement,¹⁹⁴ that juror can tie their bias to their perception of the defendant's guilt or their vote to convict, and still a new trial is not guaranteed. The court in *Hernandez-Delgado* conducted a harm analysis. The analysis examined how the biased statement may have influenced deliberations in light of the overall case, without considering how the bias may have negatively affected the public's or the defendant's perception of fairness more broadly. This allowed the court to quantify the bias, relying on the fact that it was just one comment at the beginning of deliberations to deny a new trial. The court failed to appreciate the subtle ways in which bias can influence decision-making. It also failed to recognize that just because bias was not repeatedly expressed does not mean the bias was adequately dispelled or that it did not influence the juror's (or other jurors') determination of guilt. The appellate court in *Hills* ordered the trial court to conduct a similar harm analysis. The trial court used the opportunity to find that the juror who exposed the racism was not sufficiently corroborated by the other jurors, despite the fact that the trial judge found the whistle-blower juror credible.

* * *

In sum, *Peña-Rodriguez* did not make “strides to overcome race-based discrimination” in the jury system.¹⁹⁵ In fact, the decision has more often been used as a sword to strike down juror-bias claims than it has been used as a shield to protect against racism in jury deliberations. If defendants cannot win when they raise clear claims of racial bias, there is no reason to think the result will be different when a court is faced with more subtle or nuanced instances of bias.¹⁹⁶

Peña-Rodriguez was a much-deserved victory for Miguel Peña-Rodriguez, and it *may* be helpful for a few other defendants who discover that jurors made similarly egregious statements evincing racial animus during deliberations. But it is likely a loss for defendants whose jurors express their bias through coded language. It is not a guaranteed win for defendants who live in jurisdictions where defense attorneys are not allowed to contact jurors. It does nothing to aid defendants in jurisdictions where they still have to somehow prove that a juror's racism tangibly harmed their case. Thus, in all, *Peña-Rodriguez* is not a resounding win for racial justice. Maybe now the most outlandish acts of racial bias will not be tolerated, but everything short is fair game. Given how racial bias most frequently manifests today, *Peña-Rodriguez*, and the cramped standard

194. As was the case in *Peña-Rodriguez*, it is perhaps more accurate to label the statements in *Hernandez-Delgado* as reflecting ethnic bias. However, jurisprudentially, this was a distinction without a difference to the Supreme Court, see *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017), and following the Court's lead, I broadly refer to ethnic bias as racial bias.

195. *Id.* at 871.

196. See, e.g., *United States v. Baker*, 899 F.3d 123, 134 (2d Cir. 2018) (holding that an alleged post-verdict statement by a juror that “he knew the defendant [who was non-White] was guilty the first time he saw him,” “without more, does not constitute clear, strong, and incontrovertible evidence that this juror was animated by racial bias or hostility, providing reasonable grounds for further inquiry”).

it set, can hardly be viewed as a win in the fight to eradicate racial bias from the jury box.

D. *The Supreme Bait and Switch*

Why did *Peña-Rodriguez*'s walk not match its talk? The Court said it was taking strides to eradicate racism from the jury box, but we have proof of just how ineffectual the decision has been in achieving that goal. What motivated the Court to adopt such an exacting standard for claims of juror racial bias? It is not as if the Court did not have all the relevant information at its fingertips. The numerous ways that racial bias infiltrates the jury system has long been a topic of scholarly discourse.¹⁹⁷ And, for the past few decades, the Court has claimed to be steadfast in its commitment to guard against race-based discrimination in the jury system because the jury is central to our democracy.¹⁹⁸ So, why would the Court set a standard that criminal defendants could rarely satisfy?

One could be cynical about *Peña-Rodriguez*'s purpose and what the Court was actually trying to express. A less-charitable view of *Peña-Rodriguez* is that the Court intentionally set a high bar for defendants to raise juror racial bias claims because it did not really want to open the door for such claims out of concerns about finality and whether the jury system could withstand continued scrutiny.¹⁹⁹ Moreover, no one claims that the Roberts Court is a staunch advocate for racial justice.²⁰⁰ This is the Court that has proudly proclaimed that we live in

197. For example, in *Miller-El*, a case where the Court held that the state violated the petitioner's Fourteenth Amendment rights by striking ten out of eleven potential Black jurors, Justice Breyer cited a number of "studies and anecdotal reports" demonstrating that racial bias in the jury persists. See *Miller-El v. Dretke*, 545 U.S. 231, 268–69 (2005) (Breyer, J., concurring) (first citing David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); then citing Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511 (1994); then citing Eric N. Einhorn, Note, *Batson v. Kentucky and J.E.B. v. Alabama Ex Rel. T.B.: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 188 (1994); and then citing Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1006 (1996)).

198. See *Peña-Rodriguez*, 137 S. Ct. at 867–68 (2017).

199. See *id.* (expressing these prudential concerns as reasons why jury deliberations are secret).

200. See Tom I. Romero II, *The Keyes to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L., 415, 417 (2015) ("Building upon the Burger and Rehnquist Courts severe restriction of judicial oversight of minority [non-White] claims as it intensified judicial oversight of majority [White] claims, the Roberts Court has crafted a history of race relations that does three things. . . . First, it disparages all uses of race. Second, it equates and equivocates the same harm of racial classification to Whites and Non-Whites. And third, it claims dramatic racial progress while ignoring altogether how and in what ways the shape, form, place, and targets of racial discrimination has fundamentally transformed in the last fifty to sixty years. In so doing, the Supreme Court's racial rights jurisprudence has equivocated and rendered obsolete the historical experiences of people of color in the United States." (internal quotation marks omitted)); see also Thomas Ward Frampton, *What Justice Thomas Gets Right About Batson*, 72 STAN. L. REV. ONLINE 1–2 (2019) (asserting "that the Court's liberal wing has proven loath to confront" "race in the courtroom"); Adam Bolotin, *Out of Touch: Shelby County v. Holder and the Callous Effects of Chief Justice Roberts's Equal State Sovereignty*, 49 JOHN MARSHALL L. REV. 751, 768, 769 (2016) ("As chief justice, Roberts's judicial opinions on race seem

a post-racial world and therefore we should stop talking about race altogether.²⁰¹ Consistent with this head-in-the-sand approach, the Court has largely ignored race when discussing criminal law and procedure despite the glaring racial disparities in the criminal legal system and the fact that race influences almost every aspect of the criminal process.²⁰² In so doing, the Court has “structured many of its doctrines so as to be incapable of addressing these problems.”²⁰³

Perhaps the Court issued an opinion handing down a “win” for racial justice because a loss in the face of such outrageous facts would seriously undermine the legitimacy of a Court that already has strained credibility on issues of race. Put another way, the opinion, with its over-the-top rhetoric, could be viewed as largely performative; the Court decided the way that it did to maintain face. Just a few years before *Peña-Rodriguez*, Justice Sotomayor publicly called out her colleagues for their approach to race. Pointedly rebuffing Chief Justice Roberts’s attempt to “wish away, rather than confront, racial inequality,” Justice Sotomayor stated, “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effect of centuries of racial discrimination.”²⁰⁴ The year before *Peña-Rodriguez* came down, Justice Sotomayor further proclaimed in a widely covered dissent that the Court’s criminal jurisprudence “risk[s]

to gloss over, [and] perhaps rewrite history. . . . Though the chief justice believes in a colorblind Constitution, the only way to achieve such a reality would be to strip the document of its history.”)

