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ADDRESSING RACIAL BIAS IN THE JURY SYSTEM: ANOTHER FAILED ATTEMPT?

Alisa Micu*

INTRODUCTION

A long-standing rule of evidence, Rule 606(b), also referred to as the no-impeachment rule, establishes that testimony of jurors regarding events in deliberations cannot be used to question the validity of a verdict.¹ Courts have held that the no-impeachment rule is the general tenet governing the use of juror testimony when a defendant seeks a new trial.² The purpose of this rule is to balance the preservation of valid verdicts with the interests of ensuring a fair trial for the defendant, and it expressly prohibits an inquiry based on juror misconduct during deliberations.³ By not allowing defendants to challenge jurors individually, the rule prevents endless appeals and contests while simultaneously protecting the accused's constitutional right to a fair trial by a jury of his peers.⁴ The no-impeachment rule presumes honesty during jury deliberations and only under certain limited exceptions allows evidence from the jury room to challenge a

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1. Fed. R. Evid. 606(b); see *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014). “Federal Rule of Evidence 606(b) provides that . . . juror testimony regarding what occurred in a jury room is [an] inadmissible . . . inquiry into the validity of a verdict” Rule 606(b) precludes a party seeking a new trial from using . . . what another juror said in deliberations” *Id.*; see also *Hyde & Schneider v. United States*, 225 U.S. 347, 384 (1912) (“[T]he testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration.”), *superseded by statute as stated in* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

2. Fed. R. Evid. 606(b) advisory committee’s note on subdivision (b) (“The authorities are in virtually complete accord in excluding the evidence.”) (citing Fryer, *Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial* 345, 347 (Fryer ed. 1957); see also *McDonald v. Pless*, 238 U.S. 264, 269 (1915) (“[W]hat is unquestionably the general rule . . . the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.”).

3. *McDonald*, 238 U.S. at 265; see also *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009).

4. *McDonald*, 238 U.S. at 266.

verdict.⁵ Under these exceptions, the rule admits testimony about extraneous influence that may have prejudicially influenced the verdict.⁶ Through the limited scope of its exceptions, the rule protects the finality of verdicts and freedom of deliberations and prevents jurors from being exposed to harassment based on their conduct during deliberations.⁷

Once viewed as the backbone of the judicial system, the jury's competency has been called into question by concerns of due process.⁸ In the 2017 *Pena-Rodriguez v. Colorado* decision, the Supreme Court of the United States weighed the importance of the centuries-old principles that the no-impeachment rule seeks to protect against the potential harm that jurors' racial biases may have on the defendant and the verdict.⁹ In doing so, the Court overturned a Colorado Supreme Court decision that had barred evidence of a juror's racial statements made during deliberations under Federal Rule of Evidence 606(b).¹⁰ Evaluating the protections afforded by the

5. *Id.* at 267–68.

The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

Id. at 265. *See also* Grenz v. Werre, 129 N.W.2d 681, 693 (N.D. 1964) (“The law presumes that the jury was composed of fair-minded persons and that their verdict expressed their honest judgment.”); *Mattox v. United States*, 146 U.S. 140, 149 (1892) (“[T]he evidence of jurors as to the motives . . . which affected their deliberations[] is inadmissible . . . [, b]ut a jurymen may testify to any facts . . . of the existence of any extraneous influence . . .”), *superseded by rule as stated in* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

6. *Villar*, 586 F.3d at 83. (“Juror testimony about a matter characterized as ‘external’ to the jury is admissible under Rule 606(b)[] while testimony about ‘internal’ matters is barred by the [r]ule.”).

7. *See McDonald*, 238 U.S. at 267–68 (explaining how jurors would be exposed to harassment absent the no-impeachment rule). The Court explained:

Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation[] the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id.

8. Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 445 (1997).

9. *See generally* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

10. *See generally id.*

Sixth Amendment, the *Pena-Rodriguez* Court concluded that the Constitution requires an additional exception to the no-impeachment rule.¹¹ Thus, the Court held that evidence of racial statements made during deliberations is allowed to impeach the credibility of a verdict.¹² The Court overturned precedent that excluded this evidence as a necessary measure to the administration of justice and a guard against the injury caused by racial bias.¹³

This Note explores the majority opinion and the dissents in *Pena-Rodriguez* regarding whether the Supreme Court has adequately provided guidance for lower courts to follow the ruling, which now allows exceptions for evidence of racial bias to Rule 606(b). Part I discusses the history of the no-impeachment rule, its foundation in the Sixth Amendment, and its constitutional requirements.¹⁴ Further, Part I discusses the different approaches that courts have taken in adopting Rule 606(b) and what problems courts have identified in its application.¹⁵ Part II analyzes whether the Supreme Court, as a practical matter, has provided a workable procedural scheme for lower courts to follow in meeting their new legal obligation to consider a juror's racial bias after the verdict, or whether the Court has left open important considerations, creating precedent that will further erode the protections of the no-impeachment rule.¹⁶ Finally, Part III proposes actions that the Supreme Court could take to clarify questions raised by the *Pena-Rodriguez* ruling.¹⁷

11. *Id.* at 867.

12. *Id.* (“The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror’s statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.”). Stating that “[t]he duty to confront racial animus in the justice system is not the legislature’s alone[,]” the Court recognized that “[t]ime and again, this Court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.” *Id.*

13. *Id.* (“[T]his Court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.”). The Court explained that “[t]he unmistakable principle underlying these precedents is that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’” *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

14. *See infra* Part I.

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

I. Background

Rooted in principles of ensuring verdict finality and the freedom of juror deliberations, the no-impeachment rule has maintained the integrity of the jury system and its deliberative components.¹⁸ It has not only ensured the finality of verdicts but has also safeguarded against harassment of jurors after a verdict has been rendered.¹⁹ The jury's independence from outside influence instills confidence that the court's decision is not biased toward any one particular party.²⁰ A direct correlation exists between the public's confidence in a jury and the jury's ability to legitimize judicial outcomes.²¹ However, the value placed in a jury's ability to use "common sense" in its fact finding has been diminished by increased concerns of juror prejudice.²²

A. The Origins of the No-Impeachment Rule

Rules prohibiting the use of juror testimony to impeach a verdict originated in England and predate the ratification of the United States Constitution.²³ The English Mansfield Rule provided a rigid approach to dealing with juror testimony by "prohibit[ing] jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations."²⁴ American courts adopted the Mansfield Rule

18. Fed. R. Evid. 606(b) advisory committee's note on subdivision (b).

19. *Id.* Protection of the manner in which the jury reached its verdict "extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process." *Id.*; see also *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017). "A general rule . . . give[s] substantial protection to verdict finality and . . . assure[s] jurors that . . . their verdict . . . will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule." *Pena-Rodriguez*, 137 S. Ct. at 861.

