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Batson v. Kentucky: Will It Keep Women on the Jury?

Shirley S. Sagawa†

INTRODUCTION

Say the prosecutor has six peremptory challenges1—he can remove six jurors from the panel without explanation, as long as he does not do so in the discriminatory fashion proscribed in Batson v. Kentucky.2 He uses them to strike all five Blacks from the venire. The defendant, a Black man, challenges the prosecutor's action as a denial of equal protection, and the court finds that the defendant has established a prima facie case of racial discrimination. Then, the prosecution offers up a "neutral" explanation to support the challenges: one Black man was struck because he is a Baptist, the same religion as the defendant; a second was struck because he was born in Bermuda, as was the defendant; and three Black women were struck, along with a white woman, the only other woman on the panel, because they are women.

Batson v. Kentucky, decided by the Supreme Court in 1986, held that a defendant can establish a prima facie case of race discrimination under the equal protection clause by relying solely on the facts concerning jury selection at his own trial.3 This was a significant departure from precedent. Previously a defendant was required to show that a prosecutor had followed a pattern of excluding members of his racial group from juries in a series of cases.4 The Batson Court held that a defendant can make a prima facie showing by demonstrating that he or she is a member


1 The number of peremptory challenges available to the prosecution varies among jurisdictions according to statute and may depend on the type of crime or the penalty. W. JORDAN, JURY SELECTION 57 (1980). In federal court, the government is entitled to six challenges when the crime is punishable by imprisonment for more than one year, to three for a lesser sentence or fine, and to twenty if the crime is punishable by death. FED. R. CRIM. P. 24(b).


3 Id. at 95-97.

GENDER-BASED PEREMPTORY CHALLENGES

of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of defendant’s race on account of their race.\(^5\) To rebut the defendant’s prima facie case, the prosecutor must “come forward with a neutral explanation for challenging black jurors.”\(^6\)

The majority opinion in *Batson* carefully avoids addressing whether the discriminatory exclusion from the jury of groups other than Blacks is proscribed by the holding. The introductory hypothetical in this Article therefore presents three issues unresolved by *Batson*: the legitimacy of peremptory challenges made solely because of a juror’s religion, national origin, or gender. This Article focuses on the treatment of gender and the jury system in an effort to resolve the status of women under *Batson*. Part I introduces *Batson v. Kentucky*, and notes the questions it resolves as well as the questions it raises. Part II outlines the historical exclusion of women from juries. Then Part III compares the roles of women and Blacks in the jury system and the stereotypes perpetuated by their exclusion, and discusses the unique position of Black women.\(^7\) Part IV argues that *Batson* proscribes exclusion of women through peremptory challenges, because to limit its scope to race would perpetuate, and indeed, encourage bias in our criminal justice system, particularly against Black women. In the alternative, the Article argues in Part V for the elimination of prosecutorial peremptory challenges altogether, as the most effective way to eliminate both race and gender discrimination on the jury.

### I. *Batson v. Kentucky*

In 1965, the Supreme Court, in *Swain v. Alabama*,\(^8\) held that a violation of the equal protection clause could not be established based on a prosecutor’s use of peremptory challenges without evidence of systematic exclusion of Blacks over time. The Black defendant in *Swain* had been sentenced to death for raping a white woman,\(^9\) and the prosecutor had used six peremptory challenges to create an all-white jury. This, plus the fact that “no Negro within the memory of persons now living has ever

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\(^5\) 476 U.S. at 96.
\(^6\) Id. at 97.
\(^7\) The position of Black women is shared, to some extent, by all women of color. Like those of Black women, the voices of Asian women and other women of color are rarely heard in America’s criminal justice system. The historical, stereotypical association of Blacks with criminality, explains, in part, the system’s dissimilar treatment of white women and Black women, whose position is shared in some, but not all, ways by other women of color.

\(^8\) 380 U.S. 202 (1965).

\(^9\) As the Supreme Court has noted, “[i]t remains an unfortunate fact in our society that violent crimes perpetuated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury].” Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981). For a discussion of the need for stronger safeguards against racism in cases of interracial rape, see Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103 (1983).
served on any petit jury in any civil or criminal case tried" in the county, argued strongly that the defendant's right to equal protection of the law was in jeopardy. Nonetheless, the Court found the record was not sufficient to support an equal protection claim.

*Swain* was criticized by numerous commentators and courts, primarily because the threshold showing necessary to state a prima facie case was virtually unachievable. Even particularly egregious cases were unremediable under *Swain*: In *United States v. Pearson*, for example, the court found no prima facie case, although the prosecutor's notes, showing the number of Blacks on the jury panel and the number challenged during a week of trials, demonstrated that the Government challenged as many Blacks as possible when the defendant was Black.

Several state courts found ways to get around *Swain* by relying on state constitutional rights to a jury drawn from a fair cross section of the community. In *People v. Wheeler*, decided in 1978, California became the first state to hold that a prosecutor's "use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross section of the community." In *Wheeler*, the prosecutor had struck all Blacks from the jury in a case involving two Black defendants accused of murdering a white man. Supreme Court cases had held that cognizable groups must not be systematically excluded from jury service, because to do so would violate the defendant's right to a jury drawn from a representative cross section of the community. Building on this reasoning, the California Supreme Court held that a party who shows that his opponent is using

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10 380 U.S. at 231-32 (Goldberg, J., dissenting).
12 See, e.g., J. VAN DYKE, JURY SELECTION PROCEDURES 154-60 & nn. 73-98 (1977); Annotation, Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race, 79 A.L.R.3d 14, 22 (1977) (*Swain* standard not found satisfied in any case from any jurisdiction). The first case to satisfy the *Swain* burden, *State v. Brown*, 371 So. 2d 751 (La. 1979), was decided almost 25 years after *Swain*.
13 448 F.2d 1207, 1216 (5th Cir. 1971).
15 Glasser v. United States, 315 U.S. 60 (1942) (concluding that the exclusion from juries of all women not members of the League of Women Voters would encroach on the right to a jury trial by biasing jury selection toward a non-representative group); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (reversing tort judgment on grounds that daily wage earners had been excluded from jury service, a practice inconsistent with the American system of trial by an impartial jury drawn from a cross-section of the community); Ballard v. United States, 329 U.S. 187 (1946) (reversing conviction on the ground that women had been excluded from jury service thus denying the defendant trial by a jury drawn from a representative cross section of the community); Peters v. Kiff, 407 U.S. 493 (1972) (reversing conviction of white defendant on the ground that Negroes had been arbitrarily excluded from the grand and petit juries, denying defendant due process of law); Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that exclusion of women from jury violated male defendant's sixth amendment rights).
peremptory challenges to strike jurors because they are members of cognizable groups states a prima facie case under the California Constitution.16 This showing shifts the burden to the accused party to show, by the totality of the circumstances, that the peremptories were not predicated on group bias alone.17

Soon after Wheeler was decided, the Massachusetts Supreme Judicial Court found a similar right under the Massachusetts Declaration of Rights18 in Commonwealth v. Soares.19 In Soares, three Black defendants were tried for a murder and assaults stemming from a fight with white members of the Harvard football team. The prosecutor exercised his forty-four peremptory challenges to exclude 92% of available Black jurors—eliminating all but one Black from the jury—but only 34% of available white jurors.20 Delaware,21 Florida,22 and New Mexico23 followed the lead of California and Massachusetts and interpreted their own constitutions to prohibit the use of peremptory challenges to exclude jurors on the basis of group affiliation.

The sixth amendment allowed federal courts similarly to circumvent Swain's "clear, direct, and unequivocal" holding.24 In McCray v. Abrams, the second circuit held that "the state is not permitted by the Sixth Amendment to restrict unreasonably the possibility that the petit jury will comprise a fair cross section of the community."25 To establish a prima facie violation, the defendant must show:

that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of

16 People v. Wheeler, 22 Cal. 3d at 280, 583 P.2d at 264, 148 Cal. Rptr. at 905, citing CAL. CONST. art. I, § 16 (conferring the right to trial by a jury drawn from a representative cross section of the community).
17 Id. at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 905-06.
18 MASS. CONST. Pt. 1, art. 12 ("And no subject shall be arrested, imprisoned, despoiled, or deprived . . . of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.").
20 Id. at 473, 387 N.E.2d at 508.
21 See Riley v. State, 496 A.2d 997, 1012 (Del. 1985) (holding that the use of peremptory challenges to exclude prospective jurors solely on the basis of race violates a defendant's right to trial by an impartial jury under DEL. CONST. art. I, § 7).
22 See State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (holding that the use of peremptory challenges in a single case to exclude persons solely because of their race violates FLA. CONST. art. I, § 16, which guarantees the right to an impartial jury).
23 See State v. Crespin, 94 N.M. 486, 488, 612 P.2d 716, 718 (N.M. Ct. App. 1980) (holding that improper systematic exclusion by use of peremptory challenges in violation of the N.M. CONST. art. II, § 14, can be shown where the number of challenges in a single case raises the inference of systematic acts by the prosecutor).
24 McCray v. Abrams, 750 F.2d 1113, 1124 (2d Cir. 1984) (holding that Black defendant's showing that Black and Hispanic jurors had been excused although there was no discernable reason to believe they were biased toward the defendant constitutes a prima facie violation of the sixth amendment).
25 Id. at 1129.
a possible inability to decide the case on the basis of the evidence presented.

