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Gender-Based Peremptory Challenges Under United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992)

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GENDER-BASED PEREMPTORY CHALLENGES UNDER *UNITED STATES v. DE GROSS*, 960 F.2d 1433 (9th Cir. 1992)

The right to exercise peremptory challenges gives both parties at trial an opportunity to reject jurors from the petit jury without cause.[1] The accepted rationale for this practice is to allow a party to dismiss a potential juror based upon the party's intuitive or subjective impression that the juror is not impartial.[2] The ultimate goal is to impanel a jury that both parties consider fair.[3] The exercise of peremptory challenges is, however, subject to abuse when parties attempt to use the challenges not as a method of selecting an impartial juror, but as means of elimi-

1. The Federal Rules of Criminal Procedure allow both the government and a criminal defendant to make peremptory challenges. FED. R. CRIM. P. 24(b)-(c). Each party is allowed a limited number of peremptory challenges. FED. R. CRIM. P. 24(b) allows the government and the defendant varying numbers of peremptory challenges depending on the severity of the punishment. 28 U.S.C. § 1870 (1988) authorizes the use of peremptory challenges in federal civil cases.

For a detailed discussion of the history of peremptory challenges, see Swain v. Alabama, 380 U.S. 202, 212-17 (1965). *See generally* 47 AM. JUR. 2D, *Jury* § 233 (1969) (discussing the general principle of peremptory challenges).

2. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220. *See also* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553 (1975) (observing that peremptory challenges allow each party to rely on motivations or stereotypes which they do not wish to publicly articulate).

Prejudice is inherent in the exercise of a peremptory challenge. Blackstone identified one of the reasons for the peremptory strike:

> As every one must be sensible, what *sudden impressions* and *unaccountable prejudices* we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; *the law wills not that he should be tried by any one man against whom he has conceived a prejudice*, even without being able to assign a reason for such his dislike.

4 WILLIAM BLACKSTONE, COMMENTARIES 353 (emphasis added).

3. "The right of challenge is almost essential for the purpose of securing fairness and impartiality in a trial." WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 145 (1875).

In criminal cases, it has long been considered paramount that the defendant perceive the jury to be impartial. *See* BLACKSTONE, *supra* note 2.

nating certain jurors and impanelling those who are potentially more partial toward their cause.[4] The United States Supreme Court has declared unequivocally that a party, whether in a civil or criminal case, may not use the peremptory challenge to remove jurors on the basis of race.[5] In *United States v. De Gross*, the Ninth Circuit Court of Appeals extended this prohibition to proscribe peremptory challenges on the basis of gender.[6]

In *De Gross*, the government objected during voir dire to De Gross' use of eight peremptory challenges[7] to strike male venirepersons.[8] The district court found that the defendant's pattern of striking males established a prima facie case of purposeful discrimination.[9] Because De Gross offered no explanation, the court disallowed the eighth chal-

4. "[N]either side really wishes an impartial jury, but rather wishes to do everything possible to find jurors more attuned to its world view." Richard Singer, *Peremptory Holds: A Suggestion (Only Half Specious) of a Solution to the Discriminatory Use of Peremptory Challenges*, 62 U. DET. L. REV. 275, 288 (1985). *See also* Frederick L. Brown et al., *The Peremptory Challenge as Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978) (advocating elimination of prosecutorial use of peremptory challenges because of discriminatory use to exclude blacks and other minorities); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968) (explaining how peremptory challenges were used to maintain all white juries).

5. *See* Georgia v. McCollom, 112 S. Ct. 2348 (1992) (holding that a criminal defendant's exercise of a peremptory challenge was a "state action" for purposes of the equal protection clause, and that he was therefore prohibited from exercising such a challenge in a racially discriminatory manner); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that private civil litigants may not use peremptory challenges to exclude jurors on the basis of race); Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding that criminal defendants may contest race-based exclusions of jurors exercised through peremptory challenges whether or not defendant and the excluded jurors are of the same race); Batson v. Kentucky, 476 U.S. 79 (1986) (finding that the Equal Protection Clause forbids a prosecutor in a criminal case from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to consider the State's case against a black defendant impartially).

6. 960 F.2d 1433 (9th Cir. 1992) (en banc). Other courts confronted with this issue have refrained from extending the prohibition against challenges based upon race to challenges based upon gender. *See infra* notes 54-61 and accompanying text for illustrative cases and their reasoning.

7. The court refers to "a party's attempt to excuse a venireperson as a peremptory challenge" and the court's acceptance of a party's challenge as a peremptory strike. *Id.* at 1435-36 n.1.

8. *Id.* at 1435-36. The defendant, Juana Espericueta De Gross, was accused of aiding and abetting the transportation of an illegal alien. *Id.* at 1435. She exercised seven strikes against male venirepersons before the government objected to her eighth attempt. *Id.* at 1435-36.

