Race, Gender, and the Peremptory Challenge: A Postmodern Feminist Approach

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[I]n the beginning, no word, but only a myriad of voices that could be interpreted in any number of ways.¹

I. INTRODUCTION

The peremptory challenge virtually always has been a part of the American judicial system. It was “already venerable at the time of Blackstone, . . . reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, [it] was recognized in an opinion by Justice Story to be part of common law of the United States, . . . and [it] has endured through two centuries in all the States . . . .”² However, in recent years, the peremptory challenge has been under attack as the Supreme Court has imposed restrictions on parties’ ability to strike jurors on the basis of race and gender.

The Court has analyzed the constitutionality of the exercise of peremptory challenges under both the defendant’s Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community and the excluded juror’s Fourteenth Amendment right to equal protection. In Batson v. Kentucky,³ and J.E.B. v. Alabama ex rel. T.B.,⁴ the Court combined these rights to protect the defendant and prospective jurors from the exercise of peremptory strikes based on race and gender, thereby limiting use of the peremptory challenge. However, under the Court’s test, it is very difficult to challenge the discriminatory exercise of peremptory strikes. Now that the Court’s jurisprudence is settled, it is necessary to reexamine the very concepts, such as impartiality and representativeness, that underlie the Court’s approach.

As an alternative to the Court’s equal protection analysis, the peremptory challenge could be analyzed under the Sixth Amendment.⁵ The text and purposes of the Sixth Amendment compel an inclusive approach to jury selection procedures. Only a random sample of jurors drawn from the community fulfills the Sixth Amendment’s vision of the jury. Abolishing peremptory challenges and retaining challenges for cause would preserve Sixth Amendment guarantees. The concept of an inclusive jury guarantees a

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⁵. The Sixth Amendment is binding on the states by virtue of the Fourteenth Amendment. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

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defendant the right to a cross-section of the community on his or her jury. An inclusive jury would provide a random selection process based on the concept that every citizen has a right and duty to serve that cannot be rescinded without good cause.

By moving beyond the traditional conceptions of the rights involved, postmodern feminism provides a unique way of analyzing Batson and the continuing validity of the peremptory challenge. In examining postmodern feminist deconstruction and the law, Drucilla Cornell writes, "we can and should understand the deconstructibility of law to open up the space for the reinterpretation and reinvocation that allows feminist inroads into the law." In this way, postmodern feminism provides a new medium to reinterpret the constitutional limits on peremptory challenges.

Based on a postmodern feminist analysis, I contend that the peremptory challenge should be eliminated in its entirety. A postmodern feminist analysis will show that (1) the peremptory challenge perpetuates the notion of white men as models of objectivity and of marginal groups as inherently subjective actors; (2) equal protection doctrine regarding race and gender discrimination denies members of dual categories, such as black women, protection from unlawful use of the peremptory; and (3) the peremptory challenge, in theory and in practice, reinforces the notion of essential nature, which assigns men sovereignty and relegates women to the periphery of the public domain.

Historically, postmodernism has been most influential in the fields of aesthetics and literature. However nascent its relationship with the law, postmodern analysis can provide unique insight by decentering traditional boundaries of the legal establishment. As a successor to the Enlightenment and the influences of Rousseau and Montesquieu, postmodern theory rejects the idealization of rational thought. Postmodernists deride such rationality as artifice that validates the idea of the "foundation of society upon natural reason, the self-evident rights of man, and the confidently expressed will of the collectivity of emancipating itself from superstition, tradition and blind acceptance of authority." Postmodern theory delights in internal contradiction, anomaly and irrationality. Postmodern analysis views law as a product of the primordial fear of social disruption, antagonism, and chaos.

In the early twentieth century, the feminist movement and the introduction of Freudian psychoanalysis laid the foundation for the development of postmodern feminist theory in the United States. Postmodern feminist theory relies heavily on the work of French feminist Simone de Beauvoir. De

9. Id. at 591.
Beauvoir introduced the notion that man is the Subject, and that woman is the Other, defined exclusively by her relation to man. Postmodern feminism reclaims the state of Otherness and views it positively, as a position from which to reflect upon and criticize norms, values, and practices that the dominant culture seeks to impose on women. By adopting a perspective outside of the dominant culture, postmodern feminist analysis challenges aspects of the law and of society that are considered basic truths.

The common theme of postmodern feminism has been a critique of "the desire to think in non-binary, non-oppositional thoughts, the kind that may have existed before Adam was given the power to name things." By rejecting binary oppositions as limitations on thought and knowledge, postmodern feminism provides a way of being, thinking, and speaking that allows for openness, plurality, diversity, and difference. Postmodern feminism views universal definitions as useless, challenging traditional dichotomies such as emotion/reason, beautiful/ugly, and self/other. There is neither essential woman nor essential truth. In fact, because language and reality are socially constructed, the concept of truth is inherently subjective and contested. As Drucilla Cornell explains,

[T]he deconstructive project resists the reinstatement of a theory of female nature or essence as a philosophically misguided bolstering of rigid gender identity which cannot survive the recognition of the performative role of language, and more specifically of metaphor. Thus deconstruction also demonstrates that there is no essence of Woman that can be effectively abstracted from the linguistic representations of Woman. The referent Woman is dependent upon the systems representation in which she is given meaning.

Analyses of the peremptory challenge have focused on the meaning of several phrases in the Sixth and Fourteenth Amendments and the Supreme Court's jurisprudence construing these amendments. Terms which appear frequently in the scholarly literature and the Court's opinions regarding juries include fair and impartial, representative, and cross-section of the community. By looking beyond the face value of these terms and analyzing the fundamental lexicon of the peremptory challenge, a postmodern feminist analysis allows
one to reconceptualize basic assumptions of our justice system.

