Georgia Law Review

Volume 55 | Number 2 Article 3

2021

Sacrificing Secrecy

Daniel S. Harawa
Washington University in St. Louis

SACRIFICING SECRECY

Daniel S. Harawa[*]

Juries have deliberated in secret since medieval times. The historical reason for the secrecy is that it promotes impartiality, which in turn protects a defendant's right to a fair trial. But as it turns out, jurors are not always impartial. Lurid examples exist of jurors condemning defendants based on the defendant's race, sexuality, ethnicity, and religion.

Generally speaking, courts cannot hear evidence of what transpired during deliberations. In 2017, however, the U.S. Supreme Court created an exception to this rule, holding that the Sixth Amendment requires courts to hear evidence of jurors making racially biased statements. But this exception means little if defendants have no way to uncover the bias. And because juries deliberate in private, it is incredibly difficult for defendants to discover what the jury discussed during deliberations.

This Article questions the wisdom of secret deliberations. It traces the history of jury secrecy and the public policy considerations that support secret deliberations, and it catalogs past attempts to record deliberations. It then discusses the racial bias exception to the jury no-impeachment rule created by the U.S. Supreme Court and explains how it is insufficient because it does not provide a mechanism for detecting bias. This Article then proposes a unique fix: that deliberations be memorialized and made part of the record in criminal cases. At times, secret deliberations frustrate, rather than promote, defendants' fair trial rights. Accordingly, the practice of secret deliberations should be revisited.

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[*] Associate Professor of Law, Washington University in St. Louis. Many thanks to Sam Crichton, Ray Diamond, Betsy Gwin, Alexis Hoag, Brooks Holland, Emily Hughes, Marcy Karin, Peter Joy, Zachary Kaufman, Nancy Marder, Gregory Parks, Jenny Roberts, Sarah Sherman-Stokes, Maneka Sinha, India Thusi, Madalyn Wasilczuk, Kate Weisburd, and participants in the New England Clinical Conference, ABA-AALS Criminal Justice Roundtable, and Louisiana State University Law Review "We the Jury" Symposium for extremely helpful comments and conversations. A special thanks goes to Caroline Parnass, Jason Sigalos, and the editors at the *Georgia Law Review* for making the Article better.

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I. INTRODUCTION

"Sunlight is said to be the best of disinfectants . . . ."[1]

Charles Rhines was a gay man on death row in South Dakota.[2] Seventeen years after Mr. Rhines was sentenced to death, his post-conviction lawyers interviewed some of the jurors who decided his fate.[3] These jurors were remarkably open about what they discussed during deliberations.[4] Mr. Rhines's sexual orientation was a prominent discussion topic. One juror remembered there being "lots of discussion of homosexuality" and "a lot of disgust."[5] Another juror recalled a fellow juror commenting that "if [Mr. Rhines is] gay, we'd be sending him where he wants to go if we voted for [life in prison]."[6] Yet another juror said that because Mr. Rhines is gay, "he shouldn't be able to spend his life with men in prison."[7] The courts refused to consider the merits of Mr. Rhines's juror bias claim because he discovered the bias too late.[8] Mr. Rhines was executed on November 4, 2019, despite evidence that some of his jurors may have sentenced him to die because of his sexual orientation.[9]

While Mr. Rhines's case is shocking, it is not unique. There are many examples of jurors evincing bias during deliberations, condemning defendants based on their race, ethnicity, religion, and national origin.[10] For example, in an assault trial, one juror said

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[1] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. 1933) (1914).

[2] Daniel S. Harawa, *The Supreme Court Must Rule that Juries Can't Sentence a Man to Death Because He's Gay*, SLATE (Apr. 2, 2019, 11:49 AM), https://slate.com/news-and-politics/2019/04/rhines-jury-death-sentence-because-gay.html.

[3] Petition for a Writ of Certiorari at 2–3, Rhines v. Young, 139 S. Ct. 1567 (2019) (mem.) (No. 18-8029) [hereinafter *Rhines* Cert. Petition].

[4] *See id.* at 3 (discussing the jurors' remarks).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* Rhines v. Young, No. 5:00-CV-05020-KES, 2018 WL 2390130, at *3, *6 (D.S.D. May 25, 2018) (denying Mr. Rhines's motion to amend on procedural grounds), *aff'd*, 899 F.3d 482 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1567 (2019) (mem.).

[9] *See Convicted Killer Charles Rhines Executed in South Dakota for Stabbing Co-worker in 1992*, CBS NEWS, (Nov. 4, 2019, 10:39 PM), https://www.cbsnews.com/news/south-dakota-execution-today-charles-rhines-executed-for-fatally-stabbing-co-worker-2019-11-04/.

[10] *See infra* Section II.A.

that "fellow jurors believed that 'all blacks are guilty regardless.'"[11] In a separate case, a Native American defendant was on trial for assault, and during deliberations, a juror said, "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent."[12] In a case involving Jordanian defendants on trial for conspiracy to commit fraud and money laundering, one of the jurors said "you know . . . how everybody feels about Arabs. They're thieves and they're liars."[13] In another example, a juror said during deliberations in a rape case involving a Latino defendant, "Why bother having the trial. . . . [S]pics screw all day and night."[14] In yet another example, while deliberating in a tax evasion case, a juror said, "Well, the fellow we are trying is a Jew. I say, 'Let's hang him.'"[15]

The U.S. Supreme Court has heralded the jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[16] Thus, when bias infiltrates jury deliberations, it "undermine[s] public confidence in the fairness of our system of justice."[17] Anything that shakes confidence in our jury system is deeply troubling because the integrity of the jury is critical not only to our system of justice, but to our entire democratic structure.[18] Given the importance of the

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[11] Kittle v. United States, 65 A.3d 1144, 1149 (D.C. 2013).

[12] United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008) (alteration in original), *abrogated by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

[13] United States v. Shalhout, 280 F.R.D. 223, 230 (D.V.I. 2012), *aff'd*, 507 F. App'x 201 (3d Cir. 2012).

[14] Commonwealth v. Laguer, 571 N.E.2d 371, 372, 375 (Mass. 1991). Throughout the Article, I quote cases that include racial slurs, which I have decided not to censor. I understand and appreciate the debate surrounding the reproduction of epithets, and I firmly believe that the appropriateness of using such harmful words often depends on context and audience. In this Article, I have decided that quoting cases, including the slurs, underscores the seriousness of bias in the jury box.

[15] United States v. Heller, 785 F.2d 1524, 1526 (11th Cir. 1986).

[16] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[17] Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[18] *See* Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people."); Balzac v. Porto Rico, 258 U.S. 298, 310 (1922) ("One of [the jury system's] greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.").

jury, the Court has made plain that "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."[19]

Despite the Court's seemingly clear statement that defendants should have the opportunity to prove that bias affected their verdicts, uncovering evidence of bias during deliberations is incredibly difficult given that juries decide cases in secret.[20] Simply put, defendants have no way to learn of bias affecting their trials in real time: deliberations are not part of the record, lawyers generally are not allowed to speak with jurors during proceedings,[21] and in some jurisdictions, lawyers are forbidden from speaking with jurors even after a conviction is final and the jury has been discharged.[22]

It seems that we uncritically accept the secrecy of jury deliberations. To date, legal scholarship has not focused on how secret deliberations can *undermine* a defendant's Sixth Amendment right to a fair and impartial jury,[23] when secret deliberations are

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[19] Dennis v. United States, 339 U.S. 162, 171–72 (1950).

[20] For that reason, scholars often refer to jury deliberations as a proverbial "black box." *See, e.g.*, Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1068 (1991) (referring to "the notion that juries operate by 'gut-level hunch,' rendering determinations that are as impenetrable as a black box"); Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 30 (2014) ("Accordingly, the jury must be seen as something of a 'black box,' a mysterious entity which produces a verdict from a set of facts through an unknown—and *unknowable*—deliberation process."); Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 427 (2008) ("The metaphor of the black box has often been used to describe the qualities of the human mind; likewise, the jury box is frequently referred to as a black box.").

[21] For example, ABA Model Rule 3.5, which concerns "Impartiality and Decorum of the Tribunal," provides that, absent some other law or court order, lawyers shall not "communicate ex parte" with a juror during proceedings. MODEL RULES OF PROF'L CONDUCT r. 3.5(b) (AM. BAR ASS'N 1983).

[22] *See, e.g.*, Benjamin M. Lawsky, Note, *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, 1955–56 (1994) (noting that "at least fifty-one [federal district courts] have adopted local rules governing whether and how attorneys may obtain postverdict interviews with jurors" and that most of these rules "specifically prohibit attorneys from contacting jurors without prior court approval").

[23] That is not to say that nothing has been written on the subject of recording deliberations. *See, e.g.*, Torrence Lewis, Comment, *Toward a Limited Right of Access to Jury Deliberations*, 58 FED. COMM. L.J. 195, 197 (2006) (arguing "that transcripts of jury deliberations . . . should be routinely accessible after trial"); Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1530 (2001) (arguing that judges should be allowed to

supposed to *protect* that important right. In fact, there has been stark opposition to examining the secrecy of our jury system, with one court proclaiming that "objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself."[24]

To be clear, the fact that jury deliberations are secret is a choice. The U.S. Constitution does not compel the secrecy of deliberations.[25] Legislatures or the courts could change the practice today if they were so inclined. [26] And perhaps they should have that inclination, given that jury secrecy was originally designed to protect a defendant's constitutional right to a fair and impartial jury.[27] Yet, today, there is evidence that secrecy may have the opposite effect by allowing juror bias to go unchecked.[28]

The U.S. Supreme Court has provided four "public policy" rationales that support jury secrecy. According to the Court, secret deliberations (1) protect jurors from possible harassment,[29]

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intervene in deliberations to ensure "a case is decided by a competent, actively deliberating body of jurors"); Clifford Holt Ruprecht, Comment, *Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217, 217 (1997) (arguing that deliberations should be recorded to ensure public accountability). However, this Article takes a different tack and situates the need for recording deliberations in the defendant's Sixth Amendment right to a fair and unbiased trial.

[24] United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997).

[25] *See* Lewis, *supra* note 23, at 198 ("Nothing in the Constitution prohibits the recording of jury deliberations.").

[26] The secrecy of jury deliberations is often controlled by statute or court rule. *See, e.g.*, Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865, 885 (1996) ("Federal law and the laws of seven states prohibit recording jury deliberations.").

[27] *See* Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981) ("[T]he privacy of jury deliberations is . . . essential to the 'substance of the jury trial guarantee' . . . ." (quoting Burch v. Louisiana, 441 U.S. 130, 138 (1979))).

[28] *See infra* Section II.A.

[29] *See* McDonald v. Pless, 238 U.S. 264, 267 (1915) (advocating for secret deliberations because otherwise, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict").

(2) facilitate freedom of debate,[30] (3) promote community confidence in the jury system,[31] and (4) preserve the finality of verdicts.[32]

Even though the Court did not cite any evidence supporting these rationales, this Article proceeds on the premise that the Court is correct—that jury secrecy does further these important public policy goals. Even so, it is worth revisiting the practice of jury secrecy when there is proof that it has undermined the fundamental promise that "[o]ur [criminal] law punishes people for what they do, not who they are."[33]

This Article ultimately proposes that we should consider taping jury deliberations and making them part of the record to provide criminal defendants the contemporaneous ability to discover whether their juries' deliberations were infected by bias. As the Article explains, recording deliberations as part of the trial record can be done in a way that protects the Court's stated public policy considerations in support of keeping secret deliberations.[34] In short, deliberations could be recorded in the most unobtrusive way possible, the camera's presence could be minimized so as not to stymie free-flowing discussion, jurors' identities could be kept private, and transcripts of deliberations could be sealed.

The Article makes this argument over the course of three parts. Part II provides examples of how bias has infected jury deliberations. It then discusses the history of secret deliberations and U.S. Supreme Court case law prohibiting the introduction of evidence regarding what transpired during deliberations. Part III explores the public policy considerations the Court has marshaled to support secret jury deliberations and then notes that the Court nevertheless recently carved out a racial bias exception to secrecy

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[30] *See* Tanner v. United States, 483 U.S. 107, 120–21 (1987) (noting that "full and frank discussion in the jury room" would be undermined if jurors' views could be scrutinized after a trial); Clark v. United States, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.").

[31] *See Tanner*, 483 U.S. at 121 ("[T]he community's trust in a system that relies on the decisions of laypeople would . . . be undermined by a barrage of postverdict scrutiny of juror conduct.").

[32] *See McDonald*, 238 U.S. at 267 (arguing that many verdicts would be "attacked and set aside" if courts allowed open inquiry into jury deliberations).

[33] Buck v. Davis, 137 S. Ct. 759, 778 (2017).

[34] *See infra* Section IV.B.

in *Peña-Rodriguez v. Colorado*.[35] Part III also details how the *Peña-Rodriguez* exception inadequately protects a defendant's right to a fair trial. Therefore, Part IV proposes that jury deliberations should be made part of the record in criminal cases to allow the court and the parties to review deliberations for evidence of bias. Part IV also explains how the proposal is tailored to preserve (to the greatest extent possible) the public policy considerations that spurred secret deliberations in the first place.

That a state executed a man who may have been sentenced to die because he is gay—and that numerous people have served or are serving lengthy prison sentences despite evidence that their juries convicted them because of their race, ethnicity, religion, or national origin—should prompt serious discussions about possible reforms.[36] This Article seeks to start that discussion.

II. THE HISTORY OF SECRECY

Our criminal legal system rests on a fundamental fiction—that jurors are presumed to follow the law.[37] Jurors are instructed in criminal trials that they must render a verdict based only on the evidence; they should not return a verdict based on bias or preconceived notions about the defendant's guilt.[38] In practice, we

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[35] 137 S. Ct. 855 (2017).

[36] *See, e.g.*, *supra* notes 2–15 and accompanying text.

[37] *See* Penry v. Johnson, 532 U.S. 782, 799 (2001) ("We generally presume that jurors follow their instructions."); Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.").

[38] *See, e.g.*, 50A C.J.S. *Juries* § 386, Westlaw (database updated Sept. 2020) (collecting cases that stand for the proposition that "whether the juror is competent generally depends upon whether the juror can lay aside such bias or opinion and decide the case impartially based on the evidence and instructions"). Many states' pattern jury instructions include a charge that the jury must decide the case based on the evidence and not let prejudice or bias affect the verdict. *See, e.g.*, ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS–CRIMINAL § 1.01[5], https://courts.illinois.gov/CircuitCourt/CriminalJuryInstructions/Criminal_Jury_Instructions.pdf (last visited Feb. 9, 2021) ("You should not be influenced by any person's race, color, religion, national ancestry, gender, or sexual orientation."); MICH. SUPREME COURT COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS, MODEL CRIMINAL JURY INSTRUCTIONS § 3.1(2), https://courts.michigan.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions/Documents/Criminal%20Jury%20Instructions.pdf (last visited Feb. 9, 2021) ("Remember that you have taken an oath to return a true and just verdict, based only on the evidence and

know the fiction is just that—fiction. We know that jurors, like all people, harbor bias[39] and that their bias both consciously and subconsciously impacts their views of a particular case.[40] This Part provides examples of juror bias infecting deliberations to demonstrate how serious the problem of juror bias can be. It then explores the history of secret deliberations, including the no-

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my instructions on the law. You must not let sympathy, bias, or prejudice influence your decision."); N.Y. UNIFIED COURT SYS. CJI & MC COMM., VOIR DIRE INSTRUCTIONS 14 (2019), http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Voir_Dire.pdf (last visited Feb. 9, 2021) ("Nor may [the verdict] be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty."); STANDING COMM. ON THE UTAH CRIMINAL MODEL JURY INSTRUCTIONS, MODEL UTAH JURY INSTRUCTIONS § CR202 (2018), https://www.utcourts.gov/resources/muji/index.asp (last visited Feb. 9, 2021) ("Perform your 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."); WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS—CRIMINAL § 1.01 (2016), https://govt.westlaw.com/wcrji/Document/Ief97ac11e10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default) ("It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.").

[39] *See* Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876–77 (2004) (describing how the presence of a social group can trigger preconceived concepts); Mona Lynch, *Afterword: Criminal Justice and the Problem of Institutionalized Bias—Comments on Theory and Remedial Action*, 5 U.C. IRVINE L. REV. 935, 939–42 (2015) (discussing methods for studying implicit racial bias); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 875–77 (2017) (book review) (describing research that shows a connection between implicit racial bias and perceptions of criminality).

