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Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges

S. Alexandria Jo
University of the Pacific; McGeorge School of Law

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INTRODUCTION

Until recently, attorneys had absolute and unquestioned discretion in exercising their peremptory challenges.[1] This unrestrained nature of peremptory challenges was drastically altered by the Supreme Court in 1986 when the Court ruled that prosecutors may no longer exercise their peremptory challenges based solely on the race of the prospective jurors.[2] One of the issues left unanswered by the *Batson v. Kentucky* decision is whether gender-based peremptory challenges are impermissible as well. Because the Supreme Court has not yet addressed the question of gender-based peremptory challenges, lower courts have reached conflicting conclusions.[3] In an effort to resolve the conflict, this Comment advocates that gender-based peremptory challenges, much like their racially based counterparts, are violative of the equal protection clause.

Part I of this Comment will provide a brief background of peremptory challenges in the jury selection process.[4] Part II will explore the case history of discrimination in the exercise of peremptory challenges, discussing first, racial discrimination, and second, gender discrimination cases.[5] Finally, Part III will discuss

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1. *See generally* FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE § 11.10, at 523 (1985) (explaining generally the right to a jury trial and the process of jury selection).

2. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that peremptory challenges based solely on race violate the equal protection clause).

3. *See infra* notes 91-124 and accompanying text (summarizing the conflicting lower court decisions).

4. *See infra* notes 7-33 and accompanying text.

5. *See infra* notes 34-124 and accompanying text.

the ramifications of lower court decisions and propose a resolution to the conflict.[6]

I. PEREMPTORY CHALLENGES

The common law concept of trial by jury dates back to 1166 in the Assize of Clarendon[7] which provided that inquiries of robbery and murder be made by "the twelve most lawful men."[8] This concept was continued in the Magna Carta of 1215 and was carried over to the United States by those who emigrated from England.[9] This privilege of the old common law system became a protected right in the United States under the sixth amendment of the Constitution for criminal proceedings[10] and was reserved for many civil proceedings in the seventh amendment.[11]

The jury selection process begins with the "jury pool" or "jury list" which consists of a list of names, usually drawn from voter registration lists or telephone directories.[12] From this jury pool, a "venire" or "panel" is selected.[13] Persons chosen for the

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6. *See infra* notes 125-150 and accompanying text.

7. "Assize of Clarendon" refers to the series of ordinances initiated by King Henry II of England in an assembly of lords at the royal hunting lodge of Clarendon. 3 ENCYCLOPEDIA BRITANNICA 348 (1985). These ordinances attempted to improve the procedures in criminal law and established the grand jury system consisting of twelve men. *Id.*

8. *See generally* LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 21.1, at 688 (1984) (explaining the concept of trial by jury).

9. *See id.*

10. *See* U.S. CONST. amend. VI (providing that all criminal defendants "enjoy the right to a speedy and public trial by an impartial jury"). *See also* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the right to a jury trial in criminal cases in federal courts is a fundamental right which must be incorporated into the fourteenth amendment, thereby extending the right to jury trials in state courts).

11. *See* U.S. CONST. amend. VII (providing that "the right of trial by jury shall be preserved" for all suits at common law where the value at controversy exceeds twenty dollars).

12. *See generally* WHITEBREAD & SLOBOGIN, CRIMINAL PROCEDURE § 27.05, at 614-15 (1986) (explaining the process of jury selection). Some states operate on the "key man" system where a judge appoints individuals who are responsible for selecting and maintaining jury lists. *Id.* at 615. The key men are instructed to select persons of "known integrity" or "reputation for honesty and intelligence." *Id.* This system usually results in a jury pool that is not as representative of the general population as one chosen at random. *Id.*

13. *See id.* Venire is usually chosen at random except in those jurisdictions that use non-random system such as the "key man" system. *Id. See also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Holland v. Illinois, 110 S.Ct. 803, 807 (1990) (both requiring that the jury pool or the venire

venire may be exempted under a statute[14] or by request.[15] The remaining persons make up the venire, or panel, which is further developed into a jury through the "voir dire" process.[16]

The purpose of voir dire examination is to ascertain whether the prospective jurors are acquainted with the facts or the parties of the case and whether they have a predisposition regarding the merits of the case.[17] Specifically, the prospective jurors are asked questions regarding their background, their work, and their families, to determine whether they harbor any biases that may impair their fitness to serve as jurors.[18] In American jurisprudence, there are two ways of conducting a voir dire. The first method is where the judge asks the voir dire questions of the jury panel.[19] The second method is where the lawyers themselves ask the questions.[20]

The voir dire process, however, is more than an information gathering event. The voir dire process gives attorneys the opportunity to exclude jurors from serving in the upcoming trial. Potential jurors are eliminated by attorneys exercising challenges for cause and peremptory challenges.[21] Challenges based on cause

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be chosen nondiscriminatorily, reflecting the fair cross section of the community). *See also infra* notes 69-71 and accompanying text (discussing the fair cross section requirement of the sixth amendment).

14. *See* WHITEBREAD & SLOBOGIN, *supra* note 12, § 27.10, at 615. Statutory exemption usually excuses: (1) Aliens; (2) those who cannot speak English; (3) those under eighteen years of age; (4) persons charged with a felony or serving a felony sentence; and, (5) those who are suffering from mental or physical incapacity. *Id.*

15. *See id.* A prospective juror may request an exemption if he or she has previously served as a juror, is engaged in a "critical occupation," or can show that service on a jury would produce undue hardship for him or her. *Id.* The term "critical occupation" is often defined by statute and usually includes military, government, and professional jobs. *Id.*

16. *See id.* Voir dire means "speak the truth." LAFAVE & ISRAEL, *supra* note 8, § 21.3, at 718.

17. *See generally* JAMES & HAZARD, CIVIL PROCEDURE § 8.13, at 456 (1985) (explaining the voir dire process).

