THE INTERSECTIONALITY OF JURIES, RACE, AND GENDER: EXTENDING THE *PEÑA-RODRIGUEZ V. COLORADO* DECISION TO PROTECT AGAINST GENDER DISCRIMINATION IN JURY DELIBERATIONS

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INTRODUCTION

Following the Mansfield Rule that originated in England, American courts adopted the no-impeachment rule.[1] The rule prohibits jurors from testifying, after a verdict, about subjective and objective occurrences that took place in the deliberation room.[2] This common law rule was eventually codified by Congress in 1975 as the Federal Rule of Evidence 606(b) with limited exceptions.[3] Those exceptions basically include prejudicial outside influences and clerical mistakes made when entering the verdict on the form.[4]

In the past, this rule has been strictly adhered to by federal courts; the Supreme Court in particular has consistently validated the rule even when challenged as a violation of a criminal defendant's Sixth Amendment right to a trial by impartial jury.[5] In its justification, the Court relied on the existing safeguards to detect juror bias such as *vior dire* and opportunities to report juror misconduct prior to the verdict.[6] Yet, the Court recently decided in *Peña-Rodriguez v. Colorado* that these safeguards are no longer sufficient in certain situations; here, the Court held that when a juror makes a clear statement that indicates he relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule, governed by Federal Rule of Evidence 606(b), permit the trial court to consider the evidence of the juror's statement and any possible resulting denial of the impartial jury trial guarantee.[7] This paper argues, keeping with the protections of the Sixth Amendment, that the Court should extend this exception to also include clear statements of gender discrimination. To be clear, this theory does not advocate that verdicts potentially tainted by gender discrimination should be set aside, as that was not the holding in *Peña-Rodriguez*.[8] Instead, the theory advanced here advocates that the no-impeachment rule should permit the trial court to

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1. 137 S. Ct. 855, 863 (2017).
2. *Id.*
3. *Id.* at 864; *See also* FED. R. EVID. 606(b).
4. FED. R. EVID. 606(b).
5. *See, e.g.*, Tanner v. United States, 483 U.S. 107 (1987) (deciding not to depart from the common law understanding of the 606(b)).
6. *Id.* at 127.
7. *Peña-Rodriguez*, 137 S. Ct at 869.
8. *See id.* at 868 (holding that when a juror makes a clear statement indicating that she relied on racial stereotypes or animus to make his decision, the no-impeachment rule must *permit* the court to conduct inquiry and consider the evidence) (emphasis added).

consider and inquire into clear statements of gender animus to determine whether a denial of the impartial jury trial guarantee has occurred.

This paper begins by explaining the origin and rationale of the no-impeachment rule. Then, it explains the Supreme Court's early justifications for the strict interpretation and application of the rule. Next, the paper explains the Court's recent rationale in *Peña-Rodriguez*, which declares those existing safeguards insufficient to protect one's Sixth Amendment right when clear statements of racial discrimination are made during jury deliberations.[9] Following, I note the history of the intersectionality of juries, race, and gender, placing an emphasis on landmark cases, such as *Batson v. Kentucky*[10] and *J.E.B. v. Alabama ex rel T.B.*,[11] which prohibit peremptory strikes based on race and gender respectively.[12] Finally, I analogize the reasoning stated in *J.E.B.* and other gender-related cases to that in race-related cases, such as *Batson*, to argue that a gender exception should be permitted within the rule announced in *Peña-Rodriguez*. Doing so would further contribute to the Court's goal of ridding the jury process of discrimination and protecting a criminal defendant's Sixth Amendment rights.

I. ORIGIN OF THE NO-IMPEACHMENT RULE

At common law, jurors were prohibited from impeaching a verdict by either affidavit or live testimony.[13] This rule can be traced back to an English case, *Vaise v. Delaval*,[14] where jurors allegedly were divided in their decision and decided the verdict with a coin toss.[15] Lord Mansfield did not believe that a juror could be a reliable witness against himself, and therefore "held that neither affidavits nor testimony could be received as evidence to impeach a verdict."[16] This decision became known as the Mansfield Rule and ultimately kept jurors from testifying

9. *Id.* at 859.

10. 476 U.S. 79 (1986).

11. 51 U.S. 127 (1994).

