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The Case Against Gender-Based Peremptory Challenges

by David Everett Marko

Since the inception of the jury system in the United States, attorneys have insisted that they be given the freedom to make "shoot-from-the-hip," "seat-of-the-pants," and "gut-level" judgments about a particular juror's capacity to sit as a fair trier of fact. Unfortunately, this broad discretion has led to widespread abuses. Until relatively recently, courts have allowed potential jurors to be excluded on the basis of their race, religion, political affiliation, national origin, and gender. With the exception of gender-based peremptions, all these abuses have been judicially corrected without compromising the defendant's right to a fair trial. If the state's right to exercise gender-based peremptory challenges was ever justified (and I doubt that it ever was), that time is surely past. The use of this type of challenge has been so grossly abused and has strayed so far from notions of common justice and equality that it is time to constrain it. "Seat-of-the-pants" and similar justifications for gender-based strikes are no more than euphemisms for jury manipulation and gender discrimination. Courts should no longer tolerate the use of peremptory challenges to perpetuate chauvinist myths about the "basic nature of men and women." It is time to return the peremptory challenge to its intended role as a tool for ferreting out specific juror bias and eliminate its perpetuation of wholesale gender bias.

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The goal of voir dire in a criminal trial is to choose jurors who can sit fairly and apply the facts as they see them to the law as it is explained to them. In selecting a jury, both sides are given certain devices to challenge potential jurors and exclude them from deciding the case. One such device employed to eliminate "unwanted" jurors is the peremptory challenge.

The peremptory challenge has ancient origins. Prior to the fourteenth century, English juries were chosen by the government. The Crown could eliminate anyone from jury service without showing cause. Even though this unlimited power was revoked by statute, the government retained the right to request the removal of any potential juror as long as there were other potential jurors remaining in the venire. The Crown was required to show cause for its challenges only after the panel was exhausted. Although there was no limit to the number of potential jurors the government could make "stand aside," the defendant was limited in the number of challenges he or she could raise and could exercise his or her challenges only as each juror was called.

Colonial concerns about the power of government prompted Americans to deviate from the English system. Emphasis shifted towards the interests of those accused. Originally, some states gave few or no peremptory challenges to the government; but as fear of a tyrannical gov-

1. Mark Twain is rumored to have said, "[w]e have a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty of finding twelve men everyday who don't know anything . . . ." Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Reviews of Jury Verdicts, 56 U. Chi. L. Rev. 153, 154 (1989).
2. A peremptory challenge results in the exclusion of a juror without cause, without explanation, and without judicial scrutiny. Robert Swain v. Alabama, 380 U.S. 202, 211-12 (1965). The other type of challenge is the "challenge for cause." This challenge is exercised solely at the discretion of the trial court. Typically, challenges for cause are granted because a potential juror has a pecuniary interest in the disposition of the case, is biased, or is a blood relation to a party in the case. See Tori M. Massaro, Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 501, 519 n.103 (1986). Challenges for cause are not covered in this article.
3. Jon M. Van Dyke, Jury Selection Procedures 148 (1977); Massaro, supra note 2, at 525 (before 1305 A.D. the government had an unlimited number of peremptory challenges).
5. Massaro, supra note 2, at 525.
6. Id. at 525-26.
7. For example, New York and Virginia gave no peremptory challenges to the
The peremptory challenge, however, is not a right under the Constitution; it is a creature spawned by the rules of criminal procedure. Under these rules, the prosecution and the defense have the right to exercise each of their peremptory challenges against any potential juror they choose. Jury selection is complete only after each side either exhausts its peremptory challenges or chooses not to exercise its remaining challenges.

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Each side is free to strike whomever it chooses. Problems arise when attorneys exercise their peremptory challenges to exclude prospective jurors on the basis of their group status. One group that has been particularly affected is women. A recent fed-

government until 1881 and 1919, respectively. VAN DYKE, supra note 3, at 149.
8. Id. at 150.
9. Swain, 380 U.S. at 219 (quoting Joseph Stilson v. United States, 250 U.S. 583, 586 (1919): "There is nothing in the Constitution . . . which requires . . . peremptory challenges"). See also McCray v. New York, 461 U.S. 961 (1983) (Marshall, J., dissenting from denial of certiorari). The Court has, however, often recognized the key role peremptories play in our criminal justice system. In Swain, the Court explained:

[The peremptory challenge's function is] not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Swain, 380 U.S. at 219 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).
10. Nonetheless, it has long been considered one of the "most important of the rights secured to the accused." Swain, 380 U.S. at 219 (quoting John Pointer v. United States, 151 U.S. 408 (1894)).
11. This does not mean that peremptory challenges are unregulated by the courts. While women are not sheltered against misuse of peremptory challenges, other groups are protected. The Supreme Court has explicitly held that the Constitution requires that peremptory challenges not be used to discriminate on the basis of race. James Kirkland Batson v. Kentucky, 476 U.S. 79 (1986).
12. In the federal system, each side in a capital case is allowed to exercise twenty peremptory challenges; in felony cases the defendant(s) gets a total of ten challenges and the prosecution gets six; in misdemeanor cases each side gets three. FED. R. CRIM. P. 24(b). Each state has its own criminal procedure rules, but they are substantially the same as the federal rules. WAYNE R. LAFAVE AND GEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3, at 847 (1984). Typically, each side has the same number of challenges available to it; however, the number of peremptory challenges varies between jurisdictions in cases involving multiple defendants. Id.
14. At common law only men were allowed to sit as jurors. Women were excluded because they were deemed to be inferior. The English doctrine justifying this exclusion was propter defectum sexus (because of the defect of sex). This doctrine express-
eral case illustrates this problem. In *United States v. Hamilton*, a defense attorney complained that the prosecutor struck three potential jurors because they were African-American, violating the Equal Protection Clause contrary to the Supreme Court’s decision in *Batson v. Kentucky*. The prosecutor responded that his reason for excluding the prospective jurors was not race but gender — all three were women. He claimed that he wanted more men on the jury. The trial judge held that as long as the reasons for striking the jurors were racially neutral, there were no constitutional difficulties. On appeal the Fourth Circuit affirmed the trial court’s decision, stating that neither the Equal Protection Clause nor the Sixth Amendment protected women from sex-based peremptory challenges.