20. Smith, *supra* note 8, at 482–83.

21. *Id.* at 483 ("[I]f public confidence in the jury as an institution capable of arriving at 'correct' or just outcomes is undermined then there will be a corresponding reduction in the ability of the jury to confer legitimacy upon trial proceedings.").

22. *Id.* at 487–88.

23. *Pena-Rodriguez*, 137 S. Ct. at 863. The Mansfield rule originated in England in the case of *Vaise v. Delaval*. *Id.* "Rules barring the admission of juror testimony to impeach a verdict . . . have a long history[,] . . . pre-dat[ing] the ratification of the Constitution." *Id.* at 875.

24. *Id.* at 863. The Mansfield Rule originated in *Vaise v. Delaval*, where Lord Mansfield did not

but provided some exceptions.²⁵ In *Mattox v. United States*, the Court recognized an exception to the Mansfield rule and drew a distinction between jury misconduct during deliberations and improper outside influences upon jurors.²⁶ As a result, some jurisdictions adopted the federal approach to the no-impeachment rule, permitting exceptions only for testimony about events extraneous to the deliberative process.²⁷ Others adopted the Iowa rule, a more lenient version of the Mansfield rule that allowed jurors to testify about objective facts and events occurring during deliberations.²⁸

allow juror testimony that the case had been decided through a game of chance. *Id.* This rule “prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.” *Id.*

25. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017).

American courts adopted the Mansfield rule as a matter of common law, though not in every detail. Some jurisdictions adopted a different, more flexible version of the no-impeachment bar known as the “Iowa rule.” Under that rule, jurors were prevented only from testifying about their own subjective beliefs, thoughts, or motives during deliberations. Jurors could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.

An alternative approach, later referred to as the federal approach, stayed closer to the original Mansfield rule.

Id. (citations omitted); *see also* *Martinez v. Food City, Inc.*, 658 F. 2d 369, 373–74.

26. *Mattox v. United States*, 146 U.S. 140, 148 (1892), *superseded by rule as stated in* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

... “Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because . . . it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority . . . ; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard.”

Id. at 148–49 (quoting *Perry v. Bailey*, 12 Kan. 539, 545 (Kan. 1874)); *see also* Robert A. Gallagher, *RECENT DECISION: Pennsylvania’s Exception to the No-Impeachment Rule Regarding Jury Deliberations Affected by Extraneous Information: Pratt v. St. Christopher’s Hosp.*, 44 Duq. L. Rev. 575, 584 (2006) (“Jurors may use affidavits to testify as to overt acts, more commonly referred to as extraneous prejudicial information that may have prejudiced the jury.”).

27. *Pena-Rodriguez*, 137 S. Ct. at 863. Under the federal rule, “the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts.” *Id.*

28. *Id.* (“Under [the Iowa] rule, jurors were prevented only from testifying about their own subjective beliefs, *thoughts*, or motives during deliberations . . . [but] could, however, testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony.”) (emphasis added) (citation omitted).

In 1975, by adopting the Federal Rules of Evidence, Congress rejected the Iowa rule, endorsing a broad no-impeachment approach with only a few exceptions.²⁹ The preliminary rule of evidence has undergone several changes over the decades, which narrowed the scope originally contemplated.³⁰ Congress did not specifically address juror bias in the no-impeachment rule.³¹ Rather, the rule prohibits a juror from testifying about any events that occurred during jury deliberations with exceptions only for “extraneous prejudicial information” introduced to a jury, “outside influence . . . improperly brought,” or “a mistake . . . made in entering the verdict”³² As a result of the rule’s lack of specificity in dealing with racial bias, jurisdictions have applied it inconsistently.³³

29. *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (excluding juror testimony about objective events in the jury room, where the jury allegedly calculated a damages award by averaging the numerical submissions of each member, because admitting that evidence would have dangerous consequences); see also *Pena-Rodriguez*, 137 S. Ct. at 864; Amanda R. Wolin, Comment, *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, 269 (2012).

Although Rule 606(b) imposes a general prohibition on juror testimony regarding any statement or incident occurring during deliberations, this bar is subject to three exceptions. The first exception permits a juror to provide testimony regarding extraneous prejudicial information brought to the jury’s attention. The second exception allows testimony regarding outside influences improperly brought to bear on the deliberation process. The third exception permits jurors to give testimony regarding clerical errors made in filling out the verdict form.

Id.

30. Fed. R. Evid. 606(b) advisory committee’s note to subdivision (b); see also *Pena-Rodriguez*, 137 S. Ct. at 864 (“The substance of the [r]ule has not changed since 1975, except for a 2006 modification permitting evidence of a clerical mistake on the verdict form.”). The 2006 amendment to Rule 606 specifically rejects the broader exception, adopted by some courts, allowing the use of juror testimony to prove a misunderstanding about the consequences of their verdict because an inquiry into whether the jury misunderstood an instruction goes to the “jurors’ mental processes underlying the verdict, rather than the verdict’s accuracy in capturing what the jurors had agreed upon.” Fed. R. Evid. 606(b) advisory committee’s note on subdivision (b).

31. Fed. R. Evid. 606(b).

32. *Id.* 606(b)(1), (2); see also Wolin, *supra* note 29, at 272 (“Congress did not specifically address juror bias or prejudice and, thus, did not state whether it is the type of objective matter about which jurors should not be permitted to testify.”).

33. See *infra* Section I.C.

B. The no-impeachment rule and the Requirements of the Sixth Amendment

The Sixth Amendment guarantees the right to an impartial jury in a criminal trial.³⁴ The Fourteenth Amendment extends the guarantees of the Sixth Amendment to the states.³⁵ At common law, the right to a fair trial does not provide for the ability to invalidate a jury verdict on the basis of juror testimony regarding misconduct during deliberations.³⁶ Thus, the circuits are split regarding the extent to which the Sixth Amendment protects defendants' rights when they believe that a juror's bias or prejudice influenced the final verdict.³⁷ The conflict between the Sixth Amendment and Rule 606(b) is reconciled by exceptions—in certain circumstances—to the prohibition of the use of information from jury deliberations to impeach verdicts.³⁸ Regardless of how different jurisdictions have

34. U.S. Const. amend. VI; *see* *Turner v. Murray*, 476 U.S. 28, 40 (1986) (quoting *Ham v. South Carolina*, 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part)) (“The Sixth Amendment guarantees criminal defendants an impartial jury [T]he right to an impartial jury carries with it the concomitant right . . . to insure [sic] that the jury is impartial.”); *see also* *Pena-Rodriguez*, 137 S. Ct. at 871–72 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) (Thomas, J., concurring)) (“The Sixth Amendment’s protection of the right, ‘[i]n all criminal prosecutions,’ to a ‘trial, by an impartial jury,’ is limited to the protections that existed at common law when the Amendment was ratified.”).

35. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment’s guarantee.”).

36. *Pena-Rodriguez*, 137 S. Ct. at 872.

37. Wolin, *supra* note 29, at 265–66. “There is a split among the circuit courts regarding the intersection of the Sixth Amendment’s guarantee of trial by an impartial jury and Rule 606(b)’s prohibition of juror testimony when a juror voluntarily raises allegations of another juror’s bias or prejudice after the verdict.” *Id.*

38. *Id.* The Court stated:

There is a split among the circuit courts regarding the intersection of the Sixth Amendment’s guarantee of trial by an impartial jury and Rule 606(b)’s prohibition of juror testimony when a juror voluntarily raises allegations of another juror’s bias or prejudice after the verdict.

. . . .

At first it appears that the language of Rule 606(b) provides an absolute prohibition on a juror testifying to what transpired during deliberations: Rule 606(b) states in part that “a juror may not testify about any statement made or incident that occurred during the jury’s deliberations.” Congress, however, also added three exceptions to this bar “A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury’s attention; [or] (B) an outside influence was improperly brought to bear upon any juror”

applied the rule, a defendant's Sixth Amendment concerns have to some extent shaped the decision as to whether a juror has improperly prejudiced a verdict.³⁹ In *Batson v. Kentucky* the Court made a first attempt to eliminate racial bias from the jury system at the voir dire stage of the trial process, but the attempt proved to be ineffective.⁴⁰ Thus, some courts have specifically recognized that in instances where voir dire does not permit an informed basis on which to exercise peremptory challenges, the Sixth Amendment's guarantee of fairness in the trial process may require an inquiry into whether jurors' racial biases influenced the decision to convict.⁴¹ Although every state follows some version of the no-impeachment rule, some have implemented exceptions for when a juror's racial bias influences deliberations.⁴²

Id. (footnotes omitted)

39. Fed. R. Evid. 606(b) advisory committee's note on subdivision (b).

40. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

41. *Turner v. Murray*, 476 U.S. 28, 40 (1986) (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)) ("[W]e held long ago that 'essential demands of fairness' may require a judge to ask jurors whether they entertain any racial prejudice."); see also *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981).

There are, however, constitutional requirements with respect to questioning prospective jurors about racial or ethnic bias. The "special circumstances" under which the Constitution requires a question on racial prejudice were described in *Ristaino v. Ross*, by contrasting the facts of that case with those in *Ham v. South Carolina*, in which we held it reversible error for a state court to fail to ask such a question.

Id. (citations omitted).

42. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017). Forty-two jurisdictions follow the federal Rule, whereas nine follow the Iowa Rule, which states that jurors could testify about objective facts and events occurring during deliberations but not about their own subjective beliefs, thoughts, or motives during deliberations. *Id.* Other courts have treated the issue of racial bias differently. *United States v. Benally*, 546 F.3d 1230, 1240–41 (10th Cir. 2008), *abrogated by* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). For example, the court in *Benally* declined to find an exception because other safeguards protect a defendants' constitutional interests. *Id.* In *Williams v. Price*, the court indicated in dicta that no exception exists but held that the racial bias exception was not clearly established. *Williams v. Price*, 343 F.3d 223, 237–39 (3d Cir. 2003), *abrogated by* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). The court in *Martinez v. Food City, Inc.* held that evidence of racial bias is excluded by Rule 606(b) but did not address whether the Constitution may demand an exception. *Martinez v. Food City, Inc.*, 658 F.2d 369, 373–74 (5th Cir. 1981). In *Wright v. Illinois & Mississippi Telephone Co.*, the Supreme Court of Iowa did not say that a juror's declaration cannot be received in any case. *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 201 (1866). By Iowa Code § 1810, the affidavits of jurors may be received on applications for new trials, but cannot be compelled to make them, and it is unclear that they could be used to impeach a verdict. *Id.* at 198.

C. How States Have Treated Issues of Juror Bias in Deliberations

Courts have struggled to find a balance between protecting a defendant's right to a fair trial and protecting the integrity and freedom of jury deliberations and the finality of verdicts.⁴³ Some courts have made exceptions to the rule in cases where racial bias influenced deliberations, whereas others have recognized safeguards that ensure a fair trial without the need for this exception.⁴⁴

1. Racial Bias is an Exception to the no-impeachment rule

The courts that have declined to lay down an inflexible rule recognize that to administer justice there may be instances where a juror's testimony of another juror's racially biased conduct must be considered.⁴⁵ These courts have addressed the constitutional need for an exception to Rule 606(b) where instances of racial bias influence a jury verdict.⁴⁶ For example, the United States Court of Appeals for the Seventh Circuit in *Shillcutt v. Gagnon* determined that fundamental principles of fairness and justice *could* require an exception for racial bias under the no-impeachment rule but ultimately held that it was unlikely that a "racial slur" that occurred toward the end of deliberations could have influenced the verdict so as to prejudice the defendant.⁴⁷ In contrast, in *United States v.*

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

44. *Id.* at 1119–20; *see also* *McDonald v. Pless*, 238 U.S. 264, 268 (1915).

45. *McDonald*, 238 U.S. at 268. The Court distinguished the issue solely from the point of view of a private party who has been wronged by a juror's misconduct from jurors as witnesses in criminal cases generally and determined that the legislature would have repealed or modified the rule had it thought necessary. *Id.* The Court pointed out that "[although] it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors'" and that "'[i]t would lead to the grossest fraud and abuse' and 'no verdict would be safe.'" *Id.*; *see also* *Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."), *superseded by rule as stated in* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

46. *Pena-Rodriguez*, 137 S. Ct. at 865 ("Various Courts of Appeals have had occasion to consider a racial bias exception and have reached different conclusions . . . hav[ing] held or suggested there is a constitutional exception for evidence of racial bias.")

47. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987).

[F]urther review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent . . . [W]e must consider whether prejudice pervaded the jury room, whether there is a substantial probability

Henley, the Ninth Circuit concluded that a constitutional violation could occur even in the absence of prejudice pervading the jury room, where only a single juror expressed bias or prejudice.⁴⁸

2. *Rule 606(b) Applies to All Statements Made in Deliberations*

In *Commonwealth v. Steele*, the Supreme Court of Pennsylvania addressed and applied the bar to a juror's testimony that racial bias influenced deliberations.⁴⁹ However, the court strictly construed the exceptions to Rule 606(b) as applicable only to outside influence, not statements made by the jurors themselves.⁵⁰ Refusing to allow Rule 606(b) to thwart the protections provided by the Sixth Amendment, the Tenth Circuit, in *United States v. Benally*, recognized the dangers of searching for perfect justice through jury verdicts and suggested that decisions rendered by ordinary citizens—even if irrational at times—are more likely to resemble justice than “law-bound” decisions by “professional jurists.”⁵¹ The court relied on other

that the alleged racial slur made a difference in the outcome of the trial.

