A PLACE IN THE PALLADIUM: WOMEN'S RIGHTS AND JURY SERVICE*

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When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.1

My father, who liked to call himself a country lawyer, once took in lieu of a fee a nineteenth century print entitled “Gentlemen of the Jury.” Twelve white men are in the box; several whisper, one scowls, another dozes; not one face is friendly, receptive, or even

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** Ernest W. McFarland Professor of Law, Stanford Law School. Professor Babcock presented the Marx lecture in April 1992, at the University of Cincinnati College of Law. The subject was gender and jury service in light of women’s legal history, with the career of Clara Shortridge Foltz as a major source and example. The lecture featured the unveiling of an oil portrait of Foltz, painted by her great-grandson, Truman Toland, a Cincinnati artist.

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intelligent. I have always wondered what the client, an elderly black lady, made of this possession which had hung in her parlor for many years.

Most American juries looked a lot like that old print until well into the twentieth century. In 1957, a popular movie valorizing juries portrayed Twelve Angry (Caucasian) Men. In that movie, the defendant was white. But when a black man was on trial, the prototypical American jury became the ugly, unjust villain in another classic film made a few years later: To Kill a Mockingbird.

The picture of an African American before a jury from which the state has "expressly excluded every man of his race" is a powerful negative image in our country. In 1992, the force of that image spilled out into the Los Angeles streets, following the acquittal of four white policemen accused of assaulting an African American named Rodney King (who was nominally the accused, but actually the defendant in the case). Public and professional voices joined to urge that a jury different only in the addition of African Americans would have changed the riotous response to the outcome, if not the verdict itself.

In the "Rodney King case," the defense lawyers for the white police officers, after winning a change of venue to a predominantly white jurisdiction, used peremptory challenges to shape a jury that looked racially like the defendants. More commonly in criminal
cases, it is the state that strikes people of color to prevent a jury from resembling the defendant. The practice has often resulted in minority defendants facing all-white juries.

Driven by this negative image, the Supreme Court, starting with Batson v. Kentucky in 1986, has delivered six full-dress opinions dealing with the use of peremptory challenges, with the immediate goal of making it more difficult for litigants to engineer all-white juries through the use of peremptory challenges. Ultimately, though, the Court has embarked on a mission to eliminate racial bias from jury selection entirely.

This series of cases is astonishing both in reach—potentially to every jury trial in every county, state, and federal courthouse—and in remedy—automatic reversal of criminal convictions and civil judgments. In all the cases regulating the use of the peremptory challenge, the Court has invoked the extreme remedy of reversal without any evidence that racial bias affected the jury’s decision.

7. Batson v. Kentucky, 476 U.S. 79 (1986) (allowing black defendant to challenge prosecutor’s use of peremptory challenges against racial minorities); Holland v. Illinois, 495 U.S. 474 (1990) (finding that white defendant has standing to make Sixth Amendment claim that prosecutor peremptorily struck blacks on the basis of race, but denying claim on merits); Powers v. Ohio, 111 S. Ct. 1564 (1991) (holding white defendant has standing to object to prosecutor’s strike of racial minorities); Hernandez v. New York, 111 S. Ct. 1859 (1991) (finding explanations for certain peremptory challenges of Hispanics sufficiently neutral, i.e. free from racial bias; trial court’s determination should be reviewed under the deferential abuse of discretion standard); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (prohibiting private civil litigants from exercising peremptory challenges to exclude jurors solely on the basis of race); Georgia v. McCollum, 112 S. Ct. 2348 (1992) (prohibiting criminal defense counsel from exercising race-based peremptory challenges).

8. The Court has come very close to holding explicitly that mistakes in a jury’s composition do not undermine the accuracy of its findings (and thus the conviction). Allen v. Hardy, 478 U.S. 255 (1986). In finding Batson not retroactive, the Court stated that the opinion has no “fundamental impact on the integrity of factfinding.” Id. at 259; Teague v. Lane, 489 U.S. 288, 315 (1989) (concluding that “the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction”); see also Batson, 476 U.S. at 259.
The cases were uniformly sent back for new trials with new juries that would look better to the litigants, the people in the courtroom, and those watching from the outside.

Thus far the Supreme Court has considered only the strikes of minority men—mostly African Americans—and thus has adhered to the “all-white” image that first impelled it on this course. But soon, the Court must decide whether gender can be a legitimate basis for removing individuals from the panel. The decision on gender will likely consummate a line of cases remarkable for its reaffirmation of faith in the fairly chosen jury.

I will start by examining the conventional uses of the peremptory challenge and then turn to the cases that have so heightened its actual and symbolic place in the jury selection ritual. Here is the main point: although the Batson cases originated in concern for the rights of the black accused, they have, from the beginning, also dealt with harm inflicted on the excluded jurors. The goal of protecting those summoned to serve, once a background feature, has now moved to the center of the analysis.

In effect, the Court has reframed the image of the black accused before the white jury, designating the striking of the individual juror as the critical moment. In light of this shift in emphasis, the question arises whether strikes of women because of their gender should be prohibited, like the strikes of blacks for their color in Batson. Equal protection analysis, illuminated by feminist theory and women’s legal history, points clearly to an affirmative answer.

Opponents of adding gender as a Batson category contend that it will make the peremptory impossible to administer; and some of its proponents agree, urging its abolition instead of reform. In the final section of the article, I will briefly outline various changes that

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See infra notes 68-71 and accompanying text for an explanation of why the use of race-based peremptory challenges is considered reversible error. Compare reversal in the race-based peremptory cases with the refusal to reverse when a party effectively loses his right to use peremptory challenges. See, e.g., Ross v. Oklahoma, 487 U.S. 81 (1988) (no denial of due process when capital defendant was forced to use one of his nine peremptories to cure erroneous refusal by court to excuse juror for cause); McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) (no reversal in case where counsel would have stricken juror if questionnaire responses had been accurate without a corresponding showing that a correct response would have supported a valid challenge for cause). Cf. Ham v. South Carolina, 409 U.S. 524 (1973) (ordering reversal for failure to inquire into racial bias on voir dire where there were special circumstances threatening the fundamental fairness of the trial). But see Ristaino v. Ross, 424 U.S. 589 (1976) (confirming Ham to its facts and finding no constitutional error where the trial judge questioned veniremen about general bias and prejudice but refused to question them specifically about racial prejudice).
would help preserve the peremptory challenge while ensuring that the whole jury selection process is more efficient and fair.

These conclusions are very like those reached in another piece I wrote—my first as an academic—long before *Batson* was decided. I thought I was writing about voir dire, and merely using the peremptory as a vehicle to argue that the parties’ ability to learn about potential jurors must be equalized (so that each side might make knowledgeable use of its challenges). But the part of the article most frequently cited was my description of the peremptory as a mask for the use of racial stereotypes in jury selection. Now as I address the peremptory issue explicitly, I wonder at how things change, and how they stay the same.

I. Unspeakable Reasons and Unexplained Challenges

The jurors who stand and swear to “do justice in this cause” between the plaintiff and defendant, or between the state and the accused, have survived four possible elimination points. Originally summoned from lists that typically exclude, for example, the criminally convicted, the homeless, and the unregistered voter, each juror then had a chance to offer a personal excuse (a sick child, inventory-time in a small business) for not serving. Later, they were called to a courtroom set for trial, and questioned by the judge or by counsel about their fitness to serve in the individual case. After this “voir dire” examination, the judge removed some among them for cause. Finally, lawyers for each side struck others without giving a reason—peremptorily.

While the details of administration vary, this is the basic system for jury selection followed, or at least mandated, everywhere in the United States. We now understand, after many years of constitutional interpretation and statutory reform, that the ultimate goal of all these procedures is to achieve representative and impartial juries. On the surface at least, the peremptory challenge seems ill-suited for this purpose.

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The Supreme Court has itself relied on the presumption that the composition of the jury critically influences the outcome in its line cases establishing the right to a jury drawn from a fair cross-section of the community. Derived from the Sixth Amendment guarantee of an impartial jury, the “fair cross-section” cases deal with the constitutional understanding of how impartial juries are assembled. *Id.* at 48-49. A representative
The practical operation of the peremptory challenge is not always an uplifting sight. In hundreds of appellate cases—indicative of thousands more that left no record—we see the peremptory being used to remove people of color from juries. Many African Americans, for instance, who have made it to the jury lists and been summoned, neither excused for a personal reason nor struck for cause, were finally rejected without ceremony, articulation, or outward regard for individual impartiality or fairness.\(^1\) Most egregious were the cases in which the public prosecutor purposefully removed all members of a defendant’s own race from the jury that would try him.

The constitutionality of this worst-case scenario was originally affirmed in 1965 by the Supreme Court. In Swain v. Alabama, the prosecutor struck all African Americans from a capital jury that tried a black man accused of raping a white woman. Though disapproving in theory of a pattern of racially based challenges, the Court upheld the practice in the extreme situation before it.\(^2\) As translated by the courts below, Swain indicated acceptance, even endorsement, of open season on minority juror service. Prosecutors in many courts

\(^{1}\) Jury is one drawn from a pool in which no distinctive community group is underrepresented due to systematic discrimination in the selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979).

\(^{2}\) Yet in Lackhart v. McCree, the Court expressly declined to invoke the fair cross-section principle to “invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.” 476 U.S. 162, 173 (1986).

\(^{3}\) Holland v. Illinois, 493 U.S. 474, 480 (1990), one of the cases in the Batson line, presents a sharp disagreement over the relationship of the peremptory challenge to the fair cross-section requirement. The majority concluded that the defendant could not challenge the prosecutor’s discriminatory use of peremptory challenges under the Sixth Amendment because the fair cross-section requirement does not apply to petit juries. Id. at 483. Rather, the Sixth Amendment “is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).” Id. at 480. Based on this belief, the majority concluded that the traditional understanding of the fair cross section requirement has “never included the notion . . . that initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests.” Id. Compare Justice Stevens’s view in dissent that, although the petit jury is not subject to a guarantee of representativeness, the exercise of race-based peremptory challenges is a violation of the Sixth Amendment nonetheless because it manipulates the fair chance of producing a representative jury. Id. at 511 (Stevens, J., dissenting).

\(^{11}\) Trial manuals candidly advised striking minorities because they were likely to feel sympathy with the defendant, and prosecutors spoke openly among themselves of the duty to assure convictions by arranging all-white juries. There was nothing covert, nothing irregular, nothing cabined or contained about the practice in most places. See, e.g., Frederick L. Brown et al., The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New Eng. L. Rev. 192, 224 (1978).

\(^{12}\) Swain v. Alabama, 380 U.S. 202, 226 (1965) (accepting as true that no black person had served on a jury in Talledega County since 1950).
continued their regular, unabashed removal of people of color from juries, especially those that shared the same race as the accused.\footnote{13}

During the sixties, I was a public defender in the District of Columbia, where the free-wheeling use of peremptories was common practice on both sides. I used my strikes to eliminate white and middle-class black men, assuming that both groups would be unsympathetic to my usual client, a young African American man. Ideally, I wanted African American women for his jury—any age would do. Trying to produce a white majority on the jury, the prosecutor often challenged the black women.

What chaos it seemed was present in those scenes: people making choices on the basis of intuition, stereotype, and prejudice! The fifty year old black janitor I struck from the jury that would have tried my twenty year old African American client for armed robbery might indeed have resented him; he might also have seen himself, his son, or the whole suffering race and felt the deepest empathy for the accused. Similarly, the prosecutors who dismissed African American women might have mistakenly deprived the People’s jury of stern protectors of law and order.\footnote{14}

\footnote{13} Justice White, Swain’s author, later wrote that despite the “warning” language of his original opinion, “[i]t appears . . . that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread . . . .” Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring).