12. *Batson*, 476 U.S. at 85–87; *J.E.B.*, 51 U.S. at 139–45.

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

14. 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

15. Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHIC JUST. 165, 171 (2011); *Peña-Rodriguez*, 137 S. Ct. at 863 (citing 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785)).

16. West, *supra* note 16, at 171; a*ccord Peña-Rodriguez*, 137 S. Ct. at 863 (citing 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785)).

about both their subjective mental processes and objective events that occurred while in deliberation.[17]

American jurisdictions adopted the Mansfield Rule as common law; however, some jurisdictions adopted a broader and more flexible approach.[18] The most popular and flexible approach became known as the Iowa Rule, which allowed jurors to testify about objective occurrences that took place during deliberation "in part because other jurors could corroborate that testimony."[19] In other words, jurors were only prevented from testifying about their own subjective beliefs.[20] Yet, the federal courts stayed closer to the original Mansfield Rule, and their standard became known as the Federal Approach.[21] Under the Federal Approach, the no-impeachment rule only permitted testimony about extraneous events that impacted the deliberation process (e.g., reliance on outside newspapers or personal investigations of facts).[22]

The Supreme Court's earliest decisions did not state a clear preference for either rule;[23] however, the court eventually rejected the Iowa Rule in *McDonald v. Ples,*[24] where it excluded juror testimony concerning whether the jury had calculated the damages award by averaging the numerical suggestions on each juror.[25] In its rationale, the Court focused on the consequences of disturbing final verdicts,[26] but cautioned that "the no-impeachment rule might recognize some exceptions 'in the gravest and most important cases' where exclusion of the juror affidavits might well violate 'the plainest principles of justice.'"[27]

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17. 137 S. Ct. at 863.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* (citing United States v. Reid 53 U.S. 361, 366 (1851)).

24. 35 S. Ct. 783 (1915).

25. *Id.* at 268–69.

26. *See generally McDonald*, 35 S. Ct. at 784–85 ("For, while . . . [the federal version of the Mansfield Rule] may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. The practice would be replete with dangerous consequences. It would lead to the grossest fraud and abuse and no verdict would be safe.").

27. *Peña-Rodriguez*, 137 S. Ct. at 864 (quoting *McDonald*, 35 S. Ct. at 785)).

Years later, in 1975, Congress codified the federal version of the no-impeachment rule in the Federal Rules of Evidence, prohibiting all juror testimony except for when the jury had considered prejudicial extraneous evidence.[28] The first version of the rule reflected a more flexible Mansfield rule, similar to the Iowa approach; however, after the Department of Justice expressed concerns, the committee drafted the more stringent version that is now in effect and reads:

> (b) During an Inquiry into the Validity of a Verdict of Indictment.
>
> (1) *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.
>
> (2) *Exceptions*. 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; or
> (C) a mistake was made in entering the verdict on the verdict form.[29]

Until *Peña-Rodriguez*, the Supreme Court consistently applied the codified rule,[30] enforcing the stringent federal approach in order to promote finality in the jury process.[31]

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28. *Id.* at 864; FED. R. EVID. 606(b).

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

30. *See e.g.*, Tanner v. United States, 483 U.S. 107, 125 (1987); Warger v. Shauers, 135 S. Ct. 521, 530 (2014).

31. *Peña-Rodriguez*, 137 S. Ct. at 865 (noting that the strict federal approach "promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.").

II. EARLY JUSTIFICATIONS FOR UPHOLDING 606(b)

Shortly after the common law rule was codified in the Federal Rules of Evidence, the Supreme Court validated and justified the firm rule in *Tanner*.[32] *Tanner* involved a challenge to the portion of the Rule 606(b) that excluded juror affidavits regarding misconduct that took place during the trial and deliberations.[33] In this case, after the jury rendered a verdict, one of the jurors contacted the defense counsel regarding misconduct that took place during the trial and deliberations.[34] The juror stated that seven of the jurors consumed alcohol during the recess.[35] The juror also alleged that other jurors smoked marijuana during the recess, while others consumed cocaine regularly.[36]

