UNLOCKING *PEÑA-RODRIGUEZ*'S PROMISE

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It is not often that the Supreme Court creates constitutionally required exceptions to established evidentiary rules. For that reason, when the Court created a racial bias exception to the centuries-old no-impeachment rule in Peña-Rodriguez v. Colorado*, the decision was billed as a significant step in addressing racial bias in jury deliberations. But nearly a decade later, the decision has fallen far short of its promise. This Essay explains why.*

This Essay argues that two structural impediments—juror non-disclosure instructions and no-contact rules—combine to make juror racial bias effectively undetectable and as a result, irremediable. Recognizing that relaxing no-contact rules or instructing jurors to report bias each comes with serious tradeoffs, this Essay does not propose a single reform. Instead, it calls on trial courts to serve as laboratories of racial justice, experimenting with locally tailored approaches to surface juror racial prejudice while balancing competing values.

Ultimately, if the legal system is committed to ensuring defendants are judged for what they are accused of and not the color of their skin, courts must confront not only the substance of bias but also the hidden procedural barriers that keep it from ever coming to light.

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INTRODUCTION

The Supreme Court's decision in *Peña-Rodriguez v. Colorado* had the potential to make waves in evidence law.[1] There, the Court held that the Constitution compels a racial bias exception to the no-impeachment rule[2]—a centuries-old rule that forbids inquiring into the substance of jury deliberations.[3] *Peña-Rodriguez* allowed for the piercing of deliberations in the face of compelling evidence suggesting that a juror convicted a criminal defendant in part due to his race.[4] Scholars heralded the decision as an "important step forward" for addressing the racial bias endemic to the U.S. criminal legal system.[5]

From the start, there was reason to think *Peña-Rodriguez* was full of false promise.[6] Looking at the standard the Court set for the newly announced racial bias exception to activate—a defendant must show "overt" racial bias was a "significant motivating factor in the juror's vote to convict"[7]—it was clear that the decision was deficient in at least three ways.

One, the standard is inconsistent with how racial bias operates. Racial bias is not always (or even usually) "overt." In fact, racial bias is often expressed in subtle, coded ways, not to mention the problem of unspoken implicit bias.[8] Two, it is impossible to predict precisely how racial bias influences a juror's decision-making, such that a defendant can prove that the bias significantly motivated the juror's vote. On top of that, it is equally hard to determine how expressed racial bias affects *other* jurors' votes.[9]

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1 580 U.S. 206 (2017).

2 *Id.* at 225.

3 *Id.* at 211.

4 *See id.* at 225–26; *see also* Buck v. Davis, 580 U.S. 100, 123 (2017) ("Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.").

5 Robert I. Correales, *Is* Peña-Rodriguez v. Colorado *Just a Drop in the Bucket or a Catalyst for Improving a Jury System Still Plagued by Racial Bias, and Still Badly in Need of Repairs?*, 21 HARV. LATINX L. REV. 1, 1 (2018); *see also* Cynthia Lee, Peña-Rodriguez v. Colorado*: The Court's New Racial Bias Exception to the No-Impeachment Rule*, GEO. WASH. L. REV. ON THE DKT. (Mar. 19, 2017), https://www.gwlr.org/pena-rodriguez-v-colorado-the-courts-new-racial-bias-exception-to-the-no-impeachment-rule [https://perma.cc/G89P-BJLX] (calling *Peña-Rodriguez* a "positive step forward" as a "symbolic expression of the Court's position that racial bias in the jury system must not be tolerated," but noting that it "may be of limited value" as a "vehicle for minimizing racial bias").

6 *See generally* Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, [hereinafter Harawa, *The False Promise of* Peña-Rodriguez]109 CALIF. L. REV. 2121 (2021) (expounding this view).

7 *Peña-Rodriguez*, 580 U.S. at 225–26.

8 Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2134–35; *see, e.g.*, State v. Hoffman, 326 So. 3d 232, 238 (La. 2021) (rejecting a juror racial bias claim in a capital case despite "juror statements suggest[ing] they held beliefs that may have rested on racial stereotypes").

9 Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2135. For example, in *Zora v. Winn*, it was alleged that jurors made discriminatory comments about the defendant referencing the fact that he was Middle Eastern. No. 17-1132, 2017 WL 7511334, at *5 (6th Cir. Sep. 5, 2017).

Three, the Supreme Court did not decide what happens once a defendant satisfies *Peña-Rodriguez*'s high bar—a new trial is not guaranteed.[10] Thus, after a close read of the opinion, one could come away thinking that, rather than addressing racial bias, the decision was likely to "insulate the nuanced forms that racism most often takes from review."[11]

Perhaps predictably, *Peña-Rodriguez* has proved less a bang and more a whimper. Successful *Peña-Rodriguez* claims are rare. And there are examples of shocking racial bias being expressed by jurors that courts have held do not satisfy *Peña-Rodriguez* or otherwise require remediation. For example, in a case where a white foreperson accused two Black jurors who expressed doubt about the Black defendants' guilt of protecting them "because they felt they 'owed something' to 'their black brothers,'" a court held that this did not satisfy *Peña-Rodriguez* because that was not a "clear statement" reflecting racial animus.[12] In another case, a court held that when a juror called a fellow juror a "n***** lover," that this did not satisfy the *Peña-Rodriguez* standard because, although the racial bias was "overt" (it is hard to imagine how racial bias could be more "overt"[13]), it was not directed towards the defendant.[14] In yet another case, where a juror remarked during deliberations that she thought the Salvadoran defendant was more likely to be guilty because "so many murderers come from El Salvador," a court held

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But because those jurors were dismissed, the court held that the defendant could not allege a viable juror bias claim. *Id.* at *5. A similar thing happened in *United States v. Sanchez*, except there, the dismissed juror made anti-Mexican comments. 692 F. Supp. 3d 1025, 1028–29 (D. Idaho 2023); *see also* United States v. Trawick, No. 22-2703, 2023 WL 6532391, at *1–3 (8th Cir. Oct. 6, 2023) (denying defendant's motion for a mistrial even though a dismissed juror allegedly made racist comments); Commonwealth v. Hart, 105 N.E.3d 295, 297–300 (Mass. App. Ct. 2018) (same).

10 Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2136. For example, in *United States v. Maurival*, the court held that the defendant had made a prima facie showing satisfying the *Peña-Rodriguez* standard, granted an evidentiary hearing, and then denied a new trial because it found the verdict was based on the evidence and not animus. 861 F. App'x 388, 394–95 (11th Cir. 2021). Another flaw of *Peña-Rodriguez* is that it is not clear whether its exception would extend to other forms of bias, given its emphasis on the unique history of racial discrimination in the United States. *See, e.g.*, Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the* Peña-Rodriguez *Exception Beyond Race*, 118 COLUM. L. REV. 1801 (2018) (asking whether the *Peña-Rodriguez* exception will extend beyond racial bias and concluding that it will).

11 Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2124.

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

13 Many courts have recognized that the n-word is a singularly severe and offensive expression of racial animus. *See, e.g.*, Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 577 (D.C. Cir. 2013); Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 24 (2d Cir. 2012); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001); Walker v. Thompson, 214 F.3d 615, 626 (5th Cir. 2000).

14 *See* Williams v. Price, No. 98-cv-1320, 2017 WL 6729978, at *9 (W.D. Pa. Dec. 29, 2017); *see also* Dotson v. State, No. W2019-01059-CCA-R3-PD, 2022 WL 860414, at *70 (Tenn. Crim. App. Mar. 23, 2022), *aff'd on other grounds*, 673 S.W.3d 204 (Tenn. 2023) (rejecting a juror bias claim for the same reason).

that no relief was warranted because the rest of the "lengthy deliberations [that] followed . . . focused on the legal concepts of reasonable doubt and circumstantial evidence."[15] Indeed, over the near-decade *Peña-Rodriguez* has been on the books, only *two* criminal defendants have had their convictions outright reversed by successfully showing juror racial bias.[16]

But not only have *successful Peña-Rodriguez* claims been rare; there have been few *Peña-Rodriguez* claims—successful or not—decided on their merits *at all*. A search of Westlaw reveals that courts—state and federal—have adjudicated fewer than *forty* juror racial bias claims on their merits over the past eight years.[17] This Essay explores why.

One reason could be that perhaps racial bias is not expressed all that often in deliberations—a hypothesis that is hard to test given the secrecy of jury deliberations.[18] Or perhaps lawyers do not raise juror bias claims because they are afraid they cannot meet *Peña-Rodriguez*'s stringent standard—a hypothesis not empirically tested (but still surfaced) in this Essay.[19]

Rather than focusing on these more amorphous reasons, this Essay surfaces two *structural* barriers to *Peña-Rodriguez* claims. The first barrier

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15 People v. Hernandez-Delgado, No. H043755, 2018 WL 6503340, at *17–18 (Cal. Ct. App. Dec. 11, 2018) (unpublished decision).

16 *See* United States v. Smith, No. 12-183, 2018 WL 1924454, at *15 (D. Minn. Apr. 24, 2018) (granting a motion for new trial due to juror racial bias); Stevens v. Beard, No. 13-cv-03877, 2022 WL 4585836, at *2 (N.D. Cal. Sep. 29, 2022) (granting habeas relief based on a claim of juror racial bias). The Sixth Circuit held that the *Peña-Rodriguez* exception applies in civil cases, after which a Kentucky district court granted relief on a *Peña-Rodriguez* claim. *See* Harden v. Hillman, 993 F.3d 465, 481 (6th Cir. 2021) (extending *Peña-Rodriguez* to civil cases); Harden v. Hillman, No. 15-CV-594, 2022 WL 3160735, at *19 (W.D. Ky. Aug. 5, 2022) (granting relief on remand).

17 Here is how I came to this number. As of writing, according to the Westlaw citing references feature, *Peña-Rodriguez* had been cited 444 times by a court opinion. I reviewed every criminal case (including habeas cases) to determine whether the court resolved a juror racial bias claim on its merits, i.e., whether it reviewed allegedly racially biased statements, to determine whether it (a) met the *Peña-Rodriguez* standard, or (b) required a new trial. Not included in this number are cases where the court rejected the claim on procedural grounds or reversed for further proceedings to determine whether *Peña-Rodriguez* was satisfied. With those parameters, I ended up with a dataset of thirty-four cases excluding duplicates (for example, where the same case was decided at multiple court levels). I acknowledge the fallibility of hand coding such that one may review the 444 cases and come to a slightly different number, and that Westlaw may not capture the full universe of cases deciding juror racial bias claims (for example, a judge may decide the claim orally). Thus, of the 444 cases citing *Peña-Rodriguez*, fewer than ten percent of those cases were cases that dealt with the merits of a juror racial bias claim. The precise number is not as important as the broader insight that these claims are so rarely decided on their merits.

18 *See* Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 600–23 (2021) [hereinafter Harawa, *Sacrificing Secrecy*] (exploring the "fundamental fiction" of "[o]ur criminal legal system . . . that jurors are presumed to follow the law").

19 Empirical insights as to why lawyers may not be raising *Peña-Rodriguez* claims are worthy of separate exploration. *Cf.* Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201, 204–05 (2021) (drawing on empirical evidence to discuss lawyers' strategies in raising *Batson* challenges).

is what this Essay calls "non-disclosure instructions"—the standard instruction jurors receive not to discuss what occurred during deliberations while trial is ongoing. The second barrier is what this Essay calls juror "no-contact rules"—rules that prohibit lawyers from communicating with jurors after trial is over. As this Essay explains, courts have cited these structural barriers as reasons to limit defendants' ability to pursue juror bias claims, observing that *Peña-Rodriguez* gave "no hint" that it intended to unsettle these structural impediments to uncovering what was discussed in the jury room.[20] With these two barriers in place, it is likely that *Peña-Rodriguez* will never reach its full, albeit limited, potential.