9. *Id.* at 1436. The government initially argued that the defendant's strikes against

lenge.[10] Later, De Gross objected to the government's challenge of a Hispanic woman.[11] The prosecution explained that its challenge was made in an attempt to impanel "a more representative community of men and women on the jury."[12] The court accepted the explanation and dismissed the Hispanic venirewoman.[13] The impaneled jury of three men and nine women convicted De Gross.[14] The Ninth Circuit reversed the conviction and held that equal protection principles prohibit any party from striking venirepersons on the basis of gender.[15] Accordingly, the court of appeals affirmed the district court's refusal of De Gross' challenge to a male venireperson and disagreed with the district court's decision to allow the government to strike a Hispanic venireperson on the basis of her gender.[16]

The *De Gross* decision analyzes the principles of equal protection in the context of race-based peremptory challenges and finds them equally applicable in the context of gender-based peremptory strikes.[17] Dating

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males proved her discriminatory intent to exclude them in violation of their Fifth Amendment right to equal protection of the laws. *Id.*

For a discussion of the requirements for a prima facie case of purposeful discrimination, see *infra* text accompanying notes 27-30.

10. 960 F.2d at 1436.

11. *Id.* The woman challenged was the only Hispanic remaining on the venire. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* De Gross timely appealed, and the Ninth Circuit Court of Appeals reversed and remanded. United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), *reh'q granted* 930 F.2d 695 (9th Cir. 1991). On appeal, De Gross argued that the district court erred in denying her peremptory challenge of a male venireperson and in allowing the government's challenge of a Hispanic woman. 960 F.2d at 1436, 1442.

15. 960 F.2d at 1439. Although beyond the scope of this Comment, *De Gross* also held that a criminal defendant's exercise of peremptory challenges is "state action" for purposes of the equal protection clause. *Id.* at 1440-42. The concurring opinion disagreed on this issue. *Id.* at 1443-48 (Reinhardt, J., concurring). Two months later, the Supreme Court came to the same conclusion as the *De Gross* majority in Georgia v. McCollom, 112 S. Ct. 2348, 2354-57 (1992), but not without vigorous dissent. *See id.* at 2361-64 (O'Connor, J., dissenting); *id.* at 2364-65 (Scalia, J., dissenting). For a pre-*McCollom* discussion of why criminal defendants should not be considered state actors for peremptory challenge purposes, see Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989).

16. 960 F.2d at 1442-43. The court concluded that peremptory strikes based upon a person's gender violate the defendant's and the excluded venireperson's right to equal protection of the laws. *Id.* at 1437-38.

17. *Id.* at 1437-39. The *DeGross* court noted:

Equal protection principles forbid racially discriminatory peremptory strikes, in

back to 1880, the Supreme Court has consistently prohibited race-based discrimination in the jury selection process.[18] In 1965, the Supreme Court in *Swain v. Alabama*[19] held that the Equal Protection Clause prohibits the use of peremptory challenges based on race to exclude otherwise qualified jurors.[20] Under *Swain*, a defendant alleging violations of equal protection had to show that the prosecutor discriminated against members of the defendant's race for reasons that were unrelated to the outcome of the case.[21] The defendant had to show a pattern, not confined to the facts of the defendant's case, of the systematic denial to blacks of the same rights and opportunities to participate on juries as those enjoyed by whites.[22]

In *Batson v. Kentucky*,[23] the Supreme Court affirmed *Swain* and

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part because racial discrimination during jury selection (1) harms the excluded venirepersons, (2) undermines public confidence in the judicial system, and (3) stimulates community prejudice. Because all of these evils also result from peremptory strikes based on gender, . . . equal protection principles compel us to prohibit peremptory strikes on the basis of gender.

Id. at 1438 (citations and footnotes omitted).

18. Strauder v. West Virginia, 100 U.S. 303 (1880). In *Strauder*, the Court held that a West Virginia statute which allowed only white males to serve on juries violated the black defendant's Fourteenth Amendment right to equal protection. Case law subsequently expanding this jurisprudence include Norris v. Alabama, 294 U.S. 587 (1935) (holding that the Equal Protection Clause guarantees defendant that the state will not exclude members of his race from jury venire on the false assumption that said members are not qualified to serve as jurors); Avery v. Georgia, 345 U.S. 559 (1953) (prohibiting exclusion of black jurors from state petit jury); Alexander v. Louisiana, 405 U.S. 625 (1972) (prohibiting exclusion of jurors on basis of race from state grand jury); and Peters v. Kiff, 407 U.S. 493 (1972) (overturning conviction of white male on equal protection grounds because blacks were excluded from state grand jury).

19. 380 U.S. 202 (1965).

20. In *Swain*, an all white jury convicted a black defendant of raping a white woman and sentenced him to death. The prosecutor used peremptory challenges to remove from the jury panel the only six blacks eligible to serve. *Id.* at 205. The Court stated that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 203-04.

21. *Id.* at 224.

22. *Id.* at 223-24. The Court noted that this could be proved, for example, by showing that "the prosecutor . . . , in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors . . . , with the result that no Negroes ever serve on petit juries . . . ."

