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*Sixth Amendment — No-Impeachment Rule — Racially Biased Statements in Jury Deliberations — Peña-Rodriguez v. Colorado*

The jury is a semi-sacred institution in the American legal system. The Sixth Amendment guarantees criminal defendants the right to “trial, by an impartial jury,”<sup>1</sup> and Rule 606(b) of the Federal Rules of Evidence forecloses certain inquiries into the validity of jury verdicts by forbidding jurors from testifying “about any statement made or incident that occurred during the jury’s deliberations.”<sup>2</sup> But a conflict between this “no-impeachment rule” and the impartial jury right arises when a juror expresses racial animus while advocating for a defendant’s conviction. Last Term, in *Peña-Rodriguez v. Colorado*,<sup>3</sup> the Supreme Court held that the Sixth Amendment requires an exception to the no-impeachment rule to permit trial courts to consider evidence of a juror’s racist statements during deliberations.<sup>4</sup> In reaching that holding, the Court rejected a formalistic approach to Sixth Amendment law. Instead, Justice Kennedy fused principles from the Equal Protection Clause and the Sixth Amendment to conclude that the special historical significance of racial bias required this unique exception. By prioritizing a broad constitutional narrative over the technicalities of Sixth Amendment jurisprudence, Justice Kennedy’s analysis elevated the principle of equal dignity and may reflect the rise of antisubordination considerations in the Court’s race jurisprudence.

In 2007, two teenage sisters were sexually assaulted in the bathroom of a Colorado horse-racing facility.<sup>5</sup> The girls identified their assailant as an employee of the racetrack, so police arrested one: Miguel Angel Peña-Rodriguez.<sup>6</sup> After both girls separately identified Peña-Rodriguez as the perpetrator, prosecutors charged him with one count of attempted sexual assault, one count of unlawful sexual contact, and two counts of harassment.<sup>7</sup> At trial, Peña-Rodriguez’s friend testified that the two had been together when the assault occurred and so Peña-Rodriguez could not have committed the crime.<sup>8</sup> But the jury convicted on the latter three counts nevertheless.<sup>9</sup>

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> FED. R. EVID. 606(b).

<sup>3</sup> 137 S. Ct. 855 (2017).

<sup>4</sup> *Id.* at 869.

<sup>5</sup> *See id.* at 861.

<sup>6</sup> *Id.*

<sup>7</sup> *Peña-Rodriguez v. Colorado*, 350 P.3d 287, 288 (Colo. 2015).

<sup>8</sup> *Id.* at 288 n.3.

<sup>9</sup> *Id.* at 288.

After the jury was discharged, jurors M.M. and L.T. remained behind to speak with defense counsel.<sup>10</sup> M.M. and L.T. swore out affidavits alleging that a third juror, H.C., had made racially biased statements during deliberations.<sup>11</sup> M.M. claimed that H.C. had said, “I think he did it because he’s Mexican and Mexican men take whatever they want,” and had “made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can ‘do whatever they want’ with women.”<sup>12</sup> And according to L.T., H.C. “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,” and also “said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”<sup>13</sup> L.T. also noted that H.C. had dismissed Peña-Rodriguez’s alibi witness as “an illegal” — despite explicit trial testimony that the witness was a legal resident.<sup>14</sup> Peña-Rodriguez moved for a new trial.<sup>15</sup>

The trial court denied Peña-Rodriguez’s motion, barring admission of the affidavits under Colorado’s version of Rule 606(b).<sup>16</sup> The court sentenced Peña-Rodriguez to two years’ probation and required him to register as a sex offender.<sup>17</sup> A divided panel of the Colorado Court of Appeals affirmed the conviction.<sup>18</sup> The court agreed that H.C.’s statements were inadmissible and rejected on procedural grounds Peña-Rodriguez’s argument that the rule violated his impartial jury right.<sup>19</sup>

The Colorado Supreme Court affirmed. The majority relied on two Supreme Court precedents rejecting Sixth Amendment challenges to the no-impeachment rule, and denied the existence of any “dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party’s Sixth Amendment right while another would not.”<sup>20</sup> In dissent, Justice Márquez criticized the court for allowing the secrecy of deliberations to “trump a defendant’s opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias.”<sup>21</sup>

<sup>10</sup> *Id.* at 288–89.

<sup>11</sup> *Peña-Rodriguez*, 137 S. Ct. at 861–62.

<sup>12</sup> *Peña-Rodriguez*, 350 P.3d at 289.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also *Peña-Rodriguez*, 137 S. Ct. at 862.