As such, this Essay ponders the pros and cons of relaxing juror no-contact rules and explicitly instructing jurors to report racial bias. While relaxing or eliminating juror no-contact rules may provide attorneys greater leeway to investigate juror bias, in a world of scarce defense resources, putting the onus on defense attorneys to uncover racial bias through time-intensive interviews is a less-than-ideal solution. There is also the worry that jury service may be even less appealing than it already is if a juror must worry that a lawyer will come knocking on their door after jury service has ended.[21] Another possible solution is that courts could instruct jurors to come forward if racial bias is expressed during deliberations. But this may seriously degrade the culture of the jury, particularly the frankness of deliberations, if a juror must constantly worry that a fellow juror might snitch on them. It may also cause jurors to swallow their bias, such that they think racist thoughts but never reveal them, meaning a defendant may still be convicted based on who they are and not what they did. In other words, there are tradeoffs to remediating the structural impediments to *Peña-Rodriguez* claims. Courts must consider these tradeoffs when deciding how to best breathe life into the now-practically lifeless *Peña-Rodriguez* exception.[22] And consider they must, if they take seriously the "imperative to purge racial

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20 Rouse v. United States, 14 F.4th 795, 802 (8th Cir. 2021); *see also* Mitchell v. United States, 958 F.3d 775, 790 (9th Cir. 2020) (reasoning that "*Peña-Rodriguez* does not override local court rules or compel access to jurors"); United States v. Birchette, 908 F.3d 50, 58 (4th Cir. 2018) (holding that *Peña-Rodriguez* did not disturb the applicability of "[l]ocal rules that limit post-trial contact with jurors"); United States v. Baker, 899 F.3d 123, 134 (2d Cir. 2018) (describing *Peña-Rodriguez* as "reaffirm[ing] the importance of *limits* on counsel's post-trial contact with jurors").

21 *See, e.g.*, United States v. Nelson, No. 17-cr-00533, 2022 WL 4004190, at *1 (N.D. Cal. Sep. 1, 2022) (noting that jurors expressed concern based on defense counsel investigators contacting them).

22 While most jurisdictions have codified rules of evidence, some jurisdictions' evidentiary rules are a matter of common law. *See* Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 293, 302 (1990) (noting that a "majority of the states . . . purport to codify the law of evidence along the lines of the Federal Rules" and some other states "retain[] a common law system of evidence but mak[e] the Federal Rules persuasive authority").

prejudice from the administration of justice."[23]

This Essay makes its case over the course of four parts. Part I examines the rare instances in which the Supreme Court has held that evidentiary rules must yield to significant constitutional rights. This Part sets the stage for how monumental *Peña-Rodriguez* had the potential to be. Part II then provides an empirical account of how rare *Peña-Rodriguez* claims have been and examines why defendants rarely raise these claims. It focuses primarily on two structural impediments to *Peña-Rodriguez* claims: non-disclosure instructions and juror no-contact rules. This Part explains how both act as barriers to jurors revealing that racial bias was expressed during deliberations. Part III considers the tradeoffs in remedying these structural impediments. This Part explores, among other ideas, the reality that relaxing no-contact rules will likely have limited effect, while instructing jurors to come forward may be deleterious to the institution of the jury more broadly. Given that there are clear pros and cons to each option, the final Part does not take a hard stance on the best path forward. Instead, Part IV of this Essay urges trial courts to serve as laboratories of racial justice,[24] experimenting to find the solution that fits best given the facts on the ground.

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In *Peña-Rodriguez*, the Court insisted that "blatant racial prejudice" in our jury system "must be confronted."[25] But there are barriers in place that prevent us from doing just that. This Essay provides grist to the mill for those looking to unlock *Peña-Rodriguez*'s promise.

I
WHEN EVIDENCE RULES AND THE CONSTITUTION COLLIDE

When evidentiary rules and constitutional rights collide in a criminal trial, it is not always the case that the rules of evidence must give way.[26] The

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[23] Peña-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017); *see* Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2159 (noting that many state court systems released statements claiming a commitment to fighting racial prejudice in the summer of 2020).

[24] In case it was not clear, this is a play on Justice Brandeis's conception of states as laboratories of democracy in our federal system, where they can "experiment[] to devise various solutions where the best solution is far from clear." United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). In a similar move, Professor Steven Bender has urged states and local governments to act as "racial justice laboratories" and experiment with ways to "ameliorat[e] . . . the harm of the War on Drugs." Steven W. Bender, *Racial Justice and Marijuana*, 59 CAL. W. L. REV. 223, 248 (2023).

[25] *Peña-Rodriguez*, 580 U.S. at 229.

[26] *See generally* Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57 (2015) (discussing the displacement of evidence law by constitutional law and providing a framework for how the two should interact).

Supreme Court has upheld the application of evidence rules in the face of grave constitutional concerns, including, perhaps most shockingly, when there was evidence that jurors were inebriated during trial.[27]

There have been times, however, where the Court has held that an alleged constitutional violation requires the disruption of evidence law. Prior to *Peña-Rodriguez*, the two most prominent examples of the Supreme Court holding that a criminal defendant's constitutional rights took precedence were when evidence rules impeded a defendant's ability to present a full defense, and when they impeded a defendant's right to confrontation.

Because the Court so infrequently announces new constitutional exceptions to established evidentiary rules, the fact that the Court in *Peña-Rodriguez* announced a new racial bias exception to a centuries-old evidence rule was, at least on paper, a big deal. The decision sits in rarefied air.

A. The Right to Present a Defense

One line of cases where the Court has held evidentiary rules must yield is when rules of evidence clash with a criminal defendant's constitutional right to present a defense.[28]

The first time the Court explicitly held that state evidentiary laws had to give way to a defendant's right to present a defense was in *Washington v. Texas*.[29] In a teenage tragedy, eighteen-year-old Jackie Washington and his friend, Charles Fuller, were charged with the murder of Washington's ex-

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27 Tanner v. United States, 483 U.S. 107, 126–27 (1987) (affirming the district court's refusal to hold an evidentiary hearing at which jurors would testify about alcohol and drug use among jurors during trial). The Court recently denied certiorari in a capital case where a juror "misleadingly omitted critical details of her own experience as a victim of a similar crime and then bullied the other jurors into voting for death based on that prior experience." Humphreys v. Emmons, No. 24-826, slip op. at 1 (2025) (Sotomayor, J., dissenting from denial of certiorari). As Justice Sotomayor explained, "[t]he extreme juror misconduct in this case illustrates the harms of an ironclad no-impeachment rule that prevents consideration of juror testimony to undermine a death verdict." *Id.*

28 There is no one provision that provides a criminal defendant the constitutional right to present a defense. Rather, the Court has cobbled together the right from a few constitutional provisions. *See, e.g.*, Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting California v. Trombetta, 467 U.S. 479, 485 (1984))). For more robust discussions of the right to present a defense, see Daniel S. Medwed, *Secrets of* Chambers*: The Constitutional Right to Present a Defense at Middle Age*, 66 ARIZ. L. REV. 571 (2024); John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069 (2007); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1084 (1999); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976).

29 388 U.S. 14 (1967) (holding that the Sixth Amendment's Compulsory Process Clause was incorporated against the states).

girlfriend's new boyfriend.[30] Washington's defense was that Fuller, who was intoxicated, did the deed.[31] Washington sought to call Fuller in his defense, but Texas evidence law prohibited codefendants from testifying on one another's behalf.[32] With Chief Justice Earl Warren writing, the Court held that the application of Texas law violated Washington's right to compulsory process guaranteed by the Sixth Amendment.[33] The Court reasoned that the right to present witnesses in one's own defense "is a fundamental element of due process of law,"[34] which the Texas laws at issue "arbitrarily" abridged.[35]

Less than a decade later, the Supreme Court addressed another case where the right to present a defense clashed with state evidence law: *Chambers v. Mississippi.*[36] Arising out of Woodville, Mississippi, home of Jefferson Davis, Leon Chambers was on trial for shooting a police officer in a chaotic scene outside the local pool hall.[37] Chambers maintained his innocence.[38] In fact, another man, Gable McDonald, had confessed to the crime multiple times, including in a sworn statement.[39] But by trial, McDonald had recanted, and Chambers was prohibited by Mississippi's hearsay rule from calling three witnesses who had all heard McDonald confess to the crime.[40] The Court held that the application of Mississippi's evidence rules violated Chambers's right to present a defense.[41] Holding that Chambers was deprived of due process in violation of the Fourteenth Amendment, the Court declared that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[42]

The Court reiterated this principle most recently in *Holmes v. South Carolina*.[43] Holmes had been convicted of murder based largely on forensic evidence linking him to the crime scene.[44] In his defense, in addition to undermining the State's forensic evidence, Holmes "sought to introduce proof that another man, Jimmy McCaw White, had attacked" the decedent and had even admitted to committing the crime.[45] But the South Carolina

30 *Id.* at 15–16.
31 *Id.* at 16.
32 *Id.*
33 *Id.* at 22–23.
34 *Id.* at 19.
35 *Id.* at 23.
36 410 U.S. 284 (1973).
37 *Id.* at 285.
38 *Id.* at 287.
39 *Id.*
40 *Id.* at 292–94.
41 *Id.* at 302.
42 *Id.*
43 547 U.S. 319 (2006).
44 *Id.* at 322.
45 *Id.* at 323.

courts excluded this evidence under a state rule that forbade defendants from introducing evidence implicating a third party "where there is strong forensic evidence" of the defendant's guilt.[46] The Court held that this application of South Carolina's evidence rules violated Holmes's right to present a defense.[47] Said the Court: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."[48] As the Court made clear, the right to present a defense "is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[49]

Over several decades, the Supreme Court has carved out a narrow but vital constitutional rule: At times, a criminal defendant's right to present a defense may override otherwise valid state evidentiary rules. While respectful of the "broad latitude" of rulemakers "to establish rules excluding evidence from criminal trials,"[50] these cases reflect that, sometimes, there must be a constitutional override to evidentiary frameworks.

B. The Right to Confrontation

The Supreme Court's Confrontation Clause jurisprudence is famously tortured.[51] That said, at least one principle underlying the mess is clear: Even when evidentiary rules allow for the admission of a hearsay statement, sometimes a defendant's constitutional right to confront the witnesses against them will require the statement (if it is testimonial) to be excluded.[52]

Start with the case that forms the cornerstone of the Court's modern

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46 *Id.* at 329.

47 *Id.* at 331.

48 *Id.* at 324 (quotation marks omitted).

49 *Id.* at 324–25 (quotation marks and brackets omitted). In another case, *Rock v. Arkansas*, the Court held that an Arkansas evidentiary rule precluding a defendant from testifying to a hypnotically refreshed memory infringed her constitutional right to testify on her own behalf. 483 U.S. 44, 62 (1987).

50 United States v. Scheffer, 523 U.S. 303, 308 (1998).

51 *See, e.g.*, Erin Sheley, *The Dignitary Confrontation Clause*, 97 WASH. L. REV. 207, 208 (2022) (calling the Court's Confrontation Clause jurisprudence a "doctrinal mess"); David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV.1899, 1900 (2015) (arguing that the Court's Confrontation Clause jurisprudence "has ceased generating theoretically defensible results"); Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (2012) ("As ambitious as the case was, *Crawford* only mapped out the rough contours of the long-awaited Confrontation Clause revolution, leaving a number of important questions 'for another day.'" (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004))).

52 "If a statement is made or elicited primarily with an eye toward litigation, it is 'testimonial' and generally inadmissible against the defendant, absent confrontation, in a criminal trial." Bellin, *supra* note 51, at 1873.