23. 476 U.S. 79 (1986). In *Batson*, an all white jury convicted the defendant of second degree burglary and receipt of stolen goods after the prosecutor used peremptory challenges to strike all four black persons on the venire. *Id.* at 83.

held that the use of peremptory challenges by prosecutors for the purpose of excluding blacks from juries violates the equal protection rights of black defendants, as well as those of the excluded jurors.[24] However, the *Batson* Court rejected the evidentiary burden that the *Swain* Court placed on a defendant and adopted a more relaxed standard.[25] The Court stated that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on the evidence pertaining to the prosecutor's exercise of peremptory challenges at the defendant's own trial.[26] To prove a prima facie case of purposeful discrimination in a prosecutor's use of peremptory challenges, the *Batson* Court articulated the following standard.[27] First, the defendant must be a member of a constitutionally cognizable group and show that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race.[28] Second, the defendant is entitled to rely on the fact that the peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.[29] Third, the defendant must show that these facts, and any other relevant circumstances, raise an inference that the prosecutor used that practice to exclude the venireperson from the petit jury on account of his race.[30] In *Powers v. Ohio*,[31] the Court modified the *Batson* test and no longer required defendants to show that they share the excluded juror's race.[32] Once these require-

24. *Id.* at 87. There has been a sequence of cases which have followed and expanded the principles of *Batson*. *See* Holland v. Illinois, 493 U.S. 474 (1990) (stating in *dicta* that although defendant had no Sixth Amendment claim, a prosecutor may not use race-based peremptory challenges even when the accused is of a different race from that of the prospective juror). *See also supra* note 5 for cases following *Batson*.

See generally James O. Pearson, Jr., Annotation, *Use of Peremptory Challenge to Exclude From Jury Persons Belonging to a Class or Race*, 79 A.L.R.3D 14 (1977) (analyzing cases that decided the issue of whether it is constitutional for the prosecution or defendant to use peremptory challenges to exclude members of a race or class from the petit jury, whether in a single case or in a series of cases).

25. 476 U.S. at 90-96.

26. *Id.* at 96.

27. *Id.* at 96-97.

28. *Id.* at 96.

29. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

30. 476 U.S. at 96. The court said that these three elements create "the necessary inference of purposeful discrimination." *Id.* To come to its decision, the lower courts should consider all relevant circumstances. *Id.* at 96-97.

31. 111 S. Ct. 1364 (1991).

32. *Id.* at 1373.

ments are met, the burden shifts to the prosecution to enunciate a race-neutral reason for the strike.[33]

The Supreme Court has acknowledged the harmful effects of discriminatory peremptory challenges meant to exclude blacks solely because of their race. The exclusion of blacks deprives the jurors of their right to equal protection,[34] and deprives the defendants of both their right to an impartial jury,[35] as well as one chosen in a non-discriminatory manner.[36] Discrimination in the exercise of peremptory challenges also creates suspicion about the integrity of the judicial process[37] and the fairness of the proceedings,[38] and undermines the public's con-

33. 476 U.S. at 97. *Cf.* Hernandez v. New York, 111 S. Ct. 1859 (1991) (holding that the question of whether the defendant made a prima facie showing that the prosecution used peremptory challenges to exclude latino potential jurors was moot since the prosecution had offered a racially neutral explanation and the trial court had ruled on the ultimate question of intentional discrimination).

34. *See also* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991) (holding that use of peremptory challenges by private litigants in civil cases in order to exclude jurors on account of race violates the potential jurors' equal protection rights); Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991) (stating that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race"); Batson v. Kentucky, 476 U.S. 79, 87 (1986) (noting that denying a person of jury service on account of race unconstitutionally discriminates against the excluded juror); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) ("The very fact that colored people are singled out and expressly denied by a statute all right (sic) to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified to . . . equal . . . justice. . . .").

35. *See* Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991) (explaining that the "purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict . . . is given . . . by persons who are fair").

36. Batson v. Kentucky, 476 U.S. 79, 85-86 (1986) (noting that a defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria). *Cf.* Martin v. Texas, 200 U.S. 316, 321 (1906) (holding that defendant is "entitled to demand" a grand and petit jury chosen without race discrimination); *Ex parte* Virginia, 100 U.S. 339, 345 (1880) (restating that a defendant's equal protection rights include the freedom from race discrimination in jury selection).

37. The Supreme Court has acknowledged that:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (citing Rose v. Mitchell, 443 U.S. 545, 556 (1979); Smith v. Texas, 311 U.S. 128, 130 (1940)).

