A DEFENDANT'S RACE AS A DETERMINANT OF THE OUTCOME OF HIS LAWSUIT

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Racial bias is pervasive in the U.S. criminal justice system. One example of such pervasiveness is that the Federal Rules of Evidence prevent the testimony of jurors regarding how jurors arrived at their conclusions – even when racial bias influences juror decision making. While the Supreme Court attempted to rectify this problem in Pena-Rodriguez v. Colorado *by creating an exception to the rule for when jurors explicitly say racial bias impacted their decision, circuits are split on how to apply the rule. Courts should provide jury instructions requiring jurors to report other jurors for using racial bias to influence their decision making. Additionally, courts should fully consider such evidence in reviewing a verdict. Allowing such an exception in contrast with the Federal Rules of Evidence is necessary to ensure a criminal defendant's right to a fair trial.*

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I. INTRODUCTION

Imagine, what is supposed to be an "impartial"[1] jury, convicts a criminal defendant of harassment and unlawful sexual contact simply because he is Mexican. That is what Miguel Angel Pena-Rodriguez endured in May 2015.[2] Instead of deciding Pena-Rodriguez's case on its merits, one of the jurors in the trial made explicit statements to the rest of the jury during deliberations, stating that he "knew" Pena-Rodriguez was guilty of the alleged crimes simply because Pena-Rodriguez is Mexican.[3] Additionally, the same juror told the rest of the jury that Pena-Rodriguez's alibi witness was not credible because the alibi witness was "an illegal."[4] Pena-Rodriguez's alibi witness, in fact, was a legal resident in the United States and also happened to be Hispanic.[5] In denying his motion for a new trial, the trial court upheld Pena-Rodriguez's conviction for harassment and unlawful sexual contact, regardless of the proof that a juror reached his decision on the sole basis of Pena-Rodriguez's ethnicity.[6]

Racial disparities are omnipresent in the United States criminal justice system due to subtle forms of racial discrimination.[7] From a great deal of research on aspects of that system including arrest rates, bail amounts, sentence lengths, and probation hearing outcomes, it is widely known that such racial disparities exist.[8] This is in addition to heavily publicized police brutality and shootings of minority individuals in recent years.[9] Yet, law enforcement agencies across the U.S. claim to be committed to ensuring fair and impartial justice while maintaining the ethics of the organization.[10] There is clearly a great deal of prejudice built into the United States criminal justice system as a whole that is preventing law enforcement agencies and courts from working as fairly as they were intended

1. U.S. CONST. amend. VI.

2. *See generally* People v. Pena-Rodriguez, 412 P.3d 461, 461 (Colo. App. 2012).

3. Nina Totenberg, *Supreme Court Hears Case on Racial Bias in Jury Deliberations*, NPR (Oct. 11, 2016, 4:39 AM), http://www.npr.org/2016/10/11/497196091/top-court-hears-case-on-racial-bias-in-jury-deliberations.

4. *Id.*

5. *Id.*

6. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017).

7. Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html.

8. *Id.*

9. *See, e.g.*, Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016, 3:45 PM) http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html.

10. *See About DOJ*, DOJ, https://www.justice.gov/about (last visited Sept. 7, 2019); *Mission–NYPD*, N.Y.C. POLICE DEP'T, http://www1.nyc.gov/site/nypd/about/about-nypd/mission.page (last visited Sept. 7, 2019); *Our Mission*, CHI. POLICE DEP'T, https://home.chicagopolice.org/inside-the-cpd/our-mission/ (last visited Sept. 7, 2019); *The Mission Statement of the LAPD*, L.A. POLICE DEP'T, www.lapdonline.org/inside_the_lapd/content_basic_view/844 (last visited Sept. 7, 2019).

for all Americans.[11] On the other end of the criminal justice system, the judiciary is required to protect and uphold constitutionally guaranteed rights to a criminal defendant that are meant to provide that defendant with a fair trial.[12] Even the esteemed judiciary in the U.S. is not perfect, however, and racial bias continues to exist in the administration of justice in the court system.[13]

The Federal Rules of Evidence provide that when questioning the validity of a jury verdict, "a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[14] There are three exceptions to this rule, but none of these exceptions address the situation when a juror decides the outcome of a case because of the defendant's race or ethnicity.[15] This is because other procedures that occur well before the jury issues a verdict, such as voir dire, are generally understood to filter out biased jurors.[16] The Supreme Court recently adjusted this standard, though, so that:

> [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.[17]

Yet, the Court did not clarify how much evidence of racial bias is required to show that a verdict should be set aside because racial bias influenced a juror(s) in deciding the outcome of the case, and circuits are split on this issue.[18] This Note argues that courts should mandate jurors, through a jury instruction, to come forward anytime a juror sees or hears a fellow juror expressing racial bias in his or her deciding a case. Further, trial courts should fully consider the evidence of any racial bias that comes to light after the jury enters a verdict, in order to determine whether the trial verdict has been compromised. While this latter contention may seem to disregard Federal Rule of Evidence 606(b)'s general prohibition on jurors testifying as to what happened during jury deliberations at

11. *See* Funke & Sussman, *supra* note 9.

12. *Procedural Due Process–Criminal*, JUSTIA, https://law.justia.com/constitution/us/amendment-14/57-fair-trial.html (last visited Aug. 5, 2019).

13. *See* Virginia Hughes, *How Many People are Wrongly Convicted? Researchers Do the Math.*, NAT'L GEOGRAPHIC: ONLY HUMAN (Apr. 28, 2014), https://www.nationalgeographic.com/science/phenomena/2014/04/28/how-many-people-are-wrongly-convicted-researchers-do-the-math/.

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

15. *Id.* at (b)(2) (Exceptions to the prohibition of a juror testifying about a statement made or incident that occurred during jury deliberations, including another juror's mental processes "concerning the verdict" in Fed. R. Evid. 606(b) include allowing a juror to testify about whether: "extraneous prejudicial information was improperly brought to the jury's attention; an outside influence was improperly brought to bear on any juror; or a mistake was made in entering the verdict on the verdict form.").

16. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 858 (2017).

17. *Id.* at 869.

18. Terrence W. McCarthy & Callie Brister, *The Newly-Created Racial Bias Exception to the General Rule that Precludes Jurors from Offering Testimony to Impeach their own Verdict*, 78 ALA. LAW. 285, 289 (2017).

trial,[19] this Note also argues that the policy considerations underlying Rule 606(b) do not outweigh a criminal defendant's right to a fair trial.[20]

Part II of this Note will examine relevant legal doctrines, including the Federal Rules of Evidence's ban on jurors testifying about deliberations, and also the psychology of jurors, specifically when race is a factor in jury deliberations. Part III of this Note analyzes the case law regarding racial bias in jury deliberations, in particular the current circuit split that exists on this issue. It also weighs the policy considerations of why Rule 606(b) is in place. Finally, Part IV of this Note provides a recommendation that is an approach that balances jurors' privacy interests with the necessity of delivering justice to all parties to a lawsuit, particularly in the case of defendants facing a potential criminal conviction.

II. BACKGROUND

In Part II, there will first be a discussion of both the existence of racial bias in the United States generally and, more specifically, the existence of racial bias in the law enforcement and judicial systems in the U.S. It is important to gain an understanding of the bigger picture in this way so that the arguments this Note later makes will be put into context, and it will be clear to see just how critical it is that adjustments are made in the court system. This Part will also explain the related Federal Rule of Evidence that has implications for the existence of racial bias in jury trials, discussed later in the Note.[21] Finally, this Part will provide an explanation of the science behind juries and the role that race plays in jury decision-making.

A. Racial Bias in the United States

The topic this Note is addressing—the extent to which a court can control the existence of a juror's explicit racial bias while deliberating over a trial verdict—has extremely broad importance. Not only is racial bias pervasive in the U.S. criminal justice system,[22] but it is pervasive throughout American society generally.[23] This racial bias presents itself as gaps between blacks and whites in seemingly every aspect of American society.[24] For example, there is a gaping

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

20. *See infra* Part IV.

21. *See infra* Section III.B.

22. *See* Funke & Susman, *supra* note 9; Kahn & Kirk, *supra* note 7.

