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The Trend toward the Extension of *Batson* to Gender-Based Peremptory Challenges

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I. Introduction

Since the Supreme Court decided *Batson v. Kentucky*[1] in 1986, the extent of the limitations placed upon the use of peremptory challenges has been questioned in various state and federal court decisions. The purpose of this comment is to provide an overview of one particular aspect of the limitation on peremptory challenges: Should the holding in *Batson* be extended to apply to gender-based peremptory challenges based upon the Equal Protection Clause of the United States Constitution?[2] Although the Supreme Court has yet to rule upon the validity of equal protection challenges to peremptory strikes based upon the gender of the venire persons, lower courts have addressed the issue, creating a split among various jurisdictions with contrary holdings.

This comment will examine seminal Supreme Court decisions regarding the limits of the peremptory challenge in order to determine the Court's intentions regarding the extent of *Batson*, as well as recent state and federal opinions which have, in fact, held that *Batson* applies to gender-based peremptory strikes. Finally, an analysis of established case law will be undertaken to discuss the possible future developments in this issue.

II. The Peremptory Challenge

The peremptory challenge has its origins in thirteenth century England.[3] Through its inception in English common law felonies, the challenge was defined as "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge."[4] The tradition of the peremptory challenge was carried to the American colonies,

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1. 476 U.S. 79 (1986).
2. U.S. Const. amend. XIV, § 1.
3. Swain v. Alabama, 380 U.S. 202, 212-13 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). The Supreme Court traced the history of the challenge, commencing with The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305). *Swain*, 380 U.S. at 213.
4. *Id.* at 212 n.9 (citing 4 William Blackstone, Commentaries 353 (15th ed. 1809)).

and the federal government of the young United States of America continued the English practice, as did individual state courts.[5]

The Supreme Court, in *Swain v. Alabama*,[6] noted that the use of peremptories in England had been steadily decreasing, whereas in the United States, the practice of employing the challenges has persisted.[7] One proposed explanation for this phenomenon is the voir dire in American trials, which has been characterized as "extensive and probing," and is therefore conducive to the use of peremptories in such a protracted proceeding.[8] Most importantly, the Court recognized the salient role of the peremptory challenge in "eliminat[ing] extremes of partiality on both sides . . . [while] assur[ing] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[9] Thus, the Court reaffirmed the necessity of the peremptory challenge as part of trial by jury.[10] Drawing from precedent, the opinion continued to elaborate on the commonly understood definition of the peremptory challenge, which is exercised without the requirement of a statement of cause.[11] The strike is routinely exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,"[12] and upon the "habits and associations" of the potential juror.[13] Finally, the Court noted that the peremptory challenge is often "exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for

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5. *Swain*, 380 U.S. at 216-17.

6. 380 U.S. 202 (1965).

7. *Id.* at 218. The Court noted that English juries are selected from a smaller cross-section of a relatively homogeneous society, in contrast to the larger, more heterogeneous American public. *Id.* Moreover, the Court maintained that the English courts possess greater control over pretrial publicity, thereby reducing news media attention and preventing the venire persons from forming opinions regarding the case prior to the commencement of litigation. *Id.* at 218 n.24 (citations omitted).

8. *Id.* at 218-19 (citations omitted).

9. *Id.* at 219. The Court continued to state that "the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of the challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." *Id.* at 219-20.

10. *Id.* at 219.

11. *Swain*, 380 U.S. at 220. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control." *Id.*

12. *Id.* (citing Lewis v. United States, 146 U.S. 370, 376 (1892)).

13. *Swain*, 380 U.S. at 220 (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

jury duty."[14]

III. Supreme Court Rulings on the Peremptory Challenge Prior to *Batson*

It is precisely as the result of the use of peremptory challenges based upon criteria the *Swain* Court labeled "normally irrelevant to legal proceedings" that the trend toward limiting the scope of the peremptory challenge emerged. The genesis of the debate commenced in 1879 with *Strauder v. West Virginia*,[15] wherein the State of West Virginia disallowed black persons to be members of grand or petit juries.[16] Petitioner, a black male, asserted that his Fourteenth Amendment Equal Protection rights were violated as a result of the exclusion of black persons from the jury which would sentence him.[17] The Supreme Court held that the West Virginia statute discriminated in the selection of jurors on the basis of race, thereby denying equal protection of the laws to a black man who is tried by jury.[18] In so ruling, the Court implemented the standards of the Equal Protection Clause into the jury selection process, thereby setting the stage for *Swain v. Alabama*.[19]

In *Swain*, the petitioner, a black male, contended that his equal protection rights were violated by the prosecution's peremptory strikes against all black members of the venire.[20] The Supreme

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14. *Swain*, 380 U.S. at 220 (citations omitted).