38. *See* Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991) (stating that "[a]ctive discrimination by a prosecutor during [jury selection] . . . invites cynicism respecting the jury's neutrality and its obligation to adhere to the law).

fidence in the fairness of the overall judicial system.[39]

Discrimination on the basis of gender also falls within the proscriptions of the Equal Protection Clause. In the seminal case of *Reed v. Reed*,[40] the Supreme Court held that an Idaho probate code statute which favored the appointment of men over women as estate administrators, when women were equally qualified, violated the Fourteenth Amendment's Equal Protection Clause.[41] By treating similarly situated persons differently on account of their gender, when no important governmental interest is involved, the challenged activity violates the Equal Protection Clause.[42] No state actor may make classifications or distinctions based on gender unless such distinctions facilitate important governmental objectives and are tailored to achieve those objectives.[43]

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39. *See Batson*, 476 U.S. at 87 (stating that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); *see also* Ballard v. United States, 329 U.S. 187, 195 (1946) (explaining that systematic exclusion of women causes injury to the defendant, the jury system, the law as an institution, the community at large, and "the democratic ideal reflected in the processes of our courts").

40. 404 U.S. 71 (1971).

41. *Id.* at 76. *See also* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (ruling that the statutory presumption that an unwed father is unfit for custody purposes violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

Subsequent cases extended the prohibition against gender-based discrimination to federal actions. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (finding that the military's distinction based on sex of spouse in determining espousal benefits was violative of Fifth Amendment's Due Process Clause).

The Supreme Court delineated the bounds of permissible gender discrimination on behalf of the state in Kahn v. Shevin, 416 U.S. 351 (1974), which upheld a Florida statute that provided a $500 property tax exemption to women because of the legislative intent to favor widows, upon whom "the loss [of a husband] imposes a disproportionate burden." *Id.* at 355. *See also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (holding that the military may formulate mandatory discharge rules that take into account gender differences).

42. Stanton v. Stanton, 421 U.S. 7 (1975) (holding that a Utah statute providing for different ages of majority between boys and girls was unconstitutional under the Fourteenth Amendment's Equal Protection Clause); Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (holding that a social security scheme which provided survivors benefits to a widow based on a man's earnings, but denied such benefits to a deceased female earner's widower unconstitutionally discriminated against female workers by affording them less protection for their survivors and was not justifiable by a generalization that male workers' earnings are vital to their families support while female workers' earnings are not).

43. "[T]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating an

With respect to the venire selection process, the case law addressing gender discrimination parallels that of race discrimination. In 1946, the Supreme Court addressed discrimination against women in jury service in *Ballard v. United States*.[44] In *Ballard*, the Court held that when women are eligible for jury service under local law, federal courts must not exclude them.[45] The intentional and systematic exclusion of women from the federal grand jury, like the exclusion of racial minorities, deprives the jury system of the broad base intended by Congress.[46]

Oklahoma statute which allowed women to purchase 3.2% beer at age 18, but prohibited men from purchasing until age 21).

Race-based distinctions are subject to "strict" equal protection analysis, particularly in cases involving exclusions from jury service. *See* Loving v. Virginia, 388 U.S. 1, 11 (1966) (stating that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny' " (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); *see also* Peters v. Kiff, 407 U.S. 493 (1972) (striking as unconstitutional the systematic exclusion of blacks from the petit jury). In contrast, gender-based distinctions are generally subject to less strict, or "intermediate," scrutiny. *Craig*, 429 U.S. at 197. *See also* Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding that a Louisiana statute giving a unilateral right to a husband to encumber jointly-owned property without the wife's consent violated the Fourteenth Amendment's Equal Protection Clause). *But see* Caban v. Mohammed, 441 U.S. 380 (1979) (holding that a New York statute distinguishing between unwed fathers and unwed mothers as to adoption rights was violative of the Fourteenth Amendment Equal Protection Clause because it bore no substantial relation to any important state interest); Orr v. Orr, 440 U.S. 268 (1979) (holding that an Alabama statute requiring a husband, but never the wife, to pay alimony violates equal protection principles); and Califano v. Goldfarb, 430 U.S. 199 (1977) (holding that provisions of the Social Security Act under which survivors benefits based on the earnings of a deceased man were payable to his widow but earnings of a deceased woman were not payable to her widower unless he was receiving at least half his support from her violate due process and equal protection); Califano v. Webster, 430 U.S. 313 (1977) (holding that Social Security provisions allowing women, but not men, to eliminate additional low-earning years from calculation of retirement benefits in order to rectify effects of past discrimination did not violate the Fifth Amendment's Equal Protection Clause; this gender classification served an important governmental interest and was substantially related to the achievement of the stated objectives).

44. 329 U.S. 187 (1946).

45. *Id.* at 190-96.

46. *Id.* at 195. Although the Court decided *Ballard* based upon its supervisory powers over the federal courts, rather than on equal protection principles, the language of the decision suggests that an equal protection argument may also be made:

> But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from one composed of both; the subtle interplay of influence on the other is among the imponderables.

Id. at 193.