*Hamilton* and similar cases illustrate the gender discrimination that pervades our judicial system. But gender-based peremptory challenges clearly have no legitimate purpose in the selection of the petit jury. They are fundamentally incompatible not only with contemporary societal values but also with our basic sense of fairness and equality and our constitutionally guaranteed right to be tried by a jury representing a fair cross-section of the local community.

THE SIXTH AMENDMENT


15. 850 F.2d 1038, 1040 (4th Cir. 1988).
17. *Hamilton*, 850 F.2d at 1041.
18. Id. at 1040
19. Id. at 1043.
Our notions of juries have evolved in harmony with the basic premises of a democratic society and a representative government.21 What was a common-law privilege yesterday is a recognized right today.22

The Sixth Amendment to the Constitution provides in pertinent part that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."23 Although the Sixth Amendment does not give a defendant the right to be tried by a petit jury of any particular composition, it does comprehend the opportunity of "obtaining a jury constituting a representative cross section of the community."24 This "opportunity" has been defined to mean that the jury venire must represent a cross-section of the community.

In Glasser v. United States,25 the Supreme Court held that a jury must be a body truly representative of the community from which it is drawn. As Justice Murphy noted so eloquently in Fay v. New York:

We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof . . . . [I]t may gradually and silently erode the jury system before it becomes evident . . . . If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules.26

Nevertheless, the Court has never held that the Constitution requires that the petit jury actually reflect a cross-section of the community.27

23. U.S. Const. amend. VI. The full text of the amendment reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

25. 315 U.S. at 86.
26. 332 U.S. 261, 300 (Murphy, J., dissenting).
Recently, the Supreme Court took the position that the Sixth Amendment does not preclude either side from exercising its peremptory strikes against any group. In *Holland v. Illinois*, the Court upheld the conviction of a white defendant who claimed that the Sixth Amendment fair-cross-section requirement prevented the prosecutor from excluding potential African-American jurors on the basis of their race. In a five-to-four decision the Court explained that “[t]he fair-cross-section venire requirement is obviously not explicit in this text [the Sixth Amendment], but is derived from the traditional understanding of how an ‘impartial jury’ is assembled.” The Court suggested that the fair-cross-section requirement is merely a means of insuring the right to be tried by an “impartial jury.”

The decision of the *Holland* court is both wrong and dangerous for two reasons. First, by separating the “fair-cross-section” requirement from the “impartial jury” requirement of the Sixth Amendment, the Court has created a false dichotomy: “the fair-cross-section requirement either protects impartiality or guarantees a petit jury that mirrors the community from which it is drawn.” As Justice Marshall pointed out in dissent, these two concepts are not in conflict — the right to be tried by an impartial jury and the right to be tried by a fair cross-section of the community are both found in the Constitution. In fact, the very concept of a “jury” assumes a cross-section of the community: “the fair-cross-section requirement is not based on the constitutional demand for impartiality; it is founded on the notion that what is denominated a ‘jury’ is not a ‘jury’ in the eyes of the Constitution unless it is drawn from a fair cross section of the community.”

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29. *Id.* at 480.
30. The decision in *Holland* seems odd given the Court’s recent posture on the Sixth Amendment and jury selection. For example, in Frank Dean Teague v. Lane, 109 S. Ct. 1060, 1065 (1989), a habeas corpus petitioner argued that the fair-cross-section requirement precluded a prosecutor from exercising race-based peremptory challenges. The Court held that a favorable resolution of the collateral claim would not benefit the defendant because his conviction was final at the time of the Court’s decision. However, the Court retreated from the notion that the fair-cross-section requirement does not extend to petit juries: “The Court’s characterization of the petitioner’s fair-cross-section claim as ‘requiring fair and reasonable proportional representation on the petit jury’ was remarkable.” Alschuler, *supra* note 1, at 185 n.128.
32. *Id.* Any other view is a dramatic shift from the long-held belief that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in *Smith v. Texas*, 311 U.S. 128, 130 (1940), that “[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.” *Taylor*, 419 U.S. at 527.
Furthermore, the fair-cross-section requirement serves a different role than the impartial-jury requirement.\(^{33}\) The fair-cross-section requirement exists to (1) guard against arbitrary exercises of power by "ensuring that the 'commonsense judgment of the community' will act as a 'hedge against the overzealous or mistaken prosecutor'"; (2) to preserve public confidence in the system; and (3) to manifest public involvement in the administration of justice.\(^{34}\)