Confrontation Clause jurisprudence: *Crawford v. Washington*.[53] There, Michael Crawford was on trial for stabbing a man whom he claimed tried to sexually assault his wife, Sylvia.[54] Sylvia had given a statement to police but refused to testify at Michael's trial, asserting spousal privilege.[55] The prosecution still introduced Sylvia's statement under Washington's evidentiary rule codifying the statements against penal interest exception to the ban against hearsay.[56] In holding that Michael's right to confrontation was violated, the Court rejected its previous case law that held there was no confrontation problem if the statement that is admitted fell "under a 'firmly rooted hearsay exception.'"[57] As the Court made plain: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ."[58] And thus the Court expressly rejected the notion that evidentiary rules have a binding bearing on the scope of the constitutional right to confrontation.

Turn to a more recent Confrontation Clause decision, *Hemphill v. New York*,[59] in which the Court reiterated this same point. Darrell Hemphill was charged with the murder of a toddler who had been shot by a stray bullet during a brawl in the Bronx.[60] Initially, another man, Nicholas Morris, was charged with the murder, but the charges against him were dismissed after he accepted a guilty plea to a gun possession charge.[61] At Hemphill's trial, the defense theory was that Morris was responsible for the shooting, and the defense introduced evidence to support this theory, including the fact that the police recovered a gun cartridge matching the murder weapon from Morris's apartment.[62] In rebuttal, the prosecution introduced portions of Morris's plea allocution from his earlier case, in which Morris admitted to possessing a different caliber firearm from the one used in the murder.[63] The New York trial court admitted the plea allocution without requiring Morris to testify under a state evidence rule that allows a judge to admit hearsay evidence when it is "reasonably necessary to correct [a] misleading impression" left by the defense.[64] In holding that the introduction of Morris's out-of-court statement violated Hemphill's confrontation rights, the Court emphasized

53 541 U.S. 36; *see* Garrett, *supra* note 26, at 69 ("The Supreme Court's recent Confrontation Clause jurisprudence over the past few decades has been nothing short of a revolution.").

54 *Crawford*, 541 U.S. at 38.

55 *Id.* at 39–40.

56 *Id.* at 40 (citing WASH. R. EVID. 804(b)(3)).

57 *Id.* at 60 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

58 *Id.* at 61.

59 142 S. Ct. 681 (2022).

60 *Id.* at 686–87.

61 *Id.* at 687.

62 *Id.*

63 *Id.*

64 *Id.* at 688 (alteration in original).

that while states have "flexibility to adopt reasonable procedural rules," it was not "the judge's role to decide [whether] this evidence was reasonably necessary to correct [a] misleading impression."[65] Put another way, state evidentiary rules—even those grounded in principles of fairness—could not override the strict cross-examination requirement for testimonial statements.

While states retain considerable power to craft evidentiary and procedural rules that govern the administration of criminal trials, those rules must yield when they collide with the defendant's fundamental right to confront the witnesses against her. To be sure, the Court's Confrontation Clause jurisprudence leaves open many questions.[66] But what is clear is that, at least in this context, a state's evidentiary rules cannot override the Sixth Amendment's guarantees.

C. The Right to Face Trial Free from Racial Bias

Over the years, the Supreme Court has zealously guarded the secrecy of jury deliberations,[67] even in the face of shocking juror misconduct. For instance, when a criminal defendant complained that his right to a fair trial was violated after it came to light that the jurors who judged him were drunk and high during deliberations, the Court held that Federal Rule of Evidence 606(b), which forbids a juror from "testify[ing] as to any matter or statement occurring during the course of the jury's deliberations,"[68] prevented a court from hearing evidence about the jury's misbehavior.[69] The Court reached this conclusion, in part, because it was not sure "that the jury system could survive" "postverdict investigation into juror misconduct."[70]

Peña-Rodriguez represented a rare moment where the Court prioritized the harms to defendants over the long-standing commitment to shielding jury deliberations from scrutiny. But given the underlying facts of the case, the outcome almost seemed predetermined.

After a Colorado jury convicted Miguel Angel Peña-Rodriguez of unlawful sexual contact and harassment, two jurors reported that a fellow juror expressed "anti-Hispanic bias" during deliberations.[71] That juror, who happened to be "an ex-law enforcement officer," said "he believed [Mr.

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65 *Id.* at 691–92.

66 Indeed, Justices Alito and Gorsuch recently suggested that the Court should revisit its Confrontation Clause jurisprudence to resolve the lingering confusion. *See* Franklin v. New York, 145 S. Ct. 831, 831 (2025) (statement of Alito, J.); *id.* at 833, 837 (statement of Gorsuch, J.).

67 Harawa, *Sacrificing Secrecy*, *supra* note 18, at 623.

68 FED. R. EVID. 606(b) (2006) (amended 2011).

69 Tanner v. United States, 483 U.S. 107, 127 (1987); *see also id.* at 125 ("Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct, including juror intoxication.").

70 *Id.* at 120.

71 Peña-Rodriguez v. Colorado, 580 U.S. 206, 212 (2017).

Peña-Rodriguez] was guilty because, in [his] experience . . . Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."[72] This juror said that he believed "Mexican men are physically controlling of women because of their sense of entitlement," and that he thought Mr. Peña-Rodriguez "did it because he's Mexican and Mexican men take whatever they want."[73] This juror told his fellow jurors that "in his experience, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[74] And as if that were not enough, this juror also said he did not believe Mr. Peña-Rodriguez's alibi witness because he was "an illegal," despite this witness testifying that he was a lawful resident, and without explaining what one's immigration status has to do with credibility.[75] As Justice Kagan remarked at oral argument, this case presented "the best smoking-gun evidence you're ever going to see about race bias in the jury room."[76]

The Colorado courts rejected Mr. Peña-Rodriguez's juror racial bias claim under the reasoning that the State's no-impeachment rule (which mirrors the federal rule) precluded the trial court from receiving evidence of the misconduct.[77] Given the obviousness and rankness of this juror's racial animus, it would have been strange for the Supreme Court to take the case only to countenance what happened there. With soaring rhetoric, the Court reversed.

The Supreme Court held that, when a juror's statements indicate that they clearly relied on "racial stereotypes or animus" to secure a conviction, "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."[78] In so holding, the Court carved out a narrow exception to long-standing no-impeachment rules.

When explaining why this constitutional exception to a foundational evidence rule was necessary, the Court reasoned that racial bias in the jury system "implicates unique historical, constitutional, and institutional concerns."[79] Racial prejudice, said the Court, citing Fourteenth Amendment principles, "is antithetical to the functioning of the jury system" and "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[80]

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72 *Id.* (quotation marks omitted).

73 *Id.* at 213.

74 *Id.* (quotation marks omitted).

75 *Id.*

76 Oral Argument at 45:20, Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017) (No. 15-606), https://www.oyez.org/cases/2016/15-606 (on file with the *New York University Law Review*).

77 Peña-Rodriguez v. People, 350 P.3d 287, 288 (Colo. 2015).

78 *Peña-Rodriguez*, 580 U.S. at 225.

79 *Id.* at 224.

80 *Id.* at 224, 229.

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Peña-Rodriguez marked a sea change in evidence law. Now, not only do evidence rules give way when they infringe a defendant's Sixth Amendment confrontation rights or their right to present a defense, they also give way when they impede a defendant's right to a trial free from racial prejudice. That the Supreme Court carved out a new constitutional exception to an ancient evidentiary rule had the potential to be a big deal. So big a deal, in fact, that Justice Alito worried in his *Peña-Rodriguez* dissent "whether our system of trial by jury can endure" the Court's ruling.[81]

The next Part explains that time has proven Justice Alito's concerns overblown. While *Peña-Rodriguez* had the potential to make a big splash, Justice Alito had no need to fear; the case has barely caused a ripple.

II
PEÑA-RODRIGUEZ'S LIMITED IMPACT

Since the Supreme Court decided *Peña-Rodriguez* almost a decade ago, only a handful of cases have satisfied the decision's strenuous standard. To put a finer point on it: There have been only ***three*** cases—two criminal, one civil[82]—in which a court overturned a jury's verdict based on an express finding of juror racial bias. First, in *United States v. Smith*, a federal court in Minnesota granted a new trial to a person convicted of unlawful gun possession after it came to light that one juror had said he was "just a banger from the hood, so he's got to be guilty."[83] Second, in *Harden v. Hillman*, a federal court in Kentucky ordered a new trial in a § 1983 civil rights suit where a juror described the plaintiff, a Black man, as a "crack addict," speculated whether the plaintiff's significant other "was on heroin," and referred to the plaintiff's "African American legal team as *The Cosby Show*."[84] Lastly, in *Stevens v. Beard*, a federal court granted habeas relief after it found that a juror remarked during deliberations: "You can't call these people n*****s. They'll just shoot you."[85] Aside from these three cases, there have been a handful of cases where a court either remanded for further proceedings or ordered a new trial based on the lower court's failure to adequately address a claim of juror racial bias.[86]

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81 *Id.* at 255 (Alito, J., dissenting) (citing Tanner v. United States, 483 U.S. 107, 120 (1987)).

82 Applying *Peña-Rodriguez* in the civil context was an extension of the decision, since it was rooted in the Sixth Amendment fair trial right, and the civil jury trial right is found in the Seventh Amendment. *See* Harden v. Hillman, 993 F.3d 465, 481 (6th Cir. 2021) ("Although the Sixth Amendment is unavailable . . . the Fourteenth Amendment's guarantee of 'equal protection of the laws' provides a sufficient basis to extend *Peña-Rodriguez* to civil cases.").

83 United States v. Smith, No. 12-183, 2018 WL 1924454, at *4 (D. Minn. Apr. 24, 2018).

84 Harden v. Hillman, No. 15-CV-594, 2022 WL 3160735, at *9 (W.D. Ky. Aug. 5, 2022).

85 Stevens v. Beard, No. 13-cv-03877, 2022 WL 4585836 at *1 (N.D. Cal. Sep. 29, 2022).

86 *See* Commonwealth v. Vasquez, 249 N.E.3d 713, 720–21 (Mass. 2025) (setting aside convictions where trial court failed to conduct a "meaningful inquiry" into juror racial bias); People

In previous work, I predicted *Peña-Rodriguez* would not lead to a deluge of new trials based on juror racial bias.[87] There, I argued that the standard *Peña-Rodriguez* set for overcoming the no-impeachment rule was too strict and out of step with the way racism actually operates.[88] And as proof, I pointed to several egregious examples of courts finding the *Peña-Rodriguez* standard had not been satisfied, including a case where a juror called a fellow juror a "n***** lover."[89]

But there is another, equally fundamental reason why there has not been a flood of new trials because of jurors' racial bias—*Peña-Rodriguez* claims are rarely raised or adjudicated on their merits. This Part explores why this might be.

First, this Part briefly posits hypothetical reasons that are hard to assess given the secrecy of jury deliberations. Perhaps there are few *Peña-Rodriguez* claims because jurors do not harbor racial bias, or if they do, they do not express it. Or perhaps jurors express racial bias all the time and fellow jurors do not find it worthy of reporting. The truth, given that the jury is a black box, is near-impossible to know. Then, this Part turns to the structural barriers to juror racial bias claims, focusing on two that likely inhibit juror racial bias claims: "non-disclosure instructions" and "no-contact rules." With these barriers in place, it is unlikely that *Peña-Rodriguez* will ever be the boon for racial justice that the decision proclaimed.

A. The Black Box Problem

Untestable hypothesis 1. Because juries deliberate in secret, it is impossible to know how often racial bias arises during deliberations—and in what form. Maybe there has not been a proliferation of *Peña-Rodriguez* claims because jurors do not often express "overt" racial bias. This tracks well with the wisdom that the Supreme Court recognized decades ago: "discrimination takes a form more subtle than before."[90] Society has shifted from expressions of "old-fashioned racism, classical racism, redneck racism, and blatant racism" to "symbolic racism, subtle racism, ambivalent racism,

v. Polk, 254 N.E.3d 326, 393 (Ill. App. Ct. 2024) (remanding for "further inquiry" into juror racial bias); People v. Spears, 246 N.E.3d 154, 188–89 (Ill. App. Ct. 2024) (remanding to allow defense counsel the ability to obtain a juror affidavit); Henderson v. Thompson, 518 P.3d 1011, 1017 (Wash. 2022) (remanding for an evidentiary hearing); State v. McKnight, 176 N.E.3d 802, 811 (Ohio Ct. App. 2021) (remanding for an evidentiary hearing); State v. Garcia-Ongay, 490 P.3d 1, 9 (Idaho 2021) (remanding to allow investigation into juror racial bias); State v. Berhe, 444 P.3d 1172, 1174 (Wash. 2019) (remanding for an evidentiary hearing to determine whether a prima facie case of discrimination was established).