Prior to Batson, some states under their own constitutions or statutes, and the Second Circuit under the Sixth Amendment, sought to regulate the practice. See, e.g., McCray v. Abrams, 750 F.2d 366 (2d Cir. 1984) (holding that prosecutor’s use of peremptory challenges to strike all black jurors violated the cross-sectional requirement of the Sixth Amendment); People v. Wheeler, 583 P.2d 748 (Cal. 1978) (holding it unconstitutional for a party to exercise its peremptory challenges to remove prospective jurors based solely on group bias); Commonwealth v. Soares, 387 N.E.2d 499 (Mass.) (quoting Wheeler, 583 P.2d at 762 (finding that prosecutor’s use of peremptory challenges to strike 12 of 13 blacks on venire violated state constitutional right to petit jury that “is as near an approximation of the ideal cross-section of the community as the process of random selection permits”), cert. denied, 444 U.S. 881 (1979); see also McCray v. New York, 461 U.S. 961 (1983) (Marshall & Brennan, J.J., dissenting from denial of certiorari) (calling for re-examination of Swain). Only one case, Carter v. Jury Commission, 396 U.S. 320 (1970), a civil case against the jury commissioners for a pattern of discrimination, directly took up the Court’s invitation in Swain to focus on showing a trend of race-based peremptories. But it was obviously too great a burden to raise the equal protection rights of excluded jurors in jurisdiction after jurisdiction and aside from the pressing interests of a particular case.

\footnote{14} Empirical studies support the notion that jurors of a certain age, race, ethnicity, religion, or occupation are predisposed to react a certain way to evidence or defendants of a certain sort, despite their individual attempts to be fair and impartial. Though such studies establish neither the rightness nor the need for peremptory challenges, they help explain why lawyers on both sides are prone to exercise them based on group, rather than individual characteristics. William T. Pizzi, Batson v. Kentucky: Curing the Disease but Killing the Patient, 1987 Sup. Ct. Rev. 97, 129-35; see also Jeffrey L. Kestler, Questioning Techniques and Tactics § 3.20 (1982); Jon M. Van Dyke, Jury
None of us selecting jurors in routine cases knew much about those we rejected. The wealthy or well-connected litigants who could afford jury-investigation services or other experts to assist them in looking beneath the stereotypes knew more. But even they did not often obtain the kind of information necessary to reveal the individual behind the pigmentation and the gender.\footnote{15}

Thinking along these lines many years ago, as an academic rather than a defender, I argued for expanding the pool of information available to everyone by enlarging and supplementing the voir dire procedures.\footnote{16} Seeking to turn Swain into a silk purse, I urged that because the peremptory challenge had been elevated to near-constitutional status, both parties needed more information to use it effectively.\footnote{17} Quoting Blackstone, I explained that the peremptory allows the litigant to dismiss "those he fears or hates the most, so that he is left with 'a good opinion of the jury, the want of which might totally disconcert him.'”\footnote{18}

I noted other important functions of the peremptory as well, such as shielding the exercise of the challenge for cause. When voir dire questioning has alienated a juror without necessarily establishing a basis for removal, the litigant turns to the peremptory as insurance against bias. But the most cited passage was the one in which I advised against “trafficking in the core of the truth in most stereotypes,” and located the central use of the peremptory in its

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Although the tenets of social psychology also hold that jurors, like everyone else, tend to evaluate ingroup members (shared identity) more positively than outgroup members, former Supreme Court Justice Thurgood Marshall, drawing from his life experience as well as social science studies observed that some members of minority groups “respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes.” Casteneda v. Partida, 430 U.S. 482, 503 (1977). More pungently to the same point, in response to a question about whether his replacement on the Supreme Court should be an African American, he responded that “there's no difference between a white snake and a black snake, they'll both bite.” See Thurgood Marshall, Press Conference on Supreme Court Retirement, quoted in Marshall Urges Bush to Pick "the Best", N.Y. Times, June 29, 1991, at A8; see also Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?, 92 Colum. L. Rev. 725, 728 (1992) (arguing that there is no satisfactory way to explain how “race-based jury selection discriminates against the defendant, as distinct from the jurors”).
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\footnote{16} Babcock, supra note 9, at 561-62.

\footnote{17} Id. at 561.

\footnote{18} Id. (quoting 3 William Blackstone, Commentaries 1024 (3d ed. 1894)); see also infra notes 130-35 and accompanying text.
allowance of the “covert expression of what we dare not say but know is true more often than not.”19 Here is the main drift of the supporting argument:

Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise.20

My thesis was that it would be unseemly and unfair openly to express the idea, for example, that older African American men holding low paying jobs would be prejudiced against my young black client who gave no signs of having worked hard, or at all. It would be equally unpleasant for the prosecutor to state the assumptions underlying his actions: that African American women would not convict young men who might be their sons or brothers. Instead of speaking the searing words that identified this fear, each side might quietly strike from the jury the object of his concern.21 I celebrated the evolution in the peremptory challenge as a method for dealing covertly with such assumptions, without the ugliness and embarrassment that would arise from expressing them.

What I failed to recognize, however, was that, even though no words were spoken, tides of racial passion swept through the courtroom when the peremptory challenges were exercised. Everyone could see what was happening—voir dire. Perhaps the silence harbored thoughts worse than those that might have been said. In the years after Swain, this fear became more vivid, partly because of developments in the jury selection process that were ostensibly unrelated to the common practice of race-based peremptories.

First, many more minorities were summoned for potential service. The civil rights movement ushered in the Federal Jury Selection Act of 1968.22 Widely copied in the states, the new act sought to make

20. Id.
21. Id.
22. Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1988). The statute, like its state analogs, is designed to ensure that juries are “selected at random from a fair cross section of the community in the district or division wherein the court convenes.” 28 U.S.C. § 1861. Specifically, the Act provides that the exclusion from service as a juror “on account of race, color, religion, sex, national origin, or economic status” is prohibited. 28 U.S.C. § 1862. Although in this article I use the
juries more representative by increasing the diversity of the pools from which they were drawn. But people of color—and white women—arrived at the courthouse in greater numbers only to be peremptorily ejected from particular courtrooms when a member of their race and gender was on trial. "Why bother to call us down to these courts," wrote one African American man, who with all others of his race was peremptorily struck from a jury, "we could be on our jobs or in schools trying to help ourselves instead of in courthouse Halls being Made Fools of." His experience was unusual only because he protested it to the chief prosecutor.

Other developments in jury trial administration similarly heightened the unfairness of race-based peremptory challenges. The shape of the jury changed, scaled down to eight or even six in many places. When reducing the size of individual juries, most jurisdictions did not allow for a corresponding decrease in the number of peremptory challenges. Thus, though not deliberately intended, it became easier to remove all members of any racial minority from actual jury service.

Another change that contributed to the decrease of minority participation on juries was the abandonment in many places of the re-

paradigmatic example of the African American defendant and the white jurors, the Court has extended its categories for equal protection and fair cross-section analysis to other groups. See, e.g., Hernandez v. Texas, 347 U.S. 475, 478 (1954) (finding Equal Protection Clause prohibits discrimination on bases other than race, such as national origin). But cf. Lockhart v. McCree, 476 U.S. 162, 175 (1986) (holding that class of prospective jurors fervently opposed to death penalty does not constitute distinctive group for purposes of fair cross-section requirement).

23. Anonymous Letter from excluded juror, quoted in Amicus Brief for Elizabeth Holtzman 18, Batson v. Kentucky, 476 U.S. 79 (No. 84-6263) (1986); see also Underwood, supra note 15, at 725 (arguing that the real harm in racially motivated jury selection is incurred by the excluded jurors and the stigmatized group to which they belong).


25. Pizzi, in discussing various proposals to abolish the peremptory challenge or otherwise curtail its use, argued that abolishing the system of peremptories would "eliminate the use of social science experts and psychologists in jury selection," thereby countering "the impression that it is the composition of the jury and not the evidence presented that is fundamental to the determination of guilt or innocence at trial." Pizzi, supra note 14, at 144, 147. Second, petit juries would more often actually represent a fair cross-section of the community. Id. at 144-45. Finally, he argued, trial time devoted to jury selection would be greatly diminished. Id. at 145.
quirement of jury unanimity. Thus, even if one or two African Americans remained on a jury, they would not necessarily be taken seriously because the decision could be 6-2, or 5-1. The litigant could effectively have her all-white verdict without an all-white jury.

These and other trends brought the Swain issue back to the Supreme Court on a tide of unease that had been rising for twenty years. In Batson v. Kentucky, a prosecutor had used his challenges to remove the only four blacks from the venire in a routine criminal case. But this time the Court outlawed racially based peremptories by prosecutors in individual criminal cases, without proof of any pattern or practice of discrimination in other cases. Five years later it did the same for civil litigants on both sides of the case. Last term, in Georgia v. McCollum, the Court applied its ruling to strikes by criminal defendants as well.

In McCollum, as in the Rodney King case, white men were accused of assaulting African Americans. In ruling that these criminal defendants must also give neutral, non-racial reasons for their strikes, the Court took another major step toward transforming jury selection. As a result, no one may lawfully remove jurors for racial reasons; nor may anyone hide his motives in a reverberating silence, but must, when called upon, give reasons that rise above prejudice and its surrogate: stereotype.

These procedures may result in further veiling of race hatred behind barely plausible pretexts. Yet even this result, which I will

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28. Id.
31. Before jury selection began, the prosecution, expecting to show that the victims’ race was a factor in the assault, moved to prohibit the defendants’ counsel from exercising its peremptory challenges to remove all African Americans from the jury. The prosecution argued that a statistically representative jury panel would contain 18 African Americans—all of which the defendants’ counsel would be able to strike with its 20 allotted peremptory challenges. The trial judge denied the prosecution’s motion and the Supreme Court of Georgia affirmed the ruling. Georgia v. McCollum, 405 S.E.2d 688 (Ga. 1991), rev’d, 112 S. Ct. 2348 (1992).
32. The Supreme Court has not fully addressed the circumstances under which an explanation is permissibly race-neutral. Hernandez v. New York, 111 S. Ct. 1859 (1991), upheld the strikes of Spanish-speaking jurors where the prosecutor was able to show a nexus between the jurors’ bilingualism and their possible approach to the evidence at trial. For a sample of the issues lower courts have faced in the application of Batson, see generally United States v. Bishop, 959 F.2d 820, 821, 824 (9th Cir. 1992) (holding explanation insufficiently race-neutral where prosecutor explained his strike of black juror from venire by claiming that she lived in predominantly low-income, black
argue need not follow, would be better than the open but unarticulated racism often practiced before. A central credo of contemporary culture is that the expression of thoughts and feelings ultimately helps to heal divisions. As Justice Kennedy, the chief architect of the new procedures, put it:

The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes.\(^{33}\)

Although the result in \textit{McCollum} was certainly predictable, there was a strong argument for allowing criminal defendants to retain the unfettered peremptory. A substantial body of scholarship supported the peculiar importance to the accused of this traditional feature of jury trials.\(^{34}\) In its \textit{McCullum} amicus brief, for example, the National Association of Criminal Defense Lawyers put the matter bluntly:

The defendant's interest . . . outweighs the concerns of the rejected juror or the community polarized along racial lines. The juror is not at risk of losing life or liberty, and will perceive the defendant's strike as the defensive gesture it is by one stripped to a position of almost total powerlessness.\(^{35}\)

But in this whole line of cases, the Court has not balanced competing rights, but blended them — in the name of our national pro-

\(^{33}\) Edmonson, 111 S. Ct. at 2088.


gress toward "multiracial democracy." Thus, the African American defendant's right to a jury of his peers is blended with the potential juror's right not to be excluded from juries; and over both of them, as well as over the community they share, the Court has thrown a mantle of equal protection. Whether women's rights (with attendant gender concerns) should now be included in the mix is the next question. The answer, in turn, depends on understanding how the rights of the accused became intermingled with those of the potential jurors and how the analysis shifted from the Sixth Amendment to the equal protection of the laws.