201. See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). Girardeau Spann panned *Parents Involved*, calling it “the new *Resegregation* decision [that] has not only realigned the Court with its own racially oppressive past, but it has also distanced the Court from the nation’s hope for a racially progressive future.” Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 566–67 (2008).

202. See, e.g., Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1591 (2019) (noting that “the Supreme Court’s jurisprudence has consciously ignored the troubling role that race plays in policing”); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 150 (2012) (noting that the Court, through its jurisprudence, “is seeking to create a post-racial era by ignoring race”); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247 (2010) (noting that the Court’s Fourth Amendment “jurisprudence rarely mentions race”).

203. Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033, 2038 (2018); see also Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983 (1999) (“[The] Supreme Court’s Fourth Amendment decisions treat race as a subject that can be antiseptically removed from a suppression hearing judge’s review of whether a police officer had probable cause for an arrest or warrantless search or reasonable suspicion for a stop and frisk. The decisions imagine a world in which some officers are wholly unaffected by racial considerations and in which even biased officers may make objectively valid judgments that courts can sustain despite the underlying racial motivations of the officer.”).

204. *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting). Chief Justice Roberts felt the need to directly respond to Justice Sotomayor, retorting, “People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.” *Id.* at 315–16 (Roberts, C.J., concurring).

treating [minority] members of our communities as second-class citizens.”²⁰⁵ An amicus brief jointly filed in *Peña-Rodriguez* by two of the most renowned civil rights legal organizations in the country, the NAACP Legal Defense Fund and the ACLU, made the stakes of *Peña-Rodriguez* plain:

A decision from this Court affirming the decision below would send an ominous signal that the American judiciary is, at best, indifferent to racial bias in jury verdicts. At worst, this Court would be seen as condoning the juror’s abhorrent statements and blessing a ‘guilty’ verdict it knows to be tainted.²⁰⁶

So it could well be that in order to avoid appearing insensitive to race, or worse, to condone racism, the Court did the right thing, and made a show of it along the way.²⁰⁷

Peña-Rodriguez is a shining example of what Paul Butler calls “cheap racial justice.”²⁰⁸ It cannot truly be viewed as an effective intervention to combat juror bias. The final Section therefore proposes interventions for both federal and state courts to apply to more comprehensively address claims of juror racial bias.

III.

ADDRESSING JUROR-BIAS CLAIMS POST *PEÑA-RODRIGUEZ*

Peña-Rodriguez set the floor, not the ceiling, for juror racial bias claims. Therefore, the first part of this Section provides for three interventions to fortify the *Peña-Rodriguez* framework in federal court. First, federal courts should freely allow defense counsel to investigate claims of juror bias. Second, they should adopt an expansive view of what it means for racial bias to be “overt” and what constitutes a “clear and explicit statement[] indicating . . . racial

205. Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting); see also Adam Liptak, *In Dissents, Sonia Sotomayor Takes On the Criminal Justice System*, N.Y. TIMES (July 4, 2016), <https://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html> [<https://perma.cc/NXC2-MTNN>]; Meghan Daum, *My White Privilege Meets Sonia Sotomayor’s Scathing Attack on Power*, L.A. TIMES (June 23, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-daum-sotomayor-dissent-20160623-snap-story.html> [<https://perma.cc/U627-QEQ7>]; Mark Joseph Stern, *Read Sonia Sotomayor’s Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment*, SLATE (June 20, 2016), <https://slate.com/news-and-politics/2016/06/sonia-sotomayor-dissent-in-utah-v-strieff-takes-on-police-misconduct.html> [<https://perma.cc/KNH7-PC8Y>].

206. Brief of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc. The Nat’l Ass’n of Crim. Def. Laws., & the ACLU In Support of Petitioner at 25, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

207. This sounds in Derrick Bell’s “interest convergence theory”—that “[t]he interests of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites.” Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). As Bell later elaborated, only “when [W]hites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with [B]lacks on a nondiscriminatory basis, they do so. When they fear—accurately or not—that there may be a loss, inconvenience, or upset to themselves or other [W]hites, discriminatory conduct usually follows.” DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992).

208. See Butler, *supra* note 23.

animus.”²⁰⁹ Third, to the extent it is an open question in the jurisdiction, federal courts should eschew any kind of harm analysis and hold that once a juror’s racial bias is exposed, a new trial is required.

The Section then calls for state courts to jettison the *Peña-Rodriguez* standard altogether. It proposes that state courts apply a reasonable observer standard to claims of juror racial bias, asking whether a reasonable person who heard the juror’s comment would believe it reflected racial bias. This framing is borrowed from the judicial bias context, where in two recent cases the Supreme Court crafted a sensible standard for such claims.²¹⁰ To strengthen the standard, an objective observer should be a person who is particularly attuned to issues of race. Moreover, state courts should make clear that once juror racial bias is exposed, not only must the no-impeachment rule give way, but a court must also grant a new trial. Racism during deliberations is structural error that should not be tolerated.²¹¹ This, in essence, will collapse the no-impeachment and new trial inquiries. These steps, taken in tandem with other jury reforms, would mark *real* “strides to overcome race-based discrimination” in the jury box.²¹²

A. Federal Solution: An Expansive View of *Peña-Rodriguez*

The first way federal courts can more robustly protect against juror bias is by freely allowing defense counsel to contact jurors, giving counsel the ability to investigate juror-bias claims. As the *Peña-Rodriguez* Court noted, “[t]he practical mechanics of acquiring and presenting [bias] evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel’s post-trial contact with jurors.”²¹³ Currently, a majority of federal districts have rules in place limiting juror contact, and many of the rules “require a threshold showing of good cause or the explicit prior approval of the court before attorneys may interview jurors.”²¹⁴

Federal courts should freely grant leave for defense counsel to interview jurors because, practically speaking, there is no other way for counsel to learn of racial bias infecting deliberations absent a juror coming forward on their own. Therefore, if a defendant requests permission to interview jurors, especially in cases involving a minority defendant and a predominantly White jury, courts should find good cause exists to interview the jurors. Likewise, if race played

209. *Peña-Rodriguez*, 137 S. Ct. at 861.

210. See *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

211. “Structural error” is defined as a “defect in a trial mechanism or framework that, by deprivation of basic constitutional protections, taints the trial process, making it unreliable and rendering any punishment fundamentally unfair. This error is per se prejudicial and requires automatic reversal.” *Error*, BLACK’S LAW DICTIONARY (11th ed. 2019). The Supreme Court explained: “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” *Chapman v. California*, 386 U.S. 18, 23 (1967).

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

213. *Id.* at 859–60.

