"VEGAS RULE: JURY DELIBERATION EDITION": SHOULD THE SIXTH AMENDMENT EXCEPTION FOR ALLEGED RACIAL BIAS IN DELIBERATIONS EXTEND TO GENDER?

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ABSTRACT

Federal Rule of Evidence 606(b) and its jurisprudence generally prohibit jurors from impeaching the validity of their verdicts. This general preclusion of juror testimony, derived from eighteenth-century English common law, aims to protect the public from the inherent danger of dissecting private jury deliberations, which are supposed to be "free and frank discussions." But should the tradition favoring the secrecy of these deliberations persist if said "free and frank discussions" are tainted with racial animus? Justice Kennedy—writing for the majority in Peña-Rodriguez v. Colorado*—recently answered this question in the negative, holding that the Sixth Amendment requires the Rule 606(b) prohibition make way for an inquiry into the validity of a verdict when a juror's racial animus allegedly motivates an individual juror's finding of guilt.*

This Note argues that Justice Kennedy's articulation of the recent Sixth Amendment exception to Rule 606(b) should be extended to gender animus that may motivate an individual juror's finding of guilt. The recent widespread public recognition of gender-motivated assault and harassment begs the question, can a jury deliberation room contaminated with bias be squared with the Sixth Amendment guarantee for an impartial trial?

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INTRODUCTION

Whether it is sexual harassment in the office, quid pro quo for a part in the next big Hollywood film, or allegations of sexual assault exposed after years of silence, one thing is certain: gender-motivated animus is in the air. And it is palpable. Today's headlines are riddled with allegations of gender-motivated assault and harassment, largely influenced by both social media's #MeToo movement and the politically-motivated #TimesUp movement given voice during the Golden Globes and on the Grammy's red carpets.[1] Additionally, several young

1. *See, e.g.*, Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—and How They're Alike*, TIME (Mar. 8, 2018), http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ (describing and discussing the differences between the two movements and their efforts to empower women internationally).

women recently exposed former Olympic gymnastics physician Larry Nassar and America's favorite '90s sitcom dad Bill Cosby for years of horrific and obscene sexual assault.[2]

The courtroom is an obvious place for victims of gender-motivated assault or harassment to seek justice. As increasing numbers of women come forward to face their alleged abusers after years of silence fueled by fear and stigma,[3] the American people must have confidence in the criminal justice system. And more specifically, the people must trust that their fellow citizens handing down a verdict in any given case are focused on the evidence proffered at trial rather than an individually-held belief—namely, gender-based animus. For example, it is not hard to imagine a juror spewing gender-biased sentiments—"she asked for it" or "he probably did it, all men are guilty lately"—that could fuel a jury's decision to decide "guilty" or "not guilty."[4] Because the jury is the "central foundation of [the American] justice system and our democracy,"[5] it is critically important to examine the risk that gender-motivated comments may have on the jury's decision. This risk does not compel us to abandon the traditional "secrecy" of jury deliberations, which dates back to the eighteenth century; rather, it compels us to provide a remedy if gender-motivated

2. *See generally* Graham Bowley & Jon Hurdle, *Bill Cosby Is Found Guilty of Sexual Assault*, N.Y. TIMES (Apr. 26, 2018), https://www.nytimes.com/2018/04/26/arts/television/bill-cosby-guilty-retrial.html (describing the recent legal case where the jury found Bill Cosby guilty of sexual assault); Vic Ryckaert, *Larry Nassar Case: What You Need to Know About the Abuser of More than 150 Young Athletes and the Fallout*, USA TODAY (Jan. 25, 2018, 6:57 PM), https://www.usatoday.com/story/news/nation-now/2018/01/25/larry-nassar-usa-gymnastics-sex-abuse-what-we-know/1066355001/;/ (describing the recent legal case where Larry Nassar pled guilty to seven counts of criminal sexual conduct).

3. *See, e.g.*, Anna North, *The #MeToo Movement and Its Evolution, Explained*, VOX (Oct. 11, 2018, 3:15 PM), https://www.vox.com/identities/2018/10/9/17933746/me-too-movement-metoo-brett-kavanaugh-weinstein (describing the evolution of the #MeToo movement and the countless personal experiences—for example, 1.7 million tweets in ten days—shared by way of the #MeToo hashtag).

4. *See* Julie Bindel, Opinion, *Juries Have No Place in Rape Trials. They Simply Can't Be Trusted*, GUARDIAN (Nov. 21, 2018), https://www.theguardian.com/commentisfree/2018/nov/21/juries-rape-trials-myths-justice.

5. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

animus taints the constitutional guarantee to "a speedy and public trial, by an impartial jury."[6]

Currently, Rule 606(b) of the Federal Rules of Evidence prohibits jurors from offering testimony regarding the jury's deliberations to impeach the validity of a verdict, providing for few exceptions.[7] While the three enumerated exceptions contain somewhat vague language that could be interpreted and applied broadly, the courts have construed these exceptions rather narrowly.[8] Notwithstanding Rule 606(b)'s[9] broad language, the Supreme Court recently determined that a defendant's Sixth Amendment right to an impartial trial may supersede this rule in cases where a juror's or a jury's racial animus served as a substantial motivating factor in deliberations.[10]

Part I of this Note will provide a detailed development of the general prohibition on juror testimony to impeach a verdict, from the English common law to Rule 606(b) and its jurisprudence. Part II then provides a summary of the Supreme Court's 2017 *Peña-Rodriguez v. Colorado* decision and Justice Kennedy's Sixth Amendment exception to Rule 606(b)'s general prohibition on jury testimony to impeach a verdict when there is evidence that racial animus motivated the verdict. This Note ultimately argues that the *Peña-Rodriguez* exception for race-motivated animus of jurors should be extended to gender-

6. U.S. CONST. amend. VI.

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

8. *See infra* Section I.C.

9. While this Note focuses on the Federal Rules of Evidence version of Rule 606(b), it is important to note that most states have adopted substantively similar versions of this rule. *See* Benjamin T. Huebner, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469 app. A, at 1500–04 (2006) (listing all fifty states' rules of evidence indicating which adopt substantively similar versions of the Federal Rules of Evidence, the few states which do not adopt a similar version (typically, these states do not have a statutory evidentiary code or do and do not specifically bar juror testimony), and those states which adopt a similar version but have some differences in what is barred or admissible). For example, Alaska, Arkansas, Colorado, Delaware, Iowa, Maine, Mississippi, Nebraska, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wisconsin all adopt "substantively identical" or "identical" rules to Rule 606(b). *See id.*

10. *Peña-Rodriquez*, 137 S. Ct. at 869.

motivated animus of jurors. To substantiate this proposition, Part III examines three areas of the law—equal protection doctrine, Title VII of the Civil Rights Act, and peremptory challenges—where protections against racial classification and discrimination have later been extended to gender classification and discrimination. Finally, Part IV of this Note will counter the inevitable "slippery slope" argument and reiterate the importance of applying this *Peña-Rodriguez* extension in a time when the #MeToo movement is in full swing.

While it is true that the Sixth Amendment guarantees "[a] defendant . . . a fair trial but not a perfect one,"[11] is a defendant's constitutional right to an impartial trial truly guaranteed if our justice system turns a blind eye to a jury deliberation contaminated with gender prejudice?

I. WHAT HAPPENS IN JURY DELIBERATION, STAYS IN JURY DELIBERATION

We have all heard the phrase "what happens in Vegas, stays in Vegas." This phrase implies that all events occurring while on vacation will remain secret—or "in Vegas"—when the vacationers return to their homes. Historically, jury deliberation has been treated similarly.

The tendency to treat jury deliberations as "sacred" is rooted in English common law, and traces of its legacy are still echoed in our contemporary rules of evidence.[12] The first iteration of the

11. Lutwak v. United States, 344 U.S. 604, 619 (1953); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one."); United States v. Hasting, 461 U.S. 499, 508–09 (1983) ("[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial."); Bruton v. United States, 391 U.S. 123, 135 (1968).