Second, the *Holland* decision is dangerous because the majority creates a license for bigotry in criminal trials. By suggesting that the fair-cross-section requirement is inapplicable to the petit jury,\(^{35}\) the court intimates that the Sixth Amendment does not prevent the exclusion of cognizable groups during voir dire.\(^{36}\) Thus, except for the current (albeit narrow) limitations imposed via the Equal Protection Clause, there is no mechanism for preventing an attorney from excluding African-Americans because "they are all criminals," or Jews because "they are all stingy liberals," or women because "they are all too emotional and generally unintelligent." As long as the jury that decided the case appears "impartial," there is no limit to the bigotry an attorney can employ to exclude individuals from jury service merely because they are members of a disfavored group.

The Sixth Amendment fair-cross-section guarantee should extend to the composition of the petit jury. Just because a defendant does not have an absolute right to be tried by a mathematically exact "fair cross-section" does not mean the "Sixth Amendment has no implications for the process of selecting the petit jury from the venire."\(^{37}\) If the fair-cross-

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33. Obviously, the impartial-jury requirement promotes the goal of insuring that the decision is based on the evidence presented and the correct application of the law, and not juror bias.

34. *Holland*, 493 U.S. at 495 (citing *Lockhart*, 476 U.S. at 174-75 (quoting *Taylor*, 419 U.S. at 530-31)).

35. Id. at 483.

36. Writing for the majority, Justice Scalia argued:

   But to say that the Sixth Amendment deprives the State of the ability to "stack the deck" in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side."

   *Holland*, 493 U.S. at 481. Ostensibly the "fair hand" to which Justice Scalia alludes is the venire. But the Justice obviously does not play cards often, otherwise he would not be so quick to assume that the hand a person initially is dealt is a "fair hand," nor would he be likely to tolerate a game that arbitrarily excluded every black card and every queen from play. Who would want to play by those rules?

section requirement applies only to the selection of the venire, the Sixth Amendment is meaningless, because “[n]o defendant has ever been tried before a venire.”

_Holland_ aside, the Supreme Court has laid the foundation to support the position that the Sixth Amendment guarantees defendants an opportunity for a petit jury that is representative of the community. In _Ballew v. Georgia_, the Court held that while the composition of the venire was fine, a five-person jury was insufficient to satisfy the Sixth Amendment cross-section requirement. In _Witherspoon v. Illinois_, the Supreme Court overturned a statute that allowed the state to challenge for cause any member of the venire who opposed the death penalty because these challenges would tamper with the fair composition of the petit jury.

The argument for extending the fair-cross-section requirement to the petit jury has also found sympathetic ears at the circuit court level. Both the Second and Sixth Circuit Courts of Appeals have adopted the view that the Sixth Amendment fair-cross-section requirement extends to petit juries. For example, in _Roman v. Abrams_, the Second Circuit, while reversing the grant of a habeas corpus petition, upheld the application of the fair-cross-section doctrine to petit juries:

> [A]lthough the Sixth Amendment does not give the defendant the right to a petit jury of any particular composition, ... it does protect him against the state's discriminatory use of peremptory challenges in such a way as to eliminate even the possibility that the petit jury could reflect a cross-section of the community.

In _Booker v. Jabe_, the Sixth Circuit reversed a district court's conviction of an African-American man because African-Americans were excluded from the petit jury based solely on their race. The _Booker_ court applied a Sixth Amendment analysis and concluded that a “criminal charge will not be tried before a jury that fails to represent a cross-section of the community as a consequence of a method of jury selection that systematically excludes a cognizable group from jury service.”

_Ballew, Witherspoon, Roman, and Booker_ demonstrate that the protections of the Sixth Amendment apply to the selection of the petit

38. _Id._
42. _Id._ at 224-25.
44. _Id._ at 770.
Thus, because the focus of the Sixth Amendment should be broadened,\textsuperscript{53} so should the test that is used in applying it.

The third prong is similarly flawed because it requires the defendant to prove systematic exclusion through a pattern of bigotry: a defendant must show that his or her case is one in a series of instances of discrimination.\textsuperscript{54} However, the Sixth Amendment should attach every time a group is excluded from a particular jury:

The Sixth Amendment provides that the right of the accused to trial by an impartial jury shall exist in "all criminal prosecutions." Thus, that Amendment protects each defendant who is to stand trial, not simply the last in a sequence of defendants to suffer the deprivation of an impartial jury. Accordingly, we construe the Sixth Amendment's provision to require the court to decide each case on the basis of the \textit{acts or practices} complained of in that very case.\textsuperscript{55}

Furthermore, one function of the Sixth Amendment's fair-cross-section requirement is to protect the accused from an "overzealous or mistaken" prosecutor. It would be ironic if that very same prosecutor had the power arbitrarily to excuse whole segments of the population from jury service solely because of their gender.\textsuperscript{56} If such were the case, the jury's ability to act as a check on the prosecutor would be greatly reduced or even neutralized.