[40] *See, e.g.*, Siegfried C. Coleman, *Reliance on Legal Fiction: The Race-Neutral Juror*, 41 S.U. L. REV. 317, 341 (2014) ("For several decades, empirical studies have validated the public sentiment that the fairness of jury verdicts is heavily influenced by racial bias."); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 836 (2012) (citing sources that show that "[j]udges, as well as scholars, have recognized the existence of implicit bias in the courtroom. Supreme Court opinions have acknowledged its presence in jurors, its potential to affect their assessments of evidence, and its potential to affect their verdicts" (footnotes omitted)); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1008 (2003) (noting that one social science study "found that White mock jurors were indeed more likely to demonstrate racial bias when a Black defendant committed a stereotypic (i.e., violent) crime"); Clem Turner, *What's the Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 291–92 (1996) ("[J]ury discrimination exerts a great influence on the criminal justice system even in those cases where a jury is not involved in the prosecution.").

impeachment rule, laws prohibiting recording deliberations, and past examples of jury deliberations being recorded both for entertainment and for educational purposes.

A. WHAT JURORS SAY BEHIND CLOSED DOORS

Charles Rhines faced a capital murder charge for killing an employee while burglarizing a donut shop.[41] After Mr. Rhines was found guilty of capital murder, at the penalty phase of trial, the jurors were tasked with deciding whether Mr. Rhines would spend the rest of his life in prison or whether he would be condemned to death.[42] At that time, the defense introduced mitigating evidence that Mr. Rhines "struggled with his sexuality as a gay man who grew up in a conservative, Midwestern family."[43] During deliberations, a number of jurors focused on Mr. Rhines's sexual orientation and used it to advocate for a death sentence.[44] According to juror affidavits obtained by Mr. Rhines's post-conviction lawyers, one juror said that, during deliberations, there was "lots of discussion of homosexuality" and "a lot of disgust."[45] One juror recalled that a fellow juror said that "if [Mr. Rhines is] gay, we'd be sending him where he wants to go if we voted for [life in prison]."[46] A different juror recalled a fellow juror saying that because Mr. Rhines is gay, "he shouldn't be able to spend his life with men in prison."[47] These jurors, who expressed clear and unmistakable anti-gay bias, sentenced Mr. Rhines to die in part because he was gay.[48] Yet, because jury deliberations are secret, Mr. Rhines was only able to discover this bias because his post-conviction lawyers interviewed

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[41] Rhines v. Young, 899 F.3d 482, 485 (8th Cir. 2018).

[42] *See id.* at 488.

[43] *Id.*

[44] *See Rhines* Cert. Petition, *supra* note 3, at 3.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* Ría Tabacco Mar, *A Jury May Have Sentenced a Man to Death Because He's Gay. And the Justices Don't Care*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/opinion/charles-rhines-gay-jury-death-row.html ("[S]ome members of the jury thought life in prison without parole would be fun for Mr. Rhines. So they decided to sentence him to death.").

the jurors over twenty years after Mr. Rhines's trial.[49] And perversely, the courts refused to review the merits of Mr. Rhines's juror bias claim because he discovered the bias too late, despite the fact that there was no mechanism for him to unearth the bias in real time.[50] On November 4, 2019, South Dakota executed Mr. Rhines in the face of compelling evidence that his sexual orientation played a critical role in the jury's decision to sentence him to die.[51]

Mr. Rhines's case is an arresting example of jurors using a defendant's identity as a reason for meting out punishment. It is not the only example, however. Kerry Benally, a member of the Ute Mountain Ute tribe, was charged with assaulting a Bureau of Indian Affairs officer.[52] The day after his jury announced a guilty verdict, a juror "came forward of her own volition and alleged that two of the jurors, including the foreman, had made racist statements about Native Americans during deliberations."[53] These racist statements included the foreman saying that "he used to live on or near an Indian Reservation, [and] that '[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent."[54] Another juror "agree[d] with the foreman's statement about Indians."[55] Despite admitting that Mr. Benally had "a powerful interest in ensuring that the jury carefully and impartially considers the evidence," the Tenth Circuit held that it could not consider the evidence of what happened during deliberations.[56] The court reasoned that the importance of secret deliberations trumps the defendant's interests, postulating that "[w]here the attempt to

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[49] *Rhines* Cert. Petition, *supra* note 3, at 8–9.

[50] *See* Rhines v. Young, No. 5:00-CV-05020-KES, 2018 WL 2390130, at *6 (D.S.D. May 25, 2018) (refusing to review the claim because it was a "successive petition" given the motion to amend the habeas petition to introduce evidence of the juror bias was filed after the district court rendered its decision while Mr. Rhines's appeal was pending); Status Report & Notice of Intent to Obtain Warrant of Execution at 4–10, Rhines v. Young, 899 F.3d 482 (8th Cir. 2018) (No. 18-2376) (denying Mr. Rhines the ability to appeal that ruling).

[51] *See* Christina Maxouris, *Before His Execution, a Death Row Inmate Told His Victim's Family He Forgives Them*, CNN (Nov. 6, 2019, 10:04 AM), https://www.cnn.com/2019/11/05/politics/south-dakota-charles-rhines-execution/index.html.

[52] United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008).

[53] United States v. Benally, 560 F.3d 1151, 1152 (10th Cir. 2009) (Briscoe, J., dissenting from denial of reh'g en banc).

[54] *Id.* (second alteration in original) (quoting *Benally*, 546 F.3d at 1231).

[55] *Id.* (alteration in original) (quoting *Benally*, 546 F.3d at 1231–32).

[56] *Benally*, 546 F.3d at 1234.

cure defects in the jury process—here, the possibility that racial bias played a role in the jury's deliberations—entails the sacrifice of structural features in the justice system that have important systemic benefits, it is not necessarily in the interest of overall justice to do so."[57] Thus, Mr. Benally served a fifty-seven month sentence despite evidence that bias infected his verdict.[58]

Benjamin Laguer faced similar bias. He was charged with and convicted of rape and robbery.[59] Over four years after his trial, Mr. Laguer filed a motion for a new trial based on new evidence that his verdict was "tainted by ethnic prejudice."[60] The evidence was an affidavit from one of the jurors, who attested that "[b]efore and during the jury deliberations, countless racial slurs were made in the presence of the jury members about the defendant."[61] For example, one juror said that "the goddamned spic is guilty just sitting there; look at him. Why bother having the trial."[62] That same juror said that Mr. Laguer must be guilty because "spics screw all day and night."[63] When confronted with this affidavit, the trial court ruled that it would be improper for it to consider this evidence.[64] The Massachusetts Supreme Judicial Court reversed, reasoning that "the possibility raised by the affidavit that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored."[65] Thus, despite the general rule prohibiting the probing of deliberations, the Massachusetts high court held that because the defendant put forth credible evidence of bias, the trial court was obligated to consider that evidence, and if the trial court concluded the evidence was "essentially true," Mr. Laguer would be entitled to a new trial.[66]

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[57] *Id.* at 1240.

[58] United States v. Benally, 415 F. App'x 86, 88 (10th Cir. 2011).

[59] Commonwealth v. Laguer, 571 N.E.2d 371, 372 (Mass. 1991).

[60] *Id.* at 375.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 376 (discussing the trial court judge's reasoning).

[65] *Id.*

[66] *Id.* at 377. On remand, the trial judge chose not to credit the juror who testified that the racist statements were made, and a divided appeals court affirmed. Commonwealth v. Laguer, 630 N.E.2d 618, 620 (Mass. App. Ct. 1994). Mr. Laguer is therefore serving a life

Another example is Ronald Williams, a Black man who was convicted of first-degree murder and sentenced to life in prison.[67] Almost ten years after his trial, Mr. Williams's post-conviction counsel filed an affidavit from one of the jurors stating that she "was called 'a nigger lover' and other derogatory names by other members of the jury."[68] A fellow juror also told her that "I hope your daughter marries one of them [a Black man]."[69] When Mr. Williams argued that this juror's affidavit proved that his verdict was tainted by unconstitutional racial bias, the state court refused to consider the evidence, holding that "it is firmly established that after a verdict is recorded and the jury discharged, a juror may not impeach the verdict by his or her own testimony."[70] In an opinion by then-Judge Alito, the Third Circuit held that the state court's decision was not contrary to "clearly established Federal law" because, at the time, no "Supreme Court decision clearly establishe[d] that it is unconstitutional for a state to apply a 'no impeachment' rule that does not contain an exception for juror testimony about racial bias on the part of jurors."[71] Thus, despite evidence of racial bias infecting his deliberations, Mr. Williams is serving a life sentence.[72]

Two important points emerge from these examples. First, these instances of juror bias were brought to the attention of the courts only after tenacious defense teams tracked down and interviewed the jurors or because a juror had the gumption to come forward and report a fellow juror. Without these dogged attorneys or brave jurors, the bias in these cases would have remained undetected because jury deliberations are secret.[73] One can imagine other

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sentence. *See* Brief for Defendant/Appellant at 3, Commonwealth v. Laguer, 571 N.E.2d 371 (Mass. 1991) (No. 89-982) (providing the details of Mr. Laguer's sentence).

[67] Williams v. Price, 343 F.3d 223, 225 (3d Cir. 2003), *abrogated by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

[68] *Id.* at 227.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 239.

[72] *Id.* at 236, 239. This case was decided before the U.S. Supreme Court created a racial bias exception to the no-impeachment rule in *Peña-Rodriguez*. *See* 137 S. Ct. at 869.

[73] These examples are not exhaustive. *See* United States v. Villar, 586 F.3d 76, 78 (1st Cir. 2009) (denying post-verdict inquiry into jury deliberations where, in sentencing a "Hispanic" defendant, one juror stated, "I guess we're profiling but they cause all the trouble"); Shillcutt v. Gagnon, 827 F.2d 1155, 1156 (7th Cir. 1987) (discussing when a juror said about a Black defendant charged with solicitation, "Let's be logical. He's black and he sees a seventeen year

occasions where jurors have made biased statements and no juror came forward to report it, or cases where a defense lawyer did not or could not (because of time constraints or prohibitions on juror contact) track down and interview the jurors after the case was over.

Second, these examples reveal that before the U.S. Supreme Court in *Peña-Rodriguez v. Colorado* created the racial bias exception to the no-impeachment rule, courts disagreed on when and whether they could consider evidence of racial bias influencing deliberations.[74] In some cases, courts refused to consider the evidence—either because of procedural obstacles or because they believed the rule prohibiting inquiry into jury deliberations applied even in the face of compelling evidence of bias.[75] In those instances, the defendants were required to serve—and some are still serving—their sentences despite evidence that they were convicted in part because of who they are and not what they (allegedly) did—a notion antithetical to the basic premise of the criminal legal system.[76]

These examples highlight the importance of discussing the value of secret jury deliberations when that secrecy may undermine a defendant's constitutional right to an impartial jury trial. To have this discussion, it is necessary to briefly trace the roots of jury secrecy.

B. THE NO-IMPEACHMENT RULE

The history of juries deliberating in secret dates back to at least fourteenth century England.[77] Historian William Forsyth called the

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old white girl—I know the type"); State v. Brown, 62 A.3d 1099, 1106 (R.I. 2013) (denying post-verdict relief to the defendant, a registered member of an Indian tribe, where multiple jurors swore affidavits saying that after they reached a guilty verdict against the defendant, one of the jurors "banged two water bottles together like he was playing a tom-tom drum"); State v. Jackson, 879 P.2d 307, 309 (Wash. Ct. App. 1994) (discussing when a juror repeatedly referred to African Americans as "coloreds").

[74] *See* Petition for a Writ of Certiorari at 9–16, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606) [hereinafter *Peña-Rodriguez* Cert. Petition] (detailing the split over whether there is a racial bias exception to the no-impeachment rule).

[75] *See, e.g.*, *supra* notes 41–72 and accompanying text.

[76] *See* Buck v. Davis, 137 S. Ct. 759, 778 (2017) (calling it a "basic premise" that "[o]ur [criminal] law punishes people for what they do, not who they are").

[77] *See* Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 215 (2005) ("Accounts suggesting that early juries deliberated in secret date at least to the mid-1300s.").

practice "ancient," providing centuries-old accounts of "the jury's retiring 'to some private place to consider the verdict, [where] no one was allowed to have access to them until it was delivered.'"[78] Sir Matthew Hale described that "[w]hen the evidence [was] fully given, the Jurors withdr[e]w to a private Place, and [were] kept from all Speech with either of the Parties till their Verdict [was] delivered."[79] Blackstone similarly recalled that "[t]he jury, after the proofs [were] summed up . . . withdr[e]w from the bar to consider of their verdict," and it would "entirely vitiate the verdict" if any of the jurors spoke "with either of the parties or their agents, after they [were] gone from the bar."[80]

Private deliberations transformed into an evidentiary rule forbidding jurors from testifying about what was said during deliberations—referred to as the "no-impeachment" rule.[81] The no-impeachment rule is rooted in the Lord Mansfield decision, *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785).[82] The jurors in that case flipped a coin to resolve a deadlock.[83] The defendants moved to set aside the verdict, presenting the court with affidavits from two jurors attesting that the "verdict had been based on a game of chance."[84] Lord Mansfield refused to consider the affidavits, invoking "the then-popular Latin maxim, *nemo turpitudinem suam allegans audietur* (a 'witness shall not be heard to allege his own

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[78] *Id.* (quoting WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 114 (James Appleton Morgan ed., 1857) (1853)).

[79] *Id.* at 216 (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 165 (John Clive & Charles M. Gray eds., Univ. of Chicago Press 1971) (1713)).

[80] *Id.* at 216 n.61 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *375–76) (omission in original).

[81] *See id.* at 218 ("What began as a ritual . . . transformed into . . . an evidentiary device . . . .").

[82] Vaise v. Delaval (1785) 99 Eng. Rep. 944; 1 T.R. 11; *see also* Williams v. Price, 343 F.3d 223, 232 (3d Cir. 2003) (stating that "[t]he 'no impeachment' rule has been traced to" Lord Mansfield's decision in *Vaise v. Delaval*), *abrogated by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

[83] Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 59 (1993).

[84] 27 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6071, Westlaw (database updated Oct. 2020).

turpitude')."[85] Lord Mansfield reasoned that "a person testifying to his own wrongdoing was, by definition, an unreliable witness."[86] *Vaise* established "a blanket ban on jurors testifying against their own verdict."[87] According to Wigmore, the no-impeachment rule—also known as the Mansfield Rule[88]—drew "an adherence almost unquestioned" in the United States.[89]

The U.S. Supreme Court first discussed the no-impeachment rule and the importance of jury secrecy in its 1851 decision, *United States v. Reid*.[90] There, two defendants were convicted of committing murder on the high seas.[91] After the jury returned guilty verdicts, the defendants moved for a new trial.[92] In support of their motion, they submitted the affidavits of two jurors who admitted that, while they were deliberating, one of the jurors received a newspaper that "contained a report of the evidence which had been given in the case."[93] The jurors said that the paper had "no influence" on the verdict, however.[94] Affirming the lower court's decision to deny a new trial, the Court avoided announcing any hard-and-fast rules on whether courts can receive evidence regarding jury deliberations, but it did warn that such evidence should "be received with great caution."[95] In so doing, the Court recognized that there may be instances where refusing to receive juror affidavits would violate basic notions of justice.[96] However, the

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[85] Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 881 (2009).

[86] *Id.* (quoting David A. Christman, Note, *Federal Rule of Evidence 606(b) and the Problem of "Differential" Jury Error*, 67 N.Y.U. L. REV. 802, 815 n.78 (1992)).

[87] *Id.* (quoting United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008)).

[88] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017) ("The Mansfield rule, as it came to be known, prohibited jurors . . . from testifying either about their subjective mental processes or about objective events that occurred during deliberations.").

[89] Tanner v. United States, 483 U.S. 107, 117 (1987) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2352, at 696–97 (John T. McNaughton rev. ed. 1961)).

[90] 53 U.S. 361 (1851), *overruled in part by* Rosen v. United States, 245 U.S. 467 (1918).

[91] *Id.* at 361.

[92] *Id.*

[93] *Id.* at 361–62.

[94] *Id.* at 362.

[95] *Id.* at 366.

[96] *Id.* ("[C]ases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.").