II. The Democratic Jury

Having lived through the Civil War, the Supreme Court Justices in the great Fourteenth Amendment case of *Strauder v. West Virginia* saw the black defendant before the white jury, and asked rhetorically: "[h]ow can it be maintained that compelling a colored man to submit" to a jury "from which the State has expressly excluded every man of his race . . . is not a denial to him of equal legal protection?" More than one hundred years of equal protection doctrine later, the Court in *Batson* followed *Strauder* exactly, finding that picture still unacceptable, though this time the State had used its peremptory challenges, rather than a statute, to exclude every member of the defendant's own race from his jury.

Following *Strauder* exactly meant, first, that the *Batson* Court found that the black defendant's equal protection was violated. It meant as well that the *Batson* majority, like the Court in *Strader*, was concerned with discrimination against excluded black jurors. Finally, both opinions concluded that the harm from "selection procedures that purposefully exclude black persons from juries" flows to the entire community, undermining "public confidence in the fairness of our system of justice."

37. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). In striking down an 1873 statute that limited jury service to white males, the Court found the black accused entitled to a jury chosen without the exclusion of his race and without "discrimination against them." *Id.* The Court also noted that the West Virginia statute was an example of what might be anticipated when "those who had long been regarded as an inferior and subject race" were "suddenly raised to the rank of citizenship." *Id.* at 306. The Court said it took "little knowledge of human nature" to expect "that State laws might be enacted or enforced to perpetuate the distinctions that had before existed." *Id.*
39. *Id.* at 85; see also *Strauder*, 100 U.S. at 308.
Though Strauder is a venerable and impressive case, the Court's central reliance on it in Batson was startling. The grant of certiorari had not mentioned equal protection nor had Batson's counsel urged any such ground. Both had referred instead to the defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community.40

The Sixth Amendment, after being applied to the states in 1968,41 had become the chief vehicle for ensuring representative juries. Especially in light of Swain's burdensome approach to equal protection, criminal defendants attacking race-based peremptories had come to rely almost exclusively on the Sixth Amendment or its state constitutional analogs.42 The leading cases under the Sixth Amendment invoked "the American concept of the jury trial [that] contemplates a jury drawn from a fair cross section of the community," and added that the exclusion of distinctive groups from jury service was

40. See Brown, supra note 11, at 196-234; see also Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (holding that Sixth Amendment entitles every defendant to object to venire that is not designed to represent fair cross-section of the community, whether or not systematically excluded groups are groups of which defendant is member). But while the jury must be drawn from a pool that is a representative cross-section of the community, there is no absolute right to fair representation on the jury panel itself. The Court in Taylor expressly declined to impose a requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Id. at 363-64. The Supreme Court has recently reaffirmed its belief that this Sixth Amendment right does not include any guarantee that he initial representativeness will not be diminished by the exercise of peremptory challenges on both sides. Holland v. Illinois, 493 U.S. 474, 480 (1990); see also Lockhart v. McCree, 476 U.S. 162 (1986) (refusing to invoke fair cross-section principle to invalidate the use of either for-cause or peremptory challenges, or to require petit juries, as opposed to venires, to reflect composition of the community at large).

41. Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (applying Sixth Amendment right to trial by jury guaranteed to defendants in federal criminal cases to states through Fourteenth Amendment).

42. See supra note 13 and accompanying text. Such were the grounds on which Batson's counsel and various amici urged reversal in his case. Such were also the grounds on which state courts and two federal circuits had outlawed the peremptory removal of minorities from the jury. We can see the logical and precedential force of these arguments in Justice Stevens' opinion in Holland v. Illinois, 493 U.S. 474, 504 (1990) (Stevens, J., dissenting). Holland was a white man who objected to the peremptory removal of all blacks from his jury. Id. at 475. Chary of the equal protection argument, partly because of the Court's repeated references in Batson to the defendant's sharing the same race with the excluded jurors, Holland based his claim exclusively on the Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. See supra note 10 for further discussion of Holland.

See also Massaro, supra note 34, at 503-04, arguing while Batson was sub judice that the case should be decided on Sixth Amendment rather than equal protection grounds. Identifying government, community, and defendant interests in how a jury "looks," Massaro dissected the Court's attempts to regulate jury appearance through interpretations of the constitutional word "impartial" and the definitions: "fair cross section of the community" and "a jury of peers." Id. at 542-60.
“at war with our basic concepts of a democratic society and a represen-
tative government.” As the image of the all-white jury and the black accused rose once more before the Supreme Court in Batson, language like this would lend itself to a bold new effort to regulate the peremptory challenge.

But there were significant problems in applying the Sixth Amend-
ment cases to the situation of the jury stripped of African Americans by the prosecutor’s peremptory strikes. Most notably, the fair cross-
section cases, with their language of representation, all dealt with
summoning the entire venire, not with seating the jury of an individ-
ual defendant. In a multi-racial society, including multi-racial indi-
viduals, it could be difficult to determine what exactly comprises a
representative jury for a particular case.

The timing of Batson was especially poor for applying the Sixth Amend-
ment cross-section requirement to the petit jury, moreover, because Lockhart v. McCree was under consideration at the same time. Petitioner McCree had argued that the process of death-qualifying a
jury—removing those doubtful about imposing the ultimate pen-
alty—violated the fair cross-section requirement. In that context,
the Court resoundingly rejected an extension of the fair cross-
section requirement to actual trial juries as “unworkable and
unsound.”

For these and other reasons, the Court did not openly follow the
obvious Sixth Amendment path. Instead, it imported its concerns

43. Taylor, 419 U.S. at 527 (citing Smith v. Texas, 311 U.S. 128, 130 (1940)) (holding
unconstitutional a state provision that required women, but not men, to file a written
declaration before they were placed in jury pool).

44. Albert W. Alschuler has outlined what he sees as seven major problems in the
administration of Batson. See Alschuler, supra note 15. Although I argue infra that most
of these have not come to pass, his detailing of the difficulties that might result from
having juror selection or de-selection depend on a correspondence of race with the
defendant shows conclusively that such a requirement would never work. See also
Holland, 493 U.S. at 507 n.6 (Stevens, J., dissenting) (arguing that requirement that
defendant share same race with challenged juror is inconsistent with Equal Protection
Clause and unworkable as standard).


46. Id.; see Pizzi, supra note 14, at 119 (arguing that the fair cross-section approach is
a myth because our system of jury selection has never been designed to assure
defendants “a democratically representative cross section on the jury”); see also Batson

47. Explanations for why the Court relied instead on equal protection (of the Strauder
allusive brand) are varied: ranging from the vulgar (there were not enough votes to
support boldly enlarging the rights of the criminal defendant) to the instrumental (the
Court hoped it could establish a limited principle applicable only to the prosecutorial
practice of striking minority members from the juries of minority defendants). Alschuler
speculated that the Batson majority relied on equal protection to circumvent the
concepts of standing articulated in Peters and Taylor, and to limit its holding to the
for the jury as a representative organ of the community into the allusive and diffused equal protection doctrine that it borrowed from Strauder. The crucial passage in Batson explained:

Racial discrimination in selection of jurors harms not only the accused whose life and liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial. See Thiel v. Southern Pacific Co., 328 U.S. 217, 223-224 (1946). A person's race simply "is unrelated to his fitness as a juror." But the Thiel citation is the true "Mene Mene Tekel Upharsin" of the Batson opinion.

The next sentence is one of the many references to the mother case of this opinion: "As long ago as Strauder . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." But the Thiel citation is the true "Mene Mene Tekel Upharsin" of the Batson opinion.

Translated, Thiel revealed that concern for the jury as an institution had become the centerpiece of the analysis. In peremptory challenge cases, this shift means that the rights of excluded jurors rather than those of litigants are paramount. We need only study Thiel briefly to understand how it signals the Court's switch from defendant to juror as the object of its equal protection concern.

Out of his "normal mind," Thiel threw himself from the window of a moving train. He sued the railroad and lost before a jury chosen largely from a group of "business men and their wives." On appeal, he argued that there should have been more daily wage earners in the pool, though he did not urge that members of this exclusion of blacks. Alschuler, supra note 15, at 186-88; see also infra notes 72-74 and accompanying text for a discussion of Peters and Taylor. The focus on Strauder lends itself to this latter explanation because the Court there said the equal protection it had in mind was only for "colored men" and went on to add somewhat gratuitously that states could, of course, continue to exclude others from its juries, including: women, propertyless people, and the uneducated. Strauder v. West Virginia, 100 U.S. 303, 310 (1880).

48. The Sixth Amendment never got direct mention in Batson's equal protection discourse, and yet, in the words of Justice Stevens in a later case, the "requirement of impartiality is, in a sense, the mirror image of a prohibition against discrimination." Holland, 493 U.S. at 506 n.4 (Stevens, J., dissenting). Justice Rehnquist, in his dissent in Duren v. Missouri, acknowledged that the equal protection arguments have been imported into the Sixth Amendment, and railed against it. 439 U.S. 359, 371 (1979) (Rehnquist, J., dissenting).


50. Id.

51. This was the handwriting on the wall. 5 Daniel 25 (King James ed.).

52. Thiel, 328 U.S. at 222 (noting that businessmen and their wives constituted 50% of jury lists).
class were more likely to respond to his claim. Indeed, there had been five apparently unsympathetic daily wage earners actually among the jurors who decided against him.53

Yet exercising its supervisory power, the Court reversed the judgment in order to “reassert” the “high standards of jury selection.”54 Decided the year after the Second World War ended, Thiel rings with affirmations of the jury’s fundamental role in a democratic society. Selection procedures should draw “every stratum of society into jury service” and treat “jury competence . . . as an individual rather than a group or class matter.”55 The Court found essential to the jury’s (somewhat mysterious) functioning that it include all elements of the community. When some identifiable group has been excluded, reversal, according to Thiel, was the only remedy that will “guard against the subtle undermining of the jury system.”56

In the same year as Thiel, 1946, the Court decided a similar case, Ballard v. United States, involving male criminal defendants who objected to the lack of women in the jury pool.57 Again, acting under its supervisory power, the Court reversed the conviction because the exclusion of women “deprived the jury system of the broad base it was designed . . . to have in our democratic society.”58 Ballard was the second major case cited in Batson to support the blending of defendant’s rights with those of the excluded juror.59

What should we make of the centrality of these two old cases—Thiel and Ballard—in the new peremptory challenge caseline? A

53. According to the Brief of Petitioner, Thiel v. Southern Pacific Co., 328 U.S. 217 (No. 349) (1946), Thiel himself, though salaried, considered himself a “humble wage earner,” and the daily wage earners who actually served on the jury all had some personal or business connection to the railroad.
54. Thiel, 328 U.S. at 225.
55. Id. at 220.
56. Id. at 227. Although the passage in the text concluded the majority opinion, many of the frequently quoted bon mot were from Justice Frankfurter’s opinion where he spoke of the need to maintain the “broad representative character of the jury . . . as assurance of a diffused impartiality. . . .” Id. (Frankfurter, J., dissenting). Despite his language on the importance of representative juries, Justice Frankfurter dissented, objecting to the extreme remedy of reversal when “no constitutional issue is at stake.” Id. (Frankfurter, J., dissenting). On the merits, he found it “too large an assumption . . . that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages.” Id. at 230 (Frankfurter, J., dissenting).
58. Id. at 195.
great deal, I suggest. In a strictly doctrinal sense, they are the cases that join the Sixth Amendment fair cross-section concerns with the equal protection analysis of *Batson*. The major Sixth Amendment opinions cite these cases for the same propositions that followed from their citations in *Batson*.