87 Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2133.

88 *Id.* at 2134.

89 Williams v. Price, No. 98-cv-1320, 2017 WL 6729978, at *9 (W.D. Pa. Dec. 29, 2017).

90 Rose v. Mitchell, 443 U.S. 545, 559 (1979).

laissez faire racism, aversive racism, and modern racism."[91] "The once pervasive use of epithets has morphed into the coded transmission of racial messages through references to culture, behavior, and class."[92] If jurors now know that overt expressions of racism are socially unacceptable, then it is perhaps unsurprising that we have not seen a rash of juror racial bias claims.[93]

While it is impossible to fully test this hypothesis, there is reason to be skeptical of it given the moment we are in. In a Pew research poll conducted soon after *Peña-Rodriguez* was decided, "[m]ost Americans (65%) – including majorities across racial and ethnic groups – say it has become more common for people to express racist or racially insensitive views" since President Trump was first elected in 2016.[94] In that same poll, 45% of respondents said that expressing racially insensitive views "has become more acceptable."[95] Since then, Americans have grown *less* optimistic about the state of race relations in the country.[96] This lack of optimism is seemingly well-founded, as hate crimes have surged in recent years, with race-based hate crimes making up a majority of all hate crimes.[97]

This is all to say that racial bias is alive and well in America. And there have been more than one million criminal jury trials since *Peña-Rodriguez* was decided.[98] It is hard to imagine that the jury as an institution is immune from racial bias. Thus, there is little reason to believe that the lack of juror

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

92 IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 129 (2014).

93 Professor Anna Roberts made this point when describing why voir dire is ineffectual at removing racially biased jurors: "While potential jurors may harbor bias of which they are aware, taboos are likely to prohibit its disclosure, however skillful the questioning. Jurors will often give the answers that 'seem acceptable.'" Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 844 (2012) (quoting Andrea B. Horowitz, Note, Ross v. Oklahoma*: A Strike Against Peremptory Challenges*, 1990 WIS. L. REV. 219, 224 n.37 (1990)).

94 JULIANA MENASCE HOROWITZ, ANNA BROWN & KIANA COX, RACE IN AMERICA 2019, at 6 (2019), https://www.pewresearch.org/wp-content/uploads/sites/20/2019/04/Race-report_updated-4.29.19.pdf [https://perma.cc/9T5P-DFNV].

95 *Id.*

96 *See* Juliana Menasce Horowitz, Kiana Cox & Kiley Hurst, *View of Race, Policing and Black Lives Matter in the 5 Years Since George Floyd's Killing*, PEW RSCH. CTR. (May 7, 2025), https://www.pewresearch.org/race-and-ethnicity/2025/05/07/views-of-race-policing-and-black-lives-matter-in-the-5-years-since-george-floyds-killing [https://perma.cc/597W-QELY] ("51% [of Americans surveyed] now say it is very or somewhat likely that Black people will eventually have equal rights with White people. This is down from 60% in September 2020.").

97 *See 2023 FBI Hate Crime Statistics*, U.S. DEP'T OF JUST., https://www.justice.gov/crs/news/2023-hate-crime-statistics [https://perma.cc/7ESK-ET7R] (last updated Jan. 29, 2025) (reporting that "[h]ate crimes rooted in race, ethnicity or ancestry remain the most common" with 5,900 reported incidents of hate crimes reported in 2023).

98 *See* STEVEN E. BARKAN & GEORGE J. BRYJAK, FUNDAMENTALS OF CRIMINAL JUSTICE: A SOCIOLOGICAL VIEW 366 (2d ed. 2011) (noting there are approximately 150,000 state court jury trials and 5,000 federal jury trials each year).

racial bias claims stems from the fact that jurors are not biased or do not ever express their biases.

Untestable hypothesis 2. Perhaps jurors express racial bias all the time, but they do not report it because they do not view it to be a big deal. If, as polling suggests, it has become more common for people to express their racial biases, and if more people think it is socially acceptable to hold racially biased views, then maybe expressions of bias during jury deliberations are considered typical.[99] The more racial bias proliferates, the less remarkable it becomes. Therefore, if jurors view a racially biased comment as to be somewhat expected, then perhaps they do not think of the expression of racial bias as a report-worthy event. Thus, the expression of racial bias during deliberations may happen with relative frequency but could be viewed by a juror who does not hold the same views as just another point of disagreement.

Or perhaps jurors do not see racial bias during deliberations as an important constitutional moment. It is not guaranteed that a jury will be instructed that it is impermissible to consider race during deliberations.[100] There is a statute governing federal courts that requires judges to instruct jurors that they "shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim."[101] But this statute applies only to the *sentencing* phase of a *capital* trial.[102] A federal judge is not similarly required to instruct the jury that they are prohibited from considering race when deciding a capital defendant's guilt. And federal judges need not give the instruction *at all* in non-capital cases.[103] Similarly, no state has a statute or rule that mandates that jurors be instructed that they are forbidden from considering race while deliberating, although some states like Washington and California have a model jury instruction to that effect that is non-binding.[104]

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99 Some jurisdictions attempt to be proactive about warning jurors against bias affecting deliberations by discussing bias in juror orientation videos. *See, e.g.*, Press Release, N.Y. Unified Ct. Sys., New Juror Orientation Video Instructs New York State Jurors on Hidden Bias (Sep. 29, 2021), https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR21_23.pdf [https://perma.cc/L64U-UCKY]; *Unconscious Bias Juror Video*, W.D. WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/R23B-U3MG] (last visited Nov. 13, 2025); *Jury Reforms and Attorney-Conducted Voir Dire Pilot Program*, N.J. CTS., https://www.njcourts.gov/attorneys/jury-reforms [https://perma.cc/7YAJ-A5K2] (last visited Nov. 13, 2025).

100 *See* Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 AM. CRIM. L. REV. 349, 351 (2022) ("[T]he vast majority of courts have held that a defendant does not have the right to an instruction advising jurors to avoid drawing adverse inferences based on the defendant's race."). In this article, Professor Colin Miller argues that, based on the logic of *Peña-Rodriguez*, criminal defendants have a constitutional right to an instruction that jurors cannot use their race against them. *See id.* at 366–72.

101 18 U.S.C. § 3593(f).

102 *See id.*

103 *See id.* §§ 3593(a)–(f).

104 *See* 11 WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 1.02 (5th ed. 2024),

As a result, to the extent that jurors *are* instructed not to consider race while deliberating, those instructions are given at the judge's discretion.[105] And when defendants have asked for the jury to be instructed that it cannot consider race, courts have exercised that discretion to say no.[106]

For example, in *United States v. Díaz-Arias*, the defendant requested that the judge instruct the jury to put aside "any personal feelings you may have about the defendant's race or ethnicity, or national origin . . . ."[107] The trial judge refused to give the instruction and the First Circuit affirmed, reasoning that the jury was generally instructed that they should be "completely fair-minded and impartial, swayed neither by prejudice, nor sympathy, by personal likes or dislikes toward anybody involved in the case," and that this instruction "effectively incorporated the essence of [the defendant's] request."[108] In *Jahagirdar v. United States*, a district court rejected an ineffective assistance of trial counsel claim based on counsel's failure to request a specific instruction on racial bias, reasoning defense counsel "presumably" did not ask for this instruction out of strategy as a more "specific jury instruction might [have] unnecessarily draw[n] attention to the racial differences between the defendant and the alleged victim . . . ."[109] In *State v. Roseboro*, the North Carolina Supreme Court held that the "trial court was not required to instruct the jurors that they should avoid giving any consideration to racial factors in [the] defendant's sentencing," as such an instruction "would have, in effect, injected racial bias into the jurors' consideration of the defendant's sentence and diverted their attention away from . . . more pertinent issues . . . ."[110] And appellate courts have affirmed trial courts' refusals to give such instructions in situations where "there had been no indication a jury's verdict reflected racial bias or simply because the instructions were not required."[111]

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https://govt.westlaw.com/wcrji/Document/Ief97fa32e10d11daade1ae871d9b2cbe?transitionType [https://perma.cc/6GTM-FNHK]; CALCRIM NO. 200, https://courts.ca.gov/system/files/file/calcrim_2025_edition.pdf [https://perma.cc/A6CL-8EXF].

105 *See* Miller, *supra* note 100, at 360.

106 There are some exceptions. For example, one judge would routinely give an implicit bias instruction. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 169 & n.85 (2010) (now-former Judge Bennett of the Northern District of Iowa discussing his approach to implicit bias in jury determinations). And, in a rare move, the Iowa Supreme Court held that a trial judge abused its discretion when it refused such an instruction out of the belief that it was prohibited by Iowa law. State v. Plain, 898 N.W.2d 801, 817 (Iowa 2017).

107 717 F.3d 1, 22 (1st Cir. 2013).

108 *Id.* at 23. The Eighth Circuit held that it was permissible to reject a similar requested instruction for much the same reason. United States v. Graham, 680 F. App'x 489, 492–93 (8th Cir. 2017).

109 597 F. Supp. 2d 198, 204 (D. Mass. 2009).

110 528 S.E.2d 1, 13 (N.C. 2000).

111 State v. Nesbitt, 417 P.3d 1058, 1069 (Kan. 2018) (collecting cases).

In other words, even if racial bias is expressed during deliberations, if jurors are not explicitly told that this is not allowed, then they may believe that there is nothing to complain about. This could be yet another reason why there has not been a surge in *Peña-Rodriguez* claims. This reason becomes even more powerful when read in connection with the fact, explored in Section II.B, that jurors *are* instructed *not* to reveal what was discussed during deliberations.

Needs-to-be-tested hypothesis 3.[112] Perhaps lawyers are deterred from raising *Peña-Rodriguez* claims by the decision's high standard. Even when lawyers learn of a juror expressing racial bias, they may hesitate to raise a claim if the bias is not as egregious as that featured in *Peña-Rodriguez*. It is already uncomfortable to raise claims of racial bias. The Supreme Court in *Peña-Rodriguez* recognized this when it explained that "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations."[113] And legal scholars in other contexts, including habeas corpus and civil rights, have argued that heightened evidentiary and pleading standards deter litigants from raising claims in the first instance.[114] While this hypothesis needs to be empirically tested, *Peña-Rodriguez*'s high standard may cause lawyers to forgo what might otherwise be viable juror racial bias claims.[115]

While this Section has surfaced amorphous reasons for why there has not been a bevy of juror bias claims, the rest of Part II will discuss the structural barriers in evidence law and trial practice that prevent defendants from raising *Peña-Rodriguez* claims.

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112 Unlike the first two hypotheses, which are near-impossible to test given the secrecy of deliberations, whether lawyers are deterred from raising *Peña-Rodriguez* claims by the decision's high standard is a question lawyers could be asked directly.

113 Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017). As the Court continued: "It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." *Id.*

114 *See, e.g.*, Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORN. L. REV. 1739, 1756–64 (2022) (discussing how the Antiterrorism and Effective Death Penalty Act ("AEDPA") has been a functional bar to reviewing constitutional errors in state criminal cases); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (discussing how the Supreme Court's qualified immunity doctrine prevents courts from redressing constitutional violations committed by police officers); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 161–69 (2011) (discussing how the *Iqbal*/*Twombly* heightened pleading standard has screened out otherwise meritorious claims).