Court found it "unnecessary to lay down any rule in this case" because, even assuming the facts in the juror affidavits were true, a new trial was not required given that "[t]here was nothing in the newspapers calculated to influence [the jury's] decision" and the jurors swore that the "papers had not the slightest influence on their verdict."[97]

The Court next addressed the issue of jury secrecy towards the end of the century in *Mattox v. United States*.[98] There, the defendant—after he was convicted of capital murder—attempted to introduce affidavits from jurors attesting that the bailiff made several inappropriate comments in front of the jury, including mentioning that this was "the third fellow [the defendant] has killed."[99] A local newspaper, which ran a story about the defendant previously being tried for the murder of a "colored man," was also brought into the jury room.[100]

Deciding that the defendant was entitled to a new trial based on this extraneous information being before the jury, the Court announced the rule that while "the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict[,] . . . a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."[101] The Court adopted this rule because it found it "vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiassed [sic] judgment."[102] The Court plainly proclaimed that no "ground of suspicion that the administration of justice has been interfered with [will] be tolerated,"[103] and therefore held: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the

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[97] *Id.*
[98] 146 U.S. 140 (1892).
[99] *Id.* at 141–42.
[100] *Id.* at 142–44.
[101] *Id.* at 149.
[102] *Id.*
[103] *Id.*

verdict, at least unless their harmlessness is made to appear."[104] In other words, the Court excepted from the no-impeachment rule evidence that jurors were influenced by outside forces.

However, this did not address evidence of conversations between jurors. The Court was faced with this question twenty years after *Mattox* in *Hyde v. United States*.[105] In *Hyde*, four co-defendants faced conspiracy charges.[106] Two were acquitted and two were convicted.[107] The two convicted men filed a motion for a new trial, alleging that "the 'verdict was the result of a bargain.'"[108] Defense counsel asserted that if the court held a hearing on the motion, jurors would testify that "the verdict was the result of an agreement between certain of the jurors who believed all of the defendants should be convicted and certain jurors who believed that all of the defendants should be acquitted";[109] the jurors essentially "exchanged" the conviction of one defendant for the acquittal of the other.[110] The Court affirmed the lower court's decision to refuse the testimony, holding that—even assuming what defense counsel proffered was true—"testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration."[111]

The Court reached the same conclusion a few years later in a civil case involving similar facts—*McDonald v. Pless*.[112] The plaintiff in

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[104] *Id.* at 150. The *Mattox* Court highlighted the importance of the case being a capital case when announcing its holding. *Id.* at 149. In *Remmer v. United States*, 347 U.S. 227, 229 (1954), the Court clarified that the rule extends to "a criminal case," not just capital cases. Therefore, the rule announced in *Mattox* applies to non-capital cases. *See, e.g.*, Caliendo v. Warden of Cal. Men's Colony, 365 F.3d 691, 696–98 (9th Cir. 2004) (applying the extraneous influence exception to the no-impeachment rule in a burglary case); United States v. Cheek, 94 F.3d 136, 141–42 (4th Cir. 1996) (applying the extraneous influence exception in a continuing criminal enterprise case).

[105] 225 U.S. 347 (1912).

[106] *Id.* at 351.

[107] *Id.* at 355.

[108] *Id.* at 381.

[109] *Id.* at 382–83.

[110] *Id.* at 383.

[111] *Id.* at 384.

[112] 238 U.S. 264 (1915). While *McDonald v. Pless* was a civil case, its reasoning formed the basis for later cases upholding the no-impeachment rule in criminal cases. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 119–20 (1987) (upholding the no-impeachment rule and

McDonald sued to "recover $4,000 alleged to be due them for legal services."[113] The jury awarded the plaintiff $2,916.[114] The defendant moved to set the verdict aside, alleging that jurors would testify that the verdict was the result of an agreement reached by the jury, where each juror wrote down what they thought the plaintiff was owed, and that they then averaged the amounts to reach a verdict.[115] The lower court would not hold a hearing on the matter, however, ruling that "a juror was incompetent to impeach his own verdict."[116]

In affirming the judgment, the Court—for the first time—explored in detail the policy reasons that support secret and practically unassailable jury deliberations. The Court noted that there are "two conflicting considerations."[117] On one hand lie the interests of the defendants, who "ought to have had relief" if "the jury adopted an arbitrary and unjust method in arriving at their verdict."[118] On the other lie systemic interests; the Court hypothesized that if a jury's deliberations could be attacked after trial, those attacks would lead to the "destruction of all frankness and freedom of discussion and conference."[119] In weighing the competing interests, the Court conceded that "the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct."[120] However, the Court reasoned that this argument "has not been sufficiently convincing to induce legislatures generally to repeal or

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quoting *McDonald* in a criminal case). Moreover, just as the Sixth Amendment guarantees an impartial jury in criminal trials, the Seventh Amendment guarantees an impartial jury in civil trials. *See* Skaggs v. Otis Elevator Co., 164 F.3d 511, 514–15 (10th Cir. 1998) ("Although the Seventh Amendment does not contain language identical to that found in the Sixth Amendment, which specifically guarantees a criminal defendant the right to an 'impartial jury,' the right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury.").

[113] *McDonald*, 238 U.S. at 265.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 266.

[117] *Id.* at 267.

[118] *Id.*

[119] *Id.* at 268; *see also id.* at 267 (hypothesizing that "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict").

[120] *Id.* at 268.

to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.'"[121] The Court concluded that if verdicts were allowed to be impeached by juror testimony, that "'would lead to the grossest fraud and abuse' and 'no verdict would be safe.'"[122]

The Court said little about the no-impeachment rule in the seventy years following *McDonald v. Pless*.[123] Congress, however, was not so quiet. In the mid-1970s, Congress passed Federal Rule of Evidence 606, which codified the no-impeachment rule.[124] Rule 606, which in substance has gone unchanged since its enactment in 1975,[125] provides, "During an inquiry into the validity of a verdict or

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[121] *Id.* (quoting Cluggage v. Swan, 4 Binn. 150, 158 (Pa. 1811)).

[122] *Id.* (quoting Straker v. Graham (1839) 150 Eng. Rep. 1612, 1613–14; 4 M. & W. 721, 725–26).

[123] The Court, following *Mattox*, twice overturned convictions when it was revealed that improper outside contact was made with jurors after they were sequestered. *See* Remmer v. United States, 347 U.S. 227, 229–30 (1954) (reversing because an unnamed person communicated with the jury foreman); Parker v. Gladden, 385 U.S. 363, 365–66 (1966) (per curiam) (reversing because bailiff made improper statements to jurors).

The Court also decided *Clark v. United States*, 289 U.S. 1 (1933), a case where the petitioner had been prosecuted for contempt after giving false answers during voir dire. *Id.* at 6. During her trial, evidence of her conduct during deliberations was admitted against her, and she argued that this violated the longstanding rule that a court could not receive evidence of what happened during deliberations. *Id.* at 12–13. The Court disagreed, ruling that this "privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued." *Id.* at 14. Here, the petitioner had "not been held to answer for any verdict that she [had] rendered, nor for anything said or done in considering her verdict," and therefore, the Court held that the trial court could receive evidence of her conduct during deliberations. *Id* at 17.

[124] *See* Tanner v. United States, 483 U.S. 107, 121 (1987) ("Federal Rule of Evidence 606(b) is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences.").

[125] Rule 606(b) initially provided:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him

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."[126] The Rule also makes clear that a court "may not receive a juror's affidavit or evidence of a juror's statement on these matters."[127] Tracking Supreme Court case law, Rule 606 provides for exceptions if the juror is testifying about whether "extraneous prejudicial information was improperly brought to the jury's attention"—as was the case in *Reid*—or "an outside influence was improperly brought to bear on any juror"—which is what happened in *Mattox*.[128] Most states subsequently adopted their own version of Rule 606,[129] although some states had a no-impeachment rule in place prior to the Federal Rule's enactment.[130] Today, all fifty states, either by statute, court rule, or case law,[131] have a version of the no-impeachment rule.

> concerning a matter about which he would be precluded from testifying be received for these purposes.

Id. (quoting FED. R. EVID. 606(b)).

[126] FED. R. EVID. 606(b)(1).

[127] *Id.*

[128] FED. R. EVID. 606(b)(2)(A)–(B). The rule also allows for a juror to testify about whether "a mistake was made in entering the verdict on the verdict form." FED. R. EVID. 606(b)(2)(C).

[129] *See* ALA. R. EVID. 606; ALASKA R. EVID. 606; ARIZ. R. EVID. 606; ARK. R. EVID. 606; COLO. R. EVID. 606; DEL. R. EVID. 606; FLA. STAT. § 90.607 (West, Westlaw through 2020 2d Reg. Sess.); O.C.G.A. § 24-6-606 (West, Westlaw through 2020 Legis. Sess.); HAW. R. EVID. 606; IDAHO R. EVID. 606; ILL. R. EVID. 606; IND. R. EVID. 606; IOWA R. EVID. 5.606; LA. CODE EVID. ANN. art. 606 (West, Westlaw through 2020 2d Extraordinary Sess.); ME. R. EVID. 606; MD. R. EVID. 5-606; MASS. G. EVID. 606; MICH. R. EVID. 606; MINN. R. EVID. 606; MISS. R. EVID. 606; MONT. R. EVID. 606; NEB. REV. STAT. ANN. § 27-606 (West, Westlaw through 2d Reg. Sess. of 2020); N.M. R. EVID. 11-606; N.C. R. EVID. 606; N.D. R. EVID. 606; OHIO EVID. R. 606; OKLA. STAT. ANN. tit. 12, § 2606 (West, Westlaw through 2d Reg. Sess. of 2020); PA. R. EVID. 606; R.I. R. EVID. 606; S.C. R. EVID. 606; S.D. CODIFIED LAWS § 19-19-606 (West, Westlaw through 2020 Sess. Laws); TENN. R. EVID. 606; TEX. R. EVID. 606; UTAH R. EVID. 606; VT. R. EVID. 606; VA. R. SUP. CT. 2:606; W. VA. R. EVID. 606; WIS. STAT. ANN. § 906.06 (West, Westlaw through 2019 Act 186); WYO. R. EVID. 606.

[130] *See* CAL. EVID. CODE § 1150 (West, Westlaw through 2020 Reg. Sess.); KAN. STAT. ANN. § 60-441 (West, Westlaw through 2020 Reg. Sess.); NEV. REV. STAT. ANN. § 50.065 (West, Westlaw through 2020 Special Sess.).

[131] *See, e.g.*, Aillon v. State, 363 A.2d 49, 54–55 (Conn. 1975); Brown v. Commonwealth, 174 S.W.3d 421, 428–29 (Ky. 2005); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc); Kravitz v. Beech Hill Hosp., L.L.C., 808 A.2d 34, 39 (N.H. 2002); State

After jurisdictions across the country codified the no-impeachment rule, the U.S. Supreme Court in *Tanner v. United States*[132] had to decide whether such rules must give way when faced with credible allegations that something transpired during deliberations that implicates a defendant's Sixth Amendment right to a fair and impartial jury. After the defendants in *Tanner* were convicted of conspiracy and fraud, they sought to introduce evidence that jurors were under the influence of alcohol, marijuana, and cocaine during trial—in the words of one juror, it "felt like . . . the jury was on one big party."[133] The district court held that it was prohibited from considering the evidence under Federal Rule of Evidence 606.[134] Before the Court, petitioners argued that the district court was "compelled by their Sixth Amendment right to trial by a competent jury" to consider the evidence.[135]

In a 5–4 ruling, the Supreme Court affirmed the district court's decision. While the Court recognized that "[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," to the Court, it was "not at all clear . . . that the jury system could survive such efforts to perfect it."[136] The Court was worried that the consideration of such evidence would "seriously disrupt the finality of the process," as well as "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople."[137] The Court therefore surmised that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry."[138] The Court justified keeping jury deliberations private by reasoning that a defendant's Sixth Amendment right to a fair

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v. Kociolek, 118 A.2d 812, 815–18 (N.J. 1955); Sharrow v. Dick Corp., 653 N.E.2d 1150, 1153 (N.Y. 1995); Carson v. Brauer, 382 P.2d 79, 85 (Or. 1963) (en banc); Gardner v. Malone, 376 P.2d 651, 654–55 (Wash. 1962).

[132] 483 U.S. 107 (1987).

[133] *Id.* at 109–10, 115–16 (omission in original).

[134] *Id.* at 113 ("The District Court concluded that juror testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b) to impeach the jury's verdict.").

[135] *Id.* at 117.

[136] *Id.* at 120.

[137] *Id.* at 120–21.

[138] *Id.* at 127.

trial is "protected by several aspects of the trial process," which, in the Court's opinion, made inquiry into deliberations less pressing.[139] These protections include voir dire; the fact that "during the trial the jury is observable by the court, by counsel, and by court personnel"; the fact that "jurors are observable by each other, and [they] may report inappropriate [conduct] to the court *before* they render a verdict"; and the fact that "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct."[140] In light of these protections, the Court held that upholding the no-impeachment rule in this instance did not violate petitioners' Sixth Amendment rights.[141]

Justice Thurgood Marshall wrote a stinging dissent, accusing the majority of "denigrat[ing] the precious right to a competent jury."[142] He dismissed the identified protections as inadequate, explaining that voir dire cannot expose all juror misconduct, and some juror misconduct "is not readily verifiable through nonjuror testimony."[143] He closed by countering a driving premise of the majority opinion, stating that "[p]etitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment."[144] Justice Marshall lamented that by "deny[ing] them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."[145]

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[139] *Id.*

[140] *Id.*

[141] *Id.* ("In light of these other sources of protection of petitioners' right to a competent jury, we conclude that the District Court did not err in deciding . . . that an additional postverdict evidentiary hearing was unnecessary.").

[142] *Id.* at 134 (Marshall, J., concurring in part and dissenting in part).

[143] *Id.* at 142.

[144] *Id.* More recently, in *Warger v. Shauers*, the Court faced the question of whether juror affidavits are admissible to show that a juror lied during voir dire. 574 U.S. 40, 42 (2014). Following *Tanner*, a unanimous Court held that the "plain meaning" of Rule 606 prevented the consideration of the evidence. *Id.* at 44.

[145] *Tanner*, 483 U.S. at 142 (Marshall, J., concurring in part and dissenting in part).

C. RECORDING JURY DELIBERATIONS

While the history of juries deliberating in private and the resulting no-impeachment rule can be traced back to (at least) fourteenth-century England, outside of the no-impeachment rule context, little has been said about the importance of sequestering juries. One obvious reason why juries are sequestered during deliberations is to protect the jury from improper outside influences. The Court's no-impeachment rule cases parrot this concern.[146]

When juries first began deliberating in private, those deliberations naturally would not have been part of the record because any memorialization would have required a stenographer—there was no mechanism for recording deliberations without an outsider present.[147] That is not true today. By the 1990s, video and audio recording of courtroom proceedings gained prominence across the country.[148] Today, implementing a procedure that allows juries to deliberate in private while recording those deliberations—without an outsider present—would be possible and relatively easy. Therefore, the calculus behind recording deliberations is much different than when deliberations were first made secret; the old rationales supporting jury secrecy may not still hold. If deliberations were part of the record, the no-impeachment rule would become less important because a court, at the prompting of

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[146] *See* Mattox v. United States, 146 U.S. 140, 149 (1892) (discussing the need to shield juries from "any extraneous influence"); *Tanner*, 483 U.S. at 120 (discussing the need to ensure deliberations were not tainted by any "extrinsic influence"); *Warger*, 574 U.S. at 45 (discussing the need to insulate juries "from outside influences").

[147] *See* Bernadette Mary Donovan, Note, *Deference in a Digital Age: The Video Record and Appellate Review*, 96 VA. L. REV. 643, 648 (2010) (noting that "[s]tenography has been used to record events and testimony in the courtroom since the 1800s," and that "[t]raditionally, court reporting consisted of a live person generating a transcript in shorthand (the traditional definition of stenography)").

[148] As of 1997, "forty-seven states permitted cameras in courtrooms during certain phases of proceedings." William R. Bagley, Jr., Note, *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 SUFFOLK U. L. REV. 481, 491–92 (1999); *see also* Melissa A. Corbett, Comment, *Lights, Camera, Trial: Pursuit of Justice or the Emmy?*, 27 SETON HALL L. REV. 1542, 1543 (1997) (stating that "forty-seven states permit camera access of some kind" in the courtroom); LEE SUSKIN, JAMES MCMILLAN & DANIEL J. HALL, NAT'L CTR. FOR STATE COURTS, MAKING THE RECORD UTILIZING DIGITAL ELECTRONIC RECORDING 7–8 (2013), https://www.ncsc.org/__data/assets/pdf_file/0021/17814/09012013-making-the-digital-record.pdf (discussing digital recordings in courtrooms).

the parties, could turn to the record to discover any impropriety as opposed to having jurors testify about what happened in the jury room.