28 U.S.C. § 1861 provides:

Years later, the Supreme Court held in *Taylor v. Louisiana*[47] that the systematic exclusion of women from a state venire violated the male defendant's right to a jury selected from a fair cross-section of the community as required by the Sixth Amendment.[48] The exclusion of a gender from jury service infringes defendant's right to an impartial trial under the Sixth Amendment.[49]

Though race and gender discrimination are often equated,[50] the prohibition against race-based discrimination has advanced farther than gender discrimination, beyond the venire selection stage and into the realm of peremptory challenges. Cases consistently hold race-based discrimination in the use of peremptory challenges violate the Equal Protection Clause.[51] The federal appeals courts are divided on the issue of gender-based peremptory strikes.[52] Some courts have extended *Batson* and held that equal protection principles apply to gender-based

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It is the policy of the United States that all litigants in Federal courts entitled to trials by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries . . .

28 U.S.C. § 1861 (1988). Accordingly, this Act provides that all citizens, regardless of sex, are competent to sit on federal juries. Before the Civil Rights Act of 1957, federal courts applied the exclusionary standard legislated by the state in which the federal court sat. Taylor v. Louisiana, 419 U.S. 522, 536 (1975).

47. 419 U.S. 522 (1975).

48. *Id.* at 526-33.

49. *Id.* at 535-37 (overruling Hoyt v. Florida, 368 U.S. 57 (1961)).

The statute at issue in *Taylor* read: "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." *Id.* at 523 n.2.

The court rejected the argument that women served a "distinctive" role in the community and that jury service would interfere with their responsibilities in that regard. *Id.* at 533-35. In conclusion, the court ruled that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528. *But see* Lockhart v. McCree, 476 U.S. 162 (1986) (holding that the selection of the petit jury is not subject to the Sixth Amendment's fair cross-section requirement).

50. "[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." Frontiero v. Richardson, 411 U.S. 677, 686 (1973). Discrimination on the basis of race and gender are analogous in that "sex, like race, . . . is an immutable characteristic determined solely by the accident of birth. . . ." *Id.* at 687.

51. *See supra* notes 18-39 and accompanying text for a discussion of the line of cases holding that discrimination on the basis of race when exercising peremptory challenges violates the Equal Protection Clause.

52. The state courts have also come to differing conclusions as to whether gender-

peremptory challenges.[53] Other courts have refused to apply the language of *Batson* so as to prohibit gender-based peremptory challenges.[54]

In *United States v. Hamilton*[55] the Fourth Circuit concluded that the Supreme Court's opinion in *Batson*[56] did not support the extension of gender-based discrimination to peremptory challenges because the decision focused strictly on race discrimination.[57] The Fourth Circuit acknowledged that the Equal Protection Clause prohibits gender discrimination in certain contexts, but saw no evidence in the holding of

based peremptory challenges are unconstitutional. *See infra* notes 53 and 58 for illustrative cases.

53. *See, e.g.*, United States v. DeGross, 960 F.2d 1433, 1437-39 (9th Cir. 1992) (holding that the Equal Protection Clause proscribes gender-based peremptory strikes); DiDonato v. Santini, 283 Cal. Rptr. 751, 760-61 (Cal. Ct. App. 1991) (finding that a civil litigant may not exclude jurors on the basis of their gender when exercising peremptory challenges because such exclusions violate principles of equal protection under both the federal and state constitutions); New York v. Irizarry, 560 N.Y.S.2d 279, 280 (N.Y. App. Div. 1990)(holding that a prosecutor's gender-based peremptory challenges to exclude eight women violated a male defendant's equal protection rights under the Fourteenth Amendment); State v. Burch, 820 P.2d 357, 361-63 (Wash. Ct. App. 1992) (holding that both federal and state equal protection principles prohibit peremptory challenges exercised on the basis of gender).

Several state courts have found that gender-based peremptory challenges violate the equal protection clause of their state constitutions. *See* State v. Levinson, 795 P.2d 845, 849-50 (Haw. 1990) (holding that male defendant's exclusion of women jurors based on their gender denied them equal protection as guaranteed under the Hawaiian Constitution); Commonwealth v. Hyatt, 568 N.E.2d 1148, 1149-50 (Mass. 1991) (finding that gender-based peremptory challenges are precluded under the state constitution); State v. Gonzales, 808 P.2d 40, 49 (N.M. App. 1991) (holding that the state constitution was violated when the prosecution used eight out of eight peremptory challenges to exclude Hispanic males); People v. Blunt, 561 N.Y.S.2d 90, 92 (N.Y. App. Div. 1990) (holding that when the prosecution used eleven out of twelve peremptory challenges to exclude women, the male defendant's equal protection rights under the state constitution were violated).

54. *See, e.g.*, United States v. Nichols, 937 F.2d 1257, 1264 (7th Cir. 1991) (analyzing only possible race-based challenges under *Batson*, while rejecting inquiry into possible gender-based challenges); United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988) (refusing to extend *Batson* to cover gender-based peremptory challenges). *See also infra* note 58 for a listing of state courts that have refused to extend *Batson*.

55. 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed, sub nom.* Washington v. United States, 489 U.S. 1094 (1989), *cert. denied*, 493 U.S. 1069 (1990).