Given this information, the defense counsel posed two challenges to the verdict: (1) that the trial court's exclusion of the juror's misconduct was an incorrect interpretation of Rule 606(b) and that the interpretation of the rule violated the Sixth Amendment right to an impartial jury.[37] The Court rejected the claim that the drugs and alcohol were included in the rule's exception for "outside influence" and "analogized the alcohol and drug use to the paradigmatic internal influences of 'a virus, poorly prepared food, or lack of sleep.'"[38] Furthermore, the Court was concerned that the defense counsel's reading and attempts to impeach a jury's verdict would disrupt the finality in the jury process as well as undermine both the "'juror's willingness to return an unpopular verdict' and 'the community's trust in a system that relies on the decision of laypeople.'"[39]

The Court also rejected the defense counsel's Sixth Amendment argument, stating that three safeguards that exist before and throughout trial sufficiently protect a defendant's right to an impartial jury.[40]

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32. 438 U.S. at 124.

33. *Id.* at 115–16.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.*

38. West, *supra* note 14, at 178 (citing Tanner v. United States, 483 U.S. 107, 121–22 (1987)).

39. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 866 (2017) (quoting *Tanner*, 438 U.S. at 121).

40. *Tanner*, 438 U.S. at 127; *See also*, Kevin Zhao, *The Choice Between Right and Easy:* Peña Rodriguez v. Colorado *and the Necessity of a Racial Bias Exception to Rule 606(b)*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 33, 36–37 (2016) (listing the three safeguards noted

Those three safeguards are as follows: (1) before the trial, *voir dire* provides an opportunity for the Court and parties' counsel to examine members of the jury for impartiality and biases;[41] (2) as the process proceeds and during trial, the court has some opportunity to learn of juror misconduct;[42] (3) finally, before the verdict, jurors can report misconduct to the court.[43]

Next in *Warger v. Shauers,*[44] the court reiterated those safeguards and rejected the argument that this case's facts called for an exception to the no-impeachment rule.[45] In this case, Warger sued Shauers for negligence after a car accident.[46] After the jury returned a verdict against Warger, one of the jurors contacted Warger's counsel claiming that the jury foreperson revealed two things during deliberations: that her daughter had been at fault in an accident and that a lawsuit would have ruined her daughter's life.[47] In other words, the juror failed to disclose this pro-defendant bias during *vior dire*. Even so, the Court relied on the above stated safeguards and noted that *Tanner* foreclosed the issue.[48] Yet, the Court warned that it might be willing to make exceptions to the no-impeachment rule when juror bias was "so extreme that, almost by definition, the jury trial right has been abridged."[49] The Court found such bias in *Peña-Rodriguez*.

III. *PEÑA-RODRIGUEZ V. COLORADO*'S RATIONALE AND IMPACT ON 606(b)

In 2007, two teenage girls were sexually assaulted in a bathroom at a horse-race track.[50] Ultimately, Rodriguez, an employee of the horse-race track, was identified by the victims and charged.[51] During *voir dire*, each juror was asked if there

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by the Supreme Court and adding a fourth by noting that after trial "parties may use non-juror evidence to overturn the verdict.").

41. *See Tanner*, 438 U.S. at 127.

42. *See id.*

43. *See id.*

44. 135 S. Ct. 521 (2014).

45. *See id.* at 529–30.

46. *Id.* at 524.

47. *Id.*

48. *Id.* at 530.

49. *Id.* at 530 n.3.

50. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).

51. *Id.*

was anything that would make it difficult for him to be fair in the case.[52] None of the jurors expressed any racial bias at that time.[53] At the conclusion of the trial proceedings, the jury ultimately found Rodriguez guilty of three misdemeanor charges.[54]

After trial, two jurors gave affidavits stating that another juror—H.C.—had made racially charged comments about Rodriguez during deliberations.[55] According to the jurors, H.C. made comments like, "I think he did it because he's Mexican and Mexican men take whatever they want."[56] H.C. also allegedly stated that in his past law enforcement experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[57] Finally, H.C. stated that he did not believe the alibi the witness provided for Rodriguez because the witness was "an illegal," despite the fact that the witness testified that he was a legal resident of the United States.[58]

