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Fairness in the Exceptions: Trusting Juries on Matters of Race

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FAIRNESS IN THE EXCEPTIONS: TRUSTING JURIES ON MATTERS OF RACE

Virginia Weeks*

Implicit bias research indicates that despite our expressly endorsed values, Americans share a pervasive bias disfavoring Black Americans and favoring White Americans. This bias permeates legislative as well as judicial decision-making, leading to the possibility of verdicts against Black defendants that are tainted with racial bias. The Supreme Court’s 2017 decision in Peña-Rodriguez v. Colorado provides an ex post remedy for blatant racism that impacts jury verdicts, while jury nullification provides an ex ante remedy by empowering jurors to reject convicting Black defendants when to do so would reinforce racially biased laws. Both remedies exist alongside a trend limiting the role of the jury and ultimately indicate that we trust juries to keep racism out of the courtroom in the exceptions to our normal procedures.

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INTRODUCTION

Self-identified White supremacists gathered one May, wielding Confederate flags and chanting “we will not be replaced.”¹ Torches featured prominently as protesters reacted to the proposed removal of a statute of Confederate commander Robert E. Lee.² Months later, in August, another such rally took place, torches abounding.³ And then again in October.⁴ All of these details are likely unsurprising to Americans steeped in an

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1. Jonah Engel Bromwich, White Nationalists Wield Torches at Confederate Statue Rally, N.Y. TIMES, May 14, 2017, https://www.nytimes.com/2017/05/14/us/confederate-statue-protests-virginia.html.

2. Id.

3. See Sarah Posner, After Charlottesville Rally Ends in Violence, Alt-Right Vows to Return, ROLLING STONE, April 13, 2017, http://www.rollingstone.com/politics/news/charlottesville-white-supremacist-rally-erupts-in-violence-w497446.

4. See Matt Stevens, White Nationalists Reappear in Charlottesville in Torch-Lit Protest, N.Y. TIMES, Oct. 8, 2017, https://www.nytimes.com/2017/10/08/us/richard-spencer-charlottesville.html.

educational system that teaches them about the antebellum years, the civil rights movements of the 20th century, and constant attempts to foster racial equality – from ending slavery to affirmative action. What is unnerving is that these rallies occurred in 2017 and featured young leaders and participants.⁵

The series of rallies in Charlottesville, Virginia, in 2017 led by White nationalists highlights crucial issues surrounding the First Amendment, but it is important to acknowledge what underlies the uncertainty around the legitimacy of such protests: racial bias is alive and well in the United States. Indeed, these rallies were an aggressive and explicit expression of such bias, but more insidious examples exist, too, from our mass incarceration system⁶ to experiences of students of color in our schools.⁷ Implicit bias research demonstrates the pervasive power of racial bias among both White and Black Americans.⁸ Implicit bias is so deeply rooted in our mental processes that experts tend to discuss mitigating it rather than eradicating it—if we cannot remove our biases, how might we consciously control them?⁹

Accepting the power of such bias, it becomes necessary to consider its consequences for our justice system, which strives for fairness and requires equal protection of the laws. In the quest for fairness, our justice system often relies on juries to be the final decision-makers, for it is in the collective voice of the many members of our communities that we will reach a reliable and fair result. To foster trust in our system, it is important that we have a reason to trust jury verdicts—a value reflected in federal and state evidence rules that protect verdict finality with very few and narrow exceptions.¹⁰ Our justice system therefore empowers jurors to wield vast decision-making power while ensuring that their verdicts maintain integrity.

Of course, it is equally important that the verdict reached be a fair one, thus, our justice system seeks to balance finality with fairness. Critical to our conception of fairness is the Sixth Amendment right to a trial by an

5. See C.J. Hunt, *A Charlottesville White Supremacist Stripped Down to Escape Protesters and We Got it on Video*, GQ, Aug. 16, 2017, <https://www.gq.com/story/charlottesville-white-supremacist-strips-to-escape-protestors>.

6. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6-7 (2010).

7. See Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES, Mar. 6, 2012, <http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html>.

8. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 956 (2006).

9. See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006).

10. See, e.g., FED. R. EVID. 606(b); ARIZ. R. CRIM. P. 24.1; IDAHO R. EVID. 606(b); IND. R. EVID. 606(b); MINN. R. EVID. 606(b); MONT. R. EVID. 606(b); N.D. R. EVID. 606(b); TENN. R. EVID. 606(b); TEX. R. EVID. 606(b); VT. R. EVID. 606(b).

impartial jury.¹¹ To ensure that jurors reach reliable verdicts, the legal system insulates their deliberations from influences outside of the jury box.¹² In the context of trials, there will always be a winner and loser. It is understandable, then, that at least one party may deem an outcome unfair after months of preparation and best efforts. But this indignation is not sufficient grounds for disrupting the finality of a verdict. Other safeguards exist, such as the right of appeal and judge leniency during the sentencing phase.¹³ Therefore, in considering racial bias, the legal system must be careful to neither inject undue judicial interference in jury deliberations *ex ante* nor threaten the stability of verdicts *ex post*. Key to trusting the integrity of jury verdicts is the belief that they were reached after an autonomous deliberation process in which the considerations of the many reach a fair and balanced final decision.¹⁴

Thus, those considering how to mitigate racial bias in our justice system must also consider how to do so without undermining the role of the jury. One way the legal system has attempted to reconcile these competing interests is by creating an additional exception to the rule safeguarding the finality of jury verdicts: when there is evidence that racial animus influenced a juror's decision to convict in a criminal trial, the verdict can be opened for examination.¹⁵ This form of mitigation is triggered *ex post*, and only when there is sufficient reason to suspect racism played a role.¹⁶ It thus relies on courts to make threshold determinations of what constitutes "enough" racism to warrant further investigation. As such, it is a difficult standard to implement in all but the most blatant cases of racist jurors. In the case of *Peña-Rodriguez v. Colorado*, for example, the court overturned a guilty verdict against a Hispanic defendant accused of unwanted sexual conduct and harassment after evidence of a juror making blatantly anti-Hispanic statements, including that he thought the fact that the defendant was Mexican made him more culpable because of Mexicans' general sexual views regarding women.¹⁷

A more aggressive form of mitigation occurs *ex ante*, when jurors elect to nullify the verdict. Specifically, jurors can mitigate against the bias implicit in laws and their enforcement by electing not to convict a criminal

11. U.S. CONST. amend. VI.

12. See FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules.

13. See Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1222 (2012-2013). See, e.g., *Gall v. United States*, 552 U.S. 38 (2007) (sentencing guidelines "are the starting point and initial benchmark but are not the only consideration" for the court); *Kimbrough v. United States*, 552 U.S. 85 (2007) (the court may "tailor the sentence in light of other statutory concerns" in addition to sentencing guidelines).

14. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994).

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

16. See generally *id.*

17. *Id.* at 862.

defendant charged on the basis of such laws despite the facts proving his or her guilt.¹⁸ This mitigation applies to lower-grade crimes and serves as a form of civil disobedience.¹⁹ By refusing to convict despite proof of guilt, a juror engages in civil disobedience akin to protesting by indicating her lack of support for a system she believes to be unjust.²⁰ While the verdict itself is not subject to formal judicial questioning in the same way it is with the *ex post* exception, the arbitrariness inherent in the choice to nullify creates a similar problem to the arbitrariness of threshold decisions of what is “enough” racism.²¹

Despite the possible shortcomings of these two approaches, a vast body of research compels us to consider how to ensure our justice system can mitigate the implicit bias affecting the individual decision-makers comprising the system.²² This Note was prompted by the relatively new *Peña-Rodriguez v. Colorado* decision, which provides an unprecedented exception to the finality of jury verdicts, and the uncertainty of its impact.²³ By comparing this new exception to another doctrine of mitigation—jury nullification—this Note explores considerations of race in the courtroom. It argues that these two approaches operate from opposite ends against the backdrop of how we perceive juries today. Despite the constitutionally codified power of the jury and the democratic ideals for which it stands, mechanical changes in our legal processes indicate that juries today are more constrained than in the early days of our republic.²⁴ In this context, I argue that the *Peña-Rodriguez* exception and jury nullification both indicate that when it comes to keeping racial bias out of the courtroom, we only trust juries in exceptions to our normal protocols. The Supreme Court opened the door to explicit considerations of racism in jury decision-making, which should prompt us all to pay closer attention to how fair our verdicts are and can be.

Ultimately, this Note argues that we do not trust our system as it currently stands to effectively mitigate racial bias. Part I concludes that the state of implicit bias research today indicates that jury verdicts regarding Black parties are inherently unfair. Part II then discusses *Peña-Rodriguez v. Colorado* and argues that in creating an exception to the finality of jury verdicts, the Supreme Court undermined a longstanding source of integrity in our justice system by creating a rule that will be difficult for lower courts to administer. In so doing, the Supreme Court was willing to allow

18. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995).

19. See *id.* at 715.

20. See *id.* at 708, 714.

21. See, e.g., Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191 (1996).

22. See *infra* Part I for discussion of implicit bias research.

23. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

24. See *infra* Part IV.

some uncertainty rather than continue to trust that jury verdicts are always racially fair, suggesting that such an imperfect rule is necessary for racial justice. Part III then discusses jury nullification as civil disobedience, arguing that verdicts themselves may serve to counter established law. It concludes that nullification creates an exception suggesting that sometimes justice is better served by verdicts that explicitly reject the law at hand. Part IV situates these two forms of mitigation against the backdrop of diminishing trust in the jury, concluding that *Peña-Rodriguez v. Colorado* fits within this trend though jury nullification actually empowers the jury. Both, however, indicate that we trust verdicts to be free of racial bias in the exceptions to our normal processes.

I. IMPLICATIONS OF IMPLICIT BIAS RESEARCH

Jury verdicts involving Black parties are already tainted.²⁵ Social science research indicates that individuals have unconscious mental processes that lead to implicit biases toward others.²⁶ Further studies have examined implicit bias within the legal sphere, finding that such biases impact the justice system.²⁷ The research thus indicates that it may be impossible to keep implicit racial bias outside of jury deliberations. If that is the case, then jury verdicts regarding Black parties are likely unreliable because they are inherently unfair.²⁸

There is much literature on implicit bias and its implications, but the broad consensus is that implicit bias is pervasive and unfavorable to African Americans.²⁹ Implicit or unconscious bias stems from cognitive processes over which individuals exercise no intentional control.³⁰ These processes include the formation of perceptions, impressions, and judgments, which in turn impact how individuals behave.³¹ These unconscious processes lead to development of implicit attitudes—how individuals tend to evaluate the

25. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 HARV. L. & POL'Y REV. 149, 156-58 (2010); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, OHIO ST. J. OF CRIM. L. (2010); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. 406 (2016-17). See also Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 185-86 (2011).

26. See Greenwald & Krieger, *supra* note 8, at 946-51.

27. See Levinson, et al., *supra* note 25; Levinson & Smith, *supra* note 25.

28. See, e.g., *supra* note 25.

29. See, e.g., Bennett, *supra* note 25, at 154-56 (summarizing several studies indicating implicit bias against African Americans); Greenwald & Krieger, *supra* note 8 (summarizing research indicating implicit bias exists against African Americans); Levinson, Cai & Young, *supra* note 25 (summarizing research indicating implicit bias impacts jury decision-making); Levinson & Smith, *supra* note 25 (summarizing studies suggesting racial implicit bias permeates the criminal justice system); West, *supra* note 25, at 185-86 (suggesting that implicit bias shapes how jurors react to parties and interpret the information they receive).

30. Greenwald & Krieger, *supra* note 8, at 946.

31. *Id.*

world around them—and implicit stereotypes—individual mental associations between a group and a trait.³² Taken together, implicit attitudes and stereotypes generate discriminatory implicit biases, which have the capacity to generate behavior at odds with an individual’s consciously endorsed beliefs.³³ Implicit bias can cut both ways, leading an individual to be biased in favor of members of her own social group or against members of a social group to which she does not belong.³⁴

Implicit bias impacts how individuals perceive and react to the world in all areas, including the courtroom.³⁵ Research indicates that implicit bias makes its way into jury deliberations and accurately predicts the associations jurors make between a defendant’s guilt and her race.³⁶ Specifically, jurors are more likely to associate guilt with a Black defendant than a White defendant.³⁷ In one study, jury-eligible graduate and undergraduate students were asked to complete two tests requiring them to associate “guilty” or “not guilty” and “pleasant” and “unpleasant” with various faces.³⁸ The students’ choices revealed a higher correlation between “Black” and “guilty” as well as “Black” and unpleasant words, than “White” and “guilty” or “White” and unpleasant words.³⁹ Interestingly, the results also showed that participants who reported feeling more warmly toward Black people were more likely to associate them with guilt,⁴⁰ demonstrating that implicit attitudes and explicit attitudes may not always align.⁴¹ Another part of the study involved researchers priming participants with images of dark or light skinned perpetrators, then asking them to evaluate crime scene photographs.⁴² The participants were then shown pieces of evidence and asked to determine how much each article tended to inculcate or exculpate the defendant.⁴³ The study concluded that the

32. *Id.* at 948–49.