115 This caution would be warranted if a lawyer were to take a broader survey of the Roberts Court's precedent involving actionable racial bias, as the Court only seems to address the most egregious acts of discrimination. *See* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 32 (2022) ("The Court is willing to remedy racial discrimination against people of color only when, in the Court's view, the discrimination bears a strong likeness to the racism that was practiced during the pre-Civil Rights Era. When the Court encounters an instance of racial discrimination that bears this resemblance, it remedies the racial injury.").

B. Non-Disclosure Instructions

In courtrooms across the country, before juries are sent to deliberate, judges admonish them not to reveal what they discuss to anyone—friends or family, judge or lawyer. For example, one federal circuit's pattern jury instructions advise judges to tell jurors: "Once you start deliberating, do not communicate about the case or your deliberations with anyone except other members of the jury."[116] In New York, jurors are admonished under the state pattern instructions: "[Y]ou must discuss the case only among yourself; you must not discuss the case with anyone else . . . ."[117] Judges in New York further instruct jurors: "No juror . . . can tell me what is being said about the facts of the case, or possible verdict . . . . And, while I will of course listen to whatever a juror has to say that does not involve those subjects, I may not be able to respond . . . ."[118] In California, the state pattern instructions provide that jurors are to be told to "not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, [their] spouse or other family, or friends, spiritual leaders or advisors or therapists."[119] California jurors are then specifically admonished: "Do not discuss your deliberations with anyone."[120] These instructions are illustrative of what jurors across the country are told before they retire to the jury room.

Evidence law presumes that jurors follow instructions.[121] If this is so and with instructions like these, there is reason to believe that some jurors, out of the belief that they are following instructions, will not disclose what is discussed during deliberations even if those discussions involve racial bias. While much ink has been spilled about whether and the extent to which jurors *actually* follow instructions,[122] the instruction not to say anything is

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116 SEVENTH CIRCUIT PATTERN JURY INSTRUCTION 7.01, https://www.ca7.uscourts.gov/assets/pdf/Criminal_Jury_Instructions.pdf [https://perma.cc/9D2F-8396].

117 N.Y. UNIFIED CT. SYS., CRIMINAL JURY INSTRUCTIONS & MODEL COLLOQUIES – MODEL FINAL INSTRUCTIONS 44, https://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Final_Instructions.pdf [https://perma.cc/LMU3-59U8].

118 *Id.* at 45.

119 CALCRIM NO. 3550, https://courts.ca.gov/sites/default/files/courts/default/2024-12/calcrim_2024_edition.pdf [https://perma.cc/LT4V-9XAE].

120 *Id.*

121 *See* Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions." (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987))).

122 *See, e.g.*, Bruton v. United States, 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."). As Professor David Sklansky explains, "Courts 'presume' that juries follow evidentiary instructions, as well as other instructions from the judge. This presumption is often said to be a 'premise upon which our jury system is founded.' But the presumption is also widely acknowledged to be false, a kind of professional myth." David Alan Sklansky, *Evidentiary*

simple and straightforward. A juror will easily understand that mum is the word. After all, the jury is called the "black box" for a reason.[123]

But beyond evidentiary assumptions, basic social psychology backs up the idea that jurors may not reveal what is discussed during deliberations in light of non-disclosure instructions, even if the discussions invoke racial bias. Obedience theory explains that people are more likely to obey authority figures than others, and if they feel as if they are acting out of that obedience, they are more likely to absolve themselves of personal responsibility for the decisions they make.[124] Applying this theory, juries may hear fellow jurors express inappropriate racial bias, may feel morally repulsed by what they have heard, yet still may not tell the judge what transpired out of deference to her instructions.[125] And while a juror might feel bad about not reporting racial bias, the non-disclosure instruction might help that juror relieve themselves of guilt, allowing them to feel as if they were just following orders.[126]

To be clear, jurors generally are *not* prohibited from discussing what happened once they are dismissed (even though the judge may not tell them this directly), as such an instruction would likely violate the jurors' rights.[127] But even if a juror has the right to speak about the trial after it is over, this right means little in this context if the lawyer cannot speak back, which is the practical effect of no-contact rules.[128]

Then, add to that the fact that some courts refuse to instruct jurors that

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Instructions and the Jury as Other, 65 STAN. L. REV. 407, 408 (2013) (footnote omitted). *See also* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 88–98 (1988) (providing an empirical analysis on jurors' abilities to understand pattern instructions); Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1550–94 (2012) (analyzing jurors' abilities to follow instructions based on the Arizona jury project study).

123 *See* Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 432 (2008) ("Typically, a jury verdict in a criminal case is inscrutable; the jury performs its paradigmatic function as fact finder shrouded in secrecy, and it is impossible to say why or how the jury convicted or acquitted in any given case." (footnotes omitted)).

124 *See generally* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974) (devising obedience theory).

125 *See, e.g.*, Valerie P. Hans, *Judgments of Justice*, 3 PSYCH. SCI. 218, 220 (1992) (discussing literature on obedience and the law, with a focus on the "authority-subordinate relationship and the potential misuse of procedural justice").

126 *See id.* (articulating the premise that "social-psychological dynamics in authority-subordinate relationships facilitate compliance with harmful orders").

127 *See, e.g.*, United States v. Homer, 411 F. Supp. 972, 978 (W.D. Pa.), *aff'd*, 545 F.2d 864 (3d Cir. 1976) ("We recognize that jurors after completing their duties do have the right of free speech. We cannot muzzle them to prevent them from talking to whom they please.").

128 *See, e.g.*, United States v. Birchette, 908 F.3d 50, 55 (4th Cir. 2018) (noting that local rules prohibited a defense lawyer from asking a juror any follow-up questions after the juror came forward to complain of racial bias); *see also infra* Section II.C (discussing the prominence and effect of no-contact rules).

they may not consider race when determining a defendant's guilt, and it becomes easy to see why, even if jurors *do* express racial bias during deliberations, the bias would not be revealed. From the start, juries are warned that whatever they say in the jury room *stays* in the jury room. And these warnings, while laudably designed to promote frank discussions and to encourage jurors to exercise their decision-making power freely,[129] fail to illuminate for the jury that there *are* topics—like those which invoke racial animus—that are off limits, and that when raised, *should* be disclosed. These warnings serve as barriers to jurors revealing a fellow juror's racial bias and thus can help explain the paucity of *Peña-Rodriguez* claims.

C. No-Contact Rules

Juror no-contact rules are another structural impediment to raising juror racial bias claims. In many jurisdictions, lawyers are not only prohibited from speaking with the jury while trial is ongoing, which is standard;[130] they are also prohibited from contacting jurors after trial has ended without first obtaining permission from the court.[131] Like non-disclosure instructions, the purported bases for juror contact prohibitions are laudable: They protect jurors from harassment, promote jurors speaking freely, and protect the finality of verdicts.[132] As courts with such rules see it, if jurors were routinely harassed by lawyers from the losing side, that would make jury service even less appealing than it already is in popular perception.[133] In theory, these rules encourage citizens to perform their civic duty by helping to ensure that their participation will not follow them home and potentially haunt them in the

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129 *See* Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 211, 218 (2005).

130 This Essay does not call into question the universally applied rule that lawyers are prohibited from interacting with jurors while trial is ongoing. *See* MODEL RULES OF PRO. CONDUCT r. 3.5 cmt. 2 (A.B.A. 2025) ("During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.").

131 *See* Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 148–50 (2018).

132 *See id.* at 160.

133 *See, e.g.*, United States v. Kepreos, 759 F.2d 961, 967 (1st Cir. 1985) ("Permitting the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties."); Gladney v. Clarksdale Beverage Co., 625 So. 2d 407, 416 (Miss. 1993) (expressing that court regulation of juror contact is necessary "to minimize the potential for harassment"); State v. Cabrera, 984 A.2d 149, 170–72 (Del. Super. Ct. 2008) (rejecting First Amendment challenge based on the no-contact rule's ability to prevent juror harassment and keep deliberations private). Professor William Snowden is trying to change how average citizens view jury service, coming up with novel ways to encourage people to embrace their civic duty to serve on juries. *See About Us*, THE JUROR PROJECT, https://www.thejurorproject.org/new-page [https://perma.cc/46MV-ED3V] (last visited Nov. 16, 2025).

future.[134]

A difficulty with examining the full effects of no-contact rules is that the rules differ by jurisdiction and, sometimes, even by judge within a jurisdiction.[135] The federal court system and many states leave the regulation of post-trial contact with jurors to local practice. Broadly speaking, jurisdictions or judges with no-contact rules prohibit lawyers from contacting jurors without express leave of the court.[136] And to grant said leave, many courts with these rules require the lawyer to show good cause, leaving individual judges with wide discretion to grant or deny permission.

For example, the local rules for the United States District Court for the District of Columbia provide that, once the jury is discharged, "no party or attorney shall speak with a juror concerning the case except when permitted by the Court with good cause shown in writing."[137] Similarly, in the United States District Court for the Northern District of Illinois, "no party, agent or attorney shall communicate or attempt to communicate with any members of the petit jury before which the case was tried without first receiving permission of the court."[138] Turning to some state examples, in Florida, if a party "has reason to believe that the verdict may be subject to legal challenge," they can "move the court for an order permitting an interview of a juror or jurors," which the judge can grant after notice and a hearing.[139] And in New Jersey, "[e]xcept by leave of court granted on good cause shown, no attorney or party shall directly, or through any investigator or other person acting for the attorney interview, examine, or question any grand or petit juror with respect to any matter relating to the case."[140]

As other scholars have noted, juror no-contact rules can impede

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134 Professor Kathryn Miller roundly debunks these rationales, showing that no-contact rules do not truly serve these interests. *See* Miller, *supra* note 131, at 160–73; *see also* Benjamin M. Lawsky, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1970 (1994) (critiquing the rules as not serving these interests and advocating for more tailored rules, not blanket restrictions).

135 *See* Miller, *supra* note 131, at 149 ("Rarely found in state statutes, juror restrictions most frequently appear when local court rules or individual trial judges impose them—often at the behest of the prosecutor."); Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 526–28 (1988) (explaining that these rules "vary substantially" by jurisdiction).

136 *See* Miller, *supra* note 131, at 148–49.

137 D.D.C. LCRR 24.2.

138 N.D. ILL. LR 48.1.

139 FLA. R. CRIM. P. 3.575.

140 N.J. CT. R. 1:16-1. Professor Kathryn Miller provides an appendix of state restrictions on juror contact. *See* Miller, *supra* note 131, at 197–201. And the United States provided an appendix of federal court rules with juror contact restrictions in the brief that it filed in *Peña-Rodriguez*. Brief for the United States as Amicus Curiae Supporting Respondent at app. A, Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017) (No. 15-606).

lawyers' abilities to thoroughly investigate juror misconduct.[141] As proof, these rules have been specifically cited when courts have blocked lawyers' requests to interview jurors to investigate potential racial bias.