18. *Id.*

19. *Id.* at 457. Attorneys are permitted to request topics of questions or even specific questions for the judge to ask of the panel. *Id.*

20. *Id.* A judge in a jurisdiction that uses the second method monitors the voir dire process in the same way as in examination of witnesses at trial. *Id.*

21. *Id.* The right to exercise peremptory challenges dates back to Roman Law, was preserved by the Crown in English courts, and now exists in all jurisdictions in the United States. Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 296-97 (1989). Prior to 1305, the Crown had the power to strike an unlimited number

require an attorney to state "narrowly specified, provable and legally cognizable" reasons to strike a potential juror, leaving trial judges with the ultimate discretion to grant or deny the challenges.[22]

Peremptory challenges, on the other hand, may be exercised "without a reason stated, without inquiry and without being subject to the court's control."[23] Peremptory challenges may be exercised under a struck system or a sequential system.[24] In a struck system, the venire consists of the same number of people as the size of the jury plus the number of peremptory challenges accorded to each party.[25] After examining every venireperson, attorneys for both sides exercise their cause challenges, replacing the removed jurors by other prospective jurors who are then questioned on voir dire.[26] The defense and prosecution then exercise their peremptory challenges against the venirepersons.[27]

In contrast, the sequential system divides the selection process into rounds where each round consists of venirepersons equalling the size of the jury.[28] The process is continued until each side exhausts its peremptory challenges and enough venirepersons for a jury remain upon the completion of each side's challenges for

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of jurors for no stated cause, thereby creating a prosecution-biased jury. *Id.* at 296. Parliament eliminated this procedural bias by depriving the Crown of its right to exercise peremptory challenges, leaving it with only challenges for cause. *Id.* at 296-97. The defense, however, retained the right to its peremptory challenges, resulting in, as Blackstone stated, "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." *Id.* at 297. The prosecution, despite its loss of power to exercise peremptory challenges, continued to use a procedure which closely resembled the peremptory challenges, the "step aside" procedure. *Id.* The prosecution was permitted to ask a juror to "step aside" without giving any reason. *Id.* Those standing aside were discharged if a full jury was selected from the venire. *Id.* The court required the prosecution's explanation for challenging the jurors only if the entire panel was exhausted before filling the jury box. *Id.*

22. Swain v. Alabama, 380 U.S. 202, 220 (1965) (explaining how challenges for cause are exercised). There is no limit to the number of challenges for cause. *See* JAMES & HAZARD, *supra* note 17, § 8.13, at 457 (explaining the selection of a jury in general).

23. *Swain*, 380 U.S. at 220 (1965).

24. *See* Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R. - C.L. L. REV. 227, 228 (1986) (explaining the two systems of peremptory challenges).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

cause.[29] Under either system, the number of peremptory challenges granted to both the prosecution and defense varies from jurisdiction to jurisdiction. In most systems, the defense is allotted more than the prosecution.[30]

The right to exercise peremptory challenges, as recognized by the Supreme Court, remains one of the most important rights accorded to the accused, despite the fact that the Constitution does not require Congress or the states to grant such a right.[31] The basis for such argument lies in the purpose of peremptory challenges, to eliminate extreme partialities on both sides and to assure the parties that jurors will decide cases based on the evidence before them and not on improper bases or bias.[32] Challenges for cause are not sufficient by themselves to meet this purpose because attorneys at times cannot articulate their bases for thinking that a prospective juror is biased. Peremptory challenges compliment challenges for cause by allowing attorneys to strike juror who may harbor inarticulable prejudices against the defendant, thereby attaining the goal of obtaining an impartial jury more efficiently. Legal scholars have argued however, that in the process of eliminating such partialities, peremptory challenges are used in an unconstitutionally discriminatory manner. Moreover, the Supreme Court has held that such unconstitutional discrimination was present in *Batson.*[33] It is now appropriate that courts examine whether discrimination on the basis of gender is also unconstitutional.

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29. *Id.*

30. *Id.* at 228-30. At common law, the defendant in a felony case was allowed three to fifteen peremptory challenges, depending on the state. *Id.* In the federal system, each side has twenty peremptory challenges in a capital case and three in a misdemeanor case, while for a felony trial, the defendant has fifteen and the prosecution has six. FED. R. CRIM. P. 24(b).

31. *See e.g.*, Swain v. Alabama, 380 U.S. 202, 219 (1965) (stating that the Constitution does not require peremptory challenges).

32. *Id.*

33. Batson v. Kentucky, 476 U.S. 79, 88-89 (1986).

II. PAST ADJUDICATION OF THE PEREMPTORY CHALLENGE ISSUE

Before the issue of whether gender-based peremptory challenges violate the equal protection clause may be addressed, a historical background is necessary to better understand how courts have treated the problem of peremptory challenges. In tracing the history of peremptory challenge cases, the judicial treatment of racial-based peremptory challenges must be discussed first, because the proposition that gender-based peremptory challenges violate the equal protection clause is an extension of the *Batson* holding that racial-based peremptory challenges violate the equal protection clause. After the initial examination of racial-based peremptory challenge cases, the judicial treatment of gender-based peremptory challenges before and after *Batson v. Kentucky* will be discussed.

A. Judicial Treatment Of Racial-Based Peremptory Challenges

Critics of peremptory challenges argue that there is a doctrinal inconsistency in prohibiting discrimination in one aspect of the jury formation, the formation of a venire, and allowing discrimination in another aspect, the selection of jurors from the venire.[34] The Supreme Court has recognized the problem and attempted to deal with the most prominent form of discrimination in the exercise of peremptory challenges: striking a prospective juror based on the juror's race.[35] The Supreme Court took the first step toward eliminating the racially discriminatory use of peremptory challenges in *Strauder v. West Virginia*[36] by holding that states cannot discriminate in the jury selection processes.[37] The Court took the

34. *See* Comment, *The Right of Peremptory Challenge*, 24 U. CHI. L. REV. 751, 760 (1957) (discussing the problems of peremptory challenges, such as the fairness of the number of challenges allowed, time limitation on objecting to peremptory challenges, and the discriminatory use of peremptory challenges).

35. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that racial based peremptory challenges violate the equal protection clause).

36. 100 U.S. 303 (1879).