If the defendant establishes such a prima facie case, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." 26

In *Booker v. Jabe*, 27 the Sixth Circuit similarly found that *Swain* did not "immunize the use of peremptory challenges in each case from judicial scrutiny, regardless of the constitutional provision such inquiry seeks to enforce." 28 Following *McCray*, *Booker v. Jabe* held that the prosecutor violated the sixth amendment in using peremptory challenges to excuse twenty-two Black potential jurors thus creating an all-white jury, in several instances without addressing any questions to the excused juror. 29

The Supreme Court chose a state court case, *Batson v. Kentucky*, 30 to address the continuing vitality of *Swain*. The defendant in *Batson* was a Black man accused of second-degree burglary and receipt of stolen goods. 31 After the judge conducted *voir dire*, excusing certain jurors for cause, the prosecutor used his peremptory challenges to strike all four Blacks on the venire, leaving an all-white jury. 32 Defense counsel moved to discharge the jury on the grounds that the defendant's sixth and fourteenth amendment rights to a jury drawn from a cross section of the community and to equal protection of the laws had been violated. The judge denied the motion and the defendant was convicted. 33 The Supreme Court of Kentucky upheld the prosecutor's use of peremptory challenges and affirmed the conviction. 34

The Supreme Court reversed. Declining to reach *Batson*’s sixth amendment arguments, the Court held that a defendant may establish a prima facie case of discrimination under the equal protection clause "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." 35 Thus, the Court explicitly rejected the evidentiary formulation suggested in *Swain* 36 and adopted with slight modification the sixth amendment approach of *Wheeler, Soares, McCray*, and *Booker*. Writing for the majority, Justice Powell stated that to establish a prima facie case under *Batson*,

the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to

26 *Id.* at 1131-32 (citations omitted).
27 *775 F.2d 762* (6th Cir. 1985).
28 *Id.* at 767.
29 *Id.*
31 *Id.* at 82.
32 *Id.* at 83.
33 *Id.*
34 *Id.* at 84.
35 *Id.* at 96.
36 *Id.* at 92-93.
remove from the venire members of the defendant’s race. Second, the
defendant is entitled to rely on the fact, as to which there can be no dis-
p pute, that peremptory challenges constitute a jury selection practice that
permits “those to discriminate who are of a mind to discriminate.” [Avery
v. Georgia, 345 U.S. 559, 562 (1953)] Finally, the defendant must show
that these facts and any other relevant circumstances raise an inference
that the prosecutor used that practice to exclude the veniremen from the
petit jury on account of their race.37

Once the court, after considering all relevant circumstances, concludes
that the defendant has made a prima facie case, “the burden shifts to the
State to come forward with a neutral explanation for challenging black
jurors.”38 The explanation “need not rise to the level justifying exercise
of a challenge for cause”; however, a prosecutor may not rebut a prima
facie case by stating that he believes the challenged jurors would be
biased because they share the defendant’s race, by merely denying a dis-
criminatory motive, or by affirming his good faith.39

The Court considered its decision broadly consistent with the princi-
plies affirmed in Swain, but explained that several developments had
demanded reconsideration of the equal protection test to be applied. The
Court observed that Swain had “placed on defendants a crippling burden
of proof . . . inconsistent with standards . . . developed since Swain for
assessing a prima facie case under the Equal Protection Clause.”40 Since
Swain was decided, the Court has recognized that “‘[a] single invidiously
discriminatory governmental act’ is not ‘immunized by the absence of
such discrimination in the making of other comparable decisions,’”41 and
that a defendant can make a prima facie case of discrimination under
the equal protection clause using only circumstantial evidence, such as
discriminatory impact.42 Thus, the majority believed that Batson, by
accomodating these developments, would bring treatment of discrimina-
tion in jury selection in line with other equal protection cases43 and

37 Id. at 96 (citations omitted).
38 Id. at 97.
39 Id.
40 Id. at 92-93.
41 Id. at 95 (quoting Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14
(1977)).
42 Id. at 93 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).
Davis, 426 U.S. 229 (1976), moved the Court beyond Swain by recognizing that purposeful
discrimination does not always manifest itself in explicit statements of intent, or, alternatively,
in a pattern of behavior involving more than a single incident. Arlington Heights, which
involved racially restricted zoning, established that a single invidiously discriminatory govern-
mental act can raise an inference of discriminatory intent. 429 U.S. at 256 n.14. Davis, an
employment discrimination case, held that circumstantial evidence, including “proof of dis-
proportionate impact,” can constitute evidence of discriminatory purpose. 426 U.S. at 241-45.
The Batson Court applied the precedents of Arlington Heights and Davis to the context of jury
selection, and concluded that a defendant could demonstrate discriminatory intent through a
statistical showing that Blacks were excluded disproportionately from the jury at a single trial.
476 U.S. at 93-95.
would require "trial courts to be sensitive to the racially discriminatory use of peremptory challenges."\textsuperscript{44}

Justice Marshall, in a concurring opinion, contended that the majority's holding "will not end the racial discrimination that peremptories inject into the jury selection process."\textsuperscript{45} Noting the experience of defendants in Massachusetts and California, where evidentiary analysis similar to that set out in \textit{Batson} had been adopted by state law, Justice Marshall explained the possible limits of the approach. First, even under \textit{Batson}, the abuse of peremptory challenges must be "flagrant"—involving the striking of more than one or two Blacks to form an all-white jury—before a prima facie case can be made.\textsuperscript{46} Second, even when a prima facie case has been established, a prosecutor's true motives will be difficult or impossible to discern; in fact, a prosecutor may subconsciously deny his actual motives and believe that he could not possibly have acted in a racist manner.\textsuperscript{47} These shortcomings can only be solved, according to Justice Marshall, by eliminating peremptory challenges entirely, for both prosecutor and defendant.\textsuperscript{48}

Chief Justice Burger, joined by Justice Rehnquist, dissented.\textsuperscript{49} The dissent noted that the venerable history of the peremptory challenge dates to the Romans, and emphasized its importance to the American justice system. According to the dissent, the peremptory challenge eliminates partiality on both sides and assures the parties that the case will be tried by an impartial jury, thus promoting confidence in our justice system.\textsuperscript{50} Furthermore, the peremptory "avoids trafficking in the core of truth in most common stereotypes," because no explanation is required for its exercise.\textsuperscript{51} By its very nature, according to Chief Justice Burger, the peremptory defies traditional equal protection analysis; a peremptory challenge is by design exercised for arbitrary reasons—because of the race or religion of the juror, for example.\textsuperscript{52} The dissent argued that the majority's clear intention to limit its holding to race cases and its failure to consider the strength of the state's interest, prove that the majority did not intend to apply traditional equal protection analysis at all. If it had, according to the dissent, "then presumably defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrange-

\textsuperscript{44} Id. at 99.
\textsuperscript{45} Id. at 102-03 (Marshall, J., concurring).
\textsuperscript{46} Id. at 105.
\textsuperscript{47} Id. at 106; see, e.g., United States v. Brown, 817 F.2d 674 (10th Cir. 1987) (where a prosecutor stated that he had no racial animosity toward Blacks, but argued that he was justified in excusing Black jurors because they would be partial to the Black defense counsel).
\textsuperscript{48} 476 U.S. at 107.
\textsuperscript{49} Id. at 112 (Burger, C.J., dissenting).
\textsuperscript{50} Id. at 119-21.
\textsuperscript{51} Id. at 121 (quoting Babcock, \textit{Voir Dire: Preserving "Its Wonderful Power,"} 27 STAN. L. REV. 545, 553-54 (1975)).
\textsuperscript{52} Id. at 123.
ments, and employment in a particular industry or profession."\(^{53}\) The dissent argues that such a result would destroy the peremptory challenge, at worst, causing it to "collapse into the challenge for cause";\(^{54}\) at best, it will place an emphasis on race in the jury selection process "contrary to the notion of our country as a 'melting pot.'"\(^{55}\)

Justice Rehnquist, joined by Chief Justice Burger, wrote a second dissenting opinion, arguing that the Court, "[w]ith little discussion and less analysis, . . . overrules one of the fundamental substantive holdings of Swain."\(^{56}\) Justice Rehnquist found "simply nothing 'unequal' about the State using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants."\(^{57}\) The use of group affiliations as a "proxy" for jury partiality "has long been accepted as a legitimate basis for the State's exercise of peremptory challenges," and should not, in Justice Rehnquist's view, be regarded as harmful to either the excluded jurors or the community.\(^{58}\)

As Justice White observed in his concurring opinion, "much litigation will be required to spell out the contours of the Court's Equal Protection holding."\(^{59}\) The question this Article will address is whether other groups, particularly women, come within those contours. According to Chief Justice Burger's dissent, the answer is no; he contended that the majority clearly expressed its intention to limit Batson to race\(^{60}\) by using specific language in its holding: "the defendant first must show that he is a member of a cognizable racial group . . . ."\(^{61}\)

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\(^{53}\) Id. at 124 (citations omitted). Courts have begun to consider this issue, with varied outcomes. See, e.g., United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987) (holding that Italian-Americans are a cognizable group under Batson); State v. Oliviera, 534 A.2d 867 (R.I. 1987) (holding that Batson does not extend to gender-based discrimination).

\(^{54}\) Id. at 127 (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

\(^{55}\) Id. at 129. The dissent also suggested that "[o]nce the Court has held that prosecutors are limited in their use of peremptory challenges," the Court could not "rationally hold that defendants are not" similarly limited. Id. at 126 (emphasis in original). The majority, however, states that it does not reach the questions of defense peremptories. 476 U.S. at 89 n.12.

In his dissent, Chief Justice Burger characterized the majority's holding as "truly extraordinary" because "it is based on a constitutional argument [of equal protection] that the petitioner . . . expressly declined to raise." Id. at 112 (Burger, J., dissenting) (emphasis in original). Although, Justice Stevens noted in his concurring opinion that the respondent had in fact suggested that the Court reconsider Swain, id. at 109 (Stevens, J., concurring), the majority's decision to pass on the sixth amendment question and overturn Swain was surprising. The majority explained that the petitioner avoided asking the Court to reevaluate one of its own precedents, but that the respondent insisted that the petitioner was in fact claiming a denial of equal protection, requiring a reconsideration of Swain. 476 U.S. at 84 n.4.

The Burger dissent further argued that Batson should not apply retroactively. Id. at 132 (Burger, C.J., dissenting). Justices White and O'Connor concurred in this result. Id. at 102, 111 (White, J. and O'Connor, J., concurring).

\(^{56}\) Id. at 134 (Rehnquist, J., dissenting).

\(^{57}\) Id. at 137.

\(^{58}\) Id. at 138.

\(^{59}\) Id. at 102 (White, J., concurring).

\(^{60}\) Id. at 123-24 (Burger, C.J., dissenting).

\(^{61}\) Id. at 124 (emphasis in original).
When the Court makes a statement about equal protection, its literal holding often refers specifically to the group that is the subject of the litigation. However, the Court often does not intend its decision to be so limited. Thus, Chief Justice Burger's suggestion that the majority intended to limit its decision to race is without substance. Alternatively, one might conclude that Batson applies to any group against whom an equal protection violation could be made. The dissent suggested somewhat facetiously that "if conventional equal protection principles apply... it is quite probable that every peremptory challenge could be objected to... because it excluded a venireman who had some characteristic not shared by the remaining members of the venire," thus constituting a classification subject to equal protection scrutiny. This argument, however, also goes too far. Racial classifications such as that found in Batson, are inherently "suspect," and thus, receive the strictest constitutional protection. Certainly a pattern of peremptory challenges against members of other "suspect" classes—those based on religion or national origin—would violate Batson. Other challenges would have to be considered in a traditional equal protection balancing test—which looks at the strength of the state interest supporting the state action and the relationship of the means to those ends. Challenges based on gender, which receive only intermediate scrutiny, the middle level of protection, would be subject to this balancing test.