23. *See* Stephen Henderson, *The Reality of Racism America Continues to Deny*, USA TODAY NETWORK (Aug. 19, 2017, 6:02 PM), https://www.usatoday.com/story/opinion/nation- now/2017/08/19/reality-racism-america-continues-deny/583584001/ (discussing how centuries of oppressing African Americans is embedded in the way law enforcement and other aspects of American society continue to operate); Ryan Struyk, *Blacks and Whites See Racism in the United States Very, Very Differently*, CNN (Aug. 18, 2017, 9:42 AM), http://www.cnn.com/2017/08/16/politics/blacks-white-racism-united-states-polls/index.html (citing a poll of Americans, where 87% of black Americans said that "black people face a lot of discrimination in the United States.").

24. *See On Views of Race and Inequality, Blacks and Whites are Worlds Apart*, PEW RES. CTR. (June 27, 2016), http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/.

difference in economic well-being between whites and blacks in America.[25] According to the Pew Research Center, "in 2014 the median adjusted income for households headed by blacks was $43,300, and for whites it was $71,300."[26] The gap between whites and blacks is even more astounding when viewed in terms of household wealth.[27] In 2013, the average net worth of households with mostly white individuals was about thirteen times as much as the net worth of households with mostly black individuals.[28]

These racial gaps, or rather, the broader racial bias they represent, exist not only for African Americans, but also for many other minorities.[29] A very blatant and widely publicized example comes from the United States' own Commander-in-Chief, President Donald Trump.[30] During President Trump's speech that initiated his presidential campaign, the current President referred to Mexican immigrants as "rapists," who are "bringing drugs" and "crime [to the United States]."[31] Throughout the rest of Trump's campaign,[32] and while acting as President,[33] he has contended that he will have a wall built along the U.S.–Mexico border to keep Mexican immigrants out of the United States.[34]

On the other end of the spectrum, there exist some less negative stereotypes, but stereotypes nonetheless, about other minorities in the U.S.[35] For example, Indian immigrants are often seen as "non-threatening" and the "Indian American community is seen as 'successful'" and "hardworking."[36] Regardless of the nature of the stereotypes, biases about certain ethnic and racial communities still exist.[37]

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* ("$144,200 for whites compared with $11,200 for blacks").

29. Anuhya Bobba, *Indian Americans Have Always Faced Racism, but 'Model Minorities' Don't Speak Out*, HUFFINGTON POST (Mar. 4, 2017, 12:16 AM), https://www.huffingtonpost.com/entry/the-murder-of-srinivas-kuchibhotla-beyond-the-minority_us_58ba4a29e4b0fa65b844b373 (explaining how Asian Americans are stereotyped, although never as negatively as Black or Hispanic immigrants, to whom labels such as "dangerous," "unemployed," or "illegal," are routinely applied); Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), http://time.com/4473972/donald-trump-mexico-meeting-insult/.

30. *See* Reilly, *supra* note 29.

31. *Id.*

32. *Id.*

33. *See* Alicia A. Caldwell, *Trump's Vision for U.S.-Mexico Border: 700 to 900 Miles of See-Through Wall*, PBS (July 13, 2017, 5:34 PM), https://www.pbs.org/newshour/politics/trumps-vision-u-s-mexico-border-700-900-miles-see-wall.

34. Reilly, *supra* note 29.

35. Bobba, *supra* note 29.

36. *Id.*

37. *Id.*

B. Racial Bias in Law Enforcement and the Criminal Justice System

More narrowly, racial bias is also present throughout the United States criminal justice system and related law enforcement units.[38] For a variety of reasons, there has been increased media coverage of police violence against minorities in recent years; there has long been a strong dissonance between law enforcement and minority communities, however, and this violence is nothing new.[39] There have been quite a few studies conducted regarding the role race plays in policing over the years, and the results of these studies differ; still, it is at the very least accepted by the social scientific community that racial disparities in policing exist.[40] One such study from the University of California, Davis projected that "the probability of being black, unarmed and shot by police is about 3.5 times the probability of being white, unarmed and shot by police" in America.[41] Another study in 2016 found that African Americans were more likely to be "handcuffed without arrest, pepper-sprayed or pushed to the ground by an officer" than whites.[42] A third study from 2016 found that in the twelve different police departments that were sampled, black residents in the districts those departments served were the victims of police force more often than white residents in those districts.[43] This was even after the researchers accounted for whether the victim of the police force was arrested for a violent crime.[44] There have been other studies conducted, not just about police violence against racial minorities, but also about racial discrimination in policing generally.[45] For example, one study discovered that black individuals are more likely to be stopped by police, and another study found that "black men were four times more likely than white men to be searched during a traffic stop, even though officers were no more likely to recover contraband when searching black suspects."[46]

Racial bias continues to flow through the progression of the justice system, from law enforcement all the way through to the courts.[47] There have been a variety of studies conducted to look at how race plays out in the criminal justice system, and the overall conclusion being drawn by researchers is that racial bias exists in the courtroom.[48] There is evidence to suggest that "[b]lack Americans

38. *See infra* Section II.B.

39. Eliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html.

40. *See generally* Kirsten Weir, *Policing in Black & White*, 47 MONITOR ON PSYCHOL. 36 (2016).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*; Jeff Guo, *Researchers Have Discovered a New and Surprising Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/24/researchers-have-discovered-a-surprising-racial-bias-in-the-criminal-justice-system/.

48. Guo, *supra* note 47.

are more likely to be jailed while awaiting trial" and "are more likely to serve longer sentences than white Americans for the same offense."[49]

Further, even though the majority of illegal drug users and dealers across the country are white, 75% of those imprisoned for drug-related offences are black or Latino.[50] A 2000 study found that in California, minority youths—specifically African Americans, Latinos, and Asian Americans—are 2.8 times more likely to be arrested for a violent crime, 6.2 times more likely to be transferred to adult court, and seven times more likely to be sent to prison by the adult court than white youths.[51]

In fact, it is general knowledge to judges that racial bias exists in the courtroom.[52] They are generally aware of the statistics, which cannot be denied, but some judges have different notions of what goes on in society and in the courtroom to get to those statistics.[53] Like most individuals, most judges do not want to admit that they are racist, bigoted, or that they possess any racial bias.[54] Some judges can acknowledge that those internal biases simply exist for a variety of reasons, however, while others attribute the glaring statistics to societal factors.[55] Some may point to factors such as the likelihood that, at least in terms of juvenile cases, white offenders many times come from families who have vastly more financial resources than minorities.[56] This could lead judges to feel more comfortable leaving the punishment of the white individual to the white family, who can afford counseling and a family member to constantly supervise the offender, among other things.[57] Whatever the true reasoning behind the statistics, which is likely due to a combination of many factors, even judges can agree that the judiciary is not free from racial bias.[58]

C. Federal Rule of Evidence 606(b) and Corresponding "No-impeachment" Rules at the State Level

Federal Rule of Evidence 606 governs juror testimony during and after a trial.[59] The rule was codified in 1975, but its purpose and intentions have existed, to an extent, in the common law since 1785 when an English decision held that the court was not permitted to accept affidavits from the jurors themselves about alleged misconduct that occurred during jury deliberations.[60] Prior to that case,

49. Kahn & Kirk, *supra* note 7.

50. MICHELLE ALEXANDER, THE NEW JIM CROW 98 (2010).

51. *See Is the System Racially Biased?*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/race.html (last visited Aug. 5, 2019).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. FED. R. EVID. 606.