214. Lawskey, *supra* note 114, at 1951.

any part in the case—for example, if the alleged victim was White and the defendant was Black, or if a cross-racial identification was critical to the government’s case²¹⁵—then courts should also freely grant the defendant leave to interview the jurors. Or if a juror comes forward and reveals something was amiss during deliberations, even if they do not specifically provide detailed allegations of racial bias, the defense should be able to investigate.²¹⁶ It is important to remember that while many jurisdictions limit juror contact, many do not. Therefore, a system where defense counsel are freely permitted to contact jurors after a guilty verdict is returned is certainly workable.²¹⁷ And now, given that there is a recognized Sixth Amendment right for defendants to be able to submit evidence of overt racial bias influencing jury deliberations, defendants should have adequate means to investigate whether racism was expressed in the jury room.²¹⁸

Federal courts should also construe the *Peña-Rodriguez* standard as broadly as possible. What it means for racial bias to be “overt,” or the determination of when a statement is a “clear and explicit” expression of racial animus, is highly subjective.²¹⁹ Courts should use their judgment to find that statements beyond epithets and express references to race are captured by the standard, as racism is often cloaked in “coded transmission . . . through references to culture, behavior, and class.”²²⁰

The one instance of a federal court granting a new trial in a criminal case based on a juror-bias claim is a good example of how a conscientious judge committed to addressing claims of juror bias can apply the *Peña-Rodriguez* standard. In *United States v. Smith*, a juror submitted an affidavit attesting that a fellow juror said the defendant, a Black man charged with unlawful possession

215. Cross-racial identifications are particularly prone to error, especially when White people try to identify Black people. *See, e.g.*, Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936, 937–46 (1984) (“[P]sychologists have compiled empirical evidence that incontrovertibly demonstrates a substantially greater rate of error in cross-racial recognition of faces.”).

216. *See, e.g.*, *People v. Thompson*, 2018 IL App (3d) 160604-U, ¶¶ 12–18, 24–25, 2018 WL 2073465, at *3, *5 (allowing an evidentiary hearing on juror racial bias where a juror sent a letter stating that a juror said in reference to a videotaped interrogation of the defendant “these guys are probably all high on drugs”).

217. Juror no-contact rules are often justified by the motivation to protect against juror harassment. *See Lawsby, supra* note 114, at 1954.

218. *See, e.g.*, *Commonwealth v. McCalop*, 152 N.E.3d 1114, 1123 (Mass. 2020) (“When defense counsel, in good faith, attests that a deliberating juror told counsel after the verdict that racist statements were made by one or more jurors during the course of deliberations, the judge must give the defendant a fair opportunity to obtain an affidavit from that juror setting forth with some specificity who among the jurors made statements reflecting racial bias and, to the best of his or her memory, the statements that were made.”). To further aid defense counsel in this investigation, courts can also instruct the jury that they should come forward if anyone expresses bias during deliberations. *See Samantha Saddler, Note, A Defendant’s Race as a Determinant of the Outcome of His Lawsuit*, 2019 U. ILL. L. REV. 1771, 1773 (2019).

219. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861, 869 (2017).

220. HANEY LÓPEZ, *supra* note 93, at 129.

of a firearm, was “just a banger from the hood, so he’s got to be guilty.”²²¹ The “hood” was North Minneapolis—a majority-Black neighborhood.²²² The juror who submitted the affidavit further stated that the “comment caused him to reconsider Smith’s credibility in light of his race and where he lived, rather than through the evidence.”²²³

Smith filed a motion for a new trial, which the federal government opposed by arguing that the comment did not fall within the *Peña-Rodriguez* exception because it “contains no reference to Smith’s race.”²²⁴ The court rejected the government’s argument, finding that the “statement’s reasoning employed the racist stereotype that [B]lack men from the inner city are gang members. The racially-charged language (‘banger from the hood’) was coupled with views on Smith’s guilt, creating a relationship between the two.”²²⁵ The court understood that when the comment is viewed in its “context,” it “clearly indicates racial bias.”²²⁶ The court therefore held that the no-impeachment rule had to give way and ultimately granted Smith a new trial.²²⁷

While a judge reading *Peña-Rodriguez* could likely have reached the opposite conclusion, as urged by the government, this case shows that context, common sense, and a broad conception of what constitutes racism can be infused into the *Peña-Rodriguez* standard. Given that racism, “odious in all aspects, is especially pernicious in the administration of justice,”²²⁸ courts should take the mandate to eradicate racism in the jury box seriously and take a similarly broad view of the *Peña-Rodriguez* standard.

Another example of judges taking an expansive approach to the question of what is considered “overt” racial bias can be found in a civil case from the Sixth Circuit, *Harden v. Hillman*.²²⁹ There, a Black plaintiff filed a civil rights action against a police officer alleging excessive force.²³⁰ After trial, the sole Black juror came forward and attested that a number of jurors made comments calling the plaintiff a “crack head,” saying his wife “looks like she’s on heroin,” and calling his Black legal team “the Cosby Show.”²³¹ For this person, jury service was “painful, humiliating, and embarrassing . . . because of the blatant racial

221. No. 12-183, 2018 WL 1924454, at *4 (D. Minn. 2018).

222. *Id.* at *10.

223. *Id.* at *4–5.

224. *Id.* at *9.

225. *Id.* at *10.

226. *Id.*

227. *Id.* at *13.

228. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

229. 993 F.3d 465 (6th Cir. 2021).

230. *Id.* at 470.

231. *Id.* at 472–73.

stereotyping, bias, and prejudice shown by [her] fellow jurors.”²³² The district court held that these statements did not exhibit overt racial bias.²³³

The Sixth Circuit reversed. After first holding that *Peña-Rodriguez* applies in the civil context, the majority ruled that the comments did exhibit overt racial bias given the “pervasive and harmful racial stereotypes regarding African Americans and drugs, and specifically, crack cocaine.”²³⁴ The majority looked beyond the *Federal Reporter* to support this assertion, citing law review articles and Michelle Alexander’s award-winning book, *The New Jim Crow*.²³⁵ The dissenting judge would have affirmed the district court, as he believed that none of the complained-of statements met *Peña-Rodriguez*’s “high hurdle,” because “they are all based on [the plaintiff’s] perceived vices . . . not his race.”²³⁶ As the majority characterized it, under the dissenting judge’s approach, “unless a juror’s statement explicitly references race in relation to their vote . . . the statement is merely an offhand comment.”²³⁷ These dueling opinions perfectly reflect the different approaches judges can take to interpreting *Peña-Rodriguez*. If courts are committed to redressing racial bias in the jury system, they should follow the approach taken by the majority.

Finally, to the extent it is an open question in the jurisdiction, courts that are serious about redressing racial bias in jury deliberations should hold that once a juror’s racial bias is exposed, a new trial is required. *Peña-Rodriguez* 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.”²³⁸ The Court recognized that there are two competing approaches in the federal courts of appeals. The Seventh Circuit has required a defendant to prove that the racial bias “pervaded the jury room.”²³⁹ Applying this standard, courts must ask “whether there is a substantial probability that the alleged racial slur made a difference in the outcome of trial” based on “the context of the trial as a

232. *Id.* at 472.

233. *Id.* at 474, 482.

234. *Id.* at 479–86.

235. *Id.* at 482–83 (first citing William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996); then citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); then citing David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); then citing Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941 (2019); and then citing Lis Wiehl, “*Sounding Black*” in the Courtroom: *Court-Sanctioned Racial Stereotyping*, 18 HARV. BLACKLETTER L.J. 185 (2002)).

236. *Id.* at 486 (Suhreheinrich, J., concurring in part and dissenting in part).

237. *Id.* at 483–84 (majority opinion).

238. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 870 (2017).

239. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987). The racism in *Shillcutt* was egregious. There, a Black defendant was charged with soliciting prostitutes. *Id.* at 1156. During deliberations, a White juror said, “Let’s be logical. He’s [B]lack and he sees a seventeen-year-old [W]hite girl — I know the type.” *Id.* The Seventh Circuit, applying the “pervaded the jury room” standard, held: “In the context of the trial as a whole, we are unable to say that there is a substantial likelihood that a racial slur, if it occurred, would have prejudiced *Shillcutt*” and thus denied a new trial. *Id.* at 1159.

whole.”²⁴⁰ By contrast, the Ninth Circuit rejected this standard, saying that “it would not be necessary to demonstrate that prejudice pervaded the jury room in order to establish a constitutional violation; we have made clear that the Sixth Amendment is violated by ‘the bias or prejudice of even a single juror.’ . . . One racist juror would be enough.”²⁴¹

As the next Section explains, the standard adopted by the Seventh Circuit—which seeks to measure the effect of a juror’s racist statement—is unworkable because it is hard, if not impossible, to measure the harm of racism on overall deliberations. It is unknowable whether that racism influenced the juror who made the comment’s vote, or whether the racist comment influenced any other juror. Furthermore, a standard that allows overt racism to be expressed in the jury room with no recourse would risk seriously damaging public perception of the fairness of the jury system. There should be no question that a juror who not only harbors racial bias but expresses that bias during deliberations represents a breakdown in the adjudicative process requiring a new trial.²⁴²

Given the questions *Peña-Rodriguez* left open, federal courts still have room to effectively address claims of juror racial bias. Federal courts must take whatever steps available to “continue to make strides to overcome race-based discrimination.”²⁴³

B. State Solution: A Reasonable Observer Standard

While federal courts can do some work to address juror racial bias claims, the real work must be done in state courts. In his classic article, *State Constitutions and the Protection of Individual Rights*, Justice William Brennan hailed state courts as the “font of individual liberties” and the fora best suited to “full[y] realiz[e] our liberties.”²⁴⁴ As the Supreme Court became increasingly conservative, Justice Brennan warned that the Court’s decisions are not “mechanically applicable to state law issues.”²⁴⁵ He therefore urged state courts “to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.”²⁴⁶

240. *Id.* at 1159.

241. *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (quoting *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc)).

242. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016) (“An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication.”).

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

244. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

245. *Id.* at 502.

246. *Id.*

Justice Brennan's advice is particularly prescient in this context. The vast majority of criminal prosecutions take place in state courts.²⁴⁷ State courts are free to adopt a more protective standard when deciding whether the local no-impeachment rule should give way and whether a defendant should be granted a new trial in the face of evidence of juror bias.

Now is the time for state courts to adopt a more robust framework to address juror racial bias claims given many states' renewed promise to address racism in the criminal legal system. In the wake of Black Lives Matter protests gripping the globe,²⁴⁸ state supreme courts have released statements both acknowledging that racism permeates the criminal legal system and committing to take action to remedy the invidious influence of race in the administration of justice.²⁴⁹ These statements are remarkable in their number—supreme courts or the chief justices of twenty-four states (both red and blue) and the District of Columbia have issued statements to date.²⁵⁰

While states are looking for ways to better ensure equal justice, some have already recognized that the jury system is ripe for reform. For example, in the spirit of Justice Brennan, the Washington Supreme Court recently took steps to remedy the discriminatory deployment of peremptory strikes, rejecting the purposeful discrimination framework the Supreme Court established in *Batson v. Kentucky*²⁵¹ and instead adopting an “objective observer” framework.²⁵² In so

247. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.2(b) (4th ed. 2004) (“[T]he federal system is responsible each year for less than 2% of the total number of criminal prosecutions brought in the United States.”).

248. See, e.g., Jen Kirby, “Black Lives Matter” Has Become a Global Rallying Cry Against Racism and Police Brutality, VOX (June 12, 2020), <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium> [<https://perma.cc/P4FF-8U4A>]; Peniel E. Joseph, *From the Black Panthers to Black Lives Matter, the Ongoing Fight to End Police Violence Against Black Americans*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/black-panthers-black-lives-matter-ongoing-fight-end-police-violence-against-black-americans/> [<https://perma.cc/62AM-QCEE>].

249. For a collection of the statements, see *State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE. CTS., <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice> [<https://perma.cc/HK2S-LAB7>]. See also ALM Staff, “Work to Be Done”: High Courts in N.J. and Beyond Speak on Social Justice, LAW.COM (June 8, 2020), <https://www.law.com/njlawjournal/2020/06/08/work-to-be-done-high-courts-in-nj-and-beyond-speak-on-social-justice/> [<https://perma.cc/3HVD-ATF8>]; Jess Bravin, *Breaking with Tradition, Some Judges Speak Out on Racial Injustices*, WALL ST. J. (June 13, 2020), <https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400> [<https://perma.cc/P2XK-K8VY>].

250. *State Court Statements on Racial Justice*, *supra* note 249.

251. 476 U.S. 79 (1986).

252. See WASH. CT. GEN. R. 37(e). For a discussion of the steps taken by Washington, see Annie Sloan, Note, “What to Do About *Batson*?”: Using a Court Rule to Address Implicit Bias in Jury Selection, 108 CALIF. L. REV. 233 (2020). See also Anna Roberts, *A Victory for Racially Inclusive Juries in Washington*, APPEAL (Sept. 5, 2017), <https://theappeal.org/a-victory-for-racially-inclusive-juries-in-washington-de1768861af0/> [<https://perma.cc/V4DU-KCL4>] (noting there was a rule pending before the Washington Supreme Court that “would expand *Batson* by removing the requirement of purposeful discrimination”).

doing, the court explicitly noted that the objective observer contemplated by the rule “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”²⁵³

In a similar vein, California recently passed a law that also rejects *Batson*’s purposeful discrimination framework, choosing to adopt an objective framework that requires judges to determine whether there is “substantial likelihood that an objectively reasonable person would view race . . . as a factor in the use of the peremptory challenge.”²⁵⁴ Like the rule adopted by the Washington Supreme Court, the California law makes clear that “an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.”²⁵⁵

Nevada’s Supreme Court recently criticized the government’s practice of asking *voir dire* questions designed to target Black jurors. Specifically, the court took umbrage with prosecutors asking potential jurors during *voir dire* about their opinions on the Black Lives Matter movement, noting that the court was “concerned that by questioning a veniremember’s support for social justice movements with indisputable racial undertones, the person asking the question believes that a certain, cognizable racial group of jurors would be unable to be impartial, an assumption forbidden by the Equal Protection Clause.”²⁵⁶

After surveying the various critiques of jury selection and how it is rife with racial bias, the Connecticut Supreme Court formed a task force to “propose necessary solutions to the jury selection process in Connecticut, ranging from ensuring a fair cross section of the community on the venire at the outset to addressing aspects of the voir dire process that diminish the diversity of juries in Connecticut’s state courts.”²⁵⁷ The California Supreme Court announced that it was similarly forming “a new work group to study whether modifications or additional measures are needed to guard against impermissible discrimination in jury selection.”²⁵⁸

253. WASH. CT. GEN. R. 37(f).

254. CAL. CIV. PROC. CODE § 231.7 (d)(1) (West 2021). The section also protects against the use of peremptory challenges motivated by ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. *Id.*

255. *Id.* at (d)(2)(A).

256. *Cooper v. State*, 432 P.3d 202, 206 (Nev. 2018) (internal quotation marks and citations omitted).

257. *State v. Holmes*, 221 A.3d 407, 437 (Conn. 2019).

