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**THE NEW *BATSON*: OPENING THE DOOR OF THE JURY  
DELIBERATION ROOM AFTER *PEÑA-RODRIGUEZ v. COLORADO***

JAROD S. GONZALEZ\*

I. INTRODUCTION

Secrecy in jury deliberations is an important aspect of the American jury system. In both criminal and civil jury trials, what goes on in the jury deliberations room generally stays in the jury deliberations room.<sup>1</sup> It is very difficult to impeach a jury verdict and get a new trial based on internal deliberations—what jurors say to each other during the course of formal deliberations.<sup>2</sup> There are very good reasons for the no-impeachment rule: the need for finality in jury determinations and for jurors to have free and open discussions among themselves about the case, to name a few.<sup>3</sup> Yet, a strict application of the no-impeachment rule could be problematic. There is a valid countervailing concern that improper juror statements or behavior during jury deliberations could undermine the fairness of a trial when such statements influence the verdict, perhaps implicating due process, equal protection, and fundamental justice concerns.<sup>4</sup> Recognizing that the jury system as a human

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1. *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (recognizing that the weight of authority in federal and state jurisdictions is that a juror cannot impeach his own verdict because of the public injury that would occur if jurors were allowed to testify concerning what happened in the jury room).

2. *Sellers v. United States*, 401 A.2d 974, 981 (D.C. 1979) (“Courts consistently have exercised great caution in allowing jurors to impeach their verdicts.”).

3. The rule that a juror may not impeach his own verdict once the jury has been discharged was formulated “to foster several public policies: (1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision-making body.” *Gov’t of Virgin Islands v. Gereau*, 523 F.2d 140, 148 (3d Cir. 1975).

4. *McDonald*, 238 U.S. at 269 (noting that the no-impeachment rule could recognize exceptions in the “gravest and most important cases” where exclusion of juror testimony might violate principles of justice); *United States v. Reid*, 53 U.S. 361, 366 (1852) (“[C]ases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.”).

institution cannot, as a practical matter, guarantee every party a perfect trial,<sup>5</sup> should the generally closed-door to the jury deliberations room be opened after the trial for consideration of jury misconduct or error that occurred during the jury deliberations?

As a result of the recent United States Supreme Court's decision in *Peña-Rodriguez v. Colorado*, the closed-door to the jury deliberations room has been constitutionally cracked open to consider post-trial complaints of juror expressions of racial bias during deliberations as a basis for a new trial.<sup>6</sup> In *Peña-Rodriguez*, the Court held that:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.<sup>7</sup>

The new *Peña-Rodriguez* rule constitutionalizes a racial bias exception to the no-impeachment rule that had previously been a matter of policy choice among the various federal and state jurisdictions.<sup>8</sup>

Taking the law as it now stands, this Article explores various issues that are likely to arise in all jurisdictions in the wake of the *Peña-Rodriguez* decision. First, this Article examines the history of the no-impeachment rule and the various approaches to this rule from an evidence perspective in federal and state jurisdictions. Second, the Article explains the *Peña-Rodriguez* decision that makes a constitutional exception to this rule in the context of expressions of racial bias during jury deliberations in criminal cases and evaluates the possible expansion of this holding to civil cases. Third, the Article explores the future development of additional categorical exceptions to the no-impeachment rule such as gender bias and religious bias that are protected under the Constitution based on the Court's reasoning in *Peña-Rodriguez*. Finally, the Article considers procedures and standards for implementing the *Peña-Rodriguez* decision and determining whether to grant a new trial based on expressions of racial bias during jury deliberations. The fundamental point of this Article is that the *Peña-Rodriguez* holding is likely to extend to civil cases, and exceptions beyond race. Additionally, procedural rules will be developed in a manner that is consistent with how the constitutional *Batson* exception to peremptory challenges has developed over the last thirty years.

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5. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. 2010) (en banc) (“While every party is entitled to a fair trial, as a practical matter, our jury system cannot guarantee every party a *perfect* trial.”).

6. 137 S. Ct. 855, 879 (2017) (Alito, J., dissenting).

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

8. *Id.* at 865–66.

## II. HISTORY OF THE NO-IMPEACHMENT RULE

Every state and federal jurisdiction follows to a substantial degree the concept that jury verdicts cannot be impeached based on what occurs during formal jury deliberations.<sup>9</sup> This concept originated from the English common law rule that jurors could not impeach their verdict through affidavit or live testimony.<sup>10</sup> The original English common law “Mansfield” rule was a strict rule that prohibited jurors from testifying about their subjective mental processes or events that occurred during deliberations.<sup>11</sup> American jurisdictions have tended to follow the Mansfield rule in general but with three slightly different approaches. First, Texas applies the “outside influence” rule.<sup>12</sup> This approach generally protects all juror statements and events during deliberations from impeachment of the verdict but permits new trials based on outside influences—like the threatening of jurors—that affect the integrity of the jury’s decision-making process.<sup>13</sup> In general, an outside influence has to come from a source outside the formal deliberation process such as a nonjuror third party.<sup>14</sup> Second, the federal rules approach permits exceptions to the no-impeachment rule for

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9. *Id.* at 865 (“Some version of the no-impeachment rule is followed in every State and the District of Columbia.”).

10. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

11. *Peña-Rodriguez*, 137 S. Ct. at 863 (“The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations.”).

12. TEX. R. CIV. P. 327(b) (“A juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.”); TEX. R. EVID. 606(b) (“(1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters. (2) *Exceptions*. A juror may testify: about whether an outside influence was improperly brought to bear on any juror; or to rebut a claim that the juror was not qualified to serve.”).

13. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 370, 373–74 (Tex. 2000) (recognizing that comments made by one juror to another juror during deliberations are not outside influences); *Cooper Tire & Rubber Co. v. Mendez*, 155 S.W.3d 382, 413 (Tex. Ct. App. 2004), *rev’d on other grounds*, 204 S.W.3d 797 (Tex. 2006) (recognizing that a juror looking up the definition of the term “negligence” in a dictionary and communicating the definition with fellow jurors during jury deliberations is not an outside influence).