15. 100 U.S. 303 (1879).

16. *Strauder*, 100 U.S. at 304. The petitioner, a black man, was indicted for murder in West Virginia. *Id.* The petitioner prayed for removal of the action to a federal court due to the fact that any jury impaneled in West Virginia, by law, would be composed of white males. *Id.*

17. *Id.* The Fourteenth Amendment states, in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

18. *Strauder*, 100 U.S. at 310. The Court also noted that "the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure." *Id.* at 308. The Court continued to state that the "idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine . . . ." *Id.*

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

20. *Swain*, 380 U.S. at 205-06. The venire was composed of eight black persons, two of whom were exempt, and six of whom were dismissed by the court as a result of the prosecution's peremptory challenges. *Id.* at 205. The State of Alabama did not wholly ex-

Court determined that, because all groups, including racial groups, were subject to being peremptorily struck, the removal of all black members of the venire was not a violation of the Equal Protection Clause.[21] The Court continued to find that subjecting the peremptory "challenge in any particular case to the demands of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge."[22]

Thus, the *Swain* Court set a high standard for a petitioner to meet when attempting to establish an equal protection claim involving the use of allegedly racially-motivated peremptory challenges,[23] despite the Court's statement that the Equal Protection Clause would be violated by intentionally removing black persons from the venire solely because of their race.[24] In effect, the Court appeared to draw the line at the extension of equal protection analysis with its decisions in *Strauder* and *Swain*, and it was not until 1986 that the Court would again consider the merits of such a case.[25]

IV. *Batson* and its Progeny

Justice Powell, writing for the majority in *Batson v. Kentucky*,[26]

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clude black persons from jury panels, as was the case in *Strauder*, but no black person had served on a petit jury in Talladega County, Alabama, in the fifteen years preceding *Swain*. *Id.* at 206.

21. *Id.* at 212.

22. *Id.* at 221-22. The Court continued to state that should the Equal Protection Clause be applied to the peremptory challenge, "[t]he challenge, *pro tanto*, would no longer be peremptory . . . ." *Id.* at 222. The end result of such action would be to subject each challenge to review for "reasonableness and sincerity." *Id.*

However, the Court recognized the potential for a valid equal protection claim involving peremptory challenges. Justice White, writing for the majority, noted that, where the prosecutor, in case after case, "is responsible . . . for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance." *Id.* at 223. In such instances, where "the purposes of the peremptory challenge are being perverted," the Court indicated a different result would lie. *Id.* at 224.

23. *Id.* at 223-24. Referring to the specific facts of the case before it, the Court asserted that a prima facie case of denial of equal protection may be met where the prosecutor, through peremptory challenges, removes all black persons from the venire so that no black persons ever serve on a jury, then "the presumption protecting the prosecutor may well be overcome." *Id.* at 224. However, the record in the case revealed that such a complete exclusion of black persons from Alabama juries was not proven, and the Court declined to analyze the matter further. *Id.* at 224.

24. *Id.* at 203-04.

25. The Court overruled *Swain* in its decision in Batson v. Kentucky, 476 U.S. 79 (1986).

26. 476 U.S. 79 (1986).

stated that the Court intended to reexamine the holding in *Swain* regarding the "evidentiary burden placed upon a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the . . . jury."[27] The Court commenced its analysis by reaffirming its decision in *Strauder*, wherein the Court maintained that the racial discrimination in jury selection is violative of the principles of equal protection, in that such discrimination robs defendants of the assurance that a jury of their peers will determine their fate.[28] Moreover, the Court pointed out that racial discrimination in jury selection is harmful not only to the defendant, but also to the entire community, as such actions "undermine public confidence in the fairness of our system of justice."[29]

Competence as a juror, the Court contended, is dependent upon an assessment of individual qualifications and impartiality, and therefore one's ability to serve on a jury is unrelated to one's race.[30] Hence, the Court concluded that the utilization by the state of race-based peremptory challenges is subject to the commands of the Fourteenth Amendment Equal Protection Clause.[31]

In so holding, the Court set forth a three-part test in order to establish a prima facie case of purposeful discrimination in jury selection.[32] First, defendants must demonstrate that they are members of a cognizable racial group, and that the prosecutor employed peremptory challenges to exclude members of the defendants' race from the venire.[33] Second, defendants may "rely on the fact . . . that peremptory challenges constitute a jury selection process that

