

4:00 PM - 5:00 PM

**Pound Institute Twigg Lecture: The Juror's Oath, the Imperative of
Equality, and Judicial Correctives**

Room: Four Seasons Ballroom 1-2

Venue: Colorado Convention Center

Andre M. Davis, MD

**IN PRAISE OF IMPERFECT JUSTICE: THE JUROR'S OATH, THE
IMPERATIVE OF EQUALITY, AND JUDICIAL CORRECTIVES**

Andre M. Davis

I am pleased and honored to have been invited by the Pound Civil Justice Institute to deliver the 2018 Twigg Lecture on Professionalism and Ethics, two features of the law that lie at the very heart of what lawyers and judges do. When I checked and learned that the last two lectures had been delivered by the inestimable Prof. Arthur Miller (a Pound Fellow) and, after him, my friend Stephen Bright of the Southern Center for Human Rights, I fully understood why, after those two major figures in the law, it was time for the Institute to turn to a minor leaguer such as myself. After all, most baseball fans know full well that an evening in one of the fine new minor league ballparks for a game sometimes exceeds the pleasure of attending a major league contest.

Attention to the scourge of discriminatory practices in general and **racially discriminatory** attitudes, practices and effects, in particular, is at the center of American life, politics, and culture today. I know that like many others, for those of you in this room, there is sometimes an experience of what I call “racial justice

fatigue” or “racial equity fatigue” hanging over your part of the country. But unless and until we come much closer than we have so far to ridding the scourge of racial animus from public life, people of good will must carry on the work involved in the pursuit of genuine equality, notwithstanding the sometimes exhausting need to confront the taint of racial bigotry that our history has left on our institutions, in our neighborhoods, and in so much of the very fabric of public life.

This need for continued striving is not truer in any domain than in the pursuit of justice within our court systems, state and federal. The foundational premise of my remarks today is that all of us lawyers and judges have a special professional duty—an emergent norm-- not simply to refuse to acquiesce in the toleration by others of racial bias in the law, but to work affirmatively to expose it and to rid our justice system of its influences. As my remarks will show, this can be a “heavy lift,” as settled rules and doctrines sometimes impose barriers. But these are barriers that lawyers and judges can and will overcome, and will do so without doing violence to the structure or the essential character of the law.

While the textual support for my declaration and call to duty to fight racial animus as an ethical mandate is less than perfectly explicit, the codified behavioral and attitudinal norms that bind us in our separate jurisdictions and in our distinct respective status as a lawyer and a judge are clear enough support in my view. The

ABA's 2016 amendment to Model Rule 8.4, for example, makes our obligations reasonably clear to my eyes.¹ Even as Rule 8.4 admonishes us, as it long has, of our responsibility to avoid Misconduct as we are bound to Maintain the Integrity of the Profession, the amendment includes subsection (e), stating,

It is professional misconduct for an attorney to:

- a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d) engage in conduct that is prejudicial to the administration of justice;
- e) **knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this section:**
- f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Despite the controversy that surrounds ongoing attempts to embody the amended rule in the rules of some jurisdictions, I suggest that it will not long be tenable for a state's highest court or legislature, in the regulation of the Bar, to blink at conduct by lawyers that deviates from the mandate of the rule.

¹ Md. Rule 19-308.4

“The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.”² In the same vein, and typical for judges, are the following Canons of Judicial Conduct and related commentary from the Virginia Code, just to feature codified expectations:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. This Section 3B(5) does not preclude proper judicial consideration when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or similar factors, are issues in the proceeding.³

(6) A judge shall require all persons appearing in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others⁴

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. **Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.**⁵

² Va.Sup.Ct.R.pt.6,secIII, Canon 3, Comment on subdivision (B)(4)

³ Va.Sup.Ct.R.pt.6, secIII, Canon 3 (B)(5)

⁴Va.Sup.Ct.R.pt.6, secIII, Canon 3 (B)(6)

⁵Va.Sup.Ct.R.pt.6,secIII, Canon 3, Comment on subdivision (B)(5)

