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## Blatantly Biased: Expanding Pena-Rodriguez to Cases of Bias Against Sexual Orientation, Religion, and Sex

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BLATANTLY BIASED: EXPANDING *PEÑA-RODRIGUEZ* TO  
CASES OF BIAS AGAINST SEXUAL ORIENTATION,  
RELIGION, AND SEX

INTRODUCTION

- I. TENSIONS BETWEEN THE SIXTH AMENDMENT AND FEDERAL  
RULE OF EVIDENCE 606
    - A. *Promises of the Sixth Amendment and Evidentiary  
Requirements of Rule 606(b)*
    - B. *Court Compromises*
  - II. THE GRAVEST AND MOST IMPORTANT CASE: *PEÑA-RODRIGUEZ  
V. COLORADO*
    - A. *Statement of Facts*
    - B. *A Sixth Amendment Issue Masquerading as a Fourteenth  
Amendment Issue*
  - III. EXPANDING *PEÑA-RODRIGUEZ* TO SEXUAL ORIENTATION,  
RELIGION, AND SEX
    - A. *Examples of Specific Bias Within the Jury System*
      - 1. *Sexual Orientation*
      - 2. *Religion*
      - 3. *Sex*
    - B. *Procedural Safeguards Are Insufficient in Removing  
Biased Jurors*
      - 1. *Voir Dire’s Insufficiency to Remove Biased Jurors*
      - 2. *Rehabilitation Failures to Remove Juror Bias*
      - 3. *The Inability of the Justice System to Remove Jurors  
with Bias Against Sexual Orientation, Religion, and  
Sex Undermines Confidence in the Jury Verdict*
  - IV. HESITATIONS TOWARDS EXPANDING *PEÑA-RODRIGUEZ*
- CONCLUSION

INTRODUCTION

On January 26, 1993, after eight hours of deliberation, twelve jurors sentenced Charles Rhines to death.<sup>1</sup> During jury selection before the trial, Rhines’s lawyers asked all but one juror if they harbored any biases against Rhines because he is a gay man.<sup>2</sup> One juror said that she thought of Rhines’s life choices as “sinful” but that it would not impact her decision making.<sup>3</sup> During the guilt phase, all of the jurors learned of Rhines’s sexuality through the testimony of a witness

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1. Petition for Writ of Certiorari at 3, 5–6, *Rhines v. South Dakota*, 138 S. Ct. 2660 (2018) (No. 17-8791).

2. *Id.* at 4.

3. *Id.*

who saw him “cuddling” another man, and another witness testified that he had been in a relationship with Rhines.<sup>4</sup> After finding Rhines guilty of first-degree murder, the same jurors listened to the state’s penalty phase case, which incorporated victim impact testimony, and to the testimony of Rhines’s family.<sup>5</sup> After spending some time deliberating, the jurors sent the judge a note asking the following questions, among others: “Will Mr. Rhines be allowed to mix with the general inmate population[?]”; “[Will he be] allowed to create a group of followers or admirers[?]”; “Will Mr. Rhines be allowed to marry or have conjugal visits[?]”; and “Will Mr. Rhines be jailed alone or will he have a cellmate[?]”<sup>6</sup> The trial court provided no extra information to answer the jurors’ questions, and the jury shortly sentenced Rhines to death.<sup>7</sup> Rhines appealed his sentence and conviction and lost.<sup>8</sup>

Rhines was unable to introduce on appeal the biased questions the jurors asked during the eight hours of deliberation because of South Dakota’s no-impeachment rule, which mirrors Rule 606 of the Federal Rules of Evidence.<sup>9</sup> Recent interviews with jurors showed dangerous bias against Rhines, with a juror remembering that “the jury ‘also knew that [Mr. Rhines] was a homosexual and thought that he shouldn’t be able to spend his life with men in prison.’”<sup>10</sup> A second juror remembered that “[o]ne juror made . . . a comment that if he’s gay, [they]’d be sending him where he wants to go if [they] voted for [life imprisonment without the possibility of parole].”<sup>11</sup> A third juror said, “There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. . . . There were lots of folks who were like[,] Ew, I can’t believe that.”<sup>12</sup>

While Rhines was imprisoned on death row, the Supreme Court decided *Peña-Rodriguez v. Colorado*, and so found an exception to the juror no-impeachment rule in cases of racial bias.<sup>13</sup> Rhines argued that the exception should apply to more than racial bias, including

4. *Id.*

5. *Id.*

6. *Id.* at 5.

7. Petition for Writ of Certiorari, *supra* note 1, at 6. Rhines later appealed and the South Dakota Supreme Court affirmed his conviction and sentence. *Id.* Rhines claimed that the jury held an anti-gay bias based on a note they sent the judge, but the South Dakota Supreme Court specifically found that the note did not reflect bias. *Id.*

8. *See id.*

9. *See id.* at 7. Compare FED. R. EVID. 606, with S.D. CODIFIED LAWS § 19-19-606 (2019).

10. *Id.* at 7–8.

11. Petition for Writ of Certiorari, *supra* note 1, at 8.

12. *Id.* (internal quotations omitted). Rhines also alleged that one juror referred to him as an “SOB queer,” and another juror thought that Rhines “might be ‘a “sexual threat to other inmates and take advantage of other young men in or outside of prison.’”” *Id.* at 7 n.4.

13. 137 S. Ct. 855, 869 (2017).

sexual bias.<sup>14</sup> Rhines's appeals on this matter have been exhausted; the South Dakota Supreme Court found that he did not meet the requisite bar for the exception to apply, and the Supreme Court denied certiorari in June 2018.<sup>15</sup> Rhines currently remains on death row.<sup>16</sup>

This Note will argue that *Peña-Rodriguez* should be expanded to apply to post-conviction cases where jurors have made clear statements of bias against the sexual orientation, sex, or religion of a defendant, creating an exception to Rule 606. Part I will cover the tensions between the Sixth Amendment and Federal Rule of Evidence 606, defining varied applications of Rule 606 and the Supreme Court decisions determining Rule 606's scope. Part II will discuss *Peña-Rodriguez v. Colorado* in detail and the differences between the majority and minority's rationales. Part III will argue that the exception created to Rule 606 in *Peña-Rodriguez v. Colorado* should be expanded to cover biases against sexuality, sex, and religion. Part IV will address concerns about expanding the *Peña-Rodriguez* exception.

## I. TENSIONS BETWEEN THE SIXTH AMENDMENT AND FEDERAL RULE OF EVIDENCE 606

### A. Promises of the Sixth Amendment and Evidentiary Requirements of Rule 606(b)

There is inherent tension between the Sixth Amendment and Rule 606.<sup>17</sup> The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." <sup>18</sup> The Constitution requires that defendants receive "a tribunal both impartial and mentally competent to afford a hearing."<sup>19</sup> Simply put, a fair and impartial trial does not equate to a perfect one, and an impartial jury is made up of jurors who only consider the evidence presented to them at trial.<sup>20</sup> The fundamental principles behind the Sixth Amendment clash with the Federal Rule

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14. See Petition for Writ of Certiorari, *supra* note 1, at 8–9.

15. *Rhines v. South Dakota*, 138 S. Ct. 2660, 2660 (2018); Petition for Writ of Certiorari, *supra* note 1, at 10.

16. 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> [http://perma.cc/49XA-ETBV].