14. *See* Editorial *Caballero v. Playboy Enter.*, 359 S.W.3d 318, 324 (Tex. Ct. App. 2012), *cert. denied*, No. 12-0194 2012 Tex. LEXIS 948 (2012). *But see* *McQuarrie v. State*, 380 S.W.3d 145, 151, 154 (Tex. Crim App. 2012) (noting that information does not have to originate from a non-juror to be considered an outside influence).

testimony about events extraneous to the deliberative process.<sup>15</sup> This includes outside influences such as juror bribing but also broadens out to include possible “extraneous prejudicial information” such as unauthorized juror views of crime scenes, juror experiments on the evidence, juror consultation, and juror consideration of dictionaries and newspapers.<sup>16</sup> Under this approach, extraneous prejudicial information could presumably originate from the jurors themselves without any connection to a third party. Third, some jurisdictions follow the so-called “Iowa” rule that prevents jurors from testifying about their own subjective beliefs, thoughts, or motives during deliberations but allows jurors to testify about objective facts and events that occurred during deliberations based on the idea that jurors could corroborate that testimony.<sup>17</sup> Of these three different approaches, the Texas outside influences rule appears to remain closest to the original common law Mansfield rule.<sup>18</sup> The federal rules approach also stays close to the Mansfield rule.<sup>19</sup> Both of these approaches encourage full and frank discussions among jurors during deliberations and try to ensure that jurors will not have to provide testimony about their verdict or otherwise be bothered by litigants seeking to challenge the verdict. The Iowa rule is the most flexible approach and errs on the side of protecting litigants from jury misconduct during deliberations.<sup>20</sup> Within these various approaches, prior to *Peña-Rodriguez*, at least sixteen jurisdictions recognized an exception to the no-impeachment rule

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15. FED. R. EVID. 606(b) (“(1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters. (2) *Exceptions*. A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear on any juror; (C) or a mistake was made in entering the verdict on the verdict form.”).

16. See *Peña-Rodriguez*, 137 S. Ct. at 863 (recognizing that the federal approach to the no-impeachment rule allowed juror “testimony about events extraneous to the deliberative process such as reliance on outside evidence” like newspapers and dictionaries or personal investigation of the facts); *United States v. Duncan*, 598 F.2d 839, 866 (4th Cir. 1979), *cert. denied*, 444 U.S. 871 (1979) (recognizing a jury’s unauthorized use of a dictionary is misconduct but not prejudicial *per se*); *United States v. Williams-Davis*, 821 F. Supp. 727, 740 (D.D.C. 1993) (recognizing a juror’s unauthorized visit to a crime scene is extraneous information under Federal Rule of Evidence 606(b)); *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 213 (6th Cir. 1982) (recognizing that juror experiment is extraneous information under Federal Rule of Evidence 606(b)).

17. *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 212 (Iowa 1866).

18. *McQuarrie*, 380 S.W.3d at 163–64.

19. *Peña-Rodriguez*, 137 S. Ct. at 863 (noting that the federal approach stayed closer to the original Mansfield rule than the Iowa rule).

20. *Id.* (characterizing the Iowa rule as a flexible version of the no-impeachment rule).

for post-verdict juror testimony that racial bias was a factor in jury deliberations.<sup>21</sup>

### III. THE NEW *BATSON*: EXTENDING *PEÑA-RODRIGUEZ* TO CIVIL CASES IN FEDERAL AND STATE COURTS

#### A. *The Peña-Rodriguez v. Colorado Decision*

Prior to *Peña-Rodriguez*, each jurisdiction considered whether to make an exception to the no-impeachment rule for juror testimony about a juror's alleged racial bias expressed during deliberations. The *Peña-Rodriguez* Court held that where a juror clearly states or indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment jury trial guarantee requires that a trial court consider the juror's statement and any resulting denial of such guarantee to the criminal defendant.<sup>22</sup> After *Peña-Rodriguez*, federal criminal defendants and state criminal defendants are now entitled to impeach a jury's verdict with juror testimony about a juror's alleged racial bias.<sup>23</sup> The exception applies to state criminal defendants because the Fourteenth Amendment makes the Sixth Amendment applicable to the states.<sup>24</sup>

While perhaps atypical, history is replete with instances where jurors have deliberated and then returned a verdict based on silly, improper, mischievous, and otherwise unfair reasons. Indeed, the origins of the Mansfield rule derived from a case where the jury came up with their verdict through a game of chance.<sup>25</sup> Deciding a verdict through a game of chance is silliness and presents a result that presumably nobody would try to defend as "fair" in a generic sense. But there is nothing to do about this under the no-impeachment rule.<sup>26</sup> In cases prior to *Peña-Rodriguez*, the Supreme Court had refused to recognize a Sixth Amendment right for criminal defendants to impeach a verdict based on clear flaws, irregularities, and misconduct in the jury decision-making process

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21. *Id.* at 871 (appendix listing of the cases); *Kittle v. United States*, 65 A.3d 1144, 1154–56 (D.C. 2013); *State v. Brown*, 62 A.3d 1099, 1110 (R.I. 2013); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc); *State v. Hidanovic*, 747 N.W.2d 463, 472–74 (N.D. 2008); *State v. Santiago*, 715 A.2d 1, 14–22 (Conn. 1998); *Fisher v. State*, 690 A.2d 917, 919–21, 920 n.4 (Del. 1996); *State v. Jackson*, 912 P.2d 71, 80–81 (Haw. 1996); *Powell v. Allstate Ins. Co.*, 652 So.2d 354, 357–58 (Fla. 1995); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991); *Spencer v. State*, 398 S.E.2d 179, 184–85 (Ga. 1990); *People v. Rukaj*, 506 N.Y.S.2d 677, 679–80 (N.Y. App. Div. 1986); *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 689–91 (Wisc. 1982); *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980); *Seattle v. Jackson*, 425 P.2d 385, 389 (Wash. 1967); *State v. Levitt*, 176 A.2d 465, 467–68 (N.J. 1961).

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

23. *Id.* at 871 (Thomas, J., dissenting).

24. *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968).

25. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

26. *McDonald v. Pless*, 238 U.S. 264, 268 (1915).

because to do so would subject the jury system to a level of scrutiny it could simply not withstand.<sup>27</sup> In *Tanner v. United States*, the Court denied a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial.<sup>28</sup> In *Warger v. Shauers*, the Court denied a Sixth Amendment exception for evidence that the jury foreperson had failed to disclose a pro-defendant bias during voir dire.<sup>29</sup> In *McDonald v. Pless*, the Court denied an exception where the jury allegedly improperly calculated a damages award through compromise by averaging the numerical damages submitted by each member.<sup>30</sup>

Distinguishing all of these cases, the *Peña-Rodriguez* majority reasoned that racial bias in the administration of criminal justice by juries is both wrong and systemically worse than other types of improper decision-making committed by juries in other cases.<sup>31</sup> Although the sorts of jury behavior in *Tanner*, *Warger*, and *McDonald* were improper, they were anomalies and distinct from the sort of pernicious threat to the equal administration of justice posed by racial discrimination committed by jurors.<sup>32</sup> In the prior cases, the Court stressed that sufficient safeguards existed to protect against improper jury conduct during deliberations and precluded the need for constitutional exceptions.<sup>33</sup> For example, voir dire permits the court and attorneys to examine venire members for impartiality.<sup>34</sup> Jurors can report misconduct by other jurors to the court before the verdict and judges can remedy the situation through additional instructions or perhaps dismissal of a juror and appointment of an alternate juror.<sup>35</sup> Evidence of jury misconduct from nonjuror sources can be used to impeach the verdict even after the trial is over.<sup>36</sup> Even so, the *Peña-Rodriguez* Court determined that these safeguards were not enough to avoid the creation of the exception for racial bias.<sup>37</sup> Questions about racial attitudes or bias to venire members during voir dire could fail to disclose such bias, exacerbate any prejudice that does exist, and might in fact harm jury deliberations.<sup>38</sup> According to the majority, an accusation of racial bias is more stigmatizing than other types of alleged jury misconduct and so jurors would be less inclined to report the alleged racial bias of other jurors during the deliberations.<sup>39</sup> In the words of the

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27. *Peña-Rodriguez*, 137 S. Ct. at 874, 884 (Alito, J., dissenting).

28. 483 U.S. 107, 122, 125–26 (1987).

29. 135 S. Ct. 521, 529–30 (2014).

30. 238 U.S. at 265, 269.

31. *Peña-Rodriguez*, 137 S. Ct. at 865–68.

32. *Id.* at 868–69.

33. *Id.* at 866.

34. *Id.* 866, 868–69.

35. *Id.*

36. *Peña-Rodriguez*, 137 S. Ct. at 866.

37. *Id.* at 868–69, 871.

38. *Id.* at 868–69.

39. *Id.*

Court, “it is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.”<sup>40</sup> At the end of the day, the *Peña-Rodriguez* majority concluded that a constitutional exception for post-verdict impeachment of criminal jury verdicts due to alleged racial bias by juries is needed “to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.”<sup>41</sup>

Justices Roberts, Alito, and Thomas, the dissenters in *Peña-Rodriguez*, disagreed with the Court’s holding.<sup>42</sup> Justice Thomas looked to the common law history and found there was no common law right to impeach a verdict with juror testimony of juror misconduct at the time of the ratification of the Sixth Amendment in 1791 or the ratification of the Fourteenth Amendment in 1868.<sup>43</sup> Consequently, there was no constitutional basis for creating the racial bias exception.<sup>44</sup> Justice Alito argued that the political process is the appropriate place to decide whether to adopt such an exception and noted that the federal procedure and the overwhelming majority of state jurisdictions have a strong no-impeachment rule that does not provide for a racial bias exception.<sup>45</sup> He pointed out the critical interests of finality and the promotion of freedom in juror discussions and decision-making advanced by a strong no-impeachment rule.<sup>46</sup> He criticized the majority’s failure to adequately explain how the safeguards to protect against juror misconduct in deliberations are less effective with respect to racial bias than with respect to other forms of misconduct.<sup>47</sup> Moreover, he contended the majority’s holding provides no way to make appropriate distinctions between different types of juror misconduct or bias, some of which would implicate a party’s Sixth Amendment right and some of which would not.<sup>48</sup> According to Justice Alito, the majority’s bottom line is the Constitution is less tolerant of racial bias than other forms of juror misconduct.<sup>49</sup> But he contended that neither the text or history of the Sixth Amendment, nor the nature of the right to an “impartial jury,” indicate that the protection provided by the Sixth Amendment is dependent on the type of jury partiality or bias.<sup>50</sup>

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40. *Id.*

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

42. *Id.* at 871, 874 (Thomas, J., dissenting).

43. *Id.* at 874.

44. *Id.* at 871–74.

45. *Id.* at 877–78, 881 (Alito, J., dissenting).

46. *Peña-Rodriguez*, 137 S. Ct. at 877 (Alito, J., dissenting).

47. *Id.* at 879.

48. *Id.* at 883–84.

49. *Id.* at 882.

50. *Id.*



B. *Extending Peña-Rodriguez to Civil Cases in Federal and State Courts*

*Batson v. Kentucky* could guide courts in determining whether *Peña-Rodriguez* should be extended to hold that there is a constitutional exception to the no-impeachment rule for racial bias by jurors in civil cases.<sup>51</sup> In *Batson*, the United States Supreme Court held in the context of a state criminal case that the Equal Protection Clause of the Federal Constitution's Fourteenth Amendment is violated when a prosecutor uses a peremptory challenge against a juror on the basis of the venire member's race.<sup>52</sup> *Batson* involved a black defendant and black jurors who were struck because of their race.<sup>53</sup> In *Edmonson v. Leesville Concrete Co.*, the Court held that race-based peremptory challenges violate the equal protection component of the Fifth Amendment's Due Process Clause in civil cases.<sup>54</sup> In sum, *Batson* initially applied to criminal cases but was later extended to civil cases in *Edmonson*, and is grounded on the idea that race-based peremptory challenges violate the equal protection rights of the venire members who are excluded from jury service, and uses third-party standing rules to allow a defendant or civil litigant to raise the equal protection rights of an excluded juror.<sup>55</sup>

There are striking similarities between *Batson* and *Peña-Rodriguez*. Both provide a narrow exception to a broad right. Both initially applied in the criminal context. Both initially applied to race. Therefore, *Batson* and its progeny is a potential model for the development of the *Peña-Rodriguez* constitutional exception and the extension of it to civil cases.

From a big-picture perspective, there is a similarity between *Batson* and *Peña-Rodriguez*. There is a broad right for litigants to exercise peremptory challenges on venire members for whatever reason the litigants want, except *Batson* provides the narrow exception for race.<sup>56</sup> Juries can generally go back to the jury deliberation room and come up with whatever decision they want, on

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51. 476 U.S. 79, 104–05 (1986).