The majority opinion in Batson does not explicitly address what weight is to be accorded the state interest in the free exercise of peremptory challenges, but it is possible to speculate. The Court states that "the peremptory challenge occupies an important position in our trial procedures," but contends that its contribution will not be undermined by the

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62 For example, the landmark case of Washington v. Davis, 426 U.S. 229, 245 (1976), contained specific language in its holding that "proof of discriminatory racial purpose is [necessary] in making out an equal protection violation." (emphasis added). Yet Davis has been construed broadly to apply to other types of discrimination, including gender discrimination. See e.g., Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

63 476 U.S. at 124 (Burger, C.J., dissenting).

64 Traditional equal protection analysis has three tiers: strict, intermediate, and minimum scrutiny. "Strict scrutiny" is reserved for state actions employing "suspect classifications"—those based on race or national origin—or impinging on "fundamental rights." When strict scrutiny is applied, state actions are presumed to be invalid and are sustained only if they are narrowly tailored to serve a compelling state interest. Strict scrutiny is often described as "fatal in fact." E.g., Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). "Intermediate scrutiny" is applied to "quasi-suspect classifications"—based on gender or illegitimacy—which must be substantially related to the achievement of an important governmental interest. E.g., Craig v. Boren, 429 U.S. 190 (1976). Finally, minimum scrutiny is used in all other cases, and requires only a rational relationship to a legitimate end; until City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), was decided, classifications examined under minimum scrutiny were virtually always upheld. See The Supreme Court, 1984 Term—Leading Cases, 99 HARV. L. REV. 120, 161-62 (1985) (observing that the Supreme Court's decision to invalidate an ordinance burdening the mentally retarded "made the Court's minimum scrutiny take on the characteristics of intermediate review").
**Gender-Based Peremptory Challenges**

Batson rule. Thus, it is not the value of all peremptory challenges—the peremptory challenge as an institution—that should determine the weight of the state interest, but the value of unexplained peremptory challenges against members of discrete groups.

In order for race-based use of peremptory challenges to be upheld, the ultimate goal of preserving the benefits of unexplained peremptory challenges—"assuring the selection of a qualified and unbiased jury"—would have to be closely related to the means of preserving them—allowing prosecutors to use peremptory strikes to exclude Blacks from juries. But such a "close fit" does not exist. And, as Batson makes clear, whatever state interest there is in preserving unexplained peremptory challenges against Blacks is outweighed by the benefits of preventing their use in a racially discriminatory manner.

At the other end of the spectrum are unexplained peremptory challenges against members of groups that are neither suspect nor quasi-suspect classes. These include those classifications, cited by Burger, based on field of employment, family size, and living arrangements. Such an expansion of the number of circumstances in which a prosecutor may not exercise peremptory challenges in this way could substantially undermine any value that the peremptory challenge has in assuring an unbiased jury. Where the group in question has not experienced historical underrepresentation or widespread discrimination in jury service, there is minimal gain from granting protection against such discrimination; similarly, where the group has little cohesiveness or recognizability as a group, there is little possibility that the group will be stigmatized as a result of the occasional exclusion that it might experience. Therefore,

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65 476 U.S. at 98-99.
66 Id. at 91.
67 The goal of guaranteeing an unbiased jury is in fact better met by preventing prosecutors from using their peremptory challenges against Blacks, rather than by requiring them to offer a neutral explanation. See infra Part V.
68 A group is likely to become stigmatized when its members share an easily recognizable trait and become associated with a negative characteristic that society might attribute to all members of the group, including those who do not possess it. Once that negative characteristic, or stigma, becomes attached to the group. "we believe the person with [the] stigma is not quite human. . . . We construct a stigma-theory, an ideology to explain his inferiority and account for the danger he represents. . . . We tend to impute a wide range of imperfections on the basis of the original one." E. Goffman, STIGMA 5 (1963), quoted in J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 160 (1980).

The Supreme Court long ago recognized the stigma that Blacks would carry if they were excluded from jury service in *Strauder v. West Virginia*, 100 U.S. 303 (1879). The Court noted that

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

Id. at 308. Surely this is no less true today, and is equally applicable to the exclusion of other groups, such as women.
allowing unexplained peremptories in these cases is rationally related to the state interest in forming unbiased juries. This is the implicit conclusion reached by the Batson majority’s decision not to adopt Justice Marshall’s suggestion to entirely eliminate peremptory challenges.

Gender-based classifications, “‘[t]o withstand scrutiny’ under the equal protection clause, . . . ‘must serve important governmental objectives and must be substantially related to achievement of those objectives.’”69 This intermediate standard of scrutiny, on its face, offers little insight into the status of women under Batson. Is allowing a prosecutor to use peremptory challenges to exclude women, because they are women, “substantially related” to the “important governmental objective” of creating unbiased juries? Assuming that this goal is indeed an “important governmental objective,” the question turns on whether it is achieved by allowing prosecutors unexplained peremptory challenges that exclude women disproportionately from the jury, or whether allowing the potential for abuse actually undermines the goal by perpetuating invidious stereotypes. The next section explores the historical role of women on the jury in an attempt to answer this question.

II. LADIES OF THE JURY

Until relatively recently the use of peremptories against women was a moot question: women could be excluded from jury service outright. The prohibition of women on juries came to the United States through the common law, which, according to Blackstone, rightfully kept women off juries under the doctrine of propter defectum sexus—defect of sex.70 In America, state law excluded women from jury service until the end of the nineteenth century, with the exception of a short time between 1870 and 1871 when women could serve on juries in Wyoming Territory.71 In 1879 the Supreme Court made clear, as it declared a law banning Negroes from jury service unconstitutional in Strauder v. West Virginia, that a state may confine selection of jurors “to freeholders, to citizens, to persons within certain ages, . . . to persons having educational qualifications”—or to males.72

Although one state, Utah, permitted women to serve on juries as early as 1898, and women attained universal suffrage upon ratification of the nineteenth amendment in 1920, many states continued to exclude

70 3 W. BLACKSTONE, COMMENTARIES § 362.
71 Abrahamson, Justice and Juror, 20 GA. L. REV. 257, 263-64 (1986). Women were no longer allowed on juries when, in 1871, a new chief justice was appointed who disfavored the practice.
72 100 U.S. 303, 310 (1879).
women overtly from jury service through the 1940s. The Supreme Court first questioned this practice in 1946, in *Ballard v. United States*, which concluded that a federal court in a state where women are eligible for jury service under local law may not keep women off jury panels. *Ballard* rested on the Federal Judicial Code and not the Constitution. Nonetheless, the Court's finding that the "systematic and intentional exclusion of women, like the exclusion of a racial group" violates the statute's requirement that the jury represent "a cross-section of the community," was a landmark. Justice Douglas' opinion reflected an advanced view previously unheard from the Supreme Court of the importance of including women:

It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. 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.

Fifteen years later, the Supreme Court was not willing to take this idea to its logical extreme. In *Hoyt v. Florida*, a woman was convicted of killing her husband by an all-male jury. The defendant claimed that the Florida statute that required women voluntarily to register before they would be placed on jury lists violated her right to equal protection under the fourteenth amendment. Refusing to reconsider the continuing vitality of the *Strauder* doctrine that allowed states to confine jury duty to males, the Court held that it is permissible for a state "to con-

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75 The statute was held to violate Judicial Code § 275, 28 U.S.C. § 241. 329 U.S. at 190.
76 Id. at 195.
77 Id. at 191.
78 Id. at 193-94 (footnotes omitted).
80 Id. at 58. When *Hoyt* was decided, three states, Alabama, Mississippi, and South Carolina, still excluded women from jury service. Eighteen states and the District of Columbia granted women an absolute exemption based on their sex; in three states the exemption was automatic unless a woman affirmatively volunteered for jury service. Id. at 62-63.
clude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.”\(^{81}\) The Court found that “[d]espite the enlightened emancipation of women,” it was appropriate to treat women differently than men because of their unique position “as the center of home and family life.”\(^{82}\) The Court in *Ballard* had similarly found women to be fundamentally different than men. But while the *Ballard* court found that women’s different voice argued for their inclusion on representative jury panels, the *Hoyt* court found that difference to support women’s exclusion. The *Hoyt* court subtly gave credence to the view that women differ in a very basic way from men, and their perspectives and contributions are not important to the jury process.\(^{83}\)

Although the Civil Rights Act of 1957\(^{84}\) gave women the right to sit on federal juries, it was not until 1968 that Mississippi became the last state to repeal its statute barring women from jury service.\(^{85}\) Women continued to be underrepresented on juries,\(^{86}\) however, as registration requirements, automatic exemptions, and other differential treatment for women kept their numbers down.

In 1975, the Court finally struck down an affirmative registration requirement for women who wished to serve on juries in *Taylor v. Louisiana*\(^{87}\). However, the Court relied on the defendant’s sixth amendment right to a jury selected from a representative cross section, not the defendant’s or the juror’s right to equal protection of the law.\(^{88}\) Interestingly, the appellant in *Taylor* was not a woman, but a man sentenced to death by an all-male jury for aggravated kidnapping.\(^{89}\) Finding that “weightier reasons” than “merely rational grounds” are required to justify the virtual exclusion of women, the Court refused to overrule *Hoyt* explicitly and instead distinguished *Hoyt* by its equal protection basis.\(^{90}\) The Court argued, as well, that times had changed: “If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has

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81 Id. at 62.
82 Id. at 61-62.
88 Id. at 530-31.
89 Id. at 524 (1975). The parties stipulated that 53% of the persons eligible for jury service in the judicial district were female, but no more than 10% of the persons on the jury wheel were women. Id.
90 Id. at 534.
long since passed." Instead, as noted in Ballard, "women are sufficiently numerous and distinct from men" that their systematic elimination from jury panels deprives the defendant of his sixth amendment right to a representative jury.\(^9\)

Automatic exemptions for women went the way of affirmative registration requirements in 1979, when the Supreme Court held them unconstitutional in \textit{Duren v. Missouri}.\(^9\) Although the Court recognized a state interest in ensuring that family members responsible for child care could remain at home, it found the exemption for all women too broad to be justified by this rationale.\(^9\) \textit{Duren} clarified the showing necessary to establish a prima facie violation of the fair cross section rule:

- (1) that the group alleged to be excluded is a "distinctive" group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.\(^9\)

Once a prima facie case has been made, the state may offer a "significant state interest" to advance the "jury-selection process . . . that result[s] in the disproportionate exclusion of a distinctive group."\(^9\) The Court found the "systematic exclusion" in \textit{Duren}, which "results in jury venires averaging less than 15% female" to violate the sixth amendment's fair cross section requirement.\(^7\)