In the following sections, I use a postmodern feminist approach to criticize the ideas of impartiality, dichotomies, and essentialism inherent in the peremptory challenge. This critique offers an alternative to traditional analyses of jury selection procedures. This Article will analyze the peremptory challenge and its significance in the U.S. judicial system, particularly its use as a tool to discriminate against defendants and prospective jurors. Part I will provide a general background on jury selection and peremptory challenges. Part II will cover the Supreme Court decisions in *Batson v. Kentucky*, *Holland v. Illinois*, and *J.E.B. v. Alabama ex rel. T.B.*, the leading cases concerning the peremptory challenge under the Sixth Amendment and Fourteenth Amendment. Part III will discuss the difficulty of establishing a prima facie case of discrimination and problems stemming from *Batson's* neutrality requirement. Specifically, this section examines how rigid legal categories of race and gender impact women of color, as well as the implications of permitting "neutral" explanations to justify peremptory challenges. Part IV will present arguments for the reform and elimination of the peremptory challenge, suggesting possible alternatives to ensure fair, non-discriminatory jury selection procedures.

A. Background

The concept of trial by jury can be traced to 1166 when King Henry II of England enacted a series of ordinances called the “Assize of Clarendon.” One of these ordinances directed the appointment of “the twelve most lawful men” to conduct inquiries of robbery and murder. The Magna Carta of 1215 maintained this institution and the U.S. Constitution incorporated the jury into criminal and civil cases. The Sixth Amendment protects the right to trial by jury in criminal cases, while the Seventh Amendment guarantees jury trials in most civil proceedings.


19. 493 U.S. 474 (1990) (holding that the Sixth Amendment does not apply to peremptory challenges).


22. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. REV. 153, 164-65 (1989). Juries have not been as democratic as their reputation might suggest. Alschuler notes that in eighteenth century Staffordshire only one quarter of the adult male population was sufficiently wealthy to meet the property qualification for jury service. *Id.*

23. U.S. CONST. AMEND. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State"); see also U.S. CONST. ART. III, § 3 (providing that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury").

24. U.S. CONST. AMEND. VII (providing that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved").
Beginning with this basic constitutional right, the jury selection procedure has developed into a relatively elaborate process. Using a list of names commonly drawn from voter registration lists or telephone directories, a panel or venire is selected, usually at random. Following the selection of the venire, attorneys select a jury, using the voir dire examination to decide which jurors to remove. The two types of challenges are challenges for cause and peremptory challenges. Challenges for cause are restricted to "narrowly specified, provable and legally cognizable" reasons for dismissing jurors. On the other hand, the peremptory challenge permits attorneys to excuse jurors without stating any reason. Unlike challenges for cause, the peremptory challenge is not subject to the court's control.

The Supreme Court has frequently noted that the peremptory challenge is one of the most important rights of defendants. As the Court has explained, the purpose of the peremptory challenge "is not only to eliminate extreme partiality on both sides, but to assure the parties that jurors will decide [cases based on] the evidence placed before them." By removing jurors with extreme positions or viewpoints on either side of a case, the peremptory challenge, theoretically, helps to create impartial juries. Furthermore, by providing the defendant with some control over the panel that will decide his or her fate, the peremptory challenge seeks to ensure that a criminal defendant has "a good opinion" of his jury, protecting the defendant from a trial "by anyone he intuitively dislike[s]." In other words, the "jury should not only be fair and impartial, but should seem so to those whose fortunes are at issue."


In 1986, Batson v. Kentucky held that a prosecutor's use of peremptory

27. The extensive list of possible reasons included in challenge for cause has lead to such comments as one attributed to Mark Twain: "We have a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty in finding twelve men [sic] everyday who don't know anything and can't read." Quoted in Alschuler, supra note 22, at 154. On the other hand, in practice, the challenge for cause may be more difficult to achieve. For example, the courts have demonstrated reluctance to excuse a potential juror for cause. See, e.g., Deborah L. Forman, What Difference Does it Make? Gender and Jury Selection, 2 UCLA Women's L.J. 35, 68 (1992); Brent J. Gurney, Note, The Case for Abolishing the Peremptory Challenges in Criminal Trials, 21 Harv. C.R.-C.L. L. Rev. 227, 268-71 (1986).
29. Id.
31. Id.
challenges based on race violates the Equal Protection Clause. In Batson, the prosecutor removed the only four black men on the venire during voir dire. The Supreme Court found that the defendant had made out a prima facie case of discriminatory use of peremptory challenges and shifted the burden to the prosecutor to provide race-neutral explanations for each of the peremptory challenges.

In Batson, the Court relied heavily upon Strauder v. West Virginia, which held that the statutory exclusion of black jurors from jury service violated the Equal Protection Clause. Reasoning that the constitutional harm of race-based exclusion of jurors from the petit jury accomplished through the exercise of peremptory challenges was equivalent to the statutory exclusion invalidated in Strauder, the Court held that race-based peremptory strikes violate the Equal Protection Clause. Significantly, the Batson Court linked the concept of the jury with equal protection principles to prohibit the racially discriminatory use of peremptories. Justice Powell explained:

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

In essence, Batson combined the fair cross-section requirement of the Sixth Amendment with the Equal Protection Clause of the Fourteenth Amendment. By fusing Sixth Amendment fair cross-section principles into its equal protection analysis, the Court sought to ensure a fair and impartial jury and prohibit discrimination against prospective jurors under the Equal Protection Clause. As the Batson Court explained, "A person’s race simply ‘is unrelated to his fitness as a juror’. . . . As long ago as Strauder, . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."