With my foundation thus set, I want to engage with you for a few minutes on how, in the first seventeen-plus years of the 21st Century, our profession has struggled, and must continue to struggle, to eradicate the badges and vestiges of official *de jure* and unofficial *de facto* race discrimination in the context of jury trials. My plan is, first, to offer some musings on the jury trial. Next, I will deconstruct a remarkable case decided by the Supreme Court of the United States, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); I will sometimes use the shorthand reference of the *Pena* case. The *Pena* case involves the prosecution of a Mexican-American man charged with assaulting two girls.⁶ It is a remarkable case on several levels, as it provides a window into the nature and character of the evils of race discrimination in our jury system and the means and ways we as lawyers and judges can combat that evil. The procedural and substantive history of the case illustrates with welcome clarity how the law can hide invidious discrimination in jurisprudential nooks and crannies of longstanding legitimacy. Close scrutiny of the case shows how difficult it can be for smart, well-intentioned judges acting in total good faith to overlook what, in hindsight, was a perfectly clear pathway to improved prospects for the eradication of hidden animus in our jury system. I will suggest to you, in this regard, that it is classic case of “footnote jurisprudence” to which we lawyers and judges must always pay attention. Finally, I will end on the

⁶ See *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 857 (2017).

hopeful note that the case and related experimental efforts by insightful social scientists and lawyers trained in psychology portends continued success in moving the civil justice system toward a more egalitarian regime.

The jury in the American system of civil and criminal justice is an essential element of our concept of liberty and our quest for the maintenance of human dignity that motivates our embrace of liberty as a foundation of our social contract. As Justice Clark wrote in *Irvin v. Dowd*, “England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.”⁷ Indeed, in the view of many, the jury is the most powerful institution in our scheme of representative constitutional democracy. But in contrast to this “essential to liberty” view of the jury trial right, there is the view credited to Mark Twain (perhaps tongue firmly planted in whiskered cheek) that the jury trial system is “the most ingenious and infallible agency for **defeating justice** that human wisdom could contrive.”

Churchill is credited with popularizing the aphorism that democracy is the worst form of government except for all the others. One might think similarly of trial by jury: it’s the worst possible instrument for seeking truth except for all the others. Yet, like all human enterprises, our jury system is sometimes beset with the

⁷ *Irvin v. Dowd*, 366 U.S. 717, 721 (1961).

same kinds of discriminatory impulses that are seen in all areas of American life. When juries fail of their mission, as they sometimes do, judges must provide a corrective, and they must demonstrate courage when they do so, for, as former Chief Judge Marbury of the Maryland Court of Appeals wisely observed in a 1949 opinion, oddly reported by the name, *Baltimore Radio Show v. State*, “[j]udges are not so ‘angelic’ as to render them immune to human influences calculated to affect the rest of mankind.”⁸ Thus, without the necessary judicial courage to notice and then correct the negative influence that arises from animus in the jury deliberation room, our country’s aspiration for the widespread achievement of equal justice under law is doomed to go unrealized.

Like everyone in this room, I love juries. My friends ask me often, “do you miss it?” as they used to ask me, when I had been appointed to the Court of Appeals after 22 years as a trial judge, “do you miss it?” The answer today is that, ten months into my return to the practice of law after 30 years on the state and federal bench is that what I miss most of all is the opportunity and excitement of presiding over jury trials. For me, voir dire was the commencement of a symphony, a symphony that would be written in real time by the trial lawyers and their clients and the witnesses each side called to the stand, and with me as the fully prepared conductor. And my principal role was to ensure that those chosen

⁸ *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497, 508-09 (Md. 1949).

from among the venire panel to sit in judgment of the facts understood what the lawyers expected of them, what I expected of them, and what the law expected of them. I'd like to think that I succeeded in carrying out my role.

And you may be surprised to hear that I have had the good fortune to have served on three criminal juries: two in the 1990s when, as a state trial judge, I joined 11 others good and true to pass judgment on a man charged with cocaine possession and in a second a man charged with an armed street robbery. More recently, in December 2015, I again performed my civic duty and served on a short trial of a man who had run over two police officers and went to trial on failing to stop at a personal injury accident, fleeing and eluding a law enforcement officer and related charges. I was a better judge and a better member of the larger community because of my service on those juries. (And no, none of my fellow jurors knew who I was or that I was a sitting judge before the verdicts.)