While the Court attempted to distinguish the showing necessary to prove a sixth amendment violation from an equal protection showing, Justice Rehnquist, in dissent, contended that the majority had in fact created a "hybrid doctrine" of sixth and fourteenth amendment rights.\(^9\) Justice Rehnquist observed that the majority's sixth amendment requirement that an exemption "manifestly and primarily advance[ ]" a "significant state interest"\(^9\) was suggestive of intermediate equal protection scrutiny, which requires that classifications be "substantially related" to an "important governmental objective[.]."\(^10\) The majority of the Court argued, however, that "equal protection challenges to jury selection and composition are not entirely analogous to the case at hand," since the discrepancy shown in equal protection cases has to indicate both discrimi-
inatory effect and discriminatory purpose, and is subject to rebuttal by the state.101 "In contrast, in sixth amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section," which the state can refute only by advancing significant justification.102

These cases do suggest important differences in the use of the sixth and fourteenth amendments regarding exclusion of women from juries. It is firmly established in *Taylor* that women constitute a "distinctive" group in the community for purposes of the sixth amendment fair cross section requirement.103 However, unlike an equal protection violation, a sixth amendment violation can be claimed only by the defendant and not by an excluded juror. The defendant need not be a member of the excluded group in a sixth amendment case, as he must in an equal protection claim.104 Nor does the sixth amendment right clearly extend beyond selection of the venire; the Supreme Court declined to reach this question in *Batson*105 and has not so held elsewhere. Neither the sixth nor the fourteenth amendment entitles the defendant to a "jury of any particular composition."106

The equal protection clause, however, does extend to discriminatory use of peremptory challenges. It may be invoked by a potential juror who is a member of an excluded group,107 as well as by a defendant who is a member of the group.108 But the Court has not ruled that defendants who do not belong to the excluded group may also rely on the equal protection clause for redress. And although women have been clearly established as a quasi-suspect class for equal protection purposes, the Court has not specifically ruled that sex should be treated like race in jury selection cases decided under the fourteenth amendment. In refusing to overrule *Hoyt* in *Taylor*, despite the development of a new heightened standard of equal protection analysis for gender-based classifications, the Court left women's status in these cases an open question, which was not resolved in *Batson*.

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102 *Id.*
103 419 U.S. at 531.
104 See *id.* at 526.
105 See 476 U.S. at 89 n.12. The Court did not "express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn." *Id.* (citations omitted).
106 *Taylor* v. Louisiana, 419 U.S. at 538; see also 476 U.S. at 85 ("[A] defendant has no right to a 'petit jury composed in whole or in part by persons of his own race.' " (citations omitted)).
107 E.g., *Carter* v. Jury Commission of Greene County, 396 U.S. 320 (1970) (allowing class action by a Negro citizen charging that exclusion of Negroes from juries constitutes an equal protection violation). The Court stated that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Id.* at 329 (citations omitted).
108 E.g., *Batson*, 476 U.S. at 96.
The treatment of women in jury selection by the legislatures and the Supreme Court over the last century does demonstrate that women and men are not "fungible" for jury purposes, that women's different voice may not be systematically excluded from the venire, and that women have been historically denied equal access to jury membership. The rationalizations made over the last hundred years, and presently, for the treatment of women in the jury selection process help to explain women's continuing underrepresentation on juries and the need to extend Batson to proscribe the exclusion of women. These rationalizations will be discussed in the next Part.

III. Views of Women and Blacks as Jury Members

An inherent tension exists between the defendant's claim that the exclusion of a group deprives him of an identifiable voice on an otherwise representative jury and the excluded juror's claim that she is like others and because of that sameness belongs on the jury. These counterpoints of difference and sameness can be reconciled: a woman is like a man in her ability to serve as an unbiased juror; a woman is not like a man in the perspective she brings to the jury. Unfortunately, a woman's different perspective may be viewed as biased simply because it is unlike the male norm. The messages that are sent when a Black is stricken from the jury for racial reasons and when a woman is removed because of her gender are different, relating to the traditional roles of Blacks and women in the criminal justice system. But the stereotypes that are perpetuated through this process are invidious and strongly support ending peremptory challenges against these groups.

A. Blacks and the Criminal Justice System

Historically, Black men have had a unique role in the criminal justice system. Black men are overrepresented as criminal defendants, but severely underrepresented as police, attorneys, judges, and jurors—as members of groups that control the system that will judge their guilt. Blacks represent approximately 12% of the population, U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 1987, at 17 [hereinafter Statistical Abstract]. Blacks constitute 27% of persons arrested, U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States, 1986, at 182 (1987) [hereinafter UCR], and 39% of jail inmates (92% of Blacks in jail are men). Statistical Abstract, supra, at 172. In a survey of the 50 largest cities in the United States, only one of the 47 cities responding had a police force with Black representation equal to or greater than the representation of Blacks in the community. For example, only 10% of police officers in New York City are Black, although 25% of the city population is Black; in Detroit, 31% of the police force is Black, compared to 63% of the city population. E. McGarrell & T. Flanagan, Sourcebook of Criminal Justice Statistics—1984, at 64 (1985). Only 3% of judges and lawyers nationwide are Black. Statistical Abstract, supra, at 385; see also E. McGarrell & T. Flanagan, supra note 109, at 76-77 (among presidents making judicial appointments from 1963 to
The relative overrepresentation of Blacks as defendants and their underrepresentation as law enforcers are related, and demonstrate how discrimination can permeate the criminal justice system: Blacks may be overrepresented as criminal defendants because the predominantly white police who initially bring them into the justice system may identify Blacks as criminals disproportionately; Blacks may be underrepresented as jurors because they are viewed as identifying with criminal defendants, a group thought to be primarily Black.

Prosecutors' "common and flagrant" misuse of peremptory challenges to remove Black jurors, particularly when the defendant is Black, is well documented. Even where the defendant is not Black or a member of an ethnic minority group, prosecutors tend to remove Blacks from the jury on the assumption that "they almost always empathize with the accused." Prosecutors may strike Black members of the venire without asking a single question on voir dire, strongly suggesting that it is their race and nothing else that makes them unacceptable as jurors. The effect of these practices is to perpetuate the view that all Blacks are unable to be impartial in a criminal trial, lack moral integrity and identify with criminals, and are simply not qualified to be jurors.

B. Women in the Criminal Justice System

Because women's role in the criminal justice system historically has been limited and the justifications for their exclusion from juries are unlike those used to challenge Blacks, the use of peremptory strikes against women raises different issues. Like Blacks, women hold only a small percentage of judgeships, are underrepresented as lawyers, and, as discussed in Part II, historically have been excluded from jury service. But women's involvement in the justice system as defendants has been

1982, only President Carter appointed more than 6% Blacks). Finally, Blacks are underrepresented on juries, in many cases by more than 20%. In studies of jury rolls in Montgomery County, Alabama, and Erie County (Buffalo), New York, Blacks were found to be underrepresented by 72% and 35% respectively. J. Van Dyke, supra note 12, at 28-35, 319-22.

111 See, e.g., Batson, 476 U.S. at 103-04 (Marshall, J., concurring); P. Diperna, Juries on Trial 163, 175 (1984); J. Van Dyke, supra note 12, at 152-60. Even before peremptory challenges are exercised, Blacks and Hispanics are underrepresented on the venire because of reliance on voter lists and the granting of exemptions for economic hardship. See P. Diperna, supra, at 98; J. Van Dyke, supra note 12, at 28-35.
114 See Batson, 476 U.S. at 86, 104-05 (Marshall, J., concurring).
115 Only 18% of lawyers and judges are women. Statistical Abstract, supra note 109, at 385; see also E. McGarrell & T. Flanagan, supra note 109, at 76-77 (showing that no president appointed more than 20% women to federal judgeships from 1963 to 1982; although President Nixon appointed 224 judges, less than 1% of these were women). Only 7% of police officers
limited as well. Less than 20% of arrests are of women, although women constitute over half the population. Women's criminal acts are quite different from men's; women commit just over 10% of violent crime, the only categories in which women comprise over half of those arrested are prostitution and juvenile runaways. Those violent crimes that are committed by women often occur in a family setting and in response to abuse by husbands or lovers.

In virtually every category of crime, women are more likely to be victim than defendant. And when they are defendants, they inspire more sympathy than any other category of defendant except children; in contrast, Black defendants are the least sympathetic group rated. While views of Blacks as jurors comport with the stereotype of Blacks having deficient morals and a predisposition to crime, views of women reflect their seeming inexperience with criminality and implied higher moral standards. Despite the contrast in characteristics attributed to Blacks and women, the stereotypes that are perpetuated are similarly invidious.

Ironically, both opponents and proponents of women's service on juries have rested their arguments on women's association with the separate sphere of the home. Opponents of women's jury service have contended, as did the Supreme Court in Hoyt v. Florida, that women's "special responsibilities" justify their excuse from the public duty of jury service. Such a duty not only would disrupt home life, but would expose women to indiscretions inappropriate for their ears.

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117 UCR, supra note 109, at 181.
118 UCR, supra note 109, at 181. Violent crimes are offenses of murder, forcible rape, robbery, and aggravated assault. Id. at 181 n.3.
119 Id. at 181.
121 For example, in 1986, 1,983 women were arrested for murder and nonnegligent manslaughter but 4,774 women were murdered, compared with 14,083 male murderers and 14,455 male murder victims. Id. at 9, 181. Estimates of victimization for other major crime categories involving identifiable victims—rape, robbery, assault and larceny—similarly show that more women are victimized than arrested for the crimes. While this is also true for men, except for rape, the ratios of arrests to victims are significantly higher for men than for women in each category. See UCR, supra note 109, at 181; E. McGarrell & T. Flanagan, supra note 109, at 307.
124 See Bailey v. Arkansas, 215 Ark. 53, 61, 219 S.W.2d 424, 428 (1949) ("Criminal court trials often involve testimony of the foulest kind and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships and other elements that would prove humiliating, embarrassing and degrading to a lady."); quoted in Weisbrod, Images of a Woman Juror, 9 HARV. WOMEN'S L.J. 59, 66 (1986); State v. Hall, 187 So. 2d 861, 863 (Miss. 1966), appeal dismissed, 385 U.S. 98 (1966) ("The legislature
more, if a jury were required to stay overnight, women's purity would be compromised.\textsuperscript{125} Finally, opponents contended that women were unqualified for jury service, as they knew nothing of the public world, were illogical, and even lawless.\textsuperscript{126}

Proponents of women serving on juries have relied on similar stereotypes of women as morally superior, tied to the home, and intuitive rather than logical.\textsuperscript{127} Thus, women have been thought to improve the moral character of the jury, to assess better the veracity of testimony, and to guard the interests of home and family.\textsuperscript{128} Even relatively recent commentary supporting compulsory service for women recognizes the "special interest and competence of women in dealing with young people" and the fact that "their mere presence [is] enough to improve the decorum of the courtroom and the appearance of the male participants."\textsuperscript{129}

Women's service on the jury has been regarded not as an important right for women as equal citizens, but as a means to decrease the burden on men and the economic cost of the jury system, because women do not work outside the home, and if they do, are paid less than men.\textsuperscript{130} Such opinions rest on obvious stereotypes about women's unfitness for public life and their role as keepers of the home and of the moral code.