Id.

48. *Henley*, 238 F.3d at 1120 (quoting *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc)) (“In our circuit . . . 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.’”).

49. *Commonwealth v. Steele*, 961 A.2d 786, 808 (Pa. 2008).

50. *Id.* One juror made the remark during trial that the defendant should “fry, get the chair[,] or be hung [sic].” *Id.* at 807–08. He said that race was an issue from the inception of the trial, and that another juror commented on the defendant's race early in the trial, and further “‘noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty’ Once the verdict was entered, the jurors . . . became incompetent to testify regarding any internal discussions or deliberations.” *Id.*

51. *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008), *abrogated by* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). The court explained:

To treat the jury as a black box may seem to offend the search for perfect justice. The rule makes it difficult and in some cases impossible to ensure that jury verdicts are based on evidence and law rather than bias or caprice. But our legal system is grounded on the conviction, borne out by experience, that decisions by ordinary citizens are likely, over time and in the great majority of cases, to approximate justice more closely than more transparently law-bound decisions by professional jurists. Indeed, it might even be that the jury's ability to be irrational, as when it refuses to apply a law against a defendant who has in fact violated it, is one of its strengths.

Id. (emphasis omitted). “[T]he Sixth Amendment embodies a right to ‘a fair trial but not a perfect one, for there are no perfect trials.’” *Id.* at 1240 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)). The court further reasoned that “[w]here the attempt to cure defects in the jury process—here, the possibility that racial bias played a role in the jury's deliberations—entails the

safeguards in the trial process that adequately protect a defendant's constitutional rights, taking note of the fact that a juror determined to lie would still go undetected in voir dire.⁵²

3. *Pena-Rodriguez v. Colorado*

In light of the different approaches that courts have used in considering whether racial bias is an exception to the no-impeachment rule, the Supreme Court in *Pena-Rodriguez* resolved the dispute only insofar as it aligns with one side of the argument.⁵³ In reaching this decision, the Court looked to precedent allowing exceptions under Rule 606(b) in cases of extreme bias.⁵⁴ Furthermore, the Court examined cases where these exceptions were allowed and discovered a need for an answer to the question of whether the Constitution requires an exception to Rule 606(b) in instances where a juror's racial statements significantly motivated the juror's decision in a verdict.⁵⁵ Affirmatively answering this question, the only standard the Court set forth in *Pena-Rodriguez* for this inquiry was for a lower court to analyze whether a juror's statement clearly indicated reliance on bias to convict so as to cast doubt on the fairness and impartiality of deliberations and the verdict.⁵⁶ The Court dismissed concerns of intrusive inquiry into jury deliberations created

sacrifice of structural features in the justice system that have important systemic benefits, it is not necessarily in the interest of overall justice to do so." *Id.*

52. *Id.* The court specifically mentioned "voir dire, observation of the jury during court, reports by jurors of inappropriate behavior before they render a verdict, and post-verdict impeachment by evidence other than juror testimony." *Id.* (emphasis omitted).

53. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017).

54. *Id.* at 865–67. The Court looks to precedent to justify its decision to allow juror testimony in cases of extreme bias. *Id.*

In *Warger* . . . the Court did reiterate that the no-impeachment rule may admit exceptions. . . . [T]he Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." "If and when such a case arises," the Court indicated it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process."

Id. (citations omitted) (quoting *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014)).

55. *Id.*

56. *Id.* at 869 ("To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."). Determination of this threshold is at the substantial discretion of the trial court, in light of all circumstances. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

by the exception, as expressed in decisions favoring the exclusion of evidence of bias,⁵⁷ from the “recurring evil” of racial bias “risk[ing] systemic injury to the administration of justice” in the present case.⁵⁸ Recognizing that safeguards in the trial process cannot protect against racial biases infiltrating jury deliberations, the Court found it necessary to open to judicial inquiry a juror’s statement indicating reliance on bias in reaching a verdict.⁵⁹ The *Pena-Rodriguez* Court thus concluded that the Sixth Amendment’s guarantees necessitate this exception to Rule 606(b) and removed the bar on evidence of a juror’s racist statements made in deliberations.⁶⁰ Consequently, the Court dismissed concerns of possible harassment to jurors or the infringement on jurors’ freedom to deliberate.⁶¹ In its reasoning, the Court looked to lower decisions that have long recognized the bias exception and have not experienced those problems.⁶² However, the Court did not address a standard or procedure to be used in reaching this result.⁶³

II. Analysis

Throughout history, the Supreme Court has determined that discrimination on the basis of race is damaging in all respects,

57. *Id.* at 866. See generally *Warger*, 135 S. Ct. 521; *Tanner v. United States*, 483 U.S. 107 (1987). Both *Tanner* and *Warger* rejected constitutional challenges to the no-impeachment rule as it pertains to evidence of juror bias. *Warger*, 135 S. Ct. at 524; *Tanner*, 483 U.S. at 126.

58. *Pena-Rodriguez*, 137 S. Ct. at 868. The court stated that “[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 that is so central to a functioning democracy.” *Id.*

59. *Id.* at 869 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring)) (“Generic questions about juror impartiality may not expose specific . . . biases that can poison jury deliberations. Yet more pointed questions ‘could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.’”).

60. *Id.* at 869 (“[T]he Court now holds that where a juror makes a clear statement that indicates he . . . relied on racial stereotypes . . . to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule . . . permit[s] the trial court to consider the evidence of the juror’s statement . . .”).

61. *Id.* at 870.

62. *Id.*

63. *Pena-Rodriguez*, 137 S. Ct. at 870. (“This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias.”).

especially in the administration of justice.⁶⁴ Over thirty years ago, in an attempt to remove racial bias from the trial system, the Court ruled in *Batson v. Kentucky* that race is not a legitimate basis for excluding a prospective juror.⁶⁵ The Court revisited the issue in *Pena-Rodriguez* as it reached even further, overturning precedent which previously protected juror deliberations “to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.”⁶⁶ This Part examines the extent to which the Sixth Amendment compels the *Pena-Rodriguez* review of juror deliberations that are supposed to remain independent from outside influence or harassment.⁶⁷ This Part also focuses on whether the Court’s ruling is a workable scheme to solving social injustice by removing racial bias from the jury system.

64. *Id.* at 867. “The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries.” *Id.* As examples, the Court offered the following cases: *Neal v. Delaware*, 103 U.S. 370 (1881); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (per curiam); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hernandez v. Texas*, 347 U.S. 475, (1954); *Castaneda v. Partida*, 430 U.S. 482 (1977). *Id.*

65. *See Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986).