Upon my appointment in 2009 to the United States Court of Appeals for the Fourth Circuit, I got the opportunity to read transcripts of jury trials, including on occasion voir dire and jury instructions, conducted in districts from around the five-state area comprising the Fourth Circuit. I confess that I was not infrequently taken aback at what those transcripts revealed to me. Speed seemed to be a principle driving force in some trial courts as jurors were seated and instructed in both criminal and civil cases. Folksy humor from the bench that often missed the

mark left me cringing. And a degree of familiarity among the judges in the various districts around the circuit and those summonsed for jury duty sometimes struck me as altogether inappropriate. But, as I have observed in an opinion,

If it is true that a little knowledge is a dangerous thing, it is equally true that a little **local knowledge** is invaluable. As the dissent intimates, there are districts, divisions, and cities and counties in this circuit in which what happened in this case would be highly unlikely to happen. That is to say, in some places, lawyers talk to each other frequently, even lawyers on opposing sides of disputes. They discuss, for example, in advance, proposed or expected motions and other litigation events; they stay in contact with each other during the pendency of the case. Likewise, in some places, a district judge’s staff or a magistrate judge’s staff can be counted on to telephone a lawyer who has failed to file an opposition to a long-pending dispositive motion before the court rules on such a motion; in some other places, no such call can or should be expected from a chambers staff. In some places, a lawyer (with or without the client's assent) might herself call an adversary to inquire as to the lack of an opposition to a dispositive motion. But none of these things are required or expected in any district or any court; local legal culture drives these practices.⁹

But the sanctity of the jury room in criminal and civil cases and the rectitude of what happens there should never be left to the vagaries of local legal culture. Juries may deliver to us “imperfect justice” in some cases, but that does not relieve of us of our professional duty to search for and confront impediments to outcomes that are infected by racial animus.

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⁹*Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 414 (4th Cir. 2010) (Davis, J., concurring).

The law honors jurors and understandably it seeks to protect them, their personal privacy, and especially, the secrecy of their deliberations and the finality of their verdicts. One method of achieving such protection is by what is known as the “non-impeachment rule,” set forth in Fed. R. Evid. 606(b) and parallel rules operative in every jurisdiction in the country. Those rules essentially say: “[A] juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.”¹⁰ It was the clash between the imperative of equality in the form of eradicating racial animus from the jury room, on the one hand, and the weighty interests embodied in the non-impeachment rule, on the other hand, that gave rise to the *Pena* case.

Miguel Angel Peña-Rodriguez was charged in 2007 with harassment, unlawful sexual contact and attempted sexual assault of a child.¹¹ Peña-Rodriguez worked at a Colorado racetrack; the charges against him arose when two teenage sisters were groped in a restroom at the barn where he worked.¹² The girls told their father (who also worked at the facility) of the incident and Peña-Rodriguez

¹⁰ See Fed. R. Evid. 606(b).

¹¹ See *Pena-Rodriguez*, 137 S.Ct. at 857.

¹² See *id.*

was soon arrested and identified by the girls who were driven to his location in a law enforcement vehicle for a late-night show-up.¹³

The key prosecution evidence during the trial was the eyewitness testimony of the victims. The defense emphasized the brevity of the encounter and other potential impairments to the soundness of the identification evidence and also presented an alibi through a co-worker who testified that Peña-Rodriguez was in another barn with him at the time of the assault in the bathroom. The jurors were initially deadlocked, but eventually convicted Peña-Rodriguez on the lesser counts and hung on the sole felony count.¹⁴ After receiving the jury verdict, the trial court advised the jury, in keeping with Colorado law, that they were free to discuss the case but that they should report any harassment or inappropriate efforts by anyone to question them about their service.¹⁵

As allowed by Colorado law and practice, Peña-Rodriguez's attorney entered the jury room to speak to jurors and two jurors approached him to discuss the trial in private.¹⁶ The jurors informed Peña-Rodriguez's attorney that during deliberations, another juror had expressed anti-Hispanic bias toward the defendant and the alibi witness.¹⁷ Upon hearing this information, the defendant's attorney

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

obtained the court's permission to obtain affidavits from the two jurors.¹⁸ The affidavits set forth the following information from the two jurors:

1) "He believed that 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."¹⁹

2) He said that where he used to patrol, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."²⁰

3) He said that he did not think the alibi witness was credible because, "among other things," he was "an illegal."²¹

The trial court refused to consider the affidavits.²² It concluded that to do so would contravene Colorado's non-impeachment rule, which is virtually identical to the federal rule.²³ On all the subsequent appeals up through the state system and to the U.S. Supreme Court, it was undisputed that the juror's statement egregiously injected racial bias into the jury's decision-making. However, the evidentiary prohibitions against jurors impeaching their own verdict prevented the defendant from seeking relief from the discriminatory verdict.²⁴ All acknowledged that some

¹⁸ *Id.*

¹⁹ *Id.* at 862.

