WHAT DIFFERENCE DOES IT MAKE? GENDER AND JURY SELECTION

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> [C]ritical feminism is unwilling to remain trapped in debates about women's commonality with or difference from men. Its commitment is neither to embrace nor suppress difference but to challenge the dualism and make the world safe for differences.[1]

INTRODUCTION

In *Batson v. Kentucky*,[2] the Supreme Court declared that a prosecutor's use of peremptory challenges[3] to exclude jurors solely on the basis of race violated the Equal Protection Clause.[4] The decision was hailed as a long-overdue and significant step in the fight against the pervasive and persistent racism that has infected the criminal justice system.[5] The Supreme Court has consistently reaffirmed and extended the reach of *Batson* in a series of recent cases.[6]

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1. Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 638 (1990).

2. 476 U.S. 79 (1986).

3. Peremptory challenges permit a party to excuse a juror for any reason "or for no reason at all." JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 8.01 (2d ed. 1990). The number of peremptory challenges allowed to each side varies by jurisdiction and type of case. Generally, parties to a criminal case are allowed a greater number of peremptory challenges than parties to a civil case. *Id.* § 8.02.

4. *Batson*, 476 U.S. at 97–98.

5. *See, e.g., id.* at 79, 102 (Marshall, J., concurring); Theodore McMillan & Christopher I. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 368 (1990). Still, its flaws have not gone unnoticed. *See infra* note 123 and accompanying text.

6. In Powers v. Ohio, 111 S. Ct. 1364 (1991), the Court held that a criminal defendant could object to peremptory challenges used to exclude jurors on the basis of

The Court, however, has not yet considered whether *Batson* should be extended to prohibit the use of peremptory challenges to exclude jurors solely on the basis of gender,[7] although this question has resulted in conflicting opinions in state[8] and federal[9] courts.

Commentators, too, have largely ignored the special problems gender discrimination poses in the jury selection process. Those few that have considered the question of gender and peremptory challenges have argued for extension of the *Batson* analysis to gender or, alternatively, for abolition of the peremptory challenge altogether.[10] These approaches are not without merit. A strong argument can be made for extending *Batson* to prohibit gender discrimination in the use of peremptory challenges under the equal protection doctrine. Likewise, abolition of the peremptory challenge seems a simple and effective way of eradicating invidious discrimination of all kinds with one stroke.

While these approaches have surface appeal, they fail to account for the full theoretical and practical complexity of the problem of difference, and the proposed solutions could well create as many difficulties as they solve. As a theoretical matter, discussions of gender in jury selection have proceeded on the implicit assumption that gender and race are (or at least should be) interchangeable for the purposes of equal protection doctrine and policy.[11] This approach rests on the premise that the law should not tolerate either racial or gender classifications, but rather should be "blind" to such characteristics. Recently, feminist theorists have suggested new ways of looking at gender which question the efficacy and value of

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race, whether or not the defendant and the excluded juror were members of the same race. In Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), the Court extended *Batson*'s proscription to civil cases.

7. *But see Batson*, 476 U.S. at 124 ("if conventional equal protection principles apply, then presumably defendants could object to exclusion on the basis of not only race, but also sex . . . .") (Burger, C.J., dissenting).

8. *See infra* note 50 and accompanying text.

9. *See infra* notes 50 & 64 and accompanying text.

10. *See* Jere W. Morehead, *Exploring the Frontiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289 (1990); Shirley S. Sagawa, *Batson v. Kentucky: Will It Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14, 37–47 (1987/88); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027 (1991); S. Alexandria Jo, Note, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305 (1991).

11. I say "should be" because under equal protection doctrine, race is a "suspect class" which requires strict scrutiny and a compelling state interest. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.5 (3d ed. 1986). Gender is considered a quasi-suspect classification which has only been afforded "intermediate scrutiny." *See* Craig v. Boren, 429 U.S. 190 (1976).

denying the possibility of difference and of relying on neutral principles to achieve gender equality.[12] These ideas can help illuminate the complexity of the role of gender in jury selection.

Although extension of *Batson* can be justified as a matter of law, from a practical perspective it would be an unwise policy decision. In the last five years, as lower courts have struggled to implement *Batson*,[13] it has become apparent that *Batson* will not easily fulfill its promise. Moreover, the fundamental premise of *Batson*, that peremptory challenges may not serve as tools to discriminate, is fundamentally inconsistent with the "arbitrary and capricious" nature of peremptory challenges.[14] Faced with this intractable conundrum, commentators have called increasingly for the abolition of the peremptory challenge.[15]

Abolition of the peremptory challenge, however, is no panacea. The peremptory challenge plays a critical role in ensuring the impartiality of the jury and serves other important functions which can only be fully appreciated by considering the peremptory challenge in the context of the overall voir dire.

This Article examines critically the arguments both for extending *Batson* to gender and for eliminating the peremptory challenge altogether. Part I lays the groundwork for the analysis by reviewing the history of women's exclusion from jury service, tracing the development of the *Batson* analysis, and analyzing the recent cases that have considered whether *Batson* should be extended to prohibit gender-based use of peremptory challenges. Part II discusses some of the theoretical and empirical aspects of the role of gender in the jury process. Part III examines the problems inherent in the *Batson* analysis generally, and as applied to gender discrimination. Part IV explains why abolition of the peremptory challenge is an ill-advised solution to the problem. Finally, Part V sets forth a new framework of proportional representation to ensure gender

12. *See* Leslie Bender, *Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988), and *infra* notes 82–93 and accompanying text.

13. *See infra* notes 123–82 and accompanying text.

14. Blackstone described peremptory challenges as "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all. . . ." 2 WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 346 (Katz ed. 1979). On the fundamental inconsistency, see Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 201–02 (1989).

15. *See, e.g.*, Alschuler, *supra* note 14, at 199–211; Sagawa, *supra* note 10, at 46–47.

equality in jury selection by focusing on inclusion, rather than exclusion.

I. THE HISTORY OF SEX DISCRIMINATION IN JURY SELECTION AND THE DEVELOPMENT OF THE *BATSON* ANALYSIS

A. *Women on the Jury*

The exclusion of women from jury service dates back to the English common law,[16] and was the law in most of the American states until the middle of this century.[17] As recently as twenty-five years ago, women were still barred from jury service in Mississippi.[18] Until the middle of this century, a woman's right to serve on a federal jury depended on the state law governing eligibility for jury service in the jurisdiction where the federal court sat.[19] Finally, in 1957, Congress declared women eligible for federal jury service regardless of state law.[20]

The Supreme Court first addressed women's right to serve as jurors in *Ballard v. United States*.[21] In *Ballard*, the court held that women could not be excluded from jury service in federal court in a state where women had the right to serve. The Court relied on the congressional statutory scheme governing federal jury service which required deference to state law to determine a juror's eligibility,[22] but the Court also used language that emphasized the desirability of obtaining a representative jury and the importance of including women to achieve that goal.[23]

Fifteen years later, the Court considered an equal protection challenge to a Florida statute that automatically exempted women,

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16. *See* BLACKSTONE, *supra* note 14, at 362.

17. Sagawa, *supra* note 10, at 25.

18. Mississippi finally repealed its statute barring women from jury service in 1968. *Id.* at 26.

19. *See* Hoyt v. Florida, 368 U.S. 57, 60 n.2 (1961).

20. *See* the Civil Rights Act of 1957, 28 U.S.C. § 1861 (1988), *cited in Hoyt*, 368 U.S. at 60 n.2; Sagawa, *supra* note 10, at 26 & n.84.

21. 329 U.S. 187 (1946).

22. *Id.* at 191–93.

23. Although the Court did not rely on any constitutional grounds to reach its decision, it recognized the importance of having a representative jury:

> The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society.

Id. at 195 (citations omitted).

but not men, from jury service unless they registered with the court clerk. In *Hoyt v. Florida*,[24] appellant Hoyt was convicted by an all-male jury of murdering her husband. The Court rejected Hoyt's claim that the statute operated to exclude women, even though at the time of the trial only 220 out of some 46,000 registered women voters had volunteered for jury service since Florida had removed restrictions limiting service to males.[25] The Court found this disparity of no "constitutional consequence" and declared the classification "reasonable."[26] The Court also flatly dismissed Hoyt's contention that the nature of the crime, involving "marital upheaval" and "suspected infidelity of appellant's husband," peculiarly compelled the inclusion of women on the jury.[27]

The Court revisited the problem of systematic exclusion of women from the venire by operation of a statute similar to the Florida statute at issue in *Hoyt* in *Taylor v. Louisiana*.[28] The Louisiana statute required women, but not men, to complete a written declaration to become eligible for jury service. While fifty-three percent of the women in the county were eligible to serve, only ten percent actually ended up on the jury wheel. The state conceded that the statute caused this discrepancy. The defendant, convicted of aggravated kidnapping by an all-male jury, claimed that the systematic exclusion of women violated his right to an impartial trial guaranteed by the Sixth and Fourteenth Amendments.[29] The Court agreed with the defendant and held that the systematic exclusion of women violated the fair cross-section requirement of the Sixth Amendment. The Court refrained from explicitly overruling *Hoyt*, but indicated that a rational basis was not sufficient to justify the

24. 368 U.S. 57 (1961).

25. *Id.* at 64.

26. *Id.* at 65.

27. *Id.* at 58–59. According to the Court:

> It is claimed, in substance, that women jurors would have been more understanding or compassionate than men in assessing the quality of appellant's act and her defense of 'temporary insanity.' . . . Of course, these premises misconceive the scope of the right to an impartially selected jury assured by the Fourteenth Amendment. That right does not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried. It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions.

Id. at 59.

28. 419 U.S. 522 (1975).

29. *Id.* at 525.

exclusion of women from the venire.[30] The Court also questioned the premise of the rationale articulated by the state in *Hoyt* — that women's unique place in family life and the home made jury service a hardship for them — in light of the movement of women into the paid labor force.[31]

The Court closed another loophole for gender discrimination in selecting the jury pool in *Duren v. Missouri*.[32] In *Duren*, the Court invalidated a Missouri jury selection system which provided automatic exemptions for any woman requesting not to serve and which had resulted in jury venires comprised of less than fifteen percent women.[33]

Although *Duren* leaves open the question of exactly what constitutes systematic exclusion, the *Taylor* Court firmly established that the Sixth Amendment's right to an impartial jury requires that the venire be drawn from a fair cross-section of the community and that systematic exclusion of any cognizable group violates this guarantee.[34] In recent years, the battle against discrimination in jury selection has shifted to selection of the petit jury and the use of peremptory challenges in that process.

B. *The Discriminatory Use of Peremptory Challenges*

1. Race-Based Discrimination

The Supreme Court's analysis of the problem of discrimination in selection of the petit jury has focused primarily on race and has relied on an equal protection analysis.[35] The Court first considered the problem of discriminatory peremptory challenges in *Swain v.*

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30. *Id.* at 533–34.

31. *Id.* at 534–35 & nn.15–17.

32. 439 U.S. 357 (1979).

33. *Id.* at 360. *But see id.* at 374–75 (Rehnquist, J., dissenting) (arguing that the Court's holding leaves open the question of what percentage of inclusion evidences systematic exclusion; the Court "intimated," but did not specifically hold, that men and women should be treated identically in selection of the venire).

34. "Cognizable groups" are those singled out for differential treatment. Castaneda v. Partida, 430 U.S. 482, 494 (1977). *See infra* note 78 and accompanying text.

35. *See, e.g.*, 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). The defendant in *Batson* also challenged the prosecutor's discriminatory use of peremptories based on the Sixth Amendment's fair cross-section requirement. The Court declined to rule on this issue in *Batson*, 476 U.S. at 84 n.4. Five years later, however, the Court squarely confronted this claim in Holland v. Illinois, 493 U.S. 474, *reh'g denied*, 494 U.S. 1050 (1990), and held that the Sixth Amendment guarantees a defendant an impartial jury, not a representative one, and that the discriminatory use of peremptory challenges does not violate or implicate the Sixth Amendment. *Id.* at 487.

Alabama.[36] In *Swain*, the Court recognized that purposeful race-based discrimination against blacks in the use of peremptory challenges violates the Equal Protection Clause.[37] *Swain*, however, imposed a virtually insurmountable burden on a defendant seeking to prove purposeful discrimination by a prosecutor's use of peremptory challenges.[38] The defendant had to establish that a given prosecutor had struck jurors on account of their race "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . . ."[39]

The Court rejected this evidentiary burden and partially overruled *Swain* in *Batson v. Kentucky*.[40] Batson was a black man convicted of second-degree burglary and receipt of stolen goods by an all-white jury. During voir dire, the prosecutor had used his peremptory challenges to remove all four black jurors from the venire.[41] The *Batson* Court enunciated a three-part test whereby a defendant could establish a prima facie case of purposeful discrimination in selection of the petit jury by showing that: (1) the defendant is a member of a "cognizable racial group"; (2) the prosecutor has exercised her peremptory challenges to exclude members of defendant's race; and (3) "these facts and any other relevant circumstances" create an inference that the prosecutor used peremptory challenges to exclude jurors based on their race.[42] Once the defendant has established a prima facie case, the burden shifts to the prosecutor to provide a racially neutral explanation related to the particular case for exercise of the peremptory challenges.[43]

Batson's reasoning was murky at best. The Court did not apply conventional equal protection analysis,[44] and it was unclear whose equal protection rights were being vindicated. The Court's analysis seemed premised on the protection of the *defendant's* right

36. 380 U.S. 202 (1965).

37. *Id.* at 203–04.

38. *Swain* was roundly criticized. *See, e.g.*, John A. Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966); F.R.D., Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetration of the All White Jury*, 52 VA. L. REV. 1157 (1966).

39. *Swain*, 380 U.S. at 223.

40. 476 U.S. 79 (1986).

41. *Id.* at 82–3.

42. *Id.* at 96.

43. *Id.* at 98.