33. *Id.* at 951.

34. *Id.* Note that one commonly used measure of implicit bias, the Implicit Association Test (IAT), indicates that Black people who take the test showed bias against Black people despite self-reporting strong favoritism toward Black people. *Id.* at 956.

35. See Levinson, et.al., *supra* note 25 (summarizing research indicating implicit bias impacts jury decision-making); Levinson & Smith, *supra* note 25 (summarizing studies suggesting racial implicit bias permeates the criminal justice system); West, *supra* note 25, at 185–86 (suggesting that implicit bias shapes how jurors react to parties and interpret the information they receive).

36. Levinson, et.al., *supra* note 25, at 4.

37. *Id.*

38. *Id.* at 15–16.

39. *Id.* at 17–18. “Pleasant” words included “beautiful, loveable, valuable, attractive, and smart,” and “unpleasant” words included “ugly, useless, stupid, hostile, and inferior.” *Id.* at 18 n. 72.

40. *Id.* at 18.

41. See Levinson, et.al., *supra* note 25, at 20.

42. *Id.* at 16.

43. *Id.*

stronger the association between “Black” and “guilty” as well “Black” and “unpleasant,” the more likely a participant was to find ambiguous evidence was inculcating.⁴⁴ In other words, implicit bias might make it more likely that when presented with ambiguous evidence, a juror may be more likely to find it probative of guilt with a Black defendant than a White defendant.⁴⁵

Judges may also exhibit implicit bias in their decision-making.⁴⁶ One study tested the responses of judges after asking them to make choices in hypothetical courtrooms where they were subliminally primed to identify the defendant as racially ambiguous, or were explicitly told the defendant was White or Black.⁴⁷ The study revealed that the judge participants were more likely to group White faces with positive words and Black faces with negative words, and that this racial bias was more likely to be exhibited in cases where the race was ambiguous rather than explicit.⁴⁸ This study thus indicates that judges may be better able to avoid racial bias when they are expressly aware of the party’s race than when they are not.⁴⁹ Thus implicit bias pervades the courtroom, and Black defendants may not have any safeguards against racial bias.⁵⁰

More generally, research also shows that when it comes to punishment, individuals may be more inclined to associate Black defendants with culpability and retribution than White defendants.⁵¹ One study measured how much participants associated Black and White people with various words associated with retribution and leniency.⁵² The results indicated a greater association between Black faces and words indicating retribution and White faces with words indicating leniency than other possible combinations.⁵³

Taken together, pervasive implicit bias creates a situation in which jurors are more likely to devalue the life of a Black defendant, find her

44. *Id.* at 19-20.

45. *See id.*

46. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (summarizing research indicating judges have implicit racial biases that may impact their decision-making). *See also* Bennett, *supra* note 25, at 156-57 (summarizing research indicating that judges make decisions in a way that allows their implicit biases to have influence).

47. Rachlinski et al., *supra* note 46, at 1209-11.

48. *See id.* at 1221.

49. *See id.*

50. *See id.* at 1222.

51. Levinson & Smith, *supra* note 25, at 409. *See also* Robert J. Smith, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 812 (2011) (summarizing research indicating that decision-makers in the criminal justice system associate Black adolescents with culpability).

52. Levinson & Smith, *supra* note 25, at 409.

53. *Id.*

guilty, or otherwise treat a Black party more unfavorably than a White party in a case.⁵⁴ Indeed, implicit bias becomes systemic when racial bias becomes “unwittingly infused with, and even cognitively inseparable from, supposedly race-neutral legal theories. . .and jurisprudential approach[es] to well-considered constitutional doctrines.”⁵⁵ Given how pervasive implicit bias is due to the unconscious processes that generate it, it seems unlikely that the individuals in the jury box can be immune from it, nor can the judges conducting *voir dire* necessarily be an adequate safeguard.⁵⁶ Even if an individual *is* aware of her own implicit biases, the misalignment between expressly held views and implicitly held views indicates that she may not be able to reason her way out of experiencing their effect.⁵⁷ It is therefore unlikely we can rid jury verdicts of the pervasive effects of racial bias. I now turn to ways in which we may mitigate this reality.

II. CURRENT STATE OF COMMON AND STATUTORY LAW

In 2017, the United States Supreme Court created a new rule allowing for an exception to the finality of jury verdicts: where there is evidence of express racial bias during jury deliberations, a court can examine the integrity of the verdict.⁵⁸ This new rule, while potentially mitigating the impact of implicit biases in jurors, undermines a deeply held conviction that jury verdicts carry great integrity and we must protect their finality because of an interest in their stability.⁵⁹

In *Peña-Rodriguez v. Colorado*, a Hispanic defendant was accused of unwanted sexual conduct, harassment, and attempted sexual assault following an incident in 2007 in which two teenage girls were sexually assaulted in a public bathroom. Subsequently, each victim separately identified the defendant as the perpetrator.⁶⁰ During the trial, two jurors expressed concern that a fellow juror expressed anti-Hispanic sentiments in the course of deliberations.⁶¹ According to his peers, the juror made several statements, including that “he ‘believed the defendant was guilty because, in [his] experience. . .Mexican men had a bravado that caused them to believe they could do whatever they wanted with women’” and that he thought the defendant was guilty because “he’s Mexican and Mexican men take whatever they want.”⁶² The jury ultimately found the defendant guilty of

54. See *supra* note 25.

55. *Id.* at 408.

56. See Bennett, *supra* note 25, at 159–60 (arguing judge-conducted *voir dire* is vulnerable to unchecked implicit bias).

57. See Greenwald & Krieger, *supra* note 8, at 951.

58. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

59. See FED. R. EVID. 606(b) advisory committee’s note to 1972 proposed rules.

60. *Peña-Rodriguez*, 137 S. Ct. at 861.

61. *Id.* at 862.