²⁰ *Id.*

²¹ *Id.*

²² *Pena-Rodriguez v. People*, 105 CO 31, 350 P.3d 287, 288.

²³ *Id.*

²⁴ *See id.*

injustice necessarily arises from the combination of deliberative secrecy and a rule forbidding jurors from later impeaching their verdicts. The question before the courts was whether that no-impeachment rule violated the defendant's constitutional right to a fair trial.

So, one of the interesting aspects of the case is that 18 appellate judges reviewed the facts and circumstances surrounding this instance of blatant and overt racial discrimination in our jury system. Nine of those judges found no pathway to remedy the violation of the defendant's right to a fair and impartial jury in light of settled rules and doctrines, and in light of the clash of interests on both sides of the intersection of weighty societal and legal imperatives. Nine of them did, including, of course, most saliently, five on the U. S. Supreme Court, and they did so by recognizing the imperative of equal justice under law.

In the Colorado intermediate appellate court, the judges were split 2-1 for affirmance. The dissent argued that the non-impeachment rule had to give way under the Sixth Amendment right to a fair and impartial jury. The majority refused to consider the constitutional question at all based on its view that the defendant had waived the issue by failing to employ more pointed questioning about potential racial or ethnic bias during voir dire.

In the Colorado Supreme Court, the judges were split 4-3 for affirmance. The dissenting opinion, like the dissent in the intermediate appellate court, agreed

that the non-impeachment rule applied to the juror affidavits at issue in the *Pena* case and that the case could not be resolved on the basis of one of the existing exceptions to the non-impeachment rule; thus, the constitutional issue had not been waived and had to be resolved if Pena-Rodriguez was to obtain relief.²⁵ But similarly to the intermediate dissent, the Supreme Court dissenting opinion argued that the constitutional imperative of equality required the recognition of a narrow exception to the non-impeachment rule. The Colorado Supreme Court majority, however, felt bound by a couple of U.S. Supreme Court opinions, one of which had just come down in the interim between the state intermediate appellate court's consideration of the case and the presentation of the case before the Colorado Supreme Court. That intervening case, *Warger v. Sharger*, was a civil case arising from a motor tort damages action in which, writing for a unanimous Court, Justice Sotomayor had definitively construed the federal non-impeachment rule as a strict one. She held that a juror who lied during voir dire in a federal diversity case by hiding her own daughter's role in a fatal car accident could certainly be viewed as biased against the unsuccessful and severely injured motorcyclist suing the truck driver who hit him, and that the Seventh Amendment right to a jury trial was implicated. Nevertheless, the non-impeachment rule applied.²⁶ Notably, though, in

²⁵ *Id.* at 41.

²⁶ See *Warger v. Shauers*, 135 S.Ct. 521, 530 (2014).

a footnote, Justice Sotomayor allowed as how there could be a different result in a different more extreme case of bias.²⁷

Ultimately, the state supreme court expressed three principal concerns regarding allowing investigations into jurors' racial bias as an exception to the non-impeachment rule: (1) that it might prompt lawyers to harass jurors in an effort to uncover such information;²⁸(2) that courts would be unable to “discern a dividing line between different types of juror bias” or between racially biased comments of varying “severity”;²⁹ and (3) that such inquiries would undermine public confidence in the judicial system.³⁰

The Supreme Court of the United States granted *certiorari* on the following question: Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.³¹ In a 5-3 opinion authored by Justice Kennedy, the Supreme Court held, narrowly, that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial

²⁷ See *supra* note 3.

²⁸ See *Pena-Rodriguez*, 2015 CO 31, 23.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *Pena-Rodriguez* 137 S.Ct. 855, 862-63.

of the jury trial guarantee” provided a remedy to the petitioner.³² The Court specified that such a remedy was available only in a case of “overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict” and further required the racial animus have been “a significant motivating factor”³³ in the juror’s vote. At the same time, the Court distinguished other cases where the no-impeachment rule would prevail (including other types of juror bias and misconduct), holding that although such cases were “troubling and unacceptable,” they did not represent the same systemic threat to the justice system as a whole, but instead “involved anomalous behavior from a single jury--or juror--gone off course.”³⁴

Justice Kennedy rejected the argument that the seminal Supreme Court decision on the federal non-impeachment rule, *Tanner v. United States*, 483 U.S. 107, 127 (1987), could resolve the *Pena* case. In *Tanner*, the complaint had been regarding drug and alcohol use by jurors, who also slept during trial. In *Tanner*, Justice O’Connor had fashioned a taxonomy of judicial protectives that would in most cases ameliorate some of the unfairness and injustice arising from strict enforcement of the non-impeachment rule, namely, (1) the use of voir dire to uncover hidden biases; (2) juror observation “by the court, by counsel, and by

³² *Id.* at 869.