An excellent alternative to the outdated \textit{Duren} test is the test devised by the Sixth Circuit Court of Appeals in \textit{Booker v. Jabe}.\textsuperscript{57} The court held that in order for a defendant to establish a \textit{prima facie} case that a prosecutor has violated the Sixth Amendment fair-cross-section requirement, the defendant must demonstrate that:

(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 a possible inability to decide the case on the basis of the evidence presented.\textsuperscript{58}

\begin{itemize}
  \item 53. \textit{See supra} notes 35-38 and accompanying text.
  \item 54. \textit{See Duren}, 439 U.S. at 367.
  \item 55. \textit{McCray}, 750 F.2d at 1130 (first emphasis added and second emphasis in original). \textit{See also} \textit{Booker}, 775 F.2d at 771-72.
  \item 56. \textit{See Taylor}, 419 U.S. at 530.
  \item 57. 775 F.2d 762 (\textit{see supra} notes 43-44 and accompanying text). While the case specifically involved racial discrimination, the test was sufficiently broad to encompass gender-based challenges.
  \item 58. \textit{Id.} at 773 (quoting \textit{McCray}, 750 F.2d at 1131-32).
\end{itemize}
jury and that these protections are irreconcilable with a narrow application of the Sixth Amendment.\textsuperscript{45} Eliminating the opportunity for a cognizable group to participate on a petit jury strikes at the heart of Sixth Amendment’s guarantee of a fair cross-section. The law should hold that “whatever the stage of the selection process, . . . the state is not permitted to restrict unreasonably the possibility that the petit jury will comprise a fair cross-section of the community.”\textsuperscript{46}

Although there are no Supreme Court cases dealing with gender discrimination at the petit jury level, the Court has held that women cannot be excluded from other areas of the jury-selection process. For example, in \textit{Taylor v. Louisiana}\textsuperscript{47} the Supreme Court struck down a jury-selection system whereby women could be selected for jury service only if they submitted a written declaration of their desire to serve. The Court held this practice to be a violation of the Sixth Amendment.\textsuperscript{48}

In \textit{Duren v. Missouri},\textsuperscript{49} the Supreme Court struck down a Missouri statute granting an automatic exemption from the venire to any woman who requested one.\textsuperscript{50} The defendant appealed his conviction on the grounds that his Sixth Amendment right to a fair trial had been violated because the statute caused women to be dramatically under-represented on jury venires.\textsuperscript{51} In striking down the statute, the \textit{Duren} court fashioned a test to evaluate Sixth Amendment claims of unrepresentative juries:

\begin{quote}
[T]he defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in \textit{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.\textsuperscript{52}
\end{quote}

The \textit{Duren} test should not be applied, however, in assessing Sixth Amendment claims of outright gender discrimination because the second and third prongs are incompatible with the fair-cross-section requirement. Prong two is faulty because it relies on the narrow view that the Sixth Amendment protects only the source from which petit juries are drawn.

\begin{itemize}
\item 45. \textit{See McCray}, 750 F.2d at 1129.
\item 46. \textit{Id.}
\item 47. 419 U.S. 522 (1986).
\item 48. \textit{Id.} at 531.
\item 49. 439 U.S. 357 (1979).
\item 50. \textit{Id.} at 360.
\item 51. \textit{Id.} at 362.
\item 52. \textit{Id.} at 364 (emphasis added).
\end{itemize}
Once a *prima facie* case of systematic exclusion has been established, the non-moving party would assume the burden of proof to justify the peremptory challenge(s) with a group-neutral explanation.\(^{59}\) If the prosecutor fails to rebut the claim that jurors were peremptorily struck because of their group membership, the judge should declare a mistrial.\(^{60}\)

The *Booker* test is readily adaptable to gender claims. First, there can be no doubt that both men and women are cognizable groups.\(^{61}\) Second, the fact that a peremptory challenge is based on an individual's gender affiliation, rather than the individual's capacity to serve as a fair and impartial juror, can easily be established. For example, it has long been recognized that women are sufficiently numerous and distinct from men for purposes of the Sixth Amendment fair-cross-section requirement.\(^{62}\) In *Anaya v. Hansen*,\(^{63}\) the First Circuit Court of Appeals found that women share common attitudes, experiences, and goals like a cognizable group. The court concluded that women were sufficiently distinct from men to qualify them as a cognizable group.\(^{64}\)

Therefore, gender-based peremptory challenges violate the Sixth Amendment because they are, by definition, exclusions based on cognizable group affiliation rather than on an individual's ability to serve impartially.\(^{65}\) Yet most gender-based peremptory challenges are based on the erroneous assumption that women are less qualified than men to serve on juries. However, "[i]f it were 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."\(^{66}\)

It is sad that many lawyers still cling to stereotypes to explain what they do not understand. Closed minds rely on easy explanations that have no basis in fact to explain the voting behavior of jurors. Sexist jury-selec-

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) James Barber v. Joseph Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc), held that three elements are required to establish the existence of a cognizable group: (1) the group must be clearly identifiable; (2) the group must share common attitudes or experiences; and (3) there must be a community of interest among the members of the group.

\(^{62}\) *Duren*, 439 U.S. at 364; *Taylor*, 419 U.S. at 531. See also *United States v. Diane Carol Canfield*, 879 F.2d 446, 447 (8th Cir. 1989); *Samuel Gibson III v. Walter Zant*, 705 F.2d 1543, 1547 (11th Cir. 1983); *David S. Sands v. Michael J. Cunningham*, 617 F. Supp. 1551, 1565 (D.C.N.H. 1985).