44. The Court did not purport to apply strict scrutiny to race-based peremptory challenges, i.e., it did not assess whether they served a compelling state interest and were narrowly tailored to achieve that goal. *See id.* at 123–25 (Burger, C.J., dissenting).

to equal protection.[45] But, the Court also expressed concern for impermissible discrimination against the excluded juror.[46] Recently, in *Powers v. Ohio*,[47] the Supreme Court explicitly recognized that the exercise of peremptory challenges to discriminate on the basis of race violates the *excluded juror's* right to equal protection and held that a defendant of a different race than the excluded juror had standing to raise claims based on those rights.[48] Thus, the prohibition against race-based peremptory challenges rests both on the defendant's equal protection right not to have jurors of her own race excluded based on race and on the juror's right not to suffer exclusion based on race.

2. Sex Discrimination in Selection of the Petit Jury

Batson and its Supreme Court progeny have focused almost exclusively on race discrimination.[49] Several lower courts, however, have considered whether *Batson* also prohibits gender discrimination in the use of peremptory challenges. Those courts that have decided the question have reached varied conclusions.

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45. According to the Court:

> The Equal Protection Clause guarantees *the defendant* that the State will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors. Purposeful 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 designed to secure.

Id. at 86 (citations omitted) (emphasis added).

46. *Id.* at 87. "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . As long ago as *Strauder* . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." *Id.*

47. 111 S. Ct. 1364 (1991).

48. *Id.* at 1373. The Court affirmed this point later that same term when it held that *Batson* applied to civil cases, preventing private litigants from exercising peremptory challenges to exclude jurors based on race. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

49. *Batson* appears to apply to discrimination based on national origin as well, *see, e.g.*, Hernandez v. New York, 111 S. Ct. 1859 (1991) (recognizing *Batson* claim by Latino defendant), although there is some dispute about whether *any* ethnic group may claim *Batson*'s protection. For example, federal courts have disagreed on whether *Batson* prohibits discriminatory use of peremptory challenges to remove Italian Americans. *Compare* United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987) (recognizing that *Batson* applies to ethnic as well as racial groups but declining to acknowledge Italian Americans as a "cognizable group"), *cert. denied*, 484 U.S. 1063 (1988) *with* United States v. Biaggi, 673 F. Supp. 96, 101 (E.D.N.Y. 1987) (recognizing Italian Americans as cognizable group), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

United States v. De Gross[50] is the leading case applying *Batson* to gender. Juana Espericueta De Gross was charged with three counts of aiding and abetting the transportation of an alien within the United States. In *De Gross*, the question of gender discrimination arose when the prosecutor offered gender as a "neutral" explanation to rebut the prima facie case of race discrimination established by the defendant. The defendant had raised a *Batson* objection to the government's challenge of Herminia Tellez, an Hispanic[51] woman, and the only Hispanic on the venire.[52] The district court found that De Gross had made out a prima facie case, but accepted as neutral the prosecutor's explanation that he wanted "to get a more representative community of men and women on the jury."[53] Ironically, the government itself raised a "reverse-*Batson*" claim,[54] arguing that the defendant had impermissibly used her peremptory challenges to exclude men from the jury. In this instance, the district court agreed with the government that a prima facie case of discrimination had been established by De Gross's exercise of seven peremptories against male jurors.[55] De Gross refused to offer any explanation, and her challenged peremptory strike of male juror Wendell Tiffany was denied. The court appeared oblivious to

50. No. 87-5226. 1992 U.S. App. LEXIS 5645 (9th Cir. Apr. 2, 1992) (en banc). Three state courts have also extended *Batson* to gender. State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990); People v. Blunt, 162 A.D.2d 86, 561 N.Y.S.2d 90, (1990); State v. Irizarry, 168 A.D.2d 715, 560 N.Y.S.2d 279 (1990). Discriminatory use of peremptories to exclude jurors based on gender has also been prohibited as a violation of the fair cross section requirement of some state constitutions. *See, e.g.*, People v. Cervantes, 233 Cal. App. 3d 323, 284 Cal. Rptr. 410 (1991) (men); People v. Macioce, 197 Cal. App. 3d 262, 280, 242 Cal. Rptr. 771, 782 (1987) (women), *cert. denied*, 488 U.S. 908 (1988); Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495, 499–501 (1981) (men); *see also* Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979).

51. I am aware of the current debate as to whether the term "Latina" or "Hispanic" is appropriate. I chose to use "Hispanic" here because that is the word the parties used in their briefs and the court used in its opinion. For the sake of consistency, I will continue to employ the term throughout this Article.

52. *De Gross*, 1992 U.S. App. LEXIS at *3.

53. *Id.*

54. "Reverse *Batson*" claims are those raised by the government, alleging discriminatory use of peremptory challenges by the defendant. The Supreme Court has not decided whether to extend *Batson* to end discriminatory use of peremptory challenges by the defendant. The Ninth Circuit sitting *en banc*, *id.* at *4, allowed the claim in a closely divided decision, as did the New York Court of Appeals in People v. Kern, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990). Commentators have disagreed on the issue. *Compare* Katherine Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) *with* J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015 (1990).

55. *De Gross*, 1992 U.S. App. LEXIS *2.

the inconsistency of its rulings. Three men and nine women ultimately sat on the jury that convicted De Gross.

On appeal, the Ninth Circuit *en banc* extended *Batson* to prohibit gender discrimination after applying a standard equal protection analysis. The court recognized that the Constitution treats classifications based on gender differently than those based on race.[56] Race is considered a "suspect class," requiring strict scrutiny,[57] while gender is a "quasi-suspect class" subject to "intermediate scrutiny."[58] The government must show that a racial classification is narrowly tailored to meet a compelling state interest, while a classification based on gender will survive if it is substantially related to an important government purpose.[59] The Ninth Circuit found that "peremptory challenges are a necessary means for achieving the important governmental objective of impaneling a fair and impartial jury,"[60] but concluded that gender-based peremptory challenges are not substantially related to this goal.[61] Peremptory challenges exercised on the basis of gender do not reflect a judgment about the potential juror's ability to be impartial; rather, they "are based on either the false assumption that members of a certain group are unqualified to serve as jurors . . . or on the false assumption that members of certain groups are unable to consider impartially the case against a member or a nonmember of their group."[62] Nor do such peremptory challenges further other important state interests such as ensuring public confidence in the judicial system and eradicating community prejudice. On the contrary, discriminatory peremptory challenges hinder those goals, fostering gender discrimination and stigmatizing the excluded juror whose gender has no bearing on his or her competence to serve as an impartial juror.[63] Applying the *Batson* analysis, the Ninth Circuit concluded that the Equal Protection Clause prohibited gender-based peremptory challenges.

Not all courts considering the application of *Batson* to gender-based peremptory challenges have reached the same conclusion as

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56. *Id.*

57. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Korematsu v. United States, 323 U.S. 214, 214 (1944)).

58. Craig v. Boren, 429 U.S. 190, 197 (1976).

59. *De Gross*, 1992 U.S. App. LEXIS *14.

60. *Id.* (citing Swain v. Alabama, 380 U.S. 202, 211–12 (1965); Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting)).

61. *Id.* at *15 (citing *Batson*, 476 U.S. at 98–99).

62. *Id.* (citations omitted).

63. *Id.*

De Gross. *United States v. Hamilton*[64] is representative of those cases declining to extend *Batson* to gender.[65] In *Hamilton*, several black defendants were tried on various drug-related offenses. During voir dire, the government used seven of its eight peremptory challenges to exclude black persons from the venire. The district court found that the defendant had established a prima facie case of discrimination under *Batson*.[66] The court concluded, however, that the prosecutor had provided racially neutral reasons for striking the black jurors. The defendants conceded that the government had provided race neutral explanations for four of the stricken black jurors; the case thus turned on the reasons given for striking the other three blacks. The government claimed that it struck the remaining black jurors because they were women, and "it wanted to take steps to insure that a jury would not be overly sympathetic to the female defendants who allegedly participated in the . . . drug distribution network."[67] Ultimately, the jury was comprised of six white females, three black females, and three white males.[68]

The Fourth Circuit rejected the defendants' argument that the government violated the Equal Protection Clause by using its peremptories to exclude women from the jury. Although the court acknowledged that the Equal Protection Clause undoubtedly prohibited gender discrimination "in other contexts," nothing suggested that "the Supreme Court would apply normal equal protec-

64. 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

65. *See also* Fisher v. State, 587 So. 2d 1027 (Ala. Crim. App.), *cert. denied*, 587 So. 2d 1039 (Ala. 1991), *cert. denied*, 117 L. Ed. 2d 628 (1992); Dysart v. State, 581 So. 2d 541 (Ala. Crim. App. 1990); Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990), *cert. denied*, 112 S. Ct. 315 (1991); Stariks v. State, 572 So. 2d 1301, 1303 (Ala. Crim. App. 1990) (relying on *Hamilton*, 850 F.2d 1038); People v. Hooper, 133 Ill. 2d 469, 510, 552 N.E.2d 684, 701 (1989), *cert. denied*, 111 S. Ct. 284 (1990) (citing *Hamilton*, 850 F.2d 1038); Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989) (citing *Hamilton*, 850 F.2d 1038); State v. Clay, 779 S.W.2d 673 (Mo. Ct. App. 1989); State v. Culver, 233 Neb. 228, 444 N.W.2d 662 (1989); State v. Oliviera, 534 A.2d 867 (R.I. 1987); *cf.* Patri v. Percy, 530 F. Supp. 591, 595–96 (E.D. Wis. 1982) (use of peremptories to exclude women did not violate right to fair and impartial jury).

66. This determination was made on remand. The district court initially denied defendants' motion for mistrial for failure to show systematic exclusion required by Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). *Hamilton*, 850 F.2d at 1039–40. While defendants' appeal was pending, the Supreme Court decided *Batson* and held that it would apply retroactively under Griffith v. Kentucky, 479 U.S. 314 (1987).

67. *Hamilton*, 850 F.2d at 1041. There were nine male defendants and five female defendants at the time of jury selection. *Id.*

68. At the time the government struck juror No. 54, five women and one man had been seated on the jury; when it struck No. 53, the jury consisted of seven women and one man, and when it struck No. 56, the number of women on the jury had increased to nine, while the number of men remained at one. *Id.*

tion principles to the unique situation involving peremptory challenges."[69] The court did not indicate exactly how peremptory challenges were "unique," but it enumerated some of their benefits. According to the court, the peremptory challenge facilitates the exercise of challenges for cause and allows for the elimination of jurors who may, at least statistically, have predispositions which render them "inappropriate jurors for particular kinds of cases," without the need to expose these discomfiting biases.[70] In the Fourth Circuit's view, if the Supreme Court had wanted to abolish the peremptory challenge or prohibit the exercise of challenges based on "gender, age or other group classification," it could have done so.[71] The *Hamilton* court, unwilling to take that step on its own, concluded that the Court only intended *Batson* to prohibit race-based peremptory challenges.[72]

The Fourth Circuit's decision is almost completely devoid of substantive analysis. The decision seems primarily based on timidity — the court's unwillingness to consider seriously an obvious and logical application of *Batson*, simply because the Supreme Court did not address an issue that was not even presented by *Batson*.[73]

Hamilton's shortcomings, however, do not render the court's reasoning in *De Gross* unassailable, or its conclusion inescapable. Plausible arguments could be made that the Equal Protection Clause does not prohibit gender-based peremptory challenges. First, of course, classifications based on gender are not subject to the same level of scrutiny as those based on race,[74] and thus are more likely to withstand constitutional challenge.[75] Applying intermediate scrutiny, one could dispute the conclusion in *De Gross* that gender-based peremptory challenges are not substantially related to an important government interest. Arguably, gender is a relevant characteristic to consider when exercising peremptory challenges.[76] Moreover, prohibiting gender-based peremptory challenges could substantially undercut the function of the challenge.[77] Protecting

69. *Id.* at 1042.

70. *Id.* (quoting *Batson*, 476 U.S. at 121 (quoting Barbara Allen Babcock, *Voir Dire: Prescribing "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553–54 (1975))).

71. *Hamilton*, 850 F.2d at 1042.

72. *Id.* at 1043.

73. *See* Alschuler, *supra* note 14, at 180 n.107 (accusing such courts of abdicating responsibility by failing to analyze the claim on its merits).

74. *See supra* note 11 and accompanying text.

75. *Compare* Loving v. Virginia, 388 U.S. 1 (1967) *with* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (en banc), *appeal dismissed*, 409 U.S. 810 (1972).

76. *See infra* notes 82–122 and accompanying text.

77. *See infra* notes 185–91 and accompanying text.

peremptories by limiting *Batson* to race discrimination thus might well serve important state interests that would justify the gender-based classification.[78]

While this argument is not without some force, it is ultimately unpersuasive, and *De Gross* is surely the better-reasoned decision as a matter of equal protection doctrine. Using peremptory challenges to discriminate on the basis of gender cannot be tolerated. If the Court has forbidden the use of race as a surrogate for more specific evidence of bias, no compelling reason exists to treat gender any differently.

The theoretical premise underlying *De Gross* and equal protection doctrine is that neither race nor gender are legitimate categories to use in deciding when to exercise peremptory challenges. As *De Gross* explains, neither category is relevant to whether a juror can act impartially or is otherwise competent to serve.[79] The evil of using peremptories to discriminate is that the practice reflects and perpetuates stereotyped notions that members of one race or gender will inevitably favor litigants that belong to the same group or are otherwise unable to judge the case fairly.[80]

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78. Another doctrinal problem with applying *Batson* to gender stems from an ambiguity in *Batson*: the *Batson* analysis required the defendant to show that he belongs to "a cognizable racial group." Batson v. Kentucky, 476 U.S. 79, 96 (1986) (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)). *Castaneda* defines a cognizable group as a member of an identifiable group singled out for differential treatment. The Supreme Court has identified blacks, women, and Mexican-Americans as cognizable. GOBERT & JORDAN, *supra* note 3, § 6.16. Lower courts, however, have had some difficulty identifying cognizable groups, since the Court implied that to be cognizable, a group must have been "historically disadvantaged." *Id.* If *Batson* protects only these groups, exclusion of men by use of peremptory challenges, as in *De Gross*, would not violate the Equal Protection Clause. This argument is not likely to succeed in light of Powers v. Ohio, 111 S. Ct. 1364 (1991). *Powers* prohibits the use of any racial classification in the exercise of peremptory challenges, *id.* at 1370, and thus appears to eliminate any requirement that the defendant or excluded juror belong to a cognizable group. *De Gross* is consistent with this approach, since it prohibits the use of gender classifications, rather than focusing on membership in any cognizable group. United States v. De Gross, No. 87-5226, 1992 U.S. App. LEXIS 5645 (9th Cir. Apr. 2, 1992) (en banc).