³³ *Id.* at 869.

³⁴ *Id.* at 868.

court personnel”; (3) jurors’ ability to “report inappropriate juror behavior to the court before they render a verdict”; and (4) post-verdict impeachment testimony by non-jurors.³⁵ Justice O’Connor’s 5-4 opinion for the Court was strongly criticized in *Tanner* in Justice Marshall’s dissenting opinion, joined by three others.

Professor Cassandra Burke Robertson of the Case Western Reserve University School of Law published a provocative article in the Connecticut Law Review in which she urged trial judges to take a more aggressive approach to what she called “invisible errors.”³⁶ She located the Supreme Court’s *Pena* decision in this class of invisible but nonetheless reversible error in that “unlike typical process errors that can be raised by the attorney and corrected through ordinary trial and appeal mechanisms, invisible error arises when improper jury decision-making hides behind the shroud of rules protecting the jury’s deliberative secrecy. Invisible error may arise from the ordinary failures of communication between the court and members of the jury--an innocent misunderstanding--or it may arise from more egregious juror misbehavior or undisclosed bias. In some cases, it may even arise at a subconscious level, as when the court instructs the jury to disregard trial testimony but the jurors are unable to forget what they have heard. Because these errors are invisible to both the judge and to the lawyers who could otherwise

³⁵ *Id.* at 878.

³⁶ *Supra.*

object,”³⁷ they are difficult or perhaps impossible to correct without judicial courage.

At the Supreme Court, in light of the extraordinary advocacy presented by Professor Jeffrey Fischer from the Stanford Supreme Court clinic, and aided by more than a half dozen *amici* briefs supporting the recognition of a racial bias exception rooted in the constitution to the non-impeachment rule, Justice Kennedy was able to see what other judges could not see, despite their best efforts to see what he did see, and what the Supreme Court has been telling us for as long as anyone in this room has been a practicing lawyer: race is different in our constitutional scheme. This recognition by Justice Kennedy is nothing new to us, although we sometimes are unable to puzzle out exactly when and how he sees race as sufficiently salient in constitutional decision making. But Justice Kennedy is a master of footnote jurisprudence, which I mentioned earlier. And in fact, the pathway to recognizing and giving voice to the race-is-different canon was there all along in the form of a footnote from the 2014 *Warger* case, which stated presciently: “There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect

³⁷ Cassandra B. Robertson, *Invisible Error*, 50 Conn. L. Rev. 1, 3-4 (2017).

the integrity of the process. We need not consider the question, however, for those facts are not presented here.”³⁸

It is worth visiting for a bit with the justices as they engaged with Prof. Fisher in oral argument because there is much to see insofar as the justices put on vivid display the kinds of cabined thinking that the law sometimes traps us in.

MR. FISHER: All the Court needs to decide in this case today is race.

CHIEF JUSTICE ROBERTS: No, I don't think that's fair. Once we decide race -- this is not an equal protection case; it's a Sixth Amendment case. So, a recent invocation of race is an impermissible -- impermissible enough, I guess, that we will pierce the jury confidentiality. Well, the next case is going to be religion. So, whatever we say on race is going to have to have either a limiting principle that makes sense, or it's going to open a broad category of cases.

JUSTICE SOTOMAYOR: All right. So why is a rule that says, given the exceptions we've recognized since the 1800s that have said that race is the most pernicious thing in our justice system, why can't we limit this just to race using principles of the Fourteenth Amendment as well?

MR. FISHER: . . . And of course, the Constitution needs to be read structurally. So not only --

³⁸*Warger*, 135 S.Ct. 521, 530 at n. 3.

CHIEF JUSTICE ROBERTS: You think it's odious to have the same sort of discrimination against someone because he's a Muslim or practices Islamic faith? You're saying, he's a Muslim. Of course, you know, given this, I know how Muslims behave; he committed this crime. Is that not sufficiently like racial discrimination that it should be carved out?

