

December 2019

## Expanding Peña-Rodriguez v. Colorado to Protect Criminal Defendants from Explicit Gender Animus

Katie Hicks

*University of Arkansas, Fayetteville*

Follow this and additional works at: <https://scholarworks.uark.edu/alr>



Part of the [Civil Rights and Discrimination Commons](#), [Inequality and Stratification Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Katie Hicks, *Expanding Peña-Rodriguez v. Colorado to Protect Criminal Defendants from Explicit Gender Animus*, 72 Ark. L. Rev. 525 (2019).

Available at: <https://scholarworks.uark.edu/alr/vol72/iss2/9>

This Comment is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact [ccmiddle@uark.edu](mailto:ccmiddle@uark.edu).

# Expanding Peña-Rodriguez v. Colorado to Protect Criminal Defendants from Explicit Gender Animus\*

## I. INTRODUCTION

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.<sup>1</sup>

In 2017, the United States Supreme Court extinguished explicit racial animus expressed during juror deliberations in criminal trials.<sup>2</sup> Though courts have repeatedly cloaked the jury's deliberation room—essentially, “black box”—in impenetrable armor, Miguel Angel Peña-Rodriguez leveraged the American promise of equality, piercing a juror's animus and bringing it within reach of the Court.<sup>3</sup> His case established that protection of the jury's black box decision making must yield to an even *more* fundamental protection: the equal protection of the law and the

---

\* J.D. Candidate, University of Arkansas School of Law, 2020. Editor-in-Chief of the Arkansas Law Review, 2019-2020. This author sincerely thanks Professor Alex Nunn, Assistant Professor of Law, University of Arkansas School of Law, for his thoughtful guidance, feedback, and wisdom during the drafting process. The author would also like to thank the remarkable editors of the Arkansas Law Review for their attention to detail and precision while editing. Finally, the author thanks her family and friends for their continual support, encouragement, interest, and love.

1. J.E.B. v. Alabama, 511 U.S. 127, 145-46 (1994).

2. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017) (“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.”).

3. *Id.* at 861.

right to a fair and impartial trial by jury.<sup>4</sup> Namely, the *Peña-Rodriguez v. Colorado*<sup>+</sup> decision fractured the “no impeachment” doctrine and Federal Rule of Evidence 606(b), for the first time permitting post-trial juror testimony to expose racial bias.<sup>5</sup> Ultimately, it provided a mechanism for criminal defendants to obtain a new—and *impartial*—trial.<sup>6</sup>

But Peña-Rodriguez’s narrow exception should not be viewed in isolation. Within our nation’s history exists a deeply-rooted phenomenon: the liberation of and extension of rights to African-Americans is often mirrored by the liberation of and extension of rights to American women.<sup>7</sup> Historically, where an inequality based on race has been identified and reconciled, the same inequality based on gender is subsequently identified and reconciled.<sup>8</sup> The liberation of women and the demand for gender equality followed the liberation of African-Americans and the demand for racial equality.<sup>9</sup> Demonstrations nationwide highlighted disadvantages similarly-held by African-Americans and women, such as prohibitions from holding elected positions, voting, serving on juries, independently bringing suit, holding or conveying property, and serving as legal guardians of their own children.<sup>10</sup> A basic outlay of American history demonstrates that

---

4. *Id.* (“A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.”). The Court further opined that such statements of explicit racial bias would, if left unaddressed, “risk systemic injury to the administration of justice.” *Id.* at 868. Further, “[a]n effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure 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.” *Id.*

+ Miguel Angel Peña-Rodriguez’s name appears with and without a tilde throughout this Note. This variation is not accidental, but rather represents the variations present throughout his case’s procedural history. However, the correct spelling of his last name includes the tilde.

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

6. *Id.* at 870-71 (though the Court noted that it “need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias”).

7. *See* discussion *infra* Section III.

8. *Id.*

9. *See infra* footnotes 130-53 and accompanying text.

10. *Id.*

where there is no tolerance for race-based discrimination, there is also no room for the existence of gender-based discrimination.

This Note begins by outlining the evolution of Federal Rule of Evidence 606(b), tracing its origins from the rigid English Mansfield Rule to a period of uncertainty in the late 19th and early 20th century. The focus of this history is to show that although Federal Rule of Evidence 606(b) appears absolute, courts nationwide have long recognized competing interests within the criminal justice system.<sup>11</sup> This Note will then depict how the grant of fundamental rights to women followed that of African Americans, emphasizing specifically the development of protections regarding peremptory challenges through an analysis of key cases such as *Batson v. Kentucky*<sup>12</sup> and *J.E.B. v. Alabama*.<sup>13</sup>

Because American history has recognized both racial and gender discrimination as egregious, worthy of amelioration through similar means, the Court's rejection of explicit racial animus must expand to also reject explicit gender animus. This Note argues that the fair administration of justice and the integrity of our judicial system<sup>14</sup> necessitate a jury free from explicit racial *and* gender animus. Ultimately, this Note will argue that the protection identified in 2017 by the United States Supreme Court in *Pena-Rodriguez v. Colorado*,<sup>15</sup> which permitted the admittance of post-trial juror testimony revealing explicit racial animus during juror deliberations, must also be extended to permit admittance of juror testimony revealing explicit gender animus.

---

11. See, e.g., *United States v. Reid*, 53 U.S. 361, 366 (1851) (“[C]ases might arise in which it would be impossible to refuse [juror affidavits impeaching their verdict] without violating the plainest principles of justice . . .”).

12. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

13. See generally *J.E.B.*, 511 U.S. 127 (1994); see also Jason Koffler, *Laboratories of Equal Justice: What State Experience Portends for Expansion of Pena-Rodriguez Exception Beyond Race*, 118 COLUM. L. REV. 6 (2018) (looking to the line of cases following *Batson v. Kentucky*, as well as to state cases addressing biases, and explaining that *Pena-Rodriguez v. Colorado* can expand to gender *and* religion).

14. *Id.* at 145-46.

15. See generally *Pena-Rodriguez*, 137 S. Ct. 855.

## II. THE NO-IMPEACHMENT DOCTRINE: A HISTORY

Courts in the United States have a longstanding history of prohibiting, in large part, post-trial juror testimony. Though the modern protectionary rule is today codified as Federal Rule of Evidence 606(b),<sup>16</sup> or the “no-impeachment doctrine,” its origins trace back to English common-law.<sup>17</sup>

## A. THE MANSFIELD RULE

During the early modern era, it was routine for early English courts to permit a juror’s affidavit or testimony without equivocation.<sup>18</sup> In 18<sup>th</sup> century England, however, Lord Mansfield first established what became known as the “Mansfield Rule.”<sup>19</sup> In *Vaise v. Delaval*, Lord Mansfield was forced to consider a defendant’s motion to set aside a verdict reached after indecisive jurors tossed a coin to determine his innocence or guilt.<sup>20</sup> Despite the atrociousness of the jury’s actions, Lord Mansfield unequivocally declared that the common law prohibited a juror’s affidavit in support of the defendant’s motion.<sup>21</sup> Although Lord Mansfield acknowledged that the jurors’ coin toss constituted misconduct, he opined that the Court should not derive its knowledge of that misconduct from a juror’s post-trial affidavit.<sup>22</sup>

The Mansfield Rule was thus premised on the doctrine that a person should not “be heard to allege his own turpitude.”<sup>23</sup> That

---

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

17. Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 171 (2011).

