Opening the Door to Jury Room Secrets After *Peña-Rodriguez*

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What happens in the jury room is generally a well-kept secret. No one can contest a jury verdict by eliciting evidence about jury deliberations, even if jurors accuse each other of ignoring the judge's instructions, misunderstanding the law, or improperly inferring guilt from a defendant's decision not to testify. These secrets are kept through "no-impeachment rules"—Rule 606(b) of the Federal Rules of Evidence, as well as similar rules in many states—that prohibit jurors from testifying about statements made during jury deliberations or their effect on a juror's vote in connection with an inquiry into the validity of a verdict. Rule 606(b) is not in place because concerns about jurors are unwarranted; it is in place precisely because juries are imperfect. But when do those imperfections rise to a level that warrants intervention? In other words, when does the law require jury secrecy to yield to other concerns?

The rules governing trials have historically provided sparse options for lawyers seeking to impeach a jury verdict. Rule 606(b) permits inquiry into jury deliberations only in limited circumstances, including juror testimony that "extraneous prejudicial information was improperly brought to the jury's attention" or that "an outside influence," such as biased comments made by court personnel or attempts to bribe jurors, "was improperly brought to bear on any juror." Rules 29 and 33 of the Federal Rules of Criminal Procedure also permit a court to enter a judgment of acquittal when it determines the evidence is insufficient to sustain a conviction, or to vacate a judgment and grant a new trial "if the interest of justice so requires." As trial lawyers know, these rules are often invoked, but they set a high bar that is rarely met.

The Holding in Peña-Rodriguez

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), the U.S. Supreme Court imposed an additional check on jury deliberations by allowing, in all criminal cases, inquiry into alleged express racial animus that affected the verdict. Prior to the decision, the states and the federal courts of appeals had been split as to whether an exception to the no-impeachment rules was warranted to allow such inquiry, with some 20 jurisdictions recognizing such an exception, while the majority of jurisdictions did not.

Peña-Rodriguez involved clear evidence of racial animus affecting the verdict. Miguel Angel Peña-Rodriguez was convicted of unlawful sexual contact and harassment in Colorado state court. After the jury was discharged, two jurors informed the defendant's counsel that another juror had expressed anti-Hispanic bias during deliberations. Peña-Rodriguez's counsel reported this information to the court and, under the court's supervision, obtained affidavits from the two jurors. The affiants stated that a third juror, Juror H.C., had said during deliberations