MR. FISHER: It may well be, Your Honor. It certainly is odious.

CHIEF JUSTICE ROBERTS: What about sexual orientation? Somebody gives, you know, a bigoted speech in the jury room about sexual orientation and how particular types of people are more likely to commit crimes like the one before them? Is that sufficiently odious?

MR. FISHER: And the second reason is because, I know this isn't, strictly speaking, an equal protection case, but the same values of the Fourteenth Amendment infuse the Sixth Amendment.

JUSTICE GINSBURG: Is it so different? Suppose somebody in the jury room, say it's an automobile accident, says, what do you expect of women drivers? Women shouldn't be allowed to drive cars. Every woman I know is a terrible driver. Suppose that's what was said.

MR. FISHER: Well, you would ask the same questions we're asking today, but you'd ask it through a different record and a different set of balancing. You might conclude -- and I'm not going to deny this -- the Court might conclude, as it did in

Batson, that you should extend to sex. But you might not conclude that, and that would be a separate case. And -- and maybe now I can make my tiers of scrutiny point, because remember, sex discrimination is treated differently under the Equal Protection Clause than race discrimination. And under a similar analogy, it's not that one is more odious than the other, or one is better, or one doesn't -- one doesn't violate the amendment; it's that different tools must be available to root out different kinds of discrimination. And that's the whole point of strict scrutiny is we do not leave any stones unturned when it comes to race. It's racial bias.

CHIEF JUSTICE ROBERTS: No. It's not just alleged bias. It's bias based on innate characteristics of the offensive remarks. But the question is: What is most likely to -- or a significant risk of depriving the defendant of a fair trial? And it seems to me there are statements that have nothing to do with race or gender or sexual orientation or anything that might have a far greater impact. And I'm wondering why we -- we don't allow impeachment of the jury verdict in those cases? Someone, I don't know, comes in and says, I know that witness. That witness lies all the time. Believe me, you can't take anything he says. I mean that, in a certain -- in a particular case, could have a greater impact. So why don't we allow impeachment of the jury processes in that case?

MR. FISHER: And the reason why is because the Court has said time and again that race is different. There's a difference between a bias, harmful though it

may be, that affects only a private litigant, compared to racial bias which is a stain on the entire judicial system and the integrity that it's built upon. . . .It's that stain on the system

JUSTICE ALITO: Race is -- race is different for some purposes. But why is it different from other things for Sixth Amendment purposes? What the Sixth Amendment protects is the right to a fair trial -- to an impartial jury. And if we allow the exception that you are advocating, what do you say to the defendant who -- the prisoner who is going to be spending the rest of his life in prison as a result of the jury verdict that was determined by flipping a coin? [*This is called "whataboutism"*].

MR. FISHER: I think I can give you the same answer I gave to the Chief Justice earlier, which is that is woefully unfair. But when the Court does its balancing of the harm to -- on the one side to the judicial system of the defendant against the State interest, the balance is different when it comes to race. . . .There's nothing in the Due Process Clause that singles out race, but this Court's opinion does. And it says that the structure of the Constitution and the unique problem of race in our history and our society requires special medicine.

JUSTICE ALITO: But here we have -- in this case, we have a very blatant statement, but let's consider the standard that now applies on a lot of college campuses as to statements that are considered by some people to be racist. What would happen if one of the jurors has the sensibility of a lot of current college

students, and thinks that one of the -- something that's said in the jury room that falls into one of those categories was a racious -- was a racial comment?

MR. FISHER: We're talking here, Justice Alito, only about intentional racial bias. So --

JUSTICE ALITO: Even the first time a person says something that is considered improper on a college campus today and another juror thinks that that shows intentional racial bias.

MR. FISHER: No, I think, as I said, it's an objective test. Even under the Court's equal protection jurisprudence, the Court hasn't --

JUSTICE ALITO: Yeah. How will the judge decide -- how will the judge decide whether the statement is -- is racist?

MR. FISHER: Well, I think it's the same analysis the judge would conduct in an equal protection case, which is, is the statement asking to decide directly and intentionally on its face the case based on race.

JUSTICE KAGAN: Presumably the judge faces the same situation if a juror comes in during proceedings, is that right, and then the judge has to make whether this is something real or not.

MR. FISHER: Precisely right, Justice Kagan.