79. *De Gross*, 1992 U.S. App. LEXIS at *13.

80. *Id.* at *11. Of course, it might be argued that there is some truth to the stereotype. Social psychology has long recognized that the existence of a shared group identity may lead to "ingroup-outgroup bias," resulting in favoritism toward members of the ingroup. *See* William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 S. CT. REV. 97, 129 (1987). *But see infra* notes 94–113 and accompanying text (discussing inconclusiveness of empirical research on gender bias in jury decision-making). Recognition of this statistical possibility of bias does not require the system to tolerate peremptory challenges based on group classification which the Constitution holds to be suspect (race) and quasi-suspect (gender). A litigant, and particularly a criminal defendant, might argue that denying her the right to excuse jurors who statistics (or stereotypes) indicate may be biased, violates her constitutional right to a

Surely racism and sexism have no place in jury selection, whether exercised overtly or covertly through peremptory challenge. The underlying premise of *Batson* and *De Gross*, however, may not fully account for the complexity of the interaction of gender and the jury process.[81] The *Batson* equal protection analysis is severely limited in its ability to resolve the problem of gender discrimination in selection of the petit jury, both conceptually and practically. The next Part explores some of the theoretical and conceptual difficulties and tensions embodied in the *Batson* equal protection approach, particularly as it relates to gender.

II. CHALLENGING THE ASSUMPTION: IS THERE A DIFFERENCE AND DOES DIFFERENCE MATTER?

De Gross proceeds on the assumption that the law should not recognize any difference between men and women as jurors. While this premise is appealing, it perhaps too easily glosses over gender differences. Both feminist theory and empirical jury research suggest that the role of gender in jury decision-making may be significantly more complex than the *De Gross* conclusion suggests.

A. *New Perspectives from Feminist Theory*

The traditional approach to feminism operated on the assumption that women could best and most fully achieve equality by denying difference and seeking equal treatment under the law.[82] A substantial number of feminist theorists have challenged this assumption. These feminists recognize gender differences and seek to value those differences by ensuring that women are not disadvan-

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fair trial by an impartial jury. Criminal defendants, though, as well as civil litigants, may exercise challenges for cause to exclude jurors who are truly biased, although admittedly, challenges for cause provide a limited remedy. *See infra* notes 191–202 and accompanying text. However, according to *Batson*, and by logical extension, *De Gross*, the Constitution forbids reliance on race or gender in the exercise of peremptory challenges regardless of any possible statistical group bias.

81. Nor does it take account of the special problems posed by the intersection of race and gender in the jury selection process. *See* Sagawa, *supra* note 10, at 36–37, 43–44. Women of color have suffered discrimination in jury selection both on account of race and of gender. In fact, prosecutors have relied on gender as a "neutral" explanation to justify alleged racially motivated strikes of black women. *See, e.g.*, United States v. Hamilton, 850 F.2d 1038, 1041 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

82. Anne S. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 915–17 (1983); Nadine Taub & Wendy W. Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825, 831–32 (1985); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984/1985).

taged by them.[83] Much of the theory developed by these "relational" feminists, as they are known, stems from the pioneering work of psychologist Carol Gilligan.[84] Gilligan posited that women use a different method and approach to moral decision-making than men.[85] The male approach, and the one traditionally recognized by psychological theory, emphasizes rights, abstract justice, equality, and fairness. Women, in contrast, focus on context, care, and responsibility to resolve moral conflicts.

Gilligan's theory arose, in part, out of a "rights and responsibilities" study in which she analyzed the responses of males and females to, *inter alia*, selected hypothetical moral dilemmas at various points in the life cycle.[86] A good example of this gender divergence emerges in Gilligan's discussion of the responses of Amy and Jake, two eleven year olds asked to resolve "Heinz's dilemma." "Heinz's dilemma" is whether to steal a drug which will save his wife's life. Heinz cannot afford to buy the drug, and the druggist will not reduce the price. Amy's responses reflect the ethic of care: the dilemma to her involved "a fracture of human relationship that must be mended with its own thread."[87] Her solution to the dilemma relies on communication and connection — making the druggist see the wife's plight and respond, or obtaining others' help. Jake, on the other hand, sees "a conflict between life and property that can be resolved by logical deduction."[88] He approaches the

83. *See* Bender, *supra* note 12, at 11–12, 29–30; Christine A. Littleton, *Restructuring Social Equality*, 75 CAL. L. REV. 1279 (1987).

84. Bender, *supra* note 12, at 29.

85. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan's theory has drawn criticism from a wide range of scholars. *See* Leslie Bender, *From Gender to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 14–15 (1990). Recent critiques have accused Gilligan's theory of being essentialist; however, as will become apparent, I maintain that the theory of difference makes a valuable contribution to an understanding and analysis of legal problems.

86. The rights and responsibilities study involved interviews of males and females at various ages to obtain data on conceptions of self and morality, experiences of moral conflict and choice, and judgments of hypothetical moral dilemmas. *Id.* at 3. Gilligan also relied on two other studies to support her theory. In a college student study she interviewed 25 students as college seniors, and again five years after graduation. The study "explored identity and moral development in the early adult years by relating the view of self and thinking about morality to experience of moral conflict and the making of life choices." *Id.* at 2. The abortion decision study involved interviews of 29 women in the first trimester of pregnancy who were considering abortion.

87. *Id.* at 31.

88. *Id.*

dilemma as "a math problem with humans" and concludes that the only logical result would be for Heinz to steal the drug.[89]

Recognizing a striking gender dichotomy of moral analysis, Gilligan argues for recognition of women's "different voice" in our understanding of moral development. Many feminist scholars have called for "the recognition and value of that 'different voice' in law."[90] If Gilligan is correct, the implications for jury selection are obvious: if indeed women do speak in a "different voice" and bring a distinct vision to moral dilemmas, we should expect — or at least be open to the possibility — that women will bring a different perspective to bear on the process of judging cases as jurors.

The law has already begun to recognize explicitly that gender may affect how an individual perceives and experiences the world. In a recent sexual harassment case *Ellison v. Brady*, the Ninth Circuit adopted a "reasonable woman" standard for evaluating "hostile environment" sexual harassment claims.[91] As the court explained:

> A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. . . .
>
> We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. . . .
>
> . . . .
>
> We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.[92]

It is difficult to argue that men and women are fungible as jurors when the jury will be required to apply a "reasonable woman" standard, and it seems incongruous, to say the least, to accept an all-male jury in such a case. The *Ellison* court's logic could apply to other types of cases which require the jury to access the victim's point of view — a perspective that may be related to gender. Trials of battered women who kill their batterers and rape cases, particularly where consent is a defense, are two situations that come to mind.

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89. *Id.* at 26.

90. Bender, *supra* note 12, at 29. *See, e.g.*, *id.* at 30–36; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

91. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

92. *Id.* at 878–79 (citations omitted) (footnote omitted).

But to accept both Gilligan's theory and the "reasonable woman" standard is not to conclude that inclusion or exclusion of women from a jury will automatically result in different verdicts. I do not intend such a crude application.[93] Rather, Gilligan's theory and the "reasonable woman" standard suggest that viewing gender as completely irrelevant to the jury process may obscure significant complexity and thus lead to inappropriate policy responses.

B. *Empirical Research*

Although no one has tested the applicability of Gilligan's theory to the jury process, there does exist empirical research regarding gender differences in attitudes of jurors, their perception of evidence, and their participation in deliberations.

The notion that gender differences inform the jury process has existed for decades as part of a large body of jury selection folklore, much of which was blatantly sexist, of questionable accuracy, and often contradictory.[94] Anne Rankin Mahoney discusses the five most common admonitions about women jurors: (1) that women favor the criminal defendant more than men, except in cases involving threats to a child or the family; (2) that women are more likely to favor the plaintiff in civil cases, but will make smaller awards than men; (3) that women are less likely than men to favor female defendants or plaintiffs; (4) that women are more apt to convict rape defendants, unless there is some indication that the victim encouraged her own victimization or was "not respectable";[95] and (5) that women are more likely than men to be affected by physically attractive parties, especially by attractive men.[96] While recent com-

93. Moreover, research shows that "although one way of conceiving of moral problems dominates, most individuals use both orientations some of the time." Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622, 624 (1987).

94. *See* Solomon M. Fulero & Steven D. Penrod, *Jury Selection Folklore: What Do They Think and How Can Psychologists Help?*, 3 FORENSIC REP. 233, 236–37 (1990); Ann R. Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection*, 114, 118–21 *in* WOMEN IN THE COURTS (Winifred L. Hepperle & Laura Crites eds., 1978); Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 70–79 (1986).

95. Mahoney, *supra* note 94, at 121. *But see* ANN GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS § 14.55 (1984) (" 'Because of [the] innate attraction between the sexes, and the initial, instinctual distrust between women, women are surprisingly good defense jurors in rape trials . . . .' ") (quoting MARTIN G. BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW 120 (1973)).

96. Mahoney, *supra* note 94, at 121–22. This is not a comprehensive list of generalizations about women jurors. For additional examples, see sources cited in *supra* note 94.

mentators on the jury selection process have urged attorneys to consider the diversity of women's experiences in jury selection, these commentators still draw conclusions based on gender that sound rather crude.[97]

Is there any empirical support for these assumptions, or for the existence of any gender differences in jury behavior? Mahoney found some support for the first generalization, that women are less likely to convict unless injury to a child is involved, although none of the studies purported to test this hypothesis specifically.[98] Other studies showed no significant gender differences in conviction rates,[99] and one study has found women more likely to prejudge guilt than men.[100] The evidence regarding women's purported bias toward plaintiffs, but against large damage awards, is contradictory.[101] Empirical research refutes the claim that women discriminate against other women, and lends support to the notion that each gender favors its own.[102] Empirical research does not support the claim that women are more favorable toward attractive male defendants.[103]

Rape and death penalty cases seem to generate the strongest gender differences. Several studies support the notion that women are more likely than men to convict rape defendants and to give

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97. *See* Fulero & Penrod, *supra* note 94, at 236 ("[S]uburban housewives are conservative on damages and unsympathetic to plaintiffs . . . . '[w]omen's liberationist' women may feel antagonistic toward male plaintiffs or male attorneys . . . ."); GINGER, *supra* note 95, §§ 14.55–14.61 (suggesting expanding the characteristics considered when evaluating women jurors to include those supposedly typical of "welfare mothers," "dumb blonds," and "uppity women").

98. Mahoney, *supra* note 94, at 122–23. A study by Stanley Sue and Ronald Smith showed women were *more* likely than men to convict after exposure to prejudicial pretrial publicity, but the study's sample case involved the murder of a small child, supporting the exception to the hypothesis. *Id.* at 123. A study by Hans Zeisel also supported this exception, finding women less likely than men to convict in a gang murder case, but more likely to convict in a child murder case. *Id.*

99. *See* sources cited in Edmond Constantini et al., *Gender and Juror Partiality: Are Women More Likely to Prejudge Guilt?*, 67 JUDICATURE 121, 127 n.13 (1983).

100. *Id.* at 127. *See also* Vicki S. Helgeson & Kelly G. Shaver, *Presumption of Innocence: Congruence Bias Induced and Overcome*, 20 J. APPLIED SOC. PSYCHOL. 276, 299 (1990) (finding women more likely to ascribe guilt to the defendant, but less confident than men in their judgments).

101. Mahoney, *supra* note 94, at 124. Snyder found "the presence of women on juries enhances a plaintiff's chances of winning, [but] it does not enhance the plaintiff's chances of getting a large damage award." Stuart S. Nagel and Lenore J. Weitzman reached the opposite conclusion—that there was no difference by gender regarding liability and that women awarded larger amounts than men. *Id.*

102. *Id.* at 125. Three studies found that women favor women and men favor men. *Id.*

103. *Id.* at 127.

them longer sentences.[104] A number of other studies have found that women are more likely to oppose the death penalty than men.[105]

Overall, the empirical evidence falls considerably short of establishing significant gender differences in attitude or verdicts. However, gender may play a role in other, more subtle ways. Social science research suggests that men and women may perceive and recall facts and events differently.[106] Both genders apparently "pay more attention to and store more or better information about items that attract their interest."[107] Thus, "women recalled better information about a female victim's actions, whereas men responded more accurately about the male thief's appearance."[108] Research also indicates women overestimate their ability to identify a suspect less than men do.[109] These differences in perception would presumably not lead to an attempt to exclude jurors of either sex for bias, as the research discussed *supra* might,[110] but these discrepancies do provide support for the notion that men and women are not fungible for purposes of jury service.

Moreover, research on the deliberation process suggests a need to affirmatively promote inclusion of women on juries in significant numbers. Jury research strongly suggests that women actually participate in jury deliberations much less than men.[111] Not surprisingly, women also less frequently serve as foreperson of the jury, a position that often plays a pivotal role in guiding the jury toward a

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104. *See* sources cited in Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 605 n.58 (1987). *But see* Mahoney, *supra* note 94, at 127 (finding studies "provide little support" for the hypothesis).

105. *See* sources cited in Marder, *supra* note 104, at 605 n.60; Mahoney, *supra* note 94, at 123 n.39 (citing HANS ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT (1968) (Chicago University Law School, Center for the Study of Criminal Justice)).

106. Marder, *supra* note 104, at 600–01. A literary expression of this idea can be found in the short story *A Jury of Her Peers*. Susan Glaspell, *A Jury of Her Peers*, *in* THE BEST SHORT STORIES OF 1917 252–82 (Edward J. O'Brien ed., 1918). The story involves the investigation of the murder of a neighbor found strangled. The victim's wife claimed she was asleep next to him. The sheriff and male neighbors are unable to discover the wife's motive after looking for evidence in the barn and bedroom, but the women neighbors solve the puzzle by focusing on "the insignificance of kitchen things," items men would presumably overlook. *Id.* at 263; *see also* Marder, *supra* note 104, at 600 n.35.