Perhaps because the recording of court proceedings is a relatively recent phenomenon, little attention has been paid to the question of whether jury deliberations should be memorialized in some way. While the no-impeachment rule is well-established nationwide, with every state having some version of this centuries-old rule,[149] the legal status of recording jury deliberations is much less settled.

In the 1950s, Congress passed a law making it a misdemeanor to record deliberations.[150] Congress was motivated by the same concerns animating no-impeachment rules.[151] In addition to the federal law, seven states' laws make recording jury deliberations a misdemeanor: Alabama,[152] Hawaii,[153] Illinois,[154] Louisiana,[155] Michigan,[156] North Dakota,[157] and Pennsylvania.[158] In California and North Carolina, a person is guilty of misdemeanor if they record deliberations without consent.[159] In Oklahoma, South Dakota, and Virginia, recording jury deliberations is a felony.[160]

In most states with laws that prohibit recording jury deliberations, it appears that the law was not intended to apply to court-sanctioned recording. For example, in Alabama the crime is

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[149] *See supra* notes 129–131 and accompanying text.

[150] 18 U.S.C. § 1508 (2018).

[151] *See* Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 530–31 (1997) (discussing the motivation behind the federal law prohibiting the recording of jury deliberations).

[152] ALA. CODE § 13A-10-130 (West, Westlaw through Act 2020-206).

[153] HAW. REV. STAT. ANN. § 710-1077 (West, Westlaw through 2020 Reg. Sess.).

[154] 705 ILL. COMP. STAT. ANN. 315/1 (West, Westlaw through P.A. 101-651).

[155] LA. STAT. ANN. § 14:129.2 (West, Westlaw through 2020 2d Extraordinary Sess.).

[156] MICH. COMP. LAWS ANN. § 750.120b (West, Westlaw through P.A.2020, No. 256, of the 2020 Reg. Sess., 100th Legis.).

[157] N.D. CENT. CODE ANN. § 12.1-09-05 (West, Westlaw through 2019 Reg. Sess.).

[158] 18 PA. STAT. AND CONS. STAT. ANN. § 5103 (West, Westlaw through 2020 Reg. Sess. Act 95).

[159] CAL. PENAL CODE § 167 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.); N.C. GEN. STAT. ANN. §§ 14-227.2, 14-227.3 (West, Westlaw through S.L. 2020-97 of the 2020 Reg. Sess.).

[160] *See* OKLA. STAT. ANN. tit. 21, § 588 (West, Westlaw through 2d Reg. Sess. of the 57th Legis. (2020)); S.D. CODIFIED LAWS § 23A-35A-20 (West, Westlaw through 2020 Sess. Laws); VA. CODE ANN. § 18.2-468 (West, Westlaw through 2020 Reg. Sess.).

"interfering with judicial proceedings,"[161] in Hawaii it is "contempt of court," in North Carolina it is "secret listening,"[162] and in North and South Dakota, the crime is "eavesdropping."[163] The names of these crimes indicate that they were not intended to prohibit court-approved recordings. In the other states that prohibit the recording of jury deliberations, whether the laws were specifically designed to cover court-sanctioned recordings is unclear. And in every other state not listed, no law governs the recording of jury deliberations.[164] Thus, in most of the country, the reason why jury deliberations are not recorded boils down to custom.

Though few and far between, there have been instances in which jury deliberations have been recorded, both overtly and covertly, by camera and audio recording. These examples of recording deliberations are important for two reasons: first, they show that jury deliberations can be recorded without the criminal legal system collapsing; and second, the reactions to the recordings are helpful to understand any pushback that the proposal outlined in this Article may receive.

The first well-documented example of recording jury deliberations is the University of Chicago Jury Project, which was designed "to examine jury behavior and decision making."[165] In 1954, a Kansas-based federal district court judge gave the project permission to surreptitiously record six jury deliberations (the microphones were hidden in a heater in the jury room).[166] Careful procedures were put in place to delay the public release of the recordings and to protect the jurors' identities.[167]

The legal world's initial reactions were positive—the judges and lawyers who saw the study were "impressed with the way the jury

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[161] ALA. CODE § 13A-10-130 (West, Westlaw through Act 2020-206).

[162] HAW. REV. STAT. ANN. § 710-1077 (West, Westlaw through 2020 Reg. Sess.); *see also* N.C. GEN. STAT. ANN. § 14-227.2 (West, Westlaw through S.L. 2020-97 of the 2020 Reg. Sess.) (prohibiting "[s]ecret listening").

[163] N.D. CENT. CODE ANN. § 12.1-09-05 (West, Westlaw through 2019 Reg. Sess.); S.D. CODIFIED LAWS § 23A-35A-20 (West, Westlaw through 2020 Sess. Laws).

[164] *See* Abramovsky & Edelstein, *supra* note 26, at 885 ("[I]n the majority of states, the secrecy of trial jury deliberations is a matter of common law.").

[165] Erin York Cornwell, *Opening and Closing the Jury Room Door: A Sociohistorical Consideration of the 1955 Chicago Jury Project Scandal*, 31 JUST. SYS. J. 49, 51 (2010).

[166] *See id.* at 49 (describing the University of Chicago Jury Project).

[167] *See id.* at 53–54 (listing the study's protective procedures).

balanced its responsibility," positing that the study would "aid lawyers and judges and benefit the jury system as a whole, by indicating whether instructions are clear and whether jurors understand the issues in a case."[168] However, once the study became more public, the backlash was swift. Commentators asserted the study undermined the tradition of the jury and its history of privacy, with some arguing that recording deliberations posed a national security threat and would "weaken democracy in the face of communism."[169] Concerns about the study's ethicality also emerged, and questions were raised about whether recording jury deliberations without consent was an appropriate method of social science research.[170] This backlash prompted a Senate investigation, which eventually led to Congress passing the federal law that criminalized the recording of jury deliberations.[171] In the end, the researchers were reprimanded, the tapes were destroyed, and the project was panned as a scandal.[172]

Over the past few decades, there have been instances of television networks recording (or trying to record) jury deliberations for public consumption.[173] In 1986, the PBS series *Frontline* released the documentary *Inside the Jury Room*, which filmed the jury deliberations in a case out of Milwaukee in which the defendant was charged with being a felon in possession of a handgun.[174] A decade later, in 1997, CBS released *Enter the Jury Room*, which recorded deliberations in four criminal trials (including one retrial)

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[168] *Id.* at 55–56.

[169] *Id.* at 61.

[170] *See id.* at 66 ("The jury recordings are, in fact, used as a cautionary tale regarding social-scientific research involving human subjects and the observation of social interactions." (citations omitted)).

[171] *Id.* (discussing the passage of the 1956 law against recording juries); *see also supra* notes 150–151 and accompanying text.

[172] *See id.*

[173] Additionally, Arizona allowed jury deliberations to be filmed to study the impact of a new rule of civil procedure that allowed jurors to discuss the evidence throughout trial. *See* Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1935–38 (2006) (describing the Arizona filming project).

[174] *Frontline: Inside the Jury Room* (PBS television broadcast Apr. 8, 1986); *see also* Herbert Mitgang, *Inside the Jury Room*, N.Y. TIMES (Apr. 8, 1986), https://www.nytimes.com/1986/04/08/movies/inside-the-jury-room.html (describing the facts of the case and the trial).

in Arizona, where the charges ranged from armed robbery to drug trafficking.[175] In 2002, ABC released a five-part series, *State v.*, which chronicled five Arizona murder trials, including jury deliberations.[176] And then, in 2004, ABC released a multi-part series *In the Jury Room*, which followed a number of trials in Ohio and Colorado and recorded the jury deliberations in a capital murder case.[177]

The judges who approved the filming believed there was value in the public seeing how the jury system works. For example, the Wisconsin judge who approved the *Frontline* recording "saw the educational value of the documentary to the legal system."[178] The Arizona Supreme Court approved the filming because it was "in the interest of justice that the public understands as fully as possible the operation of the justice system, including the courts."[179] Colorado's Chief Justice allowed filming for much the same reason.[180] When the Chief Justice of the Arizona Supreme Court was interviewed about the decision to allow filming, he

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[175] *CBS Reports: Enter the Jury Room* (CBS television broadcast Apr. 16, 1997); *see also* Ruprecht, *supra* note 23, at 224 n.29 (describing the trials filmed by CBS). The Supreme Judicial Court of Maine approved CBS filming civil trials, but the project fell through. *See* Administrative Order, No. SJC-228, 1996 Me. LEXIS 32, at *1 (Me. Feb. 5, 1996) (authorizing CBS to film a documentary in Cumberland County civil jury cases); Bagley, *supra* note 148, at 484 & n.22 (explaining why the CBS project in Maine fell through).

[176] *State v.* (ABC television broadcast June 19, 2002); *see also* Josh Friedman, *ABC's 'State v.' Looks Inside Five Murder Trials*, L.A. TIMES (June 19, 2002, 12:00 AM), https://www.latimes.com/archives/la-xpm-2002-jun-19-et-friedman19-story.html (describing the series).

[177] *In the Jury Room* (ABC television broadcast Aug. 10, 2004); *see also* ABC News, *'In the Jury Room': State v. Ducic*, ABC NEWS (Jan. 7, 2006, 11:22 AM), https://abcnews.go.com/amp/WNT/story?id=131868 (describing the jury deliberations in the capital murder case).

[178] Bagley, *supra* note 148, at 485 (citing Margaret E. Guthrie, *Film Takes an Inside Look at Deliberations of Jurors*, NAT'L L.J., Apr. 14, 1986, at 8).

[179] *In re* Special Electronic Access to Superior Court Proceedings, Administrative Order No. 2001-19 (Ariz. Jan. 17, 2001), https://www.azcourts.gov/portals/22/admorder/orders01/2001-19.pdf.

[180] *See* Request for Expanded Media Coverage, Exhibit B, at 1, Colorado v. Holmes, No. 2012-CR-1522 (Colo. Dist. Ct. Aug. 25, 2014), https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12CR1522/008/Request%20for%20Expanded%20Media%20Coverage.pdf (attaching as an exhibit the order issued by the Office of the Chief Justice permitting the recording, which stated that "[i]t is in the interest of justice that the public understand as fully as possible the operation of the justice system").

acknowledged that the filming "intrud[ed] into the sanctity of the jury room," but he stood by his decision, commenting that "[i]f you think [our jury system] is such a good system, and such a good system for the people of the United States, well, the people of the United States ought to have a look at it and judge for themselves."[181]

Contemporary coverage suggests that the public appreciated these looks inside the jury room. In a review of *Inside the Jury Room*, one *New York Times* journalist wrote that it was "educational television at its best."[182] A *Los Angeles Times* review of *State v.* gushed that "[a] documentary should be as involving as it is enlightening, and in the case of 'State v.,' legal drama doesn't get much better."[183] The review hypothesized that after watching "ordinary citizens in action, some viewers might even look forward to jury duty."[184] *In the Jury Room* was described by one *New York Times* review as "one of those perfect documentaries" that "showcases some of what is mind-blowing about the idea that a person's fate in the criminal-justice system is still decided by his or her peers."[185]

Not all the feedback was positive, however. In response to news that CBS was going to record deliberations, one law review article argued: "As an educational tool, recorded jury deliberations are of dubious value because the influence of taping on the jury pool and jury deliberations renders the actions of the recorded jury unlike those of a 'typical' American jury."[186] These authors thought that any advantages to recording deliberations were "offset by the damage to free debate in the jury room, jury privacy, and the centuries-old tradition of jury deliberation secrecy."[187] Stanford Professor Barbara Babcock wrote an op-ed after watching ABC's *State v.* decrying the practice of filming jury deliberations for public

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[181] Howard Rosenberg, *TV Cameras Enter the Jury Room—What's the Verdict?*, L.A. TIMES (Apr. 16, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-04-16-ca-49078-story.html.

[182] Mitgang, *supra* note 174.

[183] Friedman, *supra* note 176.

[184] *Id.*

[185] Virginia Heffernan, *Television Review; Watching Real Juries Deliberate and Decide*, N.Y. TIMES (Aug. 17, 2004), https://www.nytimes.com/2004/08/17/arts/television-review-watching-real-juries-deliberate-and-decide.html.

[186] Abramovsky & Edelstein, *supra* note 26, at 891–92.

[187] *Id.* at 892.

consumption.[188] Professor Babcock opined that juries must be independent and that "[a]n equally important aspect of the jury's independence is that it deliberates in secret and need not defend or justify the process by which it reaches its decision."[189] Professor Babcock believed it "worth asking ourselves whether we want to risk damage to one of this country's most sacred democratic institutions for the sake of a few weeks' summer entertainment."[190] Even the CEO of Court TV worried that recording deliberations would have "a chilling effect on the ability of [jurors] to take a position that may be controversial or unpopular."[191]

Not all judges supported the practice either. In 2003, the Texas Court of Criminal Appeals denied PBS permission to record jury deliberations in a capital murder trial.[192] The court ruled that Texas law prohibited the recording of deliberations,[193] and that result was "consistent with the ancient and centuries-old rule that jury deliberations should be private and confidential in order to promote 'freedom of debate,' 'independence of thought' and 'frankness and freedom of discussion and conference.'"[194]

In sum, the history of secret jury deliberations is centuries-old, as is the rule forbidding courts from receiving evidence about what jurors said during deliberations. Whether recording deliberations is

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[188] Barbara A. Babcock, *Preserving the Jury's Privacy*, N.Y. TIMES (July 24, 2002), https://www.nytimes.com/2002/07/24/opinion/preserving-the-jury-s-privacy.html.

[189] *Id.*

[190] *Id.*

[191] Austin Smith, *Court TV: ABC Jury Show a Bad Idea*, N.Y. POST (Aug. 11, 2004, 4:00 AM), https://nypost.com/2004/08/11/court-tv-abc-jury-show-a-bad-idea/ (alteration in original).

[192] State *ex rel.* Rosenthal v. Poe, 98 S.W.3d 194, 195 (Tex. Crim. App. 2003).

[193] Until this point it was undecided whether Texas law actually prohibited the recording of deliberations. The law stated: "[n]o person shall be permitted to be with a jury while it is deliberating," *id.* at 200 (quoting TEX. CODE CRIM. PROC. art. 36.22), which the Texas court interpreted to include "unattended camera[s]." *Id.*

[194] *Id.* at 202 (first quoting Clark v. United States, 289 U.S. 1, 13 (1933); then quoting McDonald v. Pless, 238 U.S. 264, 268 (1915)).

Reflecting much the same sentiment, two Maine Supreme Court justices dissented from the court's decision to allow the filming of deliberations, opining that "a need for the public to understand how juries work . . . does not outweigh the need of society to safeguard a legal institution that promotes the fullest, least inhibited, most free-flowing factfinding discussion possible." Administrative Order, No. SJC-228, 1996 Me. LEXIS 32, at *4–5 (Me. Feb. 5, 1996) (Glassman, J. & Rudman, J., dissenting) (emphasis omitted).

permissible is less settled, however, with a minority of states expressly prohibiting the practice. While there have been instances of deliberations being recorded for both educational and entertainment purposes, judges and scholars alike have raised serious concerns with the practice and the negative effects it may have on our jury system. Therefore, to fully understand the ramifications of a proposal to record deliberations as part of the trial record, the next Part examines the commonly stated values that support secret deliberations.

III. THE VALUE OF SECRECY

The U.S. Supreme Court has made a number of grand pronouncements about the importance of juries and jury service. It has proclaimed, "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary."[195] It has described the jury as a critical bulwark "against the arbitrary exercise of power,"[196] which "guards the rights of the parties and ensures continued acceptance of the laws by all of the people."[197] The Court said that jury service is "with the exception of voting," the "most significant opportunity to participate in the democratic process."[198]

Because juries are so important, the Court has claimed to guard "every encroachment upon [the jury] . . . with great jealousy."[199] One way the Court has done that is by protecting the secrecy of deliberations, which supposedly helps preserve the jury's important role as an impartial arbiter.[200] To justify secret deliberations, the Court has articulated a number of "public policy" considerations

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[195] Blakely v. Washington, 542 U.S. 296, 306 (2004).