Rodriguez submitted the affidavits to the trial court and moved for a new trial; however, the court held that under Colorado's 606(b) evidentiary rule, comments made during jury deliberation were not admissible.[59] Thus, Rodriguez was denied the motion for a new trial.[60] Both the Colorado Court of Appeals and the Colorado Supreme Court affirmed, and the United States Supreme Court granted certiorari.[61] The Court was presented with the question of whether there is an exception to the no-impeachment rule when, after a jury is discharged, a juror reveals that one of his peers made clear statements of racial bias.[62]

To reach a decision, the Court began by stating that additional exceptions to 606(b) were never completely foreclosed by the Court. Specifically, the Court noted the warning issued in *Warger* which stated that there may be some instances where "juror bias [is] so extreme that, almost by definition, the jury trial right has

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 861–62.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 862–63.

62. *Id.* at 861–62.

been abridged."[63] The Court then traced the history of the country and its struggles with racism—focusing on the ratification of the Civil War Amendments in an effort to purge racial discrimination as it relates to administrative justice.[64] Specifically, the Court pointed to acts by Congress—such as ratifying the Fourteenth Amendment—to integrate jury systems[65] and the Court's efforts to eradicate racial discrimination in the jury system, such as finding that the Constitution prohibited excluding a prospective juror based on race.[66]

Against this background, the Court noted that the *Peña-Rodriguez* case "lies at the intersection of the Court's [past] decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial in the bias in the jury system."[67] Furthermore, the Court stated that the "jury is a criminal defendant's fundamental protection of life and liberty"[68] and that "[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered" to protect the criminal defendant[69] Noticing the tension between the two goals of protecting defendants and maintaining final verdicts, the Court decided that the goal of protecting the criminal defendant throughout the entire trial process, as it relates to the jury system, outweighed the simple policy decision of giving finality to jury verdicts.[70] As a result, the Court held that when a juror makes a clear statement that indicates he relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule, governed by Federal Rule of Evidence 606(b), permit the trial court to consider the

63. *Id.* at 866–67; *see also* Warger v. Shauers, 135 S. Ct. 521, 530 n.3 (2014).

64. 137 S. Ct. at 867 ("In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat . . . to the integrity of the jury trial.").

65. *Id.* ("In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial.").

66. *See* Batson v. Kentucky, 476 U.S. 79, 86–87 (1986).

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

68. *Id.* at 868 (citing McClesky v. Kemp, 481 U.S 279, 309 (1987)).

69. *Id.* at 869.

70. *Id.* at 871 ("The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule.").

evidence of the juror's statement and any possible resulting denial of the jury trial guarantee.[71]

Additionally, the Court noted that the safeguards previously noted in *Tanner* and *Warger*—*voir dire*, observing juror conduct during the trial, and juror reports before the trial—were inadequate to achieving its goal of ridding the jury system of racial bias and protecting a criminal defendant's Sixth Amendment rights.[72] First, the Court distinguished racial bias from alcohol and drug abuse noting the unique and institutional risks that racial discrimination poses to the jury system.[73] Second, the Court stated that generic questions during voir dire may not expose impartiality.[74] Finally, the Court highlighted that jurors might be apprehensive about reporting inappropriate statements of racial bias because doing such would basically require the juror to accuse his peer of being a "bigot."[75] Overall, after coupling the nation's historical struggles with race and the risks posed to criminal defendants when racial discrimination is implicated in the jury process, the Court decided to create an exception to 606(b) for racial discrimination.[76]

IV. RATIONALE FOR EXTENDING *PEÑA-RODRIGUEZ* TO INCLUDE STATEMENTS OF GENDER BIAS

The Sixth Amendment guarantees that defendants "[i]n all criminal prosecutions . . . shall enjoy the right to a speedy and public trial, by an *impartial jury*[.]"[77] As noted above, the Court has attempted to maintain impartiality, with regards to race and ethnicity, throughout the jury process to protect criminal defendants, starting with the juror selection process and continuing through jury deliberations. To further maintain impartiality throughout the jury process and to protect criminal defendants, the Court should also extend the *Peña-Rodriguez* exception to include clear statements of gender stereotypes and animus made during juror deliberations for two reasons. First, the Court's previous decisions regarding race and the jury process are analogous to gender and the jury process; thus, the rationale provided in *Peña-Rodriguez* applies to gender. Second, the existing safeguards articulated in *Tanner* and *Warger* are not sufficient to protect a criminal

71. *Id.* at 869.