107. Marder, *supra* note 104, at 601.

108. *Id.*

109. *Id.*

110. *See, e.g.*, *supra* notes 104–05 and accompanying text.

111. *See* Marder, *supra* note 104, at 596.

verdict.[112] Perhaps women's participation rate might improve if more women were empaneled.[113]

C. *The Dilemma of Difference and Jury Impartiality*

Both feminist theory and empirical research on juries support the idea that women do bring something different to the jury box, and that gender may be a relevant category to consider in the jury selection process. This recognition is nothing new, although previous incantations of the idea doubtless rested on sexist stereotypes. In *Ballard v. United States*,[114] the Supreme Court stated that:

> The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men — personality, background, economic status — and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[115]

We seem to be faced with a paradox: the fair cross-section requirement, as reflected in the above passage from *Ballard*, recognizes women's difference, while *Batson*, *De Gross*, and equal protection analysis deny it. The challenge is how to accommodate the possibility of difference without reinforcing it and without per-

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112. *Id.* at 595. *Cf.* Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. REV. 171, 175 (1986) (discussing male dominance in mixed-sex activities among school children).

113. It is not clear what proportion of women would be required to overcome the participation differential, since studies of mixed-group interactions still show men dominating the discussion. *See* sources cited in Marder, *supra* note 104, at 597 n.22. The power dynamic of male dominance and female subordination, reflected in women's silence, is not likely to be broken down wholly and solely by increasing the number of women on the jury. Still, it could be a significant step forward.

114. 329 U.S. 187 (1946).

115. *Id.* at 193–94.

petuating invidious stereotypes,[116] while bearing in mind that the ultimate goal of jury selection is to empanel an impartial jury. The solution to this paradox lies in inclusion. The Constitution guarantees an impartial jury to criminal defendants.[117] However, there has been considerable disagreement over exactly what "impartiality" means and how to achieve it. In Sixth Amendment jurisprudence, the Court has defined an impartial jury as one comprised of "indifferent jurors" — those who lack or can set aside any preconceived notion, opinion, or prejudice about a case.[118] As Professor Babcock has said, this definition does not mean that a litigant can expect to:

> draw[ ] many jurors who have no opinions that they will bring to bear on the evidence on or on what happens in the courtroom and jury room. All people have biases and opinions that will inevitably influence their decisions and perceptions, including those on jury duty.[119]

Perhaps recognizing this inevitable fact, the Supreme Court has also described an "impartial jury" as one comprised of a representative cross-section of the community.[120] The cross-section requirement "assures that a range of biases and experiences will bear on the facts of the case."[121] The interplay of this spectrum of views and personalities is supposed to guarantee the fairness and impartiality of the jury.[122]

Yet if the key to an impartial jury is representativeness, rather than individual impartiality, surely we should attempt to maximize the representativeness of the petit jury. The fair cross-section re-

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116. For a comprehensive analysis of the dilemma of difference, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990).

117. U.S. CONST. amend. XI.

118. Irwin v. Dowd, 366 U.S. 717, 722 (1961). *See also* Stephen A. Saltzburg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 353–54 (1982).

119. Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 551 (1975).

120. Justice Marshall has suggested that "the fair cross-section requirement and the impartiality requirement provide distinct protections, and . . . the Sixth Amendment guarantees both." Holland v. Illinois, 493 U.S. 474, 494 (Marshall, J., dissenting), *reh'g denied*, 494 U.S. 1050 (1990). Justice Marshall's position finds support in Taylor v. Louisiana, 419 U.S. 522 (1975). In *Taylor*, the Court adopted the fair cross-section requirement "partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." 419 U.S. at 530–31. But the dominant view seems to be that the fair cross-section requirement is merely a way to ensure impartiality. *See id.* at 533 ("The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a *representative* jury (which the constitution does not demand), but an *impartial* one (which it does) . . . .").

121. Babcock, *supra* note 119, at 551.

122. Saltzburg & Powers, *supra* note 118, at 358.

quirement gives women a right to be included in juror pools but no right to inclusion on petit juries. We might reconcile *Batson*'s approach toward difference by noting that *Batson* does not deny the difference; it merely prohibits use of that (perceived) difference to *exclude* either women or men. *Batson* thus indirectly furthers this end by prohibiting peremptory exclusion based on race or gender. Theoretically, in a perfect world, the *Batson* approach would eliminate all gender discrimination, and we would then expect women and men to be chosen to serve on petit juries in roughly equal numbers. As the next Part will show, however, *Batson* is flawed in its conception and application and, even under ideal circumstances, does not provide any guarantees of inclusion.

III. PRACTICAL PROBLEMS WITH APPLYING *BATSON* TO GENDER DISCRIMINATION

Beyond the theoretical and conceptual difficulties, there are practical reasons for rejecting *Batson* as an effective means of eliminating sex discrimination in jury selection. It simply will not work. The example of lower courts that have struggled to apply *Batson* to eradicate race-discrimination in the use of peremptory challenges suggests that the model is seriously flawed in ways that render it equally ill-equipped to eliminate gender discrimination.[123]

The first problem concerns the requirement that the litigant make out a prima facie case of discrimination. In *Batson*, the Court gave little guidance on this point. The Court merely required that the trial court "consider all relevant circumstances."[124] These circumstances could include a "pattern" of strikes against black jurors and questions or comments made by the prosecutor during voir dire.[125] In implementing *Batson*, lower courts have developed widely differing standards for evaluating the existence of the prima facie case.[126]

While some courts will readily find a prima facie case when a timely objection is raised,[127] others have focused on whether a suffi-

123. *See* Alschuler, *supra* note 14, at 170–80, 199–201; Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293 (1989); David D. Hopper, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection*, 74 VA. L. REV. 811, 836 (1988).

124. Batson v. Kentucky, 476 U.S. 79, 96–97 (1986).

125. *Id.* at 97.

126. For a comprehensive review of the cases, see Raphael, *supra* note 123, at 309–16.

127. *Id.* at 310 & cases cited in n.115.

cient number of black jurors have been peremptorily struck to establish a "pattern."[128] For example, some courts have declined to recognize a prima facie case of discrimination where only two or three minority members of a panel are struck,[129] particularly where the prosecutor does not use her peremptories to strike all minority jurors or as many as possible.[130] Other courts have rejected any kind of numerical floor[131] and have held that striking even one juror may raise a prima facie case, at least when that juror is the only minority in the venire.[132]

Aside from breeding inconsistency among lower courts, the prima facie case requirement can easily insulate discrimination in many jurisdictions. Professor Alschuler calls this the "free shot" problem.[133] As he explains:

> In every case, *Batson* may afford the prosecutor one or two "free shots" — opportunities to discriminate against blacks without accounting for his or her actions. When only one or two blacks appear on the panel of prospective jurors, the prosecutor may need no more ammunition. Moreover, whenever the prosecutor holds his or her fire and allows one or two blacks to serve on a jury, he or she may gain additional opportunities to discriminate.[134]

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128. *See, e.g.*, United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987).

129. *Id.*

130. *See* cases cited in Hopper, *supra* note 123, at 821–22 nn.74–75.

131. *See* United States v. Clemons, 843 F.2d 741, 747 (3d Cir.), *cert. denied*, 488 U.S. 835 (1988).

132. *See, e.g.*, United States v. De Gross, No. 87-5226, 1992 U.S. App. LEXIS 5645 (9th Cir. Apr. 2, 1992) (en banc) (upholding trial court's determination that exclusion of an Hispanic juror from venire established a prima facie case where she was the sole Hispanic in the venire); *see also* United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987), *cert. denied*, 488 U.S. 993 (1988); Mitchell v. State, 279 Ark. 341, 750 S.W.2d 936, 940 (1988); Stanley v. State, 313 Md. 50, 93, 542 A.2d 1267, 1283–85 (1988).

South Carolina adopted a "bright-line" rule that a prosecutor's strike of *any* member of the defendant's race would establish a prima facie case. State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701, 703 (1987). While the South Carolina approach has the virtue of simplicity and errs on the correct side of protecting the litigant and the excluded juror, now that the Supreme Court has made clear that a defendant may challenge the exclusion of jurors of a different race, it seems unlikely that other jurisdictions will follow South Carolina's lead.

133. Alschuler, *supra* note 14, at 173.

134. *Id. See also id.* at 179–80 (courts holding that as long as a substantial number of jurors are of defendant's race, no standing to raise *Batson* challenge). Justice Marshall foresaw this problem. In his concurrence in *Batson* he wrote:

> [D]efendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race . . . .

The "free shot" problem poses a potentially greater danger for gender discrimination. Because there will likely be many more women than minorities in any given jury pool, courts will probably resist finding a prima facie case unless a litigant peremptorily excuses a significant number of jurors of one gender. If the rule were otherwise, a litigant could easily disrupt the jury selection process by raising a *Batson* gender challenge to every other potential juror. On the other hand, one might argue that the greater numerical representation of women on juries (as compared to minorities) makes the danger of discrimination less likely. Since a litigant may have no chance of excluding all potential jurors of one sex from the jury, she may not bother to discriminate at all in selecting the jury. Although it may be easier to achieve a monochromatic jury than a single-sex one, it is unlikely that this would forestall litigants from discriminating based on gender if they believe it will help their client's cause. A defendant in a child molestation case who believes that women will be biased against him, for example, might try to exclude as many women as possible, even if he knows one or two will eventually be seated,[135] since research indicates that it takes three or four initial holdouts to produce a "hung jury."[136]

Assuming that a litigant has raised a prima facie case of discrimination, the opportunity to discriminate still persists. At this point, the burden shifts to the prosecutor to provide a neutral explanation for exercising her peremptory strikes.[137] The prosecutor's explanation must relate to the particular case, but need not rise to the level of a challenge for cause.[138] The problem arises in evaluating the sufficiency of the proffered "neutral" explanation and distinguishing between legitimate reasons and pretexts for discrimination.[139] The *Batson* Court provided no guidelines for making this evaluation.[140] As Justice Marshall recognized in his

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> Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring) (citations omitted). *See also* Raphael, *supra* note 123, at 311.

135. For a response to the argument that the plaintiff *should* be able to exclude women based on statistical possibility of bias in this situation, see *supra* note 80.

136. Sagawa, *supra* note 10, at 45 & n.208; Hopper, *supra* note 123, at 822 & n.76.

137. *Batson*, 476 U.S. at 97.

138. *Id.* at 98. For a fuller explanation of the challenge for cause, see *infra* notes 192–204 and accompanying text.

139. Alschuler, *supra* note 14, at 175; Raphael, *supra* note 123, at 317; Hopper, *supra* note 123, at 826–31.

140. Chief Justice Burger complained: "I am at a loss to discern the governing principles here. A 'clear and reasonably specific' explanation of 'legitimate reasons' for ex-

concurring opinion, "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[141] Justice Marshall's concern was not limited to intentional or bad faith racial discrimination by the prosecutor. He understood that a prosecutor's exercise of peremptory challenges could also reflect unconscious racism, as could the judge's acceptance of the prosecutor's explanation,[142] making the violation even more difficult to detect and remedy.

Although the difficulty of evaluating the prosecutor's explanation may not yet have rendered *Batson*'s protection "illusory," as Justice Marshall feared,[143] courts have accepted as neutral certain explanations that could easily serve as a proxy for race.[144] Chief among such reasons are claims that the juror and the defendant share certain characteristics — they live in the same neighborhood[145] or are about the same age.[146] Another category of suspect reasons involves appearance or mannerisms of the juror. Courts have upheld strikes of black jurors who did not make eye contact,[147] or who exhibited a hostile demeanor, at least to the perception of the prosecutor.[148] By accepting such explanations as neutral and sufficient, courts essentially give attorneys free rein to discriminate, since the attorney can always find some permissible attribute to justify the strike.

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ercising the challenge will be difficult to distinguish from a challenge for cause." *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

141. *Id.* at 106 (Marshall, J., concurring).

142. For example, a prosecutor might decide to strike a black juror because he is " 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." *Id.* For a full explication of unconscious racism and the inability of the traditional equal protection "purposeful discrimination" analysis to deal with it, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987) (discussing the unconscious cultural biases of judges).

143. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

144. Judge McMillan describes "[i]neffective scrutiny of prosecution explanations" as "the single greatest problem hindering the effective implementation of *Batson*." McMillan & Petrini, *supra* note 5, at 369. For examples of weak explanations which have sustained peremptory challenges, see cases discussed in *id.* at 369–70; Raphael, *supra* note 123, at 321–22; cases cited in Hopper, *supra* note 123, at 826–29 & nn.97–99.

145. United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir. 1987); Taitano v. Commonwealth, 4 Va. App. 342, 347, 358 S.E.2d 590, 593 (1987).

146. Taitano, 4 Va. App. at 343, 358 S.E.2d at 591. *But see* State v. Gilmore, 103 N.J. 508, 543, 511 A.2d 1150, 1168 (1986) (disapproving exclusion based on shared religion).

147. United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987).

148. *See, e.g.*, United States v. Forbes, 816 F.2d 1006, 1010–11 (5th Cir. 1987).

The Supreme Court recently had occasion to consider what suffices as a "neutral" explanation, and its conclusion was not encouraging. In *Hernandez v. New York*,[149] the Court held that a prosecutor who struck two Hispanics from a jury because they were bilingual did not impermissibly discriminate in violation of *Batson*.[150] Although the Court recognized that language ability could serve as a proxy for race or ethnicity, and should in certain circumstances be treated as such under equal protection analysis,[151] it gave great deference to the trial court's finding that in this case the prosecutor did not discriminate on the basis of ethnicity.[152] The Court's willingness to accept so easily an explanation which has such a disparate impact on the defendant's ethnic group sends a strong signal to trial judges and lawyers that explanations for peremptory challenges need not be scrutinized too closely.[153]

The danger of pretext is of equal concern in cases of sex discrimination, although the proffered explanations may be slightly different. Only one of the published decisions which address sex

149. 111 S. Ct. 1859 (1991).