[196] Batson v. Kentucky, 476 U.S. 79, 86 (1986).

[197] Powers v. Ohio, 499 U.S. 400, 407 (1991).

[198] *Id.*; *see also* Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); *cf.* ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION 4 (2012) ("The fact is that jury duty is one of the few constitutional rights that every American has the opportunity to experience. It remains an American civic ritual. It connects people across class, national origin, religion, gender, and race. It creates habits of focus and purpose, and teaches values necessary for democracy.").

[199] Parsons v. Bedford, 28 U.S. 433, 446 (1830).

[200] *See supra* note 27 and accompanying text.

that purportedly support the practice.[201] Indeed, the Court has, in some instances, found that the virtues of secrecy are more important than vindicating a violation of an individual's constitutional rights.[202] Recently, however, the Court has recognized an exception to the rule that jury deliberations must remain private when there is evidence of "overt racial bias . . . tend[ing] to show that racial animus was a significant motivating factor in the jur[y]'s [decisionmaking]."[203] This Part discusses those public policy considerations and then examines how—even in the face of these considerations—the Court recognized a racial bias exception to the no-impeachment rule. Finally, this Part argues that the racial bias exception insufficiently protects defendants' constitutional right to an impartial jury.

A. THE "PUBLIC POLICY" CONSIDERATIONS SUPPORTING SECRECY

The Court has articulated four "public policy" rationales supporting the practice of keeping jury deliberations secret.[204]

Prevent Harassment. Secret deliberations arguably protect jurors from potential harassment. The Court has speculated that if deliberations were made public, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict."[205]

Protect Freedom of Debate. Deliberations should remain private to assure "full and frank discussion in the jury room."[206] The Court hypothesized that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[207]

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[201] *See supra* notes 29–32 and accompanying text.

[202] *See supra* Section II.A.

[203] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

[204] *See* McDonald v. Pless, 238 U.S. 264, 267–68 (1915) (setting forth the policy rationales that support secret deliberations); *see also* Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1509–15 (2001) (discussing the four policies set out in *McDonald*).

[205] *McDonald*, 238 U.S. at 267.

[206] Tanner v. United States, 483 U.S. 107, 120 (1987).

[207] Clark v. United States, 289 U.S. 1, 13 (1933).

Promote Public Confidence. Secret deliberations may be necessary to maintain the public's trust in the judiciary. The Court thought that secrecy protects against "a barrage of postverdict scrutiny of juror conduct," in turn preserving "the community's trust in a system that relies on the decisions of laypeople."[208] The Court did not elaborate further but cited a *Harvard Law Review* Note,[209] which argued that jury secrecy was needed because open deliberations would reveal "decisional premises with which various members of the public [were] bound to disagree."[210] The Note argued that "revelation of these inevitable yet disquieting divergences may unnecessarily undermine public acceptance of jury verdicts."[211]

Preserve Finality. Secrecy preserves the finality of verdicts because it allows deliberations to go unexamined.[212] Without secrecy, the Court surmised that "no verdict would be safe."[213] In other contexts, the Court has said that "the principle of finality . . . is essential to the operation of our criminal justice system," because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[214]

Ultimately, a fear of seeing how the sausage is made underlies the Court's exaltation of the no-impeachment rule. The Court has not-so-subtly suggested that our jury system cannot survive if we begin to explore how random community members reach a consensus.[215] Therefore, to avoid the collapse of the jury system, the

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[208] *Tanner*, 483 U.S. at 121.

[209] *Id.* (citing Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888–92 (1983)).

[210] Note, *supra* note 209, at 891.

[211] *Id.*

[212] *See* Warger v. Shauers, 574 U.S. 40, 45 (2014) (explaining that Rule 606 "was viewed as both promoting the finality of verdicts and insulating the jury from outside influences").

[213] McDonald v. Pless, 238 U.S. 264, 268 (1915) (quoting Straker v. Graham (1839) 150 Eng. Rep. 1612, 1613; 4 M. & W. 721, 725).

[214] Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion).

[215] *See* Tanner v. United States, 483 U.S. 107, 120 (1987) ("It is not at all clear, however, that the jury system could survive such efforts to perfect it."). As Albert Alschuler noted shortly after *Tanner* was decided:

> Abandoning their hear-no-evil posture [that the Supreme Court adopted in *Tanner*] would require courts to confront difficult questions of how much juror misconduct these courts should endure. Refusing to face these questions, however, subjects

Court concluded that it must be exempt from meaningful scrutiny.[216] That being said, one should keep in mind why juries were sequestered and deliberations were kept secret in the first place. Abstract constitutional concern for the jury's role did not motivate this choice. Rather, secret deliberations were believed to be the best way to ensure that juries delivered fair and impartial verdicts. As one federal court of appeals explained, "the privacy of jury deliberations [was considered] essential to the 'substance of the jury trial guarantee.'"[217] Thus, if the practice of keeping deliberations secret was designed to serve a constitutional role, it was to protect a defendant's Sixth Amendment fair trial rights. The same appellate court succinctly made this point: "jury privacy is not a constitutional end in itself; it is, rather, a means of ensuring the integrity of the jury trial."[218]

However, secrecy *has* become an end in itself. In the course of exalting secret deliberations over defendants' constitutional rights, the Court has not pointed to evidence which demonstrates that open deliberations would lead to the hypothetical concerns that it identified.[219] Rather, the Court has largely extolled the values of secrecy in an effort to find support for a centuries-old custom, even in the face of competing constitutional concerns.

Then, when Congress formalized the no-impeachment rule, rather than basing its rule on actual evidence that revealed the dangers of public deliberations, it relied on the public policy considerations articulated by the Court.[220] Congress's rule, in turn, led most states to adopt a similar rule, also without evidence

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> criminal defendants to punishment on the basis of bias, incompetence, and caprice, mocking our claim of adherence to the rule of law.

Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 228–29 (1989) (footnote omitted).

[216] As the Court later explained: "To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny." Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

[217] Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981) (quoting Burch v. Louisiana, 441 U.S. 130, 138 (1979)).

[218] *Id.* at 125.

[219] *See Tanner*, 483 U.S. at 127 (explaining that secrecy is a more pressing concern because a defendant's right to a fair trial is "protected by several aspects of the trial process").

[220] *See* FED. R. EVID. 606 advisory committee notes to 1972 proposed rules (referencing *McDonald* as the basis for the rule).

substantiating the public policies articulated by the Court.[221] Thus, for centuries, the secrecy of jury deliberations has been justified based on hypothetical concerns supported only by (at best) anecdotal evidence, even when the secrecy of deliberations has been in direct tension with defendants' constitutional rights. This has occurred despite the fact that jury secrecy is supposed to *protect* defendants' right to a fair and impartial trial.

B. A RACIAL BIAS EXCEPTION TO SECRECY

As the examples in Part II demonstrate, sometimes jury secrecy can run counter to a defendant's constitutional right to a fair trial: because deliberations are secret, juror misbehavior is sometimes never discovered or uncovered too late. In some instances, the Court has said that is acceptable. For example, when the jury reaches a compromise verdict or when some of the jurors are under the influence of drugs or alcohol.[222] The reasoning behind such rulings has been that public policy considerations in favor of secret deliberations outweigh an individual criminal defendant's rights.[223] Assuming the importance of these public policy considerations—which may be a dubious assumption, given that they are largely untested—the Court recently held that there is at least one instance in which secrecy must give way to a defendant's right to a fair trial: when there is evidence that overt racial bias influenced deliberations.[224]

In *Peña-Rodriguez v. Colorado*, the Court was tasked with deciding whether the no-impeachment rule should bar a court from considering credible evidence that a juror may have voted for guilt for racist reasons.[225] Mr. Peña-Rodriguez faced trial for various charges based on an illicit encounter with an underage girl in a

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[221] *See supra* note 129.

[222] *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 269 (1915) (upholding a verdict reached by compromise between jurors); Tanner v. United States, 483 U.S. 107, 125–27 (1987) (upholding a verdict reached by jurors under the influence).

[223] *See supra* notes 117–122 & 136–141 and accompanying text.

[224] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

[225] *Id.* at 867 ("The Court must decide whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.").

racetrack bathroom.[226] After the jury found him guilty, Mr. Peña-Rodriguez's counsel went to the jury room to discuss the trial with the jurors.[227] As the jurors left the room, two stayed behind.[228] They told Mr. Peña-Rodriguez's counsel that "another juror had expressed anti-Hispanic bias toward [Mr. Peña-Rodriguez] and [his] alibi witness."[229] The jurors then submitted affidavits stating that another juror said "that he 'believed [Mr. Peña-Rodriguez] 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.'"[230] The affidavit stated that this same juror said that in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[231] Finally, the affidavit recounted that the same juror told his fellow jurors that he did not believe Mr. Peña-Rodriguez's alibi witness because the witness was "an illegal" despite there being no evidence that supported this contention.[232] Mr. Peña-Rodriguez moved for a new trial based on this juror's bias.[233]

Despite this alarming evidence of bias, the Colorado courts ruled that the jurors' affidavits describing the bias were prohibited by Colorado's no-impeachment rule.[234] In addition to the Colorado Supreme Court, the Tenth Circuit and the Pennsylvania Supreme Court had held that no racial bias exception to the no-impeachment rule existed, despite the implications for defendants' Sixth Amendment rights.[235] On the opposite side, at least two federal

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[226] *Id.* at 861.

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.* at 862.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.* Colorado's no-impeachment rule is substantially the same as Federal Rule of Evidence 606(b). *Compare* FED. R. EVID. 606(b)(1) (stating that "a juror may not testify about any statement made or incident that occurred during the jury's deliberations"), *with* COLO. R. EVID. 606(b) (stating that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations").

[235] *See* United States v. Benally, 546 F.3d 1230, 1241 (10th Cir. 2008) ("We . . . reject the defendant's argument that Rule 606(b) contains an implicit exception for racially biased statements made during jury deliberations . . . ."); Commonwealth v. Steele, 961 A.2d 786,

appellate courts and fifteen state courts of last resort had held that a no-impeachment rule gives way in the face of evidence of racial bias influencing deliberations.[236]

The U.S. Supreme Court decided to hear Mr. Peña-Rodriguez's case to resolve this split.[237] In deciding whether an exception to the no-impeachment rule for racial bias should exist, the Court faced two competing concerns: the value of jury secrecy and the odiousness of racial discrimination.[238] The case stood "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."[239]

On one hand, the Court explained, was the importance of the jury as a "central foundation of our [criminal] justice system" and as a "necessary check on governmental power."[240] While the Court conceded that "the jury system has its flaws," it continued, "experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense."[241] The Court explained that, to preserve the sanctity of the jury, a rule had "evolved to give substantial protection to verdict

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808 (Pa. 2008) (refusing to carve out an exception to the no-impeachment rule based on racist "statements made by the jurors themselves").

[236] *See* United States v. Villar, 586 F.3d 76, 87–88 (1st Cir. 2009); State v. Brown, 62 A.3d 1099, 1110 (R.I. 2013); Kittle v. United States, 65 A.3d 1144, 1152 (D.C. 2013); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc); Commonwealth v. McCowen, 939 N.E.2d 735, 763–64 (Mass. 2010); State v. Hidanovic, 747 N.W.2d 463, 473–74 (N.D. 2008); State v. Santiago, 715 A.2d 1, 14–22 (Conn. 1998); Fisher v. State, 690 A.2d 917, 919–921, 920 n.4 (Del. 1996); State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995); Spencer v. State, 398 S.E.2d 179, 184–85 (Ga. 1990); After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 690 (Wis. 1982); State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980); City of Seattle v. Jackson, 425 P.2d 385, 389 (Wash. 1967); State v. Levitt, 176 A.2d 465, 467–68 (N.J. 1961); *see also Peña-Rodriguez*, 137 S. Ct. at 886 (listing cases from different jurisdictions recognizing a racial bias exception to the no-impeachment rule); *Peña-Rodriguez* Cert. Petition, *supra* note 74, at 10–15 (elaborating on the split among the lower courts).

[237] *See* Jacob J. Key, *Walking the Fine Line of Admissibility: Should Statements of Racial Bias Fall under an Exception to Federal rule of Evidence 606(b)?*, 39 AM. J. TRIAL ADVOC. 131, 137–39 (2015) (detailing the circuit split that existed about whether a racial bias exception to the no-impeachment rule existed).

[238] *See Peña-Rodriguez*, 137 S. Ct. at 861.

[239] *Id.* at 868.

[240] *Id.* at 860.

[241] *Id.* at 861.

finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations."[242]

On the other hand, the Court went on, was the "imperative to purge racial prejudice from the administration of justice."[243] This imperative flows from the Fourteenth Amendment's central purpose: "to eliminate racial discrimination emanating from official sources in the States."[244] The jury functions as "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[245] Thus, "[p]ermitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"[246]

Balancing these two interests, 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."[247] The Court reasoned that jurors expressing racial bias "differs in critical ways" from its previous cases where it had upheld the no-impeachment rule—*McDonald* and *Tanner*[248]—because, while the jurors' behavior in those cases was "troubling and unacceptable," both cases involved "anomalous behavior from a single jury—or juror—gone off course."[249] "The same cannot be said about racial bias," which "implicates unique historical, constitutional, and institutional concerns" that "if left unaddressed, would risk systemic injury to the administration of justice."[250] A racial bias exception to the no-impeachment rule was therefore "necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[251] The

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[242] *Id.*

[243] *Id.* at 867.

[244] *Id.* (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)).

[245] *Id.* at 868 (quoting McCleskey v. Kemp, 481 U.S. 279, 310 (1987)).

[246] *Id.* (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)).

[247] *Id.* at 869.

[248] For a discussion of both cases, see *supra* notes 112–122, 132–145 and accompanying text.

[249] *Peña-Rodriguez*, 137 S. Ct. at 868.

[250] *Id.*

[251] *Id.* at 869.

Court reasoned that a racial bias claim is also "distinct in a pragmatic sense," because while "safeguards," such as voir dire and in-court observation, protect against most types of juror misbehavior, "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations."[252] A juror may be hesitant to reveal that a fellow juror is a "bigot."[253] The Court concluded that "blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule."[254]

Peña-Rodriguez marked an important development in the law regarding jury secrecy. Until that point, the only admissible evidence about deliberations was evidence that external, prejudicial information leaked into the jury room.[255] Juror conduct, no matter how bad, was off limits. Now, however, evidence of a juror's *overt* racial bias is admissible[256] because racial bias infecting deliberations is directly contrary to the Sixth Amendment jury-trial right and is in tension with the Fourteenth Amendment's central goal of "eliminat[ing] racial discrimination emanating from official sources in the States."[257] With *Peña-Rodriguez*, some check against juries convicting defendants out of racial bias now exists—at least on paper.

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[252] *Id.* at 868–69.

[253] *Id.* at 869.

[254] *Id.* at 871.

[255] *Id.* at 863 ("Under [the previous] version of the rule, the no-impeachment bar permitted an exception only for testimony about events extraneous to the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts."); *see also supra* notes 123 & 125.

[256] In an upcoming article, I explore how the Supreme Court set the standard for the racial bias exception so high that it is ineffectual at eliminating racial bias in the jury room. *See* Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 12–15) (on file with author).

[257] *Peña-Rodriguez*, 137 S. Ct. at 867 (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)).

C. THE EXCEPTION IS INSUFFICIENT

While *Peña-Rodriguez* seems to be a step in the right direction of protecting defendants' fair trial rights, the exception is insufficient for several reasons.

First, as other scholars have begun to explore, one problem with *Peña-Rodriguez* is that it only speaks to racial bias and does not address whether its reasoning extends to other forms of bias.[258] By keenly focusing on the unique history of race-based discrimination in the administration of justice, *Peña-Rodriguez* left open the question of whether the no-impeachment rule will give way when a court is presented with evidence of other forms of bias influencing deliberations. This is not to quarrel with *Peña-Rodriguez*'s assertion that the history of racial discrimination in this country is unique. It undoubtedly is. But surely *any* discrimination based on a person's identity is antithetical to the Sixth Amendment's fair trial guarantee. If a concern that motivated the *Peña-Rodriguez* exception was a documented history of discrimination, America's history in that regard extends beyond racism.[259] And while the Fourteenth Amendment's anti-discrimination principles were originally designed to protect against race-based discrimination, today the Fourteenth Amendment also protects against arbitrary

[258] *See, e.g.*, Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the* Peña-Rodriguez *Exception Beyond Race*, 118 COLUM. L. REV. 1801, 1806 (2018) (concluding "that the [*Peña-Rodriguez*] exception will likely expand to include other types of bias that may threaten a defendant's right to an impartial jury—and that such an expansion beyond race is both normatively and pragmatically sound").