\(^{63}\) See *Linda Anaya v. Edward J. Hansen*, 781 F.2d 1, 6 (1st Cir. 1986) (cognizable groups are limited to groups subject to discrimination in the community), *cert. denied*, 475 U.S. 1050 (1986) (citing *Barber*, 772 F.2d at 999).

\(^{64}\) Id.

\(^{65}\) The key here is that an attorney must connect the reason for a peremptory challenge with a quality necessary for a juror to evaluate the evidence fairly and intelligently.

\(^{66}\) *Taylor*, 429 U.S. at 534-35 (footnote omitted).
tion manuals and "lawyer lore" provide ample evidence of the stereotyping that women must endure. For example, women are labeled by many lawyers and judges as being "emotional, submissive, envious, and passive." One author noted that

hell may have no fury like a woman juror who is to decide the case of a young and attractive woman. The juror in such cases is apt to be a severe critic of the dress, speech, and deportment of the female plaintiff. The merits of the case may only be incidental.

Another author found equally illegitimate reasons for wanting to keep women on a jury:

Women jurors are desirable if the defendant happens to be a handsome young man . . . . Women are desirable if the principal witness against the defendant is a woman. Women are somewhat distrustful of other women . . . . The occupation of a woman's husband is important, too, for generally, she will feel and think in the same manner as her husband.

Finally, the focus should not be on whether a jury has any women on it. Even if some women are on a petit jury, the Sixth Amendment may still be violated because the process allowed for the exclusion of some women who might have remained on the jury had they been men. The purpose of the Sixth Amendment is not to insure that a certain demographic make-up is maintained. Rather, the purpose is to insure that the process is designed to allow what would normally occur through random chance. Only then is the fair-cross-section requirement satisfied.

Some might argue that modern jury selection requires the use of communication theory or psychological profiling. Such approaches

68. Joseph Kelner, Jury Selection: The Prejudice Syndrome, 56 N.Y. ST. B.J. at 36 (Feb. 1984). Other authors have asserted similar notions in civil cases. Heal noted:

I find that women on juries are extremely intolerant as to the complaints of their own sex. When a woman plaintiff starts talking about backaches and headaches to another group of women, she is talking about ailments which most of the other women have had, and the other women have never been paid for these headaches.

Clarence W. Heal, Selection of the Jury, 40 ILL. B.J. 328, 340 (1952). However, civil trials are outside the scope of this article.
70. HARRY KALVEN AND HANS ZEISEL, THE AMERICAN JURY (1966); K.P. Taylor and J. Wright, Review of Research on Jury Selection and Jury Behavior, in COMMU-
entail identifying several special "indicators" of potential juror behavior. These "indicators," in turn, provide the basis for peremptorily challenging certain jurors. The pitfall of this approach is that flawed or misapplied profiling techniques could result in eliminating an entire class or group from the final jury panel.\footnote{71} For example, one study asserted that "men traditionally favor the prosecution and that women are more likely to be egalitarian."\footnote{72}

Although no study has ever proven that a lawyer's use of the peremptory challenge has influenced the jury, the discriminatory use of peremptories can result in impaneling a petit jury that the defendant and/or the community perceives as biased.\footnote{73} Even if there were some empirical data from which lawyers could make accurate inferences about women, those inferences cannot be allowed to supersede the constitutional rights guaranteed to criminal defendants.

The lack of women on juries is a symptom of a deeper problem. The problem is that the jury-selection process allows for manipulation based on characteristics that are group-based, not individually based. The peremptory challenge has been corrupted. It is no longer just a tool for eliminating specific bias. It is now a tool used to promote bigotry and sex discrimination in jury selection.

THE EQUAL PROTECTION CLAUSE

The United States Constitution grants to all persons the equal protection of the laws.\footnote{74} In \textit{Craig v. Boren},\footnote{75} the Supreme Court established a standard of review for gender discrimination under the Equal Protection Clause.
Clause. The Court decided that to withstand an equal protection challenge, gender classifications must be capable of surviving "intermediate scrutiny" — the classification must serve important governmental objectives and must be substantially related to the achievement of those objectives. The bottom line is that gender classifications are unconstitutional unless they substantially relate to an important governmental end.

There have been many court battles fought over the extent of the Fourteenth Amendment's protection of women against discriminatory practices. To date there are no Supreme Court cases that squarely address the issue of equal protection and the use of peremptory challenges to exclude women from jury panels. There are, however, clear precedents that hold that the exclusion of African-Americans from petit juries solely on the basis of their race violates the Equal Protection Clause.

In *Batson v. Kentucky*, the most recent case to come before the Court on this issue, the defendant was tried and convicted of burglary by an all-white jury in state court. During voir dire, the prosecution exercised its peremptory challenges to strike all four African-Americans from the jury panel. Defense counsel moved to discharge the jury on the grounds of discrimination in jury selection. The trial court denied the motion, and *Batson* appealed.

On review, the state relied on *Swain v. Alabama*, the landmark case that established that the Fourteenth Amendment does not prohibit the use of race as a criterion in any particular case. Rather, a Fourteenth Amendment violation must be proved by demonstrating a pattern of exclusions in "case after case."* Batson expressly rejected the Swain test, pointing out that the "case-after-case method" did almost nothing to prevent discrimination by the state at the petit jury stage. As a result, the *Batson* court embraced a different standard: it required only that the defendant demonstrate that a peremptory challenge was used to discriminate racially against a specific potential juror at the defendant's trial.