Opinion about women's actual behavior as jurors varies widely. Some "experts" suggest they favor the prosecution,\textsuperscript{131} while others have found them to favor the defendant.\textsuperscript{132} Women are thought by some to be emotional and sympathetic\textsuperscript{133} but by others to be ungenerous and

\textsuperscript{125} Weisbrod, supra note 124, at 67 (noting that opponents of women's jury service "argued that overnight arrangements in a hotel with male jurors would assault a woman's sensibilities").

\textsuperscript{126} See id. at 63-70 (discussing assumptions about differences between women and men shared by both proponents and opponents of women's jury service).

\textsuperscript{127} See id. at 67-79.

\textsuperscript{128} See id. at 71-73. The practice of calling a "jury of matrons" in certain "women's cases" dealing with mothers and children, or women defendants, illustrates the view that women would bring something different to the jury than would men. This difference, however, suggests as well that women are not needed on "normal" juries, and that men might not receive a fair trial if judged by women. See id. at 74.

\textsuperscript{129} Rudolph, supra note 73, at 100 (G. Winters ed. 1971) (arguing for compulsory jury service for women).

\textsuperscript{130} See id. at 99-100.

\textsuperscript{131} See, e.g., V. HANS & N. VIDMAR, supra note 86, at 73 (citing C. Darrow, Attorney for the Defense, ESQUIRE, May 1936, at 36-37, 211-13).

\textsuperscript{132} See, e.g., R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 35 (1980) (summarizing "the message about juror selection found in the legal cookbooks").

\textsuperscript{133} See, e.g., id. at 33 (listing "maxims that are representative of the rules of thumb lawyers are urged to follow"); R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 122 (1983) (citing I. GOLDSTEIN, TRIAL TECHNIQUE (1935)); Mahoney, Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection, in WOMEN IN THE COURTS 114, 119 (W. Hepperle & L. Crites eds. 1978) (citing I. OWEN, DEFENDING CRIMINAL CASES BEFORE JURIES: A COMMON SENSE APPROACH 98 (1973)).
unmoved by emotional displays.\textsuperscript{134} Consistency of opinion, however, may be found in the views that women favor males, especially attractive ones, but dislike attractive females;\textsuperscript{135} that women are unsympathetic to defendants in cases where the victim is a child;\textsuperscript{136} that women distrust other women and have a special ability to sense when they are lying;\textsuperscript{137} and that women’s intuition can help win a case that is weak on the facts.\textsuperscript{138} Striking women from a jury in reliance on these maxims perpetuates damaging views of women: that women’s competition for men directs their thinking; that women have a natural sympathy for children; and that women rely on intuition rather than logic.

Empirical studies actually show little relationship between gender and verdict, with a few exceptions.\textsuperscript{139} In contrast to the stereotyped view, studies have noted that women jurors actually favor women defendants,\textsuperscript{140} and that men are more influenced by attractiveness of defendants than are women.\textsuperscript{141} The only type of case in which significant

\textsuperscript{134} See, e.g., R. Simon, supra note 132, at 18 (quoting Samuels, \textit{The Verdict on Women Jurors}, N.Y. TIMES MAG., May 7, 1950, at 22).

\textsuperscript{135} See, e.g., R. Hastie, S. Penrod & N. Pennington, supra note 133, at 122 (citing J. Appleman, \textit{Successful Jury Trials: A Symposium} (1952)); R. Simon, supra note 132, at 16 (“Women jurors were judged to be ‘stonier-hearted than men in judging their wayward sisters;’ However, if a presentable young man was on trial, women jurors were inclined to identify him with a son or brother which is perfectly agreeable to his lawyer.”) (quoting \textit{Would a Lawyer Pick You as a Juror}, \textit{Reader’s Dig.}, Sept. 1945, at 86-88); Karcher, \textit{The Importance of the Voir Dire}, 15(8) \textit{Prac. Law}, 59, 62-63 (1969); Katz, \textit{The Twelve Man Jury}, \textit{Trial}, Dec./Jan. 1968-69, at 39-40, 42; Massaro, \textit{Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures}, 64 N.C.L. REV. 501, 521 n.107 (1986) (surveying common stereotypes in published advice about jury selection); Mahoney, supra note 133, at 119 (citing I. Owen, supra note 133, at 98).

\textsuperscript{136} E.g., J. Van Dyke, supra note 12, at 153 (quoting Sparling, \textit{Jury Selection in a Criminal Case}, in \textit{Prosecution Course}, quoted in 45 Texas Observer, May 11, 1973, at 9, col. 2); see also Rudolph, supra note 73, at 101 (observing that mothers are more protective of children in criminal cases than are single women).

\textsuperscript{137} See, e.g., S. McCart, \textit{Trial by Jury: A Complete Guide to the Jury System} 33 (1965) (“There is a general impression among lawyers that male jurors, out of gallantry, favor women litigants and so, when representing a woman, they seek an all-male jury which will overlook female deceit another woman would spot at once.”); Weisbrod, supra note 124, at 72-73 (discussing commentators’ views that women possess a greater understanding of other women).

\textsuperscript{138} See, e.g., J. Van Dyke, supra note 12, at 153 (quoting Sparling, \textit{Jury Selection in a Criminal Case}, in \textit{Prosecution Course}, quoted in 45 Texas Observer, May 11, 1973, at 9, col. 2); Weisbrod, supra note 124, at 71 (quoting a Wyoming Attorney General from 1884 who stated that women “do not reason like men upon the evidence, but, being possessed of a higher quality of intellectuality, i.e., keen perceptions, they see the truth of the thing at a glance.”).

\textsuperscript{139} For a survey of studies on the relationship between gender and jury verdict, see V. Hans & N. Vidmar, supra note 86, at 76-77; R. Hastie, S. Penrod & N. Pennington, supra note 133, at 140-41 (surveying numerous studies); Frederick, \textit{Jury Behavior: A Psychologist Examines Jury Selection}, 5 OHIO N.U.L. REV. 571, 572-73 & n.12 (1978) (same). The empirical accuracy of stereotypes, of course, in no way justifies the harmful effect of such prejudicial views. This Article discusses studies of the jury behavior of Blacks and women to show the importance of these individuals’ unique perspectives, not to suggest that stereotypes are empirically true.

\textsuperscript{140} See, e.g., Stephan, \textit{Sex Prejudice in Jury Simulation}, 88 J. PSYCHOLOGY 305, 306 (1974) (finding jurors less likely to convict defendants of their own sex); cf. R. Simon, supra note 132, at 38 (citing study by Nagel and Weitzman showing that juries awarded higher damages in personal injury cases to plaintiffs sharing gender of majority of jurors).

\textsuperscript{141} See, e.g., R. Hastie, S. Penrod & N. Pennington, supra note 133, at 140 (citing study by
gender differences have consistently been shown is the rape case, where women appear more likely to convict.\textsuperscript{142} This merits some discussion, given the sexism and racism that have infused the treatment of rape in our justice system.\textsuperscript{143}

C. Women, Race and Rape

Women's greater tendency to vote to convict in rape cases, may be explained by their greater empathy for rape victims which contrasts with men's understanding of the defendant's point of view.\textsuperscript{144} The handling of rape cases has prompted significant reform measures in recent years, including the passage of "rape shield laws" limiting questions about the victim's prior sexual behavior and repeal of the corroboration requirement, which had suggested that the women were likely to bring false rape charges.\textsuperscript{145} While these reforms may have some impact on the biased treatment of rape cases, sexist views of victims and defendants will almost certainly continue to influence jury deliberations; women's presence on the jury is critical to minimize this effect.

Race, like gender, has been correlated to verdicts in rape trials, but in the opposite direction. Black men accused of raping white women throughout history have been treated more harshly than white men.\textsuperscript{146} Post-Civil War propaganda commonly justified the practice of lynching by reference to the threat of the rape by Black men of white women.\textsuperscript{147} Between 1930 and 1967, nine out of every ten men executed for rape were Black;\textsuperscript{148} even after the death penalty for rape was prohibited, Black men convicted of raping white women still received the most severe penalties of any class of sex offenders.\textsuperscript{149} This undoubtedly can be attributed in part to the systematic exclusion of Blacks from juries and a strong negative reaction on the part of many whites to interracial sex

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\item Efran, The effect of physical appearance on the judgment of guilt, interpersonal attraction, and severity of recommended punishment in a simulated jury task, 8 J. OF RES. IN PERSONALITY 45-54 (1974).
\item See, e.g., V. HANS & N. VIDMAR, supra note 86, at 211; R. HASTIE, S. PENROD & N. PENNINGTON, supra note 133, at 140.
\item See generally S. ESTRICH, REAL RAPE (1987); Wriggins, supra note 9, at 103.
\item V. HANS & N. VIDMAR, supra note 86, at 211.
\item Id. at 205-09.
\item Wriggins, supra note 9, at 116. Before the Civil War, the rape of Black women was legal, but even "assault with intent to commit rape" was punishable by death if perpetrated by a Black man on a white woman. Although rape statutes were made race-neutral in the period following the war, in practice, race continued to determine treatment in the legal system. Courts allowed juries to consider the race of the defendant to determine intent, and commentators viewed rape by a Black man as "worse than death." See id. at 105-17, 124-25.
\item For a general discussion of the myth of the Black rapist, see A. DAVIS, WOMEN, RACE AND CLASS 172-201 (1981).
\item S. ESTRICH, supra note 143, at 3 n.2 (citing M. Wolfgang, Racial Discrimination in the Death Sentence for Rape in EXECUTIONS IN AMERICA 110-20 (W. Bowers ed. 1974)).
\item Id. at 107 n.2 (citing LaFree, The Effect of Sexual Stratification by Race on Official Reactions to Rape, 45 AM. SOC. REV. 842-54 (1980)). The death penalty for rape was ruled unconstitutional in Coker v. Georgia, 433 U.S. 584 (1977).
\end{enumerate}
involving a Black man and white woman. Even white feminists seeking to enlighten the community about the true nature of rape often rely on the specter of the Black rapist to illustrate the power dynamic of the crime and thereby perpetuate racist stereotypes. The sense of unfairness and outrage when a Black man accused of rape is tried by an all-white jury is deeply felt in the Black American consciousness and represented in important literature, including Harper Lee’s *To Kill a Mockingbird* and Richard Wright’s *Native Son*. The reality of racism in the treatment of rape suggests that neither justice, nor the appearance of justice can be done when Blacks are excluded from juries.