[259] *See generally* LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA (1994) (detailing the history of anti-Semitism in America); GAIL COLLINS, AMERICA'S WOMEN: 400 YEARS OF DOLLS, DRUDGES, HELPMATES, AND HEROINES (1st ed. 2003) (detailing the history of sexism in America); MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES (2011) (detailing the history of anti-queer bias in America).

gender-based,[260] religion-based,[261] citizenship-based,[262] and sexual orientation-based[263] discrimination. Presumably, bias based on any of these classifications would violate the Sixth Amendment's fair trial guarantee, especially given the Fourteenth Amendment concerns at play.[264] But because the analysis in *Peña-Rodriguez* was so tethered to race—and not to equality or anti-discrimination principles more broadly—whether courts will recognize exceptions

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[260] *See* Craig v. Boren, 429 U.S. 190, 208–09 (1976) (holding that an Oklahoma statute providing for different drinking ages for men and women violates the Fourteenth Amendment's Equal Protection Clause).

[261] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (opining that discriminatory legislation should "be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" if "directed at particular religious, or national, or racial minorities" (citations omitted)); Hassan v. City of New York, 804 F.3d 277, 294–307 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (holding that plaintiffs stated a plausible equal protection claim that they were discriminated against based on their religion). Religious discrimination claims are more frequently resolved on First Amendment grounds, rather than pure Fourteenth Amendment grounds. *See* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666 (2008) ("Challenges to discrimination based on religion are hardly ever brought under the Equal Protection Clause.").

[262] *See* Plyer v. Doe, 457 U.S. 202, 230 (1982) (holding that a school district could not charge children of undocumented immigrants tuition to compensate for lost state funding); *In re* Griffiths, 413 U.S. 717, 718 (1973) (holding that a state could not condition admission to the bar on citizenship).

[263] While the U.S. Supreme Court has not expressly recognized sexual orientation as a suspect class, some courts of appeals have held that heightened scrutiny applies to sexual-orientation based claims of discrimination. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (applying "heightened scrutiny to classifications based on sexual orientation for purposes of equal protection"); Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (holding that judicial review of a section of the Defense of Marriage Act defining "marriage" and "spouse," required "heightened scrutiny"), *aff'd on other grounds*, 570 U.S. 744 (2013).

[264] Justice Alito recognized this in his dissent in *Peña-Rodriguez*, arguing:

> Recasting [the case] 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.

Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 883–84 (2017) (Alito, J., dissenting) (citations and footnotes omitted).

to the no-impeachment rule when presented with evidence of other forms of discrimination is unclear.[265]

Second, *Peña-Rodriguez* sets too high of a standard. By holding that to overcome the no-impeachment rule racial bias must not only be "overt," but also a "significant motivating factor" in a juror's vote for guilt,[266] the Court effectively ensured that only the most egregious racism will fall within the exception. This standard overlooks the reality that racism today is often subtle, not overt.[267] It also ignores the difficulty of pinpointing how racial bias influences decision-making. As such, the decision will likely foreclose many juror racial bias claims.[268]

Third, and most relevant for this Article, *Peña-Rodriguez*'s exception cannot adequately protect against bias in the jury room because it does not grapple with the fact that discovering what was said during deliberations is incredibly difficult.[269] For *Peña-Rodriguez*'s racial bias exception to work, it requires one of two things: either (a) a juror comes forward and reveals the biased statements made during deliberations, or (b) a lawyer (or her agent) interviews jurors after the fact in an attempt to uncover any bias during deliberations, and then the juror reveals to the lawyer what biased statements were made. Both avenues are fraught with potential problems.

Starting with Avenue A, whether jurors will have the gumption to come forward and complain of bias during deliberations is

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[265] Indeed, some contend that the courts are split on whether the *Peña-Rodriguez* exception extends beyond racial bias. *See, e.g.*, Motion for Leave to File Brief and Brief of Amici Curiae Law Professors in Support of Petitioner at 5–8, Rhines v. Young, 139 S. Ct. 1567 (2019) (mem.) (No. 18-8029) (discussing an emerging split among courts over non-race-based discrimination).

[266] *Peña-Rodriguez*, 137 S. Ct. at 869.

[267] *See* William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015) ("In this age of covert racism, the conception of racism must change to capture its clandestine nature.").

[268] For a full discussion of this particular shortcoming of *Peña-Rodriguez*, see Harawa, *supra* note 256 (manuscript at 12–23).

[269] Indeed, *Peña-Rodriguez* recognized that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." 137 S. Ct. at 869. Despite this recognition, the decision did not discuss whether no-contact rules must also give way if there is any indication that a juror made racially biased statements during deliberations.

questionable. The Court acknowledged this in *Peña-Rodriguez*, noting how difficult it is for one to call another a bigot.[270] This is especially true today, when calling someone a racist is seen as "deeply offensive."[271] Additionally, jurors are assured that their deliberations are secret and are admonished not to disclose what happens in the jury room.[272] Therefore, there should be no expectation that jurors would come forward and reveal that a fellow juror exhibited bias during deliberations.

Turning to Avenue B, expecting defense attorneys—especially public defenders—to conduct the types of juror interviews necessary to reveal racial bias is unfair. These interviews often require the interviewer to build a rapport with the juror, which requires the interviewer to spend hours, if not days, with a juror before that juror may reveal to the interviewer what happened during deliberations.[273] In many jurisdictions, public defenders are already

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[270] *Id.*

[271] J. M. Blaut, *The Theory of Cultural Racism*, 24 ANTIPODE 289, 289 (1992); *see also* John Blake, *The Polite Way to Call Someone a Racist*, CNN (Sept. 29, 2018, 8:21 AM), https://www.cnn.com/2018/09/29/us/polite-racism/index.html (explaining the "old social taboo that discourages many Americans from talking directly about race"). In the current moment of national reckoning, where we as a society are more openly grappling with the ways in which racism invidiously infects our society, it could be that people are more willing to call out discriminatory behavior. *See* Jelani Cobb, *An American Spring of Reckoning*, THE NEW YORKER (June 14, 2020), https://www.newyorker.com/magazine/2020/06/22/an-american-spring-of-reckoning (discussing an "American Spring" of "reckoning" in the wake of George Floyd's murder); Audra D. S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html ("Across the nation, shifts in thinking have already begun—a closer examination of the daily hardships faced by black Americans.").

[272] *See* FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS paras. 1, 9, at 3–4, 16 (1987), https://www.fjc.gov/sites/default/files/2012/CrimJury.pdf (instructing the jury both before trial and before deliberations that the deliberations will remain secret and that jurors should not discuss the case with anyone).

[273] This point has been made by scholars who practice capital defense, where post-conviction litigation and witness and juror interviews are most robust. *See, e.g.*, Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 146–47 (2018) (explaining that for witnesses "in non-mitigation contexts," "building rapport in a casual, comfortable setting is the key to unearthing an accurate account"); Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 742 (2008) ("Rapport with clients and witnesses is

strapped for resources and are laboring under unimaginable caseloads.[274] To expect these same lawyers to sit down with each juror and explore whether a juror exhibited bias is unreasonable. Then, still, the juror would have to feel comfortable enough with the attorney to reveal that another juror said something biased, which returns to the problem just discussed—the difficulty of calling someone a bigot. Moreover, this line of investigation is open to criticism and debate from the other side. Even if a juror reveals to the defense that someone said something biased, the government will most likely contest that account by attacking either the lawyer's or the juror's credibility.[275] On top of that, some states prohibit lawyers from talking with jurors about cases, making this avenue for discovering bias a dead end.[276]

Another shortcoming of both avenues is that they are often only viable long after a guilty verdict; thus, a defendant has to labor under a conviction while a juror bias claim works its way through the courts. In the examples in Part II, the jurors who came forward of their own volition only did so after the verdict was rendered, and the bias that the defense teams uncovered was discovered years after the conviction became final.[277] Therefore, a defendant must sit behind bars, sometimes for years, while litigation ensues over a

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crucial to the representation of clients facing the death penalty for the same reasons that it is essential to effective doctor-patient relationships.").

[274] *See, e.g.*, Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017, 5:55 AM), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 ("[M]ost public defenders in Missouri are expected to handle 80 to 100 cases a week."); Innocence Staff, *Public Defenders Speak Up and Push Back*, INNOCENCE PROJECT (Nov. 27, 2017), https://www.innocenceproject.org/public-defenders-speak-up-and-push-back/ (describing public defenders' "crushing" caseloads); Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, PEW: STATELINE (Nov. 21, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads (stating that sixty New Orleans public defenders "manage roughly 20,000 cases a year").

[275] *See, e.g.*, Brief in Opposition to Petition for a Writ of Certiorari at 10–14, Rhines v. Young, 139 S. Ct. 1567 (2019) (mem.) (No. 18-8029) (accusing the Pennsylvania Federal Community Defender Office of unethical practices and submitting unreliable juror affidavits).

[276] *See* Miller, *supra* note 273, at 149 n.76 (explaining that these restrictions are found in at least thirteen states).

[277] *See supra* Section II.A.

juror's bias, meaning that defendants sometimes languish in prison under an unconstitutionally rendered conviction and sentence.

Critically, one must remember that a lot of bias will never be captured. People know, as a general matter, that bigotry is inappropriate.[278] For this reason, most jurors likely do not disclose their bias when completing juror questionnaires or when responding to voir dire questions, and they likely know better than to be overtly racist during deliberations. Therefore, in every trial, a real risk exists that a juror harbors hidden bias.[279] Observing a juror during trial will not reveal whether he or she hates certain groups of people. Thus, most unexpressed bias likely will never be discovered, and even if it is discovered at a later date, calculating how the bias may have influenced juror deliberations after the fact is difficult. The case of Keith Tharpe proves this point.

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[278] *See, e.g.*, United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984) ("As overtly bigoted behavior has become more unfashionable, evidence of [discrimination] has become harder to find." (quoting Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977))); United States v. Bannister, 786 F. Supp. 2d 617, 665 (E.D.N.Y. 2011) ("The task of recognizing [discriminatory] intent is made particularly difficult by 'the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior.'" (quoting United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985))); State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013) ("It is now socially unacceptable to be overtly racist."), *abrogated by* City of Seattle v. Erickson, 398 P.3d 1124 (Wash. 2017).

[279] Professor Jessica West proposes that to help ferret out bias, there should be "expanded jury venires, more robust and effective voir dire, less discretion for parties to remove jurors on the basis of race, and the development of jury instructions and admonitions that directly address deliberative biases." Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 169 (2011). Professor Peter Joy has explained that "defense counsel *has an obligation* to determine when and how to discuss race and racial bias during jury selection in order to be effective." Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180, 186 (2015) (emphasis added). I agree that defense counsel (and the prosecution) should do all that they can to root out bias on the front end, and mechanisms should be in place to aid defense lawyers in their efforts. However, defense counsel will not always be successful in capturing all bias or in getting jurors to admit their biases. *See* Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 933 (2015) (explaining that it is hard to get jurors to "speak up in public, especially if the response requires a prospective juror to reveal a personal experience or to admit to holding a view that is not socially acceptable, or 'socially desirable'"). All this is to say that the proposal outlined in Professor West's article is still necessary to guard defendants' rights.

Mr. Tharpe was a Black man on death row in Georgia.[280] Seven years after a jury sentenced Mr. Tharpe to die, his post-conviction lawyers interviewed one of the jurors who decided his fate—Barney Gattie.[281] In a breathtaking moment of candor, Gattie said that he chose "between life and death" for Mr. Tharpe because the victims "were 'good black folks.'"[282] There was another "category" of "black folks" according to Gattie—"Niggers"—and because Mr. Tharpe fell into this "category," the juror said that he felt that Mr. Tharpe "should get the electric chair for what he did."[283] Gattie then made this astonishing statement: "[a]fter studying the Bible, I have wondered if black people even have souls."[284] The State of Georgia argued against Mr. Tharpe's plea for relief based on Gattie's bias by submitting affidavits from other jurors attesting that race was not discussed during deliberations as well as an affidavit from Gattie himself stating that race did not play a part in his voting for Mr. Tharpe's death.[285] Due to procedural hurdles, no court heard the merits of Mr. Tharpe's juror bias claim before he died due to complications from cancer.[286] The arguments made by Georgia in Mr. Tharpe's case show the difficulty of getting relief for biases that go unstated.[287]

Mr. Tharpe's case displays only the problem of *overt* bias that goes unstated. There are also implicit biases, which are "discriminatory biases based on either implicit *attitudes*—feelings

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[280] *See* Tharpe v. Sellers, 138 S. Ct. 545, 545–46 (2018) (per curiam) (providing the procedural history of Mr. Tharpe's sentence and appeals).

[281] *Id.* at 548 (Thomas, J., dissenting).

[282] *Id.*

[283] *Id.* at 546 (per curiam).

[284] *Id.* (alteration in original).

[285] *See* Brief in Opposition at 2, Tharpe v. Sellers, 138 S. Ct. 545 (2018) (No. 17-6075) (arguing against the U.S. Supreme Court reviewing Mr. Tharpe's case because Gattie "provided live and further affidavit testimony that race was not a motivating factor of the jury" and "the remaining eleven jurors, who all testified, did not state that race was considered during deliberations").

[286] *See* Zack Linly, *Death Row Inmate Keith Tharpe Died in Prison Before Execution. Here's Why His Story Leaves Me Conflicted*, THE ROOT (Jan. 26, 2020, 11:00 AM), https://www.theroot.com/death-row-inmate-keith-tharpe-died-in-prison-before-exe-1841235372 (detailing the end of Keith Tharpe's almost thirty-year saga on death row).

[287] *See* Tharpe v. Ford, 139 S. Ct. 911, 911, 912 (2019) (statement of Sotomayor, J., respecting denial of certiorari) (noting that "Tharpe has never received a hearing on the merits of his racial-bias claim" because of the lower courts' "procedural rulings").

that one has about a particular group—or implicit *stereotypes*—traits that one associates with a particular group."[288] These biases are even harder to unearth because jurors probably are not even aware that they harbor them.[289] And even if jurors could be tested for implicit biases,[290] the thought of disqualifying jurors for implicit biases is daunting given that everyone likely holds some form of implicit bias.[291] No tool in the current trial toolbox even begins to address how a defendant can have a fair and impartial trial when implicit biases may influence a juror's view of a case.[292]

Given the impossibility of adequately checking for all instances of juror bias and determining how that bias may influence a juror's decisional process in assigning guilt, courts should do what they can to catch whatever bias is identifiable. The U.S. Supreme Court made this point decades ago, proclaiming that the "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."[293] And the Court's decision in *Peña-*

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[288] Roberts, *supra* note 40, at 833; *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006) ("*Implicit biases* are discriminatory biases based on implicit attitudes or implicit stereotypes.").

[289] *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4–5 (1995) (explaining that the hallmark of "implicit cognition" is that "it is unavailable to self-report or introspection"); David Yokum, Christopher T. Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 902 (2019) ("Most cognitive processes are unconscious and, thus, leave no phenomenological trace within the mind.").

[290] *See, e.g.*, Roberts, *supra* note 40, at 829 (noting the "rash of proposals" suggesting the use of the Implicit Association Test during jury formation to address juror biases).

[291] Justice Michael B. Hyman, *Reining in Implicit Bias*, ILL. B.J., July 2017, at 26, 28 ("Implicit bias is a human condition; a product of our brain's natural functions, molded by society, and reinforced by our environment." (footnote omitted)).

[292] How to address jurors' implicit biases is outside the purview of this Article; however, judges and scholars have written on the subject. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 165–70 (2010) (discussing various proposals—including the Implicit Association Test (IAT)—to address implicit biases during jury selection); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139, 158–69 (2010) (discussing using the IAT for jurors to uncover implicit biases); Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 418–22 (2003) (same).

[293] Dennis v. United States, 339 U.S. 162, 171–72 (1950).