First, as we have already seen, the focus is on the jury as an institution and on the experience of those summoned to serve. Second, *Thiel* and *Ballard* are about the interest of the whole community in diverse juries. Finally, the old supervisory cases found that the remedy for exclusion was reversal of the judgment and the impanelment of a new jury. These three propositions (and their logical corollaries) are at the core of the equal protection mission taken up in *Batson*: to reclaim the jurybox as the microcosm of representative democracy.60

The first case after *Batson* allowed a white defendant to object to the exercise of discriminatory peremptory challenges against African Americans, thus separating concern about the all-white jury from the image of the African American accused.61 *Powers v. Ohio* harks back to *Thiel*, where a salaried employee raised the rights of daily wage earners, and to *Ballard*, where men objected to the lack of women in the venire. These were both civil cases, as was the next case in the peremptory challenge line, *Edmonson v. Leesville Concrete Co.*62 Thaddeus Edmonson was an African-American construction worker suing for injury on his job. Lawyers for the defendant con-

60. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991) (arguing that *Batson* and its progeny are necessary to assure "progress toward a multiracial democracy by preventing the invocation of racial stereotypes which inevitably cause profound hurt and injury"). *Cf.* Georgia v. McCollum, 112 S. Ct. 2348, 2364-65 (Scalia, J., dissenting) (chastising court for using the Constitution to compromise right of criminal defendants to exercise peremptory challenges in pursuit of jury they perceive to be fair in interest of "promoting the supposedly greater good of race relations in the society as a whole").

61. *Powers v. Ohio*, 111 S. Ct. 1364, 1368, 1373 (1991). Though acknowledging "the emphasis in *Batson* on racial identity between the defendant and the excused prospective juror," the majority in *Powers* interpreted *Batson* as serving multiple ends: to prevent black defendants from being tried by a jury from which all members of his race have been excluded, but also to protect excluded jurors and the community at large from being harmed by the prosecutor's discriminatory use of peremptory challenges. *Id.* at 1368. The latter purpose is fully served only if white defendants, as well as black defendants, are able to challenge the exclusion of blacks from the petit jury. *Id.* at 1373. Compare Justice Scalia's dissent in *Powers*, which argued that "no defendant except one of the same race as the excluded juror is deprived of equal protection of the laws," by the use of racially discriminatory peremptory strikes. *Id.* at 1376 (Scalia, J., dissenting).

crete company struck all members of his race from the jury. Finding explicitly that removal of African American prospective jurors on the basis of race would violate their equal protection rights, the Court reversed the judgment for the concrete company. To reach this result, it not only held that Edmonson could raise the rights of the excluded jurors (not such a stretch after Powers), but also that the concrete company lawyers must be statesmen in the exercise of their peremptory challenges; they could not strike prospective jurors with only their client's narrow interests in mind. Engaging in jury selection transformed these insurance defense lawyers into representatives of the state, exercising its power, and thus charged with the corresponding duty not to discriminate.

_Edmonson_ explicitly rejected the main argument offered initially against the _Baton_ line of cases that its extension would impair the peremptory challenge, whose ancient role is to promote the litigant's acceptance of the jury as his own. "If race stereotypes are the price for acceptance of a jury panel as fair, the price is too high," said the _Edmonson_ Court. On the road to "progress as a multiracial society," they added, we "must recognize . . . that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." In the interest, then, of the jury's appearance, other systemic concerns become strictly secondary. The Court privileged the jury's appearance over preservation of the peremptory challenge in _Edmondson_ and over the peculiar needs of the criminally accused in relation to the jury in _McCollum._

As reversal for a new trial with a new jury is the remedy for the improper exercise of peremptory challenges, the Court swept aside as well the usually cherished goals of repose and finality of judgments. In _Thiel_ and _Ballard_, decided under the supervisory power of the Supreme Court, and in the Sixth Amendment cases, like _Taylor_, this too was the remedy. But again, these cases do not deal with the

63. _Edmonson_, 111 S.Ct. at 2077.
64. "[W]hen private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation." _Id._ at 2087.
65. _Id._ at 2088.
66. _Id._
67. _Id._; see _supra_ notes 17-24 and accompanying text. In _Georgia v. McCollum_, the Court further extended the _Baton_ doctrine, holding that the criminal defendant (this time a white seeking to exclude blacks from jury service) also acted for the state and thus must not discriminate in his use of peremptory challenges. _See supra_ note 30 and accompanying text.
selection of a particular petit jury. For this situation, we might have expected that the Court would require some showing of prejudice before ordering reversal.

For a comparison of the remedy, consider the application of equal protection doctrine to voting rights cases. If African Americans are wrongfully excluded from the polls, the Court does not invalidate the election and order a new one.68 Yet this, in effect, is what happened in the Batson cases when the judgments were reversed. Reversal does attract attention and sharpen compliance efforts, and courtrooms are unlike the polls in terms of the Court’s control over them and special interest in making them fair places. Arguably, without the remedy of reversal, the Court’s strong words about the egregiousness of race-based peremptories might be dismissed as merely idealistic or hortatory.

On the other hand, the Court has required a showing of prejudice before reversal in many other constitutional contexts.69 In interpreting the Batson line for habeas corpus purposes, the Court has held that racial bias in the exercise of peremptory challenges does not automatically affect the jury’s truth-finding function.70 Thus, it is at least odd that the Court does not demand proof of harm to the jury’s decision-making before reversing judgments on the direct appeal of Batson cases.

68. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1978) (upholding order to suspend literacy tests and similar devices for period of five years to remedy voting discrimination); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622 (1969) (invalidating New York law that restricted school district election to residents who owned property in district or had children enrolled in schools); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (declaring poll tax unconstitutional); Reynolds v. Sims, 377 U.S. 533, 586-87 (1964) (holding that remedy for malapportionment that violates the equal protection clause is mandatory reapportionment).

69. See, e.g., Strickland v. Washington, 466 U.S. 668, 691-96 (1984) (holding in ineffective assistance of counsel claim, defendant must show that, but for the counsel’s deficiencies, there is reasonable probability that result of proceeding would have been different); United States v. Agurs, 427 U.S. 97, 112-14 (1976) (holding that defendant must show, upon an assessment of the whole record, that there is a strong likelihood that the undisclosed evidence would have affected the outcome); Brady v. Maryland, 373 U.S. 83, 90 (1963) (in challenging prosecutor’s failure to disclose material evidence, defendant must show that the withheld evidence would tend to exculpate him or reduce penalty); see also Barbara A. Babcock, Fair Play: Evidence to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1193 (1982) (describing the importance of prejudice to the analysis in prosecutorial disclosure cases).

70. Teague v. Lane, 489 U.S. 288 (1989) (reaffirming that new rules of criminal procedure should generally not be applied retroactively to cases on collateral review unless the likelihood of accurate conviction is seriously diminished without the new procedures); Allen v. Hardy, 478 U.S. 255, 259 (1986) (holding that new rule laid down in Batson was designed to serve multiple ends and that it does not have such a fundamental impact on the integrity of factfinding as to compel retroactive application).
The remedy of reversal adopted from other jury selection cases is one key to the meaning and thus the outer boundaries of the *Batson* doctrine. What the Court holds when it reverses is that something is terribly amiss with the process itself, something so serious that the result simply cannot stand. Reversals are an acknowledgement of an unarticulable evil, an unprovable loss. Only reversal, ruled the *Thiel* court over Justice Frankfurter's dissent, will prevent the "subtle undermining of the jury system," in ways not subject to measurement.\(^{71}\)

Justice Marshall gave the fullest expression to the idea that we cannot measure the effects of exclusion on the jury's functioning in a case where a white man contested the exclusion of blacks from his jury. Speaking of the "unknown and perhaps unknowable" ingredient missing "[w]hen any large and identifiable segment of the community is excluded from jury service," he added: "It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."\(^{72}\)

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71. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946). Compare Justice Scalia's view in *Powers*, where he criticized the remedy of reversal by finding it to be "a reprieve, so to speak, of *Miranda v. Arizona*, in that the Court uses its key to the jail-house door not to free the arguably innocent, but to threaten release upon the society of the unquestionably guilty unless law enforcement officers take certain steps that the Court newly announces to be required by law." *Powers v. Ohio*, 111 S. Ct. 1364, 1381 (1991) (Scalia, J., dissenting). He further argued that in *Miranda*, the rule applied at least to the defendant's rights, if not to his guilt, whereas *Batson* relates to neither—the defendant is set free because even though the fairness of the trial was not affected, the jurors at this trial were denied equal protection of the laws. *Id.* (Scalia, J., dissenting).

Justice Scalia assumes that the reversal remedy vindicates the rights of the excluded jurors. It serves this purpose, of course, which could not be done by any other method. But as I argue in the text, the extremity of the remedy derives from the importance we place on the way in which a jury is composed; note, for example, counsel's remarks in *Eiland v. State*, 607 A.2d 42 (Md. App.), *cert. granted*, 613 A.2d 394 (Md. 1992), in which the prosecutor struck women on the basis of gender. "The jurors suffered an unconstitutional act. The Supreme Court has held that the defendant stands in the shoes of the jurors to vindicate the harm that has been done to them. The only remedy is reversal." Jonathan Groner, *Keeping Women Off Jury May Torpedo Convictions Jury Bias Assailants Seek Retrial*, 27 LEGAL TIMES, Nov. 23, 1992, at 1, 21 (quoting Steven Reich, defense counsel).

72. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (quoted in part at outset of this essay). *Pre-Batson* and in pluralities of three, the Court found the practice of striking blacks from the jury unacceptable. The doctrinal basis of *Peters* is difficult to discern, though Justice Marshall relied on equal protection, federal statutes and due process as prohibiting trials by illegally constituted juries. The case also has a strong Sixth Amendment flavor, though it had been litigated before *Duncan* had applied that amendment to the states. *See also Underwood*, supra note 14, at 739-42 (arguing that Justice White's opinion (also for three Justices) also has a constitutional basis, though in due process rather than equal protection).
These are sentiments that transcend logic and have no easy cut-off point before the limits of equal protection are reached. Similar views about the damage to decision-making caused by the removal of certain jurors appear most notably in two other cases: Ballard v. United States and Taylor v. Louisiana, both of which involved the exclusion of women from jury service.

III. WOMEN AND JURIES

When [the prosecutor] announced, "The People will excuse and thank Juror Number 9, Mrs. Hemphill," there were murmurs . . . and hisses . . . We all knew she was going to be excused. She knew it too. We were all embarrassed and saddened that Mrs. Janie Hemphill had to suffer another insult.

Many women have responded to the court's summons, as Mrs. Hemphill did, only like her, to be rejected upon arrival at the entrance to the jury box. The ones I felt for most when I was a defender were the sweet-faced white ladies with their walking shoes and hardcover books. Defense lawyers in the District of Columbia always struck them first. Sometimes I would convince my client that we should keep one simply because "she will love me." But usually, the African American men I represented preferred their own mothers to mine on the jury that would determine their liberty. These, the prosecutor struck.

I am certain that the women who spent their jury duty being struck from criminal cases, and from large civil cases too, suffered injury much like that of the black men who have been the subject of the Batson line of cases. The Court has identified the injury as "a profound personal humiliation heightened by its public character," and held that citizens must not be called to serve and then abused in this way.

By shifting its equal protection concern largely to the effect of the peremptory on the stricken juror, the Court necessarily rendered gender-based challenges against women illegal. In this section, I

73. Ballard v. United States, 929 U.S. 187, 193-94 (1946) (claiming that "a flavor, a distinct quality is lost if either sex is excluded").

74. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (excluding "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial").

75. Mary Timothy, Jury Woman 25-27 (1972) (white woman juror's description of peremptory strike of only black woman in the venire at trial of black radical activist, Angela Davis).