“[A] jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” . . . [A petit jury] must be “indifferently chosen,” to secure the defendant’s right under the Fourteenth Amendment to “protection of life and liberty against race or color prejudice.”

Id. (citations omitted).

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

67. *Clark v. United States*, 289 U.S. 1, 13 (1933). The Supreme Court has held:

Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.

. . . .

. . . No doubt the need is weighty that conduct in the jury room shall be untrammelled by the fear of embarrassing publicity.

Id. at 13–16; *see also Williams v. Cavazos*, 646 F.3d 626, 643 (9th Cir. 2011) (“[N]o one, including the judge, is even supposed to be aware of the views of individual jurors during deliberations, because a jury’s independence is best guaranteed by secret deliberations”) (emphasis omitted), *rev’d*, 568 U.S. 289 (2013).

A. *Does the Court's Ruling Expose Juries to Unrelenting Scrutiny?*

The Court explained that precedent upholding the no-impeachment rule does not conflict with precedent that allows evidence of racial bias to impeach a jury verdict.⁶⁸ In doing so, the Court distinguished *Pena-Rodriguez* from cases such as *McDonald v. Pless*, *Tanner v. United States*, and *Warger v. Shauers*, where the Court upheld Rule 606(b) in cases of influence on the jury verdict.⁶⁹ In discussing juror misconduct in those cases, the Supreme Court argued that “neither history nor common experience show that the jury system is rife with mischief of these or similar kinds.”⁷⁰ In *McDonald*, the Court did not allow evidence of how the jury calculated damages by averaging the numerical submissions of each jury member; in *Tanner*, the Court excluded evidence that multiple jurors had been intoxicated during trial; and in *Warger*, evidence that a forewoman failed to disclose pro-defendant bias during voir dire was excluded under Rule 606(b).⁷¹ The Court characterized the jurors’ behavior in those three cases as “troubling and unacceptable” and instances of jurors “gone off course.”⁷² The Court further argued that eliminating racial bias is not an “attempt to rid the jury of every irregularity” that can “expose it to unrelenting scrutiny” because the Court in *Tanner*, *Warger*, and *McDonald* upheld Rule 606(b) for different reasons than in *Pena-Rodriguez*.⁷³ In the majority opinion in *Pena-Rodriguez*, Justice

68. *Pena-Rodriguez*, 137 S. Ct. at 868.

69. *Id.*

70. *Id.* The Court distinguished *McDonald*, where it rejected an exception to Rule 606(b) because “the use of juror testimony about misconduct during deliberations would make what was intended to be a private deliberation[] the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.” *Id.* at 884; *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915); see also *Tanner v. United States*, 483 U.S. 107, 126 (1987) (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912)) (concluding that Rule 606(b) precluded a criminal defendant from introducing evidence that multiple jurors had been intoxicated during trial and rejecting the contention that this exclusion violated the defendant’s Sixth Amendment right to “a tribunal both impartial and mentally competent to afford a hearing.”). In *Warger*, where the jury forewoman in a civil case allegedly failed to disclose a prodefendant bias during voir dire, the Court again relied substantially on existing safeguards for a fair trial. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014).

71. *Tanner*, 483 U.S. at 121–22; *Warger*, 135 S. Ct. at 525; *McDonald*, 238 U.S. at 267–68.

72. *Pena-Rodriguez*, 137 S. Ct. at 868.

73. *Id.* at 868.

Kennedy reasoned that an effort to eliminate racial bias is “not an effort to perfect the jury” but rather to ensure that our legal system delivers the “promise of equal treatment under the law.”⁷⁴

However, as Justice Alito pointed out in the dissenting opinion, the Constitution places great importance on jurors’ ability to freely deliberate as regular people do in ordinary lives, without the scrutiny of “professionals who do not speak the language of ordinary people.”⁷⁵ In opening the door to intrusion on jury deliberations, even in instances of racial bias, the expansion of the holding is unlikely to be prevented.⁷⁶ The dissenting opinion also pointed out the majority’s failure to provide a good reason to distinguish the ruling in *McDonald* from that in *Pena-Rodriguez*.⁷⁷ In both cases, the defendants had a strong interest in “demonstrating that the jury had ‘adopted an arbitrary and unjust method in arriving at their verdict.’”⁷⁸ *McDonald* involved allegations that the verdict had been entered into by chance.⁷⁹ The *McDonald* Court recognized that if it allowed the verdict to be attacked with testimony of jurors, then “all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.”⁸⁰ The *Pena-Rodriguez* Court provided no guiding limitation in applying the racial bias exception to Rule 606(b), which would prevent this sort of inquiry into verdicts.⁸¹

In *Pena-Rodriguez*, the Court did not convincingly explain why the safeguards to ensure an impartial trial, as outlined in *Tanner*,

74. *Id.*

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

76. *Id.* In his dissent, Justice Alito points out:

Today, . . . the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution [A]lthough the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today’s holding.

Id.

77. *Pena-Rodriguez*, 137 S. Ct. at 875–76.

78. *Id.* at 876.

79. *McDonald v. Pless*, 238 U.S. 264, 267 (1915).

80. *Id.*

81. *Id.* See generally *Pena-Rodriguez*, 137 S. Ct. at 855.

inadequately prevent racial bias from infiltrating jury deliberations.⁸² Justice Kennedy pointed out that although these safeguards may be important for discovering bias, they are insufficient because the Constitution demands added precaution when dealing with racial bias.⁸³ He did not, however, explain why a juror who feels strongly enough to report racial bias of such severity as to constitute an infringement on the defendant's constitutional right to a fair and impartial trial would be less likely to do so after the trial has ended than during deliberations.⁸⁴

B. Does the Sixth Amendment Compel this Review of Juror Testimony?

The Sixth Amendment affords a defendant the right to an impartial and fair jury trial, including “a jury that is free of bias and that decides the case solely on the evidence before it”; thus, a defendant's fundamental right becomes compromised when even one juror is biased or prejudiced.⁸⁵ Rule 606(b) seeks to protect this right by restricting a juror's testimony about another juror's “subjective thought processes, mental impressions, and emotional reactions, for it

82. *Pena-Rodriguez*, 137 S. Ct. at 868.

83. *Id.* at 869. The Court, in reasoning that racial bias must be treated with added precaution, stated: For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions “could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.”

The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.

Id. at 870 (citations omitted).