17. For a more in-depth treatment of the Sixth Amendment and Rule 606, see Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 262, 264–65 (2012).

18. U.S. CONST. amend. VI.

19. *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

20. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

of Evidence 606(b), which prohibits inquiry into the inner deliberations of the jury.<sup>21</sup> Rule 606(b) reads as follows:

*Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.<sup>22</sup>

Despite the strong protections provided above, Congress foresaw a few scenarios in which the veil to the jury room should be pierced.<sup>23</sup> "A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror."<sup>24</sup> These codified exceptions are very limited; jurors can only testify about issues during jury deliberation if the jury considered extraneous information or an outside influence unduly bore upon deliberation.<sup>25</sup> Testimony of juror bias during jury deliberation does not fit easily into either exception because it is not extraneous information, nor is it an outside influence.<sup>26</sup> When a juror presents evidence or testimony that another juror was prejudiced or was in some way unable to render an impartial verdict, the Sixth Amendment demands that evidence be accepted, and Rule 606 bars its admission.<sup>27</sup>

### *B. Court Compromises*

Courts have adapted to the tension between the promises of the Sixth Amendment and Rule 606 in various ways, including holding that the Sixth Amendment can supersede Rule 606, but each state and federal jurisdiction does protect jury deliberation from impeachment.<sup>28</sup> The protections for jury deliberations in Rule 606 are based on the Mansfield Rule, which prohibited jurors from testifying on mental processes or events that happened during deliberation.<sup>29</sup> The Mansfield Rule has been interpreted in three different ways. First,

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

22. *Id.*

23. *See* FED. R. EVID. 606(b)(2).

24. *Id.*

25. *Id.*

26. *See id.*

27. *See* U.S. CONST. amend. VI; FED. R. EVID. 606.

28. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 865, 869 (2017) ("Some version of the no-impeachment rule is followed in every [s]tate.").

29. *Id.* at 863.

Texas applies the “Outside Influence” Rule, as codified in the Texas Rules of Civil Procedure.<sup>30</sup> In this interpretation, jurors can only testify to outside influences, such as threats made to jurors during deliberation.<sup>31</sup> This interpretation significantly limits juror testimony and has strayed the least from the Mansfield Rule.<sup>32</sup> Second, the Federal Rules also allow for juror testimony for “events extraneous to the deliberative process,” including juror consultation of dictionaries or newspapers.<sup>33</sup> Finally, some jurisdictions follow the “Iowa rule.”<sup>34</sup> The “Iowa rule” spawned from the 1866 Iowa Supreme Court decision in *Wright v. Illinois and Mississippi Telephone Co.*, in which the court ruled that jurors could testify to facts that happened during deliberation.<sup>35</sup> In jurisdictions following the “Iowa rule,” jurors are prohibited from testifying about their own subjective beliefs, but they may testify about objective facts and events that occurred during deliberation.<sup>36</sup> The Supreme Court disfavors the “Iowa rule” and seems to prefer the Federal Rule as a balance between the two extremes.<sup>37</sup>

Prior to *Peña-Rodriguez*, the Supreme Court addressed the scope of Rule 606 only twice.<sup>38</sup> However, it has dealt with the common-law equivalent, finding exceptions for the “gravest and most important cases,” in *McDonald v. Pless*.<sup>39</sup> In the first case regarding the scope of Rule 606, *Tanner v. United States*, the Court ruled that juror intoxication and drug use was not an “outside influence.”<sup>40</sup> After *Tanner*’s conviction, his attorney received an unsolicited visit from a member of the jury who said that during the trial several other jurors became intoxicated during breaks, he and two other jurors smoked marijuana throughout the trial, and others ingested cocaine three to five times throughout the trial.<sup>41</sup> The Court refused to find an exception, basing its reasoning on concerns that attorneys would harass jurors after litigation, destroying the freedom of discussion during deliberation, and that the exception would undermine the willingness of jurors to return an unpopular verdict.<sup>42</sup> The Court also examined several public

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30. TEX. R. CIV. P. 327(b).

31. See *Cooper Tire & Rubber Co. v. Mendez*, 155 S.W.3d 382, 412 (Tex. Ct. App. 2004), *rev’d on other grounds*, 204 S.W.3d 797 (Tex. 2006).

32. See *McQuarrie v. State*, 380 S.W.3d 145, 163–64 (Tex. Crim. App. 2012) (Cochran, J., dissenting).

33. FED. R. EVID. 606(b)(2); *Peña-Rodriguez*, 137 S. Ct. at 863.

34. *Peña-Rodriguez*, 137 S. Ct. at 863.

35. 20 Iowa 195, 212 (1866).

36. *Id.* at 210–11.

37. See *Clark v. United States*, 289 U.S. 1, 13 (1933).

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

39. 238 U.S. 264, 269 (1915).

40. 483 U.S. 107, 122 (1987).

41. *Id.* at 115–16.

42. *Id.* at 120–21, 124–26.

policy considerations, such as the finality of litigation and chilling full and free debate in deliberation by allowing in evidence about juror intoxication, determining in particular that voir dire allows for counsel to weed out any jurors incapable of judging impartially.<sup>43</sup> Juror intoxication and drug use are therefore not an exception to Rule 606(b)(1).<sup>44</sup>

The issue of voir dire as a protection for defendants' Sixth Amendment rights is a particularly thorny one that will be discussed in greater detail in Part III of this Note.<sup>45</sup> Suffice to say, voir dire is the examination of prospective jurors for selection for trial.<sup>46</sup> The Supreme Court has more fully explored voir dire as a protection for defendant's rights in the Court's second decision on the scope of Rule 606.<sup>47</sup> *Warger v. Shauers* was a civil case that dealt with juror dishonesty during voir dire.<sup>48</sup> During voir dire, each juror was asked if he or she could be fair and impartial during the trial and was given the chance to answer if he or she could not.<sup>49</sup> After rendering a verdict for the defendant, a juror approached the plaintiff's attorney about the conduct of another juror who had expressed that her daughter had been in a similar situation to the defendant's situation.<sup>50</sup> Despite clear dishonesty during voir dire by the prejudiced juror, the Court upheld the no-impeachment rule by finding no exception for a juror who fails to disclose pro-defendant bias.<sup>51</sup> Additionally, the Court stated, "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."<sup>52</sup>

More importantly, the Court echoed its old warning that there are some cases of "juror bias so extreme that, almost by definition, the jury trial right has been abridged."<sup>53</sup> It further explained what the Court would do with such a case, leaving itself open to balancing the jury system requirements and the rights of the individual defendant.<sup>54</sup> The Court then left the exception to the no-impeachment

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43. *Id.* at 124, 127 ("Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process.").

44. *Id.* at 122.

45. *See infra* Part III.

46. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 n.3 (Mo. 2010).

47. *See Warger v. Shauers*, 135 S. Ct. 521, 529 (2014).

48. *Id.* at 524.

49. *Id.*

50. *Id.*

51. *See id.* at 530.

52. *Id.* at 529.

53. *Warger*, 135 S. Ct. at 530 n.3.