150. *Id.* at 1871.

151. The Court acknowledged that:

> Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

Id. at 1872–73.

152. *Id.* at 1871–72. The trial court had taken "a permissible view of the evidence in crediting the prosecutor's explanation." *Id.* at 1872. The prosecutor volunteered his explanation before being asked, he claimed not to know which jurors were Hispanic, and he pointed out that the victim and several witnesses were also Hispanic, which cast doubt on any motive he might have had to discriminate. *Id.* Unless the trial court's determination was clearly erroneous, the Court would not overturn the findings. *Id.* at 1871–72.

153. *Cf. id.* at 1876 (Stevens, J., dissenting) (criticizing the majority for requiring the defendant to provide evidence of the prosecutor's subjective intent to discriminate: "If any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, 'the Equal Protection Clause "would be but a vain and illusory requirement." ' "(quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986) (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)))).

discrimination in the use of peremptory challenges reached the question of whether the prosecutor had provided neutral explanations for the challenges.[154] In *People v. Irizarry*,[155] the defendant objected to the prosecutor's apparent use of his peremptory challenges to discriminate based on gender. The prosecutor challenged six women out of the first group of sixteen potential jurors,[156] two of the next group of sixteen, and one alternate. In total, the prosecution challenged nine women and only one man.[157] When asked to explain the exercise of his peremptory challenges against women, the prosecutor provided the following rationales:

FIRST GROUP:

JUROR 1: Command of English was not good; it did not appear that she understood the questions.

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154. In People v. Merkle, 143 A.D.2d 145, 146, 531 N.Y.S.2d 601, 602 (1988), *cert. denied*, 490 U.S. 1024 (1989), the court declined to decide whether *Batson* applied to gender but found that the prosecutor provided non-discriminatory reasons for striking nine women from the jury. The defendant was charged with sex abuse, and none of the women struck had young daughters. The opinion does not indicate if men without young daughters were also peremptorily excused.

The other courts that have faced allegations of gender discrimination in the use of peremptory challenges have failed to reach this question for a variety of reasons. In *Hamilton*, the district court accepted gender as a neutral explanation provided by the prosecutor to rebut a prima facie case of race discrimination, so no further explanation was solicited. United States v. Hamilton, 850 F.2d 1038, 1040–41 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990). Likewise, in United States v. De Gross, No. 87-5226, 1992 U.S. App. LEXIS 5645 (9th Cir. Apr. 2, 1992) (en banc), the prosecutor admitted that he struck a woman juror to get more men on the jury to rebut a prima facie case of race discrimination, so no further explanation was provided. The defense attorney accused of gender discrimination in *De Gross* simply refused to explain his challenge of a male juror. *Id.* at *2. *See also* State v. Levinson, 71 Haw. 492, 494, 795 P.2d 845, 847 (1990).

In other cases, the defendant failed to establish a prima facie case of gender discrimination, so the burden never shifted to the government to provide a neutral explanation, *see, e.g.*, Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989), or the trial court overruled the objection based on gender discrimination, *see, e.g.*, People v. Blunt, 162 A.D.2d 86, 90, 561 N.Y.S.2d 90, 93 (1990) (prohibiting gender discrimination and remanding where trial court had failed to require prosecutor to explain strikes of women sufficient to establish a prima facie case); Fisher v. State, 587 So. 2d 1027 (Ala. Crim. App.), *cert. denied*, 587 So. 2d 1039 (Ala. 1991).

155. 142 Misc. 2d 793, 536 N.Y.S.2d 630 (1988), *rev'd*, 168 A.D.2d 715, 560 N.Y.S.2d 279 (1990). On appeal, the court accepted the trial court's factual findings regarding the sufficiency of the explanation, but reversed the ruling on the motion because two of the women were found to have been impermissibly excluded. Defendant was thus entitled to a new trial. 168 A.D.2d at 717, 560 N.Y.S.2d at 281.

156. The only other woman in that group had previously been struck for cause. 142 Misc. 2d at 816, 536 N.Y.S.2d at 643–44.

157. *Id.* at 817, 536 N.Y.S.2d at 644.

JUROR 5: Appeared smiling during questioning; had no children; was not married and did not seem to take the case seriously because it was a crime between related people.

JUROR 9: Seemed uninterested in the questions; sometimes appeared sleepy; talked to juror 10; refused to look at the prosecutor and appeared to be looking toward the defense table; hesitated when asked if she could be fair and impartial.

JUROR 10: Talked to juror 9; she refused to look at the prosecutor and made eye contact with the defense.

JUROR 15: Appeared nervous, shy and timid; would not be comfortable with the relationship between the defendant and complaining witness.

SECOND GROUP

JUROR 6: Wanted to hear both sides of a story to find the middle ground; sarcastic responses to questioning by the prosecutor which showed she was "put off" by him.

JUROR 9: Said she would not change her mind once she formed an opinion.

JUROR 16: Not attentive during questioning and unable to make eye contact with the juror.[158]

In ruling on the defendant's motion for mistrial, the trial court found the challenges to Jurors Nos. 1, 9, and 10 of the first group and Nos. 6 and 9 of the second group to be "objectively based and premised on non-gender-related reasons."[159] Although "subjectively-based," the court likewise upheld the challenges to Jurors Nos. 2 and 5 of the first group. The court found that the prosecutor did not provide a sufficiently gender-neutral explanation for challenging Juror No. 15 of the first group and No. 16 of the second. Both of those explanations relied on the demeanor of the jurors which the court found unsupported and pretextual.[160]

The decision was correct insofar as it rejected the most vague and subjective grounds as pretext. But it is unclear whether the court went far enough in accepting the explanation for striking Juror No. 5 of the first group. She was challenged in part because she was not married and had no children. We cannot evaluate whether these characteristics are neutral, gender-related, or pretextual without ascertaining whether unmarried men without children were also challenged. The court indicates that the challenged women were of "diverse employment and family backgrounds," and that "[t]he men who were not challenged disclosed information about them-

158. *Id.* at 817–18, 536 N.Y.S.2d at 644.
159. *Id.* at 818, 536 N.Y.S.2d at 644.
160. *Id.* at 818, 536 N.Y.S.2d at 645.

selves similar to the women who were challenged."[161] Yet the court does not reveal whether any of the men who were not challenged were unmarried or childless.

Given the dearth of authority on distinguishing acceptable reasons for striking female jurors from illegitimate pretext, we must look to some of the race discrimination cases where the prosecutor has proffered an explanation for strikes of black women jurors to get a further idea of possible pretextual explanations. For example, in *Wallace v. State*,[162] the prosecutor gave the following reasons for striking black women jurors: a homemaker might "have trouble making the necessary judgments that have to be made and that is the knowledge of what life is like out in the street"; an older, retired female juror was described as "a grandmotherly type" who might therefore be "overly sympathetic" to the defendant; and a middle-aged woman might be about the same age as the defendant's mother.[163] Each of these explanations reflects stereotyped assumptions about a woman's role, abilities, and character. Is striking a woman because she is a mother "neutral" or pretextual? One might conclude that it was pretextual, at least if the prosecutor did not strike fathers. Should a prosecutor be allowed to excuse "homemakers" or any other occupational category that is predominantly female? And, of course, explanations based on demeanor or appearance, commonly accepted to rebut *Batson* claims based on race,[164] could just as easily mask gender discrimination.[165] In one case reported anecdotally, an attorney apparently struck a male juror "solely in order to have another woman to look at in the jury box."[166] Again, as in the race context, the judge's own unconscious sexism or gender bias may lead him to accept pretextual explanations.[167]

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161. *Id.* at 817, 536 N.Y.S.2d at 644 (citations omitted).

162. 530 So. 2d 849 (Ala. Crim. App. 1987), *cert. denied*, 530 So. 2d 856 (Ala. 1988).

163. *Id.* at 851–52.

164. *See supra* notes 154–59 and accompanying text.

165. *See* Irizarry, 142 Misc. 2d 793, 536 N.Y.S.2d 630 (1988), *rev'd*, 168 A.D.2d 715, 560 N.Y.S.2d 279 (1990), discussed *supra* at notes 155–61 and accompanying text.

166. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 508 (1965).

167. I use the male pronoun because the vast majority of judges are male. The problem of gender bias in the courts has begun to receive attention in several states, including New Jersey, New York, Rhode Island, Arizona, Wisconsin, California, Utah, Massachusetts, Maryland, Hawaii, and Vermont. Lynn H. Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 281 (1987). The report of the Florida Supreme Court Gender Bias Commission reveals that gender bias pervades the state judicial system. *Report of the Florida Supreme Court Gender*

The need to ascertain whether an explanation is neutral requires the court to make confounding decisions about when gender-linked traits might be relevant to jury selection. For example, in a case charging medical malpractice by an obstetrician, would the defendant be justified in striking all mothers? All pregnant women? The striking attorney has a good argument that these gender-related characteristics relate to the specific case at hand and therefore evidence specific bias. Yet this conclusion arguably represents only stereotyped notions that women as a group will have shared the same experience of motherhood, pregnancy, or childbirth and that they will be unable to separate their personal experiences from the case sufficiently to render an impartial verdict. Because the striking attorney does not have to justify the strike at a level establishing a challenge for cause, the court may well accept such an explanation as sufficiently neutral and legitimate, despite the stereotyped implications, without ever establishing that a particular challenged mother would be biased.

As others have noted, these practical problems reflect a deeper, conceptual inconsistency. Peremptory challenges are by definition unexplained "arbitrary and capricious" challenges[168] which are frequently exercised based on group characteristics.[169] The decision to exercise a peremptory challenge may be the product of racist or sexist "folklore,"[170] or of demographic and social science research that predicts (or tries to predict) how different groups will react to a

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Bias Study Commission, 42 FLA. L. REV. 803 (1990). The report contains stunning illustrations of judicial sexism and insensitivity. *See, e.g.*, *id.* at 863–68.

168. *See supra* note 14.

169. In an oft-quoted passage, Professor Babcock explained the peremptory challenge this way:

> The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . [W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often that [sic] not.

Babcock, *supra* note 119, at 553–54 (footnotes omitted). *See also* Pizzi, *supra* note 80, at 129–30.

170. *See* Pizzi, *supra* note 80, at 99; *see also* Alschuler, *supra* note 14, at 210–11 (detailing examples of such stereotypes from a manual used by prosecutors in Dallas, Texas).

case.[171] Either way, using peremptory challenges in this fashion hopelessly conflicts with the central premise of equal protection doctrine and *Batson* — that certain group characteristics, such as race and gender, should not play a role in jury selection.[172]

This conceptual paradox will only be deepened on the road down the slippery slope. As this Article suggests, if race-based peremptories are impermissible, so should be gender-based ones.[173] And why draw the line at gender? While sexual orientation and age do not receive special scrutiny under equal protection doctrine, thus the argument goes, our system should be no more tolerant of discrimination based on those characteristics than discrimination based on race or gender in jury selection.[174] If exercise of the per-

171. The social science literature regarding jury selection is extensive. For a sampling, see sources cited in GOBERT & JORDAN, *supra* note 3, § 12.06 & n.18. Attorneys need not peruse this vast literature themselves; they can hire jury consultants who are skilled at identifying the demographic characteristics of the jurors most likely to favor the attorney's case, usually through detailed community surveys. Pizzi, *supra* note 80, at 132–33. For a discussion of how to conduct such a survey, see V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW METHODS, §§ 5.0–5.16. There is considerable debate over the efficacy and fairness of these "scientific" jury selection techniques, *id.* § 3.8.4, but the industry appears, nonetheless, to be thriving. Robert F. Hanley, *Getting to Know You*, 40 AM. U. L. REV. 865, 870, 871–72 & n.29 (1991).

172. As Professor Pizzi put it: "The problem with *Batson* is that it tries to have things both ways — allow the traditional system of peremptory challenges but insist that the state be race neutral in the selection of the petit jury. The result is an enforcement nightmare." Pizzi, *supra* note 80, at 134. *See also* Alschuler, *supra* note 14, at 202–03 ("[T]he tension between the Equal Protection Clause and the peremptory challenge is inescapable. The Equal Protection Clause says, in essence, 'when the government treats people differently, it has to have a reason.' The peremptory challenge says, in essence, 'no it doesn't.' "). Of course, *Batson* operates on the assumption that race should never be a factor in jury selection. Batson v. Kentucky, 476 U.S. 79 (1986). This assumption is open to question. Some would argue there may be cases where race (or gender) is explicitly implicated and should be considered in jury selection. Pizzi, *supra* note 80, at 133, 135–36. *See supra* note 3 and accompanying text.

173. As discussed earlier, the Supreme Court has treated race and gender differently under the Equal Protection Clause, but I believe gender-based discriminatory peremptory challenges would not survive under either level of scrutiny. *See supra* notes 77–80 and accompanying text.

174. Age discrimination in employment is prohibited by federal law. *See* the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621–34 (West 1985 & Supp. 1991). A few states prohibit employment discrimination based on sexual orientation. *See* WILLIAM H.L. DORNETTE, AIDS AND THE LAW 272, 277 (1987) (summary of State Antidiscrimination-in-Workplace Statutes).

Neither the young nor the elderly have been recognized as "cognizable groups" under the fair cross-section requirement. GOBERT & JORDAN, *supra* note 3, § 6.16. The Supreme Court has recognized "daily wage earners" as cognizable, Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), but not the poor or unemployed. *See also* United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977) (unemployed, young not cognizable). Some lower courts, however, have held otherwise. *See* GOBERT & JORDAN,

emptory challenge is indeed arbitrary, the peremptory challenge itself might fail even rational review.[175] Surely these traits do not affect one's ability to serve as an impartial juror any more than race or gender do. Courts will be hard-pressed to resist this logic, and if they cannot, little will remain of the peremptory challenge.