Rodriguez supports this idea because it shows that the "public policy" values supporting secret deliberations sometimes must yield in the face of overt racial bias.[294] However, *Peña-Rodriguez* does not go far enough. Even with a racial bias exception to the no-impeachment rule, using evidence from jurors to impeach verdicts is an ineffective means of ferreting out bias and protecting defendants' Sixth Amendment rights. More can be done to ensure criminal defendants are not convicted or sentenced out of prejudice.

IV. THE PROPOSED END OF SECRECY

To further protect defendants' constitutional rights and to help ensure people are only convicted of crimes based on what they have done and not based on who they are, perhaps jury deliberations should be recorded, transcribed, and made part of the trial record. This memorialization process could be done in a way that promotes (or at least does not actively harm) the public policy values that have motivated jury secrecy.

A. THE PROPOSED PROCEDURE

The following is a proposal for making jury deliberations part of the record.

> (1) All proceedings in a criminal case[295] must be recorded, including jury deliberations, to ensure a complete and accurate trial record. The jurors should be instructed of this fact at the beginning of trial. They should also be instructed that the transcript of deliberations, like the transcript of voir

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[294] *See supra* Section III.B.

[295] This proposal is designed to protect defendants' Sixth Amendment rights, and therefore only applies to criminal cases. I take no position on whether the same proposal should be implemented in civil cases to protect parties' Seventh Amendment rights. Notably, however, bias has infected civil jury trial deliberations, too. *See, e.g.*, Turner v. Stime, 222 P.3d 1243, 1245 (Wash. Ct. App. 2009) (reviewing a case in which "three of the women jurors and two of the male jurors referred to Mr. Kamitomo [plaintiff's counsel] as 'Mr. Kamikazi' or 'Mr. Miyashi' or 'Mr. Miyagi'"); After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 688 (Wis. 1982) (reviewing a case in which a juror called the defendant a "Cheap Jew" during deliberations).

dire, will be stripped of any identifying information and will be filed under seal and only shared with the court and the parties.[296]

(2) Jury deliberations should only be captured by electronic recording devices, such as a camera[297] and microphone. Only sworn jurors should be permitted in the jury room during deliberations. The recording device should be surreptitiously placed in the jury room to avoid distracting the jurors while they deliberate.[298]

(3) Deliberations should be transcribed by a certified court reporter as soon as the deliberations have ended if the jury returns a guilty verdict.[299] Jurors' names should be excluded from any transcription and replaced with the jurors' numbers, and the transcript should be filed with the court under seal.[300]

(4) A copy of the transcript should be furnished to the defendant and the prosecution within the timeframe in which a defendant must move for a new trial.

(5) In a motion for a new trial filed by the deadline set forth by the controlling rules of criminal

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[296] Informing the jurors at the outset avoids some of the ethical issues that plagued the Chicago Jury Project. *See supra* notes 165–172 and accompanying text.

[297] A camera is recommended to help ensure the accuracy of the transcription.

[298] The camera does not necessarily have to be hidden in the jury room, but it should not be an obvious focal point for the jurors.

[299] Because the proposed procedure is designed to protect the defendant's constitutional rights, transcribing would not be necessary in the case of a not guilty verdict. Likewise, because of double jeopardy concerns, the prosecution would not be able to move for a new trial under the proposed procedures.

[300] This procedure recommends the transcript be filed under seal to preserve the secrecy of deliberations, recognizing that there may be times that the public or the press may try to access the transcripts of deliberations. In scenarios where the public seeks access to deliberation transcripts, courts could apply the same standard that is used for unsealing grand jury transcripts. *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 223 (1979) (explaining that disclosure of grand jury transcripts "is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure").

procedure,[301] the defendant can raise any issue of jury bias supported by the transcript.

(6) The trial judge must decide whether the transcript shows that a juror harbored impermissible bias and whether further proceedings are necessary to address the claim of bias. If the judge ultimately finds credible evidence of bias during deliberations, the judge must grant the defendant's motion for a new trial.

This proposal raises the question of what forms of bias would warrant a new trial under this procedure. While this would ultimately be a question that rulemakers would decide, *Peña-Rodriguez* is a good place to start for answering this question. The *Peña-Rodriguez* Court was particularly concerned with the intersection between Sixth Amendment fair trial rights and Fourteenth Amendment anti-discrimination principles.[302] Consistent with that concern, any bias that implicates a suspect classification under the Fourteenth Amendment would be subject to challenge.[303] Of course, jurisdictions will be free to add other categories to the list that extend beyond suspect classifications under the Fourteenth Amendment. However, at a minimum, if the Court has recognized that the Fourteenth Amendment protects against discrimination based on certain traits, any evidence of bias during deliberations surrounding those traits should be admissible and redressable.[304]

There is also the question of how much bias is necessary to overturn a conviction. Notably, the Court in *Peña-Rodriguez* did not

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[301] For example, the Federal Rules of Criminal Procedure require a new trial motion to be filed within fourteen days of the verdict. *See* FED. R. CRIM. P. 33(b)(2). This deadline should be tolled by the time it takes to prepare and distribute the transcript of deliberations.

[302] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017) ("This case 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.").

[303] *See supra* notes 260–263 and accompanying text (collecting cases recognizing some of the suspect classifications under the Fourteenth Amendment).

[304] Jason Koffler discusses the potential expansion of the no-impeachment rule exception carved out in *Peña-Rodriguez* beyond race and persuasively argues that extending the exception to "other suspect classifications under the Fourteenth Amendment" is "both logical and administrable." Koffler, *supra* note 258, at 1854–55.

articulate "the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted."[305] Indeed, the Court recognized that a split in authority exists on this point because it cited to two cases applying different standards.[306] Therefore, litigation surrounding the question of how much bias is necessary to overturn a conviction will occur, and the Court will one day have to provide guidance. This unresolved question is deserving of an article of its own.[307] And under this proposal, a legislature will be free to set an appropriate standard so long as it is above the constitutional floor that the Court may eventually set.

With that said, the Sixth Amendment guarantees a trial by an impartial jury; therefore, if one juror is partial, that violates the Amendment.[308] And given that the Court has said that bias "odious in all aspects, is especially pernicious in the administration of justice,"[309] if bias is evinced during deliberations, a new trial should be granted. *Any* prejudice during deliberations "damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'"[310]

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[305] *Peña-Rodriguez*, 137 S. Ct. at 870.

[306] *Id.* at 871 (first citing Shillcutt v. Gagnon, 827 F.2d 1155 (7th Cir. 1987); then citing United States v. Henley, 238 F.3d 1111 (9th Cir. 2001)). In *Shillcutt*, the Seventh Circuit held that a defendant must show that the bias "pervaded the jury room" in order to obtain a new trial. 827 F.2d. at 1159. The Ninth Circuit expressly rejected this standard, stating that a defendant need only show a single juror was biased. *Henley*, 238 F.3d at 1120.

[307] *See* Harawa, *supra* note 256 (manuscript at 42–48) (exploring this issue in depth).

[308] *See, e.g.*, Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) ("The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [the] right to a fair trial."); *cf.* Tillman v. United States, 406 F.2d 930, 937 (5th Cir. 1969) ("[I]f only one juror is improperly influenced, the trial is as unfair as if every juror was so influenced."), *vacated in part*, 395 U.S. 830 (1969).

[309] Rose v. Mitchell, 443 U.S. 545, 555 (1979).

[310] *Peña-Rodriguez*, 137 S. Ct. at 868 (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)); *see also* Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001) ("[T]he presence of a biased juror, like the presence of a biased judge, is a 'structural defect in the constitution of the trial mechanism' that defies harmless error analysis . . . ." (quoting Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992))); *Dyer*, 151 F.3d at 973 n.2 ("The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice."); *Johnson*, 961 F.2d at 756 ("The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge.").

B. THE EFFECT OF RECORDING ON PUBLIC POLICY CONSIDERATIONS

The proposed recording procedure is designed to minimally affect the public policy considerations supporting the secrecy of deliberations. Indeed, in some instances, memorializing deliberations as proposed above would *further* the public policy considerations articulated by the U.S. Supreme Court. This Section analyzes each of those policy considerations.

Harassment. Recording deliberations could potentially ameliorate juror harassment by allowing lawyers to examine the transcripts for evidence of bias as opposed to going to the jurors themselves.[311] At least as an initial matter, the lawyers can consult the transcript to determine if bias was evinced during deliberations rather than asking the jurors directly. Of course, for some jurors, the proposal could aggravate the concern of harassment because, once bias is revealed, the juror (or other jurors who served with the biased juror) may be called into court to explain the biased comment, but that would likely be limited to instances where the transcript has already revealed bias. Otherwise, all of the jurors

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[311] The identities of jurors are not secret. Courtrooms are open to the public, and many courts have held that the press has at least a qualified right to juror lists. *See, e.g.*, United States v. Wecht, 537 F.3d 222, 235 (3d Cir. 2008) (holding that there is a "presumptive First Amendment right of access to obtain the names of both trial jurors and prospective jurors prior to empanelment of the jury"); *In re* Globe Newspaper Co., 920 F.2d 88, 98 (1st Cir. 1990) (holding that absent "particularized findings reasonably justifying non-disclosure, the juror names and addresses must be made public"); *In re* Balt. Sun Co., 841 F.2d 74, 75 (4th Cir. 1988) ("After a jury has been seated . . . the names of those jurors are just as much a part of the public record as any other part of the case, and we think so also are their addresses in order to identify them."). Moreover, many jurors give interviews once trial is over, especially in high profile cases. *See, e.g.*, Christine J. Iversen, Comment, *Post-Verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. MARSHALL L. REV. 507, 508–09 (1997) ("Jurors from the trials for the beating of Reginald Denny and Rodney King; and from the trials of Lorena Bobbit, the Menendez brothers and John Hinkley, Jr. have publicly appeared on both local and national television shows such as *Good Morning America* and *The Oprah Winfrey Show*. Jurors have also spoken on syndicated radio programs and many have even held personal news conferences." (footnotes omitted)); *see also* Nicole B. Casarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499, 509 (2003) (examining juror interviews given for the *Houston Chronicle* and finding approximately 700 articles between 1985 and 2002 where jurors gave interviews to the paper).

would have to be interviewed to determine if anyone remembers another juror expressing bias.

The proposed procedure further seeks to limit juror harassment by requiring the transcript of deliberations to be filed under seal. The added precaution of removing identifying information from the transcript may also lessen the likelihood that certain comments will be tied to certain jurors should the transcripts be made public.[312] When a juror says something biased during deliberations, this proposal includes protections to limit the juror's bias being exposed to the world.[313] Thus, to the extent the practice of keeping jury deliberations secret was justified by protecting jurors from harassment for information that could be used to impeach the verdict[314] and was designed to protect jurors from public scrutiny, transcribing deliberations in the way proposed minimizes these concerns.

Freedom of Debate. Stifling open and honest dialogue in the jury room is perhaps the most pressing pushback that attends any proposal to record deliberations. Indeed, this concern was most frequently cited in response to television broadcasts of jury deliberations.[315] However, the sky did not fall in any of the jurisdictions that experimented with recording jury deliberations; in fact, there is some evidence to the contrary, indicating that the

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[312] This is similar to procedures used for child witnesses or parties, or victims of sexual assault, to maintain their privacy. *See, e.g.*, FED. R. CRIM. P. 49.1(a)(3) (providing that only a minor's initials can be included in a filing); ALASKA STAT. ANN. § 12.61.140(b) (West, Westlaw through Ch. 32 of the 2020 2d Reg. Sess. of the 31st Legis.) (requiring the use of initials for victims of sexual abuse).

[313] If a dogged member of the public really wanted to, once information comes out that a new trial was ordered due to a biased juror, they could interview the jurors to discover who the bigot was. But the risk of that seems minimal, and, in any event, if bias were revealed through juror testimony or affidavits (as in *Peña-Rodriguez*) the same result could occur.

[314] *See* Tanner v. United States, 483 U.S. 107, 120 (1987) (outlining the public policy considerations in support of secrecy); Clark v. United States, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); McDonald v. Pless, 238 U.S. 264, 267 (1915) ("Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.").

[315] *See supra* notes 186–194 and accompanying text.

recordings did not influence deliberations at all.[316] Additionally, recording deliberations for the trial record is far less exciting than recording for television. Moreover, technology has also evolved to the point where courts can record deliberations without the jury even noticing. To that point, if jurors are told that everything is recorded at the beginning of trial to ensure a full and accurate record, as is proposed, it is less likely that the recording will be on their minds when they eventually return to the jury room to deliberate. This is especially true today, given that so many of our everyday interactions are recorded in some way, shape, or form; when recordings are routine, they are perhaps less likely to affect behavior.[317] Given modern-day realities, the presence of a nondescript camera in the jury room may not be seen as earth-shattering.[318] In any event, the profession should study what effect, if any, recording deliberations would have on freedom of debate rather than automatically assuming it would be negative.

We should likewise ponder whether the freedom to express bias during deliberations is worth protecting. The procedures described above could potentially stifle debate insofar as it deters a juror from exhibiting bias during deliberations. This could be seen as a bad thing—the bias will nonetheless manifest in the juror's vote, but no record of the bias will exist to help overturn a conviction. Conversely, it could be a good thing—biased jurors could modify their behavior in the right direction and truly try to check their bias at the door and focus on the evidence.[319] To the extent that a biased

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[316] Some of the jurors from the CBS *Enter the Jury Room* project said that the filming did not influence deliberations one way or another. *See* Ruprecht, *supra* note 23, at 233.

[317] Take, for example, police officers wearing body cameras. The District of Columbia commissioned a study of its police department to see what effect, if any, body cameras would have on police behavior. *See* DAVID YOKUM, ANITA RAVISHANKAR & ALEXANDER COPPOCK, EVALUATING THE EFFECTS OF POLICY BODY-WORN CAMERAS: A RANDOMIZED CONTROLLED TRIAL 1–2 (2017), https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf. After randomly reviewing the behavior of officers, the study was "unable to detect any statistically significant effects," and therefore recommended that the public and government "should recalibrate our expectations of [body-worn cameras]." *Id.* at 22.

[318] Indeed, people in cities are increasingly under surveillance; in 2014, there were 245 million professionally installed surveillance cameras around the world. Jordan G. Teicher, *Gazing Back at the Surveillance Cameras That Watch Us*, N.Y. TIMES: LENS (Aug. 13, 2018), https://www.nytimes.com/2018/08/13/lens/surveillance-camera-photography.html.

[319] For example, one of the lawyers who consented to the filming of deliberations did so because he believed the jury would likely pay closer attention to the defense evidence. *See*

juror no longer feels free to express his bias during deliberations, this procedure would benefit the other jurors as well, as they would not be forced to confront the bias, nor could the bias influence their views of the case. If conversations surrounding bias are stifled, the jury—as a communal body—can focus on the evidence rather than taking time to guard against the bias, which could lead to confrontation and a breakdown of communication. Therefore, this proposal may help, rather than hurt, the flow of conversation in the jury room.

There is also the concern that if recording deliberations drives bias underground, the proposed procedure robs a defendant of the ability to prove a juror bias claim. The difficulty of proving a juror bias claim without a recording, especially in a jurisdiction that forbids juror contact, may minimize this concern. It is also important to remember that jurors are expected to divulge their bias during voir dire, which is recorded, transcribed, and, depending on the jurisdiction, conducted in open court in front of the other potential jurors. The U.S. Supreme Court has said voir dire is critical to protecting a defendant's fair trial right.[320] Thus, if recording suppresses bias, then the efficacy of voir dire as a tool to

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Ruprecht, *supra* note 23, at 229 n.49; *see also* Teresa Wyszomierski, *The Case for Letting Cameras into the Sacred Jury Room*, CHI. TRIBUNE (Jan. 31, 2003), https://www.chicagotribune.com/news/ct-xpm-2003-01-31-0301310108-story.html ("[I]f prospective jurors elect not to serve because they're afraid that their decision won't withstand objective scrutiny, then it's best that they be excluded. Our legal system will benefit if taping deliberations forces jurors to render a more carefully considered verdict.").

Some studies also show that when people are being watched, they behave more positively, "from increasing work productivity and charitable giving, to encouraging honesty, promoting adherence to recycling rules, stimulating voter turnout, and reducing crime." *See* YOKUM ET AL., *supra* note 317, at 1–2 (footnotes omitted). These studies show that "monitoring appears to shift behavior into alignment with socially acceptable conduct." *Id.* at 2.