12. For different explorations of the common-law prohibition of post-verdict juror testimony to the adoption of Rule 606(b) of the Federal Rules of Evidence with respect to other issues regarding this evidentiary rule prior to the Supreme Court's *Peña-Rodriguez v. Colorado* decision in the 2016 term, see David A. Christman, *Federal Rule of Evidence 606(b) and the Problem of "Differential" Jury Error*, 67 N.Y.U. L. REV. 802, 815–19 (1992); Huebner, *supra* note 9; Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 880–83 (2009);

"Vegas Rule: Jury Deliberation Edition" can be traced back to Chief Justice Lord Mansfield's decision in the 1785 case *Vaise v. Delaval*, where the defendant attempted to set aside a verdict by offering testimony from "two jurors who swore that 'the jury, being divided in their opinion, [had] tossed up [a coin]' to find for the plaintiff."[13] Though Chief Justice Lord Mansfield affirmed the lower court's verdict, his opinion indicated that "a juror who tolerated or engaged in misconduct in the jury room could not testify to that misconduct," whereas "the testimony of an eavesdropper or other interloper who observed the misconduct [would be] admissible."[14] This became known as the "Mansfield Rule," which ultimately acted as a blanket ban on juror testimony of any sort.[15]

A. *From English Common Law to American Jurisprudence*

The Mansfield Rule was widely accepted in American jurisprudence until the mid-to-late nineteenth century, when it was replaced with the so-called "Iowa Rule."[16] The Supreme Court first hinted at the demise of the Mansfield Rule in *United States v. Reid*.[17] Writing on behalf of the majority, Chief Justice Taney recognized the unsustainability of the Mansfield Rule in American jurisprudence, reasoning that "[i]t would perhaps hardly be safe to lay any general rule upon" the admissibility of juror testimony to impeach a verdict, and that "such evidence ought always be received with great caution."[18] And although the Court ultimately declined to vacate the defendant's murder conviction despite evidence that "an ostensibly non-influential newspaper account of the case found its way into the deliberation room,"[19] the Court acknowledged that "cases

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Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religious Principles of Decision*, 74 TENN. L. REV. 167, 176–80 (2007).

13. Christman, *supra* note 12, at 815 (quoting Vaise v. Delaval (1785) 99 Eng. Rep. 944, 944).
14. *Id.* at 816.
15. *See* Miller, *supra* note 12, at 880–81.
16. *Id.* at 881.
17. *See* 53 U.S. 361, 366 (1851).
18. *Id.*
19. Miller, *supra* note 12, at 881; *see also Reid*, 53 U.S. at 366.

might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice."[20]

Chief Justice Taney's subtle rebuke of the untenable Mansfield Rule was given full voice by the Iowa Supreme Court in *Wright v. Illinois & Mississippi Telephone Co.*[21] The *Wright* court reviewed a defendant's appeal regarding the lower court's decision to strike jurors' affidavits from the record, which indicated that the jury calculated damages by way of "quotient verdict."[22] The court concluded that the lower court erred in striking the juror affidavits to prove the "illegal and reprehensible" use of a quotient verdict to calculate damages.[23] In rendering its decision, the court critiqued the Mansfield Rule.[24] Specifically, the court stated that jurors have "superior opportunities of knowledge and less liability to mistake" than Mansfield's outsiders, and ultimately found that because "it is the *fact* of [a jury's] improper practice, which avoids the verdict, there is no reason why a court should close its ears to the evidence of it from one class of persons" when it will hear the same evidence of jury misconduct from a less credible source.[25]

This decision marked the official demise of the Mansfield Rule and its blanket prohibition on post-verdict juror testimony.[26] The *Wright* court's Iowa Rule created a legal dichotomy between those matters which are within a juror's mind and those matters which are "external" to the mental processes of

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20. *Reid*, 53 U.S. at 366.

21. 20 Iowa 195, 212 (1866).

22. *Id.* at 197 (involving juror affidavits which all stated that "to arrive at the plaintiff's damages, it was agreed that each juror should mark down such sum as he thought proper to allow; that the aggregate should be divided by twelve, and the quotient should be verdict"); *see also Quotient Verdict*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining quotient verdict as "an improper damage verdict that a jury arrives at by totaling what each juror would award and dividing by the number of jurors").

23. *See Wright*, 20 Iowa at 211–12.

24. *See id.* at 211.

25. *Id.* at 211–12.

26. By 1969, several jurisdictions adopted the Iowa Rule, including Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, Wisconsin, and the federal district courts. *See* Timothy C. Rank, Note, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1428 & n.39 (1992) (citing JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2354, at 702 n.1 (John T. McNaughton rev. ed. 1961)).

deliberations.[27] The court reasoned that matters which are external to the mental processes of deliberation "can be readily and certainly disproved by his fellow jurors," unlike subjective mental processes of an individual, which are "incapable of disproof."[28] Therefore, allowing proof of external matters "would have a tendency to diminish such practices and to purify the jury room, by rendering such improprieties capable and probable of exposure," thus acting as a quasi-deterrent of juror misconduct.[29]

While the *Wright* decision marked a general shift in American jurisprudence, some jurisdictions adopted different standards for the admissibility of such previously forbidden testimony rather than strictly adopting the Iowa Rule.[30] For example, the Supreme Judicial Court of Massachusetts modified the Mansfield Rule only five years after the *Wright* decision in *Woodward v. Leavitt*.[31] The court in *Woodward* considered a plaintiff's motion for a new trial on two bases: (1) juror Solomon Brown's own testimony that he "formed and expressed an opinion on the merits of this case" prior to jury selection, and (2) testimony by other jurors who "testified that Brown did not take part in the discussions, and did not attempt to influence them."[32] While the court found the former admissible, the latter was deemed inadmissible.[33] The court differentiated between the two types of proffered testimony because a sole juror's own testimony was "not concerning anything that passed in the jury room," whereas the testimony from other jurors was directly "related

27. *Id.*

28. *Wright*, 20 Iowa at 210–11.

29. *Id.* at 211; *see also* Perry v. Bailey, 12 Kan. 539, 543–45 (1874) (admitting juror testimony sustaining that a fellow juror consumed alcohol and acted abusively during deliberations on the basis that this particular juror's "overt acts" are "matters lying outside the personal consciousness of the individual juror . . . and therefore accessible to the testimony of others, and subject to contradiction").

30. *See* Christman, *supra* note 12, at 817; Miller, *supra* note 12, at 882–83.

31. *See* 107 Mass. 453 (1871); *see also* Christman, *supra* note 11, at 817 n.95; Miller, *supra* note 12, at 882–83.

32. *Woodward*, 107 Mass. at 459.

33. *Id.* at 471.

to the private deliberations of the jury."[34] Thus, while the *Wright* court implemented the Iowa Rule to "distinguish[] between matters resting solely in the mind of a juror and external matters," the *Woodward* court created an "outside influence" rule that drew a physical boundary around the literal doors of the jury deliberation room.[35]

The fact that states were acting as laboratories—experimenting with different modifications to the Mansfield and Iowa Rules to determine what juror testimony could be admissible when inquiring into the validity of a verdict—likely prompted the U.S. Supreme Court to grant certiorari in *Mattox v. United States*.[36] Defendant Mattox appealed his murder conviction on the basis that the lower court erred in failing to admit juror testimony alleging that: (1) during the jury deliberation, the jurors were exposed to a newspaper article which painted the defendant in an injurious light, and (2) the bailiff informed the jury that the defendant had committed murder previously—two times to be exact.[37] Ultimately, the Court determined that the "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict."[38] Concluding that testimony alleging such improprieties should be admissible, the Court essentially granted its stamp of approval for both the Iowa Rule and the "outside influence" rule articulated in *Woodward*.[39]

Although *Mattox* concludes that post-verdict testimony regarding "external causes" on jurors is admissible, conspicuously absent from the opinion is any answer to whether post-verdict testimony regarding influences inside the deliberation

34. *Compare id.* (drawing a distinction between juror testimony regarding an opinion formed prior to entering the jury deliberation room and events occurring therein), *with Perry*, 12 Kan. at 545 (admitting juror testimony regarding one juror's alcohol use during recesses and his abusive behavior inside the deliberation room).

35. Rank, *supra* note 26, at 1428–29.

36. *See* Miller, *supra* note 12, at 883; *see also* 146 U.S. 140, 147 (1892).

37. *Mattox*, 146 U.S. at 142–43.

38. *Id.* at 150.

39. Rank, *supra* note 26, at 1429.

room are admissible.[40] The next Supreme Court case on this point only confused matters more.

In *Hyde v. United States*,[41] the Supreme Court considered whether juror testimony regarding the jury's use of a "compromise verdict"[42] in a four-defendant conspiracy trial should be admissible, thus requiring the grant of a new trial.[43] The alleged compromise verdict was a deal struck between the jurors who believed all four defendants should be acquitted and those jurors who desired a conviction for all, resulting in an even split: two acquitted defendants and two convicted defendants.[44]

Given the Supreme Court's purported approval of the Iowa Rule in *Mattox*,[45] and the striking similarities between the facts of *Hyde* and *Wright*, this decision should have been cut-and-dry: juror testimony alleging the use of a compromise verdict is admissible when it "can be readily and certainly disproved by . . . fellow jurors."[46] This, however, was not the case. While the Supreme Court determined that the *Wright* rule applied, the Court explained that "the testimony of jurors [proffered in this case] should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors, and can receive no corroboration."[47] The *Hyde* Court's reluctance to hear juror testimony regarding the jury's alleged use of an arbitrary compromise verdict cannot be squared with the Iowa Rule, which the Supreme Court

40. Miller, *supra* note 12, at 884.

41. 225 U.S. 347 (1912).

42. *See Compromise Verdict*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining compromise verdict as a "verdict reached when jurors, to avoid a deadlock, concede some issues so that other issues will be resolved as they want").

43. *See* 225 U.S. at 382–83.

44. *Id.* at 383.