60. *Id.*; Annotation, *Admissibility, in Civil Case, of Juror's Affidavit or Testimony Relating to Juror's Misconduct Outside Jury Room*, 32 A.L.R. 3d 1356 (1970).

testimony from jurors about their own misconduct was much more largely received by the courts.[61] The bulk of the Rule lies in Section 606(b), which specifically governs a juror's role (or lack thereof) in the event a court were to inquire into the validity of a jury verdict or indictment.[62] Rule 606(b) limits a juror's ability to testify as to the validity of a verdict, such that jurors are not allowed to testify "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[63] This illicit testimony cannot be presented to the court in any manner once the jury has returned a verdict.[64] There are three exceptions to this ban on juror testimony when the validity of a verdict is in question.[65] A juror is allowed to testify to whether: "extraneous prejudicial information was improperly brought to the jury's attention; an outside influence was improperly brought to bear on any juror; or a mistake was made in entering the verdict on the verdict form."[66]

The legislative history of Rule 606(b) provides specific examples of what falls under the exceptions to the no-impeachment rule.[67] A radio newscast or newspaper account would be examples of "extraneous prejudicial information" that a juror would be permitted to testify about.[68] An example of "an outside influence [that] was improperly brought to bear on any juror" would be a threat to the safety of a member of a juror's family.[69]

Yet that same legislative history contends that there are no other "irregularities" a juror is permitted to testify to that occur in the jury room, noting specifically that the rule does not allow "the impeachment of verdicts by inquiry into" the jurors' "mental processes."[70] In adding that caveat, Congress wanted to ensure that jurors would not be harassed by the losing party after the trial and to prevent "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors."[71]

The legislative history and academic discussions of Rule 606(b) have led courts to distinguish between improper "external" influences to jurors—things happening outside the trial that prejudiced, or could have possibly prejudiced, jurors in reaching a verdict—and "internal" influences—a juror's internal mental processes and discussions with other jurors while trying to reach a verdict.[72] Courts have generally found Rule 606(b) (and equivalent rules at the state level) to prohibit evidence of such "internal" influences to impeach a jury verdict, and

61. *Admissibility, in Civil Case, of Juror's Affidavit or Testimony*, *supra* note 60.
62. FED. R. EVID. 606(b).
63. *Id.*
64. *Id.* ("The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.").
65. *Id.*
66. *Id.*
67. *See* FED. R. EVID. 606(b) House committee on the judiciary's notes.
68. *Id.*
69. *Id.*
70. *Id.*
71. FED. R. EVID. 606(b) Senate committee on the judiciary's notes.
72. Tanner v. United States, 483 U.S. 107, 118–19 (1987).

Rule 606(b) to only be concerned with jury verdicts that had improper "external" influences.[73] The Supreme Court has acknowledged that this does not make for a perfect system, but has yet supported Rule 606(b) because of the importance of the finality of jury verdicts to our justice system as a whole.[74] As imperfect as the current system is, the Supreme Court expressed concern about opening the door to scrutinizing juror behavior and analysis and consequently undermining at least some jury verdicts.[75]

Finality of jury verdicts is important for a variety of reasons. Finality of jury verdicts is incredibly important to the parties to a prosecution and the third parties affected by the result of that prosecution.[76] For (a shocking) example, imagine being the family member of the victim of a murder. The perpetrator was convicted of the murder and the verdict provides some peace to you and the rest of your family, knowing that at the very least justice will be served. Then, months, or perhaps years, later, jurors from the case come forward saying that other jurors only voted to convict the defendant because of the way he looked, or the way he spoke, or some other arbitrary part of who the defendant was. All of the healing you and your family had received from the conviction would be completely undermined knowing that the perpetrator's conviction could be overturned and that the perpetrator of such a heinous crime against a loved one may get a second chance to walk free. Although a hypothetical, this demonstrates the manner in which a lack of finality in jury verdicts could be a problem, not to mention the cost of using further judicial resources on the same case that has already been through an entire trial.

In addition to the finality of a verdict greatly affecting the parties (and third parties) to a trial, other important policy considerations exist that support protecting verdict finality.[77] Public trust in the court system would weaken if jury deliberations could be scrutinized.[78] Further, jurors would be less comfortable openly discussing the case in the jury room if they know anything they say could be used against the ultimate verdict and indirectly against the juror himself.[79] Jurors may be more likely to decide a case based on the outcome that would look best to the public, instead of on the facts of the case and the corresponding law, if the deliberative process could be so easily inquired into.[80] As a policy matter, it is important to protect jurors, who are upsetting their normal lives to perform this civic duty, from harassment based on the outcome of the trial.[81] As a society, we want jurors to be able to deliberate thoroughly with each other on the facts of

73. *See id.* at 118.

74. *Id.* at 120–21 ("There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper behavior.").

75. *Id.*

76. James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 402 (1991).

77. *Tanner*, 483 U.S. at 119–21; Diehm, *supra* note 76, at 394.

78. *Tanner*, 483 U.S. at 120–21.

79. *Id.*

80. *Id.*

81. Diehm, *supra* note 76, at 396.

the case, and reach a verdict by applying those facts to the law instead of deciding a case because they feel pressured to reach a certain verdict by other community members.[82] Not only is there a fear of community members potentially harassing jurors because they reached a certain verdict, but if it is easy for a verdict to be overturned based on allegations of juror impropriety, defendants convicted of crimes would have an incentive to threaten and harass jurors into impeaching the verdict.[83]

Also of importance is the underlying suspicion of post-trial allegations of racial bias by jurors.[84] Courts will not usually explicitly express unease in considering such post-trial allegations, but it is an important question for a court to ask why a circumstance that supposedly existed before a verdict was rendered was not reported before that verdict was rendered.[85] A juror that waits until after a trial is complete to report another jurors' misconduct can seem like a big red flag for a court.[86] For example, that could be indicative of a juror attempting to extort a party by threatening to impeach the verdict in exchange for money or other benefits.[87] It could also be a matter of a juror facing pressure by others in his community for reaching an unpopular verdict and consequently regretting the verdict reached.[88] There are multiple improper reasons why a juror may come forward reporting misconduct well after a verdict has been reached, in which case a verdict should not be questioned and overturned.[89] Thus, there are valid purposes driving the strict rules for jury verdict impeachment.

Society's reluctance to impeach jury verdicts as evidenced by Rule 606 is also supported through safeguards in place to assess a potential juror's competency in reaching a fair verdict, well before it is time to reach that verdict.[90] The most prominent of such safeguards is the process of jury selection, or voir dire.[91] The purpose of voir dire is not only to select members of the jury, but to select members of the jury who will be fair and impartial in assessing the facts of the case and reaching a verdict.[92] Beyond voir dire, courts can also observe the conduct and demeanor of jurors and make use of juror reports throughout the trial and before the verdict is reached as other safeguards for protecting against juror bias.[93]

Before even selecting particular jurors, the jury pool must be drawn from a representative section of society.[94] In other words, a fundamental component of

82. *Id.*
83. *Id.* at 397.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 399.
88. *Id.*
89. *Id.*
90. Tanner v. United States, 483 U.S. 107, 127 (1987).
91. *See id.*
92. *Voir Dire and Jury Selection*, U.N.M. JUD. EDUC. CENTER, http://jec.unm.edu/education/online-training/stalking-tutorial/voir-dire-and-jury-selection (last visited Aug. 5, 2019).
93. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).
94. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

the Sixth Amendment right to a jury trial is that the jury is drawn from a fair cross-section of the community such that the jury pool is not either comprised only of particular segments of the population or that particular groups of people are not specifically excluded from the jury pool.[95] The Supreme Court has supported this notion for more than a century, starting with an 1879 opinion in which the Court noted that "[t]he very idea of a jury is a body of men 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."[96] Once potential jurors are selected from the jury pool, parties also cannot use their peremptory challenges to exclude potential members of the jury solely based on the potential jurors' race.[97]

Proponents of keeping jury deliberations as private as possible use the process of voir dire and the related protections the Supreme Court has upheld to support their argument that deliberations should not be revealed and used to impeach a jury verdict.[98] They contend that such other screening processes are enough to weed out juror biases.[99] Further, there is not a concern about verdict finality or harassment of jurors if the bias or any other misconduct is found by the court at any point before the jury returns its verdict.[100] The court could excuse a problematic juror or give cautionary instructions to the jury or take other action as the court sees fit to remedy the bias or other juror misconduct.[101]

Particularly in the context of racial biases against a party in a case, however, it is not a far leap to make that during voir dire many potential jurors will be less than willing to openly address racial biases and prejudice they may breed.[102] A majority of people probably do not want to admit to a court of law that they are racist.[103] In the same vein, jurors may struggle with reporting a fellow juror for racial bias, as individuals may be uncomfortable accusing another juror of being racist, particularly if the statements the juror in question makes are less than blatant.[104] This is a problem then if racial bias slips through the cracks of voir dire and becomes factored into deliberations, even after slipping past the other protections in place.[105]