18. *See* Norman v. Beaumont (1744) 125 Eng. Rep. 1281, 1282 (explaining that the court “always admitted” post-trial juror affidavits regarding “a misbehaviour of any of the jury, or any declaration made by any of [the jurors] either before or after the verdict to shew that a juryman was partial”); *see also* Phillips v. Fowler (1735) 94 Eng. Rep. 998; Metcalfe v. Deane (1590) 78 Eng. Rep. 445.

19. West, *supra* note 17.

20. *Vaise v. Delaval* (1785) 99 Eng. Rep. 944.

21. *Id.*

22. *Id.* (explaining that the court should instead get information regarding juror misconduct “from some person having seen the [misconduct] through a window, or by such other means”).

23. Ronald L. Carlson & Steven M. Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 248 (1978).

is, a juror should not be asked to testify to misconduct in which he and his fellow jurors partook.<sup>24</sup> This rationale would later become the broad rule to which courts nationwide are now familiar: “A juror may not impeach his own verdict.”<sup>25</sup> The Mansfield Rule distinguished between a juror’s testimony and that of a third-party actor, preventing a juror from testifying against his fellow jurors.<sup>26</sup> It enacted a stringent ban on juror testimony, even where there was severe and damaging misconduct by the jury; but its absolutism and rigidity gave rise to subsequent criticism.<sup>27</sup> Critics have said that the Mansfield Rule was “neither strictly correct as a statement of the acknowledged law nor at all defensible upon any principle in this unqualified form” and that it was a “mere shibboleth and [had] no intrinsic signification whatever.”<sup>28</sup>

## B. UNCERTAINTY IN THE REGIME

Though courts in the United States were hesitant to disrupt the finality of jury verdicts by way of juror testimony or affidavit,<sup>29</sup> they were also hesitant to adopt the Mansfield Rule in its strict and expansive form.<sup>30</sup> Many jurisdictions did adopt the Mansfield Rule in a limited form, but those jurisdictions provided flexibility for situations in which principles of justice required jurors’ testimony to correct juror misconduct or error.<sup>31</sup> In *United States v. Reid*, for example, the United States Supreme Court foresaw that circumstances might arise in which it would be “impossible” to refuse post-trial juror testimony without “violating the plainest principles of justice.”<sup>32</sup> This opinion,

---

24. *Id.* at 249.

25. Christopher B. Mueller, *Jurors’ Impeachment of Verdicts and Indictments in Federal Court under Rule 606(b)*, 57 NEB. L. REV. 920, 924 (1978).

26. *Id.* at 954-55.

27. Fraser Holmes, *Becoming Penelopes: Rethinking the Federal No-Impeachment Rule After Peña-Rodriguez*, 96 TEX. L. REV. 1053, 1055 (2018).

28. *Id.*

29. *United States v. Reid*, 53 U.S. 361, 366 (1851) (explaining that post-trial juror testimony to impeach a verdict should “always be received with great caution”).

30. Mueller, *supra* note 25 at 924-25.

31. *Id.* at 925.

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

providing that the Mansfield Rule is not always appropriate and must sometimes yield in the interest of justice, represented the first departure from the rigidity of the Old English common law regime.<sup>33</sup>

Fifteen years following *Reid*—and after years of legal uncertainty within Iowa state courts—the Supreme Court of Iowa expressly rejected the absolutism of the Mansfield Rule.<sup>34</sup> The court instead issued a concise rule, remedying Iowa’s history of uncertainty regarding the no-impeachment rule while also establishing a model rule to which the rest of the United States would look.<sup>35</sup> This rule acknowledged that though a jury’s verdict should typically remain undisturbed, where there is juror misconduct there is also “no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose

---

33. 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, 881 (2009).

34. See *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 209-13 (Iowa 1866); see also *Lloyd v. McClure*, 2 Greene 139 (Iowa 1849) (holding that a new trial should not be granted unless it is “apparent” that “manifest injustice has been done”); *Abel v. Kennedy*, 3 Greene 47, 49 (Iowa 1851) (holding that “no matter how reprehensible and improper” the jury’s misconduct, jurors *cannot* “impeach their verdict on their own affidavits or statements”); *Forshee v. Abrams*, 2 Iowa 571, 579-80 (Iowa 1856) (opining that where the defendant alleged the jury reached a quotient verdict, jurors’ affidavits—if given by the jurors voluntarily—*could* be used to inquire into jury’s “unfair dealing”); *Cook, Sargent & Cook v. Sypher*, 3 Iowa 484, 484 (Iowa 1856) (opining that allowing jurors to impeach their own verdicts was a “dangerous practice,” but that courts *could* receive juror affidavits in support of their reached verdict); *State v. Grady*, 4 Iowa 461 (Iowa 1857) (expressing uncertainty as to whether affidavits from jurors could be used to impeach their verdict).

35. *Wright*, 20 Iowa at 210 (“[A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror’s breast.”).

rights have been prejudiced by such an unlawful act.”<sup>36</sup> The court differentiated between the mental processes of a jury member and overt acts, opining that although an overt act can be disproven by other jurors and proof of such misconduct would deter others from behaving similarly, the mental processes of one juror are “incapable of disproof” and thus must be protected.<sup>37</sup>

The Massachusetts Supreme Court, however, took an alternate approach a mere five years later, conditioning the admissibility of a juror’s post-trial testimony on whether the conduct testified to occurred *outside* of the deliberation room or *inside* of the deliberation room.<sup>38</sup> The court emphasized juror privacy and sought to protect jurors from “distrust, embarrassment, or uncertainty” regarding their verdict.<sup>39</sup> But three years later, the Kansas Supreme Court adopted an approach similar to that of Iowa when a juror drank alcohol during a trial and was abusive to other jurors in the deliberation room.<sup>40</sup> Rather than distinguishing between conduct inside or outside of the deliberation room, the Kansas court defined admissibility by differentiating between the “personal consciousness” and “overt acts” of the individual juror.<sup>41</sup>

Less than two decades later, the United States Supreme Court finally sought to provide a uniform rule given these varying approaches, holding that where a newspaper article was introduced to the jury and where the bailiff made prejudicial comments about the defendant to the jury, “[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.”<sup>42</sup> This case, *Mattox v. United States*, established that where there is an external influence—

---

36. *Id.* at 212.

37. *Id.* at 210-11.

38. *Woodward v. Leavitt*, 107 Mass. 453, 453 (Mass. 1871).

39. *Id.* at 460.

40. *Perry v. Bailey*, 12 Kan. 539, 544-45 (Kan. 1874).

41. *Id.* (explaining that while “matters lying outside the personal consciousness of the individual juror” cannot be contradicted by other jurors, “overt acts” by one juror can either be contradicted or corroborated by the other jury members).

42. *Miller*, *supra* note 33 at 884 (citing *Mattox v. United States*, 146 U.S. 140, 149-50 (1892)).

”extraneous prejudicial information”—post-trial juror testimony is admissible to impeach the verdict.<sup>43</sup>

Despite *Mattox*’s holding, however, uncertainty as to what could or could not be admitted continued throughout the early 20<sup>th</sup> century, with courts across the nation issuing diverging opinions. For example, the United States Supreme Court in *McDonald v. Pless* held that though *Mattox* prohibited extraneous influences and thus created an exception allowing post-trial juror testimony attesting to the presence of extraneous influence in deliberations, this exception did not permit juror testimony regarding an extraneous influence when admitted to impeach a quotient verdict.<sup>44</sup>

### C. THE CODIFICATION OF FEDERAL RULE OF EVIDENCE 606(B)

To remedy these inconsistencies, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (“**the Committee**”) began drafting Rule 606(b) of the Federal Rules of Evidence, issuing its first draft in 1969.<sup>45</sup> This draft read:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.<sup>46</sup>

This draft largely channeled Iowa’s rule, differentiating between “misconduct” within the mental processes of a juror and

---

43. *Mattox v. United States*, 146 U.S. 140, 149 (1892).