Take the Fourth Circuit case *United States v. Birchette*.[142] There, Mr. Birchette, who was Black, was facing four counts of various drug and gun offenses.[143] After deliberating for roughly four-and-one-half hours, the jury returned a guilty verdict on one count but was undecided on the remaining three counts.[144] The judge instructed the jury to keep deliberating, and "[w]ithin half an hour" of receiving this instruction, a Black female "juror asked the judge to release her from the jury without explaining why."[145] The judge refused to dismiss the juror, and just "[e]leven minutes later, the jury returned a unanimous verdict of guilty on all counts."[146]

After the jury returned its verdict, a Black male "juror approached defense counsel and said: (1) he was 'sorry they had to do that'; (2) 'a white lady said, the two of you are only doing this because of race' [referring to the two Black jurors]; and (3) 'we worked it all out.'"[147] This same juror also reported that a "white female juror" told the two Black jurors: "It's a race thing for you."[148]

Because of the local rules prohibiting juror contact, defense counsel "did not ask the juror any questions during this interaction," and instead requested permission from the court to interview the jurors.[149] Counsel wanted to investigate whether he could bring a juror racial bias claim under *Peña-Rodriguez*.[150] The district court refused this request, holding that the defendant had failed to show the good cause necessary for juror interviews under the local court rules because the statements did "not reflect racial bias against [the] Defendant."[151] The Fourth Circuit affirmed, holding that the trial court acted within its discretion to deny the interview.[152] The court of appeals reasoned that because *Peña-Rodriguez* understood that the "practical mechanics of acquiring" evidence of juror racial bias will "be shaped and guided by state . . . and local rules," trial judges can make a "judgment call" about whether they think juror interviews will reveal the type of egregious

141 *See* Miller, *supra* note 131 (providing an example).
142 908 F.3d 50 (4th Cir. 2018).
143 *Id.* at 54.
144 *Id.* at 55.
145 *Id.*
146 *Id.*
147 *Id.* (internal quotation marks omitted).
148 *Id.*
149 *Id.*
150 *See id.* at 58.
151 *Id.* at 55.
152 *Id.* at 58.

racial bias that *Peña-Rodriguez* demands.[153] And the court of appeals held that the trial judge in this case did not abuse his discretion by concluding that the defendant "was unlikely to find evidence that a juror voted to convict him because of racial animus."[154]

The Fourth Circuit's decision in *Birchette* is a prime example of the structural barriers to raising *Peña-Rodriguez* claims. In that case, a juror came forward of his own volition to reveal that there were racial tensions in the jury room. The lawyer, respectful of the local no-contact rule, did not inquire further, and instead went to the court to seek permission to conduct interviews. And the court, exercising its broad discretion, denied that permission because the lawyer did not have evidence of the racism that the defendant was seeking to uncover *through the interviews*. The Supreme Court remarked in *Peña-Rodriguez* on how difficult it is for jurors to come forward to report racism.[155] And yet despite this difficulty, a Black juror in *Birchette* came forward to report how race impacted the jury's decision-making, all in the wake of another Black juror apparently attempting to leave the jury because of the discomfort she felt. If the types of comments that featured in *Birchette* did not even provide the lawyer with good cause to ask more questions of the jury, then it is easy to see why few *Peña-Rodriguez* claims reach the merits stage given the barrier that no-contact rules pose.

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Despite *Peña-Rodriguez* recognizing that racial bias in the administration of justice is so pernicious that it requires an exception to otherwise sacrosanct deliberative secrecy, its impact has been profoundly limited by a latticework of structural barriers. Jurors are often instructed not to disclose what is discussed during deliberations, are rarely explicitly told that considering race is impermissible, and are then insulated by no-contact rules that bar attorneys from inquiring into possible bias unless they already possess proof of the very bias they seek to uncover. *Peña-Rodriguez* did nothing to unsettle these barriers.

That is where the next Part picks up. It considers the pros and cons of affirmatively instructing jurors to come forward if racial bias is revealed during deliberations and asks whether relaxing or eliminating no-contact rules will be effective at uncovering juror racial bias.

III
UNCOVERING JUROR BIAS

If non-disclosure instructions and no-contact rules are a barrier to

153 *Id.* (quoting Peña-Rodriguez v. Colorado, 580 U.S. 206, 208 (2017)).

154 *Id.*

155 *See Peña-Rodriguez*, 580 U.S. at 225 ("The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations.").

uncovering juror bias, the question is what to do about them. To overcome the fact that jurors are instructed not to reveal what is discussed during deliberations, jurors can also be instructed to come forward if any juror makes comments evincing racial bias. But as this Part discusses, there could be downsides to this solution. Regarding no-contact rules, courts could just get rid of them or relax them substantially. But as this Part will explain, it is not clear that this will be an effective means for uncovering juror bias. In other words, neither option will be the surefire fix to *Peña-Rodriguez*'s implementational problems.

A. Rewriting Non-Disclosure Instructions

A more proactive approach to uncovering juror racial bias would be to rewrite non-disclosure instructions to inform jurors that that while they generally should not disclose what is discussed during deliberations, they *should* report a fellow juror saying anything indicating racial animus.[156] The instruction would say that not only is it impermissible to allow racial bias to cloud deliberations, but that if racial bias surfaces, jurors should report it. With such an instruction, jurors would understand that considerations driven by racial bias are off limits and that they have a role to play in protecting against racial bias influencing the outcome. If so instructed, jurors would be primed to be on the lookout for when racial bias rears its ugly head. An instruction to come forward also has the added benefit of encouraging contemporaneous reporting, allowing the bias to be addressed in real time, as compared to post-verdict interviews, which can be conducted only after trial is (often long) over.[157]

But this solution raises several questions. First, what might this instruction look like? If jurors are simply instructed to report any instances of racial bias or animus, that leaves determining which behaviors might qualify up to the jurors' sensibilities. With such play in the joints, some jurors might be under-inclusive in their view of what qualifies as reportable racial bias, waiting for the most outlandish slur. Other jurors might be over-inclusive in their views and report benign remarks that have nothing to do with race. To help alleviate this problem, a judge could instruct jurors on what "counts" as racial bias or animus. But that type of line drawing can be difficult given "[t]he indeterminacy of these terms."[158] And if the judge or

156 *See* Samantha Saddler, Note, *A Defendant's Race as a Determinant of the Outcome of His Lawsuit*, 2019 U. ILL. L. REV. 1771, 1797–98 (2019) (proposing an instruction of this kind).

157 *See* Harawa, *Sacrificing Secrecy*, *supra* note 18, at 635–37 (discussing how defendants may spend years behind bars while litigation over juror bias makes its way through the courts).

158 R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1189–90 (2006) (noting disagreement as to what constitutes racial bias and what non-discrimination would look like).

the parties wanted to look to case law to help craft the instruction, they would find little help given that there are few *Peña-Rodriguez* cases to draw from—the very problem this instruction is trying to solve. Placing guardrails around the instruction to encourage jurors to report only *actionable* animus might well prove difficult.

The instruction solution also risks degrading the jury as a decisional body. Instructing jurors to report their fellow jurors may stifle the free flow of discussion and discourage jurors from reaching across divides. One of the long-understood values of jurors deliberating in secret is that secrecy promotes frank discussions.[159] The thought is that jurors can speak freely if they do not have to fear their words later being used against them. This freedom to speak one's mind can redound to the benefit of defendants. Jurors may be more willing to focus on the evidence and less on the optics in cases involving violent or politically unpopular crimes.[160] Or if they know their words will not come back to haunt them, jurors may be more willing to nullify in cases where the evidence might otherwise point toward guilt.[161] These dynamics could change if jurors now feel like they have to watch what they say for fear that a fellow juror might snitch on them.

If jurors are afraid that another juror might report them, they may also be less willing to engage with jurors of different backgrounds. Studies show that when juries are racially diverse, they engage in "longer, more thorough deliberations than all-White juries."[162] Jurors from different backgrounds bring their different perspectives to the deliberations, creating a "broader information exchange"; for example, Black jurors are more likely to surface issues of race.[163] A diverse set of jurors "can correct each other's mistaken

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159 *See* Tanner v. United States, 483 U.S. 107, 120–21 (1987) (explaining that the no-impeachment rule promotes "full and frank discussion in the jury room").

160 *See* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 296–97 (1993) (discussing whether jurors should be protected from media inquiries that might compel them to justify their choice to "convict[], acquit[], or [their inability] to agree," which, especially after unpopular verdicts, essentially "punish[es] jurors for doing their duty"); *see also* Courselle, *supra* note 129, at 218–19 (discussing how secrecy promotes jury independence).

161 *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715 (1995) (arguing in favor of race-based jury nullification in non-violent cases).

162 Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1030 (2003) (examining the results of experimental studies on racially-mixed juries); *see also* Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 884 (2023) (discussing the Sommers & Ellsworth article and its conclusions).

163 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) (analyzing the empirical influence of diversity in juries); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different

notions, broaden each other's perspectives, and suggest different ways of looking at the evidence."[164] And jury diversity is particularly important in cases involving defendants of color. Studies show that "white jurors are harsher with black defendants."[165] But this harshness is mitigated by the presence of jurors of color, because when juries are diverse, they are less likely to be predisposed towards guilt.[166]

The benefits of jury diversity flow from people with different backgrounds coming together, sharing their experiences, and challenging each other. But jurors may be reluctant to cross-racially congregate if there is a threat of being reported hanging over their heads. White jurors may be less willing to engage with jurors of color for fear that they may say something that may be perceived as racist.[167] And jurors of color may be less likely to share their views out of fear of being accused of making decisions based on race.[168] Thus, an instruction to report any instances of racial bias might lead to the jury racially balkanizing,[169] stymieing jurors from different backgrounds coming together to render a truly communal verdict, which would be a blow to jury decision-making more broadly.

What is more, instructing jurors to come forward could also cause jurors to suppress their racial prejudice that they otherwise might have expressed, which is a double-edged sword. On one hand, jurors may still harbor their racial prejudice and let it silently influence their decision-making.[170] And if the racial bias goes unexpressed, it will also go unremedied. On the other

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perspectives and thus engage in a vigorous and thorough debate.").

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

165 Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 85 (1993); *see also* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1628 (1985) (summarizing studies demonstrating that racial bias influences white jurors to treat Black defendants more severely).

166 Sommers, *supra* note 163, at 607; *see also* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71 (1993) ("[C]onviction rate studies show a decrease in conviction rates following changes in jury selection procedures that resulted in the inclusion of more black and Latino jurors."); Sommers & Ellsworth, *supra* note 162, at 1024 (explaining that consistent with the broader psychology on group decision-making, jury diversity could "trigger normative pressures regarding race by activating jurors' motivations to avoid prejudice").

167 *See generally* Gene Demby, *Is It Racist to Call Someone 'Racist'?*, NPR (Nov. 23, 2016), https://www.npr.org/sections/codeswitch/2016/11/23/503180254/is-it-racist-to-call-someone-racist [https://perma.cc/7XFK-5ZD4] (explaining that being called racist is "like the N-word for white people").

168 *See, e.g.*, United States v. Nucera, 67 F.4th 146, 159 (3d Cir. 2023) (where a defendant, a white police officer charged with committing a racial hate crime, raised a *Peña-Rodriguez* claim because some white jurors claimed they were bullied by Black jurors who commented that their race caused them to see the evidence differently).

169 *See* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997) (discussing jury balkanization in the context of pro-government and pro-defense jurors).

170 *See* Harawa, *Sacrificing Secrecy*, *supra* note 18, at 646.

hand, the instruction could reiterate to jurors not to let their biases influence their vote and would prevent jurors from sharing their biases, and thus tainting the views of other jurors.[171] Thus, in a world where *everyone* has biases, an instruction not to let them affect decision-making and a reminder that, if you express any bias, it will be reported, may encourage jurors to actively work to put their biases aside.

The above should be read to recognize that it is hard to fully anticipate the effects that an instruction urging jurors to report racial bias might have on the quality of deliberations. But if the legal system is relying on jurors to self-report racial bias to effectuate *Peña-Rodriguez*'s promise, the question remains: How would a juror know to come forward if they are never told to do so, especially when they are instructed to keep what happens in the jury room to themselves? Providing an instruction helps solve this problem, but in so doing, it may create others.

B. Relaxing or Eliminating No-Contact Rules

A less radical step that courts can take to better facilitate juror racial bias claims is to relax or eliminate juror no-contact rules. This solution could take different forms.

There is an intermediary position. For those courts and jurisdictions that want to continue to require that lawyers show good cause before interviewing jurors, they could adopt a standard holding that investigating claims of racial bias will always be sufficient good cause. The reasoning could go like this: The Supreme Court has emphasized time and again that racial discrimination in the administration of criminal law is "odious in all aspects."[172] And given how singularly odious racial discrimination is, the Supreme Court took the remarkable step of carving out a constitutional exception to an evidentiary rule that has a centuries-old pedigree, allowing courts to receive evidence of racial bias that surfaces during deliberations. Therefore, to ensure that this constitutional rule has teeth, a trial court can rule, as a matter of law or custom, that a lawyer will always have good cause to interview jurors about whether there were any expressions of racial animus during deliberations. And if the court wishes to protect jurors from potential harassment, it can restrict the attorney by ruling they can only ask jurors about racial bias, minimizing any potential intrusion.