Finally, the applicability of Federal Rule 606 to criminal trials should be noted.[106] Considering most criminal cases are tried at the state level rather than

95. *Id.*
96. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).
97. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986).
98. *See* Diehm, *supra* note 76, at 392.
99. *Id.*
100. *Id.*
101. *Id.*
102. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) ("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.").
103. *Id.*
104. *Id.*
105. *See id.*
106. FED. R. EVID. 606(b).

at the federal level, there is a question of how many criminal cases this rule affects.[107] But many states have their own evidence rules regarding jury impeachment that mirror Federal Rule 606.[108] A nonexhaustive list of states with such a rule includes Illinois, Nevada, Pennsylvania, Texas,[109] and Colorado[110] (the State in which Rule 606 was most recently called into question, which will be later discussed).[111] In all of these listed states, with the exception of Nevada, the State's juror no-impeachment rule mirrors the federal rule down to the rule number.[112]

D. (A Brief) Psychology of a Jury

How a juror is influenced by a defendant's race is a difficult issue to study scientifically for a variety of reasons, but particularly because of the complicated and unique nature of real-life jury trials.[113] Although difficult to research, it is widely accepted by psychological scholars who study race and juries that race can affect a trial's outcome.[114] This is a very broad statement, as it is not conclusive exactly as to the roles race plays in a trial, and if those roles differ depending on whether the trial is civil or criminal. When looking at the defendant's race, there have been a variety of findings on how that is a factor in the outcome of that defendant's trial.[115] Still, a majority of such studies that used white jurors and black defendants in mock trials have concluded that the white jurors are often more intolerant of out-group defendants than in-group defendants when deciding the outcome of a mock trial.[116]

In quantitative empirical studies considering a defendant's race and a jury's decision in that defendant's trial, however, there is also evidence that all-white juries convict black defendants "significantly more often" than white defendants.[117] Specifically, one such study was conducted in 2012 in which the researchers analyzed jury data from all felony trials in which jury selection took place in two different counties in Florida (Sarasota and Lake) and in two different

107. *Compare* DOJ, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2013 7 (2013), https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf, *with* ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 43 (2013), http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2013/StatsSumm/2013_Statistical_Summary.pdf (During the 2013 fiscal year, the DOJ reported 61,529 criminal cases filed in federal district courts, while in Illinois alone in 2013, there were 332,219 criminal cases filed).

108. NEV. REV. STAT. § 50.065(2) (2017); COLO. R. EVID. 606(b); ILL. R. EVID. 606(b); PA. R.E. 606(b); TEX. R. EVID. 606(b).

109. NEV. REV. STAT. § 50.065(2) (2017); ILL. R. EVID. 606(b); PA.R.E. 606(b); TEX. R. EVID. 606(b).

110. CRE 606(b).

111. *See* discussion *infra* Section III.A.

112. NEV. REV. STAT. § 50.065(2) (2017); CRE 606(b); ILL. R. EVID. 606(b); PA.R.E. 606(b); TEX. R. EVID. 606(b).

113. Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 107 Q.J. ECON. 1017, 1018 (2012).

114. Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 171 (2007).

115. *Id.*

116. *Id.* at 171–72.

117. Anwar, Bayer & Hjalmarsson, *supra* note 113, at 1017.

time periods.[118] The researchers looked at the age, race, and gender for the chosen jurors in addition to a portion of the larger jury pool from which that jury was selected.[119] They also looked at the race and gender of each defendant in the sample, the criminal charges the defendant was facing, and the jury verdict for each case.[120] In comparing all of this data from each felony trial across the different time periods from those two counties, the researchers found that when there were at most even one or two black individuals in the jury pool, significantly more white defendants were convicted, and conversely, significantly fewer black defendants were convicted of the crimes they were being charged with.[121]On the other hand, in trials in which there were no black individuals in the jury pool, black defendants were convicted 81% of the time while white defendants were convicted 66% of the time.[122]

Another study found that this issue of racial bias against a criminal defendant is not so simple such that it would be a given that a white jury will more than likely convict a minority criminal defendant just because of individual juror biases against that defendant due to his race.[123] Studies conducted by Samuel Sommers and Phoebe Ellsworth created a variable to measure the impact of race in a jury trial, what they coined "race salience."[124] This concept of race salience was demonstrated in the Sommers and Ellsworth studies when the researchers determined that whether white mock jurors were influenced by the defendant's race depended on whether race was an issue at the forefront of the case at hand.[125]

The researchers found that in cases in which race was at issue in the case, white mock jurors were less likely to convict a black defendant of a crime, and when race was not an issue in the case, white jurors were more likely to convict a black defendant of a crime.[126] This outcome can be attributed to current theories of racial bias, sometimes described as "aversive racism," that suggest that white individuals generally today still harbor some bias (not necessarily racism) toward minorities, but whites do not want to outwardly appear biased.[127] Thus, when race is a salient issue in a case, white jurors are actively considering race, and thus do not want to seem biased against a defendant who belongs to a different race or ethnicity by convicting them.[128] On the other hand, when race is not a factor at trial, but the defendant is a racial minority, white jurors will more likely rely on their biases against that defendant's race or ethnicity in deciding a case.[129]

118. *Id.* at 1019.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599, 599 (2009).
124. *Id.*
125. *Id.*
126. *Id.* at 601.
127. *Id.*
128. *Id.*
129. *Id.*

When it comes to racial bias, psychology scholars distinguish between explicit and implicit bias.[130] Explicit racial bias "occurs when people deliberately choose to think and act in ways that harm a group."[131] Implicit bias differs in that the bias is more deeply rooted in an individual with racial bias, such that it's not something an individual consciously thinks about. Rather, implicit bias exists when a person's knowledge and experience affects that person's perceptions of the world.[132]

This psychology is no secret—attorneys can recognize racial bias in criminal trials.[133] In a 2016 study, researchers attempted to study how these two different biases play out in jury selection, and whether attorneys use these biases to their advantage.[134] Researchers found that in a mock trial setting where the victim was black and the defendant was white, attorneys selected equally biased and unbiased jurors for a case during voir dire, while in cases where the victim was white and the defendant was black, attorneys selected jurors based on how biased they were in their voir dire answers and how that would play into deciding the verdict, depending on which party the attorney was representing.[135] Put more clearly, in cases where the defendant was black and the victim was white, prosecutors favored racially biased jurors while defense attorneys wanted to keep black individuals on the jury.[136]

Further, juror psychology is important to look at because one may be wondering at this point as to why this is even an important issue, if let's say there is only one outwardly racist juror and none of the other members of the venire are otherwise affected by the defendant's race. If there's a venire comprised of anywhere from six to twelve jurors,[137] how much is one racist juror going to really affect the outcome of the trial?

In fact, there has been a plethora of psychological research regarding what influences juries and individual jurors beyond the studies of racial influence described above, including how jurors influence each other.[138] Researchers have discovered two main ways juries deliberate.[139] These two styles of deliberation are known as "evidence-driven" and "verdict-driven."[140] Evidence-driven deliberations are more of what society strives for when it comes to jury deliberations;

130. Art Markman, *Juries, Lawyers, and Race Bias*, PSYCHOL. TODAY (July 22, 2016), https://www.psychologytoday.com/us/blog/ulterior-motives/201607/juries-lawyers-and-race-bias.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. FED. R. CIV. P. 48(a) ("A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).").

138. *See generally* Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 L. & SOC'Y REV. 667 (2011); Monica K. Miller & Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?*, APA MONITOR ON PSYCHOL., Mar. 2008, at 18; Mary R. Rose, *Can Juries be Lost in Translation?*, 51 L. & SOC'Y REV. 500 (2017); Gary Wisby, *Jurors Influenced by Gender, Emotions, Moral Outrage*, UIC TODAY (Nov. 24, 2015), https://today.uic.edu/heres-how-to-sway-a-jury.