37. *Id.* at 310.

next step in *Swain v. Alabama*[38] by holding that states may not use peremptory challenges to systematically exclude prospective jurors in a repeated manner, based on race.[39] Finally, the Court took the definitive step in *Batson v. Kentucky*[40] by holding that states may not use peremptory challenges in even one instance to exclude a prospective juror based on race.[41]

1. Strauder v. West Virginia

The Supreme Court in *Strauder v. West Virginia*[42] for the first time held that the state statute depriving blacks of the opportunity to serve on a jury is forbidden by the fourteenth amendment as a violation of the equal protection clause.[43] *Strauder* involved a black man who was convicted of murder by an all white jury.[44] The black defendant alleged that the West Virginia statute, which provided that only white male citizens over twenty-one years of age could serve as a juror, violated his constitutional right to a trial by a jury selected and impanelled without discrimination against race or color.[45] The Court stated that the prohibitory language of the fourteenth amendment requires "immunity from inequality of legal protection, either for life, liberty, or property," and that any state action which denies this immunity contravenes the Constitution.[46] The Court ultimately held that every citizen is entitled to a jury chosen in a nondiscriminatory fashion.[47] While the *Strauder* court dealt with jury selection in its entirety, the first case that specifically addressed the discriminatory use of peremptory challenges was *Swain v. Alabama.*[48]

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38. 380 U.S. 202 (1965).
39. *Id.* at 223-24.
40. 476 U.S. 79 (1986).
41. *Id.* at 89.
42. 100 U.S. 303 (1879).
43. *Id.* at 310.
44. *Id.* at 304.
45. *Id.* at 304-05.
46. *Id.* at 310.
47. *Id.*
48. 380 U.S. 202 (1965).

2. Swain v. Alabama

In *Swain*, a black defendant was convicted of rape and was sentenced to death.[49] While a typical venire in his county has usually consisted of ten to fifteen percent blacks, no black person had actually served on a jury for over ten years.[50] At Swain's trial, among the eight black venirepersons, two were exempted and six were peremptorily struck.[51] Based on alleged invidious discrimination in the selection of jurors, the defendant moved to quash the indictment, to strike the jury venire, and to void the jury based on racial discrimination.[52] The defendant's motions were denied and his conviction was affirmed by the Alabama Supreme Court.[53] The Supreme Court of the United States granted certiorari.

The issue before the Court was whether a prosecutor's exercise of peremptory challenges to exclude blacks from the jury denied black defendants equal protection under the law.[54] The Court held that a prosecutor's use of peremptory challenges must be given the presumption of validity.[55] That presumption is not overcome even if every black person is excluded from the jury.[56] The presumption can only be overcome if it can be proven that the prosecution has excluded Blacks over a period of many cases, so that no black ever serves on the jury.[57] Although the *Swain* court admitted that some use of the peremptory challenge may violate the equal protection clause, the evidentiary burden of proving that such a violation had occurred was virtually impossible for a defendant to carry. As such, the prosecution's exercise of peremptory challenges was virtually immune from constitutional attack, despite *Swain*'s holding that peremptory challenges may not be used to

49. *Id.* at 203.
50. *Id.* at 205.
51. *Id.*
52. *Id.* at 203.
53. *Id.*
54. *Id.* at 209-10.
55. *Id.* at 222.
56. *Id.*
57. *Id.* at 223-24.

discriminate against race or color.[58] It was not until 1986 that the Supreme Court gave more guidance on the issue of racial-based peremptory challenges in *Batson v. Kentucky*.[59]

3. Batson v. Kentucky

The Supreme Court in *Batson* reaffirmed the *Swain* holding that the prosecutor's exercise of peremptory challenge based solely on racial discrimination violates the equal protection clause.[60] The Court also eliminated the heavy *Swain* evidentiary burden, which required a showing of a pattern of systematic exclusion based on race. The *Batson* court required only the establishment of a prima facie case of discrimination upon a showing of racial exclusion during the defendant's own case.[61]

In *Batson*, the prosecutor used his peremptory challenges to strike all four blacks on the venire for the purpose of getting an all white jury.[62] The all white jury convicted Batson, a black defendant, of second-degree burglary and receipt of stolen goods.[63] Justice Powell, writing for the majority, reaffirmed the *Swain* principle by recognizing that a state's purposeful or deliberate exclusion of blacks from a jury violates the equal protection clause.[64] The *Batson* court based its decision on the principle that the equal protection clause forbids the exclusion of blacks solely based on race or on the false assumption that Blacks as a group cannot be impartial.[65] In holding that the state is free to exercise its peremptory challenges for any reason, so long as that reason is related to the outcome of that particular case, the majority

58. *See* Comment, Batson v. Kentucky: *One Step Short of Halting the Discriminatory Use of Peremptory Challenges*, 21 U. TOL. L. REV. 267, 272 (1989) (discussing whether *Batson* should be extended to forbid the discriminatory use of peremptory challenges by defense counsel in criminal trials).

59. 476 U.S. 79 (1986).

60. *Id.* at 88-89.

61. *Id.* at 92-96.

62. *Id.* at 83.

63. *Id.*

64. *Id.* at 84.

65. *Id.* at 89.

emphasized that a juror's race or color is never related to the outcome of the case.[66]

Justice Marshall, in his concurrence, applauded the majority's decision, but wrote separately to express his view that racial discrimination in the jury selection process will continue unless the whole practice of peremptory challenge is abolished in criminal trials.[67] Chief Justice Burger dissented, stating that the Court decided an issue that was not presented on appeal, and that a restriction on the use of peremptory challenges contradicted the very nature of such challenges.[68]

Because the *Batson* court failed to offer language that would indicate that exclusion from juries of other cognizable classifications, such as gender, requires the same equal protection analysis utilized by the Court for racial-based peremptory challenges, a discussion of judicial treatment of gender-based peremptory challenges both before and after *Batson* is essential, in order to demonstrate the lack of uniformity in the courts and to illustrate the need for the Supreme Court resolution of the issue.

B. Judicial Treatment Of Gender-Based Peremptory Challenges

1. Gender-Based Peremptory Challenges Before Batson v. Kentucky

Prior to *Batson*, the question of the validity of gender-based peremptory challenges was not specifically addressed, but was relegated by the Supreme Court to an analysis under the sixth amendment. Courts have consistently held that the sixth amendment

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66. *Id.*

67. *Id.* at 105-08 (Marshall, J., concurring).

68. *Id.* at 112-21 (Burger, C.J., dissenting). Chief Justice Burger noted that the petitioner was appealing only on the issue of the sixth amendment's requirement of drawing juries from a fair cross-section of the community. *Id.* at 112-13. Justices Stevens and Brennan concurred on the same grounds. *Id.* at 108-11 (Stevens, J., concurring). Chief Justice Burger also noted that, following the conventional equal protection principles, the restriction on peremptory challenges for racial reasons must necessarily be extended to include all other classifications that are subject to equal protection scrutiny, which in effect would extinguish the whole practice of peremptory challenges. *Id.* at 124 (Burger, C.J., dissenting).

requires an impartial jury drawn from a fair cross-section of the community.[69] However, the sixth amendment analysis does not guarantee that a cognizable group[70] will not be excluded from a jury. Cases emphasize that although the defendant is entitled under the sixth amendment to a *venire* composed of a fair cross-section of the community, he or she is not entitled to a *jury* composed of a fair cross-section of the community.[71] Since the sixth amendment does not guarantee that a jury will reflect a fair cross section of the community, states turned to their own constitutions and an analysis of the equal protection clause of the United States Constitution.