62. *Id.*

unwanted sexual conduct and harassment.⁶³ The trial court denied the defendant's request for a new trial, and the Colorado Supreme Court affirmed, keeping the jury verdict final.⁶⁴ The case was appealed to the United States Supreme Court, which reversed and remanded the decision on the grounds that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider. . .any resulting denial of the jury trial guarantee."⁶⁵

To understand the significance of the new rules established by the Supreme Court in *Peña-Rodriguez v. Colorado*, it is important to first return to the question of how our legal system treats jury verdicts. Federal Rule of Evidence 606(b) states that "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."⁶⁶ This rule protects the privacy of jury deliberations, with only two types of exceptions: information received from outside of the jury box that impacts the juror or a clerical mistake in entering the jury verdict.⁶⁷

Rule 606(b) was driven by two competing goals: the preservation of verdict stability and the interest of justice.⁶⁸ The former goal is achieved by preserving the privacy and freedom of genuine deliberations while shielding jurors from the pressure of delivering a particular verdict.⁶⁹ In the presence of this security and freedom, we can trust that verdicts are genuine and therefore stable.⁷⁰ On the other hand, we avoid injustice by carving out a narrow limitation on the privacy and autonomy to deliberate.⁷¹ The rule shields deliberations from information heard outside of the jury box so that the trial—and only the trial—generates the information upon which the jurors deliberate.⁷² The verdict depends exclusively on the arguments the parties presented before the jurors, trusting that both parties were given a fair chance to present their cases.

63. *Id.*

64. *Id.*

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

66. FED. R. EVID. 606(b).

67. *See id.* Most states have either adopted the Federal Rules of Evidence or similar variants. Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: Pros and Cons*, 43 OKLA. L. REV. 293, 293 (1990).

68. FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules.

69. *See generally id.*

70. *Id.*

71. *See generally id.*

72. FED. R. EVID. 606(b).

The Federal Rules of Evidence create a strict no-impeachment rule prohibiting courts from examining the jurors' "mental processes" during deliberations.⁷³ However, as previously explained, the validity of a verdict in a criminal case may be questioned in the presence of evidence that a juror's decision depended at least in part on racial stereotypes or racial animus.⁷⁴ There is also a very narrow exception to the no-impeachment rule for evidence outside of the jury deliberation room brought to bear on jury deliberations.⁷⁵

With *Peña-Rodriguez v. Colorado*, the Supreme Court carved out a third exception for evidence from within the jury deliberation room, arguing that the Sixth Amendment right to a trial by an impartial jury takes precedence over the no-impeachment rule.⁷⁶ Justice Kennedy delivered an eloquent imperative that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."⁷⁷ Because "racial bias implicates unique historical, constitutional, and institutional concerns," Kennedy suggested that it becomes critically important for a legal system that treats all equally to have a jury free of racial prejudice.⁷⁸ The Court further stated that the rule it created "is necessary to prevent a systemic loss of confidence in jury verdicts," thereby implying that racial bias in jury deliberations is no small issue.⁷⁹ Indeed, the Court pointed out that "attitudes or biases that can poison jury deliberations" may not be exposed during *voir dire*, and by implication, are not express.⁸⁰ Recognizing the pervasive nature of the problem of racial prejudice, the Court acknowledged that justice can be unequally administered.⁸¹ Its proposed remedy was to challenge a firmly established rule protecting the privacy and sanctity of jury deliberations.⁸² But as I have already noted, jury deliberations are likely already tainted by the implicit bias of individual jurors.⁸³ The new rule, therefore, merely acknowledges this reality and provides a legal mechanism for mitigation.

The impact of *Peña-Rodriguez* remains to be seen, though it is likely going to be limited because of both the rule's threshold requirement and the Supreme Court's punt to the lower courts to decide how to implement

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

74. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

75. FED. R. EVID. 606(b)(2).

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

77. *Id.* at 867.

78. *Id.*

79. *Id.* at 869.

80. *Id.*

81. *Peña-Rodriguez*, 137 S. Ct. at 867.

82. *See id.* at 869.

83. *See supra* Part I.

the rule.⁸⁴ By its own terms, the case pointed to the lower courts to decide how to apply the new rule: “To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court.”⁸⁵ Of the two cases citing *Peña-Rodriguez* to date in which jury racial bias is alleged, neither of them found that the facts of the case triggered the new rule.⁸⁶ In those cases, the following types of statements were not considered to show racial bias:

- (a) In the case of a White defendant and Black victim, one juror expressed during deliberations that if the races of the parties were switched, the defendant would have been convicted immediately. The court attributed this statement to frustration that deliberations were continuing for as long as they were.⁸⁷
- (b) In the case of a Black defendant, one juror commented that “he felt being Black made other jurors think he initially voted to acquit” the defendant because they were both Black. The juror stated that another juror asked him if he was voting to acquit because the defendant was a Black man like the juror and of a similar age. The court did not find these statements to show racial bias because they were not directed against the defendant.⁸⁸
- (c) In the case of a Black defendant, one juror claimed in an affidavit that another juror used a racial slur to derogatorily indicate the affiant was sympathetic to Black individuals. The court did not find that *Peña-Rodriguez* applied, suggesting that statements jurors made about one another do not automatically trigger the new rule.⁸⁹

On the other hand, where racial bias is easily discernible and expressly linked to conviction, courts may be more willing to apply the new exception.⁹⁰ One federal district court found that the *Peña-Rodriguez* rule applied in a criminal case in which the defendant was Black and one juror

84. See *Peña-Rodriguez*, 137 S. Ct. at 870.

85. *Id.* at 869.

86. See *Berardi v. Paramo*, No.15-55881, 2017 WL 3188442 (9th Cir. Jul. 27, 2017); *Young v. Davis*, 860 F.3d 318 (5th Cir. 2017); *Richardson v. Komegay*, No. 5:16-HC-2115-FL, 2017 WL 1133289 (E.D.N.C. Mar. 24, 2017).

87. *Berardi*, 2017 WL 3188442 at *1.

88. *Richardson*, 2017 WL 1133289 at *10.

89. *Williams*, 2017 WL 6729978, at *9.