139. Cornwell & Hans, *supra* note 138, at 668.

140. *Id.*

they tend to have high levels of juror participation with a focus on the facts and evidence of the case and jury instructions.[141] Verdict-driven deliberations, on the other end of the spectrum, are characteristic of jurors polling each other early on in deliberations and then exerting pressure to get the minority jurors to side with the majority.[142] Verdict-driven deliberations do not tend to rely so much on the facts of the case, as this type of deliberation focuses more on the jurors' sentiments about the case as a whole or the parties individually.[143]

Yet, there are limited studies showing exactly how jurors participate with each other throughout the course of real deliberations, of course, due to legal barriers.[144] The few studies that have been able to analyze how different demographics interact with each other during deliberations have found clear patterns of how jurors participate based on those demographics.[145] The first such study was conducted in the 1950s and analyzed mock jury deliberations.[146] The researchers found that the most highly participatory jurors from those mock deliberations were mostly "upper-class men with higher status occupations."[147]

Of course, this study took place in the 1950s and a great deal has changed socially and politically; later studies, however, have found societal status to continue to play a role in jury deliberations.[148] For example, even more recent studies have found women participating less than men in mock juries.[149] Other studies have seen this continuing trend of the role status plays in mock juries by finding that "jurors with higher occupational statuses, higher levels of education, and higher incomes" had higher levels of participation than their "lower-status counterparts."[150] Further, even other studies have found that middle-aged mock jurors tend to participate more than younger and older mock jurors.[151] There has been no solid research on participation based on mock juries composed of diverse races, but in more general research on small groups, studies have found that "members of minority races are often relegated to positions of low status . . . and receive fewer opportunities to participate."[152]

None of this research is wholly conclusive, but, in sum, any given jury will likely assume one of two methods of deliberation—either evidence-driven or verdict-driven.[153] In the case a jury assumes a more evidence-driven deliberation, it seems from the above research, there is less concern for the case of the one racist juror.[154] If everyone is fully hashing out all of the facts of the case and the

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 670.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 668.
154. *See id.*

evidence presented, in addition to understanding and adhering to the jury instructions, then there is less concern the jury would be violating a minority defendant's right to a fair trial and his due process, even if there is one explicitly racist jury member.[155]

Yet, based on the available psychological research on juries, there does seem to be cause for concern in the case of even one racist juror, if the rest of the jury conducts verdict-driven deliberations.[156] If one or more jurors decide right away which is the winning side without adhering much to the true facts of the case, the evidence presented, and the jury instructions, that could be problematic for the rest of the jury and ultimately, the minority defendant.[157] In particular, if those jurors who determine from the outset which party is the winning party based on racist ideals, it is quite possible those jurors are white males—white males who will likely exert more power and voice during deliberations than other non-white male jurors, per the above research.[158] If such jurors reside in the majority for reaching a verdict against the minority defendant, those jurors can exert their pressure, along with the rest of the majority, to get the less participatory (and more likely women or minority) jurors to join the majority and reach a verdict against the defendant.[159] This is the very real situation society and, more specifically, those that comprise the judicial system, should be concerned about.

III. ANALYSIS

This Part will first examine the Supreme Court case that affected the no-impeachment rule and the issues discussed presently. It will then explain the varying standards courts use in interpreting this newly set exception to Federal Rule 606 and how those varying interpretations affect both courts and criminal defendants.

A. Pena-Rodriguez v. Colorado

Just recently, in the spring of 2017, the Supreme Court in *Pena-Rodriguez v. Colorado* held that although it is necessary to protect jurors' privacy during deliberations for a variety of policy reasons, racial bias in deciding a defendant's fate is an especially egregious violation of due process and a defendant's right to a fair trial.[160] Given that, if there is "a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and

155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.* at 668–70.
159. *See id.*
160. Nina Totenberg, *Supreme Court Allows Prying Into Jury Deliberations if Racism is Perceived*, NPR (Mar. 6, 2017, 7:03 PM), http://www.npr.org/2017/03/06/518877248/supreme-court-allows-prying-into-jury-deliberations-if-racism-is-perceived; *see also* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

impartiality of the jury's deliberations and resulting verdict," then trial courts can further inquire into the jury's deliberations.[161]

The facts surrounding Pena-Rodriguez's case are: in 2007, a man sexually assaulted two teenage sisters at a horse-racing facility in Colorado.[162] The sisters reported the assault and identified the perpetrator of the assault as one of the employees of the racetrack.[163] The police then arrested Miguel Angel Pena-Rodriguez, an employee of that racetrack.[164] Pena-Rodriguez was being detained in a police car on the side of a road while officers brought the sisters to identify him as their attacker, which they did.[165]

The State then charged Pena-Rodriguez with harassment, unlawful sexual contact, and attempted sexual assault on a child.[166] After a three-day trial, a jury convicted Pena-Rodriguez of unlawful sexual contact and harassment.[167] It took twelve hours for the jury to reach a verdict, and those twelve hours of deliberations involved a great deal of shouting that could be heard from outside the jury room.[168] It was not an easy case for the jury to decide. Pena-Rodriguez was sentenced to two years' probation and was ordered to register as a sex offender.[169]

Following the verdict, two jurors approached Pena-Rodriguez's trial counsel regarding a third juror, referred to as Juror H.C., who made quite a few "biased statements" during jury deliberations.[170] Specifically, Juror H.C. explained to the rest of the jurors that he had already come to the decision that Pena-Rodriguez was guilty of the unlawful sexual contact and harassment charges because he knew that "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," due to his experience as a former law enforcement officer.[171] Juror H.C. also told the rest of the jurors that he knows Mexican men to be "physically controlling of women because of their sense of entitlement."[172] Specifically, Juror H.C. said, "I think [Pena-Rodriguez] did it because he's Mexican and Mexican men take whatever they want."[173] Juror H.C. added to that statement, by further stating that, "in his experience, 'nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.'"[174] In addition to all of these explicit statements about Pena-Rodriguez, Juror H.C. further explained that he did not believe Pena-Rodriguez's alibi witness (another ethnically Mexican male) to be credible because "the witness

161. *Pena-Rodriguez*, 137 S. Ct. at 869.
162. *Id.* at 861.
163. *Id.*
164. *Id.*; Totenburg, *Prying, supra* note 160.
165. Totenberg, *Prying*, *supra* note 160.
166. *Pena-Rodriguez*, 137 S. Ct. at 861.
167. *Id.*
168. Totenberg, *Prying*, *supra* note 160.
169. *Id.*
170. *Pena-Rodriguez*, 137 S. Ct. at 862; Totenberg, *Prying*, *supra* note 160.
171. *Pena-Rodriguez*, 137 S. Ct. at 862.
172. *Id.*
173. *Id.*
174. *Id.*

was 'an illegal,'" even though the witness Juror H.C. was referring to testified at trial to being a legal resident of the U.S.[175]

Even after reviewing the affidavits containing the reporting jurors' statements that reiterated Juror H.C.'s biased comments made during deliberation, the trial court denied Pena-Rodriguez's motion for a new trial.[176] The court noted the bias in Juror H.C.'s statements; but it ultimately held that Colorado Rule of Evidence 606(b) "generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict," just like Rule 606(b) of the Federal Rules of Evidence.[177]

The case was appealed, but the Colorado Court of Appeals affirmed the conviction, holding that Juror H.C.'s statements to the rest of the jury did not fall under one of the exceptions in Colorado Rule 606(b) and thus could not be admitted to impeach the verdict.[178] The Colorado Supreme Court also affirmed the conviction, holding that the court could not find a legal basis for allowing the evidence of Juror H.C.'s racial bias to impeach the trial court verdict.[179] The United States Supreme Court granted certiorari to determine "whether there is a constitutional exception to the no-impeachment rule for instances of racial bias."[180]

In its opinion, the Supreme Court first conducted a historical analysis of the no-impeachment rule, up until it's adoption by Congress and codification as Federal Rule of Evidence 606(b).[181] The Court proceeded to consider case law, both from the federal appellate courts and the Supreme Court itself.[182] The two most pertinent cases to the Supreme Court's analysis were *Tanner v. United States*[183] and *Warger v. Shauers*,[184] as these are the only two cases prior to *Pena-Rodriguez* in which the Supreme Court has confronted the issue of whether there should be an exception to the no-impeachment rule of 606(b).[185]

The Court in *Tanner* held that even where there was evidence of members of the jury being under the influence of drugs and alcohol during a trial in which they were meant to be listening to the facts and evidence presented, there should not be an exception to the no-impeachment rule for evidence of such juror misconduct.[186] The *Pena-Rodriguez* Court referenced how verdict finality was heavily weighted by the *Tanner* Court when it made such a holding, and referred to