<sup>15</sup> *Peña-Rodriguez*, 350 P.3d at 289.

<sup>16</sup> *Id.* Colorado’s Rule 606(b) closely mirrors Federal Rule 606(b). Cf. FED. R. EVID. 606(b).

<sup>17</sup> *Peña-Rodriguez*, 137 S. Ct. at 862.

<sup>18</sup> *Peña-Rodriguez*, 350 P.3d at 289.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 292–93.

<sup>21</sup> *Id.* at 297 (Márquez, J., dissenting).

The Supreme Court reversed. Justice Kennedy<sup>22</sup> began by describing the history of the no-impeachment rule in the Supreme Court. The modern rule was born of a competition between two common law approaches: the strict “federal approach,” permitting only testimony about external influences on the jury, and the more permissive “Iowa rule,” which allowed jurors to testify about any evidence bearing on deliberations short of a juror’s subjective impressions.<sup>23</sup> *McDonald v. Pless*<sup>24</sup> conclusively rejected the Iowa rule, barring objective evidence regarding the jury’s quotient verdict for fear of “open[ing] the door to the most pernicious arts and tampering with jurors.”<sup>25</sup> Congress later ratified *McDonald* via a broad no-impeachment rule mirroring the federal approach, with exceptions only for evidence of “extraneous prejudicial information,” “outside influence,” or a “mistake . . . made in entering the verdict.”<sup>26</sup> Before *Peña-Rodriguez*, the Court had twice addressed whether the Sixth Amendment required additional exceptions to the rule. *Tanner v. United States*<sup>27</sup> held that it did not, pointing to four alternative safeguards that adequately protected the defendant’s Sixth Amendment right: (1) voir dire; (2) observation of the jury by court and counsel; (3) pre-verdict reports of juror misconduct; and (4) post-verdict reports of external influence.<sup>28</sup> *Warger v. Shauers*<sup>29</sup> followed suit, finding the latter three *Tanner* safeguards sufficient even where one juror had lied during voir dire.<sup>30</sup>

Having outlined the history of the no-impeachment rule, Justice Kennedy turned to a second historical narrative: the “imperative to purge racial prejudice from the administration of justice.”<sup>31</sup> He proclaimed it “the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.”<sup>32</sup> Following the Civil War, Justice Kennedy explained, all-white Southern juries had punished black defendants harshly while systematically refusing to punish white violence against blacks.<sup>33</sup> Those race-motivated outcomes had undermined Americans’ faith in the jury system and forced Congress to integrate the jury system by legislation.<sup>34</sup>

<sup>22</sup> Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

<sup>23</sup> *Peña-Rodriguez*, 137 S. Ct. at 863.

<sup>24</sup> 238 U.S. 264 (1915).

<sup>25</sup> *Id.* at 268 (quoting *Cluggage v. Swan*, 4 Binn. 150, 158 (Pa. 1811)).

<sup>26</sup> FED. R. EVID. 606(b).

<sup>27</sup> 483 U.S. 107 (1987).

<sup>28</sup> *Id.* at 127.

<sup>29</sup> 135 S. Ct. 521 (2014).

<sup>30</sup> *Id.* at 529.

<sup>31</sup> *Peña-Rodriguez*, 137 S. Ct. at 867.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citing James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004)).

<sup>34</sup> *Id.*

Courts took up the mission as well. Justice Kennedy pointed to several lines of precedent in which “this Court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system.”<sup>35</sup> From those precedents, he extracted the “unmistakable principle” that “discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’”<sup>36</sup>

With that history as a foundation, Justice Kennedy argued that racial bias uniquely justified an exception to the no-impeachment rule for two reasons. First, “racial bias implicates unique historical, constitutional, and institutional concerns.”<sup>37</sup> While *McDonald*, *Tanner*, and *Warger* “involved anomalous behavior from a single jury — or juror — gone off course,” racial bias is a “familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.”<sup>38</sup> Second, the *Tanner* safeguards serve as substantially weaker protections against racial bias. Voir dire might fail to expose racial prejudice, or worse, backfire, heightening jurors’ preexisting racial stereotypes by implicitly suggesting their relevance.<sup>39</sup> Pre-verdict reports of juror misconduct are also less likely given the “stigma” associated with racial bias; it would be one thing to accuse a juror of pro-defendant sympathies, but “quite another to call her a bigot.”<sup>40</sup>