35. 100 U.S. 303 (1879).
36. Batson, 476 U.S. at 86 (quoting Strauder, 100 U.S. at 308).
37. 476 U.S. at 87 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting); Barbara Babcock, A Place in the Palladium: Women’s Rights and Jury Service, U. Cin. L. Rev. 1139, 1154 (1993) ("[T]he Court has not balanced competing rights, but blended them—in the name of our national progress toward ‘multiracial democracy.’ Thus the African American defendant’s right to a jury of his peers is blended with the potential juror’s right not to be excluded from juries; and over both of them, as well as over the entire community they share, the Court has thrown a mantle of equal
Moreover, in *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court extended *Batson* to prohibit gender-based peremptory challenges. In one of his last opinions before retirement, Justice Blackmun wrote that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." The Court found that the equal protection analysis employed in *Batson* to address racially-based challenges is equally applicable to gender. Justice Blackmun wrote:

[T]he only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial . . . . Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box . . . . Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by law, an assertion of their inferiority." At the same time, the Court clearly did not intend to eliminate the peremptory challenge in its entirety, applying the settled criterion for establishing a prima facie case of discrimination under *Batson*.

The Court's decisions in *Batson* and *J.E.B.* were founded on the Equal Protection Clause, despite the fact that the appellants in *Batson* made only a Sixth Amendment case. The foreseeable problems inherent in the Sixth Amendment analysis may have led the Court to adopt the Equal Protection Clause as the basis for relief. Had the Court applied the Sixth Amendment in *Batson* it would have had to face the problem of prohibiting the use of peremptory challenges to exclude a member of any cognizable group (including groups not protected under Equal Protection doctrine). Moreover, there would be the problem of guaranteeing the defendant a truly cross-sectional petit jury in a multi-racial, multi-ethnic society.

Since *Batson*, the Court has confronted the Sixth Amendment claim directly, concluding with *Holland v. Illinois* that the Sixth Amendment does not apply to peremptory challenges when impaneling the petit jury. Delivering

41. *Id.* at 1425-28 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).
42. 476 U.S. at 109 (1986) (Stevens, J., concurring).
the opinion of the Court, Justice Scalia reiterated that the Constitution’s fair cross-section requirement does not guarantee a representative jury, but merely an impartial one.44 A jury must be derived from a representative venire. Eliminating the jury’s representativeness through the exercise of peremptory challenges, however, does not pose any threat to the impartiality of the petit jury. In other words, the venire, but not the petit jury, must represent a fair cross-section of the community.45 As Justice Scalia explained:

[In holding that petit juries must be drawn from a source fairly representative of the community we pose 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.]46

One might question the logic of requiring a jury pool that reflects a cross-section of the community, if the peremptory challenge defeats this requirement in the selection phase. Rather than seeking to live up to the spirit of the fair cross-section requirement by abolishing peremptory challenges, the Court found that the Sixth Amendment was inapplicable to the exercise of the peremptory challenge.47

In dissent, Justices Marshall and Stevens argued that equal protection analysis and the Sixth Amendment’s fair cross-section requirement are essentially linked and thus equally applicable to the peremptory challenge. Justice Marshall argued that the fair cross-section requirement compels the elimination of race-based peremptory challenges.48 He stated, “[O]nly if prospective jurors are excluded on account of their membership in a distinctive group—whether in the selection of the venire or in the prosecutor’s exercise of peremptory challenges—is the defendant denied the possibility of a fair cross-section of the community.”49 Furthermore, in his dissenting opinion in Holland, Justice Stevens noted that the “requirement of impartiality is, in a sense, the mirror image of a prohibition against discrimination,”50 thus fusing the Sixth and Fourteenth Amendments. Other legal theorists have also suggested that the correct analysis relies on a combination of the Sixth Amendment and the Equal Protection Clause by “ensuring defendants an equal right to an impartial jury.”51 Nevertheless, Holland reflects the current state

44. Id.
45. Id. at 480.
46. Holland at 483 (quoting Taylor, 419 U.S. at 538).
47. Id. at 478.
48. Id. at 499 (Marshall, J., dissenting); see also Martha Minow, Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors, 33 WM. & MARY L. REV. 1201 (1992).
50. Id. at 506 n.4.
51. Alschuler, supra note 22, at 190-191; see also Babcock, supra note 37, at 1151. A California judge suggested it might be better “to recognize cross-sectional analysis for what it is—vicarious assertion
of the law.

The Court has correctly applied the Equal Protection Clause to prohibit state statutes that excluded blacks from jury service based on race. However, the Court has incorrectly applied equal protection principles to peremptory challenges. Toni Massaro points out that a black defendant is treated "equally" when both black and white defendants are tried by juries subjected to the same jury selection procedures, including cause and peremptory challenges. Peremptory challenges interfere with the randomness of jury selection procedures, defeating the defendant's right to an impartial jury. Thus, the peremptory challenge violates the Sixth Amendment right to a fair and impartial jury drawn from a cross-section of the community. Nonetheless, even the dissenters in Holland would apply equal protection concepts when Sixth Amendment notions of impartiality and representativeness of the petit jury are at stake. Thus, the Holland dissenters argued that the proper mechanism for ensuring an impartial jury drawn from a cross-section of the community is to prohibit the discriminatory exercise of peremptory challenges.