77. There is currently a split among the circuits on the issue of gender-based peremptories. See United States v. Nichols, 937 F.2d 1257, 1262-64 (7th Cir. 1991).
will show why the long sad history of discrimination against women in the courtroom and on juries makes any other result insupporta-

(holding that strikes against black women were not racially motivated), cert. denied, 112 S. Ct. 989 (1992); United States v. DeGross, 913 F. 2d 1417 (9th Cir. 1990), aff’d, 960 F.2d 1433, 1437-43 (1992) (en banc) (extending Batson to prohibit gender-based peremptory challenges by either prosecutors or defense counsel in criminal cases, and by both parties in civil cases); United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (holding that Batson does not apply to restrict the use of gender-based peremptory challenges), cert. denied, 493 U.S. 1069 (1990).


ble. We can see this imperative most vividly in the situation of African American women. In fact, the difference in the standard of equal protection between racial and gender differences was born out of disregard for black women. When the Fourteenth Amendment conferred citizenship on the former slaves, only men attained the (all too formal) right to vote and to serve on juries—in any functional sense, only men became African Americans. The great post-Civil War movement for legal equality completely omitted the female half of the African American population. Strauder, the case after which Batson is modeled, found abhorrent the picture of a black man on trial before a jury from which all the members of his own race had been excluded. But this great case explicitly said that its concern for those African American jury members did not include concern for the African American women among them. Discrimination against women, even those who were former slaves, did not violate equal protection.

History heightens the incongruity when a modern litigant strikes an African American woman and justifies the rejection in terms of gender. In one recent case in which an African American man was on trial for murder, the prosecutor explained a challenge by saying: "It's been my experience women are not good jurors in capital cases . . . . They feel more sympathetic than men. They go in there and feel like a mother." Perhaps in this case the prosecutor was striking all women to reach his stereotypical ideal for a capital jury—

78. It does not follow inevitably, however, that challenges must be free from all gender considerations. If we want to preserve the unexplained peremptory challenge, the line could be drawn to exclude non-minority men from protection. Certainly, the history of discrimination that comprises the foundation for equal protection of the potential jurors has not similarly affected white men. On the other hand, there is still a strain of litigant's rights in these cases, and there are instances in which the gender-based strikes of white men from a white male litigant's jury arguably violates this aspect of the equal protection analysis. Dias v. Sky Chefs, Inc. 919 F.2d 1370 (9th Cir. 1990) (defendant challenged plaintiff's use of peremptory challenges to strike men, achieving an all-woman jury in a sexual harassment case), vacated and remanded, 111 S. Ct. 2791 (1991). On reconsideration, the court found that the issue had not been timely raised in the trial court. 948 F.2d 532, 534-35 (9th Cir. 1991), cert. denied, 112 S. Ct. 1294 (1992).

79. Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (explaining that despite its holding that blacks could not be expressly excluded from jury service, states could certainly confine jury selection "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications") (emphasis added).

80. Fisher v. State, 587 So. 2d 1027, 1037 (Ala. Crim. App.), cert. denied, 587 So. 2d 1099 (Ala. 1991), cert. denied, 112 S. Ct. 1486 (1992). In Eiland v. State, black men were on trial for murder, the state used 16 (80%) of its strikes against women, 14 strikes removing black women. 607 A.2d 42, 57, 58 (Md. App. 1992), cert. granted, 613 A.2d 394 (Md. 1992). The prosecutor gave as his race-neutral explanation the fact that they were women. As of this writing, the case was on certiorari from the Court of Appeals, No.87 September Term, set for en banc argument in January 1993.
white males. Yet the quoted words, spoken in response to a *Batson*
challenge, also make gender a proxy for race.

The use of gender as a pretext may explain why most of the cases
arguing for the extension of *Batson* involve strikes of minority wo-
men. 81 Not only may gender be used as a cover for race prejudice,
but in the case of minority women, allowing gender strikes subjects
them to the most virulent double discrimination: that based on a
synergistic combination of race and sex. 82 Noting that minority wo-
men have been “largely invisible in the debate about the use of the
peremptory challenge,” Shirley Sagawa, writing shortly after *Batson*
was decided, argued that they “will be the first to be excluded from
the jury if *Batson* does not cover gender. We can well surmise the
message this will communicate; that Black women are the most
prejudiced of jury members, the least qualified to serve.” 83

Eliminating women-based peremptories is the only way both to
enforce the purposes of *Batson* and to offer, finally, some measure of
equal protection to minority women. Perhaps, then, the Court
might distinguish between white women and those of color when it
requires justifications for peremptory challenges. 84 This result, how-

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81. Of the four gender-based peremptory cases that have reached the federal circuit
courts, all have involved the striking of minority women, as have most of the state cases.
See supra notes 77, 80.

82. For examples of scholarly treatments of the intersection of race and gender, see
generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black
Chi. Legal F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42
Stan. L. Rev. 581 (1990) (arguing that traditional feminist theory silences the voice of
the African American woman by purporting to represent all women); Marlee Kline, *Race,
contemporary feminist legal scholarship is limited by inadequate consideration of race);
Judith Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our
women results in an additive if not synergistic disability); Elizabeth Spelman, *Gender &
Race: The Ampersand Problem in Feminist Thought, in Inessential Woman: Problems of
Exclusion in Feminist Thought* 114 (1988).

83. Sagawa, supra note 77, at 36-37. This early article is both prescient and
perceptive. In a long footnote supporting her assertion that minority women have been
excluded from the debate about peremptory challenges, she noted that “[w]hen white
commentators write about women as jurors, it is often clear that they mean white women
only.” She cited examples of the stereotypes surrounding women as jurors, almost all
applying to white women only. Sagawa also noted how seldom the dual discrimination
against minority women enters the discourse, despite the plethora of academic writing
on the subject of jury discrimination. *Id.* at 37 n.162; see also Ian Ayres, *Fair Driving:
Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817, 819 (1991)
(concluding that in the process of negotiating for a new car, black women had to pay
more than three times the markup of whites males, whereas white women paid only 40% more,
and black men paid twice the markup of white males).

84. This is a line that has already been suggested. At the oral argument in *Georgia v.
McCollum*, this exchange occurred:
ever, would deny history and demean the equal protection principles on which jury selection jurisprudence now stands.

White women abolitionists like Susan Anthony, Lucy Stone, the Grimke sisters, and many others sought freedom for all black slaves and equal rights for themselves at the same time. It was not until after the Civil War that the causes of former slave men and white women were divorced from each other. How this happened is a complicated piece of history, with conflicting accounts of who was at fault in splitting the coalition. It is clear that the early woman suffrage movement itself broke apart over the refusal of Anthony and Elizabeth Cady Stanton to support the Fourteenth Amendment because it restricted the word "citizen" with the word "male" for the first time in the Constitution. 85

The former female slaves did not figure into the rhetoric of the Republicans and reformers who turned the white women away with the phrase: "It is the Negro's hour," to which Elizabeth Cady Stanton angrily replied: "May I ask . . . just one question based on the apparent opposition in which you place the Negro and the woman. My question is: do you believe the African race is composed entirely of males?" 86 Sojourner Truth, virtually the only black woman's voice from this early period, said: "There is a great stir about colored men getting their rights, but not a word about the colored women and if colored men get their rights, and not colored women

Justice Kennedy: You are not suggesting that gender stereotypes are more valid than race stereotypes, are you?

Counsel: No. There has been a particular problem with invidious race discrimination, and there has not been a similar problem with gender discrimination. The court has to draw the line somewhere if it is going to preserve the institution of peremptory challenge.

50 Crim. L. Rptr. 5183 (March 4, 1992) (oral argument in Georgia v. McCollum, No. 91-372, Feb. 26, 1992); see People v. Motten, 704 P.2d 176, 178, 181-83 (Cal. 1985) (finding black women a discrete and cognizable group; overruling a trial judge who said to defense counsel's objection to striking of black women: "You have got women on the jury. What function does a Black woman fulfill that the White woman doesn't?").


86. Theodore Stanton & Harriet S. Blatch, Elizabeth Cady Stanton as Revealed in Her Letters, Diary and Reminiscences 104-06 (1920); see also William McFeely, Frederick Douglass 266-69 (1991).
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1993] theirs, you see the colored men will be masters over the women, and it will be just as bad as it was before."87

The woman suffrage movement was born in the dawn of the realization that unless they were forced into it, neither politicians nor statesmen would ever go beyond the enfranchisement of black men. It took fifty-two years, roughly fifty national campaigns, and almost 1,000 state campaigns, as well as the whole adult life of many earnest women, to win the vote. From the beginning, their struggle was also about the right to serve on juries. The two causes were the twin indicia of full citizenship both in the minds of woman suffragists and in the attitudes of American society.88

The force of this history has borne in on me lately as I have studied the seemingly endless petitions and debates, conventions and

87. Sojourner Truth, who took this name to replace the one given her as a slave, was an important figure in the early women's movement. 2 Susan B. Anthony & Ida Harper, History of Woman Suffrage 193 (1881). For a sense of the immediacy of the connection between women's rights and former slaves' rights, see History of Woman Suffrage (Elizabeth C. Stanton et al. eds.) (in six volumes published 1848-1920).

88. This is a re-casting of the figures in Carrie C. Catt & Nettie R. Shuler, Woman Suffrage and Politics 107-08 (1970). See generally History of Woman Suffrage, supra note 87. Jury service as a badge of full citizenship and a form of political participation was within the intent of the framers of the Sixth and Seventh Amendments. Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1151, 1187-89 (1991). In 1848, De Tocqueville wrote about the jury "as the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule." Alexis De Tocqueville, Democracy in America 254 (J.P. Mayer & Max Lerner eds., 1966). In the late nineteenth century, a legal scholar wrote of the purposes of jury service, numbering among them: "it makes a participation of the public in the administration of justice possible"; and "it is the greatest practical school of free citizenship." Francis Lieber, Civil Liberty and Self-Government 234-37 (1874), quoted in Paul D. Carrington, The Seventh Amendment: Some Bicentennial Reflections, 1990 U. Chi. Legal F. 93, 37-38. The modern Court has recognized explicitly that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.” Powers v. Ohio, 111 S.Ct. 1364, 1369 (1991). Woman suffragists drew all these same connections between jury service and citizenship. See infra notes 99-104 and accompanying text.

Women's history sources and the briefs in cases arguing for extending Batson to female gender excellently explicate how jury service fits into the other great early goals of the women's movement. See, e.g., Eleanor Flexner, Century of Struggle 164 (1975) (finding that jury duty was "one of the most basic demands voiced by the women"); Aileen Kraditor, The Ideas of the Woman Suffrage Movement: 1890-1920 (2d ed. 1981); Deborah L. Rhode, Justice and Gender 48-50 (1989) (citing the "persistent" and "unsuccessful" feminist challenges to gain jury service for women). Rhode further argued that "abolishing gender discrimination in jury selection was one of the feminists' earliest demands, and passage of the Nineteenth Amendment inspired a sustained litigation campaign for that objective." Id. at 48. As the amicus brief of the ACLU pointed out, Hoyt v. Florida was as much about the citizenship right of women to serve on juries as about the defendant's right to be tried by a representative jury. Cf. Grace H. Harte, Women Jurors on the American Scene, 25 Women's L.J. 9, 9 (1939) (discussing the valiant fight of women to "lift the searing brand or stigma of inferiority resting on their sex so long as the jurybox in any state is sacrosanct to men only").
marches, bill-drafting and lobbying, that consumed the time of Clara Shortridge Foltz, a pioneer suffragist and the first woman lawyer on the Pacific Coast. Using one important year of her life for illustration—the year before Strauder, I want to show first that the arguments against women in public life were fused. Whether it was the vote, jury service, or entry to the professions that women sought, they met the same contentions about their rightful roles, and they found each rejection rooted in “an assertion of their inferiority.”