Justice Kennedy thus concluded: “[W]here 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 . . . .”<sup>41</sup> The opinion imposed two requirements for any such “clear statement” to satisfy its holding. First, the statement would have to “exhibit[] overt racial bias that cast[s] serious doubt on the fairness and impartiality” of the deliberations and verdict.<sup>42</sup> Second, the racial bias would have to be a “significant motivating factor in the juror’s vote to convict.”<sup>43</sup> Those threshold determinations would be “committed to the substantial discretion of the trial court in light of all the circumstances.”<sup>44</sup>

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<sup>35</sup> *Id.* at 867–68 (citing, inter alia, *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting litigant’s use of race-based peremptory challenges to exclude prospective jurors of a minority race); *Ham v. South Carolina*, 409 U.S. 524 (1973) (requiring that defendant be permitted to ask questions about racial bias during voir dire); *Strauder v. West Virginia*, 100 U.S. 303, 305–09 (1880) (prohibiting state law that excluded jurors on the basis of race)).

<sup>36</sup> *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 868–69.

<sup>40</sup> *Id.* at 869.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

In addition to those factual questions, the Court left two legal issues for resolution by the lower courts. First, it left unresolved the appropriate procedures for introduction of post-verdict testimony falling within the new rule.<sup>45</sup> Second, it left open the standard for determining when that post-verdict testimony, once admitted, would actually require a new trial.<sup>46</sup> Justice Kennedy closed by noting that jury instructions could induce “[p]robing and thoughtful deliberation [that] improves the likelihood that other jurors can confront the flawed nature of [racially biased] reasoning.”<sup>47</sup> He expressed hope that the Court’s holding would help achieve “the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.”<sup>48</sup>

Justice Thomas dissented. He began from the premise that the Sixth Amendment impartial jury right was “limited to the protections that existed at common law when the Amendment was ratified.”<sup>49</sup> He concluded that “[o]ur common-law history does not establish that . . . a defendant had the right to impeach a verdict with juror testimony of juror misconduct”<sup>50</sup> at the time that the Sixth Amendment was ratified. Justice Thomas would have held that fact alone “dispositive.”<sup>51</sup>

Justice Alito also dissented, joined by Chief Justice Roberts and Justice Thomas. Justice Alito first criticized the majority’s treatment of the *Tanner* safeguards. As for voir dire, he pointed to “a variety of subtle and nuanced approaches” capable of eliciting bias without increasing juror sensitivity to race.<sup>52</sup> As for pre-verdict reporting, Justice Alito deemed the majority’s speculation that jurors would be reluctant to accuse one another of bias a “seat-of-the-pants judgment . . . no better than that of those with the responsibility of drafting and adopting federal and state evidence rules.”<sup>53</sup>

Justice Alito then attacked the “real thrust” of the Court’s opinion: the idea that racial bias uniquely offends the Sixth Amendment.<sup>54</sup> “Nothing in the text or history of the Amendment . . . suggests that the extent of [its] protection . . . depends on the nature of a jury’s partiality or bias,” he argued.<sup>55</sup> A juror’s bias would offend the Sixth Amendment equally whether that bias resulted from the defendant’s race or his

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<sup>45</sup> *Id.* at 870.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 871.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 872 (Thomas, J., dissenting).

<sup>50</sup> *Id.* at 874.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 880 (Alito, J., dissenting).

<sup>53</sup> *Id.* at 882.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

sports fandom.<sup>56</sup> Breaching the no-impeachment rule to root out one form of bias but not the other would thus constitute “disparate treatment . . . unsupportable” under the Amendment.<sup>57</sup> For those reasons, he argued, the Court’s holding lacked a limiting principle and would lead to similar exceptions for bias based on national origin, religion, and gender.<sup>58</sup>

Finally, Justice Alito enumerated several harms of permitting post-verdict juror testimony. Among other things, subjecting jurors’ deliberations to post-verdict scrutiny would “inhibit ‘full and frank discussion in the jury room,’”<sup>59</sup> present possibilities for “harassment, arm-twisting, and outright coercion,”<sup>60</sup> and “undermine the finality of verdicts.”<sup>61</sup> He thus deemed the majority “well-intentioned” but wrong.<sup>62</sup>