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69. *See e.g.,* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (holding that restricting jury service to a special group or excluding an identifiable segment is in conflict with the constitutional concept of jury trial); Ballard v. United States, 329 U.S. 187, 194 (1946) (holding that a jury in which women were excluded is not representative of the community); Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24 (1946) (holding that exclusion of daily wage earners from the prospective juror list violates the requirement of an impartial jury drawn from a cross-section of the community); Glasser v. United States, 315 U.S. 60, 85-86 (1942) (stating that democracy requires that the jury be a body truly representative of the community); People v. White, 43 Cal. 2d 740, 754, 278 P.2d 9, 18 (1954) (holding that the American system requires an impartial jury drawn from a cross section of the entire community). Additionally, some courts have held that gender-based exclusions violate state constitutions. *See e.g.,* Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, 515 (1979) (holding that the exclusion of members of a discrete group solely on the basis of the group membership violates the Massachusetts Constitution, which requires a jury drawn from a fair cross-section of the community); People v. Wheeler, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978) (holding that exclusion of prospective jurors on a group bias violates the California Constitution which requires a jury drawn from a fair cross-section of the community).

70. *See* Comment, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1736-38 (1977) (defining a cognizable group as any identifiable group whose members share objective characteristics such as race and sex). Although cognizable groups may include groups defined by age, economic status, national origin, occupation, or religion, the classifications should be treated more flexibly since they are not as clearly identifiable as groups defined by race and sex. *Id.* at 1738. For the purposes of this Comment, the term "cognizable group" refers to identifiable group defined by race or sex. *See* Castaneda v. Partida, 430 U.S. 482, 494 (1977) (defining "identifiable group" as a group that is a recognizable, distinct class, singled out for different treatment under the law).

71. Taylor v. Louisiana, 419 U.S. 522, 538 (1975). The Court stated: "[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." *Id. See also* Holland v. Illinois, 110 S.Ct. 803, 807 (1990) (holding that the sixth amendment's requirement of a jury drawn from a fair cross-section of the community is not intended to ensure a representative jury, but an impartial one).

The California Supreme Court, in *People v. Wheeler*,[72] held that the use of peremptory challenges to exclude members of any identifiable group violates article I, section 16, of the California Constitution,[73] which provides that "[t]rial by jury is an inviolate right and shall be secured to all."[74] Similarly, the Massachusetts Supreme Judicial Court in *Commonwealth v. Soares* held that the exercise of peremptory challenges to exclude prospective jurors on the basis of sex, race, color, creed or national origin violates article 12 of the Massachusetts Constitution.[75]

a. People v. Wheeler

In the *Wheeler* case, two black defendants were convicted by an all white jury of a felony murder of a white victim.[76] Although a number of blacks who were present in the venire did not present any grounds for a cause challenge, all the black venirepersons were struck by the prosecutor's exercise of peremptory challenges.[77] The defendant's motions for mistrial were denied by the trial court.[78]

On appeal, the California Supreme Court reasoned that it is the courts' responsibility to ensure that the guarantee of a jury drawn from a fair cross-section of the community is not "reduced to a hollow form of words, but remains a vital and effective safeguard of the liberties of California citizens."[79] In order to ensure that

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72. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

73. *Id.* at 272, 583 P.2d. at 758, 148 Cal. Rptr. at 899-900. *See* CAL. CONST. art. I, § 16.

74. CAL. CONST. art.I, § 16.

75. Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, 516 (1979). *See* MASS. CONST. art.12, part 1 (providing that no person may be deprived of life or liberty except by the judgment of his or her peers at a trial by jury).

76. *Wheeler*, 22 Cal. 3d at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893.

77. *Id.*

78. *Id.* at 264-65, 583 P.2d at 753-54, 148 Cal. Rptr. at 894-95. The defense attorney became aware of the prosecutor's use of peremptory challenges to exclude black members after the prosecutor's second peremptory challenge of a black venireperson, and the defense attorney then started keeping the venirepersons' race for the record. *Id.* All seven black venirepersons were struck by the prosecutor through the use of peremptory challenges. *Id.* When the defense attorney protested, the judge gave the prosecutor an opportunity to explain his actions, but told the prosecutor at the same time that he need not explain his reasons for striking the prospective jurors. *Id.*

79. *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 900.

the guarantee is more than mere words, the court held that the parties, in exercising their peremptory challenges, must believe that the juror being struck is consciously or unconsciously biased against their client.[80] However, the court noted that a presumption of bias based solely on the grounds of the juror's membership in an identifiable group, such as race, religion, ethnic or similar grounds, "frustrates the primary purpose of the representative cross-section requirement."[81]

Recognizing that the exercise of peremptory challenges based solely on group affiliation violates the state constitution, the *Wheeler* court fashioned a procedural remedy, concluding that the presumption of constitutionality of the party's use of peremptory challenge could be rebutted by a prima facie showing of discrimination.[82] Furthermore, the Court held that the defendant may establish a prima facie case by showing that the persons excluded are members of a cognizable group against whom discrimination is prohibited, and by demonstrating that under the circumstances of the case there is a "strong likelihood" of exclusion based on group affiliation, rather than any specific bias.[83] Finally, once a prima facie case of discrimination is established, the court explained that the burden shifts to the other party to rebut.[84] To rebut the prima facie case, the allegedly offending party must demonstrate that the juror's exclusion was based on a specific bias. However, this demonstration "need not rise to the level of a challenge for cause."[85]

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80. *Id.* at 274-75, 583 P.2d at 760, 148 Cal. Rptr. at 901.

81. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

82. *Id.* at 278-80, 583 P.2d at 762-64, 148 Cal. Rptr. at 904-5. The Court explained that the reason for adopting the presumption of constitutionality was in deference to the legislative intent underlying peremptory challenges to encourage their use in proper cases, and out of respect for counsel as officers of the court. *Id.*

83. *Id.* The court defined "group bias" as discrimination against a juror because he or she is a member of an "identifiable group." *Id.* at 276, 583 P.2d. 761, 148 Cal.Rptr. at 902. The court defined "specific bias" as a bias relating to the particular case on trial, the parties, or the witnesses. *Id.* The *Wheeler* court made a distinction between group bias and specific bias, prohibiting group bias while allowing specific bias. *Id.* at 276-77, 583 P.2d. at 761-62, 148 Cal.Rptr. at 903.

84. *Id.* at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. The court specified that the showing of non-discriminatory basis need not rise to the level of challenge for cause. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

85. *Id.* at 281-82, 583 P.2d at 765, 148 Cal. Rptr at 906.

b. Commonwealth v. Soares

In the Massachusetts case of *Commonwealth v. Soares*,[86] three black defendants were charged and convicted of assault, battery, and murder of white victims.[87] Although the court could not find a reason to sustain challenges for cause, the prosecutor used his peremptory challenges to strike twelve out of thirteen black venirepersons, resulting in a jury composed of eleven white jurors and one black juror.[88]

Using reasoning similar to that employed in *Wheeler*, the *Soares* court held that the exercise of peremptory challenges to exclude prospective jurors on the basis of sex, race, color, creed, or national origin violated article 12 of the Massachusetts Constitution.[89] The *Soares* court adopted a procedural remedy similar to the remedy adopted by the *Wheeler* court, establishing a rebuttable presumption of the constitutionality of the exercise of peremptory challenges.[90]

Because of the decisions in *Wheeler* and *Soares*, citizens of California and Massachusetts are guaranteed the selection of a jury untainted by racial or gender discrimination. The California and Massachusetts holdings suggest that states need not look to *Batson* for language which would permit an extension of the Court's reasoning to prohibit gender-based peremptory challenges. However, other state courts were faced with the problem of whether to allow gender-based peremptory challenges in the absence of support from a state constitution. Thus, with the Supreme Court's holding in *Batson v. Kentucky*, the time was ripe for the states to attempt to apply the equal protection analysis used

86. 377 Mass. 461, 387 N.E.2d 499 (1979).

87. *Id.*, 387 N.E.2d at 503-06.

88. *Id.* at 508.

89. *Id.* at 516. *See* MASS. CONST. art. 12 (providing that no person may be arrested or imprisoned except by a judgment of his or her peers, and that the legislature may not make any law that will subject a person to a capital or infamous punishment without a trial by a jury). *See also id.* art. 15 (providing that the parties have a right to a trial by jury and that this method of procedure is sacred).

90. *Wheeler*, 387 N.E.2d at 517.

by the *Batson* court to eliminate racial-based peremptory challenges to the problem of gender-based peremptory challenges.

2. *Judicial Treatment of Gender-Based Peremptory Challenges After* Batson v. Kentucky

State and federal courts have not been in agreement on the issue of whether the *Batson* court intended to apply the equal protection analysis to gender-based peremptory challenges. At the federal level, the Ninth Circuit held that gender-based peremptory challenges violate the equal protection clause,[91] while the Fourth Circuit held that these same challenges are constitutional.[92] At the state level in *State v. Oliviera*, the Supreme Court of Rhode Island agreed with the Fourth Circuit's *United State v. Hamilton*, in holding that the *Batson* Court did not intend to extend the prohibition of racial-based peremptory challenges to gender-based peremptory challenges.[93] The Supreme Court of New York, Appellate Division agreed, however, with the Ninth Circuit, holding that gender-based peremptory challenges should be prohibited.[94]

a. United States v. De Gross

In the Ninth Circuit case, *United States v. De Gross*,[95] a jury consisting of three men and nine women convicted a female defendant of two counts of aiding and abetting the transportation of an alien within the United States.[96] The defense attorney used seven of his peremptory challenges to strike male venirepersons.[97]

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91. *See* United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990) (holding that gender based peremptory challenges violate the equal protection clause).

92. *See* United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) (holding that *Batson* did not prohibit gender based peremptory challenges).

93. *See* State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (holding that *Batson* encompassed only racial based peremptory challenges).

94. *See* New York v. Irizarry, 560 N.Y.S.2d 279, 280 (1990) (holding that gender based peremptory challenges violate the equal protection clause).

95. 913 F.2d 1417 (9th Cir. 1990).

96. *Id.* at 1419-20.

97. *Id.* at 1419.

The district court denied the defense's eighth peremptory challenge against another male when the prosecution objected on the grounds of intentional discrimination.[98] The court ruled that the government made a prima facie case of purposeful discrimination when it objected to the defense's use of peremptory challenges to strike seven males from the jury pool.[99] After holding that the government had standing to object to the defense's peremptory challenges, the court announced that such gender classification must be substantially related to the achievement of an important governmental objective.[100] The court found the governmental objective to be the impaneling of a fair and impartial jury, but held that gender-based peremptory challenges were based on the false assumption that members of certain groups are unqualified to serve as jurors, and that members of certain groups are unable to consider the case against a member or a nonmember of their group impartially.[101] The court concluded that gender-based peremptory challenges are not substantially related to achieving an impartial jury, and therefore the exercise of peremptory challenges in this case violates the equal protection clause.[102] In reaching its conclusion, the *De Gross* court analogized gender-based

98. *Id.*

99. *Id.* Before disallowing her peremptory challenge against the seventh male venireperson, the court gave De Gross the opportunity to explain her reasons for striking the male venire persons, as required by *Batson*. *Id.* However, she offered none. *Id.* De Gross also had an equal protection objection to the government's challenge against the only Hispanic venire person, but the court ruled that the government's explanation of wanting more males on the jury satisfied the burden. *Id.* at 1419-20.

100. *Id.* at 1421-22. The court found support for its holding that the government has standing from the language of *Batson*, which stated that "discrimination in the selection of jurors harms not only the accused, but also the excluded juror and the entire community." *Id.* at 1420 (citing *Batson*, 476 U.S. at 87. The court held that the government, because of its interest in protecting the rights of its citizens, had standing to assert the equal protection rights of the venireperson sought to be excluded. *Id.* at 1421. Later in the opinion, the court also held that the prohibition of discriminatory use of peremptory challenges applies to the defense as well as the prosecution, because the harm caused is the same, and there is state action due to the fact the defense uses a right created by the government. *Id.* at 1423-24.