54. *See id.* ("If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process.").

rule in *McDonald* and its predecessors but still only in “the gravest and most important cases.”<sup>55</sup> In such an important case, excluding juror testimony would “violat[e] the plainest principles of justice.”<sup>56</sup>

## II. THE GRAVEST AND MOST IMPORTANT CASE: *PEÑA-RODRIGUEZ V. COLORADO*

### A. *Statement of Facts*

The Court found its exception for the most important case in a sexual assault trial: *Peña-Rodriguez v. Colorado*.<sup>57</sup> Prosecutors brought charges against Peña-Rodriguez based on an alleged sexual assault in a bathroom.<sup>58</sup> Prospective jurors were repeatedly asked whether they believed that they could be fair and impartial and the court encouraged them to speak if they had any concerns about impartiality.<sup>59</sup> None of the jurors indicated that they could not be impartial.<sup>60</sup> The jury found the defendant guilty after a three day trial, and two jurors approached defendant’s counsel and said that another juror had expressed anti-Hispanic bias.<sup>61</sup>

With permission of the court, both jurors signed affidavits describing comments during deliberation.<sup>62</sup> The jurors swore that another juror, identified as H.C., told fellow jurors that he “believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”<sup>63</sup> They also said that H.C. stated, “Mexican men are physically controlling of women because of their sense of entitlement,” and “I think he did it because he’s Mexican and Mexican men take whatever they want.”<sup>64</sup> The “trial court acknowledged H.C.’s apparent bias” but found that the deliberations were protected under Rule 606(b), so it would not overturn the verdict.<sup>65</sup>

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55. *McDonald v. Pless*, 238 U.S. 264, 269 (1915).

56. *Id.* (citing *United States v. Reid*, 53 U.S. 361, 366 (1852); *Mattox v. United States*, 146 U.S. 140, 148 (1892)).

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

58. *Id.* at 861.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 861–62.

63. *Peña-Rodriguez*, 137 S. Ct. at 862.

64. *Id.*

65. *Id.*

*B. A Sixth Amendment Issue Masquerading as a Fourteenth Amendment Issue*

The Supreme Court found that there was an exception to Rule 606 when jurors engage in racial bias and remanded *Peña-Rodriguez* to the lower court.<sup>66</sup> The Court took a Sixth Amendment issue and framed it within the Fourteenth Amendment.<sup>67</sup> The ruling is not designed to “perfect the jury but to ensure . . . the promise of equal treatment under the law that is so central to a functioning democracy.”<sup>68</sup> It first distinguished racial bias from the pro-defendant bias in *Warger* and juror intoxication in *Tanner*, finding racial bias to be more serious.<sup>69</sup> Racial bias was an “evil that, if left unaddressed, would risk systemic injury to the administration of justice.”<sup>70</sup> In distinguishing racial bias, the Court noted that the safeguards mentioned in *Tanner* are less effective in these cases.<sup>71</sup> Specifically, voir dire can be insufficient in determining racial bias cases because generic questions may not expose bias, and pointed questions about bias could exacerbate prejudice without actually exposing it.<sup>72</sup> In addition to finding the *Tanner* safeguards inadequate, the Court also found that such cases must be addressed to prevent a “loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.”<sup>73</sup> The Court held

where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.<sup>74</sup>

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66. *Id.* at 869, 871.

67. *See id.* at 867–69.

68. *Id.* at 868.

69. *Peña-Rodriguez*, 137 S. Ct. at 868.

70. *Id.*

71. *Id.* at 869.

72. *Id.*

73. *Id.*

74. *Id.* The Court did not define “clear” or the threshold showing in order to inquire into claims of racial bias. *See Commonwealth v. Young*, No. 1305, 2018 WL 2947919, at \*5–6 (Pa. Super. June 13, 2018). Additionally, it failed to define the appropriate standard of review for appeals applying the *Peña-Rodriguez* exception to Rule 606. *See* Brief of Appellant at 24, *United States v. Birchette*, 908 F.3d 50 (2018) (No. 17-4450) 2017 WL 5997873, at \*24.

Although the Court used language related to the Fourteenth Amendment, finding that an exception for racial bias is necessary because “equal treatment under the law . . . is so central to a functioning democracy,” they held that the *Sixth Amendment* required an exception to Rule 606.<sup>75</sup> As such, the Court expanded the power of the Sixth Amendment.<sup>76</sup> Justice Alito dissented.<sup>77</sup> He opined that “[t]his disparate treatment is unsupportable under the Sixth Amendment. If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.”<sup>78</sup> In other words, he believed that once the door to the jury room had been cracked open just a little for racial bias, the door should be opened for examination for other forms of bias, as well.<sup>79</sup> He also noted:

Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin or religion—would merit equal treatment. So, I think, would bias based on sex . . . . Indeed, convicting a defendant on the basis of any irrational classification would violate the *Equal Protection Clause*.<sup>80</sup>

Justice Alito’s dissent is correct that several other classifications of bias could easily justify the same treatment as racial bias under *Peña-Rodriguez*, such as sexual orientation, religion, and sex.<sup>81</sup> Just like the racial bias noted in *Peña-Rodriguez*, jurors can be and have been biased against sexual orientation, religion, and sex.<sup>82</sup> Just like racial bias, voir dire is insufficient in discovering these biases in potential jurors, and even when they are discovered, rehabilitation does not remove them. Finally, the continued existence of biases against sexual orientation and sex undermines citizen trust in the justice system, just like racial bias.

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75. *Peña-Rodriguez*, 137 S. Ct. at 868–69.

76. *See id.* at 869.

77. *Id.* at 874 (Alito, J., dissenting).

78. *Id.* at 883.

79. *Id.* at 883–84.

80. *Id.* (emphasis added) (citations omitted).

81. *See infra* Part IV.

82. *See, e.g.,* *Commonwealth v. Delp*, 672 N.E.2d 114, 117 (Mass. App. Ct. 1996); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 86 (Mo. 2010); *cf. Harlee v. District of Columbia*, 558 F.2d 351, 354 (D.C. Cir. 1989) (holding no support for appellant’s claim that gender bias played a role in his conviction).

### III. EXPANDING *PEÑA-RODRIGUEZ* TO SEXUAL ORIENTATION, RELIGION, AND SEX

#### A. *Examples of Specific Bias Within the Jury System*

##### 1. *Sexual Orientation*

Biases based on sexual orientation, sex, and religion could all meet the standard dictated in *Peña-Rodriguez*, as voir dire is insufficient to protect defendants against these biases, and each bias could undermine belief in the legal system.<sup>83</sup> There are several noteworthy cases beyond Charles Rhine's that expose systemic juror biases against LGBTQ individuals.<sup>84</sup> In *Commonwealth v. Delp*, Christian Delp was convicted of three counts of child rape.<sup>85</sup> The week after he was convicted, a juror approached the trial judge on "a matter of conscience."<sup>86</sup> The juror stated in a letter that "[his] verdict was bias [sic] at the conclusion of Christian Delp's trial."<sup>87</sup> The juror's letter spawned a hearing and the juror testified that he "had felt that [he], [himself], had found Christian Delp guilty *solely* on his apparent homosexuality."<sup>88</sup> The court found that despite the juror's testimony that the he had found Delp guilty because of Delp's sexuality, the juror's "uncorroborated posttrial testimony" did not necessitate a new trial.<sup>89</sup> The court affirmed that public policy dictated that jurors should keep secret conversation and their personal thoughts during deliberation.<sup>90</sup>

More recent cases also expose juror bias against LGBTQ individuals.<sup>91</sup> Eric Patrick was convicted of first-degree murder in 2009.<sup>92</sup> Patrick's jury recommended the death penalty with a seven to five vote, and the trial court sentenced him to death.<sup>93</sup> During voir dire, a juror stated that he "would have a bias if [he] knew the perpetrator was homosexual."<sup>94</sup> When asked about holding the

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83. See *supra* notes 80–82 and accompanying text; *infra* notes 84–143 and accompanying text.