52. *Id.* at 89 (holding that while a prosecutor is generally entitled to exercise peremptory challenges on whatever basis the prosecutor wants, the Equal Protection Clause forbids the prosecutor from exercising peremptory challenges on the basis of race).

53. *Id.* at 82–83.

54. 500 U.S. 614, 616 (1991).

55. For an application of third-party standing rules, see *id.* at 629, 631 (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

56. A peremptory challenge is made to a venire member without assigning any reason. *See Swain v. Alabama*, 380 U.S. 202, 220 (1965) (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”); 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2483 (3d ed. 2008) (“No reason need be given for the use of a peremptory challenge.”). In federal civil cases, each party is entitled to three peremptory challenges. *See* FED. R. CIV. P. 47(b) (“The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.”); 28 U.S.C. § 1870 (2012) (“In civil cases, each party shall be entitled to three peremptory challenges.”); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

whatever basis they want, and it cannot be constitutionally impeached after the verdict is entered except under *Peña-Rodriguez* when the decision is based on racial bias.<sup>57</sup>

The similarity does not end there. The heart of both the *Peña-Rodriguez* and *Batson* decisions is really an equal protection concern, although *Peña-Rodriguez* is framed in the context of the Sixth Amendment<sup>58</sup> and *Batson* is framed more in the context of equal protection under the Fourteenth Amendment than the Sixth Amendment.<sup>59</sup> Race discrimination in the context of the administration of justice in the court system harms the community as a whole and undermines public confidence in the justice system in a systemic way, which is different from other forms of jury misconduct during deliberations.<sup>60</sup> According to both decisions, the resulting systemic and public harm is what makes race discrimination so pernicious and worthy of differential treatment from otherwise categorically broad rules—litigants strike venire members for whatever reason and juries make decisions on whatever basis deemed appropriate even if the reasons do not seem justifiable—that do not generally receive other exceptions.<sup>61</sup> Compare language from *Batson* with language from the *Peña-Rodriguez* majority and *Peña-Rodriguez* dissent.

From *Batson*:

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine *public confidence in the fairness of our system of justice*. Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others.<sup>62</sup>

From the *Peña-Rodriguez* majority:

All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some

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57. See *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014); *Tanner v. United States*, 483 U.S. 107, 125 (1987); *McDonald v. Pless*, 238 U.S. 264, 265–67 (1915).

58. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (“[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”).

59. *Batson*, 476 U.S. at 89 (noting that peremptory challenges are subject to commands of the Equal Protection Clause and that the Equal Protection Clause prohibits peremptory challenges on the basis of race in criminal cases).

60. *Id.* at 87.

61. *Peña-Rodriguez*, 137 S. Ct. at 869; *Batson*, 476 U.S. at 87–89.

62. *Batson*, 476 U.S. at 87–88 (emphasis added).

instances, after the verdict has been entered—is *necessary to prevent a systemic loss of confidence in jury verdicts*, a confidence that is a central premise of the Sixth Amendment trial right.<sup>63</sup>

From the *Peña-Rodriguez* dissent:

The real thrust of the majority opinion is that *the Constitution is less tolerant of racial bias than other forms of juror misconduct*, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner’s argument and the Court’s holding are based.<sup>64</sup>

### 1. The Civil Case Originating in Federal District Court

With all of this in mind, civil cases in federal district court will start to arise where, after a jury verdict is entered, the losing civil litigant will attempt to secure affidavits from one of the jurors stating that, during jury deliberations, another juror expressed racial bias. Under one of the applicable forms of the no-impeachment rule, the trial judge may be inclined to simply rule that the verdict cannot be impeached through testimony about what occurred during deliberations. But, after *Batson* and *Peña-Rodriguez*, attorneys now have an opportunity to argue that a constitutional exception for jurors’ racial bias now applies in the context of civil cases that the judge must follow.

There are two ways to look at this argument. First, the argument in favor of rejecting a constitutional exception for racial bias by jurors in civil cases focuses on limiting *Peña-Rodriguez* to the Sixth Amendment and highlighting the distinction between criminal cases and civil cases. The Sixth Amendment provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”<sup>65</sup> A civil litigant bringing a case in federal court and arguing for a constitutional racial bias exception to the no-impeachment rule cannot rely on the Sixth Amendment because the Sixth Amendment does not apply in civil cases.<sup>66</sup> The litigant will have to rely on some other constitutional provision.

The civil litigant in federal court may initially hang his hat on the Seventh Amendment for purposes of the jury trial right. The Seventh Amendment guarantees the jury trial right to civil litigants in federal court where the cause

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63. *Peña-Rodriguez*, 137 S. Ct. at 869 (emphasis added).

64. *Id.* at 882 (Alito, J., dissenting) (emphasis added).

65. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”).

66. *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (“[T]he Sixth Amendment does not govern civil cases.”).

of action is based on a claim that existed at common law. However, there is no specific language in the Seventh Amendment that guarantees a racial bias exception to the no-impeachment rule.<sup>67</sup> Nor does the nature of the Seventh Amendment compel this conclusion. One could say as a general matter that a central premise of the Seventh Amendment is public confidence in civil jury verdicts that are free from the taint of racial bias by jury decision-making, just like the *Peña-Rodriguez* majority stated is the case in the context of the Sixth Amendment.<sup>68</sup> But that idea seems more appropriately connected to a generalized concept of racial bias in juror decision-making being more harmful than other forms of juror misconduct in jury decision-making under equal protection principles. The actual language of the Seventh Amendment focuses on the civil jury trial right being tied to “suits at *common law*.”<sup>69</sup> This provides even further justification for the type of historical argument made by Justice Thomas in his *Peña-Rodriguez* dissent regarding the Sixth Amendment and the common law no-impeachment rule.<sup>70</sup> At the time of the Seventh Amendment ratification in the 1700s the common law did not allow a litigant to impeach a verdict with jury testimony of jury misconduct.<sup>71</sup> This tying of the “common law” language in the Seventh Amendment to the historical point made by Justice Thomas regarding the actual common law rule at the time of ratification, makes the argument for the racial bias constitutional exception in civil cases even less persuasive from a textual and historical perspective than the exception for criminal cases.