One justification of the *Batson* decision was that it was a response to the history of discrimination against African-Americans in the arena of

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76. Id. at 197.
78. McCoin, supra note 67, at 1230.
81. Id. at 223.
82. *Batson*, 476 U.S. at 93.
83. Id. at 95.
jury service. But women have an equally long history of being discriminated against, especially in the area of jury selection.

For example, in 1879 the Supreme Court ruled in *Strauder v. West Virginia* that the exclusion of African-Americans from juries was a violation of the Equal Protection Clause. Although *Strauder* was a mammoth step for the equality of African-Americans, it was no step at all for women. In dictum the *Strauder* court proclaimed that while African-Americans were protected against racial discrimination, the state was free to "confine the [jury] selection to males." It was not until 1975, more than seventy-five years later, that the Supreme Court rejected the notion that the state could bar women from jury service.

It should be apparent by now that in the area of jury selection the history of discrimination against women is at least as bad as the discrimination against African-Americans. Therefore, there is no reason why the court should continue to ignore the long history of gender discrimination in the selection of jurors after it emphatically rejected racial discrimination in the same area.

Another basis of the *Batson* decision was the recognition that the Equal Protection Clause limits the use of peremptory challenges for trial-related reasons. Yet it is impossible to accept the proposition that *Batson* does not have any implications for women without implying that the Equal Protection Clause is not a prophylactic against gender discrimination. Even Chief Justice Burger’s dissent in *Batson* conceded that women would be entitled to the same protections as African-Americans under the majority’s application of the Equal Protection Clause.

Therefore, it is logical to conclude that “equal protection of the laws” in the area of jury selection does not end at racial considerations. Although *Batson* does not express an opinion about invidious discrimination

84. *See* Olivieria, 534 A.2d at 870 (*Batson* did not cover a male juror because there was no history of discrimination against men).
86. 100 U.S. 303, 310 (1879) (overruled by *Taylor*, 419 U.S. 522).
87. *Id.*
89. I do not intend to trivialize the oppression of African-Americans. However, in the area of jury selection, women have suffered longer and in much subtler ways than any other group in American society. It is often the invisible tyrannies that have the most impact. When the system covertly oppresses its citizens, they must first realize their subjugation and then exhaust years persuading those not directly affected that they are indeed being oppressed. Only then can they attempt to solve the problem.
91. *Id.* at 124 (Burger, C.J., dissenting) (“[I]f conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex”).
against women during jury selection, the Batson rationale can easily be extended to protect everyone against gender discrimination. Therefore, Batson should be extended to protect women from the same type of discrimination that the court has so quickly condemned on racial grounds. Once the Court has accepted that the Equal Protection Clause imposes a limit on peremptory challenges, justifying juror strikes because an attorney is prejudiced against women should be neither tolerated nor condoned.92

One final question arises: What level of scrutiny should the court apply? The Court has traditionally used the strict scrutiny standard when testing racial classifications for possible Equal Protection Clause violations and intermediate scrutiny for gender classifications.93 In Batson, however, the Court did not apply strict scrutiny. Instead, it fashioned a new standard for reviewing peremptory challenges: they must be independent of the juror’s membership in a protected class.94 Thus, the burden falls on the challenger to provide a race-neutral explanation of each suspect strike.

If the Batson level of scrutiny were applied to sex discrimination, the state would be blocked by the Fourteenth Amendment from attempting to strike potential jurors merely because they are women. But even if Batson is inapplicable to gender, the use of gender-based peremptory challenges would still fail the traditional intermediate scrutiny test because the state would be hard-pressed to show that the exclusion of anyone on the basis of gender was substantially related to an important governmental interest.95

The only valid96 justification for a gender-based peremptory challenge is that women are unable to serve as fair and impartial jurors in a particular case. Such “romantic paternalism” is manifested in “gross,

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92. Alschuler, supra note 1, at 182.
94. See Batson, 476 U.S. at 97 (explicitly relating only to racial classifications). See also People v. David Irazarry, 536 N.Y.S.2d 630 (N.Y. Sup. Ct. 1988) (applying Batson to gender).
95. See Hogan, 458 U.S. at 723-24 and n.9; Boren, 429 U.S. at 197. Even the diluted “similarly situated” test established in Michael M. v. Superior Court, 450 U.S. 464 (1981), would not justify gender discrimination in jury selection. In Michael M., the Court upheld a statutory rape scheme that punished only males. Id. at 466. The Court upheld the statute because men and women were not “similarly situated” — women can get pregnant and men cannot. Id. at 471-72. Chief Justice Rehnquist’s “logic,” however, does not extend to gender discrimination in jury selection because men and women are always similarly situated in the context of a jury — both are equally capable of being fair and impartial.
96. I use the term “valid” within the confines of the preceding discussion of permissible Fourteenth Amendment activities.
stereotyped distinctions between the sexes" that have no basis in fact. 97 This kind of reasoning has been used to justify the exclusion of women from running for office, owning property, serving as legal guardians for their own children, having standing to bring a suit in their own names, and serving on juries. 98

The Boren court emphatically rejected such gender stereotyping as "loose-fitting characterizations" that are false. 99 "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." 100 Thus, even if the Court were to find that the Batson test is not sufficient to evaluate gender-based challenges, the intermediate scrutiny standard would suffice as a means of striking down gender-based peremptory challenges.