84. See, e.g., *Patrick v. State*, 246 So. 3d 253, 265 (Fla. 2018); *Delp*, 672 N.E.2d at 117. 672 N.E.2d at 115.

85. *Id.*

86. *Id.*

87. *Id.* (emphasis added).

88. *Id.* at 117.

89. *Id.*

90. See, e.g., *Patrick v. State*, 246 So. 3d 253, 262–63 (Fla. 2018)

91. *Id.* at 257.

92. *Id.* at 258.

93. *Id.* at 263.

prosecution to the proper burden of proof, he answered, “Put it this way, if [he] felt the person was a homosexual, [he] personally believe[d] that person is morally depraved enough that he might lie, might steal, might kill.”<sup>95</sup> He also answered yes when asked if his expressed bias might affect deliberations.<sup>96</sup> The Florida Supreme Court remanded the case for an evidentiary hearing after vacating Patrick’s death sentence.<sup>97</sup>

Researchers have come to similar conclusions about implicit bias against sexual orientation.<sup>98</sup> In a 2009 study, researchers examined the effects of defendant’s sexual orientation on juror’s perceptions on a mock child sexual assault case.<sup>99</sup> A racially and religiously diverse sample of mock jurors read a fact pattern laying out, through prosecution witness testimony and the defendant’s statement, a brief case of a male teacher sexually abusing a student.<sup>100</sup> The male teacher was either gay or straight, and the victim was either a boy or a girl.<sup>101</sup> The mock jurors also read applicable jury instructions about the burden of proof and the elements of the crime.<sup>102</sup> Researchers found that the mock jurors made “significantly more prosecution judgements in cases involving gay as compared to straight defendants.”<sup>103</sup> The mock jurors were more likely to convict a gay defendant, more likely to find the gay defendant as less credible than a straight one, and more likely to attribute more culpability to a gay defendant.<sup>104</sup> The jurors were also more likely to feel that the defendant needed to be punished and more likely to believe that sexual contact did occur.<sup>105</sup> The researchers concluded that “compared to straight defendants, defendants perceived to be gay face unfair presumptions of guilt in child sexual abuse cases.”<sup>106</sup> Clearly, biases against sexual orientation exist and critically affect trial outcomes in the same way that biases against race affected the initial trial outcome of *Peña-Rodriguez*.<sup>107</sup>

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95. *Id.*

96. *Id.*

97. *Patrick*, 246 So. 3d at 265.

98. See, e.g., Tisha R. A. Wiley & Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Jurors’ Perceptions of Child Sexual Assault*, 33 L. & HUM. BEHAV. 46, 46–47 (2009).

99. *Id.* at 46.

100. *Id.* at 48–49.

101. *Id.* at 49.

102. *Id.*

103. *Id.* at 54.

104. Wiley & Bottoms, *supra* note 98, at 54. The jurors were also more likely to find victims more credible when the defendant was gay. *Id.*

105. *Id.*

106. *Id.* at 55.

107. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 870 (2017).

## 2. Religion

Jurors have also expressed religious bias against defendants and have still remained on the jury.<sup>108</sup> In *People v. Al-Turki*, Homaidan Al-Turki was convicted of unlawful sexual contact, extortion, false imprisonment, and several other charges in 2006.<sup>109</sup> The court asked each of the 106 potential jurors to give their reaction to the fact that “the defendant, the complaining witness, and the other witnesses in this case are Muslims.”<sup>110</sup> The court also asked general questions about the jurors’ ability to be impartial.<sup>111</sup> After counsel whittled the 106 potential jurors to 12 and as the court swore in jury members, a juror interrupted and began to share his personal thoughts on the “Muslim religion.”<sup>112</sup> He stated that he thought that “a person of [the Muslim] faith would commit a crime if . . . the faith conflicted with the laws of [the United States] government.”<sup>113</sup> While this juror expressed bias while the jury was being sworn in, it was not caught because of *voir dire*, and so could have easily been mentioned during deliberations.<sup>114</sup>

Religious bias is also seen in civil cases.<sup>115</sup> In *Fleshner v. Pepose Vision Institution, P.C.*, a juror made multiple anti-Semitic comments about a witness.<sup>116</sup> After the jury was dismissed, a juror approached counsel and described the anti-Semitic statements made by that juror during deliberation.<sup>117</sup> The juror allegedly said, “She is a Jewish witch,” “She is a Jewish bitch,” “She is a penny-pinching Jew,” and “She was such a cheap Jew that she did not want to pay Plaintiff unemployment compensation.”<sup>118</sup> Though Missouri followed the stricter interpretation of the Mansfield Rule, the Missouri Supreme Court ruled that statements exhibiting “religious bias or prejudice deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and *equal protection of the law*.”<sup>119</sup> The court noted that

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108. Marc W. Pearce & Samantha L. Schwartz, *Can Jurors’ Religious Biases Affect Verdicts in Criminal Trials?*, AM. PSYCHOL. ASS’N (July 8, 2010), <https://www.apa.org/monitor/2010/07-08/jn.aspx> [<http://perma.cc/3H2V-JDDX>].

109. *Id.* The decision is unpublished but referred to in *People v. Al-Turki*, 2017 COA 39, ¶ 2 (Ct. App. Colo. 2017).

110. Pearce & Schwartz, *supra* note 108.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See, e.g.*, *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 85 (Mo. 2010).

116. *Id.* at 86.

117. *Id.*

118. *Id.* Another juror approached counsel and reported that anti-Semitic comments were made during deliberation but did not describe exactly what was said. *Id.*

119. *Id.* at 87, 89–90 (emphasis added).

a religiously biased juror holds negative stereotypes that would prevent him or her from making verdicts based on the facts and law presented at trial.<sup>120</sup>

In a psychological discussion about Al-Turki's appeal, Marc Pearce and Samantha Schwartz summarized relevant background research about anti-Muslim bias.<sup>121</sup> They noted that research indicated that "associating Muslims with negative attributes (such as terrorism) can create implicit biases."<sup>122</sup> They also stated that the use of negative associations could create a bias against a Muslim defendant.<sup>123</sup> A court found such a case in 2010 in which a prosecutor created bias against a Muslim defendant in South Carolina.<sup>124</sup> Angle Vazquez was charged and found guilty of two counts of murder and other assorted crimes.<sup>125</sup> During the sentencing phase of the trial, a witness testified that Vazquez was a Muslim.<sup>126</sup> Counsel had screened each potential juror about anti-Muslim bias during voir dire.<sup>127</sup> Vazquez's trial also overlapped with the second anniversary of 9/11, a fact that the prosecutor took advantage of when he argued that Vazquez should be given the death penalty because he was a "domestic terrorist."<sup>128</sup> The South Carolina Supreme Court overturned Vazquez's sentence because the prosecution appealed to "prejudice involving anti-Muslim sentiment."<sup>129</sup> Consequently, bias against certain religions has had the same effect that racial bias had in *Peña-Rodriguez*: it poisoned jury deliberation.