101. *Id.* at 1422.

102. *Id.* at 1422-23. The court also noted that the government has an interest in promoting public confidence in the judicial system and in discouraging community prejudice, and that gender discrimination during jury selection is not substantially related to achieving those interests. *Id.* at 1422. Throughout the opinion, the court emphasized that "gender bears no relationship to an individual's ability to participate on a jury." *Id.* at 1422-23.

peremptory challenges to those based on race by holding that gender, like race, is not an indication of one's ability to serve as a juror.[103]

b. United States v. Hamilton

In contrast, the Fourth Circuit, in *United States v. Hamilton*,[104] held that the *Batson* Court did not offer any authority to extend its decision to prohibit gender-based peremptory challenges.[105] *Hamilton* involved a number of black defendants who were convicted of various drug-related offenses.[106] When requested to give its reasons for striking seven of the eight black venire women, the government offered the explanation that it wanted more men on the jury.[107] The court accepted the explanation as a racially neutral explanation and rejected the contention that *Batson* should be extended to apply to gender-based peremptory challenges.[108] The court noted that although *Batson* relaxed the evidentiary burden of *Swain*, *Batson* had "offered no intimation that it was extending the equal protection safeguards involving peremptory strikes to gender."[109] The court stated that although the *Batson* Court could have clearly abolished the peremptory challenge or prohibit the use of challenge based on race, gender, age or other group classification, the Court had not done so because of the important role that peremptory challenges play in the jury system.[110] The court concluded that the Court in *Batson* intended to restrict the exercise of peremptory challenges on racial grounds alone.[111]

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103. *Id.* at 1422.

104. 850 F.2d 1038 (4th Cir. 1988).

105. *Id.* at 1042.

106. *Id.* at 1038.

107. *Id.* at 1041. The convicting jury consisted of six white females, three black females, and three white males. *Id.*

108. *Id.* at 1042.

109. *Id.*

110. *Id. See supra* note 32 (stating the important role of peremptory challenges as obtaining an impartial jury).

111. *Id.* at 1043.

c. State v. Oliviera

The state of Rhode Island, in addressing the problem of gender-based peremptory challenges, agreed with the Fourth Circuit in holding that *Batson* does not extend to gender-based discrimination.[112] In *Oliviera*, Thomas Oliviera was convicted of second degree child molestation and assault with intent to commit a sexual act.[113] On appeal, he contended that the prosecution discriminated against male members of the jury panel by exercising six of its seven peremptory challenges to remove males from the jury, thereby violating the equal protection clause.[114]

The *Oliviera* court concluded that *Batson* applied only to discrimination based on race, not discrimination based on gender.[115] The court noted that one of the purposes of the *Batson* decision was to cure the long history of discrimination against blacks in the jury selection process and that unlike blacks, males have not suffered a long history of discrimination in jury selection process.[116] Therefore, the *Oliviera* court held that the prosecution's exercise of peremptory challenges to exclude males from the jury did not violate the equal protection clause.[117]

d. New York v. Irizarry

In contrast, New York, in addressing the question of extending *Batson* to prohibit gender-based peremptory challenges, agreed with the Ninth Circuit in holding that exclusion of venirepersons based on their gender violated the equal protection clause.[118] The prosecutor in *New York v. Irizarry* peremptorily struck all five females from the venire.[119] Consequently, a male defendant was

112. *See* State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987).
113. *Id.* at 867.
114. *Id.*
115. *Id.* at 870.
116. *Id.*
117. *Id.*
118. New York v. Irizarry, 560 N.Y.S.2d 279 (1990).
119. *Id.* at 279.

convicted of burglary by a jury consisting of eleven men and one woman.[120] Relying on *Batson*, the defendant moved for mistrial because the prosecutor excluded women from the jury.[121]

The Supreme Court of New York, Appellate Division, affirmed the trial court's decision that "women were a cognizable group for *Batson* purposes," and held that the *Batson* principle of selecting jury members pursuant to nondiscriminatory criteria applies "to the improper use of peremptory challenges to exclude women from a petit jury."[122] The court also stated that the *Batson* principle should be applied to gender-based peremptory challenges because gender-based distinctions are subject to "strict scrutiny".[123] The *Irizarry* court may have used the wrong standard of review for gender-based classification by utilizing the strict scrutiny test instead of the mid-level scrutiny that has traditionally been used by the Supreme Court of the United States.[124] Thus, the few courts who have addressed the issue of gender-based peremptory challenges are in conflict. Given the conflicting positions taken by the lower courts regarding gender-based peremptory challenges, and given the importance of the issue, the Supreme Court of the United States is likely to resolve the conflict in the near future.

III. CONSTITUTIONALITY OF GENDER-BASED PEREMPTORY CHALLENGES

In its efforts to resolve the issue of gender-based peremptory challenges, the Supreme Court will have to address several related issues. The Court must first determine whether the peremptory

120. *Id.*

121. *Id.* at 279-80.

122. *Id.* at 280. The court also held that although the defendant was a male, he had standing to challenge the exclusion of females because discrimination in the jury selection process harms not only the defendant, but also the excluded juror and the society as a whole. *Id.*

123. *Id.*

124. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Michael M. v. Superior Court, 450 U.S. 464 (1981); Craig v. Boren, 249 U.S. 190 (1976) (holding that the standard of review for gender classification is not a strict scrutiny but a mid-level scrutiny, which is satisfied only if the classification substantially furthers an important governmental objective).

challenge system should be preserved. The Court must address this critical issue first, because placing another restriction on the exercise of peremptory challenges would, arguably, chip away at the very nature of peremptory challenges. If the Court decides to preserve peremptory challenges despite the changes any restrictions would bring to the exercise of peremptory challenges, it must then address the issue of gender-based peremptory challenges and juxtapose that with the courts' treatment of racial-based peremptory challenges and with the nature of the peremptory challenges itself.