Some courts have seen fit to extend the Batson Equal Protection Clause analysis to stop discrimination. For example, the Ninth Circuit has recently held that equal protection principles prohibit prosecutors from striking jurors for gender-related reasons. In United States v. De Gross, an en banc court reversed the defendant's conviction for aiding and abetting in the illegal transportation of an alien. 101 The court held that the conviction was invalid because the prosecutor's deliberate removal of women from the jury because of their gender was an illegitimate use of gender-based peremptory challenges. 102 The government argued that the strikes were an attempt to balance the jury, since the defendant was discriminatorily eliminating men. 103 The court held, however, that such practice by the government was unconstitutional discrimination despite the nobility of the prosecutor's cause. 104

The court in De Gross not only extended Batson to gender discrimination but also prohibited the use of discriminatory challenges by a criminal defendant. Previously, only prosecutors were prohibited from this practice. The De Gross court held that criminal defendants are also forbidden under the Equal Protection Clause from exercising sexually discriminatory peremptory challenge. 105 The court extended the prohibition

98. Id. at 685.
102. Id. at 1439.
103. Id. at 1443.
104. Id. at 1442-43.
105. Id. at 1441.
on discriminatory challenges to defendants because the jury-selection process "represents a unique governmental function." A criminal defendant's discrimination thus results in the sort of illegitimate state action that the Equal Protection Clause exists to prevent.\footnote{106. See id. at 1441 (quoting Edmanson v. Leesville Concrete Co., 111 S. Ct. 2077, 2086 (1991)). In Edmanson, the Court held that civil litigants' use of peremptory challenges is subject to constitutional scrutiny because, though not exercised by the government, it is tantamount to state action. Id. at 2084. Since Edmanson, the Supreme Court has specifically applied the state action doctrine to criminal defendants. See Georgia v. McCollum, 112 S. Ct. 2348 (1992) (prohibiting criminal defendants from purposefully discriminating on the basis of race in exercising their peremptory challenges).}

Some courts, however, have taken the position that Batson should not be extended to gender discrimination. For example, in United States v. Hamilton\footnote{107. 850 F.2d 1038 (4th Cir. 1988).} an African-American defendant established a \textit{prima facie} case of racial discrimination in the government's use of peremptory challenges. The government rebutted the claim by demonstrating that the excused jurors were all women and that it exercised the challenges because it "wanted more men on the jury."\footnote{108. Id. at 1041.} The Fourth Circuit accepted this explanation, rejecting the proposition that the Equal Protection Clause compelled the application of Batson to peremptory challenges on the basis of gender.\footnote{109. Id. at 1042.} The only reason the Hamilton court gave for rejecting the extension of Batson to gender was that the Supreme Court had not done so itself.\footnote{110. Id.}

Hamilton adds nothing new to the substantive debate on this issue. There is no principled justification for the court's conclusion; the Hamilton court used the Supreme Court's sidestepping of the gender issue in Batson as a rationale for its own inaction. It is irrational to claim that because something has not happened, it ought not to happen.\footnote{111. This is commonly referred to as the "is/ought fallacy." This same uncreative thinking was used to rationalize slavery in the first half of our country's history: "There is slavery, therefore, there ought to be slavery."} The Hamilton court had a unique opportunity to fill the void where no precedent existed; instead, it abdicated its responsibility by ratifying the status quo.

It is no surprise that the Batson court did not decide the gender issue, since gender was not an issue on appeal. The Supreme Court generally avoids answering a question broader than the one before it, and it avoids anticipating a constitutional question before it must decide it.\footnote{112. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985); Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).}
Court did not need to fashion a rule preventing gender-based peremptory challenges when *Batson* involved only race discrimination.

There are also several state court opinions that have concluded that *Batson* should not be extended. Most rely on the same unprincipled foundation articulated in *Hamilton*.\(^{113}\)

The only "non-*Hamilton*" argument is that "if the use of gender as a criterion for exercising peremptory challenges is prohibited, all such challenges will become inherently suspect."\(^{114}\) This "administrative nightmare" theory is empirically false. If the argument were true, appellate courts would have been deluged shortly after the *Batson* decision: every peremptory challenge would have been questioned on racial grounds. But this did not happen. Therefore, there is no reason to subordinate the Constitution. Our fundamental rights should never be sacrificed on the altar of administrative efficiency.

The Supreme Court has acknowledged that sex discrimination injures not only the defendant but also the juror,\(^{115}\) the judicial system, and society.\(^{116}\) In *Taylor v. Louisiana*\(^{117}\) the Court recognized that the jury is a vehicle for public justice and that using the jury system to exclude particular groups is repugnant to egalitarian principles.\(^{118}\) How can the public have faith in a jury system that tolerates systematic discrimination based on stereotypes and ignorance? The current tolerance of discrimination is simply a signal that the courts are ambivalent about the equality of the individual. This discrimination not only frustrates those seeking justice before the bar, but also undermines the public's trust in the system.

By expanding the Equal Protection Clause to gender-based peremptory challenges, the Court would send the unmistakably correct message that everyone truly is equal under the law.


\(^{114}\) *Oliviera*, 534 A.2d at 870 (emphasis in original).