Sexist presumptions about victim responsibility disappear when a white woman is raped by a Black man; in such cases, nonconsent is no longer an issue. When a Black woman is raped by a white man, however, the opposite is true. Although studies indicate that white men rape Black women at least as often as Black men rape white women, the rape of Black women has been largely ignored throughout history. A pervasive stereotype of Black women as “unchaste” and “immoral” was used to justify ignoring their complaints. Studies show that both judges and juries impose more lenient sentences when the victim is Black.

Central to the disparate treatment of Black and white victims and defendants is the key assumption that men prefer to rape white women, and that Black rape victims do not suffer as much as white women, and that Black rape victims do not suffer as much as white women.

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150 V. HANS & N. VIDMAR, supra note 86, at 212.
151 See generally, A. DAVIS, supra note 147, at 178-82.
152 See text accompanying notes 160-161.
153 Massaro, supra note 135, at 558-59 (providing an insightful interpretation of these works by non-lawyers and their meaning for the right to a trial by a jury of one’s peers).
154 S. ESTRICH, supra note 143, at 1 (describing the police response to her rape: “They asked me if he was a crow . . . A crow, I learned that day, meant to them someone who is black. They asked me if I knew him . . . They believed me when I said I didn’t. Because, as one of them put it, how would a nice (white) girl like me know a crow?”); cf. Wriggins, supra note 9, at 111 (“If the accused was Black and the victim white, the jury was entitled to draw the inference based on race alone, that he intended to rape her.”).
155 Wriggins, supra note 9, at 122.
156 See id. at 121.
157 Id. at 121-22; see also Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1634-35 (1985) (summarizing study showing that white students shown a videotape of a trial of a Black man accused of rape voted to convict 65% of the time when the victim was white but only 32% of the time when the victim was Black, although Black students shown the same tape voted to convict 48% of the time when the victim was white and 80% of the time when the victim was Black); cf. S. ESTRICH, supra note 143, at 115 n.50 (“Prosecutors understandably do not admit to considering race and class, but these factors may well be related to their assessments of ‘credibility.’”); Comment, Police Discretion and the Judgment that a Crime has been Committed—Rape in Philadelphia, 117 U. PA. L. REV. 277, 302-06 (1968) (observing that empirical data suggests that “[i]t appears impossible . . . not to conclude that the differential [between the treatment of white and Black complainants] resulted primarily from lack of confidence in the veracity of black complainants and a belief in the myth of black promiscuity.”).
158 Black women are in fact more likely to be raped than are white women. See Wriggins, supra note 9, at 122. The belief that white women are more likely to be raped than Black women probably rests on the racist view that white women are more attractive than Black women. This, in turn, implicates the sexist notion that rape is a manifestation of sexual desire and that women invite rape by their appearance.
rape victims.159

The racism and sexism that infuses the treatment of rape in American society shapes the unique perspective of the Black woman. Despite her own victimization, "[w]henever interracial rape is mentioned, a black woman's first thought is to protect the lives of her brothers, her father, her sons, her lover," observes the narrator in a short story by Alice Walker.160 While white feminists have fought to end the myth that women falsely cry rape, the Black community has historically struggled against the white woman's power to victimize Black men with the fraudulent rape charge. If "Black women have been conspicuously absent from the ranks of the contemporary anti-rape movement,"161 it may be due, in part, to that movement's indifference toward the frame-up rape charge as an incitement to racist aggression.

In this context, the failure of courts and commentators to account for the dual status of Black women on the jury is especially troubling. Women identify with the victim and are more disposed to convict. Blacks, on the other hand, are thought to identify with the defendant, and are more likely to acquit. Are Black women women or are they Black? Black women are largely invisible in the debate about the use of peremptory challenges,162 just as they are missing from most legal discussion about race and rape.163 Yet, presumably, they will be the first to be

159 See id. at 120.
161 A. DAVIS, supra note 147, at 173.
162 When white commentators write about women as jurors, it is often clear that they mean white women only, which perpetuates the disturbing view that Black women are not truly women because they do not fit the white stereotype. Throughout history, while white commentators argued that women should be excluded from jury service because of their moral purity and naivete, Black women's charges of rape were dropped because Black women were, almost by definition, considered to lack moral character. Compare, Asking for Trouble, 114 THE INDEPENDENT 368 (Apr. 4, 1925) ("Juries deal with all manner of crimes, from innocuous offences to the vilest and most revolting aberrations of the human beast. ... [T]he great majority of women hardly know that such things exist.") quoted in Weisbrod, supra note 124, at 66; with Dallas v. State, 76 Fla. 358, 79 So. 690 (1918) ("What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely immoral constitutes an appreciable part of the population.") quoted in Wriggins, supra note 9, at 121.


163 Black women have contributed important commentary about race and rape outside of the legal field. See, e.g., A. DAVIS, supra note 147; B. HOOKS, Ain't I A Woman: BLACK WOMEN AND FEMINISM (1981).
excluded from the jury if *Batson* does not cover gender. We can only surmise about what message this will communicate: that Black women are the most prejudiced of jury members, the least qualified to serve?

In rape cases, the presence of women on a jury makes the jury less sexist, much as the presence of Blacks makes the jury less racist. The presence of Black women brings a unique voice to the jury, previously unheard in the legal system’s treatment of rape, and makes it both less racist and less sexist. In addition, the improved appearance of justice cannot be questioned, unless one adopts the view that white males represent the impartial norm, and women and Blacks, (and especially Black women) are too biased to serve. This latter view is communicated through the questionable prosecution tactic of the discriminatory use of peremptory challenges, resulting in the perpetuation of prejudice and making trials less, not more fair.

**IV. Batson: Why It’s Right for Women**

As discussed earlier, the justification for allowing unexplained peremptory challenges that effectively exclude one particular group is to make the jury less biased, or appear less biased. And the rationale for disallowing these challenges is that the group exclusion actually makes the jury more biased or appear more biased. Thus, evidence that, as a group, women or Blacks tend to favor one type of defendant more than do other groups, for example, does not necessarily argue against their exclusion: if that tendency is due to the bias of women or Blacks, peremptory challenges excluding them would reduce jury bias; if the tendency is explained by their special insight about a certain type of defendant, which makes them less biased than white males, peremptory challenges increase jury bias. It is impossible to know whether one group is “biased” unless that bias is measured relative to that of another group. If, for example, Blacks are less likely to vote to convict a Black defendant than are whites, it may indicate Blacks are unduly lenient toward the Black defendant, or that whites are unduly harsh toward him. It is a dangerous practice to accept as “normal” the biases of white men and label as “biased” the members of other groups who do not share them.\(^\text{164}\) Furthermore, generalizations about Blacks as a group should not be applied to a Black individual. Attributing characteristics of a group to individuals in order to justify their exclusion is the very essence of prejudice.

In *Batson*, the Court acknowledged the multidimensional nature of the interests served by prohibiting prosecutors from exercising their peremptory challenges based on race. First, the defendant has a “right to be

\(^{164}\) For a discussion of the inappropriateness of attributing pro-Black bias to Blacks, rather than an anti-Black bias to whites, see Johnson, *supra* note 157, at 1668-69 & n.310 (1985).
tried by a jury whose members are selected pursuant to nondiscriminatory criteria." This right functions as a check on official power, preventing juries from becoming "weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." Second, since a "person's race simply 'is unrelated to his fitness as a juror,'" the individual juror's competence to serve is compromised. And finally, the practice harms the entire community by stimulating racial prejudice and undermining public confidence in the justice system. The same interests argue for eliminating gender-based peremptory challenges: the defendant's sixth amendment right to nondiscriminatory selection of a jury is violated when women are systematically excluded; a person's gender is unrelated to her fitness as a juror, and the community is benefited by increased public confidence in jury trials when women are not excluded. Each of these interests, as they relate to Blacks and to women, and in particular, to women of color, will be discussed.

A. Harm to the Defendant

The defendant's interest—and the public's interest—in a fair trial is a compelling one. Racial prejudice in the determination of guilt and sentencing has been carefully documented by dozens of researchers. Studies based on actual trial experience reveal that Blacks are more likely to be convicted than whites and that the conviction rate rises as the percentage of white jurors increases on a jury. As discussed by the Supreme Court in McCleskey v. Kemp, the death penalty is most likely to be imposed when the victim is white and the defendant is Black. A number of mock jury studies suggest that white jurors tend to find members of their own race less culpable than members of other races.

165 476 U.S. at 85-86.
166 Id. at 86 n.8 (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)).
167 Id. at 87 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
168 Id.
169 Taylor v. Louisiana, 419 U.S. 522, 531 (1975) (holding that a jury selection system which effectively excludes women deprives a criminal defendant of his sixth amendment rights to trial by an impartial and representative jury).
170 Id. at 537 ("If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed.").
171 Id. at 530-31.
172 See Johnson, supra note 157, at 1616-51 (compiling studies documenting the role of race in the determination of guilt and sentencing).
173 Id. at 1619-24 (discussing numerous studies of the effect of race on conviction rates and sentencing).
174 See J. VAN DYKE, supra note 12, at 33.
175 107 S.Ct. 1756, 1764 (1987) (holding that detailed statistical study by David Baldus indicating that racial considerations enter into capital sentencing determinations in Georgia does not establish equal protection or eighth amendment violation).
176 See Johnson, supra note 157, at 1625-35.
These findings provide an explanation for the higher conviction rate of Blacks, who are almost always tried by predominantly white juries. In one study that examined the effect of the defendant’s race on the verdicts of juries with various racial compositions using a mock case involving the defenses of provocation and police brutality, researchers found that:

"[t]here was a pronounced tendency for jurors to shift their votes toward acquittal as a result of group discussion, with one notable exception: white jurors who found the black defendant guilty on their first ballot tended to hold to this decision . . . By the final individual ballot, the number voting guilty had decreased to 15% and all of these guilty votes came from white subjects viewing the black defendant."\(^{177}\)

Significantly, when the defendant was Black, the only hung jury was racially balanced and the only jury to reach a unanimous verdict of guilty was an all-white jury.\(^{178}\)

These studies indicate that the use of peremptory challenges against Blacks, which often results in an all-white jury, probably has a significant prejudicial effect on the verdict and sentence in almost every kind of case,\(^{179}\) and particularly in cases involving white victims.\(^{180}\) White defendants are not similarly disadvantaged by racially discriminatory challenges simply because a prosecutor will rarely be able to secure an all-Black jury through this method.\(^{181}\) Thus, rather than eliminate jury bias, the use of peremptory challenges to minimize the number of Blacks on a jury in fact increases jury bias in cases involving Black defendants and undermines the defendants’ and the public’s interest in fair trials. The appearance of bias is increased as well: conviction of a Black defendant by an all-white jury is easily viewed as racially motivated by the defendant and observers. Convictions by a racially diverse jury have a greater appearance of legitimacy.\(^{182}\) Finally, the likelihood of an all-white jury may be a threatening specter that could be used as leverage in plea bargaining to force a Black defendant to plead guilty rather than face an all-white jury.\(^{183}\)

Batson fails to address these issues. As discussed by Justice Marshall in his concurring opinion, Batson does not prevent the prosecutor from using peremptory challenges to eliminate Blacks from a jury. If, for

\(^{177}\) Id. at 1628 (citing Bernard, Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts, 5 Law and Psychology Rev. 103 (1979)) (emphasis in original).