90. See *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454 (D. Minn. Apr. 24, 2018).

stated during deliberations that “[y]ou know he’s just a banger from the hood, so he’s got to be guilty.”⁹¹ Another juror understood “banger” to mean a Black gang member.⁹² The court found that the statement reflected racial bias and also suggested racial animus was a significant motivating factor in the juror’s choice to convict.⁹³ Moreover, the court found that the statement encouraged other jurors to convict on the basis of racial stereotypes.⁹⁴

Thus courts have limited the application of the *Peña-Rodriguez* rule by drawing a distinction between comments related to race and comments showing racial bias. Of course, this is a very limited sample size from which to assess the impact of the new rule, but there is no reason to assume such line drawing will not continue. Given the huge importance we place on the stability of jury verdicts, courts may be hesitant to apply the rule in cases lacking blatant racial bias. Yet, implicit bias research shows us that lack of explicit racial bias does not mean an individual lacks implicit racial bias.⁹⁵ This sort of line-drawing between racially related and racially biased misses the point of implicit bias research, and indeed of the logic underlying *Peña-Rodriguez* itself.⁹⁶ But in balancing the rationale behind Rule 606(b)(1) and its state-based progeny with the need to mitigate against pervasive racial bias, these cases show that courts are likely to opt for the more conservative path.

Case law prior to *Peña-Rodriguez* may offer some guidance on how lower courts may apply the Supreme Court’s new rule.⁹⁷ Numerous cases address claims that trials were unfair because a juror demonstrated racial or ethnic bias, and from these cases two basic principles can be discerned regarding questioning a jury verdict on racial or ethnic bias grounds: (1) any evidence of racial or ethnic bias warrants further investigation into jury deliberations,⁹⁸ and (2) any such investigation is only warranted if there is evidence that racial or ethnic bias impacted the jury verdict.⁹⁹ Prior decisions therefore create two rules, one more liberal in impeaching verdicts and one less so. *Peña-Rodriguez* is in line with both strands of cases in

91. *Id.* at *4.

92. *Id.* at *5.

93. *Id.* at *10.

94. *Id.* at *11.

95. Greenwald & Krieger, *supra* note 8, at 951.

96. *See supra* Part I; *Peña-Rodriguez*, 137 S. Ct. at 867.

97. *See Kittle v. United States*, 65 A.3d 1144 (D.C. 2013); *Commonwealth v. Laguer*, 571 N.E.2d 371 (Mass. 1991); *Commonwealth v. Tavares*, 430 N.E.2d 1198 (Mass. 1982); *After Hour Welding, Inc. v. Laneil Management Co.*, 324 N.W.2d 686 (Wis. 1982); *State v. Jackson*, 879 P.2d 307, 312 (Wash. Ct. App. 1994); *Commonwealth v. Jacobson*, 477 N.E.2d 158 (Mass. Ct. App. 1985); *Adams v. State*, 481 S.W.2d 884, 886 (Tex. Crim. App. 1972).

98. *See Laguer*, 571 N.E.2d; *Tavares*, 430 N.E.2d; *After Hour Welding, Inc.*, 324 N.W.2d; *Jackson*, 879 P.2d at 312; *Jacobson*, 477 N.E.2d.

99. *See Kittle*, 65 A.3d; *Adams*, 481 S.W.2d at 886.

granting lower courts the discretion to decide how to determine if racial bias is present, thereby allowing them to decide if the threshold for questioning the verdict should be any evidence of racial bias or only evidence of impact.¹⁰⁰ However, the Supreme Court opinion requires that the identified racial bias be “a significant motivating factor” in the verdict—a rule that may preclude lower courts from utilizing the more liberal standard of investigating jury verdicts.¹⁰¹

Evidence statutes may provide further guidance as to how courts will implement *Peña-Rodriguez*. There is no statute in the United States that currently codifies an exception to the finality of jury verdicts for racial bias.¹⁰² In addition to the exceptions enumerated in Federal Rule of Evidence 606(b)(2), other codified exceptions that allow courts to question the validity of a jury verdict include evidence that the jury decided the verdict by lot or chance,¹⁰³ a juror was intoxicated during deliberations,¹⁰⁴ a juror used drugs or alcohol,¹⁰⁵ a juror perjured herself or willfully failed to respond to a direct question during *voir dire*,¹⁰⁶ and a juror experienced or was threatened with violence to reach a verdict.¹⁰⁷ These exceptions are all narrow and fail to address evidence of bias to impeach a verdict. These statutes, therefore, reflect a general sense that jury verdicts must be given the utmost integrity, and the idea that the more ambiguous exceptions we codify, the more difficult it will be to have a clear and predictable rule of evidence. As I noted, Rule 606(b) was driven by two competing goals: the preservation of verdict stability and the interest of justice.¹⁰⁸ The more exceptions legislatures introduce, the more the quest for perfect justice risks intruding into the stability of verdicts. Currently, however, our statutes seem to value clear and predictable rules over true fairness.

Peña-Rodriguez flies in the face of statutory tradition and creates a new exception to the no-impeachment rule we so deeply value in our laws, allowing courts to undermine verdict stability in the interest of justice when enough racial bias contributed to the verdict. The question, of course, is what counts as “enough.” This question remains to be answered, through the development of common law rules as well as legislative amendments to procedural rules of evidence. *Peña-Rodriguez* opens the door for uncertainty by creating this exception, but in so doing suggests

100. *Peña-Rodriguez*, 137 S. Ct. at 870.

101. *Id.* at 869.

102. *See Peña-Rodriguez*, 137 S. Ct. at 886 (appendix listing all statutory exceptions to the finality of jury verdicts, none of which include an exception for racial bias).

103. ARIZ. R. CRIM. P. 24.1(c)(3)(B); IDAHO R. EVID. 606(b); MONT. R. EVID. 606(b); N.D. R. EVID. 606(b); TENN. R. EVID. 606(b).

104. ARIZ. R. CRIM. P. 24.1(c)(3)(E).

105. IND. R. EVID. 606(b)(2)(A).

106. ARIZ. R. CRIM. P. 24.1(c)(3)(C); MINN. R. EVID. 606(b).

107. MINN. R. EVID. 606(b).

108. FED. R. EVID. 606(b) advisory committee’s note to 1972 proposed rules.

that when it comes to racial bias in the courtroom, we cannot trust jury verdicts.¹⁰⁹ *Peña-Rodriguez* undermines our deep desire for stable verdicts by creating a gray area suggesting that uncertainty is better than a stability rooted in implicit bias.