Under Batson and J.E.B., the Court protects a prospective juror's right not to be excluded based on race or gender (the Fourteenth Amendment), yet is reluctant to guarantee the right to be included (the Sixth Amendment). Rather than adopting an inclusionary understanding of the Sixth Amendment, the Court has fused Sixth Amendment concerns into equal protection analysis and has rejected applying a Sixth Amendment analysis outright. Thus, the Court promoted Sixth Amendment values solely by placing limits on the power to exclude jurors.

Yet, the Sixth Amendment does protect the right to be included. This right of inclusion is at the heart of Justice Black's statement that "part of the established tradition in the use of juries as instruments of public justice is that the jury be a body truly representative of the community." The Holland dissenters were correct in arguing that the Sixth Amendment applied to the exercise of peremptory challenges. However, they should have taken the argument one step further, making clear that peremptory challenges violate the Sixth Amendment. By using equal protection concepts forbidding discriminatory exercise of peremptory challenges, rather than the Sixth Amendment's focus on an inclusive jury, the Court has elevated the ability to

52. See Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C.L. Rev. 501, 530 (1986). In such cases, Massaro points out, state laws violate the equal protection rights of "those who are barred from juries by the government exclusionary practices." Id. at 536.

53. See id. at 536.

54. Id. at 539.

55. Holland, 493 U.S. at 499 (Marshall, J., dissenting); id. at 515 (Steven, J., dissenting).

56. Id.

exercise peremptory strikes above the defendant's constitutional right to an impartial jury drawn from a fair cross-section of the community.\textsuperscript{58}

Furthermore, by focusing on the discriminatory exercise of peremptory strikes, the Court's decisions in \textit{Batson} and \textit{J.E.B.} placed the burden of proof on the defendant to show that the prosecutor used peremptory challenges to exclude prospective jurors based on race or gender. \textit{Batson}'s equal protection approach presumes that peremptory challenges are lawful until a litigant makes a prima facie case. Such a system is ineffective in eliminating discrimination in jury selection procedures. Rather than seeking to eliminate discrimination, the Court should hold the peremptory challenge unconstitutional because it violates the Sixth Amendment guarantee of an impartial jury. Consistent with established Sixth Amendment law, this understanding of an inclusive jury would not guarantee the defendant the right to a particular composition of his/her own jury. For instance, a black juror would not have the right to an all-black jury.\textsuperscript{59}

III. PROBLEMS WITH THE PEREMPTORY CHALLENGE AFTER \textit{BATSON} AND \textit{J.E.B.}

Reexamination of the Sixth Amendment is especially critical because of the problems inherent in the Supreme Court's test for determining the constitutionality of a party's exercise of peremptory challenges under \textit{Batson} and \textit{J.E.B.} These problems tend to adversely affect the representation of nonwhite, nonmale voices on juries. The limitations of this doctrine illustrate why the Court must shift its analysis from protecting the right not to be excluded under the Fourteenth Amendment to the Sixth Amendment right to be included. Postmodern feminism aids in analyzing the \textit{Batson} test and identifying its inherent problems.

In \textit{Batson}, the Court concluded that a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury based solely on the prosecutor's use of peremptory challenges at the defendant's trial. Under the governing standard,

\begin{quote}
[f]irst, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally the trial court must
\end{quote}

\textsuperscript{58} See Massaro, \textit{supra} note 52, at 539.

\textsuperscript{59} See \textit{Taylor}, 419 U.S. at 538.
determine whether the defendant has carried his burden of proving purposeful discrimination.\textsuperscript{60}

\textbf{A. The Free Shot Problem and the Difficulty of Making a Prima Facie Case}

The first part of the test requires the defendant to show that the relevant facts raise an inference that the prosecutor's motives to strike jurors were based on race or gender. This requirement has proven to be quite difficult where there are only a few minorities in the jury pool.\textsuperscript{61} As Alschuler put it, each prosecutor gets a few "free shots" before the strikes may be questioned.\textsuperscript{62} In his concurrence in \textit{Batson}, Justice Marshall argued that the Court's test gave prosecutors leeway to discriminate before a defendant would be able to establish a prima facie case.\textsuperscript{63} Only where the abuse is "flagrant" would the defendant be able to establish a prima facie case.\textsuperscript{64} Due to this "free shot" problem, the peremptory challenge provides a convenient avenue to exclude the small number of minority voices from jury panels. Although the exercise of one race-based challenge can establish a prima facie case, this happens very rarely.\textsuperscript{65} More often, the \textit{Batson} test requires the type of flagrant discrimination that Justice Marshall described. It is often extremely difficult to establish a prima facie case based on the exclusion of a few minority jurors.

This "free shot" problem particularly harms women of color. A party can easily eliminate the perspective of women of color from the jury simply by using strikes against women of color. Because the venire will often have few women of color, the exercise of peremptory challenges to exclude women of color will be exceptionally difficult to challenge. For instance, in \textit{United States v. Vasquez-Lopez},\textsuperscript{66} the prosecutor struck the only black female juror on the entire panel. By striking this prospective juror, a mother of four children who lived in the same neighborhood as the defendant, the prosecutor removed all the black people on the jury. The Court found that the strike of this single juror did not establish a prima facie case of discrimination based on race.\textsuperscript{67} Moreover, in \textit{United States v. Matha},\textsuperscript{68} the Court found that government strikes against three black women could not establish a prima facie case of discrimination on the basis of race even though these three women

\textsuperscript{60} Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (plurality opinion). \textit{J.E.B.} applies the same test to gender-based peremptory challenges.