Litigants arguing against extending *Peña-Rodriguez* to civil cases could also highlight fundamental distinctions between criminal cases and civil cases. Criminal cases involve the defendant’s life and liberty. Civil cases typically focus on money damages between parties. For this reason, different procedural rules apply, such as the beyond a reasonable doubt burden of persuasion standard in criminal cases and the preponderance of the evidence burden of persuasion standard in civil cases. Refusing to extend the racial bias exception is just another line to draw between criminal and civil cases. This is a familiar refrain: criminal and civil cases are just different and therefore different rules apply.

Second, the argument for extending *Peña-Rodriguez* to civil cases brought in federal district court should focus on equal protection principles, which apply in both criminal and civil cases. Indeed, Justice Alito’s dissent forcefully explains how the majority’s decision is less about the Sixth Amendment and

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67. U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”).

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

69. U.S. CONST. amend. VII (emphasis added).

70. *Peña-Rodriguez*, 137 S. Ct. at 871–74 (Thomas, J., dissenting).

71. *Id.* at 872.

more about equal protection based on race.<sup>72</sup> Viewed in this way, the winning argument for extending *Peña-Rodriguez* to civil cases brought in federal district court is equal protection under the Fifth Amendment. This argument merely takes a page right out of the *Batson* and *Edmonson* playbook.

A court considering extending *Peña-Rodriguez* to civil cases could easily follow the extension of *Batson* to civil cases as illustrated by the *Edmonson* decision. In *Edmonson*, the civil plaintiff claimed racial discrimination in a peremptory challenge by the opposing party.<sup>73</sup> The civil case was brought in federal district court and so the Seventh Amendment jury trial right attached.<sup>74</sup> The *Edmonson* Court held that race-based peremptory challenges violate the equal protection rights of the challenged jurors in civil cases just like the *Batson* Court said they do in criminal cases.<sup>75</sup> Because the case was in federal court and concerned the federal government, the Court based its holding on the equal protection component of the Fifth Amendment's Due Process Clause<sup>76</sup> instead of the Fourteenth Amendment, as in *Batson*.<sup>77</sup> If *Peña-Rodriguez* is really more about equal protection based on race than the Sixth Amendment,<sup>78</sup> it would make sense when the juror racial bias issue in a civil case arises to simply follow the logic of *Edmonson* and create the constitutional exception to the no-impeachment rule for juror bias in civil cases under the Equal Protection Clause of the Fifth Amendment.

*Peña-Rodriguez* is perhaps even easier to extend to civil cases than *Batson* was because *Batson*'s peremptory challenge issue had the complicated question of whether peremptory challenges by private litigants concern state action. The *Edmonson* Court ruled that a private litigant's use of peremptory challenges constituted state action and was therefore subject to equal protection.<sup>79</sup> The juror racial bias situation is more straightforward from a state action perspective than peremptory challenges. The actor in the alleged jury racial bias is the jury and not a private litigant. The alleged equal protection deprivation flows from the jury. The jury is a quintessential government body.<sup>80</sup> The jury's authority derives from the power of the court and ultimately from the government that

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72. *Id.* at 878–84 (Alito, J., dissenting).

73. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616–17 (1991).

74. *Id.* at 616.

75. *Id.* at 616–18.

76. *Id.*

77. *Batson v. Kentucky*, 476 U.S. 79, 879 (1986).

78. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 878–84 (2017) (Alito, J., dissenting).

79. State action occurred in *Edmonson* because the peremptory challenge right has its source in state authority, the peremptory challenge system could not exist absent governmental oversight and authority, and the selection of jurors is a governmental function even if in the peremptory challenges context the government delegates a portion of that authority to private litigants. *Edmonson*, 500 U.S. at 619–28.

80. *Id.* at 624.

confers jurisdiction on the court.<sup>81</sup> In short, viewing juries as state actors seems even less of a stretch than viewing a private litigant as a state actor. Furthermore, *Batson* and *Edmonson* had to consider the standing issue of parties to the case raising the equal protection rights of jurors.<sup>82</sup> The standing issue is not implicated in a *Peña-Rodriguez* situation. If there is an equal protection violation in the racial bias by juror scenario, the violation is against the litigant and the litigant is raising the violation to protect his or her own rights and has standing.

The Supreme Court has gone to great lengths to focus on the unique nature of racial bias and the importance of constitutional requirements to try and root out racial bias in the criminal justice system through the *Batson* and *Peña-Rodriguez* exceptions.<sup>83</sup> Is there any less of a policy reason for taking the same approach in civil juries than is now done in criminal cases? What would the principled argument be for making a distinction beyond a generalized idea that criminal trials and civil trials have some differences? Jury decisions free from racial bias are wanted in civil cases just like they are in criminal cases; this underlying interest applies in both systems.<sup>84</sup> The systemic and public confidence statements from both the *Peña-Rodriguez* and *Batson* Courts fit just as well with the administration of justice by civil juries as they do with the administration of justice by criminal juries.<sup>85</sup>

The critical decision involving the creation of a constitutional exception to the no-impeachment rule on the basis of racial bias by jurors during deliberations is whether to actually open the door at all and create the exception in the first place. The Supreme Court opened the door and created the exception.<sup>86</sup> But after the door is cracked open to the exception on the criminal side it seems difficult to justify keeping it shut on the civil side. It is only a matter of time for the exception to become entrenched in civil cases brought in federal court.

## 2. The Civil Case Originating in State Courts

Like the federal civil cases, civil cases in state trial courts will start to arise where after a jury verdict is entered, the losing civil litigant will attempt to secure

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81. *Id.* (“[The jury] is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court’s jurisdiction.”).

82. *Id.* at 628–30. The *Edmonson* Court ruled in favor of the litigant’s standing to raise equal protection rights of the excluded juror. *Id.*

83. *Peña-Rodriguez*, 137 S. Ct. at 869; *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986).

84. *Edmonson*, 500 U.S. at 630 (“Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. The Constitution demands nothing less.” (citation omitted)).

85. *Id.*; *Batson*, 476 U.S. at 87.

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

affidavits from one of the jurors stating that during jury deliberations another juror expressed racial bias. Under the applicable state law version of the no-impeachment rule, the trial judge may be inclined to simply rule that the verdict cannot be impeached through testimony about what occurred during deliberations. Like civil cases in the federal district court, attorneys now have an opportunity to argue that a federal constitutional exception for racial bias by jurors applies in the context of civil cases that the judge must follow.