Finally, all of this protection comes at a steep price. As Professor Pizzi points out, "one has to understand *Batson* in the context of a trial system that has been recognized over and over as one of the most elaborate and expensive in the world."[176] *Batson* adds another layer to an already costly and cumbersome system of jury selection.[177] To be truly effective, *Batson* might require hearings that resemble trials.[178] In addition to the time spent conducting the *Batson* hearing, courts may need to expend further time remedying the discrimination. Restoring the impermissibly excluded juror to the jury is impractical and ill-advised,[179] so courts have chosen instead to dismiss the entire panel and begin anew. This is a terribly expensive and wasteful procedure,[180] and one that litigants could manipulate to their own advantage.[181] Should *Batson* be extended to other characteristics such as gender, the time, expense, and complexity of jury selection will grow significantly.

In light of all these problems, a rising chorus has called for the abolition of the peremptory challenge.[182] This solution might fare better than *Batson* in eliminating impermissible race or gender dis-

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supra note 3, at 247; People v. Mora, 190 Cal. App. 3d 208, 235 Cal. Rptr. 340, 346 (1987) (recognizing blue collar workers and young jurors as cognizable groups under *Wheeler*), *appeal denied, ordered not to be officially published* (June 25, 1987).

175. *Cf.* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985) (Applying only rational review, the Court struck down zoning ordinance which discriminated against the mentally retarded.).

176. Pizzi, *supra* note 80, at 138.

177. *Id.* at 139–140.

178. *Cf.* Hernandez v. New York, 111 S. Ct. 1859, 1874 (1991) (O'Connor, J., concurring) ("A rule that disproportionate effect might be sufficient for an equal protection violation in the use of peremptory strikes runs the serious risk of turning *voir dire* into a full-blown disparate impact trial, with statistical evidence and expert testimony on the discriminatory effect of any particular nonracial classification.").

179. Alschuler, *supra* note 14, at 177–78. *But see* GOBERT & JORDAN, *supra* note 3, § 8.11.

180. *See* cases cited in Alschuler, *supra* note 14, at 178 n.99.

181. GOBERT & JORDAN, *supra* note 3, § 8.11.

182. Justice Marshall sounded the first note in Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring). Commentators have added their voices. *See, e.g.*, Alschuler, *supra* note 14, at 169–70, 208–11; McMillan & Petrini, *supra* note 5, at 374; Şagawa, *supra* note 10, at 46–47. Other commentators have argued that peremptory challenges should be sharply reduced in number. *See* Pizzi, *supra* note 80, at 147–49; Raphael, *supra* note 123, at 349.

crimination in selection of the petit jury. But it would create a host of other problems and quite possibly deprive litigants of trial by a fair and impartial jury.

IV. RESURRECTING THE PEREMPTORY CHALLENGE

The Supreme Court has made clear that the peremptory challenge is not constitutionally required.[183] However, the Court has also repeatedly asserted the importance of the peremptory challenge to securing an impartial jury, which *is* constitutionally required.[184] The peremptory challenge has been said to serve a variety of different purposes. Blackstone saw the two functions of the peremptory challenge as ensuring that a criminal defendant had "a good opinion" of his jury and protecting him from trial "by anyone he intuitively dislike[d]."[185] As a more recent scholar put it: "The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue."[186] Peremptory challenges allow both sides, and particularly criminal defendants, to feel they have some say in deciding who will judge their fate. This is particularly important in the criminal context, where the process is generally stacked in the government's favor.[187]

Peremptories serve another purpose, perhaps one that predominates today. The peremptory challenge gives litigants the opportunity to remove jurors whom they believe are likely to be biased, without meeting the stringent requirements of challenges for cause.[188] Since a judge will only remove a juror for cause where the voir dire reveals actual or implied bias,[189] the peremptory challenge acts as a safeguard, enabling litigants to remove those jurors who

183. *Batson*, 476 U.S. at 91.

184. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986); Holland v. Illinois, 493 U.S. 474, *reh'g denied*, 494 U.S. 1050 (1990).

185. BLACKSTONE, *supra* note 14, at 346–47.

186. Babcock, *supra* note 119, at 552.

187. Although the criminal defendant has certain constitutional protections, the government brings massive resources to bear against the individual in its criminal prosecution.

188. *Id.* at 554.

189. "Actual bias" is "a subjective state of mind that the court may consider prejudicial to a party's interests." Jay M. Spears, Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1499 & n.29 (1975). Actual bias essentially requires an admission by the juror. "Implied bias" is "partiality presumed by law from the existence of certain relationships or interests of the jurors," including relationships to the parties, attorneys, or witnesses in the case. *Id. See also infra* notes 193–200 and accompanying text.

may harbor an unconscious or hidden bias. In practice, of course, it is common knowledge that litigants exercise peremptory challenges not just (or even primarily) to remove jurors perceived to be biased against them, but to select jurors they hope will favor their side.[190] This practice generally has the beneficent effect of excluding extremes at both ends of the jury.[191]

Critics of the peremptory challenge seem unconcerned about eliminating the safeguard the challenge provides, asserting that litigants may rely on voir dire and challenges for cause to ensure the jury's impartiality.[192] Unfortunately, voir dire has proven singularly ineffective in revealing bias sufficient to sustain a challenge for cause. The decision whether to excuse a juror for cause rests wholly within the trial judge's discretion[193] and generally depends on a showing of actual or clearly implied bias.[194] This standard requires that the judge find the juror has "a prejudiced state of mind,"[195] relying solely on the jurors responses.

Several cases illustrate just how reluctant courts are to make this finding. In *United States v. Bedonie*,[196] the Tenth Circuit upheld the trial court's refusal to excuse a juror for cause when the

190. Professor Pizzi describes this phenomenon as "comparison shopping": Each side tries "to remove prospective jurors who are perceived as being less favorable in the hope of getting jurors who are more favorable on the petit jury." Pizzi, *supra* note 80, at 126.

191. *Id.* at 145. Professor Alschuler suggests that the peremptory challenge allows for the exclusion of "three dollar bills" — idiosyncratic jurors. Alschuler, *supra* note 14, at 206–07.

192. Some critics of the peremptory challenge casually acknowledge the need to loosen the standards for cause challenges. *See* Alschuler, *supra* note 14, at 208. Others do not even mention it. *See* McMillan & Petrini, *supra* note 5; Sagawa, *supra* note 10, at 46–47.

193. GOBERT & JORDAN, *supra* note 3, § 7.05. Most jurisdictions have statutes setting forth grounds for challenges for cause, but the judge always has "authority to dismiss a prospective juror in order to insure a fair trial." *Id.* § 7.04. Common grounds for challenge for cause include the following: Relationship to a party, attorney, or member of attorney's firm by blood or marriage; friendship or acquaintance with a party, a party's family, business associates of the attorney or her family, or a member of the attorney's firm; business relations with an attorney or party including employer-employee, client-customer, landlord-tenant, or debt owed; social relationship with an attorney or party through associations, school, politics, or religious organizations; relationship or friendship with witnesses; a preconceived opinion about the case from publicity, previous discussions about the case, or participation in a similar case in any capacity; stockholder, agent, or officer of corporate party or insurance company insuring against liability; financial interest in the case; prejudice; sympathy; prior personal experience as juror or participant in similar case; prior knowledge of the facts. *Id.*

194. *See supra* notes 189 and accompanying text.

195. Spears, *supra* note 189, at 1499 n.29.

196. 913 F.2d 782 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991).

defendant was Native American and the juror revealed on a questionnaire and during voir dire that she would not like her daughters to date or marry a Navajo.[197] In response to further questioning by the judge, the juror indicated she would "try very hard" to be fair and impartial.[198] In *Culbertson v. State*,[199] the Court refused to impute bias to several potential jurors who were employees of the state prison where the defendant had allegedly assaulted a correctional officer.[200] Likewise, the Ninth Circuit in *Tinsley v. Borg* refused to find actual or implied bias in a rape trial, even though the juror was a psychiatric social worker who had counseled rape victims, because the juror claimed she could be impartial.[201]

Even where a juror indicates she has formed an opinion about a case, the court may seat her on the jury, as long as she indicates that she believes she can judge the case fairly.[202] In *State v. Richards*,[203] the court upheld the trial court's refusal to strike for cause a juror whose husband knew the murder victim, even though she testified initially that her husband's relationship would have some effect on her ability to be impartial. In response to further questioning, the juror ultimately indicated she would "listen to the evidence and make up her own mind."[204]

The difficulty in meeting the "for cause" standard is compounded by the severe limitations placed on voir dire in many jurisdictions. The procedure varies considerably in form and scope. In the federal courts and in many state courts, the judge conducts the voir dire,[205] although usually with joint participation by the attor-

197. *Id.* at 795.

198. *Id.* at 796.

199. 193 Ga. App. 9, 10, 386 S.E.2d 894, 895 (1989).

200. *See also* Livengood v. Kerr, 391 S.E.2d 371, 374 (W.Va. 1990) (no excusal for cause where juror's wife was patient of defendant doctor in medical malpractice action); State v. Storey, 387 S.E.2d 563, 568–69 (W.Va. 1990) (no excusal for cause where jurors were friends of victim's family and state's witnesses).

201. Tinsley v. Borg, 895 F.2d 520, 524 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 974 (1991).

202. GOBERT & JORDAN, *supra* note 3, § 7.06. *See also* STARR & MCCORMICK, *supra* note 171, § 10.4.1:

> Even when it appears that a challenged potential juror has a biased view of the case, the person may be allowed to serve on the jury if the judge is convinced that the person could still be a fair and impartial juror. After the juror has said he or she can and will be impartial, the court is usually reluctant to call into question the juror's credibility by dismissing the juror for cause.

203. 391 S.E.2d 354, 356 (W.Va. 1990).

204. *Id.*

205. The Federal Rules of Civil Procedure and Criminal Procedure give the court discretion to conduct voir dire itself or to allow the attorneys to do so, FED. R. CIV. P.

neys,[206] by using questions submitted by the attorneys[207] or supplemented by questions asked by the attorneys.[208] In a few states, attorneys question the jurors directly, sometimes outside the presence of the judge.[209] Some question the jurors as a group and seek only volunteered responses.[210] Others pose a question directed to the group but require individual responses.[211] Some jurisdictions do allow examination of the jurors individually, usually in front of the whole venire.[212]

The content and scope of voir dire likewise varies among jurisdictions, depending on the judge's discretion. Some courts allow only the most perfunctory questions, such as those regarding age, occupation, or any relationship the juror may have to any party.[213] Many judges refuse to allow probing into sensitive areas that are inevitably the most crucial to the case, such as racism or sexism. In *Ham v. South Carolina*,[214] the Supreme Court held that the trial court's refusal to inquire into racial prejudice during voir dire at the defendant's request constituted a violation of the Due Process Clause of the Fourteenth Amendment.[215] The defendant was a prominent black civil rights worker charged with possession of marijuana. The defendant claimed that he had been framed by law

47(a), FED. R. CRIM. P. 24(a), but court-conducted voir dire is the preferred method in federal cases. Approximately 68% of federal judges conduct voir dire without oral participation of attorneys. STARR & MCCORMICK, *supra* note 171, § 9.0.1 n.2. In eight states, the judge alone conducts the voir dire. CONFERENCE OF STATE COURT ADMINISTRATORS, NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION 11 (1987) [hereinafter STATE COURT].

206. STATE COURT, *supra* note 205, at 11. For example, in civil trials in California, the judge conducts the initial examination of jurors, then permits oral and direct questioning by the attorneys. CAL. CIV. PROC. CODE § 222.5 (West 1992). Interestingly, in criminal trials California law provides for court examination unless the parties show good cause, in which case the court, in its discretion, may permit further questioning. CAL. CIV. PROC. CODE § 223 (West 1992).

207. STARR & MCCORMICK, *supra* note 171, § 9.2.

208. GOBERT & JORDAN, *supra* note 3, § 9.05.

209. *Id.* This is known as the "New York" method. FREDERICK WOLEGLAGE & IVAN HOLT, JURY: NATIONAL COLLEGE OF THE STATE JUDICIARY 61 (1967). California permits this method in civil cases by stipulation of the parties. CAL. CIV. PROC. CODE § 222.5 (West 1992).

210. Spears, *supra* note 189, at 1523.

211. *Id.*

212. *Id.* California law, for example, requires that voir dire occur in the presence of other jurors "where practicable." On rare occasions, jurors are questioned in private *in camera*. CAL. CIV. PROC. CODE § 223 (West 1992). *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511–12 (1984).

213. GINGER, *supra* note 95, §§ 8.28, 8.40.

214. 409 U.S. 524 (1973).

215. *Id.* at 527.

enforcement officers because of his civil rights work. The trial court denied defendant's request to question jurors regarding possible racial prejudice,[216] and the Court reversed.

Three years later, however, the Court essentially limited *Ham* to its facts. In *Ross v. Ristaino*,[217] the Court held that a criminal defendant had no constitutional right to have questions regarding racial prejudice asked during voir dire, even where there the defendant and victim were of different races. The black defendant had been charged with armed robbery, assault and battery with a deadly weapon, and intent to murder after allegedly shooting a white security guard. The Court upheld the decision, ruling that "[t]he circumstances . . . did not suggest a significant likelihood that racial prejudice might infect Ross' trial."[218] In *Turner v. Murray*,[219] the Court held that a defendant has a constitutional right to question jurors about racial prejudice in a capital case, but reaffirmed that due process only requires such inquiries where there are "special circumstances"; interracial violence alone is insufficient.[220]

Given the Supreme Court's indifference to the need for effective questioning on these sensitive subjects, trial judges have little incentive to allow extensive voir dire.[221] Indeed, the trend is in the other direction. Pressed by overcrowded dockets and dismayed by some extreme cases,[222] judges are more likely to curtail voir dire than to expand it.[223]

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216. Defendant's counsel requested that the judge ask four questions relating to possible prejudice against the defendant during voir dire. Two explicitly dealt with race and prejudice against blacks. The other two involved prejudice against people with beards and exposure to publicity about the drug problem. Instead, the judge asked only three questions: "(1) Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham? (2) Are you conscious of any bias or prejudice for or against him? (3) Can you give the State and the defendant a fair and impartial trial?" *Id.* at 526 n.3.