### 3. Sex

Claims of juror bias against sex are raised rarely and usually fail as it is difficult to show.<sup>130</sup> More often, cases are appealed for

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120. *Fleshner*, 304 S.W.3d at 90.

121. Pearce & Schwartz, *supra* note 108.

122. *Id.* "This finding suggests that people who are exposed to negative portrayals of Muslims . . . might develop anti-Muslim biases . . ." *Id.*

123. *Id.*

124. *Vasquez v. State*, 698 S.E.2d 561, 567 (S.C. 2010).

125. *Id.* at 562–63.

126. *Id.* at 563.

127. *Id.* at 568.

128. *Id.* at 563. "The solicitor, who characterized Petitioner as a 'domestic terrorist' during his opening guilt phase statements, drew a correlation between the events of September 11th and those for which Petitioner was charged." *Id.*

129. *Vasquez*, 698 S.E.2d at 569.

130. See *Harlee v. District of Columbia*, 558 F.2d 351, 354 (D.C. Cir. 1989). Harlee was convicted of indecent exposure and argued that his Sixth Amendment rights had been violated, first by having a jury with disproportionately more women than men for his community, and second by the trial court refusing to question potential jurors about "prejudices involving men." *Id.* at 352–54. The court rejected both claims, as the defendant provided no evidence the underrepresentation of men was a result of systematic exclusion and that jurors were biased against his sex. *Id.* at 353–54.

bias against sex during voir dire as opposed to after deliberation.<sup>131</sup> The Supreme Court demonstrated concern for biases against sex in voir dire.<sup>132</sup> In *J.E.B. v. Alabama*, the Supreme Court expanded *Batson v. Kentucky*, which held that the prosecution cannot exercise a peremptory strike in voir dire on the basis of race, to peremptory strikes on the basis of sex.<sup>133</sup> The Court referred to the long history of prejudice against women in the jury system.<sup>134</sup> The Court found that, just like in cases of race, “gender simply may not serve as a proxy for bias.”<sup>135</sup> While juror biases against sex are rarely argued, it is likely that the concern for sex biases in jury selection would apply to sex biases against the defendant.<sup>136</sup>

Researchers, too, have tracked biases against defendant genders.<sup>137</sup> Jurors are more likely to find men guilty of both assault and theft and applied harsher punishments when the victim was female.<sup>138</sup> In studies designed to test the effect of defendant gender on alibi credibility, mock jurors found the female defendant to be more feminine, more credible, more likeable, and therefore less likely to be guilty.<sup>139</sup> The mock jurors read about a spousal homicide case with opening and closing statements, prosecution witness statements, and the defendant’s statement containing his or her alibi.<sup>140</sup> The more the mock jurors believed the defendant’s alibi, which was also manipulated into becoming more feminine or masculine, the less likely they were to find the defendant guilty.<sup>141</sup> Female defendants with feminine alibis were seen as more trustworthy by the mock jurors as a whole.<sup>142</sup> Bias against sexual orientation, religion, and sex are present in the legal system, both explicitly, evident through court cases, and

131. See *United States v. Analetto*, 807 F.3d 423, 425 (1st Cir. 2015). The defendant in *Analetto* contended that the prosecution had used its peremptory strikes against eight male jurors. *Id.* The trial court found that the eighth strike was impermissibly based on sex. *Id.* at 426.

132. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994).

133. *Id.* at 127, 129 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

134. *Id.* at 131–35.

135. *Id.* at 143.

136. See *id.* at 153 (“We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own. . . . A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.”).

137. See Susan Yamamoto & Evelyn M. Maeder, *A Case of Culture: Defendant Gender and Juror Decision-Making*, 32 *J. INTERPERSONAL VIOLENCE* 3090, 3090 (2017).

138. *Id.* at 3095. Later research indicates that the stereotype linking men to crime has weakened, though by what degree varies by case type. *Id.* at 3096.

139. Evelyn M. Maeder & Julie L. Dempsey, *A Likely Story? The Influence of Type of Alibi and Defendant Gender on Juror Decision-Making*, 20 *PSYCHIATRY, PSYCHOL. & L.* 543, 550 (2013).

140. *Id.* at 547.

141. *Id.* at 550.

142. *Id.*

implicitly, as shown through research.<sup>143</sup> These biases, like racial bias, affect jurors and deliberation in a very real way.

### *B. Procedural Safeguards Are Insufficient in Removing Biased Jurors*

#### *1. Voir Dire's Insufficiency to Remove Biased Jurors*

Voir dire is the process of questioning and weeding out jurors who cannot be impartial.<sup>144</sup> “Ideally,” as the court in *Fleshner* stated, “the potential jurors’ answers to questioning during voir dire would reveal every bias or prejudice. Those potential jurors expressing biases or prejudices would be stricken.”<sup>145</sup> Aware of the realities of the justice system, the court also noted that potential jurors are unlikely to admit to any biases openly in court, particularly those about religion or ethnicity.<sup>146</sup> Citizens who are called for jury duty will sometimes ask whether or not they can lie during voir dire, showing how uncomfortable they are with sharing their biases.<sup>147</sup> As a practical matter, *Warger* went to the Supreme Court because a juror explicitly lied during voir dire when she said that she had no bias toward either party.<sup>148</sup>

Moreover, lawyers’ questions during voir dire are often not designed to gain information about a bias, but are designed to further a particular theory of a case; for example, on a theory of self-defense, counsel could ask questions about whether jurors felt as if they needed to retreat in a dangerous situation.<sup>149</sup> “The voir dire process, for the most part, is stuck in the 19th century.”<sup>150</sup> Both the prosecution and defense have “virtually no information” about their potential jurors besides names; most jurisdictions do not conduct background checks on jurors.<sup>151</sup> As a consequence, counsel conducting voir dire

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143. See *supra* notes 83–142 and accompanying text.

144. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 n.3 (Mo. 2010).

145. *Id.*

146. *Id.*

147. See, e.g., Amy Bloom, Jack Shafer, & Kenji Yoshino, *Can I Hide My Beliefs During Jury Selection?*, N.Y. TIMES MAG. (Mar. 4, 2015), <https://www.nytimes.com/2015/03/08/magazine/can-i-hide-my-beliefs-during-jury-selection.html> [<http://perma.cc/2NWZ-MYY5>]. A citizen in a Midwestern state asked if he or she should lie during voir dire “so [he or she] can subvert an unfair system.” *Id.*

148. *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014).

149. See Cathy E. Bennett, Robert B. Hirschhorn, & Heather R. Epstein, *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMULR. 659, 660 (1993). The authors suggest that jury selection has three main goals: eliciting juror information, educating jurors about the defense theory of the case, and establishing a relationship between the attorney and the jurors. *Id.*

150. Molly McDonough, *Rogue Jurors*, ABA J. (Oct. 24, 2006), [http://www.abajournal.com/magazine/article/rogue\\_jurors](http://www.abajournal.com/magazine/article/rogue_jurors) [<http://perma.cc/92S4-P86D>].