\(^{115}\) Although invidious discrimination against potential jurors is not the topic of this article, it deserves at least a mention. In Carter v. Jury Commission, 396 U.S. 320 (1970), the Supreme Court stated that potential jurors who are systematically excluded from service may seek judicial relief: "Defendants in criminal proceedings do not have the only cognizable legal interest in non-discriminatory jury selection." *Id.* at 329. The Court equated the injury to the potential juror with that of the defendant. There is no legitimate reason why this rationale should not apply to gender.

\(^{116}\) *Ballard*, 329 U.S. at 195 (injury from "[t]he systematic and intentional exclusion of women [from petit juries] . . . is not limited to the defendant — there is an injury to 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 courts").

\(^{117}\) 419 U.S. 522, 527 (1975).

\(^{118}\) See *McCoin*, *supra* note 67, at 1241.
CREATIVE ALTERNATIVES

One solution to the whole problem of bigotry in the jury-selection process is to abolish the peremptory challenge. As Justice Marshall noted in his concurrence in Batson, the only way to eliminate the problem of racially motivated jury strikes is to eliminate the peremptory challenge. Only then will there be no chance of discrimination in voir dire. The same logic holds true for gender-based strikes: If there are no peremptory challenges, then there will be no gender-based strikes.

However, the peremptory challenge does serve an important function. It protects the defendant's right to a fair and impartial jury trial. It would be intolerable for an African-American or a Jewish defendant to be prohibited from striking a potential juror who is editor of "White Power" magazine.

A better solution is to eliminate only the state's right to exercise peremptory challenges. The following model rule of criminal procedure is offered as an alternative to the current regime.

MODEL RULE OF CRIMINAL PROCEDURE FOR PEREMPTORY CHALLENGES

(a) The exercise of a peremptory challenge by the government is not allowed. However, a defendant has the right to exercise peremptory challenges as long as they are not directed against a cognizable group.

(b) A cognizable group is one that is (1) clearly identifiable and (2) composed of individuals who share common attitudes or experiences. Groups classified according to race, color, national origin, ethnicity, religion, gender, age, handicap, disability, sexual orientation, and alienage are examples of cognizable groups.

(c) Cognizable-group peremptory challenges are per se discrimination, and upon timely motion by the government the selected juror(s) shall either be dismissed, or, at the discretion of the trial court, the removed juror(s) shall be impaneled. The motion shall (1) establish by a pattern of challenges and facts a prima facie case that one or more venirepersons were removed as potential jurors because of their membership in a cognizable group.

120. See supra notes 9-10 and accompanying text.
121. This model rule modifies Rule 24(b) of the Federal Rules of Criminal Procedure. The model rule itself was adapted from another model rule proposed by Susan L. McCoin. See McCoin, supra note 67, at 1257.
group and (2) contain the record and affidavits in support of the charge.

(d) A record of the exercise of the challenges shall be made by the court clerk.

(e) If the presiding judge denies the motion, the movant may petition for a writ of mandamus with the clerk of the court of appeals.122

The model rule not only embraces the ideals embodied in the Batson123 and Booker124 tests, it also extends their underlying assumptions to their ultimate conclusion — that the Constitution commands the eradication of bigotry in jury selection. While the existence of peremptory challenges will always leave open the possibility of abuses on the part of the defendant, there are ways to reduce the potential for gender-based discrimination. First, the model rule provides a vehicle for preventing at least some defense against bigotry. Second, a defendant’s regard for the composition of the jury is much more important than the state’s. The potential impact on a defendant’s life or liberty justifies the adage that “it is better to set a guilty person free than to convict an innocent one.” A defendant has only one day in court; the state has many.

There is still the possibility that an all-male or an all-female jury could occur by chance. If the government is concerned that a single-gender jury might be impaneled, or that a defendant might use peremptory challenges in a discriminatory manner, then the government need only insist that jury venires be sufficiently representative of both sexes, thereby rendering the defendant’s discriminatory use of peremptory challenges ineffectual.125

Some might contend that eliminating the state’s right to peremptory challenges would put it at a disadvantage compared to the defense. However, this assumes that the state and the defendant are on equal ground from the outset. One can hardly compare the awesome power of government against the procedural and substantive rights of the individual. Governments have the power to fine, confine, and even kill. There has never been parity between the accused and the state. Perhaps if we do not allow the state to eliminate individuals from jury duty by virtue of gender, we can begin to redress the sexual discrimination that pervades our legal system.

122. Adapted from Rule 21 of the Federal Rules of Appellate Procedure.
123. See supra note 82 and accompanying text.
124. See supra note 57 and accompanying text.
125. See Massaro, supra note 2, at 560-61 (applying the same analysis to all cognizable groups).
CONCLUDING REMARKS

Abolishing the state's peremptory challenges offends no constitutional interest, nor does it threaten any state interest, by eliminating jurors incapable of rendering a fair and impartial verdict. The prosecutor may still challenge jurors for cause. And if a prosecutor can articulate a reason why a particular juror would not be fair or impartial, then that juror can be removed.

Discrimination is intolerable. When attorneys use jury selection to impose their myopia on the community, the response should be to take away the tools they are using to discriminate. Gender-based peremptory challenges are used by lawyers to justify their bias against women. If this article does nothing else, I hope it will cause those oblivious to gender discrimination in the legal community to wake up!