72. *Id.* at 868–71.

73. *Id.* at 868 (noting that the past safeguards may be "compromised" and "insufficient").

74. *Id.* at 869.

75. *Id.*

76. *See id.*

77. U.S. CONST. amend. VI. (emphasis added).

defendant from gender bias for the same reasons that the safeguards are not sufficient in cases regarding racial bias.

A. *Evolution of the Law: Intersectionality of Juries, Race, and Gender*

When confronted with the intersectionality of gender and jury issues, courts have followed along the same reasoning used in cases discussing race and jury issues. Therefore, the specific issue of gender discrimination in jury deliberations should not be treated any differently. At the outset, it is important to note that although many of these cases—including *Batson* and *J.E.B.*—primarily focused on a prospective juror's civic duty and preemptory strikes, underlying these issues has been a defendant's right to be before an impartial jury.[78]

The consideration of racial discrimination and juries begins with *Strauder v. State of West Virginia*[79] where the Court held that a black male-defendant had the right to a petit jury that was selected without racial discrimination against prospective jurors.[80] The next milestone took place in *Batson*, where the Court held that the Equal Protection Clause prohibited the State from excluding members from a jury based on their race.[81] Although the Court's holding prohibited the State from excluding prospective jurors on the basis of race, the Court's rationale for this decision also focused on protecting the defendant.[82] Specifically, the Court noted that "racial discrimination in [jury] selection . . . violates a defendant's right . . . because it denies him the protection that a trial by jury is intended to secure."[83] Finally, the Court reiterated its commitment to protecting defendants—even throughout jury deliberations—in *Peña-Rodriguez*, as noted above.

Even though the efforts to rid discrimination from the jury system started with racial discrimination, the Court saw the need to expand those rules to also include the prohibition of gender discrimination.[84] In *Ballard v. United States,*[85] the Court reiterated the "evil" that lies in the "exclusion of an eligible class" from jury

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78. *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137 (1994) (noting that the damage of both racial and gender discrimination in jury selection harms litigants and the entire community in addition to those wrongfully excluded).

79. Strauder v. West Virginia, 100 U.S. 303 (1879).

80. *Id.* at 312.

81. Batson v. Kentucky, 476 U.S. 79, 98–100 (1986).

82. *Id.* at 86–87 (noting that jurors must be "indifferently chosen" to protect a defendant).

83. *Id.* at 86.

84. *E.g.*, Taylor v. Louisiana, 419 U.S. 522, 536 (1975).

85. Ballard v. United States, 329 U.S. 187 (1946).

selection.[86] More importantly, the Court specifically compared the exclusion of women to that of racial discrimination and warned that such exclusion may be "highly prejudicial to the defendants."[87] Next, in *Taylor v. Louisiana,*[88] the Court declared that excluding women from jury venires deprived a criminal defendant of his Sixth Amendment right to a trial by an impartial jury drawn from a fair section of the community.[89] Finally, in *J.E.B.*, the Court continued to follow the same rationale it outlined regarding racial discrimination and held that it was impermissible for the State to strike an individual from the jury based on her gender.[90] Most importantly, the Court traced the similarities between the treatment of racial minorities and women[91] and found that "[f]ailing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself."[92] Given the rationales in *Batson* and the usage of those rationales in *J.E.B.*, this statement necessarily means that holding otherwise would impede upon protection of a criminal defendant's right to an impartial jury.[93] Unfortunately, unlike race, the protections for criminal defendants regarding gender discrimination stop here; however, the outline above shows that the Court has followed along the same rationale for both racial and gender discrimination when it relates to protecting criminal defendants, and thus it should continue.

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86. *Id.* at 195.

87. *Id.*

88. 419 U.S. 522 (1975).

89. *Id.* at 537.

90. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

91. *Id.* at 135–36. ("While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.' . . . 'Throughout much of the 19th century the position of women in our society was, in many respects comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until the adoption of the Nineteenth Amendment half a century later.'").

92. *Id.* at 145.

93. *See id.* at 140. ("Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants. . . The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the *entire proceedings*.") (emphasis added).