In holding that the Sixth Amendment requires an exception to the no-impeachment rule for clear statements of racial animus made during jury deliberations, the Court rejected a formalistic approach that would isolate Sixth Amendment jurisprudence from other constitutional values. Justice Kennedy instead merged principles from the Equal Protection Clause and the Sixth Amendment to conclude that the unique harms associated with racial bias required a unique exception to the no-impeachment rule. By prioritizing a broad constitutional narrative over the technicalities of Sixth Amendment doctrine, Justice Kennedy’s analysis fits neatly with his distinctive constitutional jurisprudence. In particular, it recalls his opinion in *Obergefell v. Hodges*,<sup>63</sup> where he intertwined principles from the Equal Protection Clause and Due Process Clause into a constitutional narrative of “equal dignity” that required invalidation of same-sex marriage bans. The reemergence in *Peña-Rodriguez* of this same broad narrative may reflect a rise in the race jurisprudence context of antistatutory considerations similar to those implicated in *Obergefell*.

The *Peña-Rodriguez* dissent rested on a formalistic view of the Sixth Amendment, viewing the impartial jury right as a discrete provision immune from the influence of other areas of constitutional law. Prior Sixth Amendment precedents have sometimes reflected this approach. In *Holland v. Illinois*,<sup>64</sup> for instance, the Court refused to find that a litigant’s use of peremptory challenges on a racially discriminatory basis

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<sup>56</sup> See *id.* at 883.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 883–84.

<sup>59</sup> *Id.* at 884 (quoting *Tanner v. United States*, 483 U.S. 107, 120–21 (1987)).

<sup>60</sup> *Id.* at 885.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 135 S. Ct. 2584 (2015).

<sup>64</sup> 493 U.S. 474 (1990).

violated the Sixth Amendment<sup>65</sup> — even though the Court had previously held in *Batson v. Kentucky*<sup>66</sup> that the exact same conduct violated the Equal Protection Clause.<sup>67</sup> Far from infusing its Sixth Amendment analysis with equal protection concerns, the *Holland* Court took great pains to distinguish the two provisions, noting that “[s]ince *only* the Sixth Amendment claim, and not the equal protection claim,” was at issue, “the question before us is not whether the defendant has been unlawfully discriminated against because he was white . . . but whether the defendant has been denied the right to ‘trial . . . by an impartial jury.’”<sup>68</sup> Having strictly differentiated the two claims, the Court concluded that the *impartial jury right* had not been infringed, *Batson* notwithstanding, and chastised the dissent for its “willingness to expand constitutional provisions designed for other purposes beyond their proper bounds.”<sup>69</sup> The three dissenters in *Peña-Rodriguez* all expressed the *Holland* Court’s same concern with maintaining boundaries between separate bodies of constitutional doctrine.<sup>70</sup>

Justice Kennedy’s opinion roundly rejected that formalist approach. Rather than limiting himself to the discrete body of Sixth Amendment jurisprudence, Justice Kennedy viewed Peña-Rodriguez’s Sixth Amendment claim as opening up the full panoply of constitutional values, engendering an analysis replete with equal protection references.<sup>71</sup> Justice Kennedy explained how the need to eliminate racial bias from our legal system was “given new force and direction by the ratification of the Civil War Amendments.”<sup>72</sup> The Fourteenth Amendment’s “central purpose,” he argued, “was to eliminate racial discrimination emanating from official sources in the States.”<sup>73</sup> And the Court’s role in eliminating such discrimination was best evidenced by its equal protection precedents — landmark cases such as *Strauder v. West Virginia*<sup>74</sup> and *Batson*. With

<sup>65</sup> *Id.* at 477–78.

<sup>66</sup> 476 U.S. 79 (1986).

<sup>67</sup> *Id.* at 97–98.

<sup>68</sup> *Holland*, 493 U.S. at 487–88.

<sup>69</sup> *Id.* at 488.

<sup>70</sup> See *Peña-Rodriguez*, 137 S. Ct. at 883 (Alito, J., dissenting) (“[I]t is hard to see what [the uniqueness of racial bias] has to do with the scope of an *individual criminal defendant’s* Sixth Amendment right to be judged impartially.”); *id.* at 871–72 (Thomas, J., dissenting) (“The Sixth Amendment’s protection . . . is limited to the protections that existed at common law when the Amendment was ratified.”); Transcript of Oral Argument at 4, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606) [hereinafter *Peña-Rodriguez* Oral Argument] (Roberts, C.J.) (“[T]his is not an equal protection case; it’s a Sixth Amendment case.”).

<sup>71</sup> This methodological approach was explicitly urged by at least one other Justice. See *Peña-Rodriguez* Oral Argument, *supra* note 70, at 30 (Kagan, J.) (“[I]t’s true that this is a Sixth Amendment case, but it seems artificial not to think about the Sixth Amendment issue as informed by the principles of the Equal Protection Clause.”).