44. *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (explaining that where the Court had to “choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room,” the “lesser of two evils” was to prohibit post trial juror testimony).

45. See generally Preliminary Draft of Proposed Rules of Evidence, 46 F.R.D. 161 (1969) [hereinafter 1969 Draft].

46. *Id.* at 289-90.

misconduct via an overt act.<sup>47</sup> The Committee explicitly rejected the unyielding Mansfield Rule—that a juror may *never* impeach his own verdict—explaining that that rule was a “gross oversimplification.”<sup>48</sup>

Though the Committee identified “freedom of deliberation, stability and finality of verdicts” as well as the “protection of jurors against annoyance and embarrassment” as values promoted by prohibiting post-trial juror testimony, it also acknowledged that “simply putting verdicts beyond effective reach [would] only promote irregularity and injustice.”<sup>49</sup> Juror testimony is often critical, as jurors are the only persons present within deliberations.<sup>50</sup> Therefore, the Committee opined, jurors should be allowed to testify as to matters within deliberations but outside of their privately-held rationales and processes—*i.e.* overt acts—in reaching a verdict.<sup>51</sup> Thus, the Committee declared its proposed rule as an “accommodation” between the values worthy of protection and the injustices worthy of prevention.<sup>52</sup>

In March of 1971, the Committee presented a revised version of the Federal Rules of Evidence with modifications incorporated from the 1969 draft.<sup>53</sup> However, the language of Rule 606(b) remained untouched.<sup>54</sup> Later that same year, the draft was “hastily rewritten” and presented by the Committee to the United States Supreme Court, approved, then presented to Congress.<sup>55</sup> Somewhat surprisingly, the new draft not only prohibited testimony regarding arguments, statements, discussions, mental

---

47. Miller, *supra* note 33 at 886-87; 1969 Draft, *supra* note 45 (“The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room.”).

48. 1969 Draft, *supra* note 45.

49. *Id.*

50. Miller, *supra* note 33 at 887.

51. *Id.*

52. *Id.*

53. See generally Revised Draft of Proposed Rules of Evidence, 51 F.R.D. 315 (1971).

54. *Id.*

55. David A. Christman, *Federal Rule of Evidence 606(b) and The Problem of “Differential” Jury Error*, 67 N.Y.U. L. REV. 802, 824 n.141 (1992) (explaining that the motivation for these last-minute provisions were motivated by Senator McClellan and the Justice Department’s “extensive lobbying efforts”).

and emotional reactions, votes, and all other aspects of deliberations, but also declared jurors *incompetent* to impeach their verdicts using testimony concerning a compromise verdict, a quotient verdict, speculation as to insurance coverage, misinterpretation of instructions, mistake in returning the verdict, or interpretation of a guilty plea by one defendant as implicating others.<sup>56</sup> Under this version, jurors could only testify as to “prejudicial extraneous information” or information that was “injected or brought to bear upon the deliberative process” by a third-party.<sup>57</sup>

Though the House rejected this draft, advocating that juror testimony regarding statements made during deliberations—such as the abusive statements made by a juror in *Perry*—should be admissible as in the 1969 and March of 1971 draft, the Senate vehemently championed for 1971’s later version.<sup>58</sup> The Senate cited *McDonald*,<sup>59</sup> warning that if the House’s preferred version of 606(b) were adopted, losing parties would be permitted to harass former jurors or exploit “badly-motivated” ex-jurors.<sup>60</sup> Congress ultimately adopted this later, more stringent version.<sup>61</sup>

Notably, however, the following text from the March 1971 draft remained:

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. *Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected.* The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.<sup>62</sup>

The second sentence proffers that post-trial juror testimony regarding matters other than those jurors’ own mental processes poses *no* threat to the values—freedom of deliberation, stability

---

56. Miller, *supra* note 33 at 889.

57. *Id.*

58. *Id.*

59. *McDonald*, 238 U.S. at 268-69.

60. Miller, *supra* note 33 at 890.

61. H.R. REP. NO. 93-1597 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7102.

62. H.R. REP. NO. 93-65 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7083 (emphasis added).

and finality of verdicts, and the prevention of juror harassment—protected by the no-impeachment doctrine.<sup>63</sup>

#### D. *TANNER V. UNITED STATES*

Though the no-impeachment doctrine—originating from Lord Mansfield’s absolute prohibition and transforming, broadening and constricting fluidly over the course of early American history—was now codified in the Federal Rules of Evidence,<sup>64</sup> the doctrine would continue to transform in the coming years. In 1987, for example, the United States Supreme Court considered whether testimony that jurors were intoxicated from consuming both alcohol and drugs during a trial was admissible under the recently enacted Federal Rule of Evidence 606(b).<sup>65</sup> Despite the egregiousness of the misconduct, the *Tanner* court determined that the jurors’ consumption primarily affected their internal mental processes; it was not properly deemed an extraneous influence.<sup>66</sup> Though the *Tanner* defendant asserted his Sixth Amendment right to an impartial and mentally competent tribunal and insisted that the intoxicated jury members denied him that right, the Supreme Court disagreed.<sup>67</sup> It opined that preexisting safeguards—such as the court’s and litigants’ ability to observe jurors, the elimination of unsuitable jurors in voir dire, and the ability of a party to impeach a verdict by nonjuror evidence of misconduct—ensured that the defendant’s Sixth Amendment rights were intact.<sup>68</sup> Though the Court in *Tanner* was not endorsing the jury’s misconduct as acceptable, it nonetheless held that Rule 606(b) prevented it from receiving juror affidavits in support of the defendant’s motion for a new trial.<sup>69</sup>

---

63. *Id.*; 1969 Draft, *supra* note 45.

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

65. *See generally* *Tanner v. United States*, 483 U.S. 107 (1987).

66. *Id.* at 122 (explaining that although the jurors’ ingestion of drugs or alcohol during the trial was improper, that ingestion was “no more an ‘outside influence’ than a virus, poorly prepared food, or a lack of sleep”).

67. *Id.* at 127.

68. *Id.*

69. *Id.*

E. BREAKING THE BLACK BOX: *PENA-RODRIGUEZ*  
*V. COLORADO*

Until March 2017,<sup>70</sup> American jurisprudence was in a state of uncertainty. Forty-two state jurisdictions across the United States followed the Federal Rule, codified as 606(b), while nine state jurisdictions followed the Iowa Rule, dating back before the Legislature's codification.<sup>71</sup> Within those jurisdictions following the Iowa Rule, many had exceptions other than those recognized by Rule 606(b).<sup>72</sup> At least sixteen jurisdictions had already recognized an exception to the no-impeachment doctrine for instances in which racial bias was expressed during deliberations.<sup>73</sup> There was also a federal circuit split pre-*Pena-Rodriguez*; some circuits held or suggested that an exception existed for evidence of racial animus, while others declined to recognize such exception, reasoning that "other safeguards inherent in the trial process suffice to protect defendants' constitutional interests."<sup>74</sup> Though the general tendency had been to unequivocally shield jury deliberations from any investigation,<sup>75</sup> this nationwide divergence, along with conflicting drafts within the legislative history of Federal Rule of Evidence 606(b)<sup>76</sup> and courts' recognition of real-world implications of the no-impeachment doctrine<sup>77</sup> left criminal defendants to decipher what was or was not acceptable within a criminal jury trial.