\(^{178}\) Id. (citing Bernard, supra note 177, at 110).

\(^{179}\) See sources cited supra notes 172-78.

\(^{180}\) See, e.g., McCleskey, 107 S.Ct. at 1764 (discussing Baldus study which found that in Georgia during the 1970s, 22% of Black defendants killing white victims received the death penalty, compared with just 1% of Black defendants killing Black victims); Johnson, supra note 157, at 1634-35 (discussing three studies that suggest that a “black defendant on trial for a crime against a white victim is doubly disadvantaged” by racial prejudice).

\(^{181}\) Cf. J. Van Dyke, supra note 12, at 32-33.

\(^{182}\) See infra note 189.

\(^{183}\) See S. McCART, TRIAL BY JURY 33-34 (2nd ed. 1964) (describing situation in which a plaintiff threatened to obtain an all-white jury after a settlement was refused).
example, only one or two Blacks appear on the venire, the prosecutor may strike them without raising an inference of discrimination.\footnote{476 U.S. at 105 (Marshall, J., concurring) (citing Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809-10 (1981) (finding no prima facie case of discrimination where the defendant was Black, prospective jurors included three Blacks and one Puerto Rican, and prosecutor excluded one for cause and struck the remainder, producing all-white jury); People v. Rosseau, 129 Cal. App. 3d 526, 536-37, 179 Cal. Rptr. 892, 897-98 (1982) (finding no prima facie case where prosecutor struck only two Blacks on jury panel)); United States v. Ingram, No. 87-1257 (8th Cir. Feb. 19, 1988) (LEXIS, Genfed library, USAPP file) (finding no prima facie case where prosecutor strikes one of two Blacks on jury panel).} Similarly, if a prima facie case is established, a prosecutor can assert vague but facially neutral reasons for striking a juror.\footnote{See 476 U.S. at 106 (Marshall, J., concurring) (“How is the Court to treat a prosecutor’s statement that he struck a juror because the juror had a son about the same age as defendant, or seemed ‘uncommunicative,’ or ‘never cracked a smile’...”) Id. (citations omitted).}

While the exclusion of women may not have a clearly definable prejudicial effect on the verdict and sentence in a trial, \textit{Taylor v. Louisiana} \footnote{419 U.S. 522, 531 (1975); see text accompanying notes 87-92.} made clear that the elimination of women from jury panels violates the fair cross section requirement of the sixth amendment and prevents a fair trial. The Court in \textit{United States v. Ballard} suggested that the exclusion of one sex “may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.”\footnote{329 U.S. 187, 194 (1946); see text accompanying notes 74-78.} The specific impact of the exclusion of women on any single jury may not be knowable or even relevant. What is important is that “the wholesale exclusion of a group from jury service eliminates an important perspective and permits the jury to become ‘dominated by the conscious or unconscious prejudices of the majority.’”\footnote{Brief Amicus Curiae for Elizabeth Holtzman at 16, \textit{Batson v. Kentucky} (No. 84-6263) (quoting People v. Wheeler, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978)).} Because women are underrepresented on jury panels, it is more likely that a prosecutor will be able to create an all-male jury than that the defendant will be able to create an all-female one, should either party so desire.\footnote{Commonwealth v. Soares, 377 Mass. 461, 488, 387 N.E.2d 499, 516 (1978), \textit{cert. denied}, 444 U.S. 881 (1979).} The party identified with the majority can altogether eliminate the minority from the jury, while the defendant is powerless to exclude majority members since their number exceeds that of the peremptory challenges available. The result is a jury in which the subtle group biases of the majority are allowed to operate, while those of the minority have been silenced.

\textit{Id.}

\footnote{Brief Amicus Curiae, \textit{supra} note 188, at 15.}
GENDER-BASED PEREMPTORY CHALLENGES

ates both bias and the appearance of bias, and runs contrary to the ideals espoused in *Batson*.

**B. Harm to the Excluded Group**

The negative messages, discussed in Part III, that are communicated about Blacks and women when they are prevented from serving on the jury demonstrate one type of harm to members of excluded groups when prosecutors exercise their peremptories in a racist or sexist manner. That stigma—"practically a brand upon them, . . . an assertion of their inferiority"—carries over into unknown other facets of life, affecting not only the way others see the excluded group, but the way its members view themselves.

A second harm occurs to the excluded group as they are denied one of the privileges of democracy, a chance to influence the way justice is meted out. The jury drawn from the community was regarded as an important check on the excesses of government, as Patrick Henry declared at the Virginia Convention for the ratification of the Constitution: "Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off." Justice White explained the importance of the jury in 1968, in *Duncan v. Louisiana*:

> The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Similarly, Alexis de Tocqueville, in *Democracy in America*, described the jury as "the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule." Because of the meaning attached to this exercise of power by lay citizens, the prosecutor who excludes a juror because of her race or sex says to the juror, "You are not fit to administer the laws; your voice is not welcome."

*Batson* does afford some protection against these evils. A prosecutor can no longer exclude Blacks from a jury explicitly because they are Black. This message, however, is somewhat diminished. If women are

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191 Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (holding exclusion of juror by race violates equal protection clause).

192 See Brief Amicus Curiae, *supra* note 188, at 18 (describing letter sent by excluded Black juror "complaining bitterly" about his exclusion from the jury in a murder case involving a Black victim).

193 W. JORDAN, JURY SELECTION 7 (1980).


not afforded Batson's protections, women of color will be in a worse position than before Batson because the "facially neutral" reason offered by a prosecutor may be the Black woman's gender. As discussed above, so long as peremptory challenges are available, a prosecutor who is of a mind to exclude members of a racial group will be able to do so with little effort. In this way, Blacks and women may continue to be systematically disempowered in the criminal justice system and denied the opportunity to perform an important duty of citizenship.

C. Harm to the Public

It is false to separate harm to the defendant and excluded jurors from harm to the public: all the community is harmed when a defendant does not receive a fair trial or a juror is discriminated against because of race or sex. Furthermore, defendants and excluded jurors are themselves members of the public; structuring the argument in this way risks creating the impression that discriminatory peremptory challenges should be abolished only if it benefits the white, male "public." This is, of course, not the intent. This Part need serve only as a reminder that all members of society, not just minorities and women, are harmed by racism and sexism.

When a Black defendant is convicted by an all-white jury, confidence in the merits of that verdict may be destroyed for many members of the population. The exclusion of women would have that same result in a great many cases. Because stereotypes about women jurors often produce contradictory maxims about their behavior as jurors, exclusion of women perhaps does not provoke as profound a sense of injustice as does exclusion of Blacks, who are commonly thought to empathize with defendants. Nonetheless, in certain cases—for example, where a battered wife has killed her husband—the striking of women jurors can easily suggest the verdict will be biased against the defendant. The rehabilitative effect of condemnation and punishment by one's peers is destroyed as well, if the defendant believes she has been convicted unfairly. As the Court noted in Taylor, "[c]ommunity participation in the administration of the criminal law ... is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." When the criminal justice system is perceived as unfair, it loses legitimacy and effect. That injury spreads from the jury system, "to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our

196 Batson, 476 U.S. at 87 ("Selection procedures that purposely exclude black persons from juries undermine public confidence in the fairness of our system of justice.").
197 See supra notes 123-138 and accompanying text.
198 419 U.S. at 530.
D. Injury to Women of Color

If women are not granted the same protections as Blacks under Batson, one unfortunate result of Batson's prohibition of racially based peremptories may be the disproportionate exclusion of Black women, as the hypothetical that introduces this Article illustrates. The two state courts that have created a Batson-like process under state constitutions to guard against race discrimination would bar the exercise of peremptories on the basis of sex. If only racial exclusions are prohibited, prosecutors will likely increase their reliance on other common characteristics that are easily discerned from appearance or the cursory information usually provided about members of the jury panel: national origin, age, employment, and sex. While not all of these ways of classifying people are subject to heightened scrutiny under today's equal protection jurisprudence, there is some societal consensus that discrimination on these bases—with the possible exception of discrimination based on employment—is inappropriate in our pluralistic society.

200 Even if sex-based peremptory challenges are prohibited, Black women may still be singled out for discriminatory treatment based on both race and sex. As long as Black men and white women remain on the jury, Black women will have difficulty establishing a prima facie case based on either race or sex discrimination. The Fifth Circuit recognized this problem in the context of employment in Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (1980). The Jefferies court agreed with the plaintiff "that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. . . . [D]iscrimination against black females can exist even in the absence of discrimination against black men or white women." Id. at 1032. Similar principles must be applied to the jury context. See also People v. Motton, 39 Cal. 3d 596, 606, 704 P.2d 176, 181-82, 217 Cal. Rptr. 416, 421-22 (1985) (holding that Black women constitute a cognizable class in jury discrimination case and recognizing that the "trial court's comparison of black women as a cognizable group to 'men who wear toupees' failed to acknowledge the 'concurrence of racial and sexual identity' . . . which informs the attitudes of this group.").
202 See, e.g., People v. Trevino, 39 Cal. 3d 667, 688-94, 704 P.2d 719, 730-34, 217 Cal. Rptr. 652, 663-67 (1985) (prosecutor attempted to justify his use of peremptory challenges against Spanish-surnamed jurors by reference to their sex and age); Gurney, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 HARV. C.R.-C.L. L. REV. 227, 229 (1986) (Note) ("Depending upon the jurisdiction, an attorney can still peremptorily remove all members of a minority group on the basis of their age, education, or poverty, and thereby defeat the purpose of the cross-section rule.").
Allowing prosecutors to excuse Black women from the jury not because they are Black but because they are women is contrary to the values and goals expressed in *Batson*. Such a practice would serve as a means to minimize, if not eliminate, the number of Blacks on a jury, undercutting the purpose of *Batson*. And it would result in the virtual exclusion of a unique voice rarely acknowledged in the legal system: the voice of Black women.