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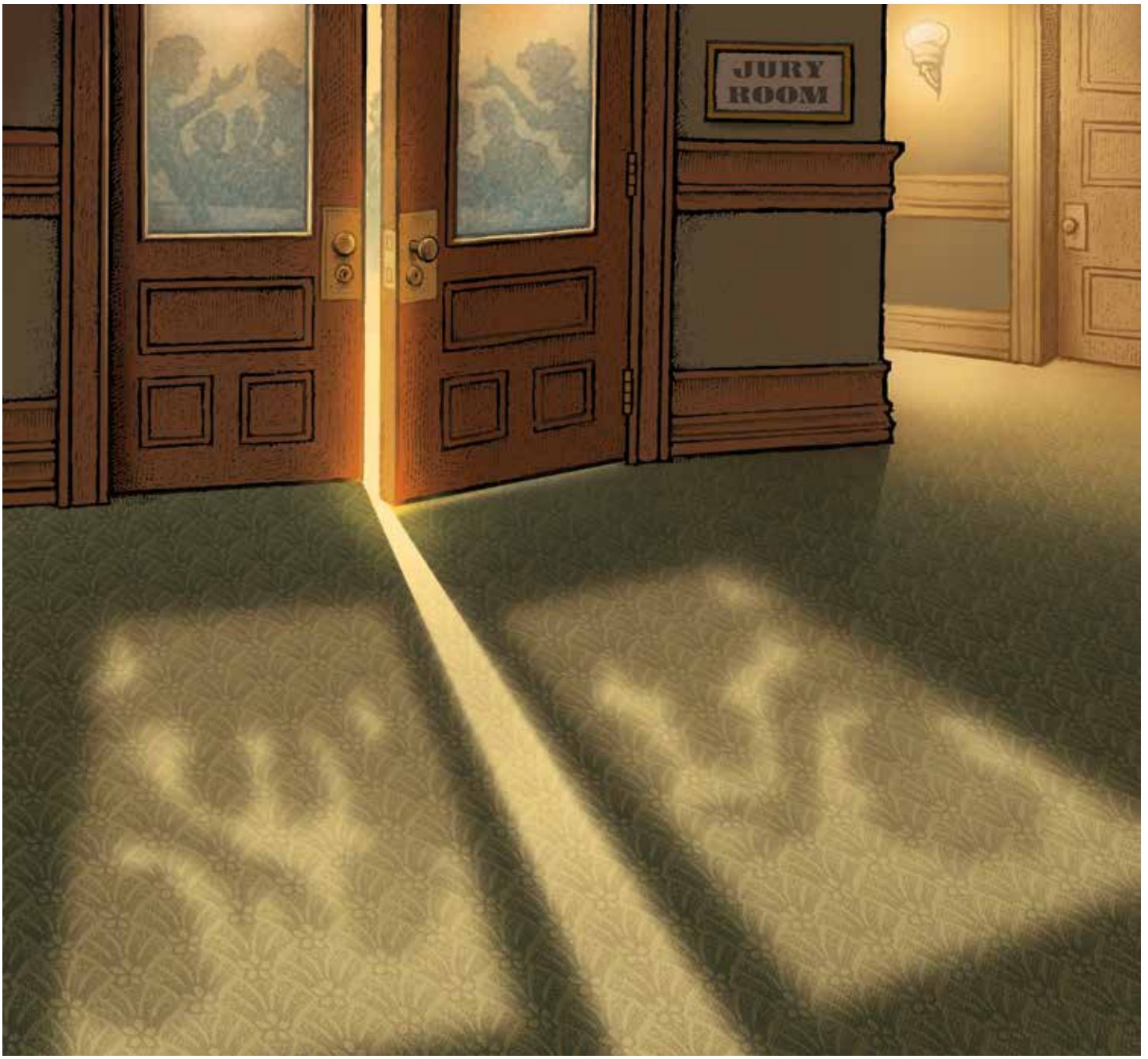

that he "believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women"; that Peña-Rodriguez "did it because he's Mexican and Mexican men take whatever they want"; and that, in Juror H.C.'s experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Peña-Rodriguez's motion for a new trial was denied, however, based on Colorado's state-law no-impeachment rule, and the Colorado appellate courts affirmed.

The U.S. Supreme Court reversed in an opinion by Justice Kennedy, which held that under the Sixth Amendment, the critical imperative to eliminate racial bias from the criminal justice system outweighed the need for secrecy in jury deliberations. In striking that balance, the Court's opinion first acknowledged that prior decisions had found most allegations of misconduct insufficient to permit inquiry into jury verdicts. For example, in *Tanner v. United States*, 483 U.S. 107 (1987), allegations that the jurors were drinking and using drugs during the trial did not justify overturning the verdict. Nor did statements during deliberations revealing that a juror had lied and concealed bias during voir dire in *Warger v. Shauers*, 135 S. Ct. 521 (2014). But the Court then turned to a separate jurisprudential narrative that demonstrated the powerful "imperative to purge racial prejudice

Illustration by Phil Foster

from the administration of justice." Dating back over a century, this history includes striking down whites-only juries and grand juries, permitting questioning into jurors' potential racial bias during voir dire, and the ban on racially based use of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986).

The *Peña-Rodriguez* case, the Court explained, "lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system." Racial animus "implicates unique historical, constitutional, and institutional concerns," and, as opposed to other forms of misconduct or bias, is a "recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." The Court further considered the empirical experience of the state and federal jurisdictions that had already recognized exceptions to no-impeachment rules.

For these reasons, the Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way 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." The Court found that the alleged juror statements during the *Peña-Rodriguez* deliberations met the threshold. And because the Supreme Court's decision was based on the Sixth Amendment—which applies to the states under the Due Process Clause of the Fourteenth Amendment—the ruling applies to every state and federal criminal proceeding. Following the Supreme Court decision, the Colorado appellate courts vacated their opinions and remanded to the trial court, where the district attorney dropped the charges against Peña-Rodriguez.