56. *See supra* notes 23-33 for a discussion of the *Batson* case.

57. 850 F.2d at 1042. In *Hamilton*, the Fourth Circuit held that the prosecution overcame the defendant's prima facie showing of racial discrimination in the striking of three black female jurors by presenting the race-neutral explanation that they were struck because they were women. *Id.* at 1041.

Batson that required equal protection principles to apply to the exercise of peremptory challenges.[58] The *Hamilton* Court also noted the

58. *Id.* at 1042. The court reasoned:

> While the strictures of the Equal Protection Clause undoubtedly apply to prohibit discrimination due to gender in other contexts, there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges.
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> . . . .
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> Clearly, if the Supreme Court in *Batson* had desired, it could have abolished the peremptory challenge or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification.

Id.

The Supreme Court of Rhode Island used reasoning similar to *Hamilton* in State v. Oliviera, 534 A.2d 867 (R.I. 1987). In *Oliviera*, the defendant questioned the prosecution's use of six out of seven peremptory strikes to remove males. *Id.* at 869. The court concluded that *Batson* did not extend to gender-based discrimination, finding that "[o]ne of the purposes of the *Batson* decision was to cure the long history of discrimination faced by Blacks during jury selection." *Id.* at 870. Unlike Blacks as a group, males as a group have not been historically discriminated against during jury selection. *Id.* The court thought that adding gender discrimination as a criterion would make all peremptory challenges "suspect," thus greatly damaging the peremptory challenge procedure. *Id.*

Other state courts have refused to extend *Batson* to cover gender-based peremptory challenges. *See, e.g.*, Daniels v. State, 581 So.2d 536, 538-39 (Ala. Crim. App. 1990) (holding that the State's use of nine peremptory challenges to exclude women from the jury did not violate male defendant's constitutional right to equal protection); Stariks v. State, 572 So.2d 1301, 1302-03 (Ala. Crim. App. 1990) (finding that the prosecutor's exclusion of male jurors in order to impanel an exclusively female jury in a sexual abuse case did not violate male defendant's equal protection rights); Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989) (holding that *Batson* does not extend to gender-based peremptory challenges); State v. Morgan, 553 So.2d 1012, 1018 (La. Ct. App. 1989) (holding that the prohibition against discriminatory use of peremptory strikes applies only to racial discrimination); State v. Adams, 533 So.2d 1060, 1063 (La. Ct. App. 1988) (finding that a female defendant was not denied Fourteenth Amendment equal protection by the prosecution's discriminatory peremptory strikes of all male venirepersons); Eiland v. State, 607 A.2d 42, 59 (Md. Ct. Spec. App. 1992) (determining that, although the State used sixteen of its twenty peremptory strikes to strike females, *Batson's* equal protection analysis does not extend to gender-based peremptory challenges discrimination); State v. Clay, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989) (finding that *Batson* applies only to race discrimination, and that women are not a cognizable racial group); State v. Culver, 444 N.W.2d 662, 666 (Neb. 1989) (finding that the Equal Protection Clause does not prohibit gender-based peremptory challenges).

The Courts in Illinois are split on the issue. *Compare* People v. Mitchell, 593 N.E.2d 882 (Ill. App. Ct. 1992) (holding that a defendant has both federal and state constitutional rights to a jury selected in a non-gender discriminatory fashion) *with* People v. Hooper, 552 N.E.2d 684, 701 (Ill. 1989) (stating in dictum that "using peremptory challenges to form a more gender-balanced panel is an acceptable, non-racial use of a peremptory challenge"); People v. Thomas, 559 N.E.2d 262 (Ill. App. Ct. 1990) (holding that *Batson* limited the prohibition against discriminatory peremptory challenges to only race).

importance of peremptory challenges within the jury system.[59] The Seventh Circuit, in *United States v. Nichols*,[60] also refused to extend *Batson* to encompass the discriminatory use of peremptory challenges on the basis of gender.[61]

Another line of decisions follows the reasoning of *De Gross* and finds gender-based peremptory challenges violative of equal protection principles.[62] The *De Gross* court took a broader view of *Batson* and its progeny than did the *Hamilton* court. After determining that the government had standing to object to the defendant's peremptory challenge,[63] the *De Gross* court reasoned that the same "evils" that result from race-based peremptory strikes were inherent in gender-based peremptory strikes.[64] First, gender-based strikes harm the excluded

59. *Id.* at 1042-43. Other cases and authorities have similarly commented on the importance of peremptory challenges. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 219 (1965) (noting the "long and widely held belief that peremptory challenge is a necessary part of trial by jury"); State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (finding that *Batson* does not extend to gender discrimination because if it did, "[t]he damage to the peremptory challenge, a vital component of trial by jury, would be enormous, if not fatal"); *See also* Babcock, *supra* note 2, at 553-54 (noting that "[t]he symbolic-educative, impartiality-promoting role of the peremptory challenge makes it central to the jury trial right").