III. IMPLICATIONS OF JURY NULLIFICATION

Jury nullification is another way in which our legal system provides mitigation for implicit bias. Jury nullification is the act of a juror refusing to convict in defiance of the written law if conviction would be unjust.¹¹⁰ In that act, the jury does not nullify the law itself, but the law as applied to the particular case at hand.¹¹¹ It is considered a power rather than a right, and it is a controversial power at that.¹¹² Moreover, it is a power with significant impact, for when a jury nullifies and the result is acquittal, that decision is unreviewable, allowing individual jurors to exercise vast power over the government's enforcement of its laws.¹¹³ Jury nullification does not have a single origin, though it stems from the democratic tradition of the ideal of the jury as a check on tyranny.¹¹⁴ Former United States Attorney Paul Butler famously presented the concept of jury nullification as an act of civil disobedience for African Americans after his experiences both as an African American man and as a federal prosecutor of drug crimes, and it is his theory I will analyze in assessing jury nullification as mitigating racial bias in the courtroom.¹¹⁵

Butler's central argument is that it is better that some Black criminals be acquitted than jailed.¹¹⁶ "[F]or pragmatic and political reasons, the Black community is better off" when it gets to decide which Black criminals should be punished.¹¹⁷ The law and its enforcement, after all, is dictated by White Americans.¹¹⁸ Indeed, it is deeply entrenched racism that creates and sustains the "breeding ground" for Black criminals.¹¹⁹ According to Butler, the failure of these lawmakers and enforcers to rely less on incarceration in responding to crime perpetrated by African Americans creates a "moral responsibility" among Black jurors to acquit a subset of

109. See generally *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

110. CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 7 (2014).

111. *Id.* at 6.

112. *Id.* at 9.

113. *Id.* at 6-7.

114. See *id.* at 5, 13.

115. See Butler, *supra* note 18.

116. *Id.* at 679.

117. *Id.*

118. *Id.*

119. *Id.* at 694.

Black criminals.¹²⁰ Jury nullification is a legally permissible way to destabilize the status quo and recognize that crime committed by African Americans can be the product of living in a racist society.¹²¹ Accordingly, the acquittal of Black defendants guilty of minor crimes serves as an act of civil disobedience that highlights and calls into question particularly racially biased laws. Qualifying crimes include “victimless” crimes like drug offenses and nonviolent *malum in se* crimes like perjury.¹²²

In this way, jury nullification as civil disobedience provides an exception to the normal jury procedure of reaching a verdict and allows jurors to ignore the law in the interest of justice. Much like *Peña-Rodriguez* implicitly acknowledged the pervasiveness of racism in America, so too does Paul Butler: “Americans seem reluctant to have an open conversation about the relationship between race and crime. . . . It is not surprising, then, that some African-American jurors are forced to sneak through the back door what is not allowed to come in through the front: the idea that ‘race matters’ in criminal justice.”¹²³ Jury nullification can therefore be seen as a response to the implicit bias of lawmakers and enforcers. While under *Peña-Rodriguez* it is the court’s responsibility to impeach verdicts motivated by racial bias, jury nullification presents the juror with the responsibility to bar the application of laws motivated by racial bias. Indeed, “[i]t would be farcical for [the Black juror] to be the sole color-blind actor in the criminal process.”¹²⁴ Further, while Butler focuses on Black jurors, his ideas can be expanded to all jurors: any juror who detects unjust laws has the power to nullify with respect to Black criminal defendants.

The fact that jury nullification is controversial prevents it from being a generally accepted practice, even if rarely invoked. In framing jury nullification as a power rather than a right, jurors are in fact less empowered to exercise the act of nullification.¹²⁵ There are many things in this world we have the power, but not the right, to do, including things we could but should not do.¹²⁶ For example, I may have the power to read the emails of the person sitting next to me on the train over his shoulder, but I do not have an affirmative right to do so. Alternatively, I have the power to shoplift but I certainly do not have the right to do so. However, there is no clear norm dictating that nullification is a power jurors should *not* exercise, especially in light of the established anti-tyranny foundations of our nation.¹²⁷

120. See Butler, *supra* note 18, at 679.

121. See *id.* at 680.

122. *Id.* at 715.

123. *Id.* at 681.

124. *Id.* at 714.

125. See Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 209-10 (1996).

126. See generally *id.*

127. See CONRAD, *supra* note 104, at 5.

Critics argue that nullification undermines our ability to trust the stability and legitimacy of the legal system.¹²⁸ Perhaps. But it is equally compelling that nullification may mitigate African Americans' distrust of the legal system. Critics also argue that jury nullification undermines democracy by allowing very few individuals, from their own narrow interests, to decide what the law should be instead of legislative bodies voted in by massive constituencies.¹²⁹ But jurors only nullify the application of a law with respect to the particular case; the law still exists and remains enforceable.¹³⁰

Moreover, it is difficult to stomach an argument calling nullification undemocratic when there is mass incarceration of African Americans, rampant discrimination, and White supremacy masquerading as First Amendment rights.¹³¹ It is true that rampant jury nullification can create a litigation process subject to arbitrary results, but jury nullification functions on a case-by-case basis within criminal law, and the criminal justice system *is* unfair toward African Americans.¹³² Implicit bias alone makes it likely that the decision-makers will not treat Black and White people equally.¹³³ These decision-makers include everyone from the officer choosing who to stop and frisk, the prosecutor choosing who to charge, the jurors deciding questions of guilt, and judges deciding questions of law and sentencing.¹³⁴ But beyond that, research indicates that while Black men are arrested and incarcerated for drug use substantially more often than White men, Black and White men use drugs at a roughly equal rate.¹³⁵ Drug offenses account for half of federal prison incarcerations and 15 percent of state prison incarcerations, and are therefore a good proxy for how fairly criminal justice is administered.¹³⁶ The research and statistics are compelling: the administration of justice is susceptible to discrimination.¹³⁷ Nullification thus

128. See Warshawsky, *supra* note 119.

129. See *id.*

130. CONRAD, *supra* note 104, at 6.

131. See, e.g., Alexander, *supra* note 6 (discussing mass incarceration of African Americans); Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles with its Role*, N.Y. TIMES, Aug. 17, 2017, <https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html> (discussing the ACLU's representation of White supremacist protesters on First Amendment grounds). See also *supra* Part I.

132. See, e.g., ALEXANDER, *supra* note 6; Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#IV>. See also *supra* Part I.

133. See *supra* Part I.

134. See Nellis, *supra* note 126.

135. *Id.*

136. See *Trends in U.S. Corrections*, THE SENTENCING PROJECT (June 26, 2017), <http://www.sentencingproject.org/publications/trends-in-u-s-corrections/> (data from linked pdf titled "Trends in U.S. Collections").

137. See Nellis, *supra* note 126.

stands as a small check on a system that cannot itself be trusted to treat Black Americans fairly; nullification is in fact quite democratic.