The Narrow Reach of *Peña-Rodriguez*

Peña-Rodriguez established a new tool for nudging open the jury room door in all criminal cases. But how should a lawyer use this tool and ensure that his or her client is afforded the full protection that *Peña-Rodriguez* provides?

As an initial matter, lawyers must appreciate the narrowness of the Court's holding. *Peña-Rodriguez* does not require that courts order a new trial whenever evidence shows that racial animus was expressed in the jury room. Rather, the Court lifted only the blanket prohibition in many jurisdictions on considering such evidence. How to remedy the consequences of racial animus now that a court must consider it is something that is, for now at least, left to develop in the lower courts. It is hardly surprising, then, that *Peña-Rodriguez* has not effected a major change in criminal trials. A search of cases citing *Peña-Rodriguez* as of this writing generated about 40 cases in which courts analyzed whether the exception applied. Courts ordered a hearing or other proceeding in fewer than 10 of those cases, and we identified only two (one of which was reversed on appeal) in which the court ordered a new trial based on juror racial bias.

Even where racial bias has been found to exist, some courts have employed "harmless error" review or otherwise decided that no new proceeding was necessary because bias did not affect the outcome. For example, in *Commonwealth v. McCowen*, 939 N.E.2d 735 (Mass. 2010), decided prior to *Peña-Rodriguez*, the court found that a verbal confrontation that ensued during deliberations in response to a juror's racially biased statement "blunt[ed] the effect of the stereotype" such that the defendant suffered no prejudice. By contrast, another court—after *Peña-Rodriguez*—found that racial animus is a "structural defect" in the trial mechanism to which harmless error does not apply, and so a new trial was necessary, regardless of whether the defendant was prejudiced. *See United States v. Smith*, No. CR 12-183 (SRN), 2018 U.S. Dist. LEXIS 69729 (D. Minn. Apr. 24, 2018).

Second, it is likely that *Peña-Rodriguez*'s holding will be limited to racial and ethnic bias, and perhaps to religious bias (which a few states had recognized as an exception to no-impeachment rules before *Peña-Rodriguez*). Some litigants have sought to expand *Peña-Rodriguez* to discrimination based on gender, sexual orientation, or other characteristics, but these efforts have generally been unsuccessful to date. For example, the Supreme Court recently declined to hear a challenge under *Peña-Rodriguez* where a gay defendant's sexual orientation allegedly led to the jury's imposition of the death penalty. *See Rhines v. South Dakota*, 138 S. Ct. 2660 (2018). Lower courts also have resisted attempts to apply *Peña-Rodriguez* more broadly, for instance, to alleged juror bias due to the presence of the victim's family members in the courtroom or a juror's personal experience with addiction in his family, to jurors' alleged predisposition toward the death penalty, and to alleged juror bias for or against the police. *See United States v. Ewing*, No. 17-5496, 2018 U.S. App. LEXIS 24824 (6th Cir. Aug. 31, 2018); *Austin v. Davis*, 876 F.3d 757 (5th Cir. 2017); *Bryant v. Mascara*, No. 2:16-CV-14072, 2018 U.S. Dist. LEXIS 137343 (S.D. Fla. Aug. 14, 2018); *United States v. Antico*, No. 9:17-CR-80102, 2018 U.S. Dist. LEXIS 16467 (S.D. Fla. Feb. 1, 2018); *Commonwealth v. Young*, No. 1305 MDA 2017, 2018 Pa. Super. Unpub. LEXIS 2074 (Pa. Super. Ct. June 13, 2018).