In the years 1878 and 1879, Foltz, together with other suffragists, including notably Laura Gordon, the second woman lawyer in California, pursued rights for themselves and other women in every conceivable public forum. They began in the legislature where they lobbied for woman suffrage, and for the amendment of the California code section that limited the legal profession to white men.

They faced the constant refrain that voting, its attendant right to serve on juries, and being a lawyer, would “unsex” women—a charge as dire then as it would be today. Its force appears in the following verse from a popular magazine, printed at the moment Foltz and Gordon were campaigning for access to the ballot and the jury box:

Shame unto womanhood! The common scold
Stands railing foul-mouthed in the public street;
And in the mart and ‘fore the justice seat
Her shallow tale of fancied wrongs is told.


For sources illustrating that the fight for jury service encountered the same responses as the fights for other rights, see Rhode, supra note 88, at 49; see also Sara Evans, Born for Liberty: A History of Women in America (1989); Joan Hoff, Law, Gender, and Injustice (1991); Jennie L. Barton, Jury Service for Women, in 1 Women in American Law 330 (Marlene S. Wortman ed., 1985); Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, 7 Women’s Rts. L. Rep. 175, 177 (1982). For cases reflecting the notion that women were unfit for most aspects of public life, see Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (participation in labor force); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (practicing law); In re Belva A. Lockwood, 9 Ct. Cl. 346 (1873), (practicing law); In re Lavinia Goodell, 39 Wis. 232, 245 (1875) (practicing law).
No woman these such as our hearts enfold,
Mothers and wives are cast not in this mold.\textsuperscript{90}

The apparent fear was that a public woman would no longer have

time for the domestic duties that were her higher and finer calling. Time spent “fore the justice seat,” would, moreover, be a pollutant

for women who were supposed to inhabit an ideal world of nur-
turance and tenderness. By the very nature of their personalities

and training, women were unfit for “all the nastiness of the world

which finds its way into courts of justice, all the unclean issues . . .
sodomy, incest, rape, seduction, fornication, adultery . . . libel and

slander of sex, impotence, divorce” and many more “among the

nameless catalogue of indecencies.”\textsuperscript{91} This is a quote from an opin-

ion, read in its entirety by Clara Foltz’s opponent who argued in

1879 that though she had been admitted to practice law, she should

not be allowed to study it at California’s newly established Hastings

College of the Law. The opinion, written by a Wisconsin judge, de-
nied Lavinia Goodell the right to practice law, because “[r]everence

for all womanhood would suffer in the public spectacle of women so

engaged.”\textsuperscript{92}

Woman defiled was a common rhetorical trope in the debate

about all forms of equal rights and jury service its prime example.

For instance, when Clara Foltz, Laura Gordon, and the other suf-

fragists lobbied the California constitutional convention of 1879 to

include woman suffrage, the chief opponent, assuming that the vote

would bring with it jury service, argued that women would lose their

purity first by hearing all the terrible evidence in court, and second

by being sequestered with male strangers to decide the case. This

idea of women relating to men as fellow jurors was seen as singu-

larly lewd. In exasperation, one of the women’s supporters finally

made the relevant comparison to crude racist arguments, recalling

that when the great abolitionists Gerritt Smith and Wendell Phillips

spoke:

[T]here were . . . these old whitened sepulchers, asking us: “Do

you want your daughter to marry a nigger?” . . . Now these

same fossilized ideas are presented to an intelligent audience.

“Do you want your daughter locked up on a jury room? . . . Ha

ha.”\textsuperscript{93}

\textsuperscript{90} Babcock, “Constitution-Maker,” \textit{supra} note 89, at 866, 907. (citing Sonnet, Puck, Jan. 1878, at 8-9.)

\textsuperscript{91} Goodell, 39 Wis. at 245-46 (denying Lavinia Goodell admission to the bar), quoted in Babcock, “First Woman,” \textit{supra} note 91, at 711-12.

\textsuperscript{92} Goodell, 39 Wis. at 246.

\textsuperscript{93} Babcock, “Constitution-Maker,” \textit{supra} note 91, at 894 (citing \textit{DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1367 (1879)}).
The third standard argument by opponents was that women would skew the otherwise reliable factfinding process. It was speculated that they would vote only for handsome men, whether at elections or on juries. Similarly, women lawyers would use their seductive wiles to cause juries to acquit the guilty and reward the undeserving. Whether as lawyers or as jurors, it was thought that women would not be able to sustain the mental labor and intensity of the work and would constantly fall ill, causing mistrials and other inefficiencies in the system.

Although the arguments against women in public life were joined, winning the vote and right to practice law did not automatically carry with it access to jury service in every state. Women who had

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94. Babcock, "First Woman," supra note 89, at 680 n.80 (quoting Sacramento Union, January 11, 1878, at 2) ("Impressionable male jurors" would "return a verdict of acquittal without leaving the box," and "the law and the facts would be simply ignored."). For another example of the attitudes of the time toward women jurors, see Women as Jurors, 95 CENT. L.J. 57 (1921), concluding that one of the dangers of enfranchising women was imposing on them the additional "duties of citizenship hard for them to perform . . . none [of which] are more difficult for women than that of determining the issues in a case at law." The article continued by noting that "[t]here are many serious and embarrassing situations caused by a woman's presence on a jury and these embarrassments sometimes affect the woman herself and sometimes the case which she is called upon to decide. . . . They are sometimes very embarrassing to lawyers on both sides of a case who do not know the psychology of a woman's mind and are not sure which way she is going to jump." Id. After cataloguing the reasons for excluding women from juries, this same article went on to conclude that because "a woman's intuition will reach a just conclusion where frequently a man, who is unable or refuses to use his reason, will stumble into error," the influence of "women in the jury box cannot, on the whole, but prove wholesome and beneficial." Id. at 58.

95. Wyoming, as territory and then as state, was first to grant women suffrage in 1869. See Grace R. Hebard, The First Woman Jury, 7 J. AM. HIST. 1293 (1913) (noting that Wyoming Women's Suffrage Act marked the first time that government (Commonwealth of Wyoming) derived its powers from "the consent of the governed" and not just from "a designated portion of those governed"). In the California constitutional debates of 1879, much was made of the experience in Wyoming, with opponents referring often to the mistrial caused after two weeks when a woman juror fell ill. DEBATES AND PROCEEDINGS OF THE [CALIFORNIA] CONSTITUTIONAL CONVENTION 1015-16 (1879).

96. See Barbara A. Babcock, et al., Sex Discrimination: Causes and Remedies 65-68 (1975) (comparing effects of Fifteenth and Nineteenth Amendments on rights attendant to suffrage, particularly jury service); John D. Johnson & Charles L. Knapp, Sex Discrimination Law: A Study in Judicial Perspective, 46 N.Y.U. L. REV. 675, 708-21 (1971) (detailing court cases seeking equal jury service); see also Rhode, supra note 88; see generally People v. Krause, 196 Ill. App. 140 (1915) (holding that although women are legal voters, they are not eligible for jury service in criminal cases); People v. Goebinger, 196 Ill. App. 472 (1916) (although women can vote, women can not serve as jurors in criminal cases); Commonwealth v. Welosky, 177 N.E. 656 (Mass. 1931) (holding that even though women were enfranchised, word "voter" in pre-existing jury eligibility statute referred solely to males); In re Opinion of Justices, 150 N.E. 685 (Mass. 1921) (interpreting state statute to hold that women are not liable to jury duty in light of history of times and entire system from which statute forms part); State v. James, 114 A.
counted on the vote to solve the major problems of discrimination now waged new battles for equal jury representation. In California, Clara Foltz saw the clause she had won at the 1879 constitutional convention, guaranteeing women access to all businesses, vocations, and professions, become the centerpiece of an opinion upholding their right to serve on juries.97 In this renewed struggle, women lawyers were in the forefront speaking, writing, lobbying, petition-

553 (N.J. 1921); In re Grilli, 179 N.Y.S. 795 (Sup. Ct. 1920) (denying woman’s claim that jury service is incidental to and apart of suffrage); Harper v. State, 234 S.W. 909 (Tex. Crim. App. 1921); McKinney v. State, 30 P. 293, 295 (Wyo. 1892) (holding that right to vote and hold office does not include right of women to serve on juries despite another constitutional clause which provided that “both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges”). But see People v. Bartlz, 180 N.W. 423 (Mich. 1920) (holding that constitutional declaration that every inhabitant of state shall be elector and entitled to vote meant that statute requiring jurors to be drawn from electors meant women were entitled to perform jury duty); Parus v. District Court, 174 P. 706 (Nez. 1918); Commonwealth v. Maxwell, 114 A. 825 (Pa. 1921).

See generally Minor Bronaugh, Jury Service as Incidental to Grant of Women’s Suffrage, 27 Law Notes 147, 150 (1923) (concluding that, according to majority view, adoption of constitutional amendment conferring on women right to vote does not ipso facto render them liable for jury service; jury service is legislative duty imposed rather than constitutional right conferred); The Effect of Women Suffrage on Our Present Laws, 6 Va. L. Reg. (n.s.) 454 (1920); Women Jurors, 26 Case & Comment, Nov.-Dec. 1921, at 136 (summarizing cases which generally find jury service not to be right incident to suffrage, but concluding that right of jury service will probably be gradually extended to women where it was not then required); Tried and Approved—The Woman Juror, 70 Literary Dig., Sept. 1921, at 46 (stating that women automatically became eligible for jury service in Ohio when they won right to vote); Note, Constitutionality Under the Fourteenth Amendment and the Proposed Nineteenth Amendment of State Laws Limiting Jury Service to Male Citizens, 6 Va. L. Rev. 589, 592 (1920) (arguing that because jury service is duty and not matter of right, it is not governed by the Fourteenth Amendment; suffrage is not coextensive with citizenship); Note, Jurors—Effect of the 19th Amendment on Qualifications of Jurors, 21 Ill. L. Rev. 292 (1926) (summarizing cases interpreting whether Nineteenth Amendment necessarily required women’s jury service).

97. Women won the ballot and the right to hold office in California in 1911. Jury service followed automatically, but within a few years a criminal defendant sought habeas corpus on the ground that his jury including women was unconstitutionally composed. In re Mana, 172 P. 986 (Cal. 1918). In holding that women were entitled to serve, the court relied on Article XX, Section 18 of the 1879 Constitution, which Clara Foltz and the other suffragists had lobbied through, and which had gained momentum from their suit against Hastings, and as sort of consolation prize for the failure of suffrage. See Babcock, “Constitution-Maker,” supra note 89, at 891-97. Clara Foltz was one of the few early suffragists who lived to cast a legal ballot; even more rare was that a pioneer woman lawyer such as she would endure to argue cases before juries that included women. See also Rhonda Copelon et al., Constitutional Perspectives on Sex Discrimination in Jury Selection, in 2 Women’s Rts. L. Rep. 3, 6 (1975) (explaining that despite early recognition that jury service was an important aspect of citizenship, courts and legislators were slow to allow women to participate).
ing, and briefing cases which they signed in their professional capacity.98

Like the suffrage crusades, the campaign for jury service was arduous and long. The law reports of many states, and federal courts as well, reflect the second major wave of women's quest for political and social equality.99 Perhaps the best known state case is the old law school chestnut that held, even after women were enfranchised, that the word "voter" in a jury eligibility statute referred solely to males.100 In 1961, the Supreme Court ruled in Hoyt v. Florida101 that a state could automatically exclude women from jury service unless they voluntarily registered, without violating equal protection of the laws. It was not enough for Gwendolyn Hoyt to show that of 46,000 registered women voters in the county, only 220 had volunteered over a period of many years as jurors. Nor was the Court appalled by the sight of a woman on trial for the murder of her husband before an all-male jury. Instead of resonating with equal protection concerns (like Strauder) the opinion invoked "woman as the center of home and family life," and found that the state's interest in enabling her presence there could reasonably supersede all else.102

98. In In re Mana, 172 P. 986 (Cal. 1918), Gail Lauglin appeared, "for various organizations of women." See, e.g., Florence Allen, To Do Justly (1965); Florence Allen, Tried and Approved — The Woman Juror, 70 LIT. DIG. 46 (1922) (Allen was an Ohio judge when she wrote this, among many such articles. Later she was the first woman appointed to a federal circuit court); Grace H. Harte, Women Jurors and the American Scene, 25 WOMAN L.J. 9, (1939) (calling on women lawyers to fight for jury duty for women); Burnita S. Matthews, The Woman Juror, 15 WOMAN L.J. 15 (1927) (Matthews was later the first woman federal district court judge in Washington, D.C.); Women as Jurors, 7 VA. L. REG. (n.s.) 634 (1921) (Annette Abbot Adams, first woman Assistant Attorney of the United States, Florence Allen and others). For a comprehensive listing of the legal, scholarly and popular materials capturing the struggle of women for full citizenship rights and responsibilities, including jury service, see Carole L. Hinckcliff, American Women Jurors: A Selected Bibliography, 20 GA. L. REV. 299 (1986).