IV. PERCEPTIONS OF THE JURY

Essential to understanding the impact of *Peña-Rodriguez* and jury nullification as civil disobedience is an examination of how the jury is perceived through social science research and jurisprudence. Over time, there has been a decline in the collective sense of trust in the jury.¹³⁸ This decline is apparent in mechanical changes in our legal procedures, and can be rationalized through historical shifts and social science research. It is in this context that I position *Peña-Rodriguez* and jury nullification as civil disobedience. Both function as exceptions to established jury procedures and norms, nestling themselves in a tradition of distrust by implying that we only trust jurors in the exceptions to the norm when it comes to matters of race in the courtroom.

Changes to the mechanics of legal proceedings have cabined the power of the jury, and this limitation suggests we do not trust juries in all circumstances. Judges can direct juries to find a civil defendant guilty or not guilty, taking the decision away from the jury.¹³⁹ In such cases, the judge decides that a reasonable jury would not have sufficient evidence to find for the losing party.¹⁴⁰ Similarly, a judge may grant a losing civil party's motions for a judgment notwithstanding the verdict and a new trial, which the judge may grant if she believes the verdict is contrary to the evidence presented.¹⁴¹ Thus in civil jury trials, it is acceptable for a judge to disregard the jury verdict.

Furthermore, there is an entire code dedicated to controlling how evidence reaches the jury, creating multiple limitations around the kind of evidence jurors should hear.¹⁴² The Federal Rules of Evidence create strict limitations on admitting evidence to prove a party's character or propensity

138. See, e.g., FED. R. CIV. P. 50, 59; Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 (1964).

139. See FED. R. CIV. P. 50.

140. *Id.*

141. See FED. R. CIV. P. 50, 59.

142. See generally FED. R. EVID. 102 (providing that the purpose of the Federal Rules of Evidence is to "administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."). What follows are a series of rules designed to achieve this purpose by barring certain kinds of evidence, such as hearsay and character evidence, and dictating how evidence can be presented. See, e.g., FED. R. EVID. 404 (banning character evidence to prove propensity); FED. R. EVID. 802 (banning hearsay unless an exception applies); FED. R. EVID. 403 (banning evidence whose "probative value is substantially outweighed by a danger of . . . unfair prejudice"); FED. R. EVID. 405 (dictating that permissible character evidence can only be admitted by opinion or reputation testimony on direct examination); FED. R. EVID. 608 (dictating how a witness's character may be presented for the purpose of establishing truthfulness or untruthfulness).

to act in a particular manner.¹⁴³ Evidence often must pass through a balancing test before it can be admitted to determine if its usefulness is “substantially outweighed” by its ability to prejudice the jury.¹⁴⁴ Evidence that is admissible for a particular purpose is subject to a limiting instruction by which the judge tells the jury to consider the evidence only for that purpose and no other purpose.¹⁴⁵ Taken together, these evidence rules indicate a concern with jurors’ capacity to be fair and impartial.

Less formalized procedures also indicate a decline in the jury’s power. Today, more than 90 percent of criminal convictions are the result of plea bargains in which defendants never see a courtroom.¹⁴⁶ Prosecutors often encourage defendants to enter a plea rather than proceed with trial.¹⁴⁷ Indeed, the Federal Rules of Evidence also encourage plea bargaining by deeming certain evidence of plea negotiations inadmissible against the criminal defendant.¹⁴⁸ Thus, most criminal cases never even reach a jury, and our legal decision-makers encourage this circumstance, albeit for reasons largely related to administrative efficiency.¹⁴⁹ Plea bargaining does not itself reflect an active distrust of the jury, but our complacency with its prevalence does indicate comfort with keeping the vast majority of convictions away from jury decision-making.

Even for cases that reach a jury, however, the trend since the founding of our nation has been to increasingly divide the spheres of decision-making between judge and jury.¹⁵⁰ Today, the jury is responsible for deciding questions of fact while the judge is responsible for deciding questions of law.¹⁵¹ This division was not always present, however; until the mid-nineteenth century jurors could make both types of determinations.¹⁵² Thus, over time there has been a growing sense that judges are more sophisticated and rational decision-makers, while jurors are easily manipulated and less sophisticated.¹⁵³ The limitations imposed by evidence rules affirm this divide, keeping evidence that may emotionally sway jurors out under the assumption that jurors cannot rise above their less rational impulses.¹⁵⁴ While these changes do not necessary suggest a decline in

143. See FED. R. EVID. 404.

144. FED. R. EVID. 403.

145. See FED. R. EVID. 105.

146. Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC, Sept. 2017, <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

147. *Id.*

148. See FED. R. EVID. 410.

149. See Yoffe, *supra* note 140.

150. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

151. See *The Changing Role of the Jury in the Nineteenth Century*, *supra* note 132.

152. Alschuler, *supra* note 144, at 903-06.

153. See generally *The Changing Role of the Jury in the Nineteenth Century*, *supra* note 132.

154. See, e.g., FED. R. EVID. 403.

trust, they do suggest a desire to allow non-jury decision-makers to play a greater role.

Myriad rationales exist to explain the apparent decline in trust in the jury. One theory is that the cabining of the jury's role in the courtroom is a result of postbellum jury diversification.¹⁵⁵ Following the Civil War and constitutional developments, African Americans were permitted to serve on juries for the first time in our nation's history.¹⁵⁶ This threat to the status quo worried the dominant group of White men, who also controlled the mechanisms of legal procedure, leading to a slow limitation of the jury's power.¹⁵⁷ The concern was that outcomes would now be different and less favorable for White defendants.¹⁵⁸

Another rationale lies in social science research in human psychology. Research indicates that the way individuals perceive and react to information is fundamentally at odds with the need for jurors to remain impartial and make a purely reasoned decision.¹⁵⁹ Our decision-making is often not impartial because conscious decisions are influenced by our unconscious, which in turn is bombarded with stimuli from the world around us.¹⁶⁰ As discussed above, implicit bias is one such example of the difficulty of reacting impartially, in terms of biases creating both favorable and unfavorable perceptions.¹⁶¹ Thus, the ideal of what a jury is supposed to do—reach a fair and unbiased verdict—runs counter to the fundamentals of the human experience. In the face of this research, we have protocols like the Federal Rules of Evidence to dictate how information is to be presented to the jury to mitigate their human instincts.¹⁶²

In this context, the *Peña-Rodriguez* verdict and jury nullification stand apart from these perceptions by indicating that sometimes we do in fact trust the jury more than the current status quo would indicate. We trust jurors who come forward with evidence of racial animus and we trust nullifiers to lead us to fairness, even if that fairness is not rooted in extant laws.¹⁶³ But a more accurate reading of *Peña-Rodriguez* and nullification as

155. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 354 (1995).