To continue the body-worn cameras example, some studies show that body-worn cameras positively impact police behavior. For example, the Las Vegas Police Department found that officers wearing cameras "may de-escalate aggression or have a 'civilizing' effect on the nature of police-citizen encounters." ANTHONY BRAGA, JAMES R. COLDREN JR., WILLIAM SOUSA, DENISE RODRIGUEZ & OMER ALPER, THE BENEFITS OF BODY-WORN CAMERAS: NEW FINDINGS FROM A RANDOMIZED CONTROLLED TRIAL AT THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT 56 (2017), https://www.ncjrs.gov/pdffiles1/nij/grants/251416.pdf.

[320] *See* Tanner v. United States, 483 U.S. 107, 127 (1987) ("[Defendants'] Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*.").

detect bias must be reconsidered, especially considering that the opportunity to voir dire is one reason the Court upheld jury secrecy in the face of constitutional concerns.[321]

Recording deliberations could reveal a dark underbelly of the jury system. Biased jurors might be utterly uninhibited by the recording of deliberations, and the transcripts could reveal that jurors are even more biased than imagined. If this is true, then perhaps it would be time to revisit fundamental aspects of our jury system.[322] On the other hand, taking a more positive view, the transcripts may reveal that bias rarely manifests during deliberations. If this were true, this could bolster public faith in the jury system.

Public confidence. An argument can be made that memorializing jury deliberations would *help* public confidence, not hurt it. As Justice Sotomayor said recently: "A reliable, credible record is essential to ensure that a reviewing court—not to mention the defendant and the public at large—can say with confidence whether [a defendant's] fundamental rights have been respected."[323] In line with this sentiment, public perception of the fairness of the jury system could be bolstered by deliberations that are recorded and reviewed for evidence of bias.[324] The public can have some confidence that people are not being convicted or sentenced based on bigotry. People who harbor bias will undoubtedly serve as jurors; the public may find solace in knowing there is a way to protect against juror bias overtly influencing criminal trials.

The proposed safeguard to catch bias can also help increase public confidence because, as Judge Learned Hand once recognized, "unlike any official, [juries] are in no wise accountable, directly or indirectly, for what they do."[325] This lack of accountability can sometimes be good; for example, juries can freely flex their democratic power, as intended by the Framers, "to interpret law and

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[321] *See id*.

[322] *Cf. supra* note 215 and accompanying text.

[323] Townes v. Alabama, 139 S. Ct. 18, 20 (2018) (statement of Sotomayor, J., respecting the denial of certiorari).

[324] *See* Courselle, *supra* note 77, at 204 ("For more than a decade, public criticism of juries has been on the increase.").

[325] United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942).

to nullify it."[326] But at other times, this lack of accountability can be bad, as jurors can condemn someone on a basis that the U.S. Constitution forbids. In the latter scenario, the proposed recording procedure does not seek to hold the jurors accountable as individuals but rather seeks to give the defendant the means to redress a violation of his constitutional rights. It hedges against jurors who flagrantly disregard their duty to weigh a case impartially.

Finally, erecting mechanisms to detect bias in the administration of justice is especially important for people of color and their confidence in the criminal legal system.[327] A spotlight is shining on how minorities are more harshly treated at all levels of the criminal

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[326] Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 588 (2014).

[327] This check may take on special importance for people of color today given that hate crimes and white nationalism are on the rise. *See, e.g.*, John Eligon, *Hate Crimes Increase for the Third Consecutive Year, F.B.I. Reports*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/us/hate-crimes-fbi-2017.html ("Hate crime reports increased 17 percent last year from 2016, the F.B.I. said on Tuesday, rising for the third consecutive year as heated racial rhetoric and actions have come to dominate the news."); Alison Faupel, Heather L. Scheuerman, Christie L. Parris & Regina Werum, *Hate Crimes Are on the Rise. What Does It Take to Get State Governments to Respond?*, WASH. POST (Aug. 13, 2019, 7:00 AM), https://www.washingtonpost.com/politics/2019/08/13/hate-crimes-are-rise-what-does-it-take-get-state-governments-respond/ (noting that the United States has seen a spike in reported hate crimes); Elisha Fieldstadt & Ken Dilanian, *White Nationalism-Fueled Violence Is on the Rise, but FBI Is Slow to Call it Domestic Terrorism*, NBC NEWS (Aug. 5, 2019, 3:49 PM), https://www.nbcnews.com/news/us-news/white-nationalism-fueled-violence-rise-fbi-slow-call-it-domestic-n1039206 (discussing the rise of white nationalism-fueled violence and noting that "[i]n recent years, white supremacists have been killing Americans in public places with regularity"); Elizabeth Thomas, *White Supremacy and White Nationalism Have Re-entered Our Political Conversation. But What Do They Mean?*, ABC NEWS (Aug. 19, 2019, 1:55 PM), https://abcnews.go.com/Politics/white-supremacy-white-nationalism-entered-political-conversation/story?id=64998396 ("[T]he FBI warned of the increasing threat of domestic terrorism, specifically saying that the number of . . . cases targeting white supremacists, white nationalists and other racially-motivated extremists has jumped in the past six months.").

Also, a more robust check against bias in the jury system is consonant with the renewed wave of energy in the country vowing to eliminate racial bias from the criminal legal system. *See, e.g.*, *State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice (last visited Jan. 25, 2021) (cataloging statements from state supreme courts committing to addressing racial bias in the criminal legal system); *see also* Jesse Wegman, Opinion, *'We are Part of the Problem They Protest,'* N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/state-supreme-courts-racial-justice.html (recounting this phenomenon).

legal system.[328] A growing concern among racial minorities in America exists regarding whether they can ever truly achieve justice in a system that has racism baked into its core.[329] Unfortunately, by the time a defendant is before a jury, racial bias has often already factored into a vast number of decisions, from policing to prosecuting,[330] and this proposal does not alleviate these problems. Even so, the proposal *does* help guarantee that blatant bigotry does not play a role in the jury's finding of guilt. The proposed procedure hopefully will increase confidence in the jury system, providing particular comfort to marginalized communities most at risk of prejudiced infliction of punishment.

Finality. Because this proposal allows for the near contemporaneous discovery of bias, the finality concerns that attend any inquiry into a jury's verdict are greatly reduced. Additionally, finality is an inevitable concern given *Peña-Rodriguez*'s recognition that evidence of (at least racial) bias can be used to impeach a verdict.[331] Recording jury deliberations ensures that impeachment occurs sooner rather than later. Furthermore, one must question at

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[328] *See, e.g.*, Radley Balko, Opinion, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 7:00 AM), https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/ (describing studies finding racial bias in the criminal justice system); ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUSTICE, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf ("Present day disparities show that the burden of the tough on crime and mass incarceration eras . . . has excessively and unfairly burdened black people.").

[329] *See, e.g.*, Jon Hurwitz & Mark Peffley, *And Justice for Some: Race, Crime, and Punishment in the US Criminal Justice System*, 43 CANADIAN J. POL. SCI. 457, 457–58 (2010) ("Most African Americans, on the other hand, see discrimination in virtually every nook and cranny of the justice system and do not trust the police or the courts to mete out justice fairly and equitably, especially when people of colour are involved."); *see also* Brett Milano, *Racial Discrimination Still Rules, Poll Says*, HARV. GAZETTE (Oct. 30, 2017), https://news.harvard.edu/gazette/story/2017/10/in-new-poll-african-americans-say-they-are-still-treated-unfairly/ ("[M]ore than half of black Americans still experience some form of racial bias, with systemic effects ranging from unequal prison terms to premature death, according to a new poll from the Harvard T.H. Chan School of Public Health.").

[330] *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 25–38 (1998) (discussing how race plays into the discretionary decisions of prosecutors and police).

[331] *See supra* Section III.B.

what cost is finality prized. Is finality a virtue when a person is sitting in prison and evidence exists that she is only behind bars because a juror harbored bias against her? Should finality trump constitutional principles? While the answers to these questions are beyond the scope of this Article, perhaps an ordered system of justice should prioritize *impartiality* over finality given that the U.S. Constitution guarantees the former and is silent on the latter.[332]

In short, recording deliberations in the manner proposed in the Article is consistent with, or at least not necessarily oppositional to, the public policy considerations articulated by the Supreme Court to support secret jury deliberations.

C. OTHER THOUGHTS

This proposed procedure has obvious advantages. First, it supplants the no-impeachment rule. Because a transcript of the deliberations would now exist, jurors would not need the temerity to come forward and report another juror's bias—a concern recognized by the Court[333]—and they would not necessarily have to testify about what happened during deliberations. Thus, to the extent contemporary jury secrecy is based on Lord Mansfield's belief that jurors are unreliable witnesses,[334] making deliberations part of the record would help obviate that concern.

Second, having an accurate transcript of proceedings is generally valuable. As the Court has said, "meaningful" review requires a court to consult the "*actual* record."[335] Under the proposed

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[332] For some arguments against finality, see generally Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151 (2014); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79 (2012). *But see* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 196–211 (2014) (supporting finality of criminal sentences on collateral review).

[333] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) ("The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations.").

[334] Miller, *supra* note 85, at 881.

[335] Parker v. Dugger, 498 U.S. 308, 321 (1991) (emphasis added) ("It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record.").

procedures, a defendant can introduce evidence of bias based on the actual record. Without an accurate record, any evidence of juror bias will be subject to intense scrutiny. Jurors who later recall the bias will be painted as lacking credibility or it will be argued that their memories are fallible. And defense lawyers and their investigators who discover the bias will be charged with putting words in jurors' mouths, if not with outright fabrication of evidence.[336] With a transcript of the deliberations, there will be no competing versions of events from different jurors. It will be much easier for all involved to get to the bottom of whether bias seeped into the jury room.

Third, because it allows for near contemporaneous review, transcribing deliberations eliminates the potential that procedural hurdles might prohibit the review of bias claims. Lawyers will no longer have to go through the time-intensive process of interviewing jurors to discover the bias, thus it will take less time for the process to resolve. The results of this proposed procedure, therefore, will mean that courts may hear more juror bias claims on their merits rather than being procedurally barred from considering them, which will be a boon to the judiciary's ability to vindicate constitutional injustices.

Recording deliberations could be helpful in a broader sense, as counsel could gain a better understanding of what does and does not translate with a jury and adjust strategy accordingly. Counsel can study the transcripts and better calibrate their performance to a jury's whimsical decision-making. Indeed, the Chicago Jury Project was specifically designed to "aid lawyers and judges and benefit the jury system as a whole, by indicating whether instructions are clear and whether jurors understand the issues in a case."[337]

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[336] Mr. Rhines's case provides the perfect example of what can happen when lawyers must rely on post-verdict evidence of bias. There, after Mr. Rhines's lawyers introduced multiple affidavits from jurors attesting to the fact that they discussed his sexual orientation during deliberations, lawyers for South Dakota impugned the defense lawyers' integrity and questioned the veracity of the accounts of bias that they provided. South Dakota's opposition to certiorari is really quite striking in its disparaging of the defense lawyers, calling their tactics "assaultive," saying that their "insinuations" were "scurrilous," and questioning their "ethics." Brief in Opposition to Petition for a Writ of Certiorari at 12, Rhines v. Young, 139 S. Ct. 1567 (2019) (mem.) (No. 18-8029). This would have been avoidable if a transcript of the deliberations had existed.

[337] Cornwell, *supra* note 165, at 55–56.

One must also acknowledge some potential downsides of recording jury deliberations. First, recording deliberations could have unanticipated consequences that work against defendants. For example, jurors may be less willing to nullify or express anti-government or anti-police sentiments if they know they are being recorded. Whether this is true given the modern-day frequency of recording[338] and the surreptitious placement of the camera is unclear. Nevertheless, this is a real concern that should be examined and weighed before recording procedures are implemented. Anecdotally, however, in *Inside the Jury Room*, the jury acquitted a sympathetic defendant of an unlawful possession of a firearm charge despite his concession of guilt, and these jurors knew they were deliberating in front of television cameras.[339] Therefore, it is not at all clear that a jury would change its behavior, especially if the jurors are explicitly instructed on their power to nullify.[340]

Second, there may be a slippery slope. What happens when the deliberations' transcript reveals problems other than a juror's racial bias? For example, what if it is clear from the transcript that the jurors misunderstood or did not follow the law? What happens if a juror did not comprehend the scientific evidence? What if the transcript reveals that jurors considered evidence that they were not supposed to?[341] What if a juror simply did not like a defendant's

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[338] *See supra* note 318 and accompanying text.

[339] Howard Rosenberg, *Putting Trial Scenes in 'Deadly Force' on Trial*, L.A. TIMES (Apr. 4, 1986, 12:00 AM), https://www.latimes.com/archives/la-xpm-1986-04-04-ca-24551-story.html (noting that the jurors put their sympathy for the defendant above the letter of the law even in the presence of cameras).

[340] Indeed, one solution could be that the jury, if recorded, could be reminded of its prerogative to nullify. *See* Irwin A. Horowitz, Norbert L. Kerr & Keith E. Niedermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1232 (2001) ("[T]here is some experimental evidence that nullification instructions increase nullification verdicts in cases in which conviction or acquittal runs counter to jurors' sense of justice").

[341] *See, e.g.*, Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1915 (2001) (discussing a study of Arizona juries in which the jurors considered insurance and attorney's fees, which were outside of the evidence introduced to the jurors at trial, in their deliberations); *see also 'Jurors Will Disregard' is Often Not Regarded*, N.Y. TIMES (Mar. 28, 1988), https://www.nytimes.com/1988/03/28/us/jurors-will-disregard-is-often-not-regarded.html (describing a study where mock jurors were told to disregard evidence of the fruits of an illegal search, and many jurors could not follow the judge's instruction and considered the evidence against the defendant).

outfit? And what would it do to public confidence in the jury should these facts be revealed?

These are questions that need answers should jury deliberations ever be made part of the trial record. For now, here are a couple of thoughts. By having a criminal legal system where guilt is decided by peers, part of the social contract may be that we accept that the jury system will contain certain vagaries. Perhaps, then, society will not be shocked by the arbitrariness that infiltrates jury decision-making. The arbitrariness of some jury decisions should probably be expected. That helps explain the outcome in *Tanner*, where the Court held that the no-impeachment rule stands strong in the face of jurors getting drunk and high during trial.[342] More to the point, while recording deliberations may expose a system riddled with randomness, whatever comes to light would not necessarily make the jury *partial*, which is what the U.S. Constitution expressly forbids.[343]

Ultimately, as the Court in *Peña-Rodriguez* recognized, racial bias is so odious that the no-impeachment rule specifically—and jury secrecy more generally—must give way when racial bias during deliberations is unearthed.[344] This exception was necessary in light of the importance of the constitutional rights at issue—racial bias during deliberations is antithetical to fundamental Sixth *and* Fourteenth Amendment principles.[345] In light of the Court's recognition that the U.S. Constitution compels the need for a bias exception to jury secrecy, bias influencing deliberations is arguably more grievous than other deliberative errors given that it implicates two constitutional rights. It could therefore follow that bias stands alone when it comes to what evidence of juror misconduct can be used to impeach a verdict. Put another way, while we, as a society, may accept some degree of quirkiness in jury decision-making, we do not accept—and our Constitution does not allow—the infusion of blatant prejudice into the jury system.

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[342] Tanner v. United States, 483 U.S. 107, 115–20 (1987).

[343] *See* Turner v. Louisiana, 379 U.S. 466, 471 (1965) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961))).

[344] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868–69 (2017).

[345] *Id.*

V. CONCLUSION

While the idea of recording deliberations may raise eyebrows, at one time, the idea of having cameras in the courtroom was thought to be preposterous.[346] Now, courtroom cameras are commonplace.[347] This is not to suggest that recording deliberations should be done without forethought or careful study, but if deliberations can be recorded and televised for educational and entertainment purposes, it is at least worth discussing whether they should be recorded to protect defendants' constitutional rights.

It is time to revisit a centuries-old practice that was never envisioned for the pluralistic society we live in today and to discuss whether our jury system is set up in the best way possible to guarantee fair and impartial justice for *all* people. As it now stands, arguably it is not, as people have been put behind bars and even been put to death because of who they are, and not because of what they were alleged to have done. This sad fact is a tragedy of constitutional proportions. Steps must be taken to protect against people being condemned based on bias. This Article proposes one step.

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[346] Of cameras in the courtroom, the U.S. Supreme Court once said:

> [W]e know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Estes v. Texas, 381 U.S. 532, 546 (1965). Cameras are now regularly used in the courtroom and the sky has not fallen.

[347] *See supra* note 148.