---

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

71. *Id.* at 865.

72. *Id.*

73. *Id.*

74. *Id.* (explaining that the First, Ninth, and Seventh Circuits either held or suggested that an exception existed, while the Tenth, Third, and Fifth Circuits either held or suggested that exception did not exist).

75. *Pena-Rodriguez*, 137 S. Ct. at 860-61 ("In the era of our Nation's founding, the right to a jury trial had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty . . . . A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.")

76. See discussion *supra* Section I.C.

77. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987).

### 1. *The Story of Miguel Angel Peña-Rodriguez*

Miguel Angel Peña-Rodriguez was charged with attempted sexual assault on a child, unlawful sexual contact, and harassment.<sup>78</sup> Though the prosecution presented no physical evidence and the defendant presented a witness testifying that Peña-Rodriguez was with him at a different location when the charged offenses happened, the jury convicted Peña-Rodriguez for unlawful sexual contact and harassment.<sup>79</sup> However, after the conclusion of the trial, two jurors told defense counsel that Juror Number 11—Juror H.C.—made “racially biased statements during deliberations.”<sup>80</sup> Juror M.M. stated in an affidavit that during deliberations, Juror H.C. said, “I think he did it because he’s Mexican and Mexican men take whatever they want.”<sup>81</sup> Juror M.M.’s affidavit, along with an affidavit from Juror L.T., indicated that Juror H.C. expressed, on multiple occasions, explicit racial animus towards Mexican men during the jury’s deliberations.<sup>82</sup>

Although the defense asked for an opportunity to investigate and relitigate the issues in a Motion for New Trial, the trial court denied the request, opining that the Federal Rule of Evidence 606(b) prohibits the use of juror testimony to demonstrate that racial bias affected deliberations.<sup>83</sup> Peña-Rodriguez appealed, arguing that the prohibition did not apply because the testimony would not be used to uproot the deliberative process, but rather would elucidate the fact that there was a racist present on the

---

78. *People v. Pena-Rodriguez*, 412 P.3d 461, 465 (Colo. App. 2012).

79. *Id.*

80. *Id.*

81. *People v. Pena-Rodriguez*, 412 P.3d 461 (Colo. App. 2012), *cert. granted*, 2013 WL 12140028 (Jan. 4, 2013) (No. 12SC9).

82. *Id.* According to these affidavits, Juror H.C. stated, “Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can ‘do whatever they want’ with women.” *Id.* Juror H.C. also expressed his belief that Pena-Rodriguez 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.” *Id.* Further, Juror H.C. stated that he did not believe that Pena-Rodriguez’s alibi witness was “credible” because, among other things, he was “an illegal.” *Id.*

83. Petition for Writ of Certiorari, *Pena-Rodriguez*, 412 P.3d 461 (No. 12SC0).

jury.<sup>84</sup> In his petition for writ of certiorari to the Colorado Supreme Court, Peña-Rodriguez explained that courts have “engaged in an ‘unceasing effort’ to eradicate racism from [the] criminal justice system,” and that procedural protections, such as the peremptory challenge exception established in *Batson*, serve to ensure that racism does not pervade criminal jury trials.<sup>85</sup> Thus, Petitioner argued, the Court should “grant [his] petition because the court of appeals opinion [was]. . . inconsistent with [the nation’s] unceasing efforts to eradicate racial prejudice from [the] criminal justice system.”<sup>86</sup> However, both the Colorado Court of Appeals and the Colorado Supreme Court denied the defendant’s request and affirmed the trial court’s decision.<sup>87</sup>

## 2. Oral Arguments

On April 4, 2016, the United States Supreme Court granted Peña-Rodriguez’s petition for writ of certiorari.<sup>88</sup> During oral arguments, Jeffrey L. Fisher, on behalf of Petitioner Peña-Rodriguez, contended that the Court should permit post-trial juror testimony regarding explicit statements of racial animus when *Tanner*’s balancing test so permits.<sup>89</sup> This *Tanner* analysis, which relies on factors such as the court’s and litigants’ ability to observe jurors, the elimination of unsuitable jurors in voir dire, and the ability of a party to impeach a verdict by nonjuror

---

84. *Id.* (arguing that he was denied “the right to a fair trial by an impartial jury, the due process of law, the equal protection of the law and about every other basic constitutional right guaranteed to a criminally accused”). Further, Peña-Rodriguez pleaded that the United States Supreme Court find that the use of juror statements to impeach a verdict where a juror expressed explicit racial animus “does not invade the deliberative process.” *Id.* Instead, such bias is equivalent to clearly admissible “extraneous prejudicial information.” *Id.*

85. *Id.*

86. Petition for Writ of Certiorari, *Pena-Rodriguez*, 412 P.3d 461 (No. 12SC0).

87. See *People v. Pena-Rodriguez*, 412 P.3d 461, 466 (Colo. App. 2012); *Pena-Rodriguez v. People*, 350 P.3d 287, 288 (Colo. 2015).

88. Natalie A. Spiess, *Pena-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809, 817 (2018).

89. Transcript of Oral Argument, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606), 2016 WL 5920142, at \*11.

evidence of misconduct,<sup>90</sup> would protect the jury's black box from exposure beyond instances of explicit racial bias.<sup>91</sup> Importantly, Fisher acknowledged that a court is only *required* to allow a lawyer to ask on voir dire about racial bias—not bias of any other kind.<sup>92</sup>

Though Fisher explained to the Court that the door would not be opened, but instead could be limited to instances of race-based animus, he acknowledged that *Batson* was a “helpful analogy” for further expansion.<sup>93</sup> He seemingly acknowledged that there is room for expansion mimicking the pattern found in other realms of American history when he encouraged the Court to “do what the Court’s done in previous situations like this, which is *start with race*.”<sup>94</sup> Further, Fisher responded to the Court by saying, “You might conclude – and I’m not going to deny this – the Court might conclude, as it did in *Batson*, that you should extend to sex . . . that would be a separate case.”<sup>95</sup> Respondent instead pointed the Court to already-present protections available to defendants during a trial: voir dire and mid-trial reporting.<sup>96</sup>

### 3. *The 2017 Supreme Court Decision*

Justice Kennedy issued the majority opinion in *Pena-Rodriguez v. Colorado*, finding in favor of Petitioner Peña-Rodriguez.<sup>97</sup> In the opinion, the Court distinguished between juror misbehavior, such as the drug and alcohol abuse in *Tanner*, and racial bias; the Court explained that though the former is unacceptable, it represents a moment in which a single juror or jury has “gone off course” while the latter represents a “familiar

---

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

91. Transcript of Oral Argument, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606), 2016 WL 5920142, at \*8-9.

92. *Id.* at \*10.

93. *Id.* at \*11 (acknowledging that the Court first issued an opinion about race in *Batson v. Kentucky*, then extended that protection to gender several years later in *J.E.B. v. Alabama*).

94. *Id.* at \*5.

95. *Id.* at \*12.

96. Transcript of Oral Argument, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606), 2016 WL 5920142, at \*49.

(“We think that this is a really serious issue and that it ought to be addressed through the kinds of safeguards this Court has always applied.”).