If a state civil court considers *Peña-Rodriguez* as limited to the Sixth Amendment, the state civil court will have no obligation to apply the exception as a matter of federal constitutional law because the Sixth Amendment applies only to criminal cases not to civil cases.<sup>87</sup> The Seventh Amendment jury trial right only applies to civil cases in federal courts and not civil cases in state courts.<sup>88</sup> So the Seventh Amendment is irrelevant to the juror racial bias exception in state civil court. State jurisdictions have their own constitutional provisions concerning the jury trial right.<sup>89</sup> Ultimately, a state supreme court would be able to analyze whether the juror racial bias exception to the no-impeachment rule should apply to civil cases in their state in the context of their own procedural rules, evidentiary rules, and constitutional provisions on the jury trial right. But if the federal courts (and ultimately the United States Supreme Court) hold that the exception is applicable in civil cases under equal protection, then a state supreme court would presumably be constrained to apply the exception to civil cases in their state courts. Such decisions would follow the pattern of state appellate courts adopting the racial bias peremptory challenge exception to civil cases in state courts after the United States Supreme Court decided *Edmonson*.<sup>90</sup> Once again, *Batson* and *Edmonson* are the models for the

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87. *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (“[T]he Sixth Amendment does not govern civil cases.”).

88. *See Granfinanciera v. Nordberg*, 492 U.S. 33, 80 (1989) (White, J., dissenting); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (“Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same.”).

89. CAL. CONST. art. I, § 16 (“Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict.”); ME. CONST. art. I, § 20 (“In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced . . . .”); N.C. CONST. art. I, § 25 (“In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of people, and shall remain sacred and inviolable.”); N.M. CONST. art. II, § 12 (“The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”); OHIO CONST. art. I, § 5 (“The right of trial by jury be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.”).

90. *See Bustos v. City of Clovis*, 365 P.3d 67, 75 (N.M. Ct. App. 2015) (recognizing the application of the *Edmonson* exception to civil cases in New Mexico state courts); *Wingate Taylor-Maid Transp., Inc. v. Baker*, 840 S.W.2d 179, 182 (Ark. 1992) (recognizing that the *Edmonson*

application of *Peña-Rodriguez* and the future line of civil cases applying the jury racial bias exception.

#### IV. THE NEW *BATSON*: EXTENDING *PEÑA-RODRIGUEZ* TO OTHER FORMS OF JUROR BIAS BEYOND RACE

Justice Alito provided a telling insight in his *Peña-Rodriguez* dissent. He explains that if the *Peña-Rodriguez* decision is based on equal protection (as opposed to the Sixth Amendment), expressions of juror bias based on suspect classifications such as national origin, religion, sex, and First Amendment freedoms of association and expression would merit equal treatment with cases of racial bias by jurors.<sup>91</sup> And he goes on to further state that “convicting a defendant on the basis of any irrational classification would violate the Equal Protection clause.”<sup>92</sup> If this is correct and equal protection is really the driving force underlying the *Peña-Rodriguez* decision, then *Batson* returns yet again as a model for the development of *Peña-Rodriguez* law in both criminal and civil cases.<sup>93</sup> The *Peña-Rodriguez* door is open to *Batson*-type arguments in terms of broadening the characteristics of post-trial protection against juror bias during deliberations to include sex, national origin, religion, disability, sexual orientation, and age, among other possible characteristics.<sup>94</sup> The United States Supreme Court extended *Batson* to ethnicity and gender.<sup>95</sup> Courts have considered *Batson* protection for other “cognizable” groups or classifications.<sup>96</sup>

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exception applies to civil cases in Arkansas state courts); *Washington v. Goodman*, 830 S.W.2d 398, 400–02 (Ky. Ct. App. 1992) (recognizing that the *Edmonson* exception applies to civil cases in Kentucky courts); *Dedeaux v. J.I. Case Co.*, 611 So. 2d 880, 883 (Miss. 1992) (recognizing the application of the *Edmonson* exception to civil cases in Mississippi state courts); *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991) (recognizing the application of the *Edmonson* exception to civil cases in Texas state courts).

91. *Peña-Rodriguez*, 137 S. Ct. at 883–84 (Alito, J., dissenting).

92. *Id.*

93. *Id.*

94. *Id.* (“Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin or religion—would merit equal treatment. So, I think, would bias based on sex, or the exercise of the First Amendment right to freedom of expression or association. Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.” (citations omitted)).

95. *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352, 355, 362 (1991) (ethnicity).

96. *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (reasoning that long, unkept hair is not a characteristic of race); *United States v. Heron*, 721 F.3d 896, 902 (7th Cir. 2013) (declining to recognize a *Batson* challenge based on a juror’s religiosity); *United States v. Iron Moccasin*, 878 F.2d 226, 229 (8th Cir. 1989) (reasoning that Native Americans are a cognizable racial group); *United States v. Biaggi*, 853 F.2d 89, 95–96 (2d Cir. 1988) (reasoning that Italian-Americans are a cognizable racial group).



Courts would likely consider granting *Peña-Rodriguez* protection to gender and other suspect classifications in a similar way.

#### V. THE NEW *BATSON*: TRIAL PROCEDURES AFTER *PEÑA-RODRIGUEZ*

Trial procedures will change in three ways in light of *Peña-Rodriguez*. First, jurisdictions will take steps to stress to jurors the importance of raising allegations of racial bias to the judge before the jury is discharged. Second, jurisdictions will develop frameworks for determining whether statements of racial bias by jurors during deliberations influenced the verdict such that a new trial is warranted. Third, jurisdictions will modify their procedures for post-verdict contact with jurors.