\textsuperscript{61} For a discussion of the difficulty in establishing a prima facie case, see Forman, \textit{supra} note 27, at 56-66.

\textsuperscript{62} Alschuler, \textit{supra} note 22 at 24.

\textsuperscript{63} 476 U.S. 79 at 105 (Marshall, J., concurring).

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} See \textit{United States v. Bishop}, 959 F.2d 820, 827 (9th Cir. 1992) (holding that racially based exclusion of even one juror violates Fourteenth Amendment).

\textsuperscript{66} 22 F.3d 900 (9th Cir. 1994).

\textsuperscript{67} \textit{Id.} at 902.

\textsuperscript{68} 915 F.2d 1220 (8th Cir. 1990).
represented sixty percent of the total number of prospective black jurors on the venire. These cases together suggest that there may be difficulty in establishing a prima facie case of discrimination for black women, reflecting black women's invisibility in the law. *Batson* will fail to protect women of color until they are recognized as a class occupying a unique social position due to their membership in the black race as well as their membership in the female sex.69

Prior to *J.E.B.*, prosecutors often removed black women from the jury because of their sex. In the majority opinion, the *J.E.B.* Court expressed concern about the use of gender as a pretext for racially-based peremptory challenges exercised against black women.70 The concern was that permitting gender-based strikes “contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.”71 Interestingly, the Court expressed concern with racially-motivated strikes, not because such strikes may affect women of color as a class, but because race is a suspect class. The implication is that black women are not harmed because they are black women, but because they are black.

*J.E.B.* refuses to recognize that women of color uniquely suffer from a “synergistic” form of race and gender discrimination.72 As a result of their unique social location, the law effectively negates the existence of black women. As Judy Scales-Trent claims:

Black women have not been seen as a discrete group with a unique history, unique strengths and unique disabilities. By creating two separate categories for its major social problems—“the race problem,” and “the women’s issue”—society has ignored the group which stands at the interstices of these groups, black women in America.73

Under *Batson*, a defendant challenging the exclusion of black women jurors must show that the prosecutor struck these jurors *either* based on race *or* based on gender. There is no basis for the defendant to establish a prima facie case based on discrimination against black women. Thus, even as *Batson* and *J.E.B.* show that the Supreme Court is struggling to salvage a “non-discriminatory” peremptory challenge, covert discrimination remains.

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70. *J.E.B.*, 114 S. Ct. at 1430 n.18. For examples of this problem, see United States v. Broussard, 987 F.2d 215 (5th Cir. 1993); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991); United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988).


72. Scales-Trent uses this term to describe how the discrimination women of color suffer is not additive, but rather creates a condition for women that is “more terrible than the sum of [its] two parts.” Scales-Trent, *supra* note 69, at 9.

73. *Id.* at 10.
B. Problems with Idea of Neutrality

Even after a party has made out a prima facie case of discriminatory use of peremptory challenges, those challenges will not be invalidated if there are race or gender neutral reasons supporting those peremptory challenges. Since Batson, courts have provided attorneys with a good deal of room to rely on stereotypes concerning race and gender in providing neutral reasons for striking jurors, thereby masking race and gender-based motives for striking a potential juror. Courts have validated such stereotypes as “neutral” in scrutinizing peremptory challenges under Batson.

In United States v. Nichols,74 the prosecutor exercised peremptory challenges against three black female jurors, saying that the strikes were related to their non-traditional family backgrounds. The prosecutor described one juror as “a young, single female with a minor dependent, [with] no indication [she was] married, and therefore of some questionable family background.”75 The prosecutor explained that he struck another juror, who was living with her fiancé, because she was a young, single female “living in questionable circumstances.”76 The Court of Appeals for the Seventh Circuit explained that the prosecutor struck the third juror on the grounds that she was “not living within the confines of the law, by cohabiting with a man.”77 The Seventh Circuit held that these explanations for striking the three black jurors were not a pretext for race, and thus did not violate Batson.78 The possibility that the attorney’s rationale was based on traditional notions of the white nuclear family as “normal,” or of black women as immoral and “oversexed,” was not explored.

Stereotypes were even more blatant in United States v. Uwaezhoke.79 In that case, the defendant objected to the prosecution’s use of a peremptory challenge to strike a black woman from the jury. The prosecution offered two explanations for the strike that the Third Circuit found to be sufficiently race neutral under Batson. The first was the prosecutor’s claim that the U.S. Attorney’s Office had a general policy of striking postal employees from juries in drug cases. The second was the prosecution’s conclusion that a potential juror, who was a single parent supporting two children and living in rental property in a poor neighborhood, might “be involved in a drug situation where she live[d].”80

If living with a man or being a single mother is found in a court of law to detract from one’s fairness and judgement, the normal or ideal juror is

74. 937 F.2d 1257 (7th Cir. 1991).
75. Id. at 1263.
76. Id.
77. Id.
78. Id. at 1264.
79. 995 F.2d 388 (3rd Cir. 1993).
80. Id. at 391.
clearly someone other than an unmarried woman with children. Having children out of wedlock and living with a man out of wedlock historically have been considered signs of a woman's immorality. In recent years, the stereotypical black, unmarried, unemployed mother, the "welfare queen," has been blamed for the corruption of the nuclear family, the disintegration of American values, and a host of other social ills.81 The courts' countenance of the exclusion of the black women jurors in Nichols and Uwaezhoke ignores these insidious sexist and racist stereotypes and at the same time promotes the ideal of the white, male juror as the "norm."