97. See generally *Pena-Rodriguez*, 137 S. Ct. 855.

and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.”<sup>98</sup> Therefore, an effort to rid a criminal jury trial from such evil would not be an attempt to perfect the jury, but rather would be a valiant effort to ensure equal treatment under the law.<sup>99</sup> Equal treatment in a criminal jury trial cannot be achieved merely through the mechanisms courts have relied upon in the past. Safeguards like “voir dire, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial” may be insufficient to reach this goal.<sup>100</sup> Further, questions about impartiality during voir dire might not only prove insufficient but also damaging, “exacerbat[ing] whatever prejudice might exist without substantially aiding in exposing it.”<sup>101</sup>

The Court adopted Petitioner’s proposed inquiry.<sup>102</sup> A party must show: (1) that one or more jurors made statements “exhibiting overt racial bias,” (2) that those statements “cast serious doubt on the fairness and impartiality” of the deliberations and verdict, and (3) that those statements tend to show that racial animus was a “significant motivating factor” in the juror’s decision to convict the defendant.<sup>103</sup> The Court refrained from answering what a trial court must use when determining whether this threshold has been satisfied, instead reserving “substantial discretion” to such court.<sup>104</sup>

### III. THE EXPANSION OF RACIAL PROTECTIONS TO GENDER PROTECTIONS

A glaring gap in American law arose following the 2017 *Pena-Rodriguez*<sup>105</sup> decision. Although *Pena-Rodriguez* established a clear, three-element standard for when post-trial juror testimony is appropriate,<sup>106</sup> the decision created an air of uncertainty because while it only explicitly rebuked racial

---

98. *Id.* at 868.

99. *Id.*

100. *Id.*

101. *Id.* at 869.

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

103. *Id.*

104. *Id.*

105. *See generally Pena-Rodriguez*, 137 S. Ct. 855.

106. *Id.* at 869.

animus, it provided language suggesting that because of our Nation's history, gender animus would be equally poisonous.<sup>107</sup> The exception forged in *Pena-Rodriguez*—designed to eliminate the “familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice”—was constructed to be leveraged and extended, reaching other expressions of animus that are “familiar and recurring evil[s].”<sup>108</sup>

Significantly, this is not the first time a state of uncertainty has arisen when a court granted a right to one class before granting that same right to another class. In the realm of peremptory challenges, this Nation's criminal justice system experienced the development and evolution of protections first against race-based challenges, then against gender-based challenges.<sup>109</sup> Thus, essential in understanding the breadth of meaningful prohibitions against biases in criminal jury trials—and in understanding this Note's argument—is the historical evolution of protections surrounding peremptory challenges.

#### A. THE DEVELOPMENT OF PEREMPTORY CHALLENGE PROTECTIONS: PROGRESS IN AMERICAN COMMON-LAW

The prohibition of race-based discrimination of veniremen began in 1879, when, in *Strauder v. West Virginia*, the United States Supreme Court opined that the Fourteenth Amendment—and the fundamental principles of equal protection—required the abolition of a state statute preventing all African-American men, who were otherwise qualified to serve as jurors, from serving in that role.<sup>110</sup> Notably, the Court explained that by denying these individuals the right to participate in the administration of the law, the statute was operating as a “brand,” an “assertion of [African-American mens'] inferiority,” and a “stimulant to [racial]

---

107. *Id.* at 871 (“It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.”).

108. *Id.* at 868.

109. See discussion *infra* Section III.

110. *Strauder v. West Virginia*, 100 U.S. 303, 307-09 (1879), *abrogated* by *Taylor v. Louisiana*, 419 U.S. 522 (1975).

prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”<sup>111</sup>

Nearly a century later in *Swain v. Alabama*, an African-American defendant convicted of rape invoked the protection created in *Strauder*.<sup>112</sup> Prior to *Swain*, many courts had consistently applied *Strauder*'s protection.<sup>113</sup> In *Carter v. Texas*, the Court held that where a state action excludes *all* members of a race, solely based on their race or color, from serving as jurors in a criminal trial, the principles of equal protection are denied.<sup>114</sup> Similarly, in *Smith v. Texas* the Court explained that when discrimination excludes jurors merely because of their race, “our Constitution and the laws enacted under it” are violated.<sup>115</sup> Further, such discrimination is “at war with our basic concepts of a democratic society and a representative government.”<sup>116</sup>

The Court in *Swain* acknowledged that the protection created in *Strauder* was rooted in the Fourteenth Amendment's Equal Protection Clause, but it nevertheless perpetuated the pre-*Strauder* mentality, accepting that peremptory challenges are frequently employed based on irrelevant characteristics like race, religion, nationality, occupation, or affiliations.<sup>117</sup> Additionally, the Court opined that inquiries into a party's peremptory challenge would unnecessarily subject that party to “scrutiny for reasonableness and sincerity[,]” discouraging the use of such challenges altogether.<sup>118</sup> Thus, the defendant's equal protection claim was denied with the majority opinion affirming the validity

---

111. *Id.* (“The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”).

112. *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

113. *Id.* at 204.

114. *Carter v. Texas*, 177 U.S. 442, 447 (1900); *see also Swain*, 380 U.S. at 204.

115. *Smith v. Texas*, 311 U.S. 128, 130 (1940); *see also Swain*, 380 U.S. at 204.

116. *Smith*, 311 U.S. at 130.

117. *Swain*, 380 U.S. at 220-21.

118. *Id.* at 221-22.

of the state's peremptory challenges.<sup>119</sup> The dissenting opinion—which characterized the majority's opinion as “unthinkable”—highlighted the concept of equality from *Strauder*, quoting, “The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”<sup>120</sup>

### B. A PROTECTION AGAINST RACE-BASED DISCRIMINATION: *BATSON V. KENTUCKY*

In 1986, a prosecutor used his peremptory challenges to strike all African-American veniremen during jury selection for a African-American defendant's trial.<sup>121</sup> The defendant argued that the prosecutor's use of the challenges violated his rights under the Sixth and Fourteenth Amendments because it prevented him from having a jury drawn from a cross-section of the community and denied him equal protection of the laws.<sup>122</sup> The trial court judge denied the defendant's motion, and the jury convicted the defendant of second-degree burglary and receipt of stolen goods.<sup>123</sup>

Though a criminal defendant is not entitled to a perfect jury,<sup>124</sup> a criminal defendant is entitled to a trial by jurors who were “selected pursuant to nondiscriminatory criteria.”<sup>125</sup> Further, “[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.”<sup>126</sup> Thus, because race is wholly unrelated to a person's

---

119. *Id.* at 227-28.

120. *Id.* at 230-31 (Goldberg, J., dissenting) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

121. *Batson v. Kentucky*, 476 U.S. 79, 82-83 (1986).

122. *Id.* at 83.

123. *Id.* at 82-83.

124. *See id.* at 85-86 (explaining that a defendant has no right to a jury composed entirely or partially of persons of his own race (citing *Strauder*, 100 U.S. at 305)).

125. *Id.*

126. *Batson*, 476 U.S. at 86.

competency as a juror,<sup>127</sup> the United States Supreme Court in *Batson* held that the freedom associated with peremptory challenges must yield to the Fourteenth Amendment's Equal Protection Clause and that such challenges based solely on racial biases are forbidden.<sup>128</sup> This prohibition—which created a key protectionary measure against race-based animus in the jury selection process—honored the idea that discrimination in jury selection would not only harm the defendant and the excluded juror, but also the entire community.<sup>129</sup>

### C. EXPANDING *BATSON*'S PROTECTION: A HISTORICAL EXPOSITION

Less than ten years later, the United States Supreme Court expanded *Batson*'s protection and identified gender-based discrimination as being equally as repugnant as race-based discrimination.<sup>130</sup> In *J.E.B. v. Alabama*, the petitioner utilized *Batson* when arguing that the state's use of peremptory challenges against male jurors in a paternity and child support action against him violated the Equal Protection Clause of the Fourteenth Amendment.<sup>131</sup> Axiomatic to the Court's opinion was the principle that intentional discrimination has no place in our judicial system<sup>132</sup> and that it is "invidious," "archaic," and perpetuates "overbroad stereotypes about the relative abilities" of members of the class being discriminated against.<sup>133</sup>

*J.E.B.*'s protections—though unprecedented and prolific—followed *Batson* naturally, mimicking America's historical trend to first legitimize persons persecuted because of their race, then liberate women oppressed because of their gender.<sup>134</sup> The 1865

---

127. *Id.* at 87 ("A person's race simply is 'unrelated to his fitness as a juror.'" (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting))).