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MR. FISHER: Just to pick up where that conversation left off, to the extent my friends on the other side are saying that in a capital case the Eighth Amendment would become relevant, that's exactly the kind of common-sense structural constitutional argument that we're making and the other side is suggesting improper, that when you look at the Sixth Amendment right to an impartial jury, you also consider other elements of the constitution, like the Fourteenth Amendment.- let me use the line from the Solicitor General's brief. They said the Court's duty here is to choose the lesser of two evils. Racial bias is never the lesser evil. The Court has never said that racial bias is a lesser evil than something like the public policy considerations here. And I know the Court is concerned about line drawing. It's obvious in -- in a situation like this where you announce a new rule as a constitutional matter that you're wondering what cases are going to come next. But I respectfully submit that the Court has never refused to remedy intentional race discrimination in the criminal justice system for fear of having to address other questions down the line. And if you look at the Court's cases, whether they're the Ham line of cases, whether the Batson line of cases or anything else, the Court will have ample tools and ample time to decide down the road whether other situations are the same or whether they are different.

JUSTICE ALITO: Well, Mr. Fisher, it's not a fear of confronting issues down the road. It's a question of understanding the scope of the rule that you are asking us

to adopt. And I'll give you one last chance. You will not tell us today whether your rule applies to discrimination on the basis of -- of religion or gender or sexual orientation or to add another one, political affiliation. So, if the jurors -- if it came out the jurors said this person is a Democrat, send him to jail, that would be a different result. You will not tell us whether the same -- whether the rule would apply in those situations.

MR. FISHER: I think it's easy to say, Justice Alito, that categories covered in the Equal Protection Clause case by rational basis analysis would not require the rule we're seeking today.

JUSTICE KAGAN: Maybe you could put the question a little bit differently, because I understand why you don't want to say, well, it wouldn't apply to this or it wouldn't apply to that. But in what ways is race unique?

MR. FISHER: *Race, this is unique in terms of our history and constitutional structure and in terms of the more practical considerations of rooting it out with the prophylactic measures we've discussed.* The briefing is filled with citations and examples of why race is particularly hard to get at through the *Tanner* factors as compared to even something like other kinds of discrimination.³⁹

³⁹ Transcript of Oral Argument at 4-57, *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) (No. 15-606)(emphasis added).

I will close with some final comments: Two recent decisions have signaled the potential reach of the admittedly narrow scope of the rule in *Pena*. In *United States v. Robinson*, 872 F.3d 760, 770–71 (6th Cir. 2017), *petition for cert. filed*, No. 17–7970 (U.S. Mar. 6, 2018), the jury foreperson, a white woman, commented to two black jurors that they, “the colored women [,]” were the only jurors who “couldn’t see” that the black defendants were guilty.⁴⁰ The foreperson then accused the black jurors of protecting the defendants out of duty to their “black brothers.”⁴¹ The Sixth Circuit majority found that while the statements were overtly racist, there was no showing that racial animus triggered the foreperson’s vote to convict.⁴² Rather, the statements impugned her fellow jurors, but not the defendants.⁴³ As to the effect on other jurors, A.R. and M.S. reported that the statements did not affect their votes to convict, leading the Sixth Circuit to conclude that “the foreperson’s animus appeared not to have influenced A.R.’s or M.S.’s vote.”⁴⁴ The court therefore found that *Peña–Rodriguez* “d[id] not overcome the no-impeachment rule here.”⁴⁵

In *United States v. Smith*, a district judge in the district of Minnesota granted a new trial some five years after a jury verdict convicting the defendant of

⁴⁰ *United States v. Robinson*, 872 F.3d 760, 768–69 (6th Cir. 2017).

⁴¹ *Id.*

⁴² *Id.* at 771.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

unlawful possession of a firearm. Interestingly enough, the motion for a new trial in that case emerged when an African-American man who had served as the foreperson on the jury when the case was tried in 2012 learned about the ruling in the *Pena* case and sent an email to the trial judge about a week after the *Pena* decision by the Supreme Court case was filed. He told the judge that he had recently become aware of the *Peña* case, describing it as a case “dealing with racial remarks made during jury deliberation.” And expressed interest in talking to someone about this ruling, “as it could pertain to [Smith’s] case,” because “[a] racial remark was made during our deliberations.” After extensive proceedings, including an evidentiary hearing, the district judge granted the motion for new trial.⁴⁶