60. 937 F.2d 1257 (7th Cir. 1991).

61. *Id.* at 1262. The court found that the prosecution's race-neutral explanations for striking three black female jurors complied with *Batson*, and that gender-neutral explanations were not required. *Id.* at 1264.

62. *See supra* note 53 for cases that have found gender-based peremptory challenges to violate equal protection. *See also* Jere W. Morehead, *Exploring the Frontiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Extend to Gender?*, 14 AM. J. TRIAL ADVOC. 289 (1990) (advocating extension of *Batson* to prohibit gender-based discrimination in jury selection).

63. *De Gross*, 960 F.2d at 1436-37. The *De Gross* court reasoned:

> [T]he government has an interest in having its criminal prosecutions tried before a tribunal most likely to produce a fair result. Thus, when a criminal defendant attempts to achieve a jury partial to her through discriminatory peremptory strikes, the government suffers injury. We view this injury as sufficient to confer standing upon the government to object to the defendant's challenge.

Id. (citations omitted).

The *De Gross* court also found that the government had standing to assert the equal protection rights of the excluded jurors. *Id.* at 1437. Applying the test provided in Powers v. Ohio, 111 S. Ct. 1364, 1370-72 (1991), the Court found that (1) the excluded jurors suffer an actual harm, (2) the government's relationship with the excluded venirepersons is sufficient to ensure that it will vigorously defend their rights, and (3) the improperly excluded jurors confront obstacles which hinder their ability to assert their own rights. 960 F.2d at 1437.

64. *Id.* at 1438. *See supra* note 17 for a quotation of the court's reasoning.

venirepersons because their qualifications to be jurors are totally ignored.[65] Second, gender-based strikes hinder full community participation, and without total participation, public confidence in the judicial system is undermined.[66] Third, discriminatory strikes perpetuate community prejudice toward those who are excluded.[67] Finally, the use of gender-based peremptory challenges violates the defendant's right to equal protection of the laws, for a defendant is entitled to be tried by a jury selected nondiscriminatorily.[68]

The *De Gross* court recognized that gender discrimination is permissible when it is substantially related to achieving important governmental objectives.[69] The court noted that the use of peremptory strikes furthers the "important governmental objective" of impaneling a fair and impartial jury.[70] The court viewed gender-based challenges, however, as based not on a subjective impression that a prospective juror may be biased, but, like race-based challenges, on either a determination that members of a certain group are unqualified to serve as jurors[71] or a blanket condemnation that members of a certain group are partial.[72] *De Gross* concluded that these erroneous assumptions are not legitimate means of achieving the "important governmental objective" of impaneling an impartial jury.[73]

After determining that a criminal defendant is a state actor when exercising peremptory challenges,[74] the *De Gross* court considered

65. *Id.* at 1439.

66. *Id.* "A jury is not truly representative of the community unless both sexes have an equal opportunity to serve." *Id.* (citing Ballard v. United States, 329 U.S. 187, 193-94 (1946)).

67. *Id.* at 1438. "Permitting gender-based peremptory challenges would simply affirm an erroneous and unconstitutional presumption that women are less qualified than men to serve as jurors." *Id.*

68. 960 F.2d at 1438.

69. *Id.* at 1439 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). *See also supra* notes 41-43 and accompanying text for discussion of the standard of review for gender-based classifications.

70. 960 F.2d at 1439 (citing Swain v. Alabama, 380 U.S. 202, 211-12 (1965)).

71. *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 86 (1986)).

72. *Id.*

73. *Id.* at 1439.

74. *See also supra* note 15 discussing the *McCollom* case, in which the Supreme Court held that a criminal defendant's use of peremptory challenges constitutes state action.

whether the defendant's peremptory challenge was gender-based.[75] Noting that males are a constitutionally cognizable group[76] and that the defendant exercised seven out of eight strikes against males, the court agreed with the district court that the defendant's challenges were on account of gender.[77] The *De Gross* court concluded that the district court properly denied the defendant's challenge when the burden of proof shifted to the defendant, who failed to justify the challenge on neutral grounds.[78]

In addition, the court of appeals in *De Gross* found that the defendant demonstrated a prima facie case of gender discrimination.[79] The prosecutor explained to the district court that his peremptory challenge of a Hispanic venirewoman was because he desired a jury of more men.[80] The court stated that this was an admission of purposeful gender discrimination and, thus, a violation of the defendant's right to equal protection.[81] Accordingly, the Ninth Circuit held that the district court improperly struck the venirewoman from the jury.[82]

Although the *De Gross* decision is correct, eliminating discriminatory peremptory challenges is not without pragmatic concerns.[83] As a result of the *De Gross* decision, attorneys must monitor not only opposing counsel's peremptory strikes in order to detect possible race-based or gender-based discriminatory patterns, but must also remain cognizant of their own strikes in order to avoid the appearance of discrimi-

75. 960 F.2d at 1442. *See also supra* text accompanying notes 27-33 presenting the elements necessary to establish a prima facie case of purposeful discrimination.