V. THE CASE FOR ELIMINATING PROSECUTORIAL PEREMPTORY CHALLENGES

*With the right to strike four members from the panel, it is generally possible to strike all members of a sex or race, but it is hard to strike all of both.*

The author of this advice relates an anecdote in which a Black man allegedly injured a white woman in a traffic accident. Although the victim’s attorney was able to secure an all-white jury, the jury included two women, who turned out to be suspicious of the woman victim and awarded only one dollar in damages.

Although a prosecutor is now prohibited from exercising peremptories on a racial basis, he might still take the advice of his civil counterpart and use the peremptories to eliminate the women on the jury. Clearly this result is not intended by the *Batson* majority, which sought to protect the defendant’s “right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.”

The Equal Protection Clause demands that women, like Blacks, must not be removed from the jury because of their membership in a historically disadvantaged group.

*Batson* may not go far enough, however, in protecting either Blacks or women from prosecutorial discrimination. Justice Marshall is concerned that challenges will have to amount to a flagrant abuse of the prosecutor’s power before a prima facie case will be upheld. He supports his fears by discussing the experience of California and Massachusetts after *People v. Wheeler* and *Commonwealth v. Soares* were decided. If only a few Blacks appear on the venire it is possible that they may be struck with impunity; if the prosecution leaves at least one Black and

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204 S. McCART, supra note 183, at 33.
205 Id. at 33-34.
206 476 U.S. at 85-86.
207 See *Batson*, 476 U.S. at 105 (Marshall, J., concurring) (citing *Commonwealth v. Robinson*, 382 Mass. 189, 195, 415 N.E.2d 805, 809-10 (1981) (finding no prima facie case where jurors included three Blacks and one Puerto Rican and prosecutor struck one for cause and three by peremptory challenge); *People v. Rousseau*, 129 Cal. App. 3d 526, 536-37, 179 Cal. Rptr. 892, 897-98 (1982) (finding no prima facie case where prosecutor struck the only two Blacks on the panel)).
strikes at least one white, no prima facie case may be found. In this latter situation, the effect may be the same as creating an all-white or all-male jury; studies have shown that more than a token Black or woman is necessary to affect the deliberation process significantly.  

Even if the defendant succeeds in establishing a prima facie case, it is quite possible for a prosecutor set on excusing a Black or woman juror to create pretextual race- or sex-neutral reasons for the strike. Cases decided following Batson demonstrate the limits of its effect. In United States v. Mathews, the Seventh Circuit upheld the prosecutor's striking of three Black jurors: one "did not seem to be attentive to the proceedings at hand" and she was late, as were others, and "this indicated to me a lack of commitment to the importance of this proceeding"; and another seemed "rather hostile." The fact that the white, female prosecutor might have observed these characteristics in the jurors because of their race did not enter the court's decision.

Even more egregious were the reasons upheld in Wallace v. State to justify the striking of six of nine Blacks on the venire: a young black female was struck because she was a homemaker and "may 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"; a young black female who is a student made no indication that she was working and "would have not [had] the necessary experience to be able to draw on to make a judgment in this case"; an older black female who was retired and "maybe overly sympathetic based on the fact that she appeared to be a grandmotherly type"; a young black male who had a beard and "I [the prosecutor] tend to think that people that have beards are somehow those

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208 See JOHNSON, supra note 157, at 1698. It is true that a single confident juror could in theory change the outcome of a trial, but studies show that this is unlikely. "Both laboratory and field studies show that without a minority of at least three jurors, group pressure is simply too overwhelming: one or two dissenting jurors eventually and inevitably accede to the majority's view." Id.; see also Marder, Gender Dynamics and Jury Deliberations, 96 YALE L.J. 593 (1987) (Note) (discussing the effects of women's lower participation rate in jury decision making).

209 The Florida Court of Appeals has created a test to instruct judges on how they should evaluate prosecutors' explanations.

The following will weigh heavily against the legitimacy of any race-neutral explanation: 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror; 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason given for the challenge is unrelated to the facts of the case; and 5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.

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210 803 F.2d 325 (7th Cir. 1986).

211 Id. at 331.

212 Cf. Batson, 476 U.S. at 106 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

that try to go against the grain," . . .; a middle-aged, black male who was not working and "may be somewhat irresponsible"; and a middle-aged black female who was some type of supervisor and appeared to be in the same age group as the defendants' parents or mothers.\footnote{Id.}

The reasons given for challenging the Black women in this case are particularly offensive, reflecting the view that women should be defined through their relationship to the home and family: a homemaker is unknowable; a middle-aged woman may relate to the defendant's mother; an older woman is "grandmotherly" and therefore sympathetic.

Another problem with Batson's protection for jurors and defendants is its requirement that the defendant be a member of the excluded group in order to make a prima facie case. While at least one court has ruled that group membership is merely one indication of discrimination and is not necessary to make a prima facie case,\footnote{E.g., Peters v. Kiff, 407 U.S. 493 (1972) (granting white defendant standing to challenge exclusion of Blacks); Taylor v. Louisiana, 419 U.S. 522 (1975) (granting male defendant standing to challenge exclusion of women).} this requirement seems arbitrary. A jury is equally unrepresentative if it includes no Blacks or no women whether the defendant is male or female, Black or white. Similarly, the injury to Black and women potential jurors who are excluded does not depend on their race or sex; they are injured by stereotyping and are prevented from contributing to the system of criminal justice. Sixth amendment cases have allowed defendants who are not members of excluded groups to challenge the exclusion;\footnote{E.g., State v. Superior Court for Maricopa County, 40 Crim. L. Rep. (BNA) 2410 (1987) (defendant does not have to be a member of a particular race to pursue an equal protection challenge against the removal of members of that race from the venire).} Batson should not be construed to deny this opportunity to defendants making fourteenth amendment claims.\footnote{Already courts have interpreted Batson narrowly to deny equal protection claims by defendants who are not members of the groups excluded from the jury. See People v. Crowder, 161 Ill. App. 3d 1009, 515 N.E.2d 783 (1987) (holding that under Batson male defendant lacks standing to challenge the exclusion of women from the jury on equal protection grounds); State v. Roe, No. 86AP-59 (Ohio Ct. App. Aug. 25, 1987) (LEXIS, States library, Ohio file) (stating that under Batson white defendant cannot challenge exclusion of Blacks from jury on equal protection grounds).}

A better solution to the problems of discrimination in jury selection would be to abolish prosecutorial peremptory challenges altogether.\footnote{Although some commentators favor banning peremptory challenges for defendants as well as for prosecutors, see, e.g., Batson, 476 U.S. at 107-08 (Marshall, J., concurring), this would be ill-advised. In brief, the defendant's right to a fair jury is stronger than that of the prosecution, as it derives from the Constitution itself. The state does not face a loss of liberty as the defendant does. In equal protection terms, the prosecutor is also limited as a state actor in a way that the defendant is not, and elimination by the defendant does not carry with it the problem of state-sanctioned discrimination. Peremptory challenges increase the defendant's belief that he has received a fair trial, and help to offset the prosecutor's substantially greater resources, in most cases. Finally, a number of states grant the defendant more peremptories than the prosecution. Gurney, supra note 202, at 228-29. Allowing defendants to continue to exercise a limited number of peremptory challenges would conform to the spirit behind this inequality. See generally Massaro, supra note 135, at 560-61.}
This has been proposed by various commentators who argue that peremptory challenges are anachronistic, not constitutionally compelled, not justified by their historical significance, likely to increase rather than decrease jury bias, and important only as a means to remove jurors who have been offended during voir dire.\(^{219}\) Peremptory challenges, it has been shown, rarely help the party exercising them, yet may significantly alter verdicts.\(^{220}\) Although a whole industry has grown up around jury selection, in most cases it "has been anything but scientific," smacking "of a modern alchemy full of jargon, superstition and mystification, but little real knowledge."\(^{221}\) Perhaps the real reason prosecutorial challenges are regarded as an important tool in criminal trials, as speculated in Derrick Bell's *Civil Rights Chronicles*, is that they represent the interests of the white majority; the white justice system is not prepared to surrender this weapon in the prosecutorial arsenal.\(^{222}\)

The abolition of peremptory challenges for prosecutors could be accomplished legislatively or judicially, under state constitutions or the sixth amendment. It would not increase jury bias, given the fact that prosecutors who exercise the challenges "[a]re not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind, rather than degree."\(^{223}\) Instead, it would remove the means by which the state can exclude Blacks and women from juries, helping to end their long involuntary silence about the doing of justice in America.

**CONCLUSION**

The policeman who shot down a 10-year-old in Queens stood over the boy with his cop shoes in childish blood and a voice said "Die you little motherfucker" and there are tapes to prove that. At his trial this policeman said in his own defense "I didn’t notice the size or nothing else only the color." and there are tapes to prove that, too.

\(^{219}\) See, e.g., *J. Van Dyke*, supra note 12, at 167; *Brown, McGuire & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978); *Massaro, supra note 135; The Supreme Court, 1985 Term—Leading Cases, supra note 162, at 125-30; *Duff, supra note 162; Gurney, supra note 202, at 246-74.


Today that 37-year-old white man with 13 years of police forcing has been set free by 11 white men who said they were satisfied justice had been done and one black woman who said “They convinced me” meaning they had dragged her 4’10” black woman’s frame over the hot coals of four centuries of white male approval until she let go the first real power she ever had and lined her own womb with cement to make a graveyard for our children.224

The important governmental objective of creating unbiased juries is not furthered by allowing prosecutors’ unexplained peremptory challenges that exclude women disproportionately from juries. Any possible gain to the system by allowing unexplained peremptory challenges against this group is more than offset by the negative effects to women, to defendants, and to the entire community. Experience suggests that the benefits of a policy allowing gender-based peremptory challenges would be negligible. Brooklyn District Attorney Elizabeth Holtzman, after four years of experience with an office policy prohibiting the use of peremptory challenges to exclude jurors on the basis of race, sex, religion, or national origin “found that the ban is consistent with both effective law enforcement and efficient judicial administration.”225

While the benefits of allowing gender-based peremptories are limited, the costs are great. Challenging a woman, because she is a woman, legitimizes sexism. Moreover, it furthers negative stereotypes about women’s ability to engage in an important duty of citizenship and denies women the very real power of administering justice. It harms defendants by denying them a truly representative jury, and undermines the criminal justice system by creating the appearance—and reality—of unfairness. Women of color are hurt most when such challenges are allowed because sex becomes a valid justification for eliminating half of the Blacks on the jury. And thus, the silence of this most silent group in the criminal justice system, Black women, continues.

225 Brief Amicus Curiae, supra note 188, at 2-3.