45. Although the *Mattox* Court expressed its support for the Iowa Rule by discussing *Perry v. Bailey*, the *Perry* court applied the Iowa Rule to the question regarding the admissibility of juror testimony post-verdict. *See* Mattox v. United States, 146 U.S. 140, 148–49 (1892); *see also* Perry v. Bailey, 12 Kan. 539, 545 (1874) (determining whether juror testimony post-verdict alleging the use of intoxicating beverages and abusive behavior by one juror during deliberations was admissible).

46. Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 211 (1866).

47. *Hyde*, 225 U.S. at 384.

presumably adopted in *Mattox*.[48] As such, the Court seemingly rejects the categorical admissibility of juror testimony regarding an impropriety—such as a quotient or compromise verdict in deliberation—that the Iowa Rule allows, and limits the admissibility of juror testimony to those influences outside the physical boundaries of deliberation like in *Woodward*.[49]

The *Hyde* Court's implicit rejection of the Iowa Rule is salient when considering *McDonald v. Pless*,[50] the last case the Supreme Court would hear concerning jury impeachment post-verdict before the Federal Rules of Evidence would be drafted in 1969.[51] In *McDonald*, the Court addressed the admissibility of jury testimony regarding the use of a quotient verdict, which was already condemned by the establishment of the Iowa Rule in *Wright*.[52] Thus, the Supreme Court could have simply applied *Wright* and the Iowa Rule to the facts of *McDonald*; yet, the Court declined this opportunity. Instead, the Supreme Court identified two competing considerations when determining the admissibility of juror testimony post-verdict: the importance of private redress for an individual litigant and the threat to the public posed by exposing the happenings of jury deliberation.[53] The Court ultimately determined that "redressing the injury of the private litigant" was the "lesser of two evils" and found that the other—more severe—evil to avoid was "the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."[54]

In a statement that would later form the foundation for Federal Rule of Evidence 606(b), the Court articulated the policy rationale underlying the general prohibition of juror testimony:

48. *See Mattox*, 146 U.S. at 148–49.

49. *Hyde*, 225 U.S. at 384; *see also* 107 Mass. 453, 471 (1871).

50. 238 U.S. 264, 265 (1915).

51. Miller, *supra* note 12, at 884.

52. *See McDonald*, 238 U.S. at 265; *see also supra* notes 21–25 and accompanying text.

53. *McDonald*, 238 U.S. at 267.

54. *Id.* at 267, 269 (concluding that "[t]he suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers, is without foundation" and that this "principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict"). It is of significance to note that the Supreme Court limited its holding to civil cases only in closing.

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.[55]

Essentially, the Court determined that the risk posed to the "frankness and freedom of discussion" in deliberation, coupled with the danger of harassment of individual jurors by the losing party, generally outweighs a losing litigant's desire to use juror testimony regarding misconduct.[56] Considering the above rationale, it seems that the Supreme Court was endorsing a reversion to Chief Justice Lord Mansfield's blanket ban on juror impeachment of verdicts. The Court, however, avoided creating a categorical rule: "[I]t would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'"[57] The Supreme Court would remain silent on this issue until after the drafting of the Federal Rules of Evidence.

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55. *Id.* at 267–68.

56. *See id.*

57. *Id.* at 268–69 (quoting United States v. Reid, 53 U.S. 361, 366 (1851)); *see also* Mattox v. United States, 146 U.S. 140, 148 (1892).

B. *Old Habits Die Hard, Don't They? Federal Rule of Evidence 606(b) Echoes Sentiments of the Common-Law "Vegas Rule: Jury Deliberation Edition"*

Lower courts were left to their own devices to determine what jury impeachment testimony was admissible and what should be excluded after *McDonald*. That said, there were two general commonalities among the many jurisdictions. The first point of agreement was that "matters within the individual conscience of one or more jurors should remain inviolate."[58] A second commonality among all jurisdictions was the admissibility of testimony "regarding the misconduct of a party or a court officer," which included testimony regarding restricted jury conduct.[59] The jurisdictions, however, generally disagreed over what occurrences inside a jury deliberation room were viable sources for juror testimony to impeach a verdict.[60] Some specific areas of difference, especially in standards applied to determine admissibility, included quotient verdicts and compromise verdicts,[61] juror intoxication, and exposure to newspapers or third-party communications with the jury.[62]

In 1969, the Federal Rules Advisory Committee set out to develop a uniform rule of evidence regarding the impeachment of a verdict by way of juror testimony. The road to Rule 606(b)

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58. Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 519 & n.79 (1988) (discussing the two points of agreement among the jurisdictions and mentioning that examples of "matters within an individual juror's conscience" include a mistake or failure to understand the law, a misinterpretation of the facts, a vulnerability to persuasion by other jurors, or a later realization of disagreement with the verdict).

59. *See id.* at 519–20.

60. *See id.* at 520.

61. *Compare* Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 212–13 (1866) (invalidating a jury verdict by way of juror testimony regarding the use of a quotient verdict system to calculate damages), *with* Hyde v. United States, 225 U.S. 347, 383 (1912) (excluding juror testimony regarding the jury's use of a compromise verdict to acquit two defendants and convict two defendants in a four-defendant conspiracy trial), *and McDonald*, 238 U.S. at 267.

62. *Compare Mattox*, 146 U.S. at 150–51 (admitting juror testimony regarding a bailiff's comment that the defendant had previously killed two individuals and the bailiff's exposure of a newspaper including an injurious excerpt about the defendant), *with* People v. Hutchinson, 455 P.2d 132, 137–38 (Cal. 1969) (applying the Iowa Rule and allowing juror testimony regarding a bailiff's injurious remarks to the jury during deliberations).

was not without its complications. The proposed rule and the Advisory Committee's Note echoed the Iowa Rule dichotomy between the internal mental processes of jurors and external "conditions or occurrences of events calculated improperly to influence the verdict . . . without regard to whether the happening is within or without the jury room."[63] The Committee understood the dangers the Supreme Court articulated in *McDonald*—emphasizing the importance of "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment"—and reasoned that these principles would be protected under the proposed rule.[64]

However, as a result of persistent lobbying by Arkansas Senator John Little McClellan, the proposed draft was rewritten to include two enumerated exceptions in which the jurors may testify.[65] Senator McClellan expressed concern that the 1969 draft would prohibit inquiry into the validity of jury verdicts where there was clear bias.[66] To allay these concerns, the rewritten draft added the following two exceptions regarding a juror's competency as a witness post-verdict: (1) "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention," and (2) "whether any outside influence was improperly brought to bear upon any juror."[67]

The proposed draft, which incorporated Senator McClellan's suggested exceptions, was approved by the Supreme Court and submitted to Congress. While the House of Representatives endorsed a version without the enumerated exceptions, the

63. Preliminary Draft of Proposed Rules of Evidence, Advisory Committee's Note, 46 F.R.D. 161, 291 (1969).

64. *See id.* at 290.

65. *See* Christman, *supra* note 12, at 824 n.141.

66. *See* Miller, *supra* note 12, at 888.

67. *Id.* Additionally, the Advisory Committee noted in this rewrite that the "door of the jury room is not a satisfactory dividing point." *See* H.R. REP. NO. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7083. These two exceptions ultimately because Federal Rules of Evidence 606(b)(2)(A) and 606(b)(2)(B).

Senate endorsed the version of the rule with the exceptions.[68] Ultimately, the dispute was resolved in favor of the Senate.[69]

Rule 606(b)(1) as it appears today—after minimal technical and stylistic changes since the original enactment in 1974—reads as follows:

> 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.[70]

Additionally, Rule 606(b)(2) delineates three exceptions for when jurors are permitted to testify during an inquiry into the validity of a verdict: "(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."[71]

While the three enumerated exceptions—especially the first two—to Rule 606(b) may seem broad, courts have been reluctant to construe them broadly. For example, threats from one juror to coerce a fellow juror into finding a defendant guilty

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68. *See* Miller, *supra* note 12, at 889–90.

69. *Id.* at 890.

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

71. FED. R. EVID. 606(b)(2)(A)–(C). The third exception ("C") embodies the most recent amendment to the Rule, which was added in 2006. Although this Note discusses Federal Rule of Evidence 606(b), at least twenty-five states "have adopted rules that either are substantially similar to [Rule 606(b)] or have even stronger bars against juror testimony." *See* Huebner, *supra* note 9, at 1487 & n.96. Additionally, "six states have adopted rules that are substantially similar to [Rule 606(b)] but also specify one other area of misconduct to which jurors may testify." *Id.* at 1487–88 & n.97. "Seven states have no statutory rules analogous to [Rule 606(b)]," and Arizona has a similar rule to Rule 606(b), but it only applies to civil actions. *Id.* at 1488 & nn.98–99. Only three states—Florida, Hawaii, and Nevada—have "evidentiary codes that have codified rules substantially different from [Rule 606(b)]." *Id.* at 1488 & n.100.

do not fall within any of the exceptions of Rule 606(b).[72] Additionally, as will be explored further below, jurors' substance abuse throughout the trial and deliberations does not constitute an "extraneous prejudice" or "outside influence."[73] Courts have even been reluctant to declare that the presence of a juror with a mental or physical impairment does not constitute an "extraneous prejudice" or "outside influence," as understood by the exceptions to the general prohibition of juror post-verdict impeachment.[74] That said, these exceptions are not without force. For example, the Court has admitted juror testimony regarding alleged bribes to jurors,[75] external information such as newspapers in the jury deliberation room,[76] and a

72. *See, e.g.*, United States v. Lakhani, 480 F.3d 171, 185 (3d Cir. 2007) (drawing a distinction between the jury foreman's threats and bribery of a juror as an "extraneous influences"); Anderson v. Miller, 346 F.3d 315, 329–30 (2d Cir. 2003) (denying that the alleged threats that occurred during deliberation are grounds for a new trial as the jurors differ on the nature of the threats, and furthermore, the jurors had an opportunity to disclose this information to court officials throughout the process of deliberation).