76. 960 F.2d at 1449. *See also* Craig v. Boren, 429 U.S. 190, 197-99 (1976) (noting that statutory classifications that distinguish between males and females must pass heightened scrutiny); Reed v. Reed, 404 U.S. 71, 75 (1971) (holding that statutes preferencing males or females are subject to scrutiny under the Equal Protection Clause).

77. 960 F.2d at 1442.

78. *Id.*

79. *Id.* at 1443.

80. *Id.*

81. 960 F.2d 1443.

82. *Id.*

83. Some authorities claim that the objective to do away with discriminatory peremptory challenges is theoretically impossible. Blackstone recognized centuries ago the prejudices of individuals. *See* BLACKSTONE, *supra* note 2. Because peremptory challenges are inherently based on prejudice, any effort to remove the prejudices by prohibiting discriminatory challenges may prove futile. Some argue that, ultimately, the abolition of peremptory challenges may be warranted. *See* Batson v. Kentucky, 476 U.S. at 108 (Marshall, J., concurring) (agreeing with the Court in *Batson* but noting that "only by banning peremptories entirely can such discrimination be ended").

nation. The order in which the members of the venire are presented becomes increasingly important. Gender, unlike race in an increasingly multi-racial society, is limited to a dichotomy of roughly equal proportions. To avoid the appearance of gender discrimination, counsel in effect is compelled to impanel a relatively gender-balanced jury.

In addition, counsel bent on discrimination will be tempted to create fallacious, but otherwise acceptable, reasons for striking an "undesirable" juror.[84] The trial judge is then required to second-guess counsel's motives.[85] The trial judge is also placed in a difficult position because the appellate courts gave little guidance as to what constitutes a pattern of discrimination. The Supreme Court explicitly delegated trial courts with the discretion to develop evidentiary rules for proving prima facie cases of discrimination.[86] It is unclear how many strikes against members of a cognizable group are sufficient to establish a pattern.[87]

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84. The Supreme Court noted this concern in the context of race discrimination:

> Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide that facts in this case?" If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected today by the Court today may be illusory.

Batson v. Kentucky, 476 U.S. at 106 (Marshall, J., concurring) (citations omitted).

85. *See* Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991) (discussing the trial court's necessary inquiry into the validity of the prosecution's race-neutral explanation).

86. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088-89 (1991) (directing courts to consider all the relevant circumstances in determining whether the facts indicate a prima facie case of racial discrimination in the striking of potential jurors); Batson v. Kentucky, 476 U.S. at 96-97 (directing trial courts to consider whether criminal defendants have made their prima facie showing of racially-discriminatory use of peremptory challenges).

87. [D]efendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Batson, 476 U.S. at 105 (Marshall, J., concurring) (citations omitted).

If the jurisdiction allows only for a six-member jury, it may be virtually impossible to detect a pattern of discriminatory peremptory strikes. *See* State v. Morgan, 553 So.2d 1012 (La. Ct. App. 1989) (holding that the prosecution did not violate the defendants' equal protection rights by using peremptory challenges to exclude males; the State

Another effect of extending *Batson* is that every constitutionally cognizable group falls within the penumbra of those protected from discriminatory peremptory challenges.[88] The possibility of multiple objections to peremptory challenges based upon a variety of potentially discriminatory grounds may slow down the trial process and contribute to courts' backlog.[89] Furthermore, repeated accusations of discrimination by counsel may distract the courtroom proceedings.

Despite the alleged negative effects of extending *Batson* to cover gender-based peremptory challenges, the main objective of equal protection cannot be overlooked. It is illogical to limit *Batson* to only race discrimination, for the reasoning used to support the prohibition against race-based discrimination is also applicable in the context of gender-based discrimination.[90] Even administrative concerns do not justify upholding discriminatory conduct.[91] The *De Gross* court acknowledged the unreasonableness of limiting protection to only racial minorities and set precedent that discrimination in peremptory challenges, whether based on gender or race, will not be tolerated under modern principles of equal protection.[92]

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struck both males and females, yet only one male served on the six-member jury to hear an obscenity case).

88. "[I]f conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrangements and employment in a particular industry, or profession." *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting) (citations omitted).

89. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2095-96 (1991) (Scalia, J., dissenting) ("We have now added to the duties of already-submerged state and federal trial courts the obligation to assure that race is not included among the other factors (sex, age, religion, political views, economic status) used by private parties in exercising their peremptory challenges."). *But see Batson*, 476 U.S. at 99 ("In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived.") (Footnote omitted).

90. *See supra* notes 64-68 and accompanying text for discussion of how discriminatory peremptory challenges violate the Equal Protection Clause.

91. *See* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (rejecting administrative convenience as an important governmental objective that justifies gender-based classifications).

92. *See supra* notes 63-82 and accompanying text discussing the *De Gross* court's rationale.

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