217. 424 U.S. 589 (1976).

218. *Id.* at 598.

219. 476 U.S. 28 (1986).

220. *Id.* at 35 n.7.

221. *See, e.g.*, Commonwealth v. Richardson, 504 Pa. 358, 473 A.2d 1361 (1984) (holding that trial court did not abuse discretion in refusing to question jurors about racial prejudice where black defendant was charged with raping a white woman and claiming consent as a defense).

222. In one case, the voir dire lasted four months and involved examination of over 1,000 prospective jurors. Alschuler, *supra* note 14, at 157. Sometimes jury selection takes as long as the trial. *Id.*

223. Some studies indicate that court-conducted voir dire "substantially reduces the time devoted to jury selection." *Id.* at 157–58 & n.15 *But see* People v. Williams, 29 Cal. 3d 392, 407, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981), in which the California Supreme Court held that trial judges must permit counsel to ask questions

Moreover, it is far from clear that lawyers would use more extensive voir dire even if the courts allowed it, or that such increased use would succeed in ferreting out bias sufficient to sustain a challenge for cause. One empirical study of voir dire demonstrated that it "was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.' "[224]

There are many reasons for this discouraging conclusion. First, as suggested above, judges' hostility toward extensive voir dire may discourage lawyers from full questioning.[225] Lawyers do not want to anger the judge, and perhaps equally as important, do not want to do so in front of jurors who look to the judge for guidance throughout the case.[226] Second, because of their desire to please the person in the most authoritative position, jurors questioned by judges during voir dire may not respond honestly. Rather, cued by the form of the questions or the judge's demeanor, the jurors may provide the answer they believe the judge wants to hear.[227]

"reasonably designed to assist in the intelligent exercise of peremptory challenges whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause." The court recognized that:

> bias often deceives its host by distorting his view not only of the world around him, but also of himself. Hence, although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially, further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome. And although his protestations of impartiality may immunize him from a challenge for cause, they should not foreclose further reasonable questioning that might expose bias on which prudent counsel would base a peremptory challenge.

Id. at 402, 628 P.2d at 873, 174 Cal. Rptr. at 321 (citations omitted) (footnotes omitted). The California Court of Appeals in People v. Wells, 149 Cal. App. 3d 721, 727, 197 Cal. Rptr. 163, 166 (1984), relied upon the above quotation to hold that the trial court should have allowed questions directed at racial prejudice. *Id.* at 168. The *Williams* holding has been overturned by statute. *See* CAL. CIV. PROC. CODE § 223 (West 1991).

224. Broeder, *supra* note 166, at 505.

225. *Id.*

226. *Id.*

227. GOBERT & JORDAN, *supra* note 3, § 9.07. *See also* Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205, 209 (1986). A recent study supported Broeder's findings about the general lack of candor by jurors and also found a significant difference between judge- and attorney-conducted voir-dire. Susan E. Jones, *Judge- Versus Attorney- Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131 (1987). The results of the study indicated that attorneys are much more effective at eliciting candid responses from jurors. When questioned by a judge, prospective jurors changed their answers twice as frequently as

The problem of lack of candor by jurors is not limited to judge-conducted voir dire. Factors other than the judge's expectations may also lead to dishonest responses by jurors. One empirical study suggests that evaluation anxiety — the concern that the juror is being judged and the desire to perform positively — may discourage candor. Jurors are told that the purpose of voir dire is to determine if they can be "fair and impartial," and thus that they will be evaluated on their ability to meet this qualification.[228] The study found a strong relationship between evaluation anxiety — the degree of nervousness, anxiety, embarrassment, and wanting to be believed by judges and attorneys — experienced by the jurors and their degree of honesty during the voir dire process: "The more jurors reported being anxious and tense, the more dishonest they said they were in their answers."[229]

The evaluation anxiety problem is particularly acute when trying to discern racial prejudice.[230] Because overtly racist attitudes have become socially unacceptable, people are reluctant to admit them, particularly when questioned as a group.[231] Moreover, questioning jurors on racial prejudice would not necessarily uncover unconscious racism.[232]

In other areas as well, jurors may not admit bias, either intentionally or because they are unaware of it. For example, in a study of the effectiveness of voir dire in eliminating jurors biased from pre-trial publicity in high-publicity cases, the authors found that

> those jurors exposed to the highly prejudicial publicity were significantly more likely to convict (fifty-three percent guilty) than those not exposed (twenty-three percent guilty). It was unclear

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when questioned by an attorney. *Id.* at 143. Modification of interpersonal style by the judges had no discernable effect on juror candor. *Id.* at 144. The judge's role as an authority figure apparently outweighs the influence of any particular interpersonal style. *Id.*

Interestingly, anecdotal evidence suggests that women jurors may respond more candidly to women judges. GINGER, *supra* note 95, § 14.50 (reporting comments of Criminal District Court Judge Miriam G. Waltzer of New Orleans). Overall, Jones found a significant gender difference in juror candor, with women distorting their replies more than men, regardless of whether the voir dire was conducted by judges of attorneys. Notably, the roles of judge and attorney were played by men in Jones's study. Jones, *supra* at 136.

228. Marshall & Smith, *supra* note 227, at 208.

229. *Id.* at 214.

230. *See* Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985); GINGER, *supra* note 95, § 18.7 (both discussing the tendency of people to hide their racist attitudes and the difficulty of penetrating this shield through voir dire).

231. Johnson, *supra* note 230, at 1675.

232. *See id.* at 1676 and *supra* notes 227–31 and accompanying text.

> whether the jurors were not aware of the biasing effect of the publicity or were simply not admitting a bias of which they were aware.[233]

In either case, these conclusions raise doubts about relying exclusively on a "juror's assertions of impartiality during voir dire to eliminate bias due to pretrial publicity."[234]

Should peremptory challenges be abolished, the need to engage in extensive and probing voir dire to try to sustain challenges for cause would entail additional costs. Attorneys who must question jurors in a way that will reveal their biases are likely to alienate both those particular jurors who may ultimately withstand the challenge for cause and those jurors observing the proceedings.[235] Expanding voir dire might also lead to greater invasions of juror privacy.

In *Press-Enterprise Co. v. Superior Court*,[236] the Supreme Court recognized the need to balance the jurors' privacy rights against the need for effective voir dire. In some states, jurors have a constitutional right to privacy;[237] other states impose an obligation on trial judges to protect jurors' privacy.[238] In those states where voir dire includes the right to question jurors to allow the intelligent exercise of peremptory challenges, courts permit more probing inquiry than in those where voir dire is strictly limited to facilitating the exercise of challenges for cause.[239] If peremptory challenges were abolished

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233. Norman L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 669 (1991) (discussing Stanley Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 PSYCHOL. REP. 1299, 1300 (1975)).

234. *Id.* And, of course, there is little attorneys can do to identify jurors who purposely lie or withhold information because they desire to sit on a given jury or for other more compelling reasons. *See, e.g.*, People v. Evens, 233 Cal. App. 3d 982, 284 Cal. Rptr. 861, 866 (1991), *ordered not published, reprinted as modified*, 1 Cal. Rptr. 2d 1 (1991) (conviction for attempted murder and assault of a female victim overturned for juror misconduct where juror failed to disclose prior rape even though specifically questioned about involvement in criminal matters as accused or victim). Jurors who lie during voir dire have even been prosecuted. *See* Janet R. Dupree, *Juror Accused of Perjury For Not Revealing Criminal Past*, L.A. TIMES, Aug. 9, 1991, at B1.

235. *See* People v. Wheeler, 22 Cal. 3d 258, 275 n.16, 583 P.2d 748, 761 n.10, 148 Cal. Rptr. 890, 902 n.16 (1978); Babcock, *supra* note 119, at 552–55.

236. 464 U.S. 501 (1984).

237. *See, e.g.*, People v. Wells, 149 Cal. App. 3d 721, 726, 197 Cal. Rptr. 163, 167 (1984).

238. *See, e.g.*, State v. Ball, 685 P.2d 1055, 1060 (Utah 1984).

239. *Compare* Commonwealth v. Slocum, 384 Pa. Super. 428, 435, 559 A.2d 50, 53 (1989) (counsel has no right to ask questions "intended solely to aid the exercise of peremptory challenges"; refusal to question jurors on sex abuse upheld) *with* State v. Ball, 685 P.2d at 1059–60 (proper purpose of voir dire is to detect actual bias and gather information to permit the exercise of the peremptory challenge; trial court should have allowed question concerning religious belief of jurors).

and voir dire expanded to facilitate greater exercise of challenges for cause, greater intrusions on jurors' privacy would likely result.

Abolishing peremptory challenges might eliminate racial and gender discrimination in the selection of jurors, but in the process, it would undoubtedly leave criminal defendants and civil litigants with little opportunity to exclude potentially biased jurors from the panel. At best, it would lead to an expanded voir dire which would prove as time-consuming as the *Batson* hearings, invasive of jurors' privacy, and of dubious effectiveness. Rather than adopt a cure which proves worse than the disease, I propose enacting a scheme of jury selection that requires proportional representation of men and women: that is, all juries would be composed of an equal number of men and women.[240]

V. ELIMINATING GENDER DISCRIMINATION BY PROPORTIONAL REPRESENTATION

Although the Constitution does not require proportional representation of any group on the petit jury,[241] a system requiring equal numbers of men and women on a jury panel could be mandated by congressional or state statute or by the supervisory powers of the federal courts.[242] In theory, the system would be very easy to implement since women make up approximately one-half of the population. The system would operate as follows: Assuming for the moment that jury lists essentially mirror the gender distribution of the population,[243] the venires of equal numbers of men and women would be randomly selected. Then, at the petit jury stage, voir dire would be conducted among groups divided by gender. For example, in a jurisdiction with twelve person juries, the jury would have to consist of six men and six women and at least one alternate of each gender. Attorneys would have an equal number of peremptory

240. For reasons that will be discussed briefly *infra* notes 265–67 and accompanying text, I do not believe proportional representation is the best response to the problem of race discrimination in selection of the petit jury. A full analysis of that issue, however, is beyond the scope of this Article. *Cf.* Johnson, *supra* note 230.

241. Holland v. Illinois, 493 U.S. 474, *reh'g denied*, 494 U.S. 1050 (1990).

242. The federal court may use its supervisory powers for three purposes: to remedy violations of recognized rights, to preserve judicial integrity, and to deter illegal conduct. United States v. Hasting, 461 U.S. 499 (1983). The Supreme Court has used its supervisory powers to remedy discrimination in the jury selection process twice before. *See* Ballard v. United States, 329 U.S. 187, 193 (1946) (remedying systematic exclusion of women) and Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (remedying exclusion of daily wage earners).

243. This assumption is open to question. *See infra* notes 247–64 and accompanying text.

challenges to use for men and women. The attorneys or judge would conduct voir dire according to current practices, except that the pool of men would be examined together, and all peremptories for that pool exercised, until the six jurors and the alternates were chosen. The women jurors would be selected in the same way.

A jury comprised of equal numbers of men and women would reduce the problem of gender discrimination in jury selection, and eliminate it in the use of peremptory challenges.[244] It would leave open the possibility that women indeed do bring a different voice or vision to the jury room, without the need to traffic in denigrating or inaccurate stereotypes and without prejudice to the litigant's right to an impartial jury. Each juror would be evaluated for potential bias without regard to gender, thus protecting the excluded juror from stigmatizing dismissal based on gender. At the same time, preserving peremptory challenges would allow the litigant freedom to exercise some influence over selection of those who will decide his fate and afford him the opportunity to eliminate jurors potentially biased against him.

In addition to serving as an effective remedy and prophylactic for gender discrimination, proportional representation would also affirmatively promote other important goals. The system would more accurately present a microcosm of the real world, and thus further ensure that a defendant would be tried by a true jury of her peers. Proportional representation would create juries that were not simply men and women, but juries that foster that "interplay"[245] between groups that guarantees impartiality[246] and renders the whole greater than the sum of its parts.

This solution is open to several criticisms, each of which will be addressed in turn. First, the system assumes that men and women are found in roughly equal numbers in the population, and that this is reflected in the composition of jury pools from which petit jurors are selected. Until recently though, jury lists from which the venire was drawn in many counties were disproportionately comprised of men, due to historic discrimination against women in choosing the venire.[247] It is unclear to what extent that disparity has ameliorated

244. Admittedly, though, it would not entirely prevent attorneys from relying on sexist stereotypes in the exercise of peremptories. For example, attorneys could still use peremptories to strike all mothers, as long as they eventually accepted the required number of women.

245. *See Ballard*, 329 U.S. at 193–94, *quoted in supra* text accompanying note 115.

246. *See supra* notes 60–63 and accompanying text.

247. Automatic exemptions, for example, contributed to the underrepresentation of women eligible to serve. Surveys conducted by federal district court clerks in 1971 and

since *Taylor*. The most recent survey[248] reports that men are still disproportionately called to jury duty and actually serve as jurors more frequently. The survey reported that "men have actually served as trial jurors more frequently than women (20% vs. 13%) and [are] more likely to have served two or more times (9% men, 5% women)."[249] The Eleventh Circuit recently reversed a conviction on Sixth Amendment grounds because women were underrepresented on the master jury list.[250]

A system of proportional representation would require, first, that any remaining gender imbalance in the jury pools be rectified, so that jury service does not fall disproportionately on either men or women. Presumably, facially discriminatory practices, like the automatic exemption, have been eradicated.[251] Certain types of jury pool selection procedures still in force may contribute to persistent discrimination against women. The Jury Selection and Service Act[252] which governs federal jury selection procedures provides that potential jurors be selected from voter registration lists or lists of actual voters.[253] In theory, women and men should be represented roughly equally on such lists, so this procedure should not lead to underrepresentation of women.[254] Other sources for compilation of juror lists create a greater risk of underinclusion. For ex-

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1974 revealed a gross underrepresentation of women, ranging from 10% to over 30%. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 39–40 (1977). In jurisdictions with automatic exemptions, the disparity was striking. For example, a 1972 survey showed that women made up only 16% of jurors in Montgomery County, Alabama. Women constituted less than 20% of juries in New York during the period when that state provided automatic exemptions. *Id.* at 40.