175. *Id.*
176. *Id.*
177. *Id.*; *see* FED. R. EVID. 606(b); COLO. R. EVID. 606(b).
178. *Pena-Rodriguez*, 137 S. Ct. at 862.
179. *Id.*
180. *Id.* at 862–63.
181. *Id.* at 863–65.
182. *Id.* at 865–67.
183. 483 U.S. 107 (1987).
184. 135 S. Ct. 521, 526 (2014).
185. *Pena-Rodriguez*, 137 S. Ct. at 866.
186. *Tanner*, 483 U.S. at 124–26.

all of the other safeguards in place to ensure an "impartial and competent" jury.[187]

The Court in *Warger* again rejected carving out a new exception to the no-impeachment rule when the forewoman of the jury did not disclose her bias toward parties of motor vehicle accidents during voir dire even though the lawsuit she was chosen to deliberate on was the result of a motor vehicle accident.[188] The Court in that case again referenced, like the Court in *Tanner*, the safeguards in place for ensuring an impartial jury, even though a juror's bias had managed to get past the voir dire hurdle.[189] After these two precedential cases that were firm on not creating a new exception to the no-impeachment rule, however, the Court in *Warger* opined that in extreme cases it is possible that an exception to the no-impeachment rule would be made.[190] This dicta kept the door open to the possibility of creating another exception to the no-impeachment rule, and this helped inform the ultimate opinion in *Pena-Rodriguez*.[191]

Following that analysis of precedents, the Court next discussed "racial animus in the justice system" and the historical impact of racial discrimination.[192] The Court distinguished those prior cases from *Pena-Rodriguez*, in which racial bias was at the forefront.[193] In the other cases, the objectionable behavior of the jurors was an isolated incident of objectionable behavior in that particular trial—abusing drugs and alcohol and not disclosing bias toward one party.[194] This is different from the case at hand, in which the objectionable behavior is explicit racial bias in reaching a jury verdict.[195] Such racial bias is pervasive throughout the criminal justice system, or, as the court put it, "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[196] Thus, the Court recognized the incredible dangers potentially raised if lower courts did not consider evidence of jurors using racial bias in reaching a verdict in a criminal trial as affecting the validity of that verdict.[197]

In determining whether a juror expresses racial bias such that it would qualify as an exception to the no-impeachment rule, the Court established that "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."[198] The Court further clarified by saying that such a statement made by a juror "must tend to show that racial animus was a

187. *Pena-Rodriguez*, 137 S. Ct. at 866 (explaining that such safeguards included the voir dire process, "some opportunity to learn of any juror misconduct" during the trial for "the court, counsel, and court personnel," and the fact that "jurors themselves can report misconduct to the court" before the verdict is issued).

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.* at 866–67.

192. *Id.* at 867–68.

193. *Id.* at 868.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 869.

significant motivating factor in the juror's vote to convict."[199] The Court chose to defer to the trial courts in making the determination of whether that threshold was satisfied while taking into account the content of the statement and its timing, the reliability of the evidence of that statement, and the circumstances regarding the alleged statement as a whole.[200]

If a trial court were to take such racial bias into consideration after a verdict is rendered, the Supreme Court did not specify how much evidence of that racial bias is required such that a new trial could be granted.[201] The current circuit split that exists regarding this issue will be discussed in the next Section.

B. Evidence Necessary to Trigger the New 606 Exception

Since the *Pena-Rodriguez* Court established there is an exception to the no-impeachment rule when a jury expresses racial bias during deliberations, the question becomes: how much and what evidence of a juror's racial bias would permit a court to grant a new trial? Since the *Pena-Rodriguez* Court explicitly declined to address this question, and this was a recent decision, there is a circuit split on this issue.[202] The Fourth Circuit and the Sixth Circuits have used local court rules that restrict attorneys from communicating with jurors after a verdict has been rendered as a means of restricting the gathering and presenting of such evidence altogether.[203] The Seventh Circuit and the Ninth Circuits have maintained positions on two very different ends of the spectrum, and it should be noted that these decisions were made before *Pena-Rodriguez* was decided; there have been no other cases in those circuits to address this since *Pena-Rodriguez*.[204] The Seventh Circuit has narrowly held that the appropriate standard to determine if evidence of a juror's racial bias is enough to undermine the validity of a verdict is "whether prejudice pervaded the jury room, whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial."[205] The Ninth Circuit has taken a much broader approach, holding that "[o]ne racist juror would be enough," for the verdict to be overturned and a new trial granted if there is evidence that juror was racially biased in deciding the outcome of the case.[206]

199. *Id.*
200. *Id.*
201. McCarthy & Brister, *supra* note 18, at 288–89.
202. *Id.*
203. *See* United States v. Birchette, 908 F.3d 50, 58–59 (4th Cir. 2018); United States v. Robinson, 872 F.3d 760, 770 (6th Cir. 2017).
204. *See* McCarthy & Brister, *supra* note 18, at 289.
205. Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987).
206. United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001).

1. Shillcutt v. Gagnon

The facts underlying the case in *Shillcutt* were that the defendant, who was a black male, was charged with soliciting prostitutes and "keeping a place of prostitution" in Wisconsin.[207] During deliberations on those charges, the jury was deadlocked for almost six hours.[208] The jury eventually found the defendant to be guilty.[209] After the trial, one juror submitted an affidavit reporting that during deliberations, another juror, who was a white male, said, "[l]et's be logical. [Defendant's] black and he sees a seventeen year old white girl—I know the type."[210] The trial court acted similarly to the trial court in *Pena-Rodriguez*'s case, as even after finding the juror's affidavit to be credible, the court still denied the defendant's motion for a new trial.[211] The Wisconsin Court of Appeals affirmed the conviction, holding that the juror's statement during deliberations "was not competent evidence under state law,"[212] as Wisconsin has a statute similar to Federal Rule 606(b) such that jurors are only permitted to testify about deliberations if an impermissible outside influence affected deliberations.[213] After the Supreme Court of Wisconsin affirmed, the defendant filed a habeas corpus petition in the federal district court, which was denied.[214] The defendant appealed the federal court's decision and subsequently argued in the Seventh Circuit that the racially charged comment the juror made during deliberations violated his Sixth Amendment right to an impartial jury, his due process was violated, and the verdict was null due to the comment, among other arguments.[215]

The Seventh Circuit agreed with the lower courts, holding that it is unlikely that the one statement expressing racial bias prejudiced the jury.[216] The court reasoned that since the comment was made after more than five hours of deliberations, and since the court had no knowledge of any other racially charged statements or discussions, it was unlikely that the one statement actually prejudiced the rest of the jury.[217]

Yet, the court's reasoning could lend to the opposite conclusion. The jury had been deadlocked for more than five hours, and once the juror instructed his

207. *Shillcutt*, 827 F.2d at 1156.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. WIS. STAT. §906.06(2) (2018), https://docs.legis.wisconsin.gov/statutes/statutes/906/06 ("Upon an inquiry in to the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.")
214. *Shillcutt*, 827 F.2d at 1156.
215. *Id.*
216. *Id.* at 1159.
217. *Id.* at 1159–60.

fellow jurors to be "logical" and proceeded with his racially charged statement, the jury reached a verdict about twenty minutes later.[218] The fact that the jury finally reached a verdict relatively soon after the statement was made seems like it was more probable, or at least possible, that the statement did prejudice the rest of the jury, as opposed to if the statement was made in the beginning of deliberations and then the jury was deadlocked for another six hours.