##### A. *Model Jury Instructions*

It is more efficient for courts to address allegations of racial bias by jurors during the trial than after the trial is over. If an allegation of racial bias by jurors is brought to the trial court's attention during the jury deliberation process, the trial court can remedy the bias by including supplemental jury instructions that remind jurors of the duty not to discriminate because of race, dismissing the biased jurors, and appointing alternate jurors.<sup>97</sup> The trial judge could then order the jury to continue with their deliberations and not necessarily grant a new trial. If an allegation of an expression of racial bias by jurors during deliberations is raised by a juror after the trial is over and it influenced the verdict, the remedy is a new trial.<sup>98</sup> Consequently, *Peña-Rodriguez* will incentivize jurisdictions to incorporate model juror instructions whereby judges consistently remind jurors that race must play no part in the jury's decision-making process and encourage jurors to report allegations of racial bias as soon as they arise and not wait to report them until after the trial is over.<sup>99</sup> It seems plausible that such jury instructions would increase the likelihood that jurors report expressions of racial

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97. See *State v. Tennors*, 923 So. 2d 823, 833 (La. Ct. App. 2006) ("La. Code Crim.P. art. 789 permits replacement of a juror with an alternate juror when the juror is physically unable to serve, or when the juror is found to have become disqualified, or to have *either the real or potential for bias in the deliberations.*" (emphasis added)).

98. See *Powell v. Allstate Insurance Co.*, 652 So. 2d 354, 358 (Fla. 1995) (deciding that a new trial must be ordered if the trial court determines that racial statements were made by jurors during jury deliberations).

99. Courts already frequently instruct juries that "bias" should play no part in the jury's decision-making process. See Fla. Std. Jury Instr. Civ. 700 ("In reaching your verdict, do not let bias, sympathy, prejudice, public opinion or any other sentiment for or against any party to influence your decision."); *Walton v. City of Manchester*, 666 A.2d 978, 980 (N.H. 1995) (noting that the trial court instructed jury not to decide facts on the basis of any "sympathy, prejudice, bias," which was in line with standard New Hampshire civil jury instructions); *State v. Moen*, 786 P.2d 111, 137 (Or. 1990) (approving jury instruction cautioning the jury to disregard "bias or prejudice" for or against the state, the victims, and defendant).

bias by fellow jurors during deliberations before the jury signs its verdict.<sup>100</sup> The instructions will also hopefully discourage jurors from making such statements during deliberations.

*B. Procedures and Standard for Granting a New Trial Due to Racial Bias During Jury Deliberations*

The *Peña-Rodriguez* Court declined to decide what procedures a trial court must follow when a defendant files a post-verdict motion for new trial based on juror testimony of racial bias.<sup>101</sup> The Court also failed to decide the appropriate standard for determining when racial bias is enough to grant a new trial.<sup>102</sup> But these are certainly practical issues that all jurisdictions will have to deal with in the near future.

The motion for new trial procedure alleging racial bias in jury decision-making should be tailored to each jurisdiction. But one approach would be to initially require the motion for new trial to be supported by the affidavit of the juror describing the alleged racial bias. The trial court could then evaluate the affidavit to decide whether to hold an evidentiary hearing on the motion.<sup>103</sup> Live testimony from the juror(s) alleging racial bias and other jurors who could corroborate or dispute the allegation would be helpful—and perhaps even required—because the trial court’s ruling on the motion would be affected by credibility determinations of the witnesses.<sup>104</sup>

The standard for granting a new trial could vary between two extremes: (1) evidence of a racially biased statement in the jury deliberation room could result in a new trial;<sup>105</sup> or (2) proof that racial bias played a motivating causal role in

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100. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 870–71 (2017).

101. *Id.*

102. *Id.*

103. *Kittle v. United States*, 65 A.3d 1144, 1157 (D.C. 2013) (reasoning that the trial court did not err or abuse discretion in declining to hold a hearing on racial bias allegation and admit juror testimony because statements did not indicate racial bias affected the jury’s verdict); *State v. Brown*, 62 A.3d 1099, 1110–11 (R.I. 2013) (upholding the trial court’s decision not to hold an evidentiary hearing on racial bias allegation because evidence of racial bias was ambiguous); *State v. Jackson*, 912 P.2d 71, 80 (Haw. 1996) (reasoning that the trial court has no duty to interrogate the jury until the defendant makes a prima facie showing that improper comments were used against the defendant).

104. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 89 (Mo. 2010) (en banc) (discussing that an evidentiary hearing should be required when a motion for a new trial alleges statements reflecting racial bias were made by a juror during deliberations); *State v. Santiago*, 715 A.2d 1, 21 (Conn. 1998) (discussing that testimony should be sought from juror reporting alleged prejudicial comments, jurors who could corroborate or dispute the allegations, and the juror alleged to have made the prejudicial comments).

105. *Fleshner*, 304 S.W.3d at 89–90 (discussing that upon a finding by the trial court that racially biased or prejudicial statements were made, the trial court should grant a new trial); *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (noting that racial bias or prejudice of a single juror could result in a new trial).

the verdict of the jury overall could be required.<sup>106</sup> It seems preferable for trial courts to evaluate whether any expression of racial bias by a juror meaningfully affected the jury's verdict because there could be cases where the evidence demonstrates that other jurors expressly rejected a fellow juror's racially biased comments and that race discrimination ended up playing no role in the jury's verdict.<sup>107</sup> Factors to consider in deciding whether to grant the motion for new trial could include the statements themselves, the number of jurors exposed to the statements, jurors' responses to the statements, the strength of the admitted evidence supporting the verdict, and any other matters which might have a bearing on how the statements affected or influenced the jury.<sup>108</sup> Whether the facts rise to the applicable standard will require a fact-specific analysis by a trial court. Appellate courts would likely give considerable deference to the trial courts that make this judgment call.<sup>109</sup>

*Batson*-type frameworks for evaluating alleged racial comments and the effect of the racial bias in the jury verdict are conceivable. In *Batson*, the focus is on whether the challenged party made a peremptory challenge for race or because of some other reason.<sup>110</sup> In *Peña-Rodriguez*, the focus is on whether the jury based its verdict on race or for some other reason.<sup>111</sup> In *Batson*, the United States Supreme Court developed a three-part burden-shifting framework to ascertain whether a party's peremptory challenge was really based on race or some other reason.<sup>112</sup> Under this framework, the party alleging a race-based peremptory challenge has to make a prima facie case of discrimination.<sup>113</sup> If this happens, the burden of production shifts to the challenged party to introduce evidence of a neutral explanation for the peremptory challenge.<sup>114</sup> If this burden

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106. *State v. Hidanovic*, 747 N.W.2d 463, 470 (N.D. 2008) (finding that the district court must decide under an objective standard whether there is a reasonable possibility that the verdict of a hypothetical average juror would be affected by the racial comments); *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 691 (Wis. 1982) (finding that the trial judge is required to determine whether statements were made and then evaluate their probable effect upon a hypothetical average jury).