128. *Id.* at 89.

129. *Id.* at 87 (explaining that "[s]election procedures that purposefully exclude [African-American] persons from juries undermine public confidence in the fairness of our system of justice.").

130. *See generally* *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

131. *Id.* at 129.

132. *Id.* at 140.

133. *Id.* at 130-31.

134. *See generally* *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *cf.* Lynn Yeakel, *Struggle for Women's Rights and Civil Rights Linked*, HUFFPOST

ratification of the Thirteenth Amendment<sup>135</sup> was followed in 1867 by the first Reconstruction Act, which “enfranchise[d] [African-American] males and [ ] disenfranchise[d] large numbers of white voters.”<sup>136</sup> Momentum sparked by similar legislation nationwide led to the ratification of the Fourteenth Amendment—and its Equal Protection Clause—in 1868,<sup>137</sup> which would later be the authority to which petitioners in *Swain, Strauder, Carter, Smith, Batson*, and *J.E.B.* would cling.<sup>138</sup> Two years later the Fifteenth Amendment was ratified, providing that voting rights “shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”<sup>139</sup> Although the first woman suffrage bill was introduced in Wyoming that same year,<sup>140</sup> courts nationwide still expressed incredulity at the idea that women, like men, would be allowed to vote.<sup>141</sup>

Though *Strauder*—in 1879—represented a pivotal step forward in eliminating intentional acts of racial bias in jury selection, it simultaneously reinforced the nation’s perception of

---

(AUG. 20, 2013), [https://www.huffingtonpost.com/lynn-yeakel/march-on-washington\\_b\\_3769211.html](https://www.huffingtonpost.com/lynn-yeakel/march-on-washington_b_3769211.html) [<https://perma.cc/579D-VVGF>] (“[T]he fight for racial equality is intertwined in the fight for women’s equality in our country’s history.”).

135. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1324 (1952).

136. Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 566 (2002).

137. See Gressman, *supra* note 135, at 1333.

138. See generally *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986); *Smith v. Texas*, 311 U.S. 128 (1940); *Carter v. Texas*, 177 U.S. 442 (1900); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

139. U.S. CONST. amend. XV, § 1; *Shelby County, Ala. v. Holder*, 570 U.S. 529, 536 (2013).

140. May Schons, *Woman Suffrage*, NAT’L GEOGRAPHIC (JAN. 21, 2011), <https://www.nationalgeographic.org/news/woman-suffrage/>

[<https://perma.cc/G7EV-3FY2>] (noting, though, that some politicians thought granting such legislation would be the “greatest hilarity” and “originated in a joke”).

141. See, e.g., *Winans v. Williams*, 5 Kan. 227, 229 (Kan. 1869) (“We hardly suppose it necessary to enter upon an argument of this question, as probably no lawyer in the state, whatever his opinion may be upon the general question of ‘woman suffrage,’ seriously thinks that women have a *legal* right to vote . . .”).

women as an inferior class.<sup>142</sup> Other opinions followed *Strauder*, justifying the exclusion of women from jury service by pointing to antiquated laws prohibiting all female jurors, even *after* passage of the Nineteenth Amendment.<sup>143</sup> Over the next sixty-five years, the woman suffrage movement would continue to shadow the Civil Rights Movement.<sup>144</sup> Where the Civil Rights Movement featured key events such as the passage of *Brown v. Board of Education* in 1954,<sup>145</sup> Rosa Parks' boycott on a Montgomery bus in 1955,<sup>146</sup> the Birmingham Campaign of 1963 which featured marches, sit-ins, and boycotts,<sup>147</sup> and the March on Washington that same year when Martin Luther King Jr. delivered his famous "I Have a Dream" speech,<sup>148</sup> the women's rights movement featured similar demonstrations nationwide, highlighting issues such as suffrage, the portrayal of women's role in society, and states' failure to ratify the 1972 Equal Rights

---

142. See *Strauder*, 100 U.S. at 310 (explaining that though a state shall not exclude jurors based on their race, it "may confine the selection to males.>").

143. *Fay v. New York*, 332 U.S. 261, 289 (1947) (explaining that "for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries"); *Hoyt v. Florida*, 368 U.S. 57, 60 (1961) (explaining that states may confine jury duty to men, that this principle has "gone unquestioned" for over eighty years, and that requiring women—but not men—to affirmatively register for jury service was not violative of the Fourteenth Amendment). It is also essential to note that one suffragist, Carrie Chapman Catt, summarized the woman suffrage movement prior to the Nineteenth Amendment's enactment as costly, saying "To get the word 'male' in effect out of the Constitution cost the women of the country fifty-two years of pauseless campaign . . . . During that time they were forced to conduct fifty-six . . . campaigns to get Legislatures to submit suffrage amendments to voters; 47 campaigns to get State constitutional conventions to write woman suffrage into state constitutions; 277 campaigns to get State party conventions to include woman suffrage planks . . . in party platforms, and 19 campaigns with 19 successive Congresses." Johanna Neuman, *The Campaign to Win the Vote for Women: Why Social Change Takes Time*, FROM THE SQUARE (MAR. 1, 2018), <https://www.fromthesquare.org/gilded-suffragists-womens-history-month/#.W9nq5WhKhPY> [<https://perma.cc/EAK7-TNDN>].

144. See Yeakel, *supra* note 134.

145. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954).

146. Cheryl Bond-Nelms, *Boycotts, Movement and Marches: Events That Initiated Social Change During the Civil Rights Movement*, AARP (FEB. 9, 2018), <https://www.aarp.org/politics-society/history/info-2018/civil-rights-events-fd.html#quest1> [<https://perma.cc/8DQJ-BRQ2>].

147. *Id.*

148. *Id.*

Amendment which would have guaranteed women the same rights as men.<sup>149</sup>

The oppression faced by African Americans and women were similar in that both classes were prohibited from holding elected positions, voting, serving on juries, independently bringing suit, holding or conveying property, and serving as legal guardians of their own children.<sup>150</sup> Though differences in their sufferings certainly existed, it is irrelevant—for the purposes of eliminating intentional discrimination against either class in a criminal jury trial—to “determine . . . whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation’s history.”<sup>151</sup> Rather, it is only important to recognize that our Nation has endured a long history of discrimination.<sup>152</sup> Moreover, in light of the “injustice” that this discrimination has “wreaked” on our Nation, intentional discrimination by litigants on the basis of gender “invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law.”<sup>153</sup>

#### IV. THE *PEÑA-RODRIGUEZ* EFFECT: APPLYING THE FRAMEWORK OF PEREMPTORY CHALLENGES TO POST-TRIAL JUROR TESTIMONY

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and

---

149. Megan Gibson, *The Suffrage Movement*, TIME (AUG. 12, 2011), [http://content.time.com/time/specials/packages/article/0,28804,2088114\\_2087975\\_2087964,00.html](http://content.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087964,00.html) [<https://perma.cc/3ZRJ-HZ2H>]; Megan Gibson, *The ‘Bra Burning’ Miss America Protest*, TIME (AUG. 12, 2011), [http://content.time.com/time/specials/packages/article/0,28804,2088114\\_2087975\\_2087965,00.html](http://content.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087965,00.html) [<https://perma.cc/97NR-7EAB>]; Megan Gibson, *The Ladies Home Journal Sit-In*, TIME (AUG. 12, 2011), [http://content.time.com/time/specials/packages/article/0,28804,2088114\\_2087975\\_2087966,00.html](http://content.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087966,00.html) [<https://perma.cc/ZZZ6-ZH9R>]; Megan Gibson, *The Equal Rights Amendment Marches*, TIME (AUG. 12, 2011), [http://content.time.com/time/specials/packages/article/0,28804,2088114\\_2087975\\_2087972,00.html](http://content.time.com/time/specials/packages/article/0,28804,2088114_2087975_2087972,00.html) [<https://perma.cc/8Q72-96V2>].