Third, *Peña-Rodriguez* is limited to criminal trials only, and counsel for civil litigants hoping to arm their clients against racial bias will likely have to look elsewhere. The decision in *Peña-Rodriguez* is rooted in the Sixth Amendment, which applies only to "criminal prosecutions." Courts thus have rejected attempts to expand *Peña-Rodriguez* to civil cases, although some states—including Connecticut, Florida, Missouri, Oklahoma, Washington, and Wisconsin—recognize a bias exception for civil cases under state law. Notably, if the foundation of *Peña-Rodriguez* were the Equal Protection Clause, the exception would apply in all cases, as does the *Batson* prohibition on racially motivated peremptory

strikes. Given the fundamental importance of extirpating racism from the judicial system, we encourage lawyers who learn of racial bias in the deliberations of civil juries to argue that no-impeachment rules must yield there as well to the imperative of equal protection. Under the logic of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), which applied *Batson* to civil cases, it seems likely that civil jury deliberations would constitute state action for equal protection purposes.

Steps to Take When Faced with Possible Racial Bias in Deliberations

Understanding that *Peña-Rodriguez* opens the door to the jury room only a sliver, what steps can an attorney take to protect clients from racial bias in deliberations? An option at one end of the spectrum is waiting for a juror to approach you, as occurred in *Peña-Rodriguez* and several of its important precursors, as well as in most cases that have applied these decisions. It goes without saying that defense counsel who are contacted by jurors should bring their concerns to the court's attention.

On the other end of the spectrum, lawyers can be more proactive in initiating inquiries. The problem, however, is that the Supreme Court in *Peña-Rodriguez* did not grant attorneys blanket permission to question jurors about racial bias after a verdict. Indeed, the Court emphasized that no-impeachment rules rightly encourage "full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict." The Court cautioned that lawyers must heed applicable ethics and court rules governing contact with jurors even when they suspect racial animus. For example, the Court cited ABA Model Rule of Professional Conduct 3.5, which prohibits a lawyer from "communicat[ing] with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment." Similarly, courts in the post-*Peña-Rodriguez* era have refused to interpret the decision as an invitation for routine post-verdict discovery into deliberations. In *United States v. Reyes*, No. 2:16-CR-00069, 2018 U.S. Dist. LEXIS 17184 (D. Vt. Feb. 1, 2018), for instance, the defendant's request to conduct juror interviews because there was no other "way to ensure that the guilty verdict was not based on racial bias or other improper considerations" was denied because this "[m]ere speculation" would lead to a "fishing expedition."

Despite the difficulty of finding a middle ground between waiting for jurors to say something and "fishing expeditions," there are steps a lawyer can take. One approach is through jury instructions. We recommend three sets of jury instructions to this end. First, lawyers should request general instructions that, in the Supreme Court's words, tell juries to "review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind." The Court cited instructions in *Federal Jury Practice and Instructions* as an example: "Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way." Second, lawyers should ask courts to instruct jurors that they should inform the court immediately of any bias they believe is affecting deliberations (e.g., "If you believe that the jury's deliberations may be affected by any bias, sympathy, or prejudice to one side or the other, you should inform the Court through a juror's note.").

How should a lawyer ensure that his or her client is afforded the full protection that *Peña-Rodriguez* provides?

Third, lawyers should seek a post-verdict instruction that jurors are no longer bound to secrecy and may bring information concerning bias to the attention of the court or counsel. *The New York Pattern Jury Instructions*, for example, provide: "Although you are not required to maintain secrecy about what occurred in the jury room, you should keep in mind your own best interests as jurors before discussing the case. . . . [Y]ou are free to discuss the case with anyone and you are also free to decline to discuss the case." A lawyer may request that the court add language such as the following: "Although the trial has concluded, you still can inform the Court if the jury's deliberations were affected by any bias, sympathy, or prejudice."

Counsel also must continue to use other tools to fight racial animus in juries. These include the voir dire process, in which courts and lawyers should not shy away from both direct and indirect questions. Questioning on race can signal jurors to be alert for possible racial bias. For example: "As some of you may know, it is improper for racial bias to play any part in a jury's deliberations. Juror No. 4, what would you do if you heard another juror say something you felt showed racial bias?" In federal court, where extensive questioning by lawyers is often curtailed, counsel can propose that judges ask questions using similar language.

No-impeachment rules do not prevent the court from questioning jurors about alleged bias during ongoing deliberations. Absent a juror's note, however, it may be difficult to uncover racial animus through juror observation because signs like body language are inexact and unlikely to cause a court to inquire further. That said, if lawyers overhear jurors making racially charged remarks or see what appear to be racial divisions among the jury, there is potential for the court to act.