In other words, if the exclusion of juror members based on either race or gender violates a defendant's Sixth Amendment right to an impartial jury drawn from a fair section of the community[94] and racial discrimination within the jury deliberations violates a defendant's Sixth Amendment right,[95] it seems only natural that gender discrimination in jury deliberations would also serve as a violation of a criminal defendant's Sixth Amendment right. The Court has already identified gender and race as "overlapping categories"[96] and should not prohibit racial and gender discrimination in the jury selection process only to later encourage or permit it in jury deliberations.[97] As further support, courts and scholars, while analyzing race, suggested that gender discrimination within jury deliberations should be an exception to 606(b) long before the *Peña-Rodriguez* holding.[98] As one example, in *After Hour Welding, Inc.*, the Supreme Court of Wisconsin stated that whenever a trial court recognizes that

> a jury verdict may have been the result of any form of prejudice based on race, religion, gender or national origin, judges should be especially sensitive to such allegations and conduct an investigation . . . . For even if only one member of a jury harbors a material prejudice, the right to a trial by an impartial jury is impaired.[99]

Overall, the Court has repeatedly followed the same reasoning for gender discrimination in juries that follows from racial discrimination in juries. While there

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94. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

95. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017).

96. *J.E.B.*, 511 U.S. at 145.

97. *Id.* at 153 (Kennedy, J. concurring).

98. *See, e.g.*, After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 690 (Wis. 1982); *see also* Leah S. P. Rabin, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of* Tanner *and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. PA. J. CONST. L. 537, 560 n.121 (2011) (citations omitted) (noting that outside of racial bias, "there are other types of biases a juror can harbor that are equally abhorrent, such as gender bias . . . , and these biases may mar a jury verdict in much the same fashion. . . . '[M]any courts have recognized that Rule 606(b) should not be applied dogmatically where there is a possibility of juror bias during deliberations that would violate a defendant's Sixth Amendment rights.'").

99. 324 N.W.2d at 690 (citing United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973)); *see also* State v. Shillutt, 350 N.W.2d 686, 690 (Wis. 1984); State v. Finney, 337 N.W.2d 167, 175 (S.D. 1983) (Henderson, J., dissenting).

is tension between giving finality to jury verdicts and protecting Sixth Amendment rights, the Court has affirmatively decided that the constitutional rights will outweigh the policy concerns in cases involving racial discrimination.[100] Since race and gender are "overlapping categories[,]"[101] the Court should likewise decide that the constitutional rights of criminal defendants outweigh policy concerns when it relates to gender discrimination because "[a]ll forms of improper bias pose challenges to the trial process."[102]

B. *The Safeguards Previously Relied On are Insufficient to Adequately Protect Criminal Defendants*

In both *Tanner* and *Warger*,[103] the Court noted that

> safeguards exist within the court system to sufficiently protect a party's Sixth Amendment right to an impartial jury . . . . First, *voir dire* could screen out irresponsible or incompetent jurors. Second, court personnel, counsel, and the judge all observe the jury during the trial and could report any irregularities or misconduct. Third, jurors could report other jurors for misconduct before they render a verdict. Finally, after a trial, parties may use nonjuror evidence to overturn the verdict.[104]

However, in *Peña-Rodriguez*, the Court deemed these safeguards inadequate to protect criminal defendants.[105] Given that race and gender are "overlapping categories," it follows that these same safeguards would be inadequate to protect criminal defendants from gender discrimination in jury deliberations.

To begin, relying on voir dire raises multiple issues for the Court. Voir dire cannot readily detect racial basis, thus it follows that it likely also cannot readily

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

101. *J.E.B.*, 511 U.S. at 145.