84. *See generally id.*

85. U.S. Const. amend. VI. The Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.; *see also* Wolin, *supra* note 29, at 264.

is testimony on such internal matters that poses the greatest risk to the policies underlying the general prohibition on juror impeachment of a verdict.”⁸⁶ Under the rule’s exceptions, however, testimony about events “extraneous to the deliberative process” may be admitted to impeach a verdict, but even then, a juror is only allowed to testify as to the intrusion itself, not to how it affected deliberations.⁸⁷ The Court in *Pena-Rodriguez* found that the Constitution mandates an additional exception for impeaching a verdict where evidence of racial bias is thought to have influenced the verdict.⁸⁸ The Court did so by distinguishing racial bias from other instances that might have led to the partiality of the verdict, stating that racial bias is a “recurring evil” that would “risk systemic injury to the administration of justice.”⁸⁹ The Court based its reasoning in part on precedent that suggests that Rule 606(b) allows the possibility of an exception for the “gravest and most important cases,” determining that racial bias warrants this kind of exception under the Constitution.⁹⁰ But how is racial bias different from other “grave” influences on the jury verdict? As Justice Thomas pointed out in his dissenting opinion, the Sixth Amendment’s guarantee of impartiality involved the “common[]law understanding of [the] term,” which was that “jurors could ‘have no interest of their own

86. See Fed. R. Evid. 606(b)(1) (prohibiting juror testimony “about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment”); see also Dean Sanderford, *The Sixth Amendment, Rule 606(B), and the Intrusion Into Jury Deliberations of Religious Principles of Decision*, 74 Tenn. L. Rev. 167, 189 (2007).

87. Fed. R. Evid. 606(b) advisory committee’s note on subdivision (b); see also *Pena-Rodriguez*, 137 S. Ct. at 864.

88. *Pena-Rodriguez*, 137 S. Ct. at 869. The Court held:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.

Id.

89. See *Tanner v. United States*, 483 U.S. 107, 122 (1987) (rejecting a Sixth Amendment exception for evidence that some jurors were intoxicated during the trial); see also *Pena-Rodriguez*, 137 S. Ct. at 868; *Warger v. Shauers*, 135 S. Ct. 521, 530 (2014) (rejecting post-verdict juror testimony that forewoman failed to disclose pro-defendant bias during voir dire).

90. *Pena-Rodriguez*, 137 S. Ct. at 858; see *McDonald v. Pless*, 238 U.S. 264, 268–69 (1915); *United States v. Reid*, 53 U.S. 361, 366 (1851), *overruled in part by Rosen v. United States*, 245 U.S. 467 (1918).

affected, and no personal bias, or pre-possession, in favor [of] or against either party.”⁹¹ Allowing juror testimony of racial bias on this ground would compel review of any influence that might have led a jury to reach a partial verdict, based on Sixth Amendment considerations, as even the Court in *Pena-Rodriguez* extended the term “racial bias” to include instances of ethnic bias.⁹²

By effectively eviscerating the rule against juror impeachment in cases of racial bias with reasoning rooted in the Sixth Amendment, the Court opened the door to other challenges, such as religious bias during deliberations.⁹³ In *Pena-Rodriguez*, the Court did not address how eliminating racial bias in the name of “equal treatment under the law” differs from the unequal treatment due to other factors, such as the constitutionally guaranteed freedom of religion.⁹⁴

The Constitution protects the free exercise of religious beliefs.⁹⁵ Consequently, a juror may express his religious beliefs during jury deliberations, as is his constitutional right.⁹⁶ However, a juror who bases his verdict on a religious principle, rather than the law, has “abdicated [his] responsibility to decide the case on the basis of the law and facts and has deprived the defendant of his Sixth Amendment right to an impartial jury.”⁹⁷ The Colorado Supreme Court, in a case involving a juror who read text from the Bible during jury deliberations as rationale for his decision, made a distinction between religious text and religious discussion and afforded the defendant a new trial.⁹⁸ The ruling has been criticized for constituting

91. *Pena-Rodriguez*, 137 S. Ct. at 871–72 (Thomas, J., dissenting) (“The Sixth Amendment’s protection of the right, ‘[i]n all criminal prosecutions,’ to a ‘trial, by an impartial jury,’ is limited to the protections that existed at common law when the Amendment was ratified.”); see also *Pettis v. Warren*, 1 Kirby 426, 427–28 (Conn. 1788).

92. *Pena-Rodriguez*, 137 S. Ct. at 863.

93. Sanderford, *supra* note 86, at 190 (“[P]ermitting a juror to testify that a jury’s decision was based on religious principle would constitute a major shift in the law, requiring the overruling of *McDonald v. Pless* and *Hyde v. United States*, and opening the door to numerous other challenges . . .”).

94. See *Pena-Rodriguez*, 137 S. Ct. at 868.

95. U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

96. *Id.*

97. Sanderford, *supra* note 86, at 188.

98. *People v. Harlan*, 109 P.3d 616, 631 (Colo. 2005). The Colorado Rule of Evidence 606 is almost identical to its federal counterpart:

Colorado Rule of Evidence 606(b) strongly disfavors any juror testimony impeaching

a major shift in the law, “requiring the overruling of *McDonald v. Pless* and *Hyde v. United States*” by allowing juror testimony that a “jury’s decision was based on religious principle.”⁹⁹ The Court’s decision in *Pena-Rodriguez* did just that.¹⁰⁰

C. The Court Did Not Provide a Workable Standard to Eliminate Racial Bias

The Court did not offer an appropriate standard for determining when adequate prejudice exists to set aside a verdict.¹⁰¹ Additionally, the Court did not set out procedures that a trial court must follow when dealing with a request for a new verdict on these grounds.¹⁰² Courts need further guidance to prevent the making of “what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.”¹⁰³ Jury deliberations have long been protected, and their value has justified how the loss of evidence has impacted the justice system.¹⁰⁴ Because trial courts are left without a

a verdict, even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard. This rule is designed to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion.

Id. at 624 (citations omitted). The court based its decision on the fact that the Bible was brought as an outside source, carefully distinguishing “between a situation in which a Bible was actually introduced in the jury room—deemed impermissible—and a situation where a juror merely discusses ‘his or her religious upbringing, education, and beliefs’ with fellow deliberating jurors—presumably permissible.” Sanderford, *supra* note 86, at 191. But, “the defendant suffers the same injury whether the jury read directly from the Bible or merely discussed it.” *Id.* at 188.

99. Sanderford, *supra* note 86, at 190.

100. *See generally* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

101. *Id.* at 870.

102. *Id.*

[T]he experience of the courts going forward[] will inform the proper exercise of trial judge discretion in these and related matters. This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. The Court also 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.

Id. (citations omitted).

103. *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915).

104. *Pena-Rodriguez*, 137 S. Ct. at 874 (Thomas, J., dissenting).

Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way. The goal of avoiding interference with confidential communications of great

standard or set of guidelines to follow, the door has been left open to inquiry into these deliberations without restriction. The only guidance that the Court provided for determining when racial bias adequately justifies inquiry into a verdict is where a juror makes a “clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant.”¹⁰⁵ But Justice Kennedy further explained that “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar.”¹⁰⁶ However, if the trial court is to make this determination, it would first need to decide if the comment is “offhand.” This kind of inquiry requires the same analysis that courts faced prior to this decision, which included weighing the gravity of the racial comment against the interests of existing safeguards.¹⁰⁷

Additionally, the Court’s ruling was unpersuasive in its claim that it aims to eliminate racial bias from jury deliberations. In *Batson*, where a prosecutor used peremptory strikes to remove every African-American from the jury, the Supreme Court intended to eliminate jury-based racial discrimination by concluding that racial bias cannot be the motivating factor behind the use of peremptory strikes.¹⁰⁸ Despite the Court’s effort, stating a legitimate purpose for the use of a peremptory challenge could overcome an allegation of an

value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails.

Id.

105. *Id.* at 869 (majority opinion).

106. *Id.*

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id.

107. *See id.* at 866. Evidence of misconduct other than juror testimony was used by courts upon balancing safeguards already in place against the defendant’s Sixth Amendment interest. *Pena-Rodriguez*, 137 S. Ct. at 866; *see also* *Tanner v. United States*, 483 U.S. 107, 127 (1987).

108. *See generally* *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

illegitimate use.¹⁰⁹ In *Batson*, the Court recognized the importance of eliminating racial bias in jury selection, but its approach was “aimed at only the most overt discrimination.”¹¹⁰ Thus, the ruling in *Batson* continues to be ineffective in actually eliminating bias from jury selection because any allegation of bias can be overcome by simply stating any other legitimate reason for using the peremptory challenge.¹¹¹ Moreover, courts have expanded the *Batson* ruling to apply to gender-motivated peremptory strikes.¹¹² Similarly, the Supreme Court in *Pena-Rodriguez* again attempted to remove racial bias from a different part of the jury system at the expense of exposing jurors to scrutiny and compromising the finality of verdicts.¹¹³ However, the Court’s ruling will prove unworkable

109. See generally *id.*; see also Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. Chi. L. Rev. 809, 833 (1996).

Batson held that a defendant could overcome the presumption that peremptory challenges were used legitimately by making a prima facie case that the challenges in the case at hand were race-motivated (*Batson* step one), after which the burden would then shift to the prosecutor to articulate a race-neutral reason for the challenges (*Batson* step two). If a race-neutral reason were proffered, then the final step would be for the trial court to determine whether the challenger had met his or her burden of proving that the peremptory challenges were in fact exercised because of racial prejudice (*Batson* step three).

Id. at 833–34 (footnotes omitted).

110. Sarah Jane Forman, *The #Ferguson Effect: Opening the Pandora’s Box of Implicit Racial Bias in Jury Selection*, 109 Nw. U. L. Rev. Online 171, 175 (2015).

111. See generally *Batson*, 476 U.S. 79.

It also raised the specter of a generalized equal protection attack on the very existence of the peremptory challenge: If a prospective juror has a right not to be excluded for constitutionally impermissible reasons, does he or she not also have a right not to be excluded for reasons which, by definition, cannot be rationally articulated? It is an odd constitutional right indeed which cannot be taken away for certain reasons, but which can freely be taken away for a universe of other unstated and unstatable reasons. It is also an odd constitutional right that can be taken away without explanation by a lawyer, but not by a state legislature.

Hoffman, *supra* note 109, at 835–36 (footnotes omitted).

112. See *United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (stating that use of gender-based peremptory strikes violated defendant’s right to jury composed of fair cross-section of community); see also Nancy J. Cutler, *Recent Development: J.E.B. v. Alabama ex rel. T.B.: Excellent Ideology, Ineffective Implementation*, 26 St. Mary’s L.J. 503, 515 (1994) (“After finding similar discrimination in the use of race- and gender-based peremptory strikes, Justice Blackmun applied mid-level equal protection scrutiny to the use of gender-based peremptory challenges.”).

113. See generally *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). “Allowing such post-verdict inquiries would ‘seriously disrupt the finality of the process.’ It would also undermine ‘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.’” *Id.* at 878 (citations omitted) (Alito, J., dissenting) (quoting *Tanner v. United States*, 483 U.S. 107, 120–21 (1987)).

unless the Court also provides guidelines for how lower courts should apply the exception that it created for Rule 606(b). What will prevent courts from expanding this ruling into gender-bias inquiries in jury deliberations, as has been done with the *Batson* holding? Indeed, at the core of our democracy is the “promise of equality under the law.”¹¹⁴ Equally important are the finality of verdicts and the protection of free, frank, and candid jury deliberations that maintain the integrity of the jury system and its role in democracy. Allowing inquiry into jury deliberations for reasons of discovering racial bias not only opens the door to other equal protection inquiries but the Court’s lack of guidance in *Pena-Rodriguez* also leaves it to the lower courts to answer whether the racial bias allegations, no matter how overtly stated, have actually made a difference in the outcome of the verdict.¹¹⁵

III. Proposal

The right to an impartial jury trial is a fundamental principle in our justice system.¹¹⁶ The Supreme Court, called upon to determine when this right has been compromised, has now added racial bias to the narrow list of exceptions to Rule 606(b), weakening the rule’s protections of verdict finality, no juror harassment, and free and frank jury discussions.¹¹⁷ But as seen in previous attempts by the Court to eliminate racial bias from the trial system, the result is often unworkable.¹¹⁸ In *Batson*, the Court aimed to eliminate attorney

114. *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”); *see also* *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 146 (1994).

115. *See generally* *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009).

[T]he court concluded that the lower court “did have the discretion to inquire into the validity of the verdict by hearing juror testimony to determine whether ethnically biased statements were made during jury deliberations and, if so, whether there is a substantial probability that any such comments made a difference in the outcome of the trial.”

Wolin, *supra* note 29, at 278 (quoting *Villar*, 586 F.3d at 87).

116. Wolin, *supra* note 29, at 297 (citing *Villar*, 586 F.3d at 76); *see also* *Pena-Rodriguez*, 137 S. Ct. at 861 (“The jury is a central foundation of our justice system and our democracy.”).