A. Peremptory Challenges Should Not Be Abolished

The Supreme Court Justices have recognized that placing restrictions of any kind on peremptory challenges must be reconciled with the very nature of the challenges themselves.[125] For instance, Justice White, writing the majority opinion in *Swain v. Alabama*, noted that subjecting peremptory challenges to the demands of the equal protection clause would radically change the nature and operation of the challenge so that the challenge is no longer arbitrary.[126] In the eyes of Justice White, such a change in the character of the peremptory challenges would be unwarranted at any cost. Chief Justice Burger states a similar view in his dissent in *Batson v. Kentucky*, in which he stressed that requiring rationality in government action has no application in "an arbitrary and capricious right."[127] Although Justices White and Burger preferred leaving the peremptory challenge system in its pure form

125. *See* Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring) (arguing that peremptory challenges must be abolished to completely eliminate discrimination in the jury selection). Some commentators have raised similar arguments. *See e.g.*, Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trial*, 21 HARV. C.R. - C.L. L. REV. 227 (1986) (advocating the abolition of peremptory challenges in criminal proceedings); Comment, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026 (1987) (advocating the elimination of peremptory challenges as a remedy for the misuse of peremptory challenges).

126. Swain v. Alabama, 380 U.S. 202, 221-22 (1965).

127. *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting).

with no restrictions,[128] others have recommended for a complete abolition of the system.

In the *Batson* decision, Justice Marshall indicated his belief that the only way to end discrimination is to eliminate peremptory challenges entirely.[129] Justice Marshall explained that the right of peremptory challenges is "not of constitutional magnitude" and can be eliminated without impairing the constitutional guarantee of an impartial jury and fair trial.[130] Justice Goldberg, in his dissent in *Swain v. Alabama*, emphasized that the Constitution compels the protection of a defendant's right to have a jury chosen in conformity with the requirements of the fourteenth amendment, rather than the right to exercise peremptory challenges.[131]

Although the Supreme Court has recognized that peremptory challenges are not required by the Constitution,[132] historically, the Court has repeatedly upheld the system as a necessary part of trial by jury.[133] Given the long history and the deference accorded to peremptory challenges by the Court and given the Court's current conservative composition, it is highly unlikely that the Court would take on the task of abolishing a practice that is as old as the Court itself.

Another argument for preserving peremptory challenges is that without peremptory challenges, the courts are left only with challenges for cause. Allowing challenges for cause to take over the functions served by peremptory challenges would be

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128. *See Batson*, 476 U.S. at 112 (Burger, C.J., dissenting) (arguing that peremptory challenges should be allowed without restrictions placed by the equal protection clause); *Swain*, 380 U.S. at 227 (holding that there must be a showing of pattern of systematic discrimination before the exercise of peremptory challenges can violate the Equal Protection Clause).

129. *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring).

130. *Id.* at 108 (Marshall, J., concurring).

131. *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting).

132. *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986); Stilson v. United States, 250 U.S. 583, 586 (1919) (stating that peremptory challenges are not of constitutional origin).

133. *See* Pointer v. United States, 151 U.S. 396, 408 (1894) (upholding peremptory challenges as one of the most important rights secured to the accused); Lewis v. United States, 146 U.S. 370, 376 (1892) (stating that peremptory challenges are a necessary part of trial by jury).

difficult.[134] Although both challenges have the ultimate goal of obtaining a fair and impartial jury, attorneys have always relied on peremptory challenges when they are not able to articulate reasons for feeling that certain jurors have bias or prejudice against their clients. Challenges for cause, without its peremptory counterpart, will not satisfactorily serve the function of obtaining a fair and impartial jury. The reason is two-fold. First, jurors can sometimes deceive the court regarding their prejudices, consciously or subconsciously, during voir dire, thereby escaping elimination under challenges for cause alone. Without peremptory challenges, courts must rely upon the juror's statement of impartiality. Peremptory challenges operate as a safeguard in cases where the juror's statement of impartiality is not credible but there exists no effectively way of impugning the juror's credibility. Second, the requirement of court approval for challenges for cause may further frustrate the attorney's efforts to obtain an impartial jury, because without peremptory challenges attorneys are prohibited from eliminating a juror when the court does not agree that the juror should be excused for cause.

Considering the Supreme Court's acceptance of peremptory challenges as a necessary tool of a jury trial and the consequence of abolishing peremptory challenges, it is likely that the Court will choose to preserve the peremptory challenge system, even if it has to alter the nature of the system by placing restrictions required by the equal protection clause. The *Batson* court's willingness to limit peremptory challenges rather than abolishing them altogether is a further support for the view that the Supreme Court will not abolish the peremptory challenge system.

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134. *See* Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 839 (1989) (contending that allowing challenges for cause to take over the functions served by peremptory challenges would be unwise because the challenge for cause does not permit court to assess jurors' bias realistically).

B. Gender-Based Peremptory Challenges Should Be Prohibited as a Violation of the Equal Protection Clause.

Once the Court determines that the peremptory challenges should be preserved, the next consideration would be whether gender-based peremptory challenges should be prohibited. In contemplating the issue of gender-based peremptory challenges, the Supreme Court should recognize that although racial and gender classifications have traditionally been analyzed differently,[135] in the context of peremptory challenges gender classification shares many similar characteristics with racial classification, to warrant similar treatment under the equal protection clause.

Racial and gender classifications are analogous in three respects. First, both groups have historically suffered disparate treatment because of their membership to an identifiable group. Second, race and gender are immutable characteristics, which cannot be changed. Finally, both members of minority races and members of the female gender, have historically been politically powerless. Because of these reasons, race and gender classifications have traditionally been treated with special care by the courts.[136]

Considering the similarities between classifications based on race and those based on gender, it seems as though gender classifications should be given the same strict scrutiny that is

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135. Gender groups have been recognized as quasi-suspect classes whose standard of review is the mid-level scrutiny, whereas racial groups have been recognized as suspect classes whose standard of review is a higher one of strict scrutiny. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971) (holding that gender classifications are quasi-suspect classes deserving of mid-level scrutiny, which can be satisfied only if the classification substantially furthers an important state interest). *See also* Galloway, *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 142 (1989) (explaining that the Supreme Court has held that classifications based on gender are semi-suspect and violate the equal protection clause unless they are substantially related to an important government interest). *See id.* at 132 (explaining that the core purpose of the equal protection clause was to protect the recently liberated blacks from government discrimination). The Court has extended the protection to other minorities, holding that classifications based on race violates the Equal Protection Clause unless they are necessary to further a compelling government interest. *See id.*

136. *Cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that mentally retarded persons are not a quasi-suspect class because they do not satisfy the requirements of a quasi-suspect class, such as historical discrimination, immutable trait, and political powerlessness).

accorded to racial classifications. However, the Supreme Court has refused to administer heightened review to gender classifications. The Court has often reasoned that disparate treatment based on race is rarely justifiable. Disparate treatment based on gender, on the other hand, is justifiable in some cases because of the physical differences that exist between men and women. For example, the Court has previously held that imposing criminal sanctions for statutory rape only on men is constitutional because women are deterred from committing rape by the possibility of pregnancy.[137] However, the physical differences between the genders do not have any bearing on a person's ability to serve as a juror.