73. *See* Tanner v. United States, 483 U.S. 107, 127 (1987).

74. *See, e.g.*, Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1080 (3d Cir. 1985) (concluding that a juror's alleged self-diagnosed hearing impairment that may have impeded his ability to hear all the evidence adduced during trial does not constitute an "extraneous prejudic[e]" or "outside influence"; therefore, fell outside of the Rule 606(b) exceptions); United States v. Dioguardi, 492 F.2d 70, 80 (2d Cir. 1974) (concluding that the court generally will not consider allegations of a juror's mental incompetence post-verdict unless "there be proof of an adjudication of insanity or mental incompetence closely in advance . . . of jury service" or "a closely contemporaneous and independent post-trial adjudication of incompetency").

75. *See* United States v. Cheek, 94 F.3d 136, 140, 144 (4th Cir. 1996) (holding that a defendant was entitled to a new trial after his codefendant allegedly attempted to bribe a juror during the trial, despite no real exchange of money and the overall failure of the alleged attempt, as this was "presumptively prejudicial" to the defendant's trial); *see also* Remmer v. United States, 350 U.S. 377, 380–81 (1956) (granting a new trial for the defendant after a juror was bribed and reported it to the trial judge, who referred the matter to the Federal Bureau of Investigation; there were no repercussions).

76. *See* United States v. Thomas, 463 F.2d 1061, 1062–63, 1065 (7th Cir. 1972) (vacating the defendant's conviction and granting a new trial on the basis of juror testimony that several jurors had copies of the Chicago tribune, which contained information "outside the record and not properly before the jury"); *see also* Mattox v. United States, 146 U.S. 140, 142–43, 150–51 (1892) (granting the defendant a new trial after the jury was exposed to a newspaper that discussed the status of the case, the jury's disposition as fact-finder, and the defendant's prior criminal history). *But see* United States v. Reid, 53 U.S. 361, 366 (1851) (declining to grant the defendant a new trial when the jury was exposed to a newspaper on the basis that nothing in the newspaper influenced the jury's decision).

bailiff's prejudicial comments regarding the defendant[77]—all on the basis that these examples embody the "extraneous prejudices" or "outside influences" that the exceptions to Rule 606(b) aim to admit for the validity of a post-verdict inquiry.

But what if the conduct in question does not fall into one of these three narrowly construed exceptions? Is the defendant left without redress? These questions have prompted some defendants to invoke their Sixth Amendment "right to a speedy and public trial, by an impartial jury"[78] to circumvent Rule 606(b).

C. *Sixth Amendment Challenges to Rule 606(b)*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[79] Left with the narrowly construed Rule 606(b) exceptions, defendants turned to their Sixth Amendment guarantee to an impartial jury to extract juror testimony to impeach the verdict upon discovery of a potentially "biased" decision. From the defendants' perspective, the Sixth Amendment afforded them an additional layer of protection that Rule 606(b) and its exceptions failed to provide.

In *Tanner v. United States*, the Supreme Court attempted to clarify the relationship between the Sixth Amendment and Rule 606(b) when considering whether the lower court's failure to admit juror testimony upon the defendant-petitioners' motion for a new trial was improper after the jury handed down a guilty verdict for mail fraud.[80] Notwithstanding the willingness of a juror to testify that "several of the jurors consumed alcohol during the lunch breaks at various times throughout the trial,

77. *See* Parker v. Gladden, 385 U.S. 363, 363–64 (1966) (reversing the lower court's denial of post-conviction relief for defendant after the bailiff in charge of supervising the sequestered jury told a juror that the defendant was "a wicked fellow" who was "guilty" and later informed another juror that if the defendant were found guilty and there was an issue, the Supreme Court would "correct it"); *see also Mattox*, 146 U.S. at 142, 150–51 (reasoning that a bailiff's comments to the jury regarding the defendant's prior criminal activity, or reputation for such activity, in conjunction with the jury's exposure to a newspaper, warrants the grant of a new trial).

78. U.S. CONST. amend. VI.

79. *Id.*

80. *See* 483 U.S. 107, 113 (1987).

causing them to sleep through the afternoons," the trial court determined that this juror's testimony regarding the alleged intoxication was inadmissible under Rule 606(b).[81] While pending appeal, the defendant-petitioners filed an additional new trial motion after another juror shared anecdotes of marijuana sales between jurors, the ingestion of cocaine by some jurors, and similar testimony regarding frequent alcohol consumption while court was in recess.[82] The trial court denied both of the defendant-petitioners' motions for a new trial and rendered the forthcoming jurors' testimony inadmissible, which the Eleventh Circuit affirmed.[83]

The defendant-petitioners, on appeal to the Supreme Court, argued that their Sixth Amendment guarantee "to trial by a competent jury" compelled an evidentiary hearing that included the willing jurors' testimony regarding the ingestion of drugs and alcohol during trial.[84] Upon review, the Supreme Court emphasized "the near-universal and firmly established common-law rule in the United States [that] flatly prohibit[s] the admission of juror testimony to impeach a jury verdict."[85] The Court continued,

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency,

81. *Id.*

82. *Id.* at 115–16.

83. *Id.*

84. *Id.* at 116–17. Defendant-petitioners also argued—to no avail—that the jurors' particular testimony was not barred by Rule 606(b), as the jurors' substance abuse throughout the trial embodied an "outside influence" and fell under the exceptions to Rule 606(b)(2)(B). *Id.* at 122. The Court made short-shrift of this argument by emphasizing the legislative history and Congress's rejection of a "version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication"; therefore, the jurors' substance abuse was not considered an "outside influence" under Rule 606(b)(2)(B). *Id.* at 125.

85. *Id.* at 117.

> or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.[86]

To supplement the policy rationale behind the inadmissibility of juror testimony, the Court discussed four remaining safeguards to assure an impartial jury: (1) the questioning of all potential jurors during *voir dire*, (2) the observation of the jury by the court, counsel for both parties, and officers of the court throughout the trial, (3) the observation of jurors by one another and the ability to report inappropriate conduct prior to the verdict, and (4) the right to use non-juror evidence to impeach the verdict.[87] As such, the Court rejected the defendant-petitioners' Sixth Amendment argument, finding that the lower court did not err in concluding that Rule 606(b) barred the proffered juror testimony.[88]

The question over the Sixth Amendment's relationship with Rule 606(b), although posed to some lower courts over the years,[89] did not reach the Supreme Court again until the Court

86. *Id.* at 120–21 (citation omitted).

87. *See id.* at 127.

88. *See id.*

89. *See, e.g.*, United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009) (stating that although it is within a trial judge's discretion to "hold an inquiry into possible bias in jury deliberations," there is a general prohibition of jury testimony to "protect a frank and candid jury deliberation process"); United States v. Benally, 546 F.3d 1230, 1240 (10th Cir. 2008) ("Where the attempt to cure defects in the jury process—here, the possibility that racial bias played a role in the jury's deliberations—entails the sacrifice of structural features in the justice system that have important systemic benefits, it is not necessarily in the interest of the overall justice to do so."); Anderson v. Miller, 346 F.3d 315, 330 (2d Cir. 2003) (rejecting a defendant's writ of habeas corpus and reasoning that although "the deliberations of the jury that convicted him were clearly something less than a model of rational discourse, it cannot be said that [defendant] received a perfect trial. But because the jurisprudence of our system of trial by jury allows us to

granted certiorari in *Warger v. Shauers*, where the lower court excluded a plaintiff's proffered juror testimony evidencing another juror's dishonesty during *voir dire* pursuant to Rule 606(b).[90] Notwithstanding the plaintiff's severe left leg injury that ultimately required amputation, the jury returned a verdict in favor of the defendant in this negligence action for a vehicular accident.[91]

After the verdict, a juror contacted the plaintiff's counsel to share statements made by a fellow juror during deliberation, which included anecdotes of a car accident the juror's daughter caused that ultimately killed the other driver and the juror's revelation that "if [this juror's] daughter had been sued, it would have 'ruined her life.'"[92] Although plaintiff's counsel asked specific questions probing the potential juror's ability to be impartial and only listen to the evidence, this juror presumably lied to allay the counsel's concerns.[93] The plaintiff moved for a new trial upon discovery of this particular juror's testimony and asserted—to no avail—that the juror lied during *voir dire* regarding her ability to be impartial and hear the evidence.[94] The Eighth Circuit affirmed the lower court's decision to omit the juror testimony and denied the plaintiff's motion for a new trial.[95]

Upon review at the Supreme Court, the plaintiff—in addition to questioning the scope of Rule 606(b) and its applicability to this particular juror testimony—argued that "parties [should] be allowed to use evidence of deliberations to demonstrate that a juror lied during *voir dire*" pursuant to any litigant's right to an impartial jury guaranteed by the Sixth Amendment.[96] The Supreme Court unanimously rejected the plaintiff's contention

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overturn a jury's verdict only when its deliberations have taken the most egregious departures from rational discourse, we cannot say that [defendant] received an unfair [trial].").