117. *See Pena-Rodriguez*, 137 S. Ct. at 857; *United States v. Benally*, 546 F.3d 1230, 1234 (10th Cir. 2008), *abrogated by* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

118. *See generally* *Batson v. Kentucky*, 476 U.S. 79 (1986).

racial bias toward potential jurors as well as to protect a juror's right to sit on a jury.¹¹⁹ Although “these biases should be acknowledged and formally addressed” to avoid “denial of constitutional rights and eroding public confidence in the fairness of jury verdicts,” the Court should look to more effective ways to implement a strategy to reach this goal.¹²⁰ “Studies suggest that, despite *Batson* . . . , demographic profiling remains a principal strategy during voir dire.”¹²¹ Attorneys have found ways around the *Batson* challenge, being able to offer any reason other than a racially discriminatory one for eliminating a juror.¹²² As critics of *Batson* point out, “[T]he Court purports to solve the problem of endemic jury discrimination by simply mandating a state of denial about it.”¹²³ In doing so, the Court did not provide a workable strategy of eliminating racial bias from the process of jury selection. Similarly, thirty-two years later in *Pena-Rodriguez*, the Court revisited the attempt to eliminate bias from the trial process, although on a different end—the jury itself. Rather than assess the shortcomings of its prior, arguably failed attempt to set out a workable scheme to eliminating racial bias, the Court provided a similarly unworkable ruling that compromises the system more than it protects it.

When courts decide at their discretion that “what went on in the jury room [is] judicially reviewable for reasonableness or fairness, trials [are] no longer truly . . . by jury, as the Constitution commands. Final authority would be exercised by whomever is empowered to decide whether the jury's decision was reasonable enough[] or based on proper considerations.”¹²⁴ The prior discretion of the district court to determine if the application of Rule 606(b) extends to an allegation of juror misconduct was not changed by the ruling in *Pena-*

119. See generally *id.*

120. Siegfried C. Coleman, *Reliance on Legal Fiction: The Race-Neutral Juror*, 41 S.U. L. Rev. 317, 318 (2014).

121. Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 Yale L.J. 2535, 2536 (2016).

122. See generally *Batson*, 476 U.S. 79.

123. Tania Tetlow, Symposium, *Why Batson Misses the Point*, 97 Iowa L. Rev. 1713, 1714 (2012).

124. *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008) (citing *Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982)), *abrogated by* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

Rodriguez. The Supreme Court did not resolve the issue as to how a district court judge should treat possible racial biases of jurors because it did not provide a standard by which to guide the lower court into making the determination as to what merits an exception under Rule 606(b).¹²⁵ For those courts which already followed this exception to the no-impeachment rule, the judge still needs to determine what constitutes juror misconduct and when to set aside the verdict. One court may decide that an offhand racial slur is enough to require inquiry into the verdict, while another court may interpret the standard to be broader, and may choose to deny inquiry under the same circumstances.¹²⁶ All the Supreme Court did in *Pena-Rodriguez* was provide a bright line rule that racial bias is an additional exception to Rule 606(b) and may be grounds for setting aside a verdict. The Court has left to the state rules of professional ethics and to the discretion of the lower courts the “practical mechanics of acquiring and presenting such evidence.”¹²⁷ A lower court may still conclude that a juror’s bias did not rise to the standard required to bring the verdict’s credibility into question.

The Supreme Court should provide a test or standard by which lower courts can determine when racial bias sufficiently influences the verdict, so as to allow an exception to Rule 606(b). Although it seems unlikely that racial bias can be measured uniformly using a test or standard without any direction, courts will still make this determination on their own just as they did before. For example, the

125. *United States v. Villar*, 586 F.3d 76, 82 (1st Cir. 2009) (“The district court’s response to an allegation of juror misconduct is generally reviewed only for abuse of discretion.”).

126. *See Pena-Rodriguez*, 137 S. Ct. at 869. The Court stated:

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id.

127. *Id.*

Villar court, recognizing important policy considerations underlying the rule, identified two exceptions—extraneous prejudicial information and outside influence—and concluded that “[a] ‘court should only conduct such an inquiry “when reasonable grounds for investigation exist,” i.e., . . . clear, strong, substantial[,] and incontrovertible evidence that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.’”¹²⁸ Under the *Pena-Rodriguez* standard, the *Villar* outcome would hold the same validity as the outcome in *Shillcutt v. Gagnon*, where the court found no substantial likelihood that an alleged racial slur in jury deliberations would have prejudiced the defendant.¹²⁹

Alternatively, the Supreme Court can set a very strict standard so that only the most overt and blatant manifestations of racial bias are considered in overturning a verdict, and the Court can implement additional safeguards for dealing with lesser showings of bias. For example, the court can provide an additional instruction to the jury at the beginning of the trial that jurors may come forward at any time before the verdict and privately disclose another juror’s misconduct to the judge and the grounds for which the jurors may do so. Although this is not a new standard or rule, the additional reminder to the jurors that they should deal with any concerns regarding misconduct *before* the verdict is rendered may help bring those concerns to the surface sooner in the trial process. Evidence of racial bias should not be ignored at any stage of the trial process, but a lack of a defined standard for dealing with such racial bias after a verdict

128. *Villar*, 586 F.3d at 83.

129. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (“[In] the affidavit submitted after trial, one juror encouraged the others to be ‘logical’ and to take notice that Shillcutt was black and the girl was white. Another juror responded by saying Shillcutt ‘wasn’t capable of loving anybody.’”). The court reasoned:

[E]ven if we could take a close-up view, still we would know little of what prompted such a comment, or whether it was typical of the observations made by jurors . . .

[N]o other racial comments were made. The jury deliberated at least five hours prior to the time the comment was allegedly made, and there is nothing to suggest that in the final twenty minutes of deliberation the comment influenced or had any impact on the verdict.

Id. at 1159–60.

has been rendered may compromise other principles that the jury system seeks to uphold in maintaining due process.

CONCLUSION

In the wake of *Pena-Rodriguez*, courts that have not previously embraced the racial-bias exception must now allow evidence of jurors' racial biases to be considered in impeaching a verdict.¹³⁰ To protect the integrity of the justice system in cases where extreme juror bias infringes on a defendant's right to a fair and impartial jury, the *Pena-Rodriguez* Court dismissed concerns of disruption to verdict finality and future invasive inquiries into deliberations.¹³¹ However, as Justice Thomas's dissenting opinion points out, the Supreme Court has offered no guidance as to what standard trial courts must follow to determine when evidence of racial bias adequately justifies setting aside a verdict.¹³² The Court vaguely provided that not every "offhand comment" indicative of racial bias will suffice to set aside a verdict.¹³³ Going forward, the lower courts are therefore left to figure out on their own how to implement the Supreme Court's decision in *Pena-Rodriguez*. Without further instruction from the Supreme Court on how to treat different degrees of racial bias and when this bias warrants setting aside a verdict, lower courts are dealing with the same decision making as before this ruling. The Supreme Court should set a standard for the most overt and extreme instances of racial bias, which will guide the lower courts in making the determination to set aside a verdict. Additionally, the Court should implement additional safeguards for uncovering less extreme expressions of juror racial bias earlier in the trial process.

130. *Pena-Rodriguez*, 137 S. Ct. at 870.

While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose . . . racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

Id.

131. *Id.* at 866.

132. *Id.* at 870 ("The Court also 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.")

133. *Id.* at 869.