Batson held that states may not exclude jurors based on race on the false assumption that persons of that race as a group are not qualified to serve as jurors.[138] The Court reasoned that the competence to serve as a juror depends on an assessment of individual qualifications, and ability to consider evidence impartially at trial.[139] Therefore, a person's race is simply unrelated to his or her fitness as a juror.[140] Similarly, there is no basis to assume that persons of one gender as a group are not qualified to serve as jurors. Additionally, the Court stated that public confidence in the justice system is undermined when the jury selection procedure purposefully excludes blacks because of their race.[141] Public confidence is undermined because the state's exclusion based on race is readily identifiable, thus indicating to the public that the state is engaged in an impermissible practice of discrimination. Such a display of discrimination works to invalidate the credibility of the judicial system. The public confidence is equally undermined when the procedure purposefully excludes persons solely based on their gender, because exclusion based on gender is as easily identifiable as that based on race.

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137. *See* Michael M. v. Superior Court, 450 U.S. 464 (1981) (holding that imposition of criminal liability only on males for statutory rape is constitutional because females are deterred by fear of pregnancy). *See also* Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that requiring only males to register for draft is constitutional because only males are allowed to engage in a combat).

138. Batson v. Kentucky, 476 U.S. 79, 86 (1986).

139. *Id.* at 87.

140. *Id.*

141. *Id.*

If the Court plans to keep peremptory challenges but satisfy the requirements of the equal protection clause, the only limitation to peremptory challenges, other than the prohibition against racial based exclusion, should be the prohibition against gender-based exclusion. Prohibition of gender-based peremptory challenges is not only a logical extension of the *Batson* prohibition, but is also the logical place to end the restructuring of the peremptory challenge. Some commentators have argued that a distinction cannot be made between gender and other classifications. As Justice Burger noted in his dissent in *Batson*, the conventional equal protection principles would have to include prohibition of peremptory challenges based not only on race and sex, but also on "religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry."[142] However, while courts have held that the equal protection clause specifically requires that no person in a similar situation be treated disparately, the Court only applies heightened scrutiny to members of suspect classes.[143] The people belonging to the classifications mentioned by the Chief Justice are not accorded heightened scrutiny. The Court has never afforded the kind of protection it has given to classifications based on race and gender to the classifications mentioned by Justice Burger. The reason that higher protection has been withheld from the people belonging to the classifications that Justice Burger mentioned is because, according to the Supreme Court, those people have not experienced the kind of discrimination historically suffered by people belonging to a certain race or gender.[144] Such classes do not share the unequal treatment or political powerlessness suffered by minorities and females. Moreover, most of classes mentioned by Justice Burger do not share immutable traits. The classification other than gender

142. *Id.* at 124 (Burger, C.J., dissenting).

143. Plyler v. Doe, 457 U.S. 202, 216-17 (1981).

144. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that mentally retarded people are not a quasi-suspect class because they are not politically powerless, and their disabilities cannot be distinguished from other immutable non-suspect class disabilities such as age or physical handicap); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (declining to extend heightened review to differential treatment based on age because the aged have not experienced a history of purposeful unequal treatment).

which the Court has recognized as deserving of a higher review accorded to quasi-suspect class, is illegitimate children.[145] However, classifications based on illegitimacy may be readily distinguished from those based on gender because, typically, illegitimacy has presented a problem only in cases involving a beneficiary's eligibility to inherit.[146] Moreover, Justice Brennan has specifically stated that discrimination against illegitimates has never been as severe or pervasive as the historic legal and political discrimination against women and blacks.[147] Today's society no longer place much stigma on illegitimacy. Therefore, discrimination based on illegitimacy is less of a problem.[148] Additionally, the community cannot readily ascertain the existence of discrimination against illegitimacy since that trait is not immediately visible, and thus, the public confidence in the judicial system would not be undermined by allowing peremptory challenges based on such a classification.[149] Therefore, although illegitimacy may share the quasi-suspect classification with gender classification, it is not as crucial to prohibit illegitimacy based peremptory challenges as compared to gender-based peremptory challenges.

Because of the similarities shared by racial-based and gender-based peremptory challenges, the Supreme Court should prohibit gender-based peremptory challenges as violative of the equal

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145. *See* United States v. Clark, 445 U.S. 23, 27 (1980); Lalli v. Lalli, 439 U.S. 259, 268 (1978) (holding that classification based on illegitimacy is unconstitutional unless the classification is substantially related to a particular interest of the state).

146. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628 (1974) (invalidating a federal classification which did not permit some illegitimate children to obtain benefits under parent's disability insurance); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (invalidating a statute that did not permit dependent, illegitimate children of a father to recover workers' compensation benefits for death of the father).

147. Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973).

148. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2346 (1989) (stating that California does not recognize legitimacy and illegitimacy as distinct classes).

149. Some may argue that illegitimacy is as readily ascertainable as race and gender since although not a visible trait, as illegitimacy can be easily recognized if every person who answers "yes" to the question "are you an illegitimate child?" is excluded from the venire. However, such a problem will not present itself often. The only occasion which will prompt questions regarding illegitimacy is when the case involves the issue of illegitimacy. In other cases, the question has no relevancy and therefore will most likely not be asked. In contrast, the state need not ask whether the prospective juror is male or female before excluding him or her, because gender is clearly visible.

protection clause. Since classifications based on other factors do not present the same problems as does classifications based on gender, the gender-based peremptory challenge is the logical place to end the restrictions on peremptory challenges.

CONCLUSION

The Supreme Court took "a historic step" when it sought to eliminate racial discrimination in the selection of juries.[150] However, that "historic step" is not complete if the Court allows sexual discrimination in a process that is designed to guarantee a fair trial. To end the conflict among the lower courts, and more importantly, to end the continuing discrimination in courtrooms, *Batson v. Kentucky* should be extended to prohibit gender-based peremptory challenge, because both types of challenges violate the equal protection clause of the United States Constitution.

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150. Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).