Finally, lawyers and judges may rely on non-juror evidence of misconduct. Again, from a practical standpoint, this may not be easily available, but some courtroom personnel have significantly more interaction with the jury than does counsel and may observe evidence of racial bias that should be reported to the court. Research by jury consultants could also turn up reasons to be suspicious that a juror may harbor racial animus. We note, however, that both tactics carry some risk—counsel must not be seen as harassing court personnel or jurors.

How to Investigate Evidence of Racial Bias Once Discovered

The next question is how to investigate any evidence of racial animus that is discovered and in what manner to bring it to the court's attention. This is a fine line to walk, as courts may fault lawyers for doing too much investigation without seeking the court's approval, on the one hand; yet, on the other hand, a court may dismiss a *Peña-Rodriguez* claim if the defendant lacks sufficient prima facie evidence.

Complicating these questions is that while *Peña-Rodriguez* has proven to be a high bar, it has also proven to be a fuzzy one. According to the Supreme Court, the defendant must make a prima facie showing of "a clear statement that indicates [that a juror] relied on racial stereotypes or animus to convict a criminal defendant." An "offhand comment indicating racial bias or hostility" is insufficient; rather, the statement must rise to the level of "cast[ing] serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." In other words, "[t]o qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."

In practice, this standard has led courts to brush aside troubling, arguably racially charged statements as insufficient even to require further inquiry. Among the statements found to not warrant further inquiry are a juror's comment that he "knew the [non-white] defendant was guilty the first time he saw him" (in *United States v. Baker*, 899 F.3d 123 (2d Cir. 2018)) and a foreperson's statements that the "colored women" on the jury were "the only two that can't see" and that they were protecting the defendants because they felt they "owed something" to their "black brothers" (in *United States v. Robinson*, 872 F.3d 760 (6th Cir. 2017)).

Yet, in other cases, similar statements have been found to require additional inquiry. For example, one court ordered a hearing concerning a juror's statement during deliberations, referring to a videotape of police questioning the defendant, that "these guys are probably all high on drugs." *See People v. Thompson*, 2018 Ill. App. 3d 160604-U, ¶ 12 (May 2, 2018), *appeal denied*, No. 123673, 2018 Ill. LEXIS 976 (Ill. Sept. 26, 2018). In another case (in which the court conducted a hearing but ultimately denied a new trial), a juror stated that if the races of the white defendant and African American victim had been switched, "they would have convicted [the defendant] immediately." *See Berardi v. Paramo*, 705 F. App'x 517 (9th Cir. 2017). Because the subjective nature of the *Peña-Rodriguez* standard leaves much to the individual court's discretion, evidence of a troubling and racially charged statement alone may not be enough without something more. Lawyers would be well-advised to obtain as much evidence as possible before bringing a claim to the court.

At the same time, lawyers must be careful not to incur the disapproval of the court—and undermine their clients' interests—by going beyond what the court may deem permissible. In *United States v. Robinson*, 872 F.3d 760 (6th Cir. 2017), a lawyer seeking to fully investigate a potential *Peña-Rodriguez* claim did not immediately seek a hearing but hired a private investigator to interview two jurors. This action may have proved fatal to the claim, as the attorney was reprimanded for violating a local rule and a specific court directive not to contact jurors. The trial court held, and the circuit agreed, that "these violations were enough on their own" to deny the motion for a new trial—despite the harshness of punishing the defendant for his attorney's mistakes—and contrasted such conduct with *Peña-Rodriguez*, in which defense counsel "did follow all the rules." Attorneys should thus consider seeking permission from the court before contacting jurors. Even where local rules do not prohibit juror contact, the trial court's broad discretion makes seeking guidance prudent.