<sup>72</sup> *Peña-Rodriguez*, 137 S. Ct. at 867.

<sup>73</sup> *Id.* (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

<sup>74</sup> 100 U.S. 303 (1879) (holding that exclusion of black jurors violates Equal Protection Clause).

that framing, Justice Kennedy refused to limit *Peña-Rodriguez* to the status of a Sixth Amendment case, instead casting it as the latest in a line of “decisions seeking to eliminate racial bias in the jury system.”<sup>75</sup>

In its fusion of Sixth Amendment and Equal Protection Clause principles into a broader constitutional narrative, *Peña-Rodriguez* resembles another watershed constitutional law opinion written by Justice Kennedy. In *Obergefell*, Justice Kennedy explicitly intertwined his analyses under the Equal Protection and Due Process Clauses — even though the petitioners had brought two discrete challenges under the two provisions.<sup>76</sup> “The Due Process Clause and the Equal Protection Clause are connected in a profound way,” he wrote.<sup>77</sup> “In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.”<sup>78</sup> Like Justice Alito in *Peña-Rodriguez*, Chief Justice Roberts in *Obergefell* criticized Justice Kennedy’s approach for its failure to keep discrete constitutional provisions within proper doctrinal boundaries. The Chief Justice addressed the case as two discrete constitutional questions, faulting Justice Kennedy’s due process analysis for failing to identify a fundamental right with robust historical origins,<sup>79</sup> and then his equal protection analysis for failing to apply the familiar tiers of scrutiny.<sup>80</sup>

*Obergefell*, like *Peña-Rodriguez*, thus reflects Justice Kennedy’s trade of doctrinal niceties for what Professor Laurence Tribe has called “the broader postulates of our constitutional order.”<sup>81</sup> According to Tribe, *Obergefell*’s holding rested “on the dignity and autonomy of the individual standing against the forces of coerced conformity — on principles underlying the written Constitution but nowhere expressly articulated in its text.”<sup>82</sup> Likewise, *Peña-Rodriguez*’s “imperative to purge racial

<sup>75</sup> *Peña-Rodriguez*, 137 S. Ct. at 868.

<sup>76</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2615 (2015) (Roberts, C.J., dissenting). This similarity between the two opinions — Justice Kennedy’s refusal to accept boundaries between individual constitutional provisions — also highlights an important difference between them. While the *Obergefell* petitioners asserted an independent Equal Protection Clause violation, *Peña-Rodriguez* invoked the Equal Protection Clause only obliquely. See Brief for Petitioner at 18, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606). Thus, the Court’s reliance on equal protection principles signals an even bolder commitment to cross-constitutional principles than the one at work in *Obergefell*.

<sup>77</sup> *Obergefell*, 135 S. Ct. at 2602–03.

<sup>78</sup> *Id.* at 2603.

<sup>79</sup> *Id.* at 2618–19 (Roberts, C.J., dissenting); see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring a “careful description” of a liberty interest “deeply rooted in this Nation’s history and tradition” for substantive due process analysis (first quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993); then quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion))).

<sup>80</sup> *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting). Chief Justice Roberts accused the majority of ignoring “casebook doctrine” by failing to apply the means-end methodology typically used in Equal Protection Clause cases. *Id.*

<sup>81</sup> Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 26 (2015).

<sup>82</sup> *Id.*

prejudice from the administration of justice” was derived not from a sole textual provision but from constitutional values and history.<sup>83</sup> But even beyond the methodological parallel, the broad constitutional narratives advanced in the two opinions also share a common theme. Just as *Obergefell* “tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*,”<sup>84</sup> *Peña-Rodriguez* recognized the need to eradicate racial bias “so inconsistent with our commitment to the *equal dignity* of all persons.”<sup>85</sup> *Peña-Rodriguez*, like *Obergefell*, thus bears the indelible mark of Justice Kennedy’s distinctive constitutional jurisprudence of dignity.