There is a conservative position. A more cautious court could add one extra step and ask the lawyer to articulate why they feel the need to conduct the interviews. But if the court were to adopt this step, it must do so with the understanding that often, given the lack of information at their disposal, a

171 *Id.* at 646–47.

172 Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

lawyer's reason for why they wish to conduct interviews will be largely vibes-based. It could turn on the facts of the case (e.g., an alleged cross-racial crime or a mostly white jury deciding the fate of a defendant of color). It could be based on a juror's body language or facial expressions. Perhaps there were other indications of dissent or discord in the jury room, such as claims of deadlock or bullying. The point is that if courts were to adopt a requirement that a lawyer must articulate a reason for interviewing jurors about whether racial bias was expressed during deliberations, they should do so with the understanding that the lawyer, at that point, will likely not have the smoking-gun evidence of bias like that featured in *Peña-Rodriguez*. To hold this lack of evidence against the lawyer makes little sense when the whole point of the interview is to gather the information of racial bias that *Peña-Rodriguez* demands.[173]

And there is the more liberal position. Going further, a court could get rid of no-contact rules altogether. Many courts across the country do not regulate lawyers' contact with jurors after trial is over, and, in those jurisdictions, the skies have not fallen.[174] One would presume that most lawyers would use their discretion and good judgment in deciding when and how to interview jurors to ask about whether racial bias influenced the verdict. After all, lawyers are officers of the court who are strictly bound by rules of the court and professional conduct, in addition to any laws that might apply to lawyer-juror contact.[175] And if that is not enough to cause lawyers to moderate their behavior, there is also the reputational harm lawyers would face for any improper contacts. Thus, the simplest solution might be for courts not to regulate lawyers' post-verdict contact with jurors at all.[176]

Scholars have discussed and refuted some potential objections to more freely allowing juror interviews. For instance, Professor Kathryn Miller has explained that for those worried about the harassment of jurors, "practical

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173 One district court explained just that when granting a defendant leave to contact jurors. *See* Carlson v. Thornell, No. CV-23-00522, 2024 WL 3653058, at *3 (D. Ariz. Aug. 5, 2024) ("Moreover, requiring evidence of misconduct as a prerequisite to the authorization of post-verdict interviews of jurors creates an almost insurmountable hurdle that prevents criminal defendants from discovering constitutional error . . . .").

174 For instance, in *Peña-Rodriguez*, the United States represented that roughly "two-thirds of federal districts . . . have rules that prohibit attorneys from contacting jurors except upon prior permission of the court (which can often be granted only based on a showing of cause)." Brief for the United States as Amicus Curiae Supporting Respondent at 35, Peña-Rodriguez v. Colorado, 580 U.S. 206 (2017) (No. 15-606). This means by the government's own calculations that one-third of federal district courts do not have such restrictions, and the government did not claim that those districts were in disarray as a result.

175 *See* Miller, *supra* note 131, at 162. For interesting discussions of what exactly it means for lawyers to be officers of the court, see Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989). *See also* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005) (same).

176 *See* Miller, *supra* note 131, at 196–97.

and ethical considerations" largely curb those concerns.[177] For those who worry that interviews might impede free-flowing deliberations, "there are no data" to support the notion that jurors will censor themselves out of fear that one day they could be asked questions about what was discussed during deliberations, not to mention that jurors themselves can (and do) publicly discuss deliberations.[178] And for those who worry about finality, *Peña-Rodriguez* largely took this justification off the table by creating an exception to the no-impeachment rule that necessarily thwarts finality.[179]

Let us assume, then, that more freely allowing juror interviews to investigate potential racial bias is a solution that also largely preserves the integrity of the jury. The question is, whatever form this solution takes, will it be effective at uncovering juror racial bias? Maybe not.

There are practical limitations to relying on post-verdict juror interviews as the primary mechanism for uncovering juror bias. First, defense lawyers must have the capacity to conduct the interviews. As has been long documented, many public defender "offices are mired in the entrenched crisis of underfunding, leaving them treading water and, far too often, drowning."[180] The vast majority of criminal defendants, both state and federal, are represented by public defenders or more usually, court-appointed lawyers.[181] And indigent defense services across the country are often underfunded to the point that lawyers are either unable or not incentivized to

177 *Id.* at 161.

178 *Id.* at 166–67.

179 *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 209 (2017). Indeed, this was one of the dissent's main concerns in *Peña-Rodriguez*. *See id.* at 254 (Alito, J., dissenting). Professor Nicole Cásarez also did an empirical study of juror post-verdict comments and found that concerns about juror interviews to be overblown. *See* Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 507 (2003) ("The predicted horrors associated with post-verdict juror interviews have not materialized.").

180 Vincent M. Southerland, *Public Defense and an Abolitionist Ethic*, 99 N.Y.U. L. REV. 1635, 1667 (2024) (explaining that chronic structural underfunding leaves public defender offices overwhelmed and without the investigative bandwidth to take on additional tasks such as conducting post-verdict juror interviews); *see also* Alexis Hoag-Fordjour, *White Is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 774 (2023) (noting that structural resource shortages constrain public defenders' ability to take on added tasks); Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312–15 (2013) (noting that many public defender offices are chronically underfunded, limiting their ability to investigate potential juror bias).

181 *See* Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 205, 209–10 (2023); *Other Judiciary Entities – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/data-news/reports/handbooks-manuals/a-journalists-guide-federal-courts/other-judiciary-entities-journalists-guide [https://perma.cc/TC43-6UUN] (last visited Nov. 20, 2025); NAT'L LEGAL AID & DEF. ASS'N, AT WHAT COST? FINDINGS FROM AN EXAMINATION INTO THE IMPOSITION OF PUBLIC DEFENSE SYSTEM FEES 10 (2022), https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf? [https://perma.cc/8E4G-CCAU].

provide the baseline level of constitutional representation,[182] which is already far below the bar of what *good* criminal defense looks like.[183]

If many lawyers delivering indigent defense services are already laboring under impossible conditions, there is no reason to think that they would also be able to engage in the timely enterprise of conducting post-verdict jury interviews for every case they try. Doing juror interviews correctly "require[s] the interviewer to build a rapport with the juror, which requires the interviewer to spend hours, if not days, with a juror before that juror may reveal to the interviewer what happened during deliberations."[184] For these reasons, juror interviews are often not conducted until the post-conviction phase, and even then, are usually only conducted in capital cases.[185] To expect lawyers (or their teams, if they are lucky enough to have one) to conduct juror interviews in the mine-run of criminal cases is to ignore the state of criminal defense in America.

In short, relying on juror interviews to uncover juror racial bias is likely to be an avenue available only to the wealthiest and well-resourced criminal defendants, and perhaps defendants represented by well-resourced public defense offices. Because defendants of color are more likely to be indigent than their white counterparts,[186] that means white defendants—i.e., those who often have less to worry about when it comes to jurors' racial bias[187]—will be those most able to avail themselves of juror interviews as a mechanism for uncovering racism. There would need to be wide-scale investment in indigent defense systems if juror interviews are ever to be an effective means of uncovering juror racial bias. Given that defense systems are largely not equipped to provide *the basics* of effective representation, an

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182 Alexis Hoag-Fordjour, *Universal Public Defense*, 60 HARV. C.R.-C.L. L. REV. 661, 686 (2025).

183 *See* Hoag-Fordjour, *supra* note 180, at 779 (explaining that the current constitutional standard for effective representation "acts as an empty vessel designed to protect the profession").

184 Harawa, *Sacrificing Secrecy*, *supra* note 18, at 635.

185 *See* Miller, *supra* note 131, at 146–47; Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 742 (2008) ("Rapport with clients and witnesses is crucial to the representation of clients facing the death penalty for the same reasons that it is essential to effective doctor-patient relationships.").

186 *See generally Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system [https://perma.cc/585U-BRAG] (describing this phenomenon).

187 "Research in the field of social psychology over the past four decades repeatedly demonstrates that most individuals of all races have implicit, i.e., unconscious, racial biases linking Blacks with criminality and Whites with innocence." L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73, 75 (2017). *See also* Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 283 (2010). There is no data showing that white defendants experience systemic racial discrimination.

influx of resources that allow for routine juror interviews seems highly unlikely.

But even assuming all defendants have access to post-verdict juror interviews, there is still the need for the juror to willingly disclose to the interviewer that racial animus played a role in deliberations. If we operate under the belief that it is difficult to call someone a bigot, there is no reason to believe that this difficulty dissipates in an interview with a lawyer.[188] A juror may be reluctant to tell a defense lawyer that someone said something racist during deliberations, especially if they did nothing about it in the moment, or if they strongly believe that the defendant was guilty. That same juror may also get the sense (if they do not outright ask) that revealing there was racial bias expressed during deliberations may mean that they will be further entangled in the case, including potentially being haled back to court to be examined by both sides under the withering eye of the judge.[189] With all this looming, a juror may sit tight-lipped even if a defense lawyer (or their agent) shows up at their door to ask them about what happened during deliberations.

Taking stock, it would be relatively easy and non-disruptive for courts to relax juror no-contact rules, thereby more freely allowing lawyers the ability to interview jurors about potential racial bias. This approach certainly carries less unknown risk than that which comes with instructing jurors to come forward. But easy does not equal effective.[190] Relaxing no-contact rules alone will likely not be the magic key to unlocking *Peña-Rodriguez*'s potential.

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There is a tension in attempting to protect the jury as a deliberative body that depends on secrecy while at the same time ensuring jurors are not expressing racial animus while deliberating. The approaches outlined above to uncovering juror racial bias—rewriting non-disclosure instructions and relaxing or eliminating no-contact rules—reflect this tension. One solution relies on jurors policing one another, which has the potential to undermine the jury as an institution that depends on candor. The other solution relies on post-hoc investigation and adjudication, a solution constrained by practicalities. The lack of a clear fix sets the groundwork for Part IV, which argues that if courts wish to truly address the problem of racial bias in jury

188 *See* Harawa, *Sacrificing Secrecy*, *supra* note 18, at 635.

189 *See id.* at 636. ("Even if a juror reveals to the defense that someone said something biased, the government will most likely contest that account by attacking either the lawyer's or the juror's credibility."); *see also supra* note 86 (providing examples of where courts remanded for evidentiary hearings on *Peña-Rodriguez* claims).

190 *See* Daniel S. Harawa, *Complicating Racial Justice Narratives: The Peremptory Elimination Debate*, 105 B.U. L. REV. 1731, 1739 (2025) (warning against using "simple measures to solve the deeply entrenched, perhaps intractable problem of racial injustice in America").

deliberations, it will be necessary to experiment with ways to address the structural issues that prevent parties from discovering the bias in the first place. But as Part IV will warn, in addressing these barriers, it is also important to consider what is gained and what is lost along the way.[191]

IV
TRIAL COURTS AS LABORATORIES OF RACIAL JUSTICE

With two structural barriers to *Peña-Rodriguez* claims identified, and two less-than-perfect solutions proposed, which road should courts take if they wish to better facilitate the discovery of juror racial bias? The upshot of addressing this problem is that it does not require a singular solution. In fact, the very architecture of the justice system counsels against a one-size-fits-all approach. Trial judges enjoy broad discretion in setting the rules and norms of their courtrooms.[192] Jury instructions are a creature of local practice.[193] And judges are mostly free to regulate when and how parties interact with jurors.[194]

At first blush, this diffuse nature of authority may seem like a hindrance to effectively addressing the structural impediments to juror racial bias claims. Usually, any discussion of diffuse authority and experimentation calls to mind federalism. And as Professor Heather Gerken notes, "those interested in racial justice have long been skeptical of federalism"given the "strained" relationship "between federalism and equal protection."[195] This is so because "preservation of states' rights" often frustrated "the federal government's [historical] goal of promoting racial equality."[196]

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191 *See id.* at 56 ("In adopting a remedial measure in the name of 'racial justice,' we must recognize the tradeoffs being made and think carefully about who is potentially being left behind.").