Beyond the jurisprudential barriers to uncovering and addressing the kind of overt bias exemplified by the *Pena* case, there is the even larger challenge as the law moves to address unconscious or implicit bias. My former colleague and distinguished district judge Janet Bond Arterton of Connecticut elegantly captured the framework of this challenge in sharing the following anecdote:

The potential impact of unconscious prejudice exists in every jury deliberation. For example, after an employment discrimination trial with a black plaintiff in which the all-white jury returned a verdict in favor of the defendant employer, I met with the jurors (as I usually do) to hear their reactions to their jury service. I asked these jurors whether

⁴⁶ See *United States v. Smith*, Crim. No. 12-183 (SRN), 2018 WL 1924454 (D. Minn. Apr. 24, 2018).

they thought having a more racially diverse jury composition would have affected their deliberations, and each earnestly assured me that there would have been no difference in outcome. But how could they know this? In light of recent social science research such as the Implicit Association Test, which has provided powerful insight into and documentation of the prevalence of our collective unconscious prejudice, I took little reassurance from these jurors' sincere belief that they held no racial attitudes that had played any role in their verdict. It is precisely the functioning of potential unconscious perceptions toward members of minority racial groups that leaves the operation of the jury process, from selection to verdict, as one grounded largely in optimism and trust, because there is yet no way to tap into a juror's unknown bias—which according to academic research likely exists.⁴⁷

I suspect that most in this room are generally familiar with the Implicit Association Test, or IAT, which “assesses bias by measuring the speed with which an individual associates a categorical status (such as black or white) with a given characteristic or description (such as good or bad).”⁴⁸ IAT research has been understood to “show[] implicit attitudinal preference for [white characteristics] relative to [black characteristics].”⁴⁹

Professors Jonathan Cardi (at Wake Forest Law), Valerie P. Hans (at Cornell Law), and Gregory Parks (also at Wake Forest Law) will soon publish the results of a new study they undertook to test the role of implicit racial bias in jury decision

⁴⁷ Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008).

⁴⁸ Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 6 (2006).

⁴⁹ *Id.* at 953.

making in tort cases.⁵⁰ This is a hopeful development in the struggle to uncover and address the problem of unconscious bias.

Building on previous research, their study's objective was to examine the role of race and implicit racial bias in reactions to tort cases. They constructed several tort scenarios and sought to test the following major hypotheses:

(1) Whether the win rate for black plaintiffs will be lower than that for similarly-situated white plaintiffs.

(2) Whether the race of the plaintiff will influence award amounts, with black plaintiffs receiving lower awards than identically-situated white plaintiffs.

(3) Whether plaintiffs who sue black as opposed to otherwise identically situated white defendants will receive lower awards.

(4) Whether, the higher a potential juror's implicit bias for whites versus African Americans, the more likely it is that the juror will find for white parties (whether plaintiff or defendant) in tort cases.

(5) Whether, the higher a potential juror's implicit bias for whites versus African Americans, the more generous the damage awards will be for white plaintiffs over similarly-situated black plaintiffs.⁵¹

The real-world importance of the work of researchers such as these three cannot be doubted. This can be seen in the following excerpt from a letter sent to Judge Arterton by a white juror in a civil rights case resulting in a defendant's verdict against three black plaintiffs:

I would like to convey to you, in confidence, a few thoughts about my experience Personally, I have no qualms with our decision in the case. We were able to size up the credibility of witnesses and their testimony without a great deal

⁵⁰ Jonathan Cardi, Valerie Hans, & Gregory Parks, *Predicting Racial Bias in Tort Jury Decisionmaking* (forthcoming).

⁵¹ *Id.*

of soul-searching or in-depth deliberation. I believe this was fortunate, considering the makeup and predisposition of the jury. During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about “those people” rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). Had just one African-American been sitting in that room, the content of discussion would have been quite different. And had the case been more balanced-one that hinged on fine distinction or subtle nuances-a more diverse jury might have made a material difference in the outcome. I pass these thoughts onto you in the hope that the jury system can some day be improved.⁵²

If those of us lawyers and judges who are in a position to make that juror’s hope a reality continue to work diligently to make it so, then we will have lived up to our ethical obligations. Nothing less would be acceptable.

Thank you for your presence, for your courtesy, and thank you to the Pound Institute for this opportunity to share these thoughts.

⁵² Arterton, *supra* note 46, at 1033.