258. Merrill Balassone, *Supreme Court Announces Jury Selection Work Group*, CAL. CTS. NEWSROOM (Jan. 29, 2020), <https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group> [https://perma.cc/HK8J-XAR9]. As just discussed, the California Legislature passed a bill jettisoning *Batson*, beating the California Supreme Court to the punch. *See* CAL. CIV. PROC. CODE § 231.7 (d)(1). The Connecticut task force released a detailed report at the end of 2020 proposing a number of jury reforms to address racial bias; however, there was no proposal to address bias during deliberations or how to handle juror-bias claims. *See* REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (2020),

These state courts (among others) were taking steps to address racial bias in the jury system even before the calls to action,²⁵⁹ proving that the jury system is fertile ground for reform. As state courts continue the work of addressing racial bias in the jury system, they should take a close look at the standard necessary to prove juror racial bias claims.²⁶⁰

1. *The Case for an Objective Standard*

State courts can more adequately address juror racial bias claims by moving away from the concept of purposeful or “overt” racial discrimination that was a “significant motivating factor” in voting for guilt, and instead adopting an objective standard. An objective standard asks whether a reasonable person who heard the comment would believe it reflected racial bias or animus. This standard would be easily administrable, as it is similar to the standard used for claims of judicial bias brought under the Fourteenth Amendment’s Due Process Clause.

In *Caperton v. A.T. Massey Coal Company*, the Supreme Court had to decide whether due process required a judge to recuse himself in a case involving a company whose chairman donated to his reelection campaign.²⁶¹ In finding that the Constitution compelled recusal, the Court began by noting that it “is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process.”²⁶² For decades, the Court has “articulated an objective standard to protect the parties’ basic right to a fair trial in a fair tribunal.”²⁶³ The Court explained that an objective standard is necessary for judicial bias claims because it is difficult to discern how bias may have factored into a decision given the nuanced and multifaceted nature of judging—the “difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.”²⁶⁴ Inquiry into judicial bias “is not one that the law can easily superintend or review”; bias “cannot be defined with precision.”²⁶⁵ Accordingly, “the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.”²⁶⁶ Thus, the question for

https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf
[<https://perma.cc/E24S-HFQ2>].

259. See Beth Schwartzapfel, *A Growing Number of State Courts Are Confronting Unconscious Racism in Jury Selection*, MARSHALL PROJECT (May 11, 2020), <https://www.themarshallproject.org/2020/05/11/a-growing-number-of-state-courts-are-confronting-unconscious-racism-in-jury-selection> [<https://perma.cc/VP38-EYJ5>].

260. There are fixes that can be implemented in the federal system too. Congress can, and should, amend the federal no-impeachment rule to include a reasonable observer exception for juror racial bias claims and make clear that an objective observer under the standard is one who is particularly attuned to all forms of racial bias.

261. 556 U.S. 868 (2009).

262. *Id.* at 876.

263. *Id.* at 887 (first citing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); and then citing *In re Murchison*, 349 U.S. 133 (1955)).

264. *Id.* at 883.

265. *Id.* at 883, 887 (internal quotation marks omitted).

266. *Id.* at 883.

judicial bias claims is “whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional potential for bias.”²⁶⁷

The Supreme Court’s observations in the judicial bias context apply with equal if not more force to claims of juror racial bias. Jurors, like judges, make complicated decisions, and it is hard to disentangle what exactly motivated the outcome. Just as it is hard to measure how a judge’s personal or pecuniary interest may have influenced their decision, it is impossible to “define with precision” how a juror’s racial bias may have influenced their vote for guilt or the bias’s effect on other jurors’ votes. Moreover, jurors, like judges, are people too, and they are also ill-equipped to introspectively evaluate how bias may have infiltrated their thought processes, especially racial bias, which is socially embarrassing and often influences decision-making in unknowable ways. All of these facts, like in the judicial bias context, scream for “the need for objective rules”²⁶⁸ when evaluating a claim of juror racial bias.

Objective rules are arguably even more necessary to evaluate juror racial bias claims because juries never have to explain themselves. Judges at least have to give public reasoning for their decisions and base those decisions on objective facts, scrubbed of bias. A judge’s decision, therefore, has a veil of propriety. By contrast, we do not ask jurors to explain their decisions, and in fact, we specifically admonish them not to reveal their deliberations and shield their decision-making from review.²⁶⁹ In the juror context, therefore, there is not even the same *appearance* that improper bias did not factor into the decisional process. Because, unlike judicial decision-making, there are not even superficial assurances that a jury arrived at a decision free from bias, an objective standard is critical to preserving the perception of fairness.²⁷⁰

To be sure, judges and juries are not perfect comparators. Judges are supposed to be experts at applying the law to the facts and operate under a mandated code of conduct;²⁷¹ perhaps that militates in favor of judges being held

267. *Id.* at 881 (internal quotation marks and citations omitted).

268. *Id.* at 883.

269. *See, e.g.*, FED. JUD. CTR., PATTERN CRIMINAL JURY INSTRUCTIONS nos. 1, 9 (1987) (instructing the jury both before trial and before deliberations that the deliberations will remain secret and that jurors should not discuss the case with anyone).

270. A majority of White adults (61 percent) and almost all Black adults (87 percent) already believe that Black individuals are “treated less fairly by the criminal justice system than [W]hites.” John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of the Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [<https://perma.cc/L8SF-BH2K>].

271. *See, e.g.*, MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 2020); *see also* Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL’Y REV. 123, 139 (2011) (“Currently, every state has a judicial code of conduct modeled after one or more of the ABA’s codes.”). Under the code governing judicial ethics, recusal is required in any situation where a judge’s “impartiality might reasonably be questioned.” *See* MODEL CODE OF JUD. CONDUCT r. 2.11(A); *see also* *Liljeberg v. Health Servs. Acquisition Corp.*, 486, U.S. 847 (1998) (construing the federal judicial disqualification statute, 28 U.S.C. § 455).

to stricter standards. On the flip side of the same coin, maybe juries should be given more leeway because we expect them to bring their common sense and lived experiences into the jury room, which may well include any number of biases.²⁷² It may make sense to hold judges and juries to different standards when it comes to most things, but when it comes to racial bias in the criminal legal system, the bottom line must be consistent: how much racism are we willing to tolerate? If the goal is to eradicate racial bias from the jury system altogether, regardless of its source, then a broad standard should apply to juror racial bias claims to ensure that all racial bias that can be captured is caught. Simply, if it “is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process,”²⁷³ then that requires that both the judge *and* the jury be impartial. And as the Court’s judicial bias case law explains, an objective standard better preserves this guarantee.

2. *The Case against a Harm Analysis*

To further underscore the notion that racism, “odious in all aspects, is especially pernicious in the administration of justice,”²⁷⁴ state courts should mandate that once racial bias during deliberations is uncovered, a new trial is automatically required. This, too, would be consistent with the Supreme Court’s judicial bias case law. It is also consistent with the notion that racism influencing the criminal legal system is irreparably damaging given that “[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”²⁷⁵

A few years after *Caperton*, the Supreme Court addressed a judicial bias claim in a case where a state supreme court justice had previously served as the chief district attorney who approved pursuing capital charges against the petitioner.²⁷⁶ In *Williams v. Pennsylvania*, the Court held that the justice’s previous participation in the case “gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the case must be forbidden if the guarantee of due process is to be adequately implemented.”²⁷⁷ The Court then had to decide whether relief was warranted

272. See Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 HASTINGS L.J. 999, 1007 (2014) (One idea of the jury “insists that jurors’ subjective viewpoints equip them to speak with the voice of the community. Unlike the single, professional judge who decides a bench trial, a jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations.” (quotation marks omitted)).

273. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); see also Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 183 (2011) (“The notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justice.”).

274. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

275. *Id.* at 556 (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

276. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1904 (2016).

277. *Id.* at 1908–09 (internal quotation marks and citations omitted).

even though the justice in question did not cast a deciding vote.²⁷⁸ The Court had “little trouble concluding that a due process violation arising from the participation of an interested judge is a defect not amenable to harmless-error review, regardless of whether the judge’s vote was dispositive.”²⁷⁹

The Court elaborated why a bias claim is not susceptible to harmless-error review: “deliberations of an appellate panel, as a general rule, are confidential,” and in light of that, “it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process.”²⁸⁰ The individual judge’s vote, deciding or not, does not matter because a “multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.”²⁸¹

Williams helpfully demonstrates why granting a new trial must occur when a defendant shows racial bias infiltrated deliberations. *Peña-Rodriguez* left this question open but noted that some courts require a defendant to further prove that the racial bias “pervaded the jury room” in order to receive a new trial,²⁸² which means proving “there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial.”²⁸³ This requires a harm analysis, including looking at the strength of the government’s case, the number of hurled slurs, and the length of deliberations.²⁸⁴ But as the Supreme Court explained in *Williams*, a biased decision-maker is structural error because it represents a breakdown in the adjudicative process.²⁸⁵ Measuring the harm of a

278. *Id.* at 1909.

279. *Id.* (internal quotation marks and citations omitted).

280. *Id.*

281. *Id.*

282. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 870–71 (citing, for example, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (1987)).

283. *Shillcutt*, 827 F.2d at 1159.

284. *See id.* at 1159–60. At oral argument, Mr. Peña-Rodriguez’s counsel pointed to *Williams* and another case, *Parker v. Gladden*, 385 U.S. 363 (1966), as answering the question of “whether one biased juror is enough” to require a new trial. *See* Transcript of Oral Argument at 23, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

285. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (eschewing a harm analysis when faced with evidence of a biased judge because “[n]o matter what the evidence was against him, he had the right to have an impartial judge”).

Most trial errors are subject to a harm analysis, where the significance of the error is measured by its potential effect on the case. Harmless error review is supposed to protect the finality of convictions and promote the efficiency of the criminal legal system by ensuring that convictions are not reversed for minor unimportant errors (assuming such an error exists in the context of a criminal trial). *See* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 *FORDHAM L. REV.* 2027, 2032, 2040 (2008) (explaining structural error and harmless error). However, many Sixth Amendment violations are considered structural error and therefore are not subjected to the same harm analysis. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (denial of the right to counsel is structural error); *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (racial discrimination in grand jury selection is structural error “not amenable to harmless-error review”); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right to self-representation is

juror's racial bias is as fruitless a task as measuring the harm of a judge's bias. Like the machinations of appellate judicial deliberations, jury deliberations "as a general rule, are confidential," thus "it is neither possible nor productive to inquire whether the [juror] in question might have influenced the views of his or her [fellow jurors] during the decision-making process."²⁸⁶ Same as in the judicial bias context, a jury "must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one [juror], but of the larger institution of which he or she is a part."²⁸⁷ As Justice Alito noted in his dissent in *Peña-Rodriguez*, "even a tincture of racial bias can inflict great damage on [the criminal legal] system, which is dependent on the public's trust."²⁸⁸ Once a juror's racial bias is exposed, the damage to the legitimacy of that jury is already done. Thus, to preserve the integrity of the jury system as a whole, a court should grant a new trial before a different jury.

The rationales the Court has given for why judicial bias claims are not susceptible to harm analyses apply forcefully to claims of juror racial bias. The Supreme Court has in the past declared that for purposes of harmless error analysis, there is no difference between a biased juror and a biased judge: "We have recognized that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, *be it judge or jury*, is such a right."²⁸⁹

Had the Court in *Peña-Rodriguez* been truly committed to eradicating racial bias from the jury box, it would have proposed a rule that went something like this: when deciding whether a juror's statement requires the no-impeachment rule to give way, the inquiry should be whether a reasonable person who heard the comment would believe it reflected racial bias or animus. If so, the no-impeachment rule should yield, and the court should inquire further. And if the court finds, based on credible evidence, that the comment reflecting racial bias was made, then the court should automatically grant a new trial. This should be true no matter if it was a single comment that other jurors shut down; regardless of whether the deliberations were lengthy and the juror who uttered the comment indicated other reasons for voting for guilt; and even if the government's case was overwhelming.

"not amenable to 'harmless error' analysis"); *Waller v. Georgia*, 467 U.S. 39, 49–50 (1984) (recognizing that defendants do not have to prove "specific prejudice in order to obtain relief for a violation of the public-trial guarantee"); *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (defective reasonable doubt instruction is not amenable to harmless error review).

286. *Williams*, 136 S. Ct. at 1909.

287. *Id.*

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

289. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (emphasis added) (internal quotation marks and citations omitted). Analogously, the Supreme Court has held that "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amendable to harmless-error review." *Hillery*, 474 U.S. at 263–64.

This standard mirrors the judicial bias standard and better protects the impartial jury guarantee, due process, and the equal protection goal of eliminating racial bias from the jury system.

3. *The Upsides of the Proposal*

This standard is superior to the one set in *Peña-Rodriguez* for many reasons that build on the arguments made thus far in this Article.

First, it allows the capturing of more than just “overt” or “explicit” racism. By focusing on the effect on the listener, as opposed to the words themselves, the standard recognizes that racial bias can take many forms aside from explicit epithets.

Second, the proposed standard understands that it is hard, if not impossible, to measure how bias may influence decision-making, so it does not endeavor to undertake that task. It assumes that once a juror expresses racism, that juror cannot be impartial.

Third, by focusing on what someone outside looking in would think, the standard accords with the Supreme Court’s understanding that even the *appearance* of racial bias can undermine the legitimacy of the criminal legal system. It more adequately accounts for public perception and its importance to the continued functioning of our jury system.

Fourth, relatedly, the proposed standard better encapsulates the “community’s judgment” of its tolerance for racism.²⁹⁰ This fits squarely with the ideal of a jury as a feature of a participatory democracy,²⁹¹ keeping “the administration of law in accord with the wishes and feelings of the community.”²⁹²

Fifth, an objective standard that does not include a harm analysis contemplates the fact that a racially biased juror is tantamount to a structural breakdown of the judicial process and its promise of impartiality. Thus, there is no need to ask whether or how the bias influenced the verdict. Once racial bias surfaces, no matter the context, a new trial is required.²⁹³

Sixth, the proposed standard limits the intrusion on the jury. One of the main concerns confronting the Court in *Peña-Rodriguez* was piercing the secrecy

290. Chernoff, *supra* note 134 at 184.

291. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) (the jury embodies “the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights”); Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 8 (1993) (“[T]he right to a jury trial signified America’s ratification of participatory democracy.”).

292. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 344 (1979) (Rehnquist, J., dissenting).