Even so, the Seventh Circuit ultimately held that the statement did not satisfy the standard of whether "prejudice pervaded the jury room, whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial," and specifically that there was not a substantial probability that the juror's racial slur made a difference in the outcome of the trial.[219] Notably, the Ninth Circuit in the following case commented on that standard and distinguished it, as the Seventh Circuit's "scope of review was 'narrow' because [defendant] was challenging his state custody" and thus, that standard should not be used in all cases.[220]

2. United States v. Henley

The court in *United States v. Henley* had a variety of allegations of juror misconduct to sort through.[221] One of the main allegations was that one of the defendants at trial, Darryl Henley, in conjunction with a former juror of the trial, Michael Malachowski, attempted to bribe another juror, Bryan Quihuis, to vote not guilty for Henley and one of his co-defendants.[222] Michael Malachowski also alleged that Quihuis had been using methamphetamines during the trial.[223] Further, Malachowski alleged that he, Quihuis, and a third juror, Sean O'Reilly, "had engaged in premature deliberations by discussing the evidence prior to the jury's deliberations."[224] Another important allegation of juror misconduct in the *Henley* trial, and important for the discussion at hand, is that juror O'Reilly had made racist statements to Malachowski and Quihuis when the three were "prematurely deliberating" amongst themselves.[225] After trial, the convicted defendants contended that O'Reilly's racial bias affected the outcome of the trial, as three of the four defendants were African American and "the prosecution's principal witness was a young white woman who had a sexual relationship with one of the African American defendants."[226]

When O'Reilly's racist statements were brought to the district court's attention (through Quihuis' testimony), the court held that O'Reilly's statements could not be used to impeach the jury verdict due to Rule 606(b)'s restriction on

218. *Id.*
219. *Id.* at 1159–60.
220. United States v. Henley, 238 F.3d 1111, 1120 n.15 (9th Cir. 2001).
221. *Id.* at 1112–14.
222. *Id.* at 1112.
223. *Id.* at 1112–13.
224. *Id.* at 1113.
225. *Id.* at 1112–13.
226. *Id.* at 1119.

juror testimony.[227] The district court denied the multiple defendants' motions for a new trial based on the other allegations of juror improprieties.[228]

On appeal, the appellants argued that O'Reilly's racial bias was in fact an "extraneous influence," that qualified as an exception to Rule 606(b)'s bar on juror testimony.[229] The Ninth Circuit acknowledged the difficulty between protecting jury deliberations and ensuring a defendant's due process.[230] The court ultimately held, however, that ensuring a defendant's right to a fair trial outweighed the sanctity of jury deliberations.[231] In doing so, the court held that evidence of one single juror expressing racial bias is enough to disregard the no-impeachment rule.[232]

The court noted, however, that evidence of the jurors' racial bias would be admitted without fail in this type of case because all potential jurors were explicitly asked questions regarding potential racial biases they may have had during voir dire, and evidence of O'Reilly's statements directly contradicted his voir dire responses to that line of questioning.[233] Even so, the court, immediately after noting the Seventh Circuit's standard of "prejudice pervad[ing] the jury room" as the threshold for whether an exception to Rule 606(b) may exist, continued to hold that, in contrast to the Seventh Circuit, "one racist juror would be enough" in the Ninth Circuit.[234]

Although there are these varying standards circuits have set for impeaching a jury verdict when race was a factor in jury deliberations, it is very important to heed the caveat to the holding in *Henley*.[235] The court noted it was not explicitly deciding to what extent there was an exception to Rule 606(b)'s restriction on juror testimony in the case of jurors using racial bias in deliberations.[236] Rather, the court held that further inquiry was made into the juror's potential racist statements in *Henley* because the juror was not only directly asked about any racial bias he may possess during voir dire, but he also took an oath such that he would not base his deliberations on any racial biases.[237] Thus, evidence of the juror's possible racial bias was admissible to determine whether the juror's voir dire responses were truthful.[238]

This is an important distinction to make. Rule 606(b) provides a great deal of protection for jurors during deliberations so that the jurors cannot later be har-

227. *Id.* at 1114.
228. *Id.*
229. *Id.* at 1119.
230. *Id.*
231. *See id.* at 1120.
232. *Id.*
233. *Id.* at 1121.
234. *Id.* at 1120.
235. *See id.* at 1121.
236. *Id.*
237. *Id.*
238. *Id.*

assed, and their decisions questioned, among other reasons for such protections.[239] Now with the narrow exception to Rule 606(b) carved out in *Pena-Rodriguez*, courts may allow inquiry into alleged statements made by jurors that are racially biased in certain circumstances.[240] With the reasoning presented by the Ninth Circuit, however, inquiries into racist statements made by jurors during deliberations could be considered, but only to show that a juror had lied about his or her racial biases during voir dire.[241] The Ninth Circuit was in the minority for supporting this type of reasoning, and, in 2014, the Supreme Court held that Rule 606(b) precludes even this "loophole," further leaving the Ninth Circuit's threshold standard of evidence unclear.[242]

IV. RECOMMENDATION

Federal Rule of Evidence 606(b) and analogous rules of evidence at the state level have limited courts too much in efforts to ensure criminal defendants get a fair trial, such that a jury will decide a criminal case based on the facts of the case and not based on a criminal defendant's race or ethnicity.[243] Therefore, this Note proposes that courts adopt the same threshold as the Ninth Circuit in *Henley*, where any evidence of just one juror deciding a criminal case based on his own racial bias will be enough to disregard the no-impeachment rule.[244] In addition to this threshold, this Note proposes that in criminal cases, the trial court should issue a jury instruction that instructs jurors to come forward, before a verdict is rendered, to the court if another juror explicitly expresses any racial bias against a defendant during deliberations, or otherwise throughout the trial. This way, courts will be able to look into claims of racial bias in jury deliberations without the same restrictions as if the claims were made after a verdict has been rendered, and jurors will know not only that racial bias is not something that should influence deliberations, but also that if jurors perceive racial bias being expressed in deliberations, they should report it to the court.

In an ideal world, juries would listen to the evidence presented to them at trial, deliberate in a rational manner, understand and follow all of the court's instructions, and, from that process, reach a fair and impartial verdict.[245] But criminal defendants do not live in an ideal world and jurors are not always fair and impartial in their deliberations.[246] For example, jurors may not answer voir dire questions truthfully and will consequently be placed on a jury when they

239. John Soto, *How Insulated Are Jurors From Having to Testify About Deliberations?*, LINKEDIN (Nov. 28, 2014), https://www.linkedin.com/pulse/20141128122404-23581909-how-insulated-are-jurors-from-having-to-testify-about-deliberations/.

240. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

241. *Henley*, 238 F.3d at 1121.

242. Warger v. Shauers, 135 S. Ct. 521, 527 (2014).

243. *See* FED. R. EVID. 606(b); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 167 (2011).

244. *Henley*, 238 F.3d at 1120.

245. Diehm, *supra* note 76, at 391.

246. *Id.* at 391–92.

otherwise would not be serving as a juror in a particular case.[247] This is a very real possibility, especially in cases where there are sensitive issues involved such as race.[248] If potential jurors do not feel comfortable answering voir dire questions in front of a group of people about personal ideologies, particularly concerning race, there is a good chance they simply will not disclose that information or will lie about their true feelings regarding the question asked.[249] In fact, studies have shown that when permitted, when attorneys conduct individual voir dire—the practice of questioning and selecting jurors individually rather than in groups[250]—more juror biases are exposed.[251] Some jurisdictions have come to realize how critical individual voir dire can be to a trial and have laws explicitly allowing individual voir dire.[252] Without the use of individual voir dire, jurors might not answer questions regarding race and other sensitive issues truthfully and openly and consequently violate a defendant's right to an impartial jury, and generally a fair trial, before that defendant even has a chance to make his case at trial.

Further, some jurors may take outside information, such as "rumors, newspaper accounts, or comments by court personnel" into account when reaching a verdict instead of deciding a case based on the actual evidence presented to them.[253] Bias itself can be a factor in reaching a verdict, again, rather than the facts of the case itself, as previously discussed for one juror in the case of Pena-Rodriguez.[254] These are all very plausible situations, and clearly, in fact, a reality in some cases.[255] And in all of these potential situations, either individual jurors or the jury as a whole would not be acting impartially, and thus a criminal defendant would not be receiving his full rights to a fair trial guaranteed under the Sixth Amendment.[256]

247. *Id.*

248. *Cf. Are Jurors With Little to Say in Voir Dire Unbiased Jurors?*, KKCOMCON: ONLINE JURY RES. UPDATE (Feb. 2008), http://www.kkcomcon.com/OJRU/ROJR0208-1.htm ("The most common excuses jurors gave for failing to answer questions in group voir dire were shyness, embarrassment, and a belief that their answers weren't very important.").