99. For a discussion of women's historical exclusion from jury service, see Beyond Batson, supra note 77, at 1924-27 (discussing women's historical exclusion from jury service); Carol Weisbrod, Images of the Woman Juror, 9 HARV. WOMEN'S L.J. 59, 60-61 (1986).


101. 368 U.S. 57, 62 (1961) (holding that state may constitutionally relieve woman from jury service unless "she herself determines that such service is consistent with her own special responsibilities").

102. Id.; see Rhode, supra note 88, at 50 (explaining that holding in Hoyt "was significant less for its effect on jury classifications than for its articulation of prevailing legal ideology, for its assumption about gender differences, and its tolerance of gender bias"). For cases explicating similar assumptions, see Edwards v. Healy, 363 F. Supp. 1110 (E.D. La.), vacated and remanded, 421 U.S. 772 (1975); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966); see also Taylor v. Louisiana, 419 U.S. 522 (1975).
But Hoyt is, in some sense, an outlier among Supreme Court cases treating gender and jury service. Many of the Court’s most far-reaching jury cases deal with women, including those that rendered Hoyt obsolete by requiring that there be a fair cross-section of the community in jury pools. Moreover, in holding that the “systematic and intentional exclusion of women, like the exclusion of a racial group,” violated a federal statute whose purpose was to make juries representative, the Court in Ballard v. United States wrote words whose ring has yet to be fully realized: “The truth is that the two sexes are not fungible . . . the subtle interplay of influence one on the other is among the imponderables. . . . [A] flavor, a distinct quality is lost if either sex is excluded.”

103. Taylor, 419 U.S. at 533-37. At issue in Taylor was a Louisiana statute that required women, but not men, to complete a written declaration to become eligible for jury service. Id. at 523. As a result of this exemption for women, only 10% of the women in the county ended up in the jury pool, while 53% were eligible to serve. Id. at 534. The Court held that women cannot be categorically excluded because of sex alone, and the court further found that exemptions for women resulted in juries that do not represent a fair cross-section of the community. Id. at 526-33; see Duren v. Missouri, 439 U.S. 357, 362 n.16, 363 (1979) (invalidating a Missouri jury selection system which provided automatic exemptions for any women requesting them; consequently some venires had less than 15% women); see also Copelon et al., supra note 98, at 3 (arguing, before Duren, that existence of automatic exemptions based on notion that jury service is particular hardship for women operated to drastically reduce number of women serving on juries).

In addition to Taylor’s specific ruling that domestic exemptions for women violate fair cross-section requirements under the Sixth Amendment, the domestic exemption upheld in Hoyt was rendered obsolete by the Supreme Court’s adoption of heightened scrutiny for all gender classifications. See Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (holding that classifications based on sex are subjected to strict scrutiny); see also Craig v. Boren, 429 U.S. 190 (1976) (settling on intermediate scrutiny as official standard of review for gender classifications). Under intermediate scrutiny, the reasons advanced in Hoyt favoring the exemption would likely fail to meet the required showing that the exemption was substantially related to an important governmental interest. Administrative convenience has been rejected as a justification for gender classifications, as have laws which protect archaic and overbroad generalization. See, e.g., Wengler v. Druggist’s Mutual Ins. Co., 446 U.S. 142, 147 (1980) (invalidating a statute that automatically assumed dependency of women on their husbands but not the converse for purposes of workers’ compensation death benefits); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (upholding differential treatment of women for purposes of tenure in the navy where women have fewer opportunities to complete the requisite number of tasks required for promotion). Under this heightened scrutiny, the desire to keep women as the center of home and family would definitely be struck down as a justification for a law that facially adverted to gender.

104. Ballard v. United States, 329 U.S. 187, 193-94 (1946) (holding that women may not be systematically excluded from jury service in federal courts that sit in states allowing them to serve); see also supra notes 54, 73 and accompanying text. The Court relied in this case on its supervisory power and on Judicial Code § 275, 28 U.S.C. § 241 (1940) (current version at 28 U.S.C. §§ 171, 173, 433 (1988)).
To recapitulate the history, women sought jury service as one facet of a greater struggle for recognition in the public life of the community. Arguments that it would be unseemly, inappropriate, and harmful for women to be jurors were joined with the contentions that they were incompetent to vote or practice law as well. In the end, acceptance of women as jurors proved hardest to achieve because special legislative exemptions (like that in Hoyt) made it unlikely that women would actually serve even when they had the right. As these kinds of exemptions have largely disappeared, the remaining point at which women may effectively be excluded from jury service is in the exercise of the peremptory challenge.

The denouement of the whole jury selection story came down to the peremptory challenge for African Americans too, resulting in the Batson line of cases. Because the story of women’s exclusion from jury service is not only analogous to the history of racial exclusion but also the same story growing out of the same historical period and events, the same conclusion must also be reached. What the Supreme Court said of the African Americans who were peremptorily struck in Edmonson is equally true of women: they should no longer be “required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system.” 105

Opponents of the extension of Batson will argue that the implications of woman-based strikes are fundamentally different from racial peremptories. There is less humiliation and stigma, they will say, when gender rather than race is the reason for the peremptory challenge. Yet to those watching in the courtroom, at the counsel tables, in the newspapers and appellate records, striking a woman for no apparent reason other than her gender carries a message far different than striking, for example, a lawyer from the jury, even (or especially) a woman lawyer. The message comes from the long history of sex discrimination in this country and is based strongly “in archaic and overbroad generalizations.” 106

105. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991). The Court made this observation in relation to its finding of state action. The paragraph quoted in the text continues: “The injury to excluded jurors would be the direct result of governmental delegation and participation.” Id. Edmonson contains as well a paean to the importance of the civil jury that would be inconsistent with sex discrimination in its administration. Id. at 2082.

106. See Frontiero, 411 U.S. at 682 (holding it was denial of equal protection for women’s military dependents to receive fewer benefits than men’s dependents). “[W]hat differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating
The unexplained strike of a woman says that she does not belong on the jury—that she could not be impartial or that she is incompetent. The crude stereotypical message is summed in the trial manuals and jury selection tracts that typically advise that “women are more suspicious of other women, especially as plaintiffs in civil cases or defendants in criminal cases” and that “women are more likely than men to be influenced by the physical attractiveness and personality traits of witnesses.”

Striking individual women on the assumption they hold such views because of their sex is “practically a brand upon them, affixed by the law, an assertion of their inferiority”—to return as ever to the words of Strauder.

Again it will be said, all peremptory challenges are based on stereotypes, expressing various intuitive biases. When a postman or Presbyterian is struck, unpleasant stereotypes are also at work—so goes the refrain. But in the case of the postman or the Presbyterian, the same ancient stereotypes about their competence and predispositions have not been used to prevent them from voting, being summoned for juries, pursuing their chosen professions and vocations or otherwise participating in public life and discourse.

Though women are now becoming lawyers, as well as voting and holding office in unprecedented numbers, sex discrimination still exists and the courtroom, in particular, remains, in many jurisdictions, a white male arena. Gender bias task forces in more than half the states have documented the unequal, and comparatively bad, treatment of women attorneys, witnesses, and parties in the court-

the entire class of females to inferior legal status without regard to the actual capabilities of individual members.” Id. at 686-87. Counsel for the defendant in Eiland v. State, 607 A.2d 42 (Md. App.), cert. granted, 613 A.2d 394 (Md. 1992) (arguing that the prosecutor’s peremptory challenges of black women violate equal protection) pointed out that the Court in its most recent peremptory challenge case, Georgia v. McCollum, 112 S. Ct. 2348 (1992), stated that “constitutional considerations militate against the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.” Id. at 2539. The court’s reference to “the accident of birth” clearly indicates that peremptory strikes aimed specifically at women are unlawful, for the Court has previously remarked that “sex...is an immutable characteristic determined solely by the accident of birth.” Id. (citing Frontiero, 411 U.S. at 686) (emphasis added).


108. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

109. See Holland v. Illinois, 493 U.S. 474, 486 (Scalia, J., dissenting) (analogizing white defendant’s challenge to strikes of blacks to claim based on exclusion of “postmen, or lawyers, or clergymen, or any number of other identifiable groups”).

room. The open and unjustified striking of women from juries only adds to the chill. Not surprisingly, women lawyers are once again in the forefront of the final fight to win equal access to jury service.

IV. PRESERVING THE PEREMPTORY

The tradition of peremptory challenges . . . already venerable at the time of Blackstone, was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, was recognized in an opinion by Justice Story to be part of the common law of the United States, and has endured through two centuries in all the States.

The Supreme Court leaves the translation of large edicts like those in the Batson line to the offices and officers of the courts below. Some would find the peremptory challenge too much like the offending right hand, and heeding the Biblical injunction, simply cut it off. Others would make race the only forbidden

110. See generally Karen Czapskiy, Gender Bias in the Courts: Social Change Strategies, 4 GEO. J. LEGAL ETHICS 1, 1-3 (1990); Jeannette Svent, Gender Bias at the Seat of Justice: An Empirical Study of State Task Forces (manuscript on file with author) (showing that one universal finding of 14 completed state reports is that the courtroom atmosphere is still decidedly chilly for women).

111. Judy Clarke, Mario Conte, Sara Rapport, Brief of Amicus Curiae, National Association of Criminal Defense Lawyers on Rehearing En Banc 21-37, United States v. DeGross, 960 F.2d 1433 (No. 87-5226) (9th Cir. 1991) (discussed supra note 77 and accompanying text); see also Amicus Curiae Brief for Elizabeth Holtzman, Batson v. Kentucky, 476 U.S. 79 (1986); Marcia Greenberger, Myung Lee for the National Women's Law Center, Brief of Amici Curiae in Eiland v. State, 607 A.2d 42 (Md. App.) (No. 265), cert. granted, 613 A.2d 394 (Md. 1992). In addition to litigating the issue of gender-based peremptory challenges, women are also the leading academic commentators on the subject. See, e.g., Sagawa, supra note 77; Underwood, supra note 13; Weisbrod, supra note 100.


category.114 Still others, with whom I agree, would use the occasion to rework and revitalize the jury selection process so that it better suits all its declared purposes, one of which is to help ensure the willing acceptance of verdicts.115

Critics and dissenters have warned (or perhaps threatened) that the Batson line will make the peremptory challenge so difficult to administer that its abolition must quickly follow.116 To forbid gender-based strikes would simply be the last straw under this view. Somewhat paradoxically, though, the Batson dissenters have in the course of their argument, elevated the peremptory from an ordinary (if old) procedural device to near constitutional status.117 Repeatedly, the Supreme Court and lower courts have praised the peremptory challenge as well-designed to ensure both that juries are impartial and that they appear so to the litigants and to society at large.118 Thus, any effort to abolish peremptories would rouse due process objections, as well as Sixth or Seventh Amendment claims about the nature of the jury that is guaranteed to defendants or litigants.