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

103. Tanner v. United States, 483 U.S. 107, 127 (1987); *see also* Warger v. Shauers, 135 S. Ct. 521, 530 (2014).

104. Zhao, *supra* note 41, at 36–37.

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

detect gender bias.[106] For example, most people are generally apprehensive about admitting to prejudice and biases; as a result, jurors might purposefully conceal any biases they harbor during voir dire.[107] The Court has recognized this issue as it relates to race; it follows that gender bias might present this same problem. To further complicate the voir dire process, psychology commonly recognizes that people's attitudes and beliefs may be implicit.[108] Implicit biases are dangerous in the context of the jury process because they are "pervasive and predict behavior."[109] Thus, even if one claims to be impartial, his biases might influence his ultimate decision.[110] Critics of this theory might note that a juror would have no way of speaking about biases that he is unaware of while deliberating; thus, the concerns surrounding *voir dire* do not apply. However, as illustrated by the Court's holding in *Peña-Rodriguez*, this argument does not outweigh the fact that a juror can simply hide any bias he may harbor during *voir dire.*[111] Ultimately, the Court's decision that voir dire is an adequate protection should also apply to gender because the same concerns are implicated.

The second safeguard states that attorneys, personnel and judges can observe wrongdoings, and that jurors can report wrongdoings before the verdict is rendered.[112] Gender discrimination, like racial discrimination, may be concealed in a way that is not easy for judges and attorneys to easily observe or infer from watching jurors at trial, thus this safeguard also does not provide adequate protection to criminal defendants.[113] Furthermore, even though a juror may conceal his bias during the selection process and throughout trial, it is likely that he may feel

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106. *See id.* at 869; *See also* Crawford v. United States, 212 U.S. 183, 196 (1909) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.").

107. Amanda R. Wolin, Comment, *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, 288 (2012).

108. *Id.* at 284.

109. *Id.*

110. *Id.*

111. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017); *see also* Wolin, *supra* note 107, at 288.

112. Wolin, *supra* note 107, at 281–82.

113. *See id*; *see also* Peña-Rodriguez v. People, 350 P.3d 287, 293 (Colo. 2015) ("Admittedly, bias is less readily visible . . . meaning the second *Tanner* protection . . . carries less force in such cases.") *rev'd on other grounds*, 137 S. Ct. 855 (2017).

more comfortable to reveal any biases once in the intimate setting of jury deliberations.[114] Even so, there are very few cases where jurors reported racial bias before a verdict; therefore, it is unlikely that jurors would be willing to come forward to report gender bias, thus, this protection virtually serves no purpose.[115]

Finally, parties are allowed to use non-juror evidence to overturn a verdict; however, when a decision is made pursuant to gender bias, there would not be any available evidence for a juror to use outside of his testimony, leaving the criminal defendant without any protections.[116] Overall, in *Peña-Rodriguez*, the Court has already announced that these protections are inadequate; likewise, they are inadequate in this context.

C. *Implications if the Court Does Not Extend the Rule*

If the Court declines to extend the *Peña-Rodriguez* rule to gender stereotypes and animus, it could create a loophole for biased jurors, ultimately impeding criminal defendants' constitutional rights. The language in *J.E.B.* sets forth strong indicators for what may happen when only racial discrimination is protected. As noted above, the Court indicates that race and gender are "overlapping categories."[117] As a result, "gender can be used as a pretext for racial discrimination."[118] Here, the Court simply means that if gender is not afforded the same protections as race in the jury context, gender could then be used as a way to circumvent the racial discrimination prohibition. The potential loophole can be illustrated by the Court's reasoning in its previous cases.[119] For example, imagine that a black woman is set to be tried for the murder of a white man. Operating under *Batson* alone, a prosecutor could permissibly strike all black women from the jury, fearing that their race might lead them to be sympathetic to the black defendant and ultimately rule against the State.[120] When challenged that his actions violate the

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114. Wolin, *supra* note 107, at 267.

115. Zhao, *supra* note 41, at 44.

116. Wolin, *supra* note 107, at 281–82.

117. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994).

118. *Id.*

119. *E.g.*, United States v. Hamilton, 850 F.2d 1038, 1042–43 (4th Cir. 1988) (finding that Court did not intend for *Batson* to apply the context of race), *cert. denied*, 502 U.S. 1080 (1992), *abrogated by* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

120. *See* United States v. Nichols, 937 F.2d 1257, 1262–63 (7th Cir. 1991), *abrogated by* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (declining to examine gender discrimination where prosecutor used preemptory strikes to exclude all black women on the venire).