249. *Id.*; *see also* Diehm, *supra* note 76, at 391–92.

250. Jeffrey B. Welty, *Individual Voir Dire*, UNC SCH. GOV'T: N.C. CRIM. L. (Nov. 28, 2011, 10:11 AM), https://nccriminallaw.sog.unc.edu/individual-voir-dire/.

251. *Is Individual or Group Voir Dire More Effective at Identifying Juror Bias?*, KKCOMCON: ONLINE JURY RES. UPDATE (July 2008), http://www.kkcomcon.com/OJRU/ROJR0708-4.htm; *see* Jeffrey T. Frederick, *Effective Voir Dire*, THE COMPLEAT LAW. 26, 26 (1997), https://www.nlrg.com/hs-fs/hub/79400/file-15660979-pdf/docs/effective_voir_dire.pdf/documents_attorney_writing_samples/effective_voir_dire.pdf.

252. *See, e.g.*, Richard A. Silver, *Individual Voir Dire=Justice*, THE SG&T BLOG (Mar. 30, 2016), https://www.sgtlaw.com/2016/03/individual-voir-dire-justice/; Welty, *supra* note 250.

253. Diehm, *supra* note 76, at 392.

254. *See supra* Section III.A.

255. *See id.*

256. *See* U.S. CONST. amend. VI.

A. United States v. Henley *Standard*

Due to all of these potential opportunities for jurors to violate a defendant's rights to a fair trial, this Note proposes that trial courts universally adopt, at a minimum, the standard set by the *Henley* court.[257] The standard being that a trial court may inquire into a jury verdict if there is any evidence of even one racist juror, as "the Sixth Amendment is violated by 'the bias or prejudice of even a single juror.'"[258]

The Sixth Amendment affords criminal defendants the right to an "impartial jury."[259] An "impartial jury" and the general right to a "fair trial" do not have clear bright-line definitions.[260] Thus, this is where different arguments about exceptions to Rule 606(b) can arise. But these are not questions of terms that have gone unanswered, or at least uncontemplated.[261] One legal article conducted a historical analysis into the term "fair trial" to develop an understanding of the term.[262] Most notably throughout this analysis, a great deal of sources referenced the impartiality of the trier of fact.[263] For example, one version of *Black's Law Dictionary* used language to define "fair trial" from the two cases *Goldstein v. United States* and *Sunderland v. United States*.[264] The Supreme Court in those cases declined to define the term "fair trial" but did hold that at the very least the term encapsulates "a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. Being impartial means being indifferent as between the parties."[265] The article presented another definition of "fair trial" as "[a] hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."[266] A third definition the article presented also contained a provision of "fair trial" as an "impartial trial by a jury of one's peers."[267] Regardless of not having a specific definition of a "fair trial," common amongst authorities is that a "fair trial" at least contains an impartial, and thus unbiased jury.[268]

With that being said, it only makes sense that any evidence of even just one juror using his or her racial bias to deliberate would be a violation of the defendant's Sixth Amendment right to a fair trial.[269] Thus, that would be enough to trigger any court to inquire into the validity of the jury verdict in accordance with

257. *See Henley*, 238 F.3d at 1120.
258. *See id.*
259. *See* U.S. CONST. amend VI.
260. Danny J. Boggs, *The Right to a Fair Trial*, 1998 U. CHI. LEGAL F. 1, 2 (1998).
261. *Id.*
262. *Id.* at 2–4.
263. *Id.*
264. *Id.* at 3.
265. *See* Goldstein v. United States, 63 F.2d 609, 613 (1933); Sunderland v. United States, 19 F.2d 202, 216 (1927).
266. Boggs, *supra* note 260, at 4.
267. *Id.*
268. *Id.*
269. *See id.*

the new exception to Rule 606(b) for racial bias.[270] To interpret any higher threshold of evidence required to qualify for the racial bias exception to Rule 606(b) established by the Supreme Court in *Pena-Rodriguez* would be in violation of a criminal defendant's Sixth Amendment right.[271]

B. Jury Instruction

Even if all trial courts were to impose this minimal threshold standard for evidence of juror racial bias to trigger an inquiry into a jury verdict, this still presumes that other jurors will come forward when another juror expresses racial bias during deliberations.[272] Jury duty disrupts people's lives, and it is for that reason, along with many others, that there is a widespread disdain for being called to participate in jury duty in the U.S.[273] Those who are employed in non-salaried jobs and get called for jury duty tend to want the process to be as quick as possible so they can get back to work, as they likely lose money by spending that time in court instead of at work.[274] Among other personal complications, jury duty can also cause difficulties for those needing to find child care they otherwise wouldn't need had they not been called to serve.[275] In addition to all of the logistical complications, in some cases, jury duty can be emotionally taxing on a juror.[276]

For these reasons, jurors may want the trials they are serving on to end as quickly and painlessly as possible so they may get back to their regular lives. Given that, in combination with the idea that not everyone has the same sense of justice or the same compelling reasons to speak up to a court, it is just as likely jurors who notice another juror's racial bias in deliberations will choose to not speak up and inform the court of such infractions.[277]

Yet if race is, or could be, an issue in a trial, and the court instructs a jury of their ability to notify the court that certain jurors were expressing racial bias against a party during deliberations, jurors may feel more comfortable, and possibly as if they have even more of a duty, to come forward to the court about such infractions. Further, if this is given in a jury instruction before the trial even begins, a court could potentially avoid the conflict of having to inquire into a jury verdict altogether because jurors will have been instructed to come forward about such infractions if they occur before a verdict is even reached. Further, upon

270. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

271. *Id.*

272. *See id.* (holding that new standard of when a "juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant" would require the "no-impeachment rule give way" such that the court should consider evidence of the juror's statement, implies that another juror would have to come forward with such evidence, as there is no other way to obtain evidence from what occurred in the jury room).

273. Kevin Drum, *Why We All Hate Jury Duty*, MOTHER JONES (Feb. 27, 2012, 3:59 PM), https://www.motherjones.com/kevin-drum/2012/02/why-we-all-hate-jury-duty/.

274. *Cf. id.*

275. *Id.*

276. *See id.*

277. *See id.*

hearing such instruction, jurors will be on notice that such means of deliberating are inappropriate and will actively deliberate and ultimately reach a verdict based on the facts of the trial and the evidence presented. With such instructions, the possibility of even avoiding racial bias in deliberations altogether arises. This may seem too hopeful, but it is hard to see the harm in at least making such instructions clear to the jury before deliberations even begin.

V. CONCLUSION

As this Note has demonstrated, racial bias persists throughout most facets of American society, and the judiciary is no exception.[278] Yet, it has been the optimistic goal for a long while to "purge racial prejudice from the administration of justice."[279] The Supreme Court has taken another step in that direction by creating a new exception to Federal Rule of Evidence 606(b) that allows a juror to present evidence to the court, after a jury verdict is reached, that another juror had used "clear" racial bias during deliberations.[280] This is a change from the original rule that would not have allowed a court to inquire into a jury verdict once that verdict was reached, with some other narrow exceptions.[281] Although this is a step in the right direction, the Court declined to address how much evidence is needed of a juror's alleged racial bias for a court to set aside the verdict.[282]

Without addressing how much evidence of racial bias in a jury is required to impeach a jury verdict, there is a split amongst the circuits regarding when exactly a trial court may inquire into a jury verdict once it is on notice of potential racial bias in the jury room.[283] This Note recommends that all courts adopt a standard of when evidence of even just one juror expressing racial bias during jury deliberations when race is at issue in the trial, is brought to the court's attention, then that is enough for the court to set aside a jury's verdict. Further, the Note recommends all courts allow a jury instruction if requested by a party in a lawsuit that informs the jurors about their duty to be impartial and put them on notice of reporting any instances of racial bias they perceive during deliberations. This would ideally curb the need, at least in some instances, for a court to further inquire into what is supposed to be a final jury verdict after a trial has ended. There is still great room for improvement in ridding the justice system of racial bias; but this is one important step to take.

278. *See supra* Part II.
279. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017).
280. *Id.* at 869.
281. FED. R. EVID. 606(b).
282. *Pena-Rodriguez*, 137 S. Ct. at 870.
283. *See supra* Section III.B.