Aside from the difficulty of accomplishing it, total elimination of the peremptory challenge is ill-advised as it would focus jury selection entirely on the challenge for cause. The judge alone—in a series of highly discretionary, practically unreviewable decisions—would then be permitted to shape the jury in every case. But under the Constitution, the jury trial is guaranteed precisely because our tradition is not to trust the unilateral actions of judges.119 In particular, the jury is meant to offset the class bias and elitism that characterizes the judiciary, yet we can hardly expect judges to find

114. "A careful examination of the Batson opinion, however, leads this Court to the firm conclusion that, in light of the important position of the peremptory challenge in our jury system, the Court intended Batson to apply to prohibit the exercise of peremptory challenges on the basis of race only." United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988), quoted in Eiland v. State, 607 A.2d 42, 59 (Md. App.), cert. granted, 613 A.2d 394 (Md. 1992); see supra note 77 and cases cited within.


117. Batson, 476 U.S. at 112 (Burger, C.J., dissenting); id. at 134 (Rehnquist, J., dissenting).

118. "We have acknowledged that this device [the peremptory challenge] occupies 'an important position in our trial procedures,' and has indeed been considered 'a necessary part of trial by jury.'" Holland v. Illinois, 495 U.S. 483, 484 (1989) (citing Batson, 476 U.S. at 98; Swain v. Alabama, 380 U.S. 202, 219 (1965)).

"cause"—i.e. incipient bias—in jurors who reflect their own image in background or outlook.

Not only would the increased importance of the cause challenge heighten the judge’s power, but abolition of the peremptory would make it more difficult for the litigant to lay the groundwork for a cause challenge, as vigorous questioning may antagonize and hence prejudice a potential juror. The peremptory challenge is the insurance that makes genuine inquiry into juror bias possible.120

Most important, the peremptory endows the litigant with a role in the process, thus promoting in Blackstone’s words “a good opinion of the jury the want of which might totally disconcert him.”121 Although the Supreme Court disallows race as a reason for striking jurors, and should forbid female gender as an explanation also, it does not follow that litigants must relinquish all sense of choice over their shared juries.

The peremptory is important enough that instead of urging our legislatures to abolish it, we should seize the occasion of the Supreme Court’s intervention in jury selection to enact modern statutes that will aid our “progress toward a multiracial democracy.”122 This essay concludes by outlining some of the elements such a statute might include, though many of the suggestions could easily be implemented by trial judges or by appellate courts through their respective supervisory powers.123

A comprehensive statute would begin by broadening the juror pool beyond voter registration lists to include licensed drivers, utility users, and residents listed in the city directory.124 Jurors to be summoned should each receive (on the back of the summons), as they now often do, a questionnaire covering items relevant to their basic fitness to serve.

The statute would forbid racial and gender discrimination in the exercise of peremptory challenges. It would also reduce peremptories where they are disproportionate to jury size in the juris dic-

120. Underwood, supra note 14, at 771 (describing peremptory as “margin of protection” for cause challenges); see supra notes 18-19 and accompanying text.

121. BLACKSTONE, supra note 18, at 1714. This was written in the criminal context about the right to challenge peremptorily as “a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous.” Id.

122. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991); see also supra notes 65-67 and accompanying text.

123. Many of the suggestions here were presented at the Conference on the Civil Jury from which this article springs. See Steven A. Saltzburg, Improving the Quality of Jury Decisionmaking, in VERDICT (Robert Litan ed., forthcoming 1993); H. Lee Sarokin and G. Thomas Munsterman, Recent Innovations in Civil Jury Trial Procedures, in VERDICT, supra.

tion. In light of the history of the peremptory challenge and of the greater significance of the jury verdict to the criminally accused, legislation might award more challenges to the defense.

The voir dire process can also be changed to facilitate the exercise of peremptory challenges on a basis other than race or gender. Juror questionnaires can be supplemented by questions, tailored to individual cases designed to probe the attitudes of potential jurors toward sensitive issues that are likely to arise.

Such tailored questionnaires can help the parties base their arguments for cause challenges and their exercise of peremptories on actual suspicion of race prejudice rather than simply on the color of the potential juror's skin. And though they cannot substitute for some public procedures—to see and to hear is, after all, the point of voir dire—the questionnaires can provide grounds for open inquiry that neither humiliates the potential juror nor rouses the ire of the others in the venire.

In order to explore prejudiced attitudes more effectively and efficiently, the parties might give their opening statements to the whole venire and then make inquiries afterward for both cause and per-

125. Pizzi, supra note 14, at 147-51 (suggesting this change, while acknowledging difficulties of statutory reform).

126. See, e.g., William W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 581 (1991); Sarokin & Munsterman, supra note 123; Robert Takesug, Jury Selection in a High-Profile Case, 40 Am. U. L. Rev. 837 (1990) (discussing the jury questionnaire in United States v. DeLorean, a highly publicized criminal case in which the defendant was acquitted). Questionnaires may not only provide a greater volume, but also may raise the quality of information. See Robert W. Balch et al., The Socialization of Jurors: The Voir Dire as Rite of Passage, 4 J. Crim. Just. 271, 278 (1976) (reporting strong tendency of jurors in oral voir dire to provide answers they felt the questioner wanted or expected them to give).

127. Georgia v. McCollum held that the third party standing which allows litigants to raise the rights of excluded jurors depends partly on the bond formed between attorneys and potential jurors at the voir dire. 112 S. Ct. 2348, 2357 (1992); see also Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991); Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991). The public inquiry will better enable the establishment of such a bond if private questionnaires are first administered, allowing for better framing of questions, and perhaps on some sensitive issues, individual voir dire out of the presence of the other venirepersons. (This aspect of McCollum would also support attorney-conducted voir dire, which has recently become less frequent in Federal jury trials. See Fed. R. Civ. P. 47(a) (allowing judge-conducted voir dire in the court's discretion)). For other suggestions on improving voir dire through a combination of attorney and judge conducted inquiry and questionnaires, see Babcock, supra note 9, at 545, 561-62 (citing sources).

Some provision for the confidentiality of jury questionnaires must be included in the statute or considered case by case. In re South Carolina Press Ass'n, 946 F.2d 1037 (4th Cir. 1991), limited access to juror questionnaires that were described as "designed to examine the prospective jurors' possible racial prejudice, attitudes toward elected officials, concerns about 'sting' operations, efforts to bribe members of the General Assembly, use of undercover agents, possible entrapment, and may other sensitive areas . . ." Id. at 1038 n.2.
emptory challenges. Potential jurors would then understand how and where their answers fit into the theory of the case and the evidence that will be presented. Once procedures are in place allowing parties to act on intimations of actual bias, rather than on the crude proxy of race or gender, then the requirement for making a prima facie case by letting one or two strikes pass before objecting would no longer be necessary.

Expanding the information available from voir dire responds to the concerns of those who fear that modifying the peremptory challenge will destroy the mystique—or science—of jury selection. Automatic strikes of white women and people of color are not only unnecessary to the art, but they detract from it. When the legendary jury lawyer Clarence Darrow spoke in a much-cited passage of “the knowledge of life, human nature, psychology and the reactions of the human emotions,” that a lawyer must bring to jury selection, he was looking at juries that contained no racial minorities and few women. Rather, in shaping the jury he examined “nationality, business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads and many more matters that combine to make a man.” These qualities will still be open for consideration after the Batson line of cases is complete.

Litigants should be able to point to attitudes that, when held by an individual, would make for bias in a particular case, and to devise procedures for uncovering these. Recently, for instance, professional football players sued to terminate a contractual system in which they allegedly could not market their services freely. They submitted affidavits from sports psychologists about the biases of “highly identified sports fans” and sought a tailored questionnaire, individual voir dire and extra peremptory challenges to identify and

128. Sarokin & Munsterman, supra note 123; Judge Jim Corrigan (N.D. Colo.) reported successful use of this technique at the Brookings-sponsored conference discussed supra note 123.

129. Noting that the purpose of Batson is to eliminate discrimination, not to minimize it, the New York Court of Appeals has, in effect, cancelled the requirement of a prima facie case. People v. Jenkins, 554 N.E.2d 47 (1990). Mary Erickson, Administering Batson, Research Memorandum (on file with author), finds that “fast forwarding” to the Batson inquiry is the trend, but notes the importance of making a record of voir dire sufficient for review.


131. Id. Darrow did not use the male pronoun generically, since he advised striking any women who might be called.

eliminate such fans. Special procedures for exploring attitudes and experience might also be appropriate to sexual harassment cases, for another example, rather than the present crude system in which one side strikes women and the other, men.

Finally, the actual routine of exercising challenges can be revised to ease the stigma of rejection. One attractive suggestion is a form of "affirmative selection," in which, after voir dire and cause strikes, each party designates, in preferential order, those venire persons who should sit on the jury. Jurors who appear on both lists are seated, and then, alternating between lists until the number of peremptories is reached for each side, the Court will either seat or strike a juror who appears on only one list. If the juror is a white woman or a person of color, a neutral explanation would be required. At the very least, courts should insist, as many already do, that the explanations for strikes are offered out of the potential juror's presence.

The Batson doctrine establishes three kinds of challenges: cause; peremptory; and modified peremptory, i.e. those for which some explanation is required. In many jurisdictions, practices regulating and enabling a modified peremptory are already in effect and can serve as models for statutory, as well as discretionary procedural change. Although its administration takes time at the jury selection stage, and still generates new issues for appeal, Batson has not, by any account, created the chaos some critics warned it would. And, less than a decade has passed since the case was decided—not very long in law time. There is, finally, much we can do procedurally

133. Under similar circumstances, in Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381 (9th Cir. 1984), the court administered a 48 page questionnaire, provided each party with 10 peremptory challenges, and dismissed "jurors for cause if even the slightest doubt of prejudice was raised." Id. at 1400.


136. See Underwood, supra note 14, at 761.

137. State courts in California, Massachusetts, and Florida have had more than a decade's experience in administering Batson-type rules. As Barbara Underwood pointed out, their "experience suggests that the cost of administering the rule need not be overwhelming." Id. at 769; see also Erickson, Administering Batson, supra note 129; Gerald Uelmen, Striking Jurors Under Batson v. Kentucky: Lessons From California, 2 Crim. Just. 2 (1987) (explaining impact of Batson in California courts).
to ease the burden of making jury selection actually and symbolically representative of our best collective selves.

CONCLUSION

The Feminist and the Defense Lawyer

I have been subject to warring impulses in writing this piece. At heart, I will always be a criminal defense lawyer—one of that peculiar breed who look to the jury for their clients’ salvation and their own. Thus, though it has been twenty years since I tried a case, I cannot view with academic detachment the picture of a jury that includes somebody the defendant hates or fears—even for irrational, or unpopular, reasons. That picture could materialize were the peremptory abolished.

On the other hand, as I study American women’s history through the experiences of a single women lawyer, I see how prejudice cripples lives and extinguishes hopes. When Clara Foltz, who could not vote or serve on juries, appeared in court, she often first had to defend herself before she could reach her client’s cause. The accusation was always, in one form or another, simply: “She is a woman.” Through Foltz’s struggles, I have learned that acceptance of the phrase, “She is a woman” as an explanation for any exclusion denies equal protection of the laws. That sort of unfair discrimination, exacerbated when women of color are rejected, occurs now and will continue if women may be peremptorily removed for their gender alone.

Harmonizing these oppositions, I suggest that jury selection procedures be expanded and elevated to preserve the peremptory challenge while eliminating its excesses. This is a conclusion that reconciles competing claims, widens the context, embraces what is, and rejects only rigid dichotomies: thus it is feminist in method as well as in effect.