151. *Id.*

does so in the dark.<sup>152</sup> Voir dire is also seen as a less important part of trial, as lawyers spend little time on it.<sup>153</sup>

Additionally, voir dire often fails to eliminate “stealth” and “rogue” jurors.<sup>154</sup> “Stealth” jurors have an agenda while “rogue” jurors lie during voir dire and deliberately hang juries.<sup>155</sup> While “rogue” jurors are rare, “stealth” jurors can be a problem.<sup>156</sup> Beyond jurors who intentionally try to manipulate the system, jurors often experience fear and try to please the judge and therefore do not tell the truth during voir dire.<sup>157</sup> Beyond fear of the courthouse, certain questions during voir dire put the potential jurors in tight spots; some worry about disclosing prior crimes in fear that they might lose their jobs.<sup>158</sup> Jurors who want to please judges may also mislead counsel during voir dire.<sup>159</sup> Judge Gregory E. Mize studied juror answers and found that some jurors always gave what they thought was the answer the judge wanted to hear in court, but when asked privately, would change their answer.<sup>160</sup>

How effective voir dire is depends on who is asking the questions and how formal the procedure is.<sup>161</sup> When voir dire is conducted by a judge, “subjects changed their answers to a significantly greater degree when they were asked to report their attitudes . . . .”<sup>162</sup> Researchers also found that the most anxious jurors were also the most likely to lie during voir dire.<sup>163</sup> In a study about juror honesty,

152. *See id.* Some jurisdictions provide counsel with questionnaires and individual voir dire to solve this problem. *Id.*

153. *See* Mark A. Drummond, *Voir Dire: Don't Let the Judge Cut You Out*, ABA, <https://apps.americanbar.org/litigation/litigationnews/articles-print/050412-practice-points-spring12.html> [<http://perma.cc/AEN4-GSFR>] (noting that a judge gave lawyers exactly the amount of time they asked for voir dire: 30 to 45 minutes).

154. *See* McDonough, *supra* note 150.

155. *See id.* When caught, “rogue” jurors can face charges. In a DC murder trial, a “rogue” juror winked at the defendant to let him know that she was on his side and later conspired to hang the jury. The juror was later convicted of conspiracy and obstruction of justice. *Id.*

156. *Id.* One jury consultant stated that 15–18% of potential jurors harbor bias and actively seek out jury service to comment on or influence trials. *Id.*

157. McDonough, *supra* note 150. Jurors who lie as a result of fear or panic can also be punished. A juror was sentenced to a four month sentence for failing to disclose past arrests on his jury questionnaire; the juror had no ulterior motives but thought that he did not need to disclose the arrests because he had never been convicted. *Id.*

158. *Id.* One potential juror was asked whether she had an abortion and feared on one hand that her husband would find out, and on the other hand, that she could be convicted of perjury. *Id.*

159. *Id.*

160. *Id.*

161. *See* Marvin Zalman & Olga Tsoudis, *Plucking Weeds From The Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 178 (2005).

162. *Id.*

163. *Id.* at 177. Other predictors of juror honesty include previous juror experience. Those who had been jurors before were the least likely to lie. *Id.*

jurors were asked in court if they or their family had been victims of a crime or if they knew any police officers.<sup>164</sup> Voir dire was brief and jurors answered questions mostly by raising hands.<sup>165</sup> Only 8.9% of the jurors indicated yes to the prior victimization question and only 7.9% indicated yes to knowing a police officer.<sup>166</sup> However, about 34% of the jurors or their family members had been victims and about 40% of the jurors knew police officers.<sup>167</sup> The authors concluded that “to a significant degree, . . . jurors withhold information or lie during voir dire.”<sup>168</sup> Voir dire is insufficient to prevent bias as a whole even when the bias is not stigmatized, like knowing a police officer; it cannot handle the very real bias against sexual orientation, religion, and sex.<sup>169</sup> Jurors in Rhines’s, Delp’s, and Fleshner’s respective trials did not express their bias during voir dire and later tainted jury deliberations.<sup>170</sup> Voir dire is insufficient in protecting defendants from bias against sexual orientation, religion, and sex in the same way it is insufficient to protect against racial bias.

## 2. Rehabilitation Failures to Remove Juror Bias

Even after a potential juror has expressed bias, judges may rehabilitate or ask if he or she could set aside bias.<sup>171</sup> The process of rehabilitation is quick and begins with questions similar to “If the court were to instruct you, as a matter of law, to only consider evidence that is presented from the witness stand, could you set aside your bias?”<sup>172</sup> Next, potential jurors “agree to ignore their biases” and are allowed to serve on the jury if counsel does not use one of their peremptory strikes.<sup>173</sup> Caroline Crocker and Margaret Bull Kovera studied the effect of rehabilitation on an insanity defense.<sup>174</sup> The judge pulled potential jurors into chambers one by one, and gave each either the rehabilitative instructions or normal voir dire questions.<sup>175</sup> The rehabilitative instructions did not affect the verdict

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164. *Id.* at 180.

165. *Id.*

166. Zalman & Tsoudis, *supra* note 161, at 180.

167. *See id.*

168. *Id.* (quoting Richard Seltzer et al., *Juror Honesty During Voir Dire*, 19 J. CRIM. JUST. 451, 460 (1991)).

169. *See* Petition for Writ of Certiorari, *supra* note 1, at 2, 16. Each juror answered that he or she would be impartial and fair during voir dire, including those who later made biased statements against Rhines during jury deliberation. *Id.* at 2.

170. *See supra* notes 82–89 and accompanying text.

171. Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 L. HUM. BEHAV. 212, 212 (2010).

172. Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1474–75 (2003).

173. Crocker & Kovera, *supra* note 171, at 212.

174. *Id.*

175. *Id.* at 216.

itself, and so did not remove any bias the jurors expressed during voir dire.<sup>176</sup> “Rehabilitation did not, however, interact with juror bias to affect verdict judgements . . . .”<sup>177</sup> Crocker and Kovera concluded that rehabilitation did not reduce the “negative impact of juror bias on verdicts” but instead decreased the confidence in the verdict of both unbiased and biased jurors.<sup>178</sup> Jurors did not become less biased as a result of rehabilitative instruction but instead became less sure of themselves.<sup>179</sup> Provided that jurors are honest about biases against sexual orientation, religion, and sex and the trial court deigns to rehabilitate them, they still bring their bias into deliberation.<sup>180</sup> Additionally, if unbiased jurors heard rehabilitative instructions, they become less sure in their verdict.<sup>181</sup> Jurors in Patrick’s and Al-Turki’s respective trials expressed specific biases and were not removed from the potential jury pool because they had been rehabilitated.<sup>182</sup>

*3. The Inability of the Justice System to Remove Jurors with Bias Against Sexual Orientation, Religion, and Sex Undermines Confidence in the Jury Verdict*

The Supreme Court has addressed systematic bias against defendants to protect the constitutional right to a fair and impartial trial.<sup>183</sup> Despite previous discrimination, all races, genders, and ethnicities serve on juries so as to represent the defendant’s community.<sup>184</sup> However, as explained by Ronald Wright, “the colorblind ideal isn’t true in practice.”<sup>185</sup> Later discovered or known and ignored bias have spawned a growing list of articles online, decrying the fairness of the system.<sup>186</sup> Before 2018, there was no empirical data confirming

176. *Id.* at 220. However, the rehabilitative instruction made participants less confident in their verdict. *Id.* The authors postulate that the jurors thought that because the judge gave rehabilitative instructions, “the judge possessed favorable attitudes toward the . . . defense.” *Id.*

177. Crocker & Kovera, *supra* note 171, at 220.

178. *Id.* at 224.

179. *See id.*

180. *See id.*

181. *Id.*

182. *See supra* notes 91–97, 108–14 and accompanying text.

183. *See supra* notes 29–82 and accompanying text.

184. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 127 (1994); Batson v. Kentucky, 476 U.S. 79, 79 (1986).

185. Ronald Wright, *Yes, Jury Selection Is as Racist as You Think. Now We Have Proof*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html> [http://perma.cc/XUN5-B4RR].

186. Adam Benforado, *Reasonable Doubts About the Jury System*, ATLANTIC (June 16, 2015), <https://www.theatlantic.com/politics/archive/2015/06/how-bias-shapes-juries/395957> [http://perma.cc/E9W7-TCLG]; Joshua Rozenberg, *Verdict on Juries: Placing Blind Trust in Them Helps No One*, GUARDIAN (May 14, 2013), <https://www.theguardian.com/law/2013/may/15/juries-research-internet-use> [http://perma.cc/5Z3W-MRT6]; Wright, *supra* note 185.

what those who spend time in court already knew: peremptory challenges are used to remove minorities, who are more sympathetic both to defendants of color and defendants as a whole.<sup>187</sup> Later removal of white jurors does not rebalance the jury.<sup>188</sup> As an effect of stacking the jury against defendants of color, “the community become[s] more cynical about the justice system.”<sup>189</sup> Biases against sexual orientation, sex, and religion weaken community trust in the American justice system in the same way. The public becomes aware of juror biases in two different ways: through the internet, and through participating in trials.<sup>190</sup>

While few people would have heard about juror prejudice against Christian Delp’s sexual orientation in 1996, Charles Rhines’s denial of certiorari was written about in the *New York Times*, the *Miami Herald*, and even Snopes, a website dedicated to debunking myths and rumors.<sup>191</sup> Homaidan Al-Turki has his own Wikipedia page.<sup>192</sup> The cracks in the justice system are becoming more visible and are compounded by decreasing citizen participation in jury trials.<sup>193</sup>

As noted by Jocelyn Simonson’s article, *The Criminal Court Audience in a Post-Trial World*, criminal jury trials are essentially a phenomenon.<sup>194</sup> As fewer defendants opt for jury trials, fewer members of the public experience the criminal justice system firsthand as jurors.<sup>195</sup> Their experiences are limited to being members of the audience, and thus, they have “minimal input into and receive[] little information about the behind-the-scenes decisions and negotiations” of the justice system.<sup>196</sup> Despite the decreasing number of

187. Wright, *supra* note 185. While Wright’s data is from North Carolina, data from Mississippi and Louisiana show similar results. *Id.*

188. *See id.*

189. *Id.*

190. Mar, *supra* note 16; Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2174–75 (2014).

191. Kim Lacapria, *Was a Gay Man From South Dakota Sentenced to Death for Fear He Would ‘Enjoy’ Prison?*, SNOPE (June 25, 2018), <https://www.snopes.com/news/2018/06/25/gay-man-sentenced-death> [<http://perma.cc/V5W8-7WB2>]; Mar, *supra* note 16; Leonard Pitts, Jr., *His Crime Was Horrendous, But So Was the Reason Jurors Sentenced Him to Death. He’s Gay.*, MIAMI HERALD (June 22, 2018), <https://www.miamiherald.com/opinion/opn-columns-blogs/leonard-pitts-jr/article213672629.html> [<http://perma.cc/6HYS-ZJY7>]. Rhines’s case was also notably covered by the Marshall Project before the Supreme Court denied certiorari. Maurice Chammah, *Was This Man Sentenced to Death Because He’s Gay?*, THE MARSHALL PROJECT (June 11, 2018), <https://www.themarshallproject.org/2018/06/11/was-this-man-sentenced-to-death-because-he-s-gay> [<http://perma.cc/X6T5-BLE5>].

192. *Homaidan Al-Turki*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Homaidan\\_Al-Turki](https://en.wikipedia.org/wiki/Homaidan_Al-Turki) [<http://perma.cc/83JU-6AWE>] (last visited Nov. 4, 2019). The Wikipedia page goes through Al-Turki’s arrest, trial, and appeals to the Supreme Court.

193. *See* Simonson, *supra* note 190, at 2179–80.

194. *Id.* at 2174–75.

195. *See id.*

196. *Id.* at 2175.

jurors in criminal cases, jurors are still lauded as an important part of the checks and balances of the criminal justice system.<sup>197</sup> As fewer citizens serve as jurors and are limited to observing the rare trial, they can no longer “perform a vital role in the American system of justice.”<sup>198</sup> They no longer enjoy the “high duty of citizenship.”<sup>199</sup> Instead, they are left to rely on what they have read: stories of clear juror prejudice. They contrast jurors as the gatekeepers of justice and liberty with the cold reality that jurors have expressed clear bias against sexual orientation, religion, and sex.<sup>200</sup> As more stories are written about jurors’ expression of bias against sexual orientation, religion, and sex, the public will become more cynical about the justice system, just as racial minorities have.

#### IV. HESITATIONS TOWARDS EXPANDING *PEÑA-RODRIGUEZ*

There has been concern over expanding *Peña-Rodriguez* beyond race, best typified by Justice Alito’s dissent in the case itself.<sup>201</sup> One of Justice Alito’s concerns was that because the Court applied the Sixth Amendment instead of the Fourteenth, there was no framework in limiting the exception.<sup>202</sup> Indeed, because *Peña-Rodriguez* was decided as a Sixth Amendment case, bias against a defendant does not need to be limited to what have been previously decided as suspect classes.<sup>203</sup> Under this expansive view, bias against a defendant’s sports team could be treated as a violation of his or her Sixth Amendment right to an impartial jury.<sup>204</sup> While surely avoiding all biases would be in line with the proper text of the Sixth Amendment, declaring that all defendants have a right to an impartial jury, the exception can easily be limited by applying the Fourteenth Amendment suspect classification test.<sup>205</sup> Because *Peña-Rodriguez* used the language of

197. *Why Jury Trials Are Important to a Democratic Society*, JUDGES, <https://www.judges.org/uploads/jury/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf> (last visited Nov. 4, 2019).

198. *Importance of Jury Service*, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, [http://www.nysd.uscourts.gov/jury\\_handbook.php?id=2](http://www.nysd.uscourts.gov/jury_handbook.php?id=2) [<http://perma.cc/Y65G-ZJA6>] (last visited Nov. 4, 2019).

199. *Id.*

200. *See supra* note 16 at the comments. Commenters grapple with the juror comments in the Rhines case and swing between claiming that the Supreme Court has no respect for due process, that certain cases should have trained jurors, and that the jurors came to the right decision regardless of any bias.

201. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 874–85 (2017) (Alito, J., dissenting).

202. *Id.* at 883 (“But it is hard to see what [racial bias] has to do with the scope of an individual criminal defendant’s Sixth Amendment right to be judged impartially.”).

203. *See id.* Suspect classes have usually suffered a history of discrimination, exhibit immutable or distinguishing characteristics, and show that they have little political power or are a minority. Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 325 (2016).

204. *See Peña-Rodriguez*, 137 S. Ct. at 883.