90. 135 S. Ct. 521, 524–25 (2014).

91. *Id.* at 524.

92. *Id.*; Petition for Writ of Certiorari at 3, *Warger*, 135 S. Ct. 521 (No. 13-517).

93. *Warger*, 135 S. Ct. at 524.

94. *Id.* at 524–25.

95. *Id.* at 525.

96. *Id.* at 529.

because "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*."[97]

Even though *voir dire*, which is one of the four alleged "safeguards" proffered in *Tanner*, failed to ensure jury impartiality in this case, the Court bolstered its ultimate foreclosure of the plaintiff's contentions by emphasizing the remaining safeguards of the trial process.[98] These included "the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."[99] Despite *Tanner* and its progeny "foreclosing" this Sixth Amendment argument, it would not be the last time the Court heard it; Justice Kennedy would ultimately revive it.

II. *PEÑA-RODRIGUEZ V. COLORADO*: THE SIXTH AMENDMENT ARGUMENT REVIVED

After *Tanner*, the circuit courts struggled to determine the relationship between the Sixth Amendment and Rule 606(b) regarding post-verdict juror testimony to impeach verdicts linked to race-based animus expressed during deliberation.[100] The resulting circuit split likely led to the Supreme Court granting certiorari in *Peña-Rodriguez*.[101] The Court has repeat-

97. *Id.*

98. *Id.*

99. *Id.*

100. *See generally* Leah S.P. Rabin, Comment, *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 (2011) (discussing the *Tanner* safeguards, in particular *voir dire*, and the Sixth Amendment regarding racial bias in jury deliberation).

101. *Compare* United States v. Henley, 238 F.3d 1111, 1119, 1121 (9th Cir. 2001) (addressing a defendant's Sixth Amendment claim when a juror stated "[a]ll the n*****s should hang" and continuous use of the derogatory term "n*****" in reference to African American persons, but stating in dictum that racial bias might be beyond the purview of Rule 606(b)'s general prohibition), *with* United States v. Benally, 546 F.3d 1230, 1231–32 (10th Cir. 2008) (rejecting a defendant's Sixth Amendment claim to admit juror testimony regarding a juror's statement that all Native Americans are violent drunks and that the jury should "send a message back to the reservation" under the precedent of *Tanner*), *and* United States v. Villar, 586 F.3d 76, 81, 84 (1st Cir. 2009) (rejecting a Hispanic defendant's Sixth Amendment claim despite juror testimony

edly held that "[a] defendant is entitled to a fair trial but not a perfect one."[102] However, can a trial really be "fair" as understood and required by our Constitution if jury deliberation is contaminated by racially-motivated bias or discrimination? Justice Kennedy, in *Peña-Rodriguez*, answered this question in the negative.

Defendant Miguel Angel Peña-Rodriguez allegedly entered a bathroom at the horse race track where he was employed, offered alcohol to two teenage girls in said bathroom, and then attempted to sexually assault the girls.[103] Peña-Rodriguez was charged and prosecuted for felony sexual assault on a victim under the age of fifteen, a misdemeanor charge for unlawful sexual contact, and two misdemeanor charges of harassment.[104] After reporting a potential hung jury and receiving a supplemental jury instruction from the judge, the jury deliberated for only twelve hours and ultimately found Peña-Rodriguez guilty of the charged misdemeanors; however, the jury never reached a verdict regarding the sexual assault felony.[105] After the verdict, Peña-Rodriguez's counsel addressed the jury in the deliberation room, during which two jurors informed counsel that another juror had expressed anti-Hispanic animus toward Peña-Rodriguez and his alibi witness.[106]

The jurors who came forward reported the misconduct in affidavits under court supervision for purposes of Peña-

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that a juror stated, "I guess we're profiling but *they* all cause the trouble," referring to Hispanic people (emphasis added)).

102. Rabin, *supra* note 100, at 537 & n.5 (citing several Supreme Court cases in which the Court iterated this exact principle when addressing Sixth Amendment arguments).

103. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017); *see also* Kevin Zhao, Comment, *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, 34 (2016).

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

105. *See* Zhao, *supra* note 103, at 34. The jury never reached a verdict regarding the felony attempted assault. *See Peña-Rodriguez*, 137 S. Ct. at 862. Pursuant to the jury's guilty verdict, Peña-Rodriguez was sentenced to two years of probation and had already served this term by the Supreme Court's grant of certiorari in 2016. *See* Kira Mitchell, *U.S. Supreme Court Agrees to Take Up Colorado Bias Case*, DENVER POST (Apr. 4, 2016, 2:22 AM), https://www.denverpost.com/2016/04/04/u-s-supreme-court-agrees-to-take-up-colorado-bias-case/. Peña-Rodriguez was also required to register as a sex offender. *See Peña-Rodriguez*, 137 S. Ct. at 862.

106. *See id.* at 861.

Rodriguez's appeal.[107] The alleged comments were not one-off, isolated remarks or covert, racially-charged remarks; rather, these alleged statements expressed blatant hatred and distaste for persons of Hispanic descent. For example, one juror—a former law enforcement officer—informed other jurors that he "believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."[108] He also allegedly stated "his belief that Mexican men are physically controlling of women because of their sense of entitlement" and he thought Peña-Rodriguez "did it because he's Mexican and Mexican men take whatever they want."[109] Moreover, this juror testified that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[110] He even went on to describe his doubts regarding the credibility of Peña-Rodriguez's alibi witness because the witness was "an illegal."[111]

Although the lower court judge reviewed the affidavits submitted by defense counsel and recognized the apparent bias, he ultimately concluded that the Colorado version of Rule 606(b) foreclosed any inquiry into the validity of the verdict with juror testimony regarding the *actual* deliberations.[112] This decision was echoed by all panels reviewing Peña-Rodriguez's claim as it made its way through the Colorado state court system.[113] As such, the Supreme Court granted certiorari to

107. *See id.*

108. *Id.* at 862 (quoting Brief for Criminal Justice Legal Foundation as Amicus Curiae Supporting Respondent at 4, *Peña-Rodriguez*, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 4760310, at *8 [hereinafter Brief for Criminal Justice Legal Foundation]).

109. *Id.* (quoting Brief for Criminal Justice Legal Foundation at 4, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606)).

110. *Id.* (quoting Brief for Criminal Justice Legal Foundation at 4, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606)).

111. *Id.* (quoting Brief for Criminal Justice Legal Foundation at 4, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606)).

112. *See id.*

113. *See id.*

address, yet again, the relationship between the Sixth Amendment and Rule 606(b).[114]

Notwithstanding the reluctance of the Supreme Court to consider the Sixth Amendment as an exception to the no-impeachment bar on juror testimony in *Warger*, Justice Kennedy, writing on behalf of the majority, opined to the contrary in April 2017. Justice Kennedy first paid credence to the Rule 606(b) jurisprudence through the aforementioned landmark precedents.[115] Preparing to answer the narrow issue before the Court—"whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt"[116]—Justice Kennedy even acknowledged the Supreme Court's decision only three years prior in *Warger*, which ostensibly reiterated the foreclosure of a Sixth Amendment exception for post-verdict juror impeachment testimony.[117] However, this seemingly categorical rejection was not so categorical; Justice Kennedy noted the Court's hedge in *Warger* that in the event that the issue was brought before the Court, it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the [jury deliberation] process."[118] Justice Kennedy decided that the day the *Warger* Court alluded to was upon the Court.

Justice Kennedy briefly acknowledged that "[t]he duty to confront racial animus in the justice system" had been one the Court welcomed as early as 1880.[119] He also described that "[a]n effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury" as critics would likely state, but rather an assurance "that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."[120]

114. *Id.* at 862–63.
115. *See id.* at 865–67.
116. *Id.* at 867.
117. *Id.* at 866–67.
118. *Id.* at 866 (quoting Warger v. Shauers, 135 S. Ct. 521, 529 (2014)).
119. *Id.* at 867.
120. *Id.* at 868.