If a lawyer brings concerns about juror bias to the court, we recommend doing so by providing a fully formed suggestion as to how to proceed with further investigation and weighing the evidence. *Peña-Rodriguez* did not address "what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias," and our review of subsequent cases shows that courts have adopted various practices. These include holding evidentiary hearings (sometimes giving counsel the opportunity to ask questions, other times itself posing questions requested by counsel), holding informal in camera hearings without counsel present, and deciding the issues based exclusively on juror affidavits and declarations. Of course, a hearing with counsel present likely affords the greatest opportunity for full consideration. One benefit of seeking the court's permission to engage in further inquiry is that it encourages the court's buy-in to the procedures ultimately

employed, while giving a road map of how to proceed in largely unexplored territory.

Lawyers also should think critically about how to present the merits of their arguments. In most recent cases, attorneys appear to have presented the allegedly racist statement to the court and argued that it was sufficiently offensive to affect the verdict. But we should hesitate to assume that the intuitions of lawyers or judges about the impact of racial stereotyping is correct. Attorneys should consider using psychological experts and scientific research on racial and cognitive biases in small-group decision making to help courts understand how explicit stereotyping may have greater effects on juries than a judge might otherwise expect. In recent decades, for example, this kind of empirical data was essential to ensuring greater judicial attention to the significant likelihood of erroneous eyewitness identification testimony.

If lawyers run up against courts that fear opening a Pandora's box by prying into secret jury deliberations, they should push back.

To the extent that lawyers run up against courts that fear opening a Pandora's box by prying into secret jury deliberations, they should push back. The dissent in *Peña-Rodriguez* cited familiar concerns that the new exception would "inhibit 'full and frank discussion in the jury room'"; "prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors," which would "erode citizens' willingness to serve on juries"; lead to "an increase in harassment, arm-twisting, and outright coercion"; and "undermine the finality of verdicts." The dissent's concerns are understandable, but they are undermined by empirical evidence.

On behalf of the Center on the Administration of Criminal Law at New York University School of Law, the authors submitted an amicus brief in support of Peña-Rodriguez, which concluded that real-world experience largely obviates these concerns. That conclusion was based on researching the jurisdictions in which exceptions to no-impeachment rules for racial, ethnic, and religious bias already existed. The research led to two important conclusions. First, the availability of limited impeachment rights did not lead to a flood of challenges to jury verdicts. In the 20 jurisdictions in which we found relevant exceptions to no-impeachment rules, there were only 42 cases reported in which courts actually applied the exception to inquire into racial bias during jury deliberations. This was true even though 11 jurisdictions had allowed such inquiry for over 20 years. Second, we found that the exception was highly effective at identifying incidents of racial bias. Of those 42 cases, 24—over half—led to a court-ordered hearing or new trial. In other words, although the issue rarely came up, when it did arise, courts found that further inquiry was warranted more than half the time. As we argued then—and as lawyers should continue to argue now—"With a low systemic cost to the courts as a whole and a high individual value in the specific cases in which it arises, consideration of racial bias in jury deliberations is a paradigmatic example of a beneficial rule."

As the above evidence shows, the widespread availability of online court decisions and databases facilitates empirical analysis of policy concerns such as those expressed by the dissent in *Peña-Rodriguez*. Indeed, Justice Kennedy's opinion specifically noted the jurisdictions that had exceptions to no-impeachment rules, including listing in an appendix many of the cases we had identified.

Conclusion

Our review of the initial wave of litigation applying *Peña-Rodriguez* suggests that there has been no great change in outcomes. Although there has been a surge in cases grappling with asserted bias in jury deliberations—in part because the rule applies to every state and federal jury verdict—many cases unsuccessfully sought to expand the decision beyond the strict holding. Once this surge dies down, it seems likely that courts and litigants applying *Peña-Rodriguez* will focus on the core issue of racial and ethnic bias in jury deliberations in criminal trials. Courts will likely establish clearer standards for what kind of evidence warrants further investigation and justifies a new trial. Expansion of the rule to cover other types of bias and to cover civil cases under the Equal Protection Clause is a logical possibility. Based on past experience, there will continue to be a fair number of hearings, but new trials will be rare. Nevertheless, with minimal disruption of jury secrecy, the *Peña-Rodriguez* decision establishes an important constitutional protection for individual defendants and substantially advances the integrity of the criminal justice system. ■