150. *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).

151. *Id.*

152. *Id.*

153. *Id.* at 140 (quoting *Powers v. Ohio*, 499 U.S. at 412)

delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.<sup>154</sup>

The development of these peremptory challenge protections exist as a meaningful—and prudent—precedent. The Court has before been comfortable applying a race-based protection to create an identical gender-based protection,<sup>155</sup> so it follows sensically that the race-based protection created in *Pena-Rodriguez* could be applied to create an identical gender-based protection. As early as 1851, the Supreme Court in *Reid* recognized that circumstances would arise where the denial of post-trial juror testimony would violate the “plainest” principles of justice.<sup>156</sup> Over a century later, the *Pena-Rodriguez* court identified racial discrimination as one of those circumstances.<sup>157</sup> However, *Reid*<sup>158</sup> and *Pena-Rodriguez*<sup>159</sup> must be viewed in conjunction with *Bates*<sup>160</sup> and *J.E.B.*<sup>161</sup> Such a cohesive analysis manifests that the American jury system must not permit stereotypes to presuppose the abilities—or guilt—of members of the class being discriminated against.<sup>162</sup> Where racial discrimination cannot lie, neither can discrimination based on gender.

Notably, the Supreme Court premised its *J.E.B.* opinion on the principles fundamental to the Nation and to its criminal justice system: equal opportunity, democracy, equality, and equal protection.<sup>163</sup> It explained that communities are “harmed by the State’s participation in the perpetuation of invidious group

---

154. *Id.* at 133 (quoting *Bradwell v. State*, 83 Wall. 130, 141 (1873)).

155. *See generally* *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

156. *United States v. Reid*, 53 U.S. 361, 366 (1851).

157. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (“The unmistakable principle underlying these precedents is that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’”) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

158. *See generally* *Reid*, 53 U.S. 361.

159. *See generally* *Pena-Rodriguez*, 137 S. Ct. 855.

160. *See generally* *Batson v. Kentucky*, 476 U.S. 79 (1986).

161. *See generally* *J.E.B.*, 511 U.S. 127.

162. *Id.* at 130-31.

163. *Id.* at 145-46.

stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.”<sup>164</sup> The Court’s fear of a nation in which citizens might still be discriminated against on the basis of gender propelled the opinion, with the Court explaining:

Failing to provide [citizens] the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself . . . . Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.<sup>165</sup>

Additionally, the opinion stymied the conception that historically-held roles must eternalize; the Court explained that discrimination merely “serves to ratify and perpetuate *invidious*, *archaic*, and *overbroad* stereotypes about the relative abilities of men and women.”<sup>166</sup> Thus, the Court distanced itself from the stereotypical “spheres and destinies” of men and women and from the idea that women have no role to play in the administration of justice.<sup>167</sup> The Supreme Court recognized that such stereotypes were “unconstitutional prox[ies] for juror competence and impartiality.”<sup>168</sup>

Though understanding the fundamental principles driving the *J.E.B.* opinion is essential, this Note’s analysis requires more. Rather, a line-by-line analysis of the opinion’s text demonstrates how this language could—and *should*—be applied to expand *Pena-Rodriguez*. The language is artful and easily adaptable; it is fully capable of eliminating gender animus from jury deliberations as gracefully as it originally eradicated gender animus from peremptory challenges.

---

164. *Id.* at 140.

165. *Id.* at 145-46.

166. *J.E.B.*, 511 U.S. at 131 (emphasis added).

167. *Id.* at 133 (quoting *Bradwell v. State*, 16 Wall. 130, 141 (1873)).

168. *Id.* at 129.

**J.E.B.’s Original  
Language**

**J.E.B.’s Language Expanding  
Pena-Rodriguez**

<p>We shall not accept as a defense to gender-based peremptory challenges “the very stereotype the law condemns.”<sup>169</sup></p>	<p>We shall not accept as a defense to [<i>explicit statements of gender bias</i>] “the very stereotype the law condemns.”</p>
<p>[Protecting gender-based peremptory challenges] urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box.<sup>170</sup></p>	<p>Protecting [<i>explicit statements of gender bias</i>] urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box.</p>
<p>Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.<sup>171</sup></p>	<p>Discrimination in [<i>jury deliberations</i>], whether based on race or on gender, causes harm to the litigants, the community, and the individual [<i>defendants</i>] who are wrongfully [<i>convicted based on their gender</i>] in the judicial process.</p>
<p>The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings.<sup>172</sup></p>	<p>The litigants are harmed by the risk that the prejudice that motivated the [<i>jury deliberations</i>] will infect the entire proceedings.</p>

169. *Id.* at 138 (quoting *Powers v. Ohio*, 499 U.S. at 410).

170. *Id.* at 139.

171. *J.E.B.*, 511 U.S. at 140.

172. *Id.*

<p>When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women.<sup>173</sup></p>	<p>When [<i>jurors</i>] exercise [<i>deliberations</i>] in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women.</p>
<p>Because [stereotypes about the abilities of men and women] have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."<sup>174</sup></p>	<p>Because [stereotypes about the abilities of men and women] have wreaked injustice in so many other spheres of our country's public life, active discrimination by [<i>jurors</i>] on the basis of gender during [<i>jury deliberations</i>] "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."</p>
<p>Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side.<sup>175</sup></p>	<p>Discriminatory use of [<i>explicit statements of gender bias</i>] may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked in favor of one side."</p>
<p>Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority."<sup>176</sup></p>	<p>[<i>Convicting defendants</i>] on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, and assertion of their inferiority."</p>

173. *Id.*

174. *Id.* (quoting *Powers v. Ohio*, 499 U.S. at 412).

175. *Id.* (quoting *Powers v. Ohio*, 499 U.S. at 413).

176. *J.E.B.*, 511 U.S. at 142 (quoting *Strauder v. West Virginia*, 100 U.S. at 308).

This exercise establishes a simple truth: *J.E.B.*'s extension of *Batson* is an obvious and natural scheme under which *Pena-Rodriguez* should be extended to expose explicit statements of gender bias during jury deliberations. Though a critic might argue that *any* language could be interposed in *any* opinion, thus justifying that opinion's expansion, this Note's demonstration is uniquely persuasive because the *Batson*, *J.E.B.*, and *Pena-Rodriguez* decisions all share the same history of invidious discrimination.<sup>177</sup> Similarly, the fundamental principles evoked in the *J.E.B.* opinion—equal opportunity, democracy, equality, and equal protection<sup>178</sup>—were similarly referenced in *Pena-Rodriguez*.<sup>179</sup> Thus, the ease with which *J.E.B.*'s language can be interchanged with language prohibiting explicit statements of gender bias in jury deliberations is not accidental or unproductive; *J.E.B.*'s language is a key precipice on which this Note's proposed expansion should rest.