By advancing this feature of Justice Kennedy’s methodology — freeing the Court to look beyond the doctrinal walls of particular provisions to the constitutional values that transcend them — *Peña-Rodriguez* may reflect and further enable the emergence of antistatutory subordination considerations in the Court’s race jurisprudence. In the sexual-orientation context, “the freedom to marry championed in *Obergefell* was understood by all to directly redress the subordination of LGBT individuals.”<sup>86</sup> Justice Kennedy’s analytical method, intertwining the Equal Protection and Due Process Clauses, was specifically attentive to those antistatutory subordination concerns, using the “interrelation of the two principles [to] further[] our understanding of what freedom is and must become.”<sup>87</sup> Likewise, by sweeping more broadly than preexisting Sixth Amendment doctrine, *Peña-Rodriguez*’s asserted “imperative to purge racial prejudice from the administration of justice” incorporates similar antistatutory subordination aims.<sup>88</sup> Looking strictly within the four corners of the Sixth Amendment, Justice Alito may be correct to dispute the uniqueness of racial bias.<sup>89</sup> But looking through a wider constitutional lens, the historical marginalization of blacks within the criminal justice system provides “a sound basis to treat racial bias with added precaution.”<sup>90</sup> Moreover, by casting the decision in terms of a broad constitutional mission transcending particular textual provisions, *Peña-Rodriguez* foregrounds

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<sup>83</sup> See *Peña-Rodriguez*, 137 S. Ct. at 867.

<sup>84</sup> Tribe, *supra* note 81, at 17.

<sup>85</sup> *Peña-Rodriguez*, 137 S. Ct. at 867 (emphasis added).

<sup>86</sup> Tribe, *supra* note 81, at 18; see also Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174 (2015) (describing *Obergefell* as advancing a notion of “antistatutory subordination liberty”).

<sup>87</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); see also *id.* at 2604 (citing cases that “confirm this relation between liberty and equality” and show how the Equal Protection Clause can aid the Due Process Clause in “help[ing] to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution”).

<sup>88</sup> *Peña-Rodriguez*, 137 S. Ct. at 867.

<sup>89</sup> *Id.* at 883 (Alito, J., dissenting).

<sup>90</sup> *Id.* at 869 (majority opinion).

further extensions of that mission to redress other instances of ongoing subordination.

Justice Kennedy's emphasis on dignity in particular presents significant antisubordination possibilities. As Professor Christopher Bracey has explained, "[t]he concepts of dignity and subordination are powerfully linked."<sup>91</sup> An emphasis on dignitary concerns may help shift race jurisprudence from "procedural equality" to "substantive racial justice" by "mak[ing] relevant a host of considerations — for example, the widespread acceptance of destructive stereotypes, the disabling consequences of seemingly innocuous subtle forms of racial bias, and the unexamined acceptance of so-called societal discrimination — routinely thought to be 'off limits' in contemporary race jurisprudence."<sup>92</sup> *Peña-Rodriguez* reflects this possibility. Justice Kennedy's emphasis on dignity shifted the focus away from doctrinal formalities like the *Tanner* factors and toward more tangible considerations like the history of racial discrimination in the jury system and the resulting "systemic loss of confidence in jury verdicts."<sup>93</sup> In so doing, it allowed Justice Kennedy to situate the case within the need to bring the legal system "ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."<sup>94</sup>

The breadth of the constitutional mission at the heart of Justice Kennedy's *Obergefell* and *Peña-Rodriguez* opinions may also forecast additional changes to come. In *United States v. Windsor*,<sup>95</sup> which decried the Defense of Marriage Act's "interference with the equal dignity of same-sex marriages,"<sup>96</sup> Justice Scalia saw a premonition of the impending invalidation of same-sex marriage bans at the state level, writing in dissent: "How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."<sup>97</sup> Justice Alito's dissent in *Peña-Rodriguez* contains a similar prediction: "Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question."<sup>98</sup> Justice Scalia's premonition in *Windsor* was famously borne out, as the dignity narrative from *Windsor* blossomed into *Obergefell*'s constitutional right to gay marriage. The equally powerful narrative of *Peña-Rodriguez* likewise foreshadows future expansion, and perhaps even beyond Justice Alito's prediction: if the Constitution truly requires elimination of all racial prejudice from the administration of justice, juror-contact laws may be only one target of many.

<sup>91</sup> Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005).

<sup>92</sup> *Id.* at 675.

<sup>93</sup> *Peña-Rodriguez*, 137 S. Ct. at 869.

<sup>94</sup> *Id.* at 868.

<sup>95</sup> 133 S. Ct. 2675 (2013).

<sup>96</sup> *Id.* at 2693.

<sup>97</sup> *Id.* at 2709 (Scalia, J., dissenting).

<sup>98</sup> *Peña-Rodriguez*, 137 S. Ct. at 884 (Alito, J., dissenting).