293. As Judge J. Harvie Wilkinson explained, “racial bias in criminal justice proceedings” is structural error because it is “easily identified as the category of error that sweeps across any particular offense, and speaks overarchingly to the kind of flaws that any citizen would instinctively know to be both unlawful and unfair.” *United States v. Gary*, 963 F.3d 420, 421–22 (4th Cir. 2020) (Wilkinson, J., concurring in the denial of rehearing en banc).

of jury deliberations and the harms that may ensue.²⁹⁴ As the principal dissent summarized, before the decision, “the door to the jury room ha[d] been locked, and the confidentiality of jury deliberations ha[d] been closely guarded” to encourage free-flowing discussion.²⁹⁵ Because *Peña-Rodriguez* opened the door to juror-bias claims, the dissent worried that the decision would chill jury debate.²⁹⁶ Taking those concerns seriously, an objective standard better preserves the confidentiality of the jury. Focusing on whether a reasonable person would perceive a comment to reflect racial animus, as opposed to trying to understand the motivation behind a comment and its effect on other jurors and the verdict, limits the need to do a deep dive into the substance of deliberations as jurors will not have to testify about how the comment influenced their thought. Instead, courts just have to assure themselves that the comment was made, and then decide whether a reasonable observer would believe the comment reflected racial animus. If yes, the only thing left is to grant a new trial.

4. Addressing Some Concerns

There are concerns with adopting a reasonable person standard for juror racial bias claims, and it is important to say at the outset that an objective standard will not be the silver bullet that will end racism once and for all.²⁹⁷ With that caveat, here are some responses to the more pressing critiques.

One glaring concern is that oftentimes, an objective “inquiry is so unguided and standardless that the reasonable observer essentially becomes a stand-in for the judge and her personal predilections. . . .”²⁹⁸ This phenomenon is problematic when considering that the vast majority of judges—both state and federal—are overwhelmingly White and mostly male.²⁹⁹ In light of the judiciary’s demographics, “[c]ritical race theorists and feminist scholars have long challenged the reasonable person standard as a masquerade for the reasonableness of what the people in authority ([W]hite, male, and wealthy) believe to be reasonable.”³⁰⁰ Thus, “a court’s reliance on a reasonable person

294. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 866–67 (2017).

295. *Id.* at 875 (Alito, J., dissenting).

296. *Id.* at 884.

297. It is also important to note that the standard does not capture unexpressed biases.

298. B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1410 (2014).

299. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC’Y, THE GAVEL GAP: WHO SITS IN JUDGEMENT ON STATE COURTS 7 (2016), <https://www.gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/HR78-XQNM>] (noting that as of 2014, 57 percent of state trial judges were White men and 26 percent were White women; and on state appellate courts, 58 percent of judges were White men and 22 percent were White women); see also DANIELLE ROOT, JAKE FALESCHINI & GRACE OYENUBI, CTR. FOR AM. PROGRESS, BUILDING A MORE INCLUSIVE FEDERAL JUDICIARY (2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/STF8-2AZM>] (noting that as of October 2019, 73 percent of sitting federal judges were men and 80 percent were White).

300. Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1529 (2018).

standard runs the risk of reinforcing the prevailing biases and racial stereotypes in the criminal justice system.”³⁰¹

This critique is important to keep in mind when implementing an objective standard for juror racial bias claims. One way that courts can be sensitive to this critique is to follow the Washington Supreme Court’s lead by explicitly mandating that under the standard, the objective observer is a person who is aware that explicit, implicit, institutional, and unconscious biases exist.³⁰²

In *State v. Berhe*, the Washington Supreme Court set forth its own unique framework for implementing *Peña-Rodriguez*.³⁰³ In that decision, the court made clear that, similar to the standard it announced for fortifying *Batson*, when addressing juror-bias claims, “[t]he ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and conscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict.”³⁰⁴ The court held that if the answer to that question is yes, then the trial court must conduct an evidentiary hearing.³⁰⁵

In this respect, similar to the standard adopted in Washington,³⁰⁶ a reasonable person contemplated by the standard is well-attuned to race and racism and the various ways in which biases manifest. The reasonable person is also aware the jury has been a key situs for racial discrimination throughout American history.³⁰⁷ In short, a reasonable observer has a broad view of what constitutes race-based discrimination.³⁰⁸

301. *Id.*; see also I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 695 (2018) (discussing how the “good citizen” is often seen as synonymous with the White citizen and explaining how this “stems from the long association of American-ness with whiteness”).

302. See WASH. CT. GEN. R. 37(f); see also CAL. CIV. PROC. CODE § 231.7 (d)(2)(A) (West 2021) (“[A]n objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.”).

303. 444 P.3d 1172 (Wash. 2019).

304. *Id.* at 1181.

305. *Id.*

306. Where the Washington court went wrong is that it requires a defendant to prove that an objective observer “could view race as a factor in the jury’s verdict.” *Id.* at 1182. As explained in the body, I would not require a defendant to make this showing given the difficulties in proving causality between racism and a vote for guilt.

The Iowa Court of Appeals adopted a far less satisfactory framework. The Iowa court essentially held that it would apply the *Peña-Rodriguez* framework from an objective viewpoint, stating that whether “a defendant has proved by compelling evidence that juror has made a clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict . . . is an objective determination based on the content and context of the statements, including the evidence and issues in the trial.” *State v. Spates*, 953 N.W.2d 372, 2020 WL 6156739, at *9 (Iowa Ct. App. Oct. 21, 2020) (quotation marks omitted).

307. See, e.g., EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/L38C-2NA8>].

308. This is in some ways similar to Justice O’Connor’s opinion that the reasonable observer in applying the First Amendment endorsement test must be an “informed observer.” *Capitol Square Rev.*

A corollary concern with adopting a reasonable-person-attuned-to-racism standard is that it requires a level of expertise that many, if not most, judges will not have. For the standard to be effective, judges need to be adequately educated about racism.³⁰⁹ And when the diversity of the judiciary does not reflect the diversity of the country—and more specifically, when judges do not look like the average defendant³¹⁰—it is perhaps likely that many judges will not have the requisite awareness to apply this standard.

As an initial matter, we should always strive to diversify the bench to make it more reflective of society.³¹¹ But in the meantime, an objective standard gives lawyers the room to advocate about how certain comments reflect racism and to educate unknowing judges. The standard permits them to point to social science literature and lived experiences to explain why a comment that appears race neutral on its face can actually smack of racism.³¹² This opportunity to educate is vitally important. It at least creates the ability for the law surrounding bias to evolve with a more robust understanding of what racism is and can be, rather than judges woodenly comparing comments made in one case to the comments made in *Peña-Rodriguez* and determining whether they are similarly egregious. Giving advocates and judges the tools to break free from the restraints of the

& Advisory Bd. v. Pinette, 515 U.S. 753, 773, 780–81 (1995) (O'Connor, J., concurring) (noting that such an observer is “aware of . . . history and context”).

309. An option to embark on this educational campaign could be to use some of the interventions proposed in the seminal article *Implicit Bias in the Courtroom*, most importantly for this context, educating judges on racial bias, including how to surface their own biases. Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Athony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172–74 (2012).

310. See, e.g., THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 6 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> [<https://perma.cc/MEU7-57RD>] (“Although African Americans and Latinos comprise 29% of the U.S. population, they make up 57% of the U.S. prison population.”).

311. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410–11 (2000) (arguing that “minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities” and ensuring “that a single set of values or views do not dominate judicial decision-making”).