248. *Survey Shows Men in Higher Income Groups More Likely to Be Called for Jury Duty*, MICH. LAW. WKLY., June 24, 1991, at B7 (discussing survey conducted by the Defense Research Institute of 1,005 Americans, age 18 and older, between October 26 and November 1989) [hereinafter *Survey*].

249. *Id.*

250. Berryhill v. Zant, 858 F.2d 633, 639 (11th Cir. 1988).

251. *See* STATE COURT, *supra* note 205, at 315–20, Table 23.

252. 28 U.S.C. §§ 1861–78 (1988).

253. GOBERT & JORDAN, *supra* note 3, § 6.08 (citing 28 U.S.C. § 1863(b)(2) (1988)).

254. There have been no cases alleging that reliance on voter lists excludes women from jury service. In fact, statistics suggest women may outnumber men on such lists. For example, in 1986, 65% of the 91.5 million women eligible to vote reported that they had registered to vote, compared to 63.4% of the 84.4 million men eligible to vote. Thus women should have outnumbered men on voter registration lists by approximately 6 million in total. While this sounds like a substantial number, it actually represents a disparity of only slightly more than 5%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1990 (110th ed. 1990) § 8, Table No. 439 [hereinafter STATISTICAL ABSTRACT]. Numerous other groups, including ethnic minorities and

ample, telephone and property lists are frequently in the husband's name.[255] The key man system of jury selection also raises the possibility of impermissible discrimination. Under this system, "key" persons in the community have the responsibility to nominate jurors.[256] These "key men" tend to choose jurors who resemble themselves, and thus may discriminate against other groups. In *Berryhill v. Zant*, the Eleventh Circuit overturned a system in which Georgia commissioners chose those they considered "intelligent and upright" for master jury lists; only thirty-nine percent of those on the list were women.[257]

The possible disparate impact of categorical exemptions and hardship excuses poses another potential barrier to equal gender representation. The Federal Act and all states provide categorical exemptions for certain classes of people. While some of these categories are disproportionately comprised of men,[258] others include more women.[259] It has been suggested that women may now predominate on jury panels in some areas because they are less likely than men to be able to claim exemptions or excuses from jury service.[260] It is just as likely, however, that women are still underrepresented on juries by virtue of hardship excuses. During the late 1970s, excuses granted to women ran second only to those granted for poor health, primarily because clerks liberally excused mothers of children of varying ages.[261] More recently, a survey revealed that

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young people, have claimed to be excluded by reliance on voter lists although most such legal challenges have failed. GOBERT & JORDAN, *supra* note 3, § 6.08.

255. GOBERT & JORDAN, *supra* note 3, § 6.08 n.105; VAN DYKE, *supra* note 247, at 40.

256. GOBERT & JORDAN, *supra* note 3, § 6.09.

257. Berryhill v. Zant, 858 F.2d 633, 638–39 (11th Cir. 1988).

258. Traditionally male-dominated groups that receive exemptions in many states include doctors, lawyers, judges, and clergy. GOBERT & JORDAN, *supra* note 3, § 6.05; STATE COURT, *supra* note 205, at 315–20, Table 23.

259. For example, teachers, nurses, and persons caring for small children are entitled to exemption in some states. GOBERT & JORDAN, *supra* note 3, § 6.05; STATE COURT, *supra* note 205, at 315–20, Table 23.

260. Two reasons are given for this trend: (1) because women were previously underrepresented, they are more frequently chosen as jurors, since jurors who have never served are given priority, and (2) women often hold subordinate positions in the paid labor force and thus seek exemptions less frequently than men. GINGER, *supra* note 95, § 14.31. This claim is not new, although it may have more validity today. *See* VAN DYKE, *supra* note 247, at 39 ("It is commonly assumed that women dominate our jury panels because they are thought to have more free time and to be more available for jury duty than men. In fact, the opposite is true in most courts, and in some states, women continue to be grossly underrepresented.").

261. VAN DYKE, *supra* note 247, at 121–22. Only a few states still categorically exempt parents of small children. STATE COURT, *supra* note 205, at 315–20, Table 23.

women were more often excused "for personal, family, or health reasons."[262] Eight percent of the women otherwise eligible to serve were excused because they had children at home, while no men were excused on this ground. An additional three percent of women were excused because of pregnancy. Similarly, seventeen percent of women were excused for illness as compared to only five percent of the men. On the other hand, slightly more men were excused for "work/monetary" reasons (nineteen percent) than women (seventeen percent).[263] Perhaps the existence of a range of exemptions and excuses offsets the gender imbalance. Without more extensive current data specifically addressing the gender composition of juror lists, it is difficult to know whether a significant problem of disproportionate representation exists today. To the extent that it does, steps can and should be taken to alleviate the problem, regardless of whether a system of proportional representation on petit juries is adopted.[264]

In any case, given the roughly equal proportion of men and women in the population, it should be possible to achieve representative jury pools, and thus to implement proportional representation at the petit jury stage without too much difficulty. The numbers make proportional representation a viable remedy for gender discrimination and provide one answer to another possible criticism — the slippery slope. If we enact proportional representation for women, why not for all "cognizable" groups?[265]

The most obvious response is that it would be practically impossible to achieve proportional representation of various minority groups. In many jurisdictions, there might not be enough members of a certain minority group to provide a pool large enough to ensure selection of an impartial jury.[266] Moreover, because of the disparity in minority population in different areas, requiring proportional representation of minority groups on petit juries could lead to forum-shopping based on race — a particularly repugnant notion — that would reinforce, rather than alleviate, racism. Proportional

262. *Survey*, *supra* note 248.

263. *Id.*

264. A comprehensive discussion of remedying discrimination at this stage of the jury selection process is beyond the scope of this Article. For some suggestions, see Harris, *supra* note 10, at 1056–59.

265. Professor Johnson has proposed that black, Native American, Hispanic, and Asian-American criminal defendants each have a right to three racially similar jurors to remedy discrimination in jury selection and to "eliminat[e] the effects of racial bias on the determination of guilt." Johnson, *supra* note 230, at 1696–98.

266. *Cf. id.* at 1698, 1705–06.

race or ethnic representation would also require jurors to declare a racial or ethnic identity, which might force them to choose between multiple identities. Would a potential juror with a black mother and white father be classified as black or white for jury purposes? The situation becomes more complex if we extend proportional representation beyond gender and require proportional representation of ethnic groups as well.[267]

Proportional gender representation poses none of these problems. Because women constitute approximately fifty-three percent of the population,[268] there should be no problem achieving a sufficient jury pool. Because both genders are fairly evenly distributed throughout the country, the risk of forum-shopping is minimized. And, of course, proportional representation by gender would not force any jurors to "choose" among competing identities.

Still, some will balk at a method of jury selection that explicitly takes gender into account. They might argue that employing a gender conscious jury selection mechanism contravenes the Equal Protection Clause of the Constitution. As already discussed, the Equal Protection Clause prohibits gender classifications which are not substantially related to an important government purpose.[269] Proportional gender representation meets this standard. First, it is substantially related to two important government purposes — the need to eradicate gender discrimination in jury selection and specifically in the use of peremptory challenges, and the need to affirmatively promote inclusion of women on juries. In *Regents of Univ. of Calif. v. Bakke*,[270] the Court recognized the "interest of diversity" in university admissions as "compelling" for equal protection purposes. In *Metro Broadcasting, Inc., v. FCC*,[271] the Court upheld policies of the Federal Communications Commission designed to promote minority participation in broadcasting on the ground that:

> [T]he interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership poli-

267. *See id.* at 1696–97 (limiting "right to 'racially similar' jurors" to blacks, Hispanics, Native Americans, and Asian-Americans, noting that the cost of extending this right to white ethnic groups "would be exorbitant, and the benefits are not apparent").

268. This percentage is based on statistics of voting age population in 1988. STATISTICAL ABSTRACT, *supra* note 254, § 8, Table 439.

269. Craig v. Boren, 429 U.S. 190, 197 (1976). The Supreme Court has made clear that it will only apply "intermediate scrutiny" to gender-based legislation. I believe such laws generally warrant strict scrutiny, and that proportional jury representation would meet this more stringent standard as well.

270. 438 U.S. 265 (1978) (plurality).

271. 110 S. Ct. 2997 (1990), *reh'g denied*, 111 S. Ct. 15 (1990).

> cies. . . . [T]he diversity of views and information on the airwaves serves important First Amendment values. The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry . . . rather, the benefits redound to all members of the viewing and listening audience. . . . [T]he American public will benefit by having access to a wider diversity of information sources.[272]

The same reasoning applies to the proportional jury selection scheme: all litigants will enjoy the benefits of a more representative and diverse jury.

Second, the system is substantially related to these purposes because it undeniably achieves these goals. For all the reasons discussed *supra*, no better alternatives exist. The purpose of requiring a substantial relationship between the classification and the government's purpose is "to assure that the validity of the classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[273] The proportional representation system fully meets this goal: it would *prevent* litigants from impermissibly relying on gender stereotypes in jury selection while remaining open to the possibility of difference and furthering the goal of inclusion.[274] The Court has recognized the legislature's power to implement a scheme which takes race or gender into account both as a remedial measure,[275] and as an affirmative measure to promote inclusion.[276]

Unlike gender-based statutes invalidated by the Court, this system does not rely on "the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classifications.' "[277] Nor does this system implicate the same concerns as the use of quotas does in the context of controversial affirmative action programs. Some worry that affirmative action remedies backfire by reinforcing the inferior status of the minority group and engendering further hostility on the part of the majority.[278] Neither of these concerns apply to this system. Ensuring

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272. *Id.* at 3010–11.

273. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982) (citation omitted).

274. In addition, proportional gender representation would help ensure that the special voices of women of color are not excluded from jury service. *Cf.* Sagawa, *supra* note 10, at 44.

275. *See* Johnson v. Transportation Agency, 480 U.S. 616, 641–42 (1987).

276. *See Metro Broadcasting*, 110 S. Ct. at 2997.

277. *Hogan*, 458 U.S. at 726 (quoting Craig v. Boren, 429 U.S. 190, 198 (1976)).

278. Johnson, *supra* note 230, at 1703.

men and women equal treatment in the jury selection process does not deny individuals of either gender any benefit which they otherwise would have to earn, nor does it favor either gender. Thus it cannot lead to any logical conclusions about either gender's abilities or "merit."[279]

This system simply does not raise the Court's concern that "any gender-based classification provides one class a benefit or choice not available to the other class . . . ."[280] This aspect distinguishes the proposed system from the "set-aside" programs that have proved so troublesome to the Court.[281] By contrast, the proposed jury selection system denies neither gender an opportunity to serve as a juror. Jury service is essentially an unlimited resource which all eligible men and women will have an opportunity to enjoy. Indeed, by eliminating gender-based peremptory challenges the proportional system ensures that no one will be impermissibly deprived of this opportunity based on gender and thus expands the opportunities for all.[282]

It is difficult to conceive of any grounds to challenge the system, since no man or woman would suffer any deprivation or injury.[283] Nonetheless, it might be argued that requiring an equal number of men and women on juries reinforces the idea that women and men are somehow different in the way they act as jurors. Even if this were the case (and I believe, to the contrary, that requiring proportional representation makes no affirmative statement on this

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279. As Professor Johnson argued in describing her quasi-proportional minority jury representation scheme:

> Because the allocation of scarce goods is not at issue (as it is in affirmative action programs), one would not expect the acknowledgment of this right to increase hostility toward minorities; because minorities could not be seen as being 'handed' special benefits instead of 'earning' them, no implications concerning their abilities would be rational.

Id.

280. *Hogan*, 458 U.S. at 731 n.17.

281. In City of Richmond v. J.A. Croson Co., 478 U.S. 469 (1989), the Court held unconstitutional a Richmond ordinance which "required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contracts to one or more Minority Business Enterprise (MBEs)." *Id.* at 477. "The Richmond Plan denie[d] certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race." *Id.* at 493.

282. Justice Powell, joined by Justice Rehnquist, argued that a "narrowly utilized state classification that provides an *additional* choice for women" should not even receive heightened scrutiny. *Hogan*, 458 U.S. at 736, 741–42 (Powell, J., dissenting).

283. Moreover, even if the system might somehow be construed to favor one gender, the Constitution permits a gender-based classification favoring one sex if it "intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728.

point), acknowledging difference is not necessarily in and of itself an evil, unless it disadvantages the group labeled different.[284] Proportional jury representation would not have this effect since it would not prevent any woman from serving on a jury because of gender.

CONCLUSION

The peremptory challenge is a critical safeguard of the litigant's right to trial by an impartial jury. Yet it is also subject to pernicious abuse. Can we prevent invidious gender discrimination in selection of the petit jury without abolishing the peremptory challenge?

Probably not by extending *Batson*. Extension of the *Batson* analysis to gender discrimination in the exercise of peremptory challenges is doctrinally justifiable and has the virtue of consistency, but it would be a grave error. As a theoretical matter, the premise of *Batson* hopelessly contradicts the very essence of the peremptory challenge and operates by denying the possibility of difference. Feminist theory and empirical research suggest that denial of gender difference obscures the complexity of the role of gender in the jury selection process. The only way to accommodate this possibility without perpetuating invidious gender stereotypes is to aim for inclusion as our goal. By establishing a system of proportional representation, we make gender irrelevant to the jury selection process and remove the potential for impermissible discrimination. Simultaneously, we ensure that if men and women do indeed speak in different voices or see the world through different lenses, the jury will encompass these varied perspectives. We can then have greater confidence in the fairness and impartiality of juries' decisions and in the system as a whole.

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284. As Ann Scales has observed:

> When we try to arrive at a definitive list of differences, even in sophisticated ways, we only encourage the law's tendency to act upon a frozen slice of reality. In so doing, we participate in the underlying problem — the objectification of women. Through our conscientious listing, we help to define real gender issues out of existence. Our aim must be to affirm difference as emergent and infinite. We must seek a legal system that works and, at the same time, make differences a cause for celebration, not classification.

Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376 (1986).