107. In *Peña-Rodriguez*, the Supreme Court indicated that judicial inquiry into the racial bias is triggered when the racially biased statements "tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

108. *Hidanovic*, 747 N.W.2d at 470.

109. *Santiago*, 715 A.2d at 18 (discussing that the appellate court evaluates trial court's decision on jury misconduct under an abuse of discretion standard); *State v. Jackson*, 912 P.2d 71, 81 (Haw. 1996) (applying abuse of discretion standard to trial court's decision to deny motion for new trial based on allegations of racial bias during deliberations).

110. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

111. *Peña-Rodriguez*, 137 S. Ct. at 861–62.

112. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995); *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991).

113. *Hernandez*, 500 U.S. at 358.

114. *Id.* at 358–59.

is satisfied, the challenging party must prove the stated legal reason is actually a pretext for unlawful race discrimination.<sup>115</sup> Courts might apply a similar burden-shifting framework in the context of *Peña-Rodriguez*. For example, the party that loses the verdict must make a prima facie case that a juror (or jurors) made statements of racial bias. If the losing party makes such a prima facie showing, the burden of production shifts to the winning party on the verdict to introduce evidence that racial bias did not affect the jury's verdict. If this burden is satisfied, the losing party must establish by a preponderance of the evidence that the racial bias did have a probable effect upon the jury's verdict. Alternatively, once the losing party establishes a prima facie case of racial statements, the winning party attempting to protect the verdict must prove by the required standard of proof—preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt—that the juror's racial comments could not have affected the verdict.<sup>116</sup> Because of the desire to protect the defendant from an unfair trial, it seems probable that courts in criminal cases would tend to place the burden of proof upon the prosecution to show that—once racial bias by one juror has been established—racial bias did not affect the jury's verdict.<sup>117</sup>

### C. *Attorney Post-Verdict Contact with Jurors*

After a jury is discharged, jurors in both criminal cases and civil cases have always been free to talk to others about their jury service or to decline to do so.<sup>118</sup> Attorneys who try a case are a category of individuals who have a special interest in learning about the juror's perspective of the case and the reasons for their verdict. Attorneys may want to discuss the case with the jurors for educational purposes to learn something that will help in the future.<sup>119</sup> But attorneys on the losing side may also want to initiate post-verdict contact with jurors to inquire about any potential misconduct from jurors to try and get a new trial.<sup>120</sup> Federal rules, state professional rules of ethics, and local rules many times place limitations on attorneys' opportunity to contact jurors after the trial

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115. *Id.* at 359, 363–64.

116. In *State v. Jackson*, the Hawaii Supreme Court articulated a similar approach. 912 P.2d 71, 80 (Haw. 1996). The defendant has the initial prima facie burden of showing that improper racial comments made by jurors were used against him or her. A presumption of prejudice then arises and the verdict is set aside unless the prosecution proves beyond a reasonable doubt that the juror's comments could not have affected the verdict. *Id.* at 80.

117. *Id.*

118. Fla. Std. Jury Instr. Crim. 4.2 (“Although you are at liberty to speak with anyone about your deliberations, you are also at liberty to refuse to speak to anyone.”); TEX. R. CIV P. 226(a) (“Thank you for your verdict. I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.”).

119. *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 433 (Tex. 1998).

120. *Hall v. State*, 253 P.3d 716, 718–19 (Idaho 2011) (criminal defendant filed motion for post-verdict communications with jurors).

is over.<sup>121</sup> Before *Peña-Rodriguez*, procuring a new trial based on juror statements made during deliberations was generally not going to be a basis for a new trial under the no-impeachment rule.<sup>122</sup> But now with the *Peña-Rodriguez* exception, any limitations that prevent an attorney from initiating such a post-trial question to jurors in criminal cases are going to have to be evaluated and perhaps modified in light of the *Peña-Rodriguez* decision.<sup>123</sup> For example, stringent rules that prevent attorneys from speaking to jurors after the trial unless permitted by the court in exceptional circumstances and under considerable regulation may need to give way in the context of post-verdict contact that seeks to inquire with jurors about possible racial bias during the deliberations. After *Peña-Rodriguez*, criminal defense attorneys should presumably have some opportunity post-verdict to ask jurors about whether any racially biased statements were expressed during deliberations.<sup>124</sup>

## VI. CONCLUSION

The United States Supreme Court cracked open the door of the jury deliberation room as a matter of Constitutional law in *Peña-Rodriguez*. Now that the door is open a little bit, it is not going to be shut. The question is whether courts are going to keep the door where it is or bust it wide open. There will be pressures to keep the door where it is because of the practical problems associated with increasing post-trial reconsiderations of jury verdicts. But equal protection principles are going to push the other way because of the desire for

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121. *Cuevas v. United States*, 317 F.3d 751, 753 (7th Cir. 2003) (explaining that rules regulating parties' post-trial contact with jurors are "quite common" and that most of the 94 federal district courts have rules regarding post-trial juror contact); *Dall v. Coffin*, 970 F.2d 964, 972 (1st Cir. 1992) ("[T]his Circuit prohibits the post-verdict interview of jurors by counsel, litigants, or their agents except under the supervision of the district court, *and then only in such extraordinary situations as are deemed appropriate*. 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." (quoting *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985))); *Haeberle v. Tex. Int'l Airlines*, 739 F.2d 1019, 1021 (5th Cir. 1984) ("Federal courts have generally disfavored post-verdict interviewing of jurors."); MISS. RULES OF PROF'L CONDUCT r. 3.5 (2011) ("A lawyer shall not . . . communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; or (2) the juror has made known to the lawyer a desire not to communicate."); 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, 1980–51 (1994) ("Many of the federal district court local rules require a threshold showing of good cause, or the explicit prior approval of the court before attorneys may interview jurors. In many of the districts lacking such local rules, appellate courts have issued similar guidelines. These restrictions burden access to an excellent source of potentially admissible evidence of juror misconduct." (citations omitted)).

122. *See supra* Part II.

123. *See supra* Part III.

124. *See supra* Parts II, III.

fundamental fairness and justice in our jury system at a systemic level and the need for public confidence in the jury system. *Batson* and its progeny will likely play a significant role in making decisions about implementing and extending *Peña-Rodriguez*.