312. When imagining *Peña-Rodriguez* at work, Christian Sundquist persuasively argued that “[a] thorough and informed evidentiary hearing, considering not only juror testimony but also scientific and specialized evidence on the nature of racism and stereotyping, is the best way to uphold the constitutional trial rights protected by *Peña-Rodriguez*. The sociological and psychological literature on racial bias supports this conclusion, given the complex ways in which such bias can be expressed.” Sundquist, *supra* note 99, at 347. Sundquist specifically thought that courts should be “incorporating the lessons of sociological and psychological research in their rulings on *Peña-Rodriguez* post-verdict motions.” *Id.* at 351. Other scholars have called for similar education of juries. See Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1851 (1993) (asserting that judges or attorneys should be allowed “to educate jurors, using available social science data” on implicit bias); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 500 (2010) (calling for educating jurors about implicit biases).

existing case law will also help them break free from the status quo focused on Jim Crow-style racism. Thoughtfully implementing an objective observer standard, while not perfect, goes further than the standard adopted by the Supreme Court in *Peña-Rodriguez* and is familiar to state courts that wish to make a more concerted effort in eradicating bias from the jury system.³¹³

There is also the rejoinder that a reasonable person standard such as the one proposed will do little to capture implicit biases. Undoubtedly, this is a downside of addressing juror bias post-verdict; because these types of claims rely on statements made by the jurors, implicit biases will often not be captured. For this reason, the proposal in this Article should not be read as supplanting the other thoughtful interventions judges and scholars have proposed for addressing jurors' implicit biases³¹⁴ and front-end solutions for ferreting out biased jurors more generally.³¹⁵ But if juror bias exists on a continuum, with slurs and other more "overt" manifestations of bias on one end, and implicit biases on the other, it is preferable to adopt a standard that explicitly covers more than just slurs, and allows courts to redress more subtle expressions of bias consistent with the way racism is most commonly expressed today.

Finally, one can argue that a more expansive standard poses a floodgates risk. Yes. The opening of the floodgates is intentional: *Peña-Rodriguez* already permits juror racial bias claims, and by design, the proposed standard could lead

313. I acknowledge that there may be some hard questions under this standard that courts will have to confront, but that is why it is important to give the advocates the space to fully assert their position based on the best research and evidence available.

314. Other scholars have written on implicit bias and the jury and have put forth thoughtful proposals to tackle implicit bias during jury selection. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139 (2010); Reshma M. Saujani, "The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395 (2003); see also Roberts, *supra* note 18 at 847–75 (analyzing some of the proposals to implement implicit bias testing in the jury selection process); CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 224–25 (2003) (proposing a "race switching instruction").

315. To this end, courts could take such steps as always allowing defendants to *voir dire* on racial bias when asked. See Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 188 (2011); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1297–98 (2018). State courts can consider whether jurors should be expressly instructed that it is permissible to come forward if they believe a fellow juror made a racially biased statement. See, e.g., Gonzalez, *supra* note 2, at 412. Indeed, at least one defendant has argued that *Peña-Rodriguez* and the Sixth Amendment require courts "to instruct the jurors that they 'must inform the court of racially biased statements in deliberations.'" *United States v. Stokes*, 834 F. App'x 213, 217 (6th Cir. 2020) (rejecting the claim under a plain error standard of review, stating that *Peña-Rodriguez* "itself imposed no such requirement"). Colin Miller has argued that *Peña-Rodriguez* supports a constitutional right to an implicit bias instruction. See Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, AM. CRIM. L. REV. (forthcoming), <https://ssrn.com/abstract=3785645> [<https://perma.cc/R3UG-WZA9>]. And states can revamp the peremptory process, reconsider how juror lists are compiled, and repeal juror qualification statutes that work to eliminate racial minorities. See *supra* notes 120, 122–136 and accompanying text.

to more successful juror-bias claims. Not only is the standard more expansive in the bias that it covers, but it also collapses the no-impeachment and harm inquiries, such that the no-impeachment rule gives way in the face of evidence that a juror made a statement reasonably viewed as evincing racial animus. If the judge finds that the statement was actually uttered, a new trial is required no matter the context in which the statement is made.

If this standard opens the floodgates, so be it. That means we are doing a better job at eradicating racial bias from the jury system, which after all was the professed goal of *Peña-Rodriguez*. A risk of too many successful claims in this context is a risk society should be willing to tolerate given the constitutional rights at stake and the odiousness of race-based discrimination. As Justice Brennan memorably said, we should not be afraid of “too much justice” when it comes to addressing racial discrimination in the administration of justice.³¹⁶

Moreover, from a pure numbers perspective, any floodgates concern is necessarily overblown. Evidence shows that guilty pleas resolve the vast majority of criminal cases, and thus jury trials are already the exception rather than the norm.³¹⁷ To the extent defendants do not exercise their constitutional right to a jury trial because they are afraid of bias influencing their fate, then a more robust standard for addressing juror bias can help reassure defendants who wish to exercise their constitutional rights but who are afraid that their race may prove damning. Moreover, because it is incredibly difficult for a defendant to uncover what was said during deliberations given that juries deliberate in secret, there is still an information deficit that will act as a barrier to many juror racial bias claims.³¹⁸

In fairness, an objective standard could mean that prosecutors have to retry more cases at the margin, even those they perceive as being open and shut. Thus, there could be a drag on efficiency.³¹⁹ But this could also have a net positive effect on the prosecutorial function. It may lead to a shift in incentives for prosecutors when it comes to jury selection, causing prosecutors to invest more

316. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). Justice Brennan made this statement in the face of the Court rejecting a claim challenging the imposition of the death penalty based on statistical evidence of racial disparities showing that race heavily influenced who gets the ultimate punishment. The Court held that this evidence was insufficient to sustain a constitutional challenge, reasoning that “disparities in sentencing are an inevitable part of our criminal justice system.” *Id.* at 312 (majority opinion).

317. See, e.g., SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016); Honorable Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99 (2018); Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006).

318. See Harawa, *supra* note 28, at 634–40.

319. As Darryl Brown argues, however, there is a cost of prizing efficiency in the criminal legal system. See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

in ensuring that racially biased people do not make it onto juries.³²⁰ When armed with the knowledge that courts will take juror racial bias claims seriously and reverse convictions if there is even a whiff of racism, perhaps prosecutors will start striking potential jurors who say things during *voir dire* that give a hint of racial prejudice. Even better, it could prompt prosecutors to try to affirmatively select more racially diverse juries given the studied positive effect that racial diversity has on jury deliberation.³²¹ Either way, it will be a happy change from the familiar pattern of prosecutors striking jurors because of their race.

To be sure, the solutions proposed by this Article are not perfect. However, perfection cannot be the enemy of progress. After all, a jury free from racial bias is not a perfect jury, it's the jury that our Constitution demands and thus something for which we should strive.

CONCLUSION

Had the Supreme Court in *Peña-Rodriguez* been truly engaged in eradicating racial bias from the jury system, the Court could have adopted a much more robust framework for addressing juror-bias claims. But it did not. Instead, it made lofty declarations about the perniciousness of race and then, in a sleight of hand, adopted an unreasonably high standard that would insulate most racial bias from review. As courts' implementation of the decision makes clear, a wooden application of *Peña-Rodriguez* allows courts to sidestep most claims of juror bias, meaning little progress has been made in the effort to detect and remedy racial bias in the jury room.

Justice Sotomayor recently remarked that “the work of purging racial prejudice from the administration of justice is far from done.”³²² It was this hard work that the Supreme Court seemed unable, or unwilling, to do. We can hope, following the interventions proposed in this Article, that other courts take up the mantle.

320. See, e.g., Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117, 1135–38 (2012) (arguing that prosecutors should have a corresponding obligation to *voir dire* on racial bias).

321. See *supra* note 138.

322. *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., statement respecting denial of certiorari) (internal quotation marks and citation omitted).