156. *Id.* at 355.

157. *Id.* at 354-56.

158. *See id.*

159. *See, e.g.*, Greenwald & Krieger, *supra* note 8, at 947-49 (discussing implicit cognition and how things we perceive over time may unconsciously influence our future attitudes and categorizations); John A. Bargh & Ezequiel Morsella, *The Unconscious Mind*, 3 PERSP. ON PSYCHOL. SCI. 1, 74 (2008) (discussing how humans can unconsciously process stimuli, which in turn have a significant influence on decision-making).

160. *Id.*

161. *See supra* Part I.

162. *See, e.g.*, FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules.

163. *See generally* *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); Butler, *supra* note 18.

civil disobedience is that they are exceptions to the established norm in the courtroom. Both cede to implicit bias and attempt to mitigate it. *Peña-Rodriguez* suggests that racism is pervasive, and courts are to undermine verdicts clearly influenced by racism.¹⁶⁴ Nullification suggests that implicit racial bias is the undercurrent of our laws and their enforcement, and jurors are empowered to fight against such racism.¹⁶⁵ In other words, racism in the courtroom can be mitigated when we allow for exceptions to the finality of the jury verdict and to the notion that jurors will decide in line with the codified laws. These exceptions are in fact in line with the broader trend of distrusting the jury: jury verdicts can be colored by racism, either on the part of the jurors themselves or in following laws undergirded by racism. *Peña-Rodriguez* offers an ex post remedy while nullification offers an ex ante remedy. Operating from opposite directions, these two exceptions show us that when it comes to racism in the courtroom, we can better trust the verdicts reached as exceptions to the normal protocols. In the face of pervasive racial bias in America, it is better for the jury to opt for justice rather than verdict stability or predictability.

CONCLUSION

Implicit bias research tells us that jurors are unlikely to avoid relying on unconscious racial stereotypes as they deliberate.¹⁶⁶ Indeed, despite one's expressly stated and genuinely held views that we should all be treated equally under the law, implicit racial bias—forged by existing in a nation founded on the backs of slaves and still working to combat White supremacy—is the undercurrent of our decision-making processes.¹⁶⁷ But the fact that implicit racial bias is pervasive does not mandate that we resign ourselves to societal outcomes skewed against Black Americans. In the absence of conscious mechanisms by which to prevent the formation of such bias, we can turn to external sources of mitigation.¹⁶⁸ Implicit bias colors the laws legislatures create and prosecutors enforce, the punishments judges dole out, and the verdicts jurors reach.¹⁶⁹

Thus the great irony: the jury verdict represents the height of democracy's fairness and egalitarianism and yet falls victim to racial bias. It is a criminal defendant's constitutionally enshrined right to be judged by a jury, and we defer to jurors for credibility assessments and determinations

164. See generally *Peña-Rodriguez*, 137 S. Ct. at 867.

165. See generally *Butler*, *supra* note 18, at 679.

166. See *Greenwald & Krieger*, *supra* note 8; *Levinson et al.*, *supra* note 25; *Levinson & Smith*, *supra* note 25.

167. See *Greenwald & Krieger*, *supra* note 8, at 951.

168. See *id.* at 946; *infra* Parts II, III.

169. See *Butler*, *supra* note 18; *Levinson et al.*, *supra* note 25.

of guilt.¹⁷⁰ But to be judged by a fair cross-section of one's peers is to risk being judged by a group of racially biased or racist individuals. Of course, despite the lip service we pay to the glory of the jury, there has been a clear decline in the scope of the jury's power indicating that perhaps we do not trust them with the full decision-making process.¹⁷¹ Nor should we, at least when it comes to race in the courtroom and the normal decision-making protocols by which jurors must abide.

To that end, our legal system provides two particular forms of mitigation. The Supreme Court's decision in *Peña-Rodriguez v. Colorado* in March 2017 provides ex post mitigation by providing a remedy after the verdict has been issued. The *Peña-Rodriguez* exception on its face functions against explicit racial bias rather than implicit racial bias.¹⁷² But where there is explicit bias, there is surely also implicit bias.¹⁷³ Though an imperfect and potentially weak remedy, the decision is rooted in an understanding of America's history of pervasive racism.¹⁷⁴ As such, the exception represents the fallibility of the jury verdict in the face of racial bias. Though the Court's exception is narrow, it nevertheless acknowledges the powerful hold such bias still has in our nation. On the ex ante end of the spectrum, jury nullification as civil disobedience provides another source of mitigation. Recognizing that racial bias, both implicit and explicit, undergirds our laws and their enforcement, nullification empowers jurors to refuse to convict on the basis of such flawed laws.¹⁷⁵ It is not the case that jurors cannot be trusted, but that the decision-making processes prior to the trial cannot be so trusted.

Peña-Rodriguez expresses that jury deliberations cannot always be relied upon to lead to a fair outcome. The idea of nullification seems to cut the other way: we should trust jurors more on matters of race in the courtroom. The sources of mitigation reflect the broader ambivalence as to how much trust to put in the jury in determining the outcome of a trial, but the commonality between the ex post and ex ante remedies is that they are exceptions to the normal protocol. Undermining the finality of a jury verdict is an exception to codified evidentiary rules safeguarding the very same. Nullification is an exception to how jurors are supposed to reach verdicts, i.e., in accordance with the relevant laws. This commonality is crucial, for while it implies that normal jury decision-making protocols fall

170. U.S. CONST. amend. VI. See generally FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules.

171. See *supra* Part IV.

172. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 855 (2017).

173. See generally Greenwald & Krieger, *supra* note 8, at 951 (discussing how pervasive implicit bias is, even among individuals expressing a lack of bias).

174. See *Peña-Rodriguez*, 137 S. Ct. at 868 (calling racial bias a "familiar and recurring evil" and stating that "[t]his Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns.").

175. See Butler, *supra* note 18.

prey to racism, it also suggests that there is hope. In recognizing the overwhelming influence of racial bias, law makers and adjudicators can consciously reflect on their decision-making motivations before creating laws and handing down verdicts that only perpetuate an America that does not treat all equally under the law. More importantly, if our legal system allows for chipping away at the sacredly held integrity of the jury verdict, then there is certainly room for race conscious adjustments to less enshrined parts of our legal system, like the legislative process and prosecutorial discretion.