Similarly, in U.S. v. Roan Eagle82 the prosecution struck the only American Indian from the venire in a case involving an American Indian defendant. The prosecutor explained that he struck the juror in part because he was "slovenly."83 The Eighth Circuit allowed the strike, explaining: "[T]here is a fine distinction between disguised racism and prosecutorial privilege based on subjective evaluation, but if peremptory challenges are to continue, we follow precedent to award substantial leeway to the prosecutor's privilege."84

Finally, in Hernandez v. New York,85 the Supreme Court found that striking two Latinas because they were bilingual was sufficiently neutral. In Hernandez, a Latino defendant was charged and convicted with two counts of attempted murder and two counts of criminal possession of a weapon. The victims were all Latinos. The prosecutor claimed that he had exercised peremptory challenges against the bilingual Latina venire members because their ability to speak and understand Spanish might make it impossible for them to defer to the official English translation of Spanish language testimony.86 The Court accepted the prosecutor's reasoning that the challenges were based on the prosecutor's explanation, finding that it rested neither on an intention to exclude Latina or bilingual jurors, nor on stereotypical assumptions about Latinas or bilinguals.87

In her analysis of Hernandez, Martha Minow suggests that for the jurors' knowledge of Spanish to be considered problematic, one must assume:

(1) that the normal juror would not know Spanish; (2) that only the official English translation of Spanish testimony should be used in the jury's deliberations; (3) that people who do not speak Spanish adequately can fairly judge people who do; and (4) that the exclusion of Latinos from the jury leaves a jury that can be

82. 867 F.2d 436 (8th Cir. 1989).
83. Id. at 441.
84. Id. at 442.
86. 500 U.S. at 357 n.1.
87. Id. at 357.
Peremptory Challenge

perceived as fair and impartial in a case involving a Latino defendant. . . . 88

By ascribing impartiality only to monolingual English speakers, the Hernandez court quelled "an entire perspective and knowledge base."9 Rather than considering a multiplicity of backgrounds an asset, the court accepted the notion that impartiality can be achieved only through uniformity.

Clearly, Batson's neutrality requirement fails to eliminate the use of racist and sexist stereotypes from the voir dire process. In sanctioning these stereotypes, courts give a legal stamp of approval to notions of white male "impartiality," versus the presumed partiality and particularity of marginalized groups. In contrast, postmodern feminism rejects the possibility of pure impartiality,90 maintaining that in some contexts gender or race may shape one's outlook, but that race and gender will never be determinative.91 Postmodern feminism maintains that each person is "embedded in a matrix of social and psychological factors that interact in different contexts. Essentialism dissolves before the notion of a shifting, constantly reconfigured self, shaped but not determined by membership in sets of social categories that crystallize power relations in America."92

Postmodern feminism suggests that, rather than denying the inevitability of people's experiences, the judicial system should embrace diversity. The inclusion of diverse perspectives would not detract from juries' ability to discern the Truth, but would rather enrich their capacity to understand a much wider array of events and experiences. Viewed in light of the postmodern feminist critique of impartiality, the jurors who were struck in Hernandez93 for their ability to speak Spanish would have been seen not as biased and incompetent, but rather as one part of a cross-section of the defendant's community.

Postmodern feminism argues that questions about a group's identity cannot be answered without reference to the discourse that constitutes the group.94 Group identity is continually being restated95 and there can be no minority representative voice.96 Yet while group identity is not determinative

88. Minow, supra note 48, at 1210-11.
89. Id. at 1211.
90. Non-foundationalists have questioned the ideal of impartiality since the late nineteenth century, arguing that because each interpretation embodies a different viewpoint, none is final or objective. See Joan C. Williams, Dissolving the Sameness/Difference Debate: A Postmodern Path Beyond Essentialism in Feminist and Critical Race Theory, 1991 DUKE L.J. 296, 309. Courts and commentators generally agree that a truly impartial jury is merely a theoretical objective. Massaro, supra note 52, at 544.
91. Williams, supra note 90, at 307.
92. Id. at 307-08.
93. Id. at 307-08.
95. Id. at xxi.
96. Cf. id. at 22 ("[L]aw requires all legal claimants to assume a particular posture . . . in seeking judicial assistance; we must leave aside much of the multiplicity and complexity of our lives in order to engage in legal discourse.").
of voice or viewpoint, it is a significant factor among many other factors. As such, the wholesale exclusion of marginal groups skews legal discourse toward norms that center upon the experience of white men. Ironically, it is only white men who are immune from cries of group “subjectivity,” as “white” and “male” are not deemed particularistic factors. Rather, these characteristics are presumed to embody an objective “standard” or “norm.”

As an illustration of this point, Martha Minow relates the story of Judge Constance Baker Motley, who was once asked to recuse herself from a case involving sex discrimination against a law firm. Because Judge Motley is a black woman who had previously represented plaintiffs in discrimination cases, the defendant assumed that she would not be sufficiently removed from the case to preside prudently. Judge Motley denied the defendant’s request that she recuse herself.

If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

A white male judge presiding over a civil rights case concerning a white male defendant is unlikely to be asked to recuse himself for fear that he might be partial. Generally, it is only when women of all races and when men of color are placed in an adjudicative role that fears of partiality arise. Thus, the presumption that a particular viewpoint is determined by gender or race in fact silences women and people of color. The acceptance of this presumption via the peremptory challenge violates the rights of members of these groups.