He discussed the insufficiency of the four *Tanner* safeguards to address the seriousness of a jury tainted by racial animus.[121] For example, Justice Kennedy recognized that the inherent "stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations."[122] He emphasized the inherent difference between reporting a juror's personal experiences clouding judgment and essentially calling a juror a bigot.[123]

Recognizing the shortcomings of the *Tanner* safeguards, Justice Kennedy determined that the appropriate remedy for the severe and pervasive nature of racial animus in the justice system was best fulfilled by the right to a fair trial, as promised by the Sixth Amendment.[124] As such, he stated 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 of the jury trial guarantee.[125]

Before closing, likely to counter Justice Alito's dissenting comment that "it is doubtful that there are principled grounds for preventing the expansion of [this] holding,"[126] Justice Kennedy addressed the narrow application of the Court's decision to "egregious cases like this one."[127] Justice Kennedy emphasized that in a country which prides itself on equal justice under the law, "[t]he Nation must continue to make strides to overcome race-based discrimination."[128]

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121. *See id.* at 868–69.
122. *Id.* at 869.
123. *See id.*
124. *Id.*
125. *Id.* (emphasis added).
126. *Id.* at 875 (Alito, J., dissenting).
127. *Id.* at 871.
128. *Id.*

Justice Kennedy's opinion in *Peña-Rodriguez*, resulting in a 6–3 majority,[129] breathed life into the admissibility of juror impeachment testimony through the Sixth Amendment doctrine that seemed to be categorically foreclosed only three decades prior in *Tanner*. The remainder of this Note will argue that this "narrow" exception Justice Kennedy and the *Peña-Rodriguez* majority declared for race-based animus tainting jury deliberation and a defendant's constitutional guarantee for a fair trial should now be extended to gender-based animus.

III. FIRST COMES RACE PROTECTION, THEN GENDER . . . OR SO THAT HAS BEEN THE TREND

While Justice Kennedy and the *Peña-Rodriquez* majority cautioned throughout much of its analysis that the decision was limited to correcting the unfortunate embedded nature of racial animus throughout U.S. history, gender-motivated bias and animus is no less prevalent in the United States—especially in recent headlines detailing the long-silenced group of females speaking out against their abusers.[130] The Supreme Court is no stranger to this concern. Notably, over three decades ago, the Supreme Court analogized discrimination on the basis of race to discrimination on the basis of gender in *Roberts v. U.S. Jaycees*: "That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[131]

The trend in American jurisprudence—for example, the Fourteenth Amendment's equal protection doctrine, Title VII of the Civil Rights Act of 1964, and other instances in the justice system—has echoed the *Jaycees* Court's sentiments and often extended protections granted to race classifications to gender

129. *Id.* at 860.

130. *See id.*; *supra* notes 1–3 and accompanying text.

131. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

classifications.[132] As such, the next sub-section will briefly discuss instances in which protections applied to race were ultimately, whether from the beginning or after some litigation, extended to gender-based classifications. This examination illustrates a pattern in American law of extending protections granted for race-based classifications or discrimination to gender-based classifications or discrimination.

A. *Extensions from Race to Gender: Equal Protection Doctrine*

One of the primary examples of protections extended from race to gender classifications is that developed during the mid-to-late twentieth century in the Court's equal protection jurisprudence and the respective levels of constitutional scrutiny for these suspect and quasi-suspect classifications. For example, in 1967 the Supreme Court heard a challenge to Virginia's miscegenation statute making interracial marriage between a "colored" person and a white person a felonious offense punishable by a term of imprisonment from one to five years.[133] The Supreme Court framed its analysis within the purported "clear and central purpose of the Fourteenth Amendment," which it deemed "was to eliminate all official state sources of invidious racial discrimination in the States."[134]

With this purpose in mind, the Court reasoned that classifications such as those which the Virginia miscegenation statute employed were unconstitutional.[135] The Court stated that the Equal Protection Clause of the Fourteenth Amendment

> [a]t the very least . . . demands that racial classifications . . . be subjected to the "most rigid scrutiny," and, if [these classifications] are ever to be upheld, they must be shown to be necessary to

132. *See* U.S. CONST. amend. XIV; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(2) (1964) (expressing the trend in American Jurisprudence to recognize minority classes and extending protection to them).

133. Loving v. Virginia, 388 U.S. 1, 4 (1967).

134. *Id.* at 10.

135. *Id.* at 11–12.

> the accomplishment of some permissible state objective, independent of the racial discrimination.[136]

The "most rigid scrutiny" test that the Supreme Court applied to Virginia's miscegenation statute—and the standard that applies to all race-based classifications—has been referred to as "strict scrutiny," or the "most exacting scrutiny."[137]

Within ten years, then Professor and now esteemed Justice Ruth Bader Ginsburg—with assistance from the American Civil Liberties Union—would appear in front of the Supreme Court to endorse the extension of this "most rigid scrutiny" doctrine to gender classifications.[138] For example, in 1973 Ginsburg argued in favor of an application of "heightened scrutiny," similar to that which was applied to race, in a case involving a gender-based classification for collection of military benefits—only six years after the Supreme Court declared the requirement of the "most rigid scrutiny" to race-based classifications.[139]

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136. *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

137. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005) (applying what it referred to as "strict scrutiny" to California state prison policy classifications on the basis of race, describing that "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (stating that the "most exacting scrutiny" applied to a race-based custody decision, and in order to survive this test and "pass constitutional muster, [race-based classifications] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose" (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964))).

138. *See* Sara Fritz, *Inch by Inch, Ginsburg Set Gender Scale Toward Center*, L.A. TIMES (June 28, 1993), http://articles.latimes.com/1993-06-28/news/mn-7987_1_supreme-court. *See generally* Panel Discussion, Reed v. Reed *at 40: Equal Protection and Women's Rights*, 20 AM. U. J. GENDER SOC. POL'Y & L. 315 (2012) (discussing reactions to the development of the Equal Protection doctrine in the purview of gender as pioneered by Justice Ruth Bader Ginsburg in the 1970s). Notably, while Justice Ginsburg is credited for bringing the race-gender analogy to the Supreme Court's attention in *Frontiero v. Richardson*, Pauli Murray—an African American civil rights attorney—was the pioneer of the race-gender analogy beginning in the 1960s Civil Rights Movement. *See* Serena Mayeri, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1045–46 (2001).

139. Frontiero v. Richardson, 411 U.S. 677, 682 (1973); *see* Fritz, *supra* note 138 (reflecting on Justice Ruth Bader Ginsburg's impact on the Equal Protection doctrine in the 1970s and stating that "Ginsburg decided to duplicate what she described as 'the orderly, step-by-step campaign' of the civil rights litigation that led to Brown vs. Board of Education in 1954, which overturned the 'separate but equal' principle. But she would substitute gender for race.").

While the Court agreed with Ginsburg's argument that some sort of "heightened judicial scrutiny" should be applied to gender-based classifications, the exact test remained unresolved.[140]

Although reluctant to apply the "most exacting judicial scrutiny" to gender-based classifications, Justice Brennan—writing for the plurality—discussed the history of invidious discrimination based on gender in the United States.[141] Throughout history, women—like African Americans—were not permitted to sit on juries or hold public office; married women were even unable to own property or serve as a legal guardian to their children.[142] Justice Brennan acknowledged that despite the relative improvements for women in America, "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[143] As such, the stage was set for another plaintiff to proffer a compelling argument to heighten the scrutiny for gender-based classifications.

Three years later, the Supreme Court addressed the constitutionality of an Oklahoma statute differentiating the sale of 3.2% beer between males and females: females were able to purchase these beverages at eighteen years old, whereas males were prohibited from purchasing the 3.2% beer until the age of twenty-one.[144] The Supreme Court developed a standard—albeit not as stringent as "the most rigid scrutiny"—to apply to gender-based classifications, articulating that these classifications cannot serve as a "proxy" of legitimate nondiscriminatory government action.[145] The Court described this "intermediate scrutiny" standard as follows: "To withstand constitutional challenge, previous cases establish that classify-

140. *See Frontiero*, 411 U.S. at 691–92 (Powell, J., concurring).

141. *Id.* at 685–86.

142. *Id.* at 685.

143. *Id.* at 686.

144. Craig v. Boren, 429 U.S. 190, 191–92 (1976).

145. *Id.* at 204.

cations by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[146] Applying this standard, the Supreme Court invalidated the law,[147] and thus marked the first articulation of a heightened scrutiny for gender classifications that continues to invalidate these suspect classifications.[148]

While the scrutiny applied to gender classifications is not as stringent as that applied to race classifications, the application of a heightened standard indicates the highest Court's recognition of the dangers of allowing these biases and discrimination to persist.

B. *Title VII: The Alleged "Fluke" Protecting both Race and Gender*

It is common knowledge that the civil rights movement in the late 1950s and early 1960s revolved around pervasive racial discrimination and animus. Led by Dr. Martin Luther King, Jr. and President Lyndon B. Johnson's open support for the civil rights movement, thousands of activists engaged in civil disobedience to share their pursuit of liberty and equality. The movement soon gained widespread national attention—and success.[149] Additionally, the Supreme Court's willingness to reassess—and ultimately strike down—the constitutional validity of *Plessy v. Ferguson*'s "separate but equal" legacy in places of public accommodation[150] and the success of protests like the

146. *Id.* at 197.