192 *See, e.g.*, Nixon v. State, 707 S.W.3d 279, 284 (Tex. Crim. App. 2024), *cert. denied*, 145 S. Ct. 1448 (2025) ("[T]rial judges have broad discretion over courtroom practices."); State v. Kahler, 410 P.3d 105, 117 (Kan. 2018) ("The trial judge has broad discretion in controlling the courtroom proceedings."); *Ex parte* Malone, 12 So. 3d 60, 62 (Ala. 2008) ("Trial judges are vested with broad discretion in determining courtroom procedure . . . ."); Czech v. State, 945 A.2d 1088, 1095 (Del. 2008) ("It is well-settled that a trial judge is responsible for management of the trial and is vested with broad discretion to perform that function."); Commonwealth v. Berrigan, 501 A.2d 226, 234 (Pa. 1985) ("[T]rial judges are vested with broad discretion in setting and enforcing the standards of proper conduct for all those who seek to attend judicial proceedings before them.").

193 And while most jurisdictions have pattern jury instructions, judges are free to craft instructions—often with the help of the parties—to fit the case before them. *See, e.g.*, Michael D. Cicchini, *Criminal Jury Instructions: A Case Study*, 84 ALBANY L. REV. 579, 597 (2021) (describing the wide leeway judges have in crafting jury instructions and that judges are "never bound" by pattern instructions).

194 *See, e.g.*, A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1571 (1991) (discussing federal district courts' ability to fashion their own local rules).

195 Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 48–49 (2010).

196 Medha D. Makhlouf, *Laboratories of Exclusion: Medicaid, Federalism & Immigrants*, 95

This Essay does not quarrel with this account of federalism.[197] Still, it argues that here, diffuse authority and localized decision-making can be harnessed as a feature.

There are tens of thousands of trial judges in courthouses across the United States.[198] That means there are tens of thousands of laboratories in which to experiment with how best to uncover potential instances of juror racial bias.[199] Courts can and should use this discretion to engage in localized innovation aimed at unearthing and then addressing juror racial bias.[200] If racial prejudice in the jury system "must be confronted," as the Court in *Peña-Rodriguez* insisted,[201] then courts not only have the power, but the obligation to take steps toward meaningful confrontation. Indeed, this obligation could not be clearer given that *Peña-Rodriguez* expressly left the operationalization of its standard to "local court rules."[202]

Individualized experimentation rather than a top-down solution makes particular sense at the trial court level. Trial judges are not only closer to the facts, but they are also in closer proximity to the community.[203] They interact

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N.Y.U. L. REV. 1680, 1752 (2020). Professor Medha Makhlouf elaborates that "federalism arrangements regulating public accommodations, voting, housing, healthcare, and other areas were proxies for the preservation of states' rights to discriminate based on race." *Id.* As another group of scholars explains: "People of color have long been disproportionately disadvantaged by federalism, and the core problems of racial inequality still find their core in questions of federalism." Lindsay F. Wiley, Elizabeth Y. McCuskey, Matthew B. Lawrence & Erin C. Fuse Brown, *Health Reform Reconstruction*, 55 U.C. DAVIS L. REV. 657, 719 (2021) (alterations and internal quotations omitted).

197 Speaking directly of federalism's effect on the criminal legal system, political scientist Lisa Miller argues that "the nature of the American federal system makes it difficult to see disparities in crime, violence, and punishment as linked to broader socioeconomic patterns of racialized policymaking . . . ." Lisa L. Miller, *The Invisible Black Victim: How American Federalism Perpetuates Racial Inequality in Criminal Justice*, 44 L. & SOC'Y REV. 805, 808 (2010).

198 Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1538 (2006) ("There are nearly 30,000 state trial judges, sitting in more than 3000 courthouses."); *Status of Article III Judgeships – Judicial Business 2023*, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states/judicial-business-2023/status-article-iii-judgeships-judicial-business-2023 [https://perma.cc/24RN-V4RX] (noting there are 677 authorized federal district court judgeships).

199 *Cf.* Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2195–96 (2022) ("Our federal system of government is commonly thought to encourage experimentation" in that it "allows states with different circumstances and different preferences to adopt different approaches to the myriad problems they confront."); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 398 (1997) (explaining the innovative value of federalism).

200 *See* Harawa, *The False Promise of* Peña-Rodriguez, *supra* note 6, at 2159 (urging "courts to adopt a more robust framework to address juror racial bias claims").

201 Peña-Rodriguez v. Colorado, 580 U.S. 206, 229 (2017).

202 *Id.* at 226.

203 *Cf.* Peter B. Rutledge, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. CHI. L. REV. 1311, 1322–24 (1996) (explaining that appellate courts defer to trial courts' factual findings because they are closer to the facts); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58

with jurors and have intimate insight into what jury service looks like in their jurisdiction. They are therefore well positioned to test different methods for surfacing juror racial bias. Whether through creative instructions, revised post-verdict procedures, or reformed contact rules, trial courts can serve as the proving ground for reforms that can be tweaked, scrapped, or, if successful, adopted more broadly. And while this may mean that different approaches may be adopted in different courtrooms, there is already much variation in trial practice across the country, and indeed, within jurisdictions.[204] In other words, in this context, trial courts can serve as laboratories of racial justice.

Different jurisdictions, courtrooms, and cases may call for different approaches.[205] Some judges might adopt model instructions that affirmatively tell jurors to report instances of racial bias, while others might work with the parties to tailor an instruction to the case before them. And for those judges looking for inspiration, they might start with the instruction federal capital juries receive during the sentencing phase of trials.[206] That instruction provides that jurors "shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim."[207] A judge could provide this instruction verbatim, or limit it to race, color, and ethnicity to more closely hew to the facts of *Peña-Rodriguez*, or tailor the instruction to better fit the facts before them. The judge could then instruct the jury that if, during the course of deliberations, a juror makes a comment that seemingly goes against this instruction, the juror who heard the offending remark should alert the court. The judge can then voir dire both the juror who came forward and the juror who was alleged to have made the remark (and any other juror as necessary) to learn exactly what was said and determine what next steps are necessary.

Some judges, rather than taking the instruction route, may opt instead to get rid of no-contact rules. This solution, too, can take many forms. Some judges may choose to adopt standing orders that presume good cause for

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HARV. L. REV. 70, 79–80 (1944) (making a similar observation).

204 For example, many trial judges have their own personalized standing orders. *See, e.g.*, *United States District Judges*, S.D.N.Y., https://www.nysd.uscourts.gov/judges/district-judges [https://perma.cc/56ZT-65AW] (last visited Nov. 20, 2025) (where each district judges' profile has a link to their own personalized rules or procedures).

205 In addition to experimenting in the criminal courtroom, experimentation might be necessary in civil cases, too, since there is no reason to think that they are immune from bias. *See, e.g.*, Harden v. Hillman, No. 15-CV-594, 2022 WL 3160735, at *9 (W.D. Ky. Aug. 5, 2022) (emphasizing that civil cases also warrant differing approaches, including specialized hearings, because they, too, confront risks of juror bias).

206 Federal capital cases are bifurcated, such that there is a guilt phase—where a jury decides culpability, and a sentencing phase, where the jury decides whether to sentence the defendant, if found guilty of capital murder, to death. *See* 18 U.S.C. § 3593(b).

207 *Id.* § 3593(f).

juror interviews about racial bias.[208] Others may set up interview protocols tailored to inquiries into racial bias.[209] Some court systems might open it up to the public, providing notice, calling for comments, and holding hearings on how best to approach the issue of juror racial bias.[210] And of course, a judge is not limited to these solutions or just one solution. There is a vast menu of reforms that courts can choose from to begin to address the problem of juror racial bias.

To be sure, not every innovation will work, and even those that do may carry negative costs. It is therefore critical that courts that adopt new practices and procedures closely monitor their results. This monitoring can be both quantitative: keeping track of what solution was tried in which case and monitoring whether it has led to any appreciable change in the number of juror bias claims raised. And the monitoring can also be qualitative, with judges and other court staffs talking to lawyers and jurors to get a sense of whether a tried solution affected behavior.

Fortunately, because the experimentation will happen at the local level, the costs will be contained. For example, if a judge tries to relax no-contact rules in a particular case and it leads to a juror being harassed, that judge can create stricter guidelines about juror contact that will limit any spillover effect. Or if a judge instructs the jury to come forward and jurors start reporting things far afield from what would count as actionable racial bias, a judge can work to refine the instruction to better inform the jury of their duty without affecting any other jury.

And importantly, inaction has costs, too—costs borne disproportionately by defendants of color, who are more likely to be harmed by juror racial bias and less likely to be represented by lawyers with the time or resources to uncover it. A legal system that claims to abhor racial prejudice cannot allow localized structures that are easily changed to stand in the way of the work of racial justice.

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We are closing in on a decade since *Peña-Rodriguez* was decided, and if you search Westlaw, you will find fewer than forty cases—state and federal—that resolved juror racial bias claims on their merits.[211] Given that

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208 *See supra* Section III.B.

209 *See supra* Section III.B.

210 *See, e.g.*, Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1718–29 (2023) (discussing common deliberative democratizing reforms, including public hearings and notice and comment, but also discussing their shortcomings in being truly representative); *see also* Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 101, 103 (2012) (discussing, in the administrative context, how notice and comment procedures often exclude marginalized persons and communities).

211 *See supra* note 17 and accompanying text.

there are over 150,000 criminal jury trials across the country each year,[212] it seems fair to say that we are not catching all the bias out there. But even if we are, there is no harm in removing the barriers to uncovering potential juror racial bias if in fact there is nothing to see. Courts have plenty of options for how to address the structural impediments that prevent them from learning about jurors expressing racial bias. And it is important for courts to address these barriers to ensure people are convicted based on what they have done and not what race they happen to be, especially because race factors into the criminal law adjudicatory process in myriad other ways.[213]

CONCLUSION

In *Peña-Rodriguez v. Colorado*, the Supreme Court professed to be addressing the pernicious problem of racial bias in jury deliberations.[214] At the same time, however, the Court left untouched the evidentiary rules and procedural structures that make discovering such bias so difficult. Jurors are told not to discuss what happens in the jury room; they are rarely instructed that racial bias is off-limits; and they are shielded from inquiry by no-contact rules that leave lawyers unable to investigate whether racial bias had any role in a trial's outcome. In this way, *Peña-Rodriguez* invites the remediation of racial bias without providing the tools necessary to find it.

This Essay hopes to provide a roadmap for unlocking some of *Peña-Rodriguez*'s promise. Trial courts across the country have the power to experiment with ways to uncover juror racial bias. Whether through explicit jury instructions or more permissive rules on juror contact, courts can find context-sensitive ways to give *Peña-Rodriguez* force. These reforms need not be universal; the structure of the legal system allows virtually every court to test what works. And testing is key. If the legal system is serious about confronting racial prejudice in the jury system, then it must create the conditions that allow racial bias to be detected in the first place.

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212 Avani Mehta Sood, *Reaching a Verdict: Empirical Evidence of the Crumbling Conventional Wisdom on Criminal Verdict Format*, 98 N.Y.U. L. REV. 1265, 1273 & n.24 (2023).

213 *See* Buck v. Davis, 580 U.S. 100, 123 (2017) (finding ineffective assistance where counsel elicited race-based violence predictions); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 (discussing racial disparities in various stages of the criminal law enforcement process).

214 *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 214 (2017) ("This Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of *racial bias*." (emphasis added)).