Batson rule, the prosecutor could simply lie and state that he struck those individuals, not because of their race, but because of their gender and the likelihood that they might be biased toward the female defendant. *J.E.B.* closes the gap that would allow for such discrimination because such discriminatory action not only harms the jury and community but also violates defendant's rights to an impartial jury.[121]

The current *Peña-Rodriguez* holding allows for such a loophole; therefore, the criminal defendant is not adequately protected. Using the same hypothetical, imagine the following. While in deliberations, a white male juror repeatedly makes disparaging and misogynistic comments while vocalizing that he is only voting to convict the defendant because "that's how women are." The current rule would provide no protection to the criminal defendant, and the final verdict would remain undisturbed. Even if the juror instead stated that he was only voting to convict the female defendant because "that's how black women are," the current rule might not provide protection to the criminal defendant. Because racial discrimination is implicated, the trial court *might* consider his comments, but it would not be required to do so if gender rather than racial animus seems to be the "significant motivating factor in the juror's vote to convict."[122] Overall, under the current rule, the black female defendant's rights in this example would turn solely on whether the trial judge thinks that the juror disliked the defendant more because she is black or because she is female.

Critics of this theory might argue that such issues can be cured by a simple jury instruction rather than extending the new rule because the Court has noted that jury instructions might help prevent bias.[123] Reliance on jury instructions to combat gender discrimination is problematic and inadequate to protect criminal defendants for various reasons. First, jurors are often given minimal and broad instructions regarding bias.[124] If such instructions have been ineffective in combatting racial discrimination, it follows that they would likely also be unhelpful in combatting gender discrimination. Even the model instructions noted in *Peña-Rodriguez* are vague

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121. *J.E.B.*, 511 U.S. at 145–46; *see also* Taylor v. Louisiana, 419 U.S. 522, 530, 536 (1975).

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

123. *Id.* at 871.

124. West, *supra* note 14, at 192–93, 204 n.178 (noting that jurors are often given a long set of instructions at the end of trial that informs them of the applicable law and standards, their responsibilities and completing the verdict form, the expectation regarding using evidence—but only a general prohibition against prohibition against allowing their personal biases and prejudices to influence their decisions, such as the directive in Model Civ. Jury Instr. 3d Cir. 3.1 (2010) not to "let any bias, sympathy[,] or prejudice that you may feel toward one side or the other influence your decision in any way.").

and do not refer to any particular type of bias.[125] Additionally, even if the specific instructions help combat gender discrimination, when gender discrimination does in fact occur there would no protections available to the criminal defendant.[126] Overall, failing to extend the rule to gender discrimination ignores potential issues that the Court has already identified. Perhaps more importantly, a failure to extend the rule would ignore the possible repercussions for criminal defendants.

CONCLUSION

The Sixth Amendment seeks to protect criminal defendants through an impartial jury.[127] The theory advanced here does not ask for a perfect jury, nor a jury that is completely free of all biases because both are impossible. Instead, this theory advocates that courts be allowed to simply inquire into jury verdicts whenever gender stereotypes or animus appears to be a "significant motiving factor in the juror's vote to convict."[128] In *Peña-Rodriguez*, the Court was faced with the tension between protecting criminal defendants' constitutional right to an impartial jury and the policy decision of providing finality to jury deliberations and verdicts.[129] Noting the nation's struggle with racial discrimination, the Court determined that the no-impeachment rule must give way in order to protect criminal defendants.[130] Similarly, the nation has also struggled with gender discrimination and stereotypes.[131] Like race, gender bias can also "infect the entire proceedings[,]" including the defendant.[132] This issue illustrates the same competing tensions found in *Peña-Rodriguez*, and should be treated the same because "[i]t is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history."[133] The desire to protect criminal defendants must extend to statements of

125. *See generally* 137 S. Ct. at 871 (noting that trial courts generally explain that jurors should be "free from bias of any kind").

126. FED. R. EVID. 606(b) (prohibiting inquiry into "any juror's mental processes concerning the verdict or indictment.").

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

128. *Id.*

129. *Id.* at 861.

130. *Id.* at 871.

131. John Gramlich, *10 things we learned about gender issues in the U.S. in 2017*, PEW RESEARCH CTR. (Dec. 28, 2017), http://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/.

132. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 140.

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

gender stereotypes and animus to prevent a loss of confidence in the jury system, which is the "central premise of the Sixth Amendment trial right."[134]

134. *Id.* at 869.