147. *Id.* at 204.

148. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996) (discussing the evolution of gender classification's presumptive invalidity since 1971 and applying this heightened scrutiny to invalidate a military institution that was sex-segregated); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–28 (1982) (applying the "intermediate scrutiny" standard to a nursing school that refused to enroll male nursing students for credit and adding the idea that this standard must be applied "free of fixed notions concerning the roles and abilities of males and females").

149. *See* Juan F. Perea, *An Essay on the Iconic Status of the Civil Rights Movement and Its Unintended Consequences*, 18 VA. J. SOC. POL'Y & L. 44, 46 (2010).

150. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954) (holding that the "separate but equal" doctrine established in *Plessy* had no place in public education).

Montgomery Bus Boycott and the March on Washington sparked hope for change.[151]

That said, the pinnacle moment in the movement's efforts to combat invidious racial discrimination came when Congress enacted the Civil Rights Act of 1964.[152] While the focus of the 1960s civil rights movement was to eliminate pervasive racial discrimination throughout the United States, the word "sex"[153] was added into the movement's landmark federal legislation—namely, Title VII of the Civil Rights Act.[154] The relevant provisions of Title VII render it "an unlawful employment practice for an employer . . . [to discriminate on the basis of] such individual's race, color, religion, *sex*, or national origin."[155]

The precise reason why Title VII included sex discrimination with racial discrimination is unclear.[156] Academics—and even the entity tasked with enforcement of Title VII, the Equal Employment Opportunities Commission (EEOC)—often characterize the inclusion of the sex discrimination provision as a "fluke."[157] More specifically, some speculate that "opponents of the job discrimination title . . . decided to try to load up the bill with objectionable features that might split the coalition supporting it."[158] Here, the "objectionable feature" was the

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151. *See* Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1148–50 (2005).

152. *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991) (referring to the Civil Rights Act as a "milestone of federal legislation").

153. This section will refer to gender as "sex." The relevant provision of the Civil Rights Act uses the term sex for what this Note refers to as "gender."

154. Freeman, *supra* note 152.

155. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(2) (1964) (emphasis added).

156. *See* Freeman, *supra* note 152.

157. *Id.* at 163–64 (discussing that even the EEOC attempted but failed to squelch the "sex" amendment; indeed, "one-third of the complaints filed with the EEOC in the first year charged discrimination on the basis of sex").

158. *Id.* at 164 (quoting GARY ORFIELD, CONGRESSIONAL POWERS: CONGRESS AND SOCIAL CHANGE 299 (1975)); *see* Rosenberg, *supra* note 151, at 1151 (stating that "[t]he inclusion of the prohibition of sex discrimination in Title VII appears to have resulted in large part from a failure of a tactical move by opponents of the civil rights bill" because "[t]he thinking was that prohibiting sex discrimination in hiring was such a silly idea that its inclusion in the bill would doom it").

addition of sex discrimination in the legislation, because apparently the only thing less desirable than a workplace absent race discrimination is a workplace absent sex discrimination.

Regardless of whether the inclusion of sex discrimination was a fluke or instead based on a genuine recognition of a problem, Title VII protects race and sex even-handedly and provides another example of the law protecting both race and gender classifications.

C. *Equal Protection and the Peremptory Challenge: From* Batson *to* J.E.B.

A related topic is the Supreme Court's application of the equal protection doctrine to peremptory challenges in the jury selection process. For example, in 1986 the Supreme Court determined in *Batson v. Kentucky* that using a peremptory challenge to exclude a juror during jury selection solely on the basis of the prospective juror's race was a violation of the Equal Protection Clause of the Fourteenth Amendment.[159]

The *Batson* decision likely surprised the public, given the Supreme Court's rejection of an African American male defendant's challenge to a prosecutor's similar practice just twenty years prior, after the defendant was convicted of rape by an all-white jury.[160] Nonetheless, the *Batson* Court addressed a defendant's similar claim and found that the Constitution required an examination of a prosecutor's decision to strike a juror if the defense counsel timely objected that the prosecution did so solely on the basis of the potential juror's race.[161] The *Batson* majority emphasized the previous pattern of race discrimination in the United States—the systemic exclusion of African American males to serve on a jury—to reach its decision.[162] As such, the Court determined that if a defendant

159. *See* 476 U.S. 79, 89 (1986).

160. *See* Swain v. Alabama, 380 U.S. 202, 222–24 (1965).

161. *See Batson*, 476 U.S. at 100.

162. *See id.* at 85–89; Strauder v. West Virginia, 100 U.S. 303, 305, 310 (1879) (holding that the West Virginia statute providing that "[a]ll white male persons who are twenty-one" are eligible to serve on a jury "amounts to a denial of the equal protection of the laws to a colored man").

established a prima facie case of purposeful discrimination by the prosecution, the burden shifts to the prosecution to proffer a "neutral explanation"; however, if such an explanation is not offered, the defendant's conviction may be reversed.[163]

Only eight years later—reminiscent of Justice Ginsburg's efforts to extend the strict scrutiny applied to race under the Equal Protection Clause to gender classifications—the Supreme Court granted certiorari in *J.E.B. v. Alabama ex rel. T.B.* to determine whether *Batson* prohibits preemptory strikes on the basis of gender.[164] The Court answered in the affirmative.[165]

Similar to *Batson*, the *J.E.B.* majority emphasized that women were entirely excluded from jury service until the twentieth century.[166] More specifically, the Court discussed the heightened scrutiny applied to gender-based classifications,[167] noting that "[w]hile 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.'"[168] Further, the opinion highlighted the dangers "to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process" if the Court allowed jury selection discrimination to persist.[169] As such, the Court ultimately concluded that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[170]

Not only does this embody another instance where American jurisprudence has protected race and gender alike; the opinion

163. *See Batson*, 476 U.S. at 100 (providing a three-prong analysis to apply to such claims, which many states have modeled theirs after); Leah M. Provost, Note, *Excavating from Inside: Race, Gender, and Peremptory Challenges*, 45 VAL. U. L. REV. 307, 316–20 (2010) (describing in more detail the *Batson* three-prong test and how it functions in practice).

164. 511 U.S. 127, 129 (1994).

165. *Id.*

166. *Id.* at 131.

167. *See supra* Section III.A.

168. *J.E.B.*, 511 U.S. at 135 (quoting Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)).

169. *Id.* at 140.

170. *Id.* at 129.

also contains language applicable to this Note's proposition. In closing, the Court cautioned against the potential danger of deciding otherwise: "The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."[171] If there is reluctance to extend the recent *Peña-Rodriguez* Sixth Amendment exception for juror testimony of egregious racial bias to gender-motivated bias, the loss of confidence in our system cautioned by the *J.E.B.* court will be substantiated.

IV. SO, YOU'RE CONCERNED ABOUT THE SLIPPERY SLOPE?

As illustrated above, the Court and even Congress have conferred similar protections to race and gender as suspect classifications; therefore, any concern with expanding the *Peña-Rodriquez* Sixth Amendment guarantee of a right to a fair trial should be allayed through an exploration of this general trend in American law. More specifically, courts addressing the potential to expand a race-based protection to gender often draw parallels between the history of race discrimination and gender discrimination in the United States.[172] While there is an inherent difference between race discrimination and gender discrimination in our country, there are undeniable parallels between the subordinate status of racial minorities and the subordinate status of women in the United States.[173] For example, as the *Frontiero* and *J.E.B.* Courts recognized, women—like African American citizens—were similarly denied the right to sit on a jury, the right to vote, the right to own property, and the right to hold public office throughout history.[174] The Supreme Court has previously drawn on these similarities between racial minorities and women in the United States to afford greater protections to classifications and

171. *Id.* at 140.

172. *See supra* Section III.A–C.

173. *See* Mayeri, *supra* note 138, at 1046 (explaining that "the political connotations of analogies between race and sex are highly context-dependent and historically variable").

174. *See supra* notes 141–43, 166–68 and accompanying text.

discrimination based on gender. For example, the Supreme Court reasoned that the "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[175] Accordingly, the extension of the *Peña-Rodriguez* Sixth Amendment exception to Rule 606(b)'s general prohibition on juror impeachment testimony post-verdict is hardly drastic.