#### V. THE *PENA-RODRIGUEZ* EXPANSION: A NARROW APPROACH

Although in *J.E.B.*, the Supreme Court uses language identifying discrimination by *state actors* as unacceptable,<sup>180</sup> the case's protections extend to private actors' discrimination in the jury selection process as well.<sup>181</sup> In *United States v. Martinez*, the defendant argued that the holding in *J.E.B.* should be narrowly construed to apply only to the *government's* use of gender-based peremptory strikes.<sup>182</sup> If the defendant's argument had been

---

177. See discussion *supra* Section III.

178. *J.E.B.*, 511 U.S. at 145-46.

179. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867-68 (2017) (explaining that permitting post-trial juror testimony to expose explicit statements of racial bias was required to uphold the Nation's commitment to "equal dignity of all persons" and to guarantee "the equal protection of the laws").

180. *J.E.B.*, 511 U.S. at 130-31 ("Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by *state actors* violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.") (emphasis added).

181. *United States v. Martinez*, 621 F.3d 101, 107 (2d Cir. 2010).

182. *Id.* at 106.

successful, then *Martinez* would undermine this Note's argument because there is certainly no government actor within the jury's black box. However, the United States Court of Appeals for the Second Circuit held that the defendant in *Martinez* was incorrect, explaining that "the Constitution bars a [private citizen] defendant in a criminal case from exercising peremptory challenges based on gender . . . . [because] [t]here is no principled basis for distinguishing between civil and criminal cases for these purposes, or between the exercise of a peremptory strike by the government and a defendant."<sup>183</sup> Additionally, *Pena-Rodriguez* protects criminal defendants from the discriminatory actions of private actors.<sup>184</sup> Therefore, *J.E.B.*'s language, establishing a protection against gender-based discrimination by both government and private actors at the forefront of a criminal trial's jury process, is certainly an appropriate framework for expanding *Pena-Rodriguez* to gender-discrimination by private actors at the rear of that same criminal trial.

Further, a slippery slope critique—the argument that expanding *Pena-Rodriguez* to gender will initiate further expansions to other classes, exposing juries and undermining the secrecy of deliberations in criminal trials—would be utterly unfounded. In *J.E.B.*, Justice Scalia's dissent expressed a warning that the majority's opinion would later be expanded beyond gender,<sup>185</sup> "spawn[ing] a wave of collateral litigation"<sup>186</sup> Similarly, in *Pena-Rodriguez*, Justice Alito cautioned that the Court's decision could not successfully "limit the degree of intrusion" into the black box, setting the stage for further expansion.<sup>187</sup> However, the fears of the Court were "vastly overstated."<sup>188</sup> Though a few lower courts have extended *J.E.B.*'s protection to religion,<sup>189</sup> courts have been "extremely reluctant to extend the supervision of *Batson* and *J.E.B.* to peremptory strikes

---

183. *Id.* at 107 (emphasis added).

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

185. *J.E.B.*, 511 U.S. at 162 (Scalia, J., dissenting).

186. Susan Hightower, *Sex and the Peremptory Strike: An Empirical Analysis of J.E.B. v. Alabama's First Five Years*, 52 STAN. L. REV. 895, 896 (2000).

187. *Pena-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

188. Hightower, *supra* note 185 at 896 ("If attempts to comply with *J.E.B.* and prevent discrimination against women in jury service have thrown the court system into turmoil, it is not revealed in the case law.").

189. See, e.g., *United States v. Brown*, 352 F.3d 64, 668 (2d Cir. 2003).

against other categories of jurors.”<sup>190</sup> Instead, it is evident that “neither the Supreme Court nor lower courts around the country have slid far down the slippery slope of *Batson* extensions that doomsayers foretold in the wake of *J.E.B.*”<sup>191</sup> Because this Note argues that courts should expand *Pena-Rodriguez* to gender using *J.E.B.*’s framework, any slippery slope concerns would likely never come to fruition when analogized with the seeming void of unwanted expansion following *J.E.B.*<sup>192</sup>

Finally, any plea to leave evidentiary traditions undisturbed would be gravely misplaced in American society. However, such pleas in response to this Note’s argument would not be unique. Justice Scalia’s dissent in *J.E.B.*<sup>193</sup> and Justice Alito’s dissent in *Pena-Rodriguez*<sup>194</sup> contain such arguments. In *J.E.B.*, Justice Scalia explained, “the Court imperils a practice [of peremptory challenges] that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people’s traditions.”<sup>195</sup> In *Pena-Rodriguez*, Justice Alito opined that even where a criminal defendant’s constitutional rights are at stake, “long-established rules stand in the way” of that defendant’s “critical need to obtain and introduce evidence of [a juror’s discriminatory statements].”<sup>196</sup>

However, these longstanding rules must not embrace rigidity and instead must reflect the historical progression of civil rights, which has bent and broken traditions to comport with updated conceptions of fairness.<sup>197</sup> *Reid* foreshadowed this in 1851: “[C]ases might arise in which it would be impossible to refuse [evidence] without violating the plainest principles of justice.”<sup>198</sup> As American society has evolved, the Nation’s “principles of justice” have also evolved, necessitating that evidentiary rules comport with those newly-recognized principles in the interest of

---

190. Hightower, *supra* note 185 at 903.

191. *Id.* at 904.

192. *Id.* at 904.

193. *J.E.B.*, 511 U.S. at 163 (1994) (Scalia, J., dissenting).

194. *Pena-Rodriguez*, 137 S. Ct. at 874 (2017) (Alito, J., dissenting).

195. *J.E.B.*, 511 U.S. at 163 (Scalia, J., dissenting).

196. *Pena-Rodriguez*, 137 S. Ct. at 874 (Alito, J., dissenting).

197. *See* discussion *supra* Section III.

198. *United States v. Reid*, 53 U.S. 361, 366 (1851).

“justice.”<sup>199</sup> Thus, the extension of civil rights from race to gender in both the courts and beyond should also be reflected within the jury’s black box.

#### IV. CONCLUSION

The unfortunate truth is that where invidious racial inequity lies, so too does gender inequity often rest.<sup>200</sup> Rather than granting relief to victims of gender bias in the delayed fashion that has been predominant throughout American history, where progress for women has trailed slowly behind relief granted by courts to African Americans, *Pena-Rodriguez* provides a bright-line framework that courts could easily apply to both explicit racial *and* gender animus.<sup>201</sup> The burden suffered by African Americans and women does not require comparison to understand that relief from discrimination for the two classes may coexist. Thus, the exception to Federal Rule of Evidence 606(b) created by *Pena-Rodriguez* should not only be applied to explicit racial bias, but also to explicit gender bias, tracking the American tradition of extending protections and rights first to African Americans, then to women. Specifically, the Court’s prohibition of racial animus, followed by that of gender animus, in peremptory challenges suggests that the same extension in juror deliberations follows naturally. Logically, why would the Court admonish gender discrimination at the forefront of a criminal trial while lauding it at the conclusion of the same trial? Because such an inconsistency would perpetuate the evil of animus, denying equal dignity to all persons and falling victim to the odious and pernicious nature of discrimination,<sup>202</sup> the exception created in *Pena-Rodriguez* must certainly extend to instances of explicit gender-based discrimination in juror deliberations.

KATIE HICKS

---

199. *Id.*

200. *See* discussion *supra* Section III.

201. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

202. *Id.* at 867-68.