205. *See* U.S. CONST. amends. VI, XIV; *id.* at 868.

the Fourteenth Amendment, the Court could easily recast the decision as being based on Equal Protection and therefore limit *Peña-Rodriguez* significantly.<sup>206</sup>

As noted by Justice Kennedy in *Peña-Rodriguez*, racial bias is distinct because it “implicates unique historical, constitutional, and institutional concerns.”<sup>207</sup> Indeed, race is incredibly inimitable in its historical treatment. However, the law has treated other biases similarly situated to racial bias under the Fourteenth Amendment.<sup>208</sup> These biases, including sex and sexual orientation, can be treated as quasi-suspect classifications.<sup>209</sup> Both sex and sexual orientation suffer from historical prejudice and are distinguishing characteristics to a degree.<sup>210</sup> While race is unique in its deeply entrenched history of bias, it is not so unique that its characteristics cannot be applied to sexual orientation or sex. Nor is there a clear basis from distinguishing biases against sexual orientation, sex, religion, or race from the juror misconduct testimony allowed by Rule 606(b).<sup>211</sup>

Another hesitation over expanding *Peña-Rodriguez* is whether other biases are prevalent enough to consider widening the exception to Rule 606(b). Rule 606(b) and its progeny in state jurisprudence are strongly protected, and in some circuits, Rule 606(b) trumped the Sixth Amendment.<sup>212</sup> Rule 606(b) was nearly sacred prior to *Peña-Rodriguez*.<sup>213</sup> The Texas legislature, for example, specifically chose to limit any juror testimony about deliberations by only allowing testimony about outside juror influences.<sup>214</sup> However, as previously shown, cases in which jurors exhibit explicit bias against the sexual orientation, religion, and sex of defendants, while rare, are present.<sup>215</sup> Implicit bias against sexual orientation, religion, and sex are also present.<sup>216</sup> The Sixth Amendment does not guarantee an impartial trial to only

206. See *supra* notes 59–80 and accompanying text.

207. *Peña-Rodriguez*, 137 S. Ct. at 868.

208. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 756–57, 761–63 (2014). Pollvogt states that “race is the paradigmatic suspect classification” and later qualifies bias against sex and sexual orientation as “quasi-suspect classifications.” *Id.* at 748, 761–88.

209. *Id.* at 761–63, 785–89.

210. *Id.* at 775 (noting that even Justice Scalia, speaking of bias against sex, “agreed that social institutions—historical and contemporary—are permeated with prejudice”).

211. See, e.g., Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 SYRACUSE L. REV. 1, 19 (2010) (“There . . . is no clear basis for distinguishing juror testimony about racial bias from testimony about . . . other forms of juror misconduct that Rule 606(b) was designed to exclude.”).

212. See *supra* notes 23–27 and accompanying text.

213. See *supra* notes 18–54 and accompanying text.

214. TEX. R. CIV. P. 327(b). However, other legislatures, most notably Virginia, which had no exception prior to *Peña-Rodriguez*, has created an exception which covered racial and *national-origin* biases. VA. R. EVID. 2:606.

215. See *supra* Section III.A.

216. See *id.*

a majority of defendants, but to all of them.<sup>217</sup> In the words of Dr. Martin Luther King, Jr., “[i]njustice anywhere is a threat to justice everywhere.”<sup>218</sup>

The final set of reasons for hesitating to expand *Peña-Rodriguez* are procedural in nature: lawyers will engage in “fishing expeditions” searching for bias, resulting in juror harassment, and the exception will encompass too many cases, making trials substantially more difficult to put on.<sup>219</sup> *Peña-Rodriguez* addresses the first issue itself, noting that court rules often limit interaction with jurors after trials.<sup>220</sup> Counsel is often barred from contacting jurors after the trial through local court rules, state statutes, and judge orders.<sup>221</sup> Juror harassment is also less of a concern; while juror harassment has been often mentioned in preserving Rule 606(b), in practice, “restrictions on . . . interviews of jurors often result in procedures that are more disruptive and traumatic than standard unencumbered interviews.”<sup>222</sup>

Courts should not hesitate in expanding *Peña-Rodriguez* for fear that they will be overrun with motions. While the Supreme Court only provided that a juror statement of racial bias had to be clear to trigger the exception to 606(b), the lower courts have interpreted “clear” to be a high bar.<sup>223</sup> The Second Circuit held that even though a juror had expressed that “he knew the defendant was guilty the first time he saw him,” it was not “clear, strong, and incontrovertible evidence that this juror was animated by racial bias or hostility.”<sup>224</sup> The Ninth Circuit has held similarly that a comment that the jury would quickly convict the defendant if he were black to be insufficient to trigger the exception.<sup>225</sup> Given the unique legal treatment of race, it would be anomalous for biases against sexual orientation, religion, and sex to trigger the exception more frequently. Provided that the lower courts treat “clear” in the same manner, it would be unlikely for the exception to be triggered only in cases that “cast serious doubt on the fairness and impartiality of the jury’s deliberations.”<sup>226</sup>

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217. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .”).

218. Martin L. King, Jr. *Letter from Birmingham Jail* (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) [<http://perma.cc/Z9C3-LP5Y>].

219. The Supreme Court expressly rejected an exception in *Tanner* for these reasons. *Tanner v. United States*, 483 U.S. 107, 124 (1987).

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

221. Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, CALIF. L. REV. 135, 138 (2018).

222. *Id.* at 160–61.

223. *United States v. Baker*, 899 F.3d 123, 130, 134 (2d Cir. 2018); *Berardi v. Paramo*, 705 F. App’x 517, 518–19 (9th Cir. 2017).

224. *Baker*, 899 F.3d at 134.

225. *Berardi*, 705 F. App’x at 518–19.

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

## CONCLUSION

Biases against sexual orientation, religion, and sex have very real effects and jurors with these biases can poison the jury deliberation room just as easily those with racial biases. Voir dire fails to protect defendants from these biased jurors in the same way that voir dire cannot always protect defendants from racially biased members of the jury. Other safeguards such as juror rehabilitation also fail to remove bias based on sexual orientation, religion, and sex. Each failure of the criminal justice system to remove bad jurors becomes more apparent with the use of the internet and social media as citizen involvement in juries decreases. Citizens are limited to weighing news stories about unfair trials and the American principle that jurors should be impartial, losing trust in juries.

As of February 2019, the Supreme Court has rejected expanding *Peña-Rodriguez* to any bias beyond race.<sup>227</sup> However, expanding the *Peña-Rodriguez* exception seems likely. States have already begun to codify larger exceptions to their equivalents to Rule 606(b), signaling a larger trend toward trials free of clear juror bias.<sup>228</sup>

The Supreme Court has also failed to limit illegal discrimination to only racial bias previously.<sup>229</sup> The Court could easily limit exceptions to Rule 606(b) to suspect classes under the Equal Protection Clause and is likely to as a failsafe. The criminal justice system as a whole should continue to embrace changes that provide fair trials for defendants. As Justice Kennedy stated in his majority opinion in *Peña-Rodriguez*, “It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history.”<sup>230</sup> History has taught that jurors have held and exercised bias against sexual orientation, religion, and sex in jury trials. The principle of the Sixth Amendment, declaring that all defendants have a right to a fair and impartial trial, demands that *Peña-Rodriguez* be expanded to cover these real biases, too.

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227. See *Rhines v. South Dakota*, 138 S. Ct. 2660 (2018), for the Supreme Court’s rejection of expanding *Peña-Rodriguez* to sexual orientation.

228. Goldman, *supra* note 211, at 19.

229. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 127 (1994) (expanding *Batson v. Kentucky* beyond race to gender).

230. *Peña-Rodriguez*, 137 S. Ct. at 871.

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