As one scholar boldly stated, "Ever since there have been juries, there has been juror misconduct."[176] Through the detailed analysis from the common-law categorical prohibition on juror testimony to the modern applications of Rule 606(b), the reality that juries are susceptible to misconduct and impropriety is obvious. Examples abound of juror intoxication, misrepresentations during *voir dire*, and racial biases clouding the juror's duty of impartiality.[177] Even Justice Kennedy noted that "[l]ike all human institutions, the jury system has its flaws."[178] Nonetheless, juries are considered the "central foundation of our justice system and our democracy,"[179] and the right to an impartial jury has been revered as a "touchstone of a fair trial."[180] Rather than doing away with juries in those cases that are particularly susceptible to juror biases, as one journalist has suggested,[181] certain flaws can be remedied by our Constitution—here, the Sixth Amendment guarantee to an impartial jury. The Supreme Court has already recognized a need for the

175. Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

176. Huebner, *supra* note 9, at 1469.

177. *See, e.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862–63 (2017) (racial bias motivating the verdict); Wargers v. Shauers, 135 S. Ct. 521, 524–25 (2014) (juror misrepresentation during *voir dire*); Tanner v. United States, 483 U.S. 107, 113 (1987) (juror intoxication); United States v. Villar, 586 F.3d 76, 81–84 (1st Cir. 2009) (racial bias motivating the verdict); United States v. Benally, 546 F.3d 1230, 1231–32 (10th Cir. 2008) (same); United States v. Henley, 238 F.3d 1111, 1119, 1121 (9th Cir. 2001) (same); Perry v. Bailey, 12 Kan. 539, 543–45 (1874) (juror intoxication).

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

179. *Id.* at 860.

180. Huebner, *supra* note 9, at 1469 (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1982)).

181. *See* Bindel, *supra* note 4 (arguing that juries have no place in rape trials due to the prevalence of biases surrounding sexual assault).

Sixth Amendment exception to Rule 606(b) to remedy the threat of racial biases tainting the sanctity of what is supposed to be an impartial jury deliberation.[182] As such, this rule protects against juror biases.

Skeptics will likely echo Justice Alito's concerns expressed in the *Peña-Rodriguez* dissent in response to this Note's proposition.[183] Justice Alito critiqued the majority opinion, arguing that "with the admirable intention of providing justice for one criminal defendant, the Court not only pries open the door; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution."[184] He further cautioned the likelihood of a limitless expansion of this doctrine.[185]

However, this "opening of the flood-gates" argument, often referred to as the slippery slope, is without merit. Notably, Justice Kennedy anticipated this argument and safeguarded the "prying open" of the jury deliberation door for allegations of juror bias by explicitly holding that "not *every* offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[186] This exception requires overt jury commentary that casts "serious doubt on the fairness and impartiality" of deliberation, and further, the commentary must be a "significant motivating factor" of the ultimate verdict.[187]

As Chief Justice Burger stated when considering the reality of private biases in our society, "The Constitution cannot control

182. *See supra* Part II.

183. *See Peña-Rodriguez*, 137 S. Ct. at 874–85. *See generally* Mark Walsh, *Bias Behind Closed Doors: Racially Discriminating Statements Made in the Privacy of Jury Rooms Are Subject to Scrutiny*, 103 A.B.A. J. 20 (2017) (discussing the *Peña-Rodriguez* decision and referring to Justice Alito's dissent by the fear that this case pried open the door to jury deliberations which the no-impeachment rule sought to protect).

184. *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

185. *See id.* (Alito, J., dissenting).

186. *Id.* at 869 (majority opinion) (emphasis added); *see* United States v. Villar, 586 F.3d 76, 88 (1st Cir. 2009) ("The determination of whether an inquiry is necessary to vindicate a criminally accused's constitutional due process and Sixth Amendment rights is best made by the trial judge, who is most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment.").

187. *See Peña-Rodriguez*, 137 S. Ct. at 869.

such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[188] A reluctance—or worse yet, a refusal—to extend the *Peña-Rodriguez* Sixth Amendment exception to the general no-impeachment bar in the face of an affidavit expressing the presence of gender animus within the four walls of jury deliberation may, indirectly, not only give those private biases effect but also give them the state's stamp of approval. Allowing a verdict motivated by gender animus despite evidence of private biases clouding the independent judgment of a juror could result in a "loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."[189]

Thus, the policy that justified the common-law priority—and echoed in the adoption of Rule 606(b) and its subsequent jurisprudence—to protect the secrecy of jury deliberation is outweighed by the threat of individual injury on the basis of gender prejudice in our society. Expanding the *Peña-Rodriguez* Sixth Amendment exception to the no-impeachment rule does not threaten public injury; rather, it serves as a protection to the public from the further injury of implicitly approving pervasive gender animus by turning a blind eye (or in this case a deaf ear).

Furthermore, with the #MeToo movement in full swing, this extension is necessary now more than ever to protect both the accused and the accuser—and most importantly, the integrity of our justice system.[190] With several women coming forward about past abuse after years—and sometimes decades—of silence, the public discourse surrounding the validity of such claims is extreme on both ends, as illustrated by the widespread political and public reaction to (now Justice) Brett Kavanaugh's confirmation hearings. This reality could potentially lead to an

188. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

189. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994).

190. While this Note discussed the significance of extending the *Peña-Rodriguez* Sixth Amendment exception to Rule 606(b) in the context of #MeToo and sexual assault or harassment cases, this exception would apply to all cases where there is evidence that gender motivated a verdict.

increasing temptation of jurors selected on a case like Bill Cosby's, Larry Nassar's, or Harvey Weinstein's, to allow their extreme, privately held biases to rear their ugly heads during jury deliberations—where the only consideration should be the evidence proffered at trial—rather than the juror's pre-conceived notions motivated by the #MeToo movement. Moreover, Time Magazine recently published a list of prominent public figures that have been accused of sexual misconduct since the accusations launched against Harvey Weinstein, which marked the beginning of the #MeToo movement in October 2017.[191] This list includes 142 names of accused public figures; notably, only one woman has been accused, illustrating the inherently gendered nature of the #MeToo movement.[192]

As such, in cases spurred by the #MeToo movement, the privately held biases likely to penetrate the deliberation room could be motivated by gender.[193] Examples of gendered utterances that might motivate a jury's verdict include comments regarding the way the accuser was dressed, questions of what a juror would think if the accused were a male relative or spouse, and presumptions of guilt or innocence due to the prevalence of such claims in today's headlines prior to even setting foot in the jury box.[194] For example, during *voir dire* before Bill Cosby's trial, the judge specifically addressed the prevalence of the #MeToo movement and its likely effects on the trial when he asked the potential jurors: "Do you have knowledge, have you read or seen anything about the #MeToo

191. *See* Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Nov. 9, 2017), http://time.com/5015204/harvey-weinstein-scandal/.

192. *See id.*

193. *See, e.g.*, Bowley & Hurdle, *supra* note 2 (quoting the Cosby accusers' lawyer who stated that "[a]fter all is said and done, women were finally believed" after the jury found Bill Cosby guilty); Chitra Ramaswamy, *Why Are We So Desperate to Believe Men in Rape Cases?*, GUARDIAN (Sept. 24, 2018, 1:27 PM), https://www.theguardian.com/lifeandstyle/2018/sep/24/rape-conviction-figures-uk (addressing sexual assault from a gendered perspective; that is, either believing all women or believing all men).

194. *See* Bindel, *supra* note 4 (discussing comments made by jurors during rape trials).

movement or the allegations of sexual misconduct in the entertainment industry?"[195]

What is the real "harm" in condemning gender-based animus inside a jury room? The question is rhetorical. There is no harm in a society which condemns both racial *and* gender animus, by way of judicial precedent or an evidentiary rule created to provide the accused with an impartial, fair trial free from the biases of the outside world and juror's personal beliefs. Such biases have no place in today's society, let alone the justice system.

CONCLUSION

While the long-standing tradition of protecting the sanctity of the jury and the ability of jurors to engage in "full and frank discussions" without fear of exposure to the public is valid, the risk of gender animus contaminating what has been deemed the central foundation of our justice system—the jury—may require an exception to the broad prohibition. The safeguards provided by a three-decade-old, dated precedent no longer serve the values of equality our Constitution and American principles require.

Pursuant to the Sixth Amendment guarantee of a trial by an impartial jury, the Supreme Court recently carved out an exception to the general prohibition of post-verdict juror testimony to allow jurors to testify regarding statements that contained egregious racial bias during jury deliberation. This sudden shift in protecting the secrecy of jury deliberation indicates the highest Court's recognition that a defendant cannot have a fair trial by an impartial jury when the verdict is tainted by individual juror racial bias. The extension of protections afforded to racial classifications to those gender classifications is not some taboo suggestion; the Supreme Court and Congress have made similar extensions in other fields of

195. Angela Helm, *Judge Asks Potential Cosby Jurors About #MeToo Bias*, ROOT (Apr. 3, 2018, 4:50 PM), https://thegrapevine.theroot.com/judge-asks-potential-cosby-jurors-about-metoo-bias-1824295739.

law, a few of which have been discussed in this Note. In fact, when extending protections of race to gender, several esteemed Supreme Court justices drew analogies between the struggles among racial minorities and the struggles to achieve equality among the sexes in the United States. As such, the *Peña-Rodriguez* Sixth Amendment exception to juror testimony should be extended to juror testimony regarding any egregious gender-based animus occurring in jury deliberation.

Although a defendant is entitled to a fair, but not perfect trial, can defendants truly be afforded their constitutionally guaranteed "fair trial" if a juror may spew gender-based animosity while the law turns the other cheek?