The problems associated with the post-Batson and post-J.E.B. peremptory challenge doctrine include its denial of an adequate remedy for dual group members such as women of color, its promotion of a false norm of impartiality, and the leeway it provides attorneys to make discriminatory strikes for purportedly neutral reasons. Postmodern feminism offers alternative modes of thinking about impartiality, subjectivity, and neutrality. In doing so, it challenges legal institutions to relinquish their own biases about the biases of others.

IV. ELIMINATION OF THE PEREMPTORY CHALLENGE

Proponents of peremptory challenges argue that Batson and J.E.B. irrevocably damaged the peremptory challenge, fundamentally changing its character. Justice Scalia warned in his dissent in J.E.B. that the entire justice

97. Minow, supra note 48, at 1207.
system would bear the burden of the "expanded quest for 'reasoned peremptories ...'."99 It is ironic that restrictions on peremptories have made them difficult to administer, given that they have not prevented peremptories from being used to discriminate.

The solution is to eliminate the peremptory challenge entirely. Even ignoring their discriminatory aspects, peremptory challenges are not worth preserving. While the purpose of the peremptory is ostensibly to allow litigants to strike jurors who are biased, in practice, peremptories are not used to impanel the most fair and impartial jurors.100 Instead, each side uses its peremptory challenges to exclude the jurors it perceives to be unsympathetic to its case and difficult to persuade.101 Thus, while much of the rhetoric surrounding the peremptory challenge involves concepts such as _fair and impartial, representative, unbiased_, and _competent_, in reality, jurors are struck because a lawyer believes that he or she can find another juror who will be more amenable to his or her case.102

Moreover, the very nature of the peremptory challenge, as a means to dismiss jurors based on "inarticulable bias," promotes the idea that individuals are defined by an essential nature. The peremptory challenge perpetuates the notion that individuals can be defined by some superficial characteristic. After _voir dire_ reveals the most legitimate reasons to challenge jurors' competence for cause, attorneys exercise peremptories based on their own unconscious biases. But what type of lawyer can determine if a black, lesbian, mother-of-two will make a decision as a black, as a lesbian, as a woman, or as a mother?

Discrimination in jury selection should be addressed not by proscribing exclusion, but by demanding inclusion. To implement the Sixth Amendment's vision of an inclusionary jury, all summoned individuals should have a right to jury service. Jurors could be excused for cause, but peremptory challenges would not be available to either party. Such a system of inclusion would ensure that juries would represent the greater diversity of the community and eliminate the discriminatory practices that _Batson_ sought, with limited success, to prevent.

Postmodern feminist theory provides praxis for jury selection procedures that use the idea of inclusion to create impartiality. By validating a multitude of perspectives, postmodern feminist theory invites the participation of those individuals traditionally considered to be on the periphery of public life. Underlying _Holland_ is a notion of impartiality that does not incorporate the multiple perspectives which are a part of American society. By moving past

101. _Id._
102. _Id._; _see also_ Gurney, _supra_ note 27, at 230-36 (describing how peremptory challenges can create partial juries).
Holland's conception of an impartial jury drawn from a fair cross-section of the community, we can create an inclusive jury based on postmodern feminist ideas of impartiality and representativeness.  

If the peremptory challenge were abolished, voir dire and challenge for cause would be the key instruments of jury selection. Commentators have suggested many reasons why these might be insufficient. For one, evidence suggests that jurors are not always completely truthful under voir dire examination because of evaluation anxiety.  

In addition, jury selection often produces, in jurors, a competitive spirit in which the ultimate goal is "qualifying" or "winning," so that jurors may be tempted to mislead lawyers and judges in order to avoid "losing." Furthermore, studies have shown that judges often limit voir dire to perfunctory questions, which make it difficult for lawyers to base challenges on anything other than superficial characteristics. Conversely, lawyers who ask inappropriate, probing questions to satisfy a suspicion of partiality risk insulting potential jurors or invading their privacy. Expansion of voir dire could be subject to manipulation by attorneys who would use it as a "means of pre-educating or indoctrinating a jury."

Most importantly, a jury selection process based only on voir dire and challenge for cause might be ineffective in detecting juror bias. The most persuasive argument against eliminating the peremptory challenge is that it may be the only recourse for striking prejudiced jurors who cannot be challenged for cause. Particularly with sensitive issues such as rape or sexual harassment, bias might be difficult to detect in voir dire both because individuals are often unconscious of their biases and because they might feel pressure to express only acceptable views.

However, it seems unlikely that extreme biases would remain hidden with an expanded voir dire. Moreover, if such biases were not exposed in voir

103. In some ways, it is difficult to reconcile postmodern feminism's critique of essentialism with its goal of empowering disadvantaged groups. On the one hand, postmodernism refuses to define individuals based on group identity or apparent traits. But at the same time, it warns that the law cannot ignore the significance of historical oppression of a class of people.

104. See Forman, supra note 27, at 73-75; Pizzi, supra note 100, at 127-28. When jurors are told voir dire is meant to determine if they can be fair and impartial, they often react as if they are being judged on their ability and integrity as a person.

105. Conversely, prospective jurors who do not want to serve can easily tailor their answers to get excused.

106. See Forman, supra note 27, at 70-74. One empirical study of voir dire revealed that it was "grossly ineffective, not only in weeding out 'unfavorable' jurors, but even in eliciting the data which would have shown particular jurors as very likely to prove unfavorable."

107. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (recognizing the need to balance the juror's privacy rights against the need for an effective voir dire.); Ross v. Ristaino, 424 U.S. 589 (1976) (holding that criminal defendants had no constitutional right to ask questions about racial prejudice during voir dire); Ham v. South Carolina, 409 U.S. 524 (1973) (holding that trial court's refusal to inquire into racial prejudice during voir dire despite defendant's requests violated Due Process Clause of the Fourteenth Amendment); see also Forman, supra note 27, at 70-71.


109. See Gurney, supra note 27, at 249.
dire, there is no reason to believe that attorneys could accurately identify them in order to address them with a peremptory.\textsuperscript{110}

There is empirical evidence that voir dire can be used more effectively, particularly if it is conducted by the attorneys themselves. A study by Michael Nietzel and Ronald Dillehay in 1980 revealed the highest number of successful challenges for cause were in cases where the attorneys were able to conduct voir dire privately and extensively.\textsuperscript{111} Some commentators have concluded that attorney-conducted voir dire results in a less biased jury than voir dire conducted by a judge, since more individuals are eliminated for prejudice that way than through any other method. With an expanded voir dire, any bias that remained after jurors were excused for cause would simply represent the diversity of views that is necessary for jury impartiality.

The elimination of the peremptory challenge is not a panacea. Challenge for cause should be used only in ways that distinguish real bias from diverse perspectives that would ensure jury impartiality. Martha Minow points out that personal experience may affect one’s perspective but that it is impossible to predict exactly how. Minow notes that in a case of sexual harassment, despite conventional wisdom, women may be less likely to believe an alleged victim\textsuperscript{112} and that men might be overly concerned with an appearance of bias and therefore side with the accuser.\textsuperscript{113}

Elimination of the peremptory challenge should be accompanied by reform in the assembly of jury pools to make them more representative of the community. Jury pools should be randomly selected based on the most reliable sources in a given community.\textsuperscript{114} These include not only telephone directories and voter registration lists, but also government support rosters and census listings. Restrictions on occupational exemptions should be tightened to help diversify the pool, and child or dependent care and transportation should be provided for members of the jury pool who need them. There should be better access to the courts for people with disabilities. Finally, employers should be required to provide some type of paid leave for jury service to improve the representation of people who would otherwise suffer financial hardship from serving.

What should the selection of a jury look like? What type of system would allow a jury to consider the personal, social, and cultural experiences of the parties, particularly of historically oppressed and marginalized people? What

\textsuperscript{110} See id. at 249-53 for a discussion of the accuracy of attorneys’ peremptory strikes.
\textsuperscript{112} Indeed, polls conducted during Justice Clarence Thomas’s confirmation hearings revealed that many women who had been sexually harassed were skeptical of Anita Hill’s charges. See Minow, supra note 48, at 1208.
\textsuperscript{113} See id. at 1208-09.
\textsuperscript{114} Changes in state and federal law could expand jury pools to include indigent, homeless people and individuals with sight and hearing impairments.
type of system would ensure that citizens could fulfill their civic duty without being subject to either overt or covert discrimination and prejudice?

One could imagine using a computer to generate a representative pool of potential jurors who would come to the courtroom to fill out a questionnaire that had been designed by the attorneys and approved by the presiding judge. They would do this outside the presence of the participating attorneys and would not be required to provide demographic information. Using the answers to the questionnaires, the attorneys would challenge jurors for cause, based solely on their actual ability to decide the case fairly on its facts. In the end, a random selection from the remaining pool would generate the final petit jury list. Eliminated jurors would never be told whether they were challenged for cause or randomly eliminated.

Such a system would reflect the ideals of the Sixth Amendment, since it would create a pool that was truly representative of a defendant's community. If a black defendant were tried by an all white jury, it would be because he or she lived in a community where such a sample was the norm. More importantly, such an occurrence would be the result of chance rather than prejudice and stereotyping. Finally, such a system would avoid assumptions about particular groups and would produce a system of justice that embodied the values and perspectives of the community it was intended to protect.

V. CONCLUSION

From a postmodern feminist perspective, the science of predicting a juror's behavior based on skin color or composition of chromosomes seems haphazard. The approach offered here provides alternative ways of examining these issues. Impartiality, classification, and representativeness can be re-envisioned. The concept of impartiality could incorporate pivoting standpoints and thus value the experiences and perceptions of a diverse community. Classifications based on race and gender could be seen as fluid notions, meaningless when decontextualized. Representativeness could be achieved by making juries a truly random sample of the community, without being actively defeated by the peremptory challenge.

Legal categories which divide people according to their skin color and anatomy are harmful to a diverse society. All the peremptory challenge accomplishes is to maintain the privilege and power of those who may be categorized as white, heterosexual, and male. Compartmentalizing

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115. Social scientists are capable of creating questionnaires which detect juror bias to a significant degree of accuracy. Moreover, using a pen and paper format would limit attorneys' ability to influence potential jurors.

116. Impaneling a jury, "sight unseen," might be a terrifying prospect for some trial attorneys. It would be helpful if further research determined how attorneys exercise challenges under those circumstances.
characteristics such as race and gender and pitting marginalized groups against one another ensures that the "mainstream" culture will continue to dominate. The peremptory challenge undermines justice, deprives citizens of their opportunity to serve a civic duty, and perpetuates stereotypical notions of race and gender. Defendants' and jurors' rights not to be subjected to the prejudice and stereotypes of attorneys and judges must be recognized and protected.

An ideal jury selection procedure is fair and accommodating and incorporates individual, social, and historical contexts into its principles. As the Supreme Court wrestles with the ideas of impartiality and representativeness, and the categories of race and gender, I encourage a reconceptualization of these terms. My hope is that this important issue is seriously considered with the time and energy it merits.