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27. *Batson*, 476 U.S. at 82. In *Batson*, the defendant was a black male who was indicted for second-degree burglary and receipt of stolen goods. *Id.* During voir dire, the prosecutor employed peremptory challenges and thereby excused all the black persons in the venire. *Id.* at 83. The impaneled jury, composed solely of white persons, subsequently convicted the petitioner on all counts, and the petitioner appealed to the Supreme Court, alleging a violation of his equal protection rights through the prosecutor's use of peremptories to remove all black venire members. *Id.*

28. *Id.* at 86 (citing *Strauder*, 100 U.S. at 308). The Court continued to assert that the venire "must be indifferently chosen to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.' " *Batson*, 476 U.S. at 86-87 (quoting *Strauder*, 100 U.S. at 309).

29. *Batson*, 476 U.S. at 87.

30. *Id.* at 87 (citing Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24 (1946)).

31. *Batson*, 476 U.S. at 89. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption the black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.*

32. *Id.* at 94.

33. *Id.*

permits those to discriminate who are of a mind to discriminate."[34] Finally, defendants must raise an inference through the use of these facts and "any other relevant circumstances," that the prosecutor exercised the peremptory strikes to exclude members of the venire from a jury on account of their race.[35]

Once the defendant has established a prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors.[36] The Court took note of the fact that "this requirement imposes a limitation in some cases on the full peremptory character" of the challenge, and pointed out that it is unnecessary that the explanation of the challenge meet the same standards as a challenge for cause."[37]

Responding to the objections of the prosecutor that the holding of the Court "will eviscerate the fair trial values served by the peremptory challenge," the Court maintained that there is no constitutional right to the peremptory challenge.[38] Moreover, the majority in *Batson* cited the fact that, in practice, the challenge has been exercised in such a manner as to discriminate against black jurors, which is forbidden by the Equal Protection Clause.[39] Thus, in reversing its position on the applicability of the Equal Protection Clause to peremptory challenges as set forth in *Swain*, the Court struck the first blow to the challenge and commenced the trend toward limiting its use under the aegis of the Fourteenth Amendment.

Having injected the strictures of the Equal Protection Clause into the jury selection process, the Court at first appeared unwilling to extend *Batson* beyond challenges to peremptories based on race.[40] Justice O'Connor, concurring in the denial of certiorari in *Brown v. North Carolina*,[41] maintained that *Batson* does not apply

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34. *Id.* at 96 (citations omitted).

35. *Id.* at 97.

36. *Batson*, 476 U.S. at 97.

37. *Id.* However, the Court warned that the prosecutor "may not rebut the defendant's prima facie case of discrimination by merely stating that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Id.*

38. *Id.* at 98.

39. *Id.* at 98-99. In fact, the majority stated that its decision, "requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, . . . enforces the mandate of equal protection and furthers the ends of justice." *Id.* at 99.

40. Brown v. North Carolina, 479 U.S. 940 (1986). The Court denied certiorari on petitioner's claim that peremptory strikes based upon the prospective juror's concerns regarding capital punishment violated the Equal Protection Clause. *Brown*, 479 U.S. at 941.

41. 479 U.S. 940.

outside the confines of racially-discriminatory challenges.[42] However, the Court did expand the coverage of *Batson* to situations in which the criminal defendant and the prospective juror do not share the same race.[43]

Perhaps the most significant development in the trend toward limiting the use of peremptory challenges occurred in *Edmonson v. Leesville Concrete Co.*[44] In that decision, the Court held that race-based exclusion from jury service in civil trials is subject to the same equal protection restrictions as are criminal proceedings.[45] Thus, all peremptory strikes allegedly made upon racially-discriminatory grounds, in both civil and criminal proceedings, were rendered subject to the *Batson* rule requiring the litigant to articulate a race-neutral reason for the exercise of such a strike. Having limited the applicability of the peremptory challenge by requiring the articulation of race-neutral reasons for exercising peremptory strikes, and then mandating such a showing in civil as well as criminal proceedings, the Court was perceived by some lower courts to have opened the door to further restriction of the peremptory challenge.[46]

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42. *Id.* at 941 (O'Connor, J., concurring). According to Justice O'Connor, *Batson* "depends upon this Nation's profound commitment to the ideal of racial equality," and aside from racial grounds, prosecutors may exercise their challenges for any reason. *Id.* (O'Connor, J., concurring).

43. Melissa C. Hinton, Note, Edmonson v. Leesville Concrete Co.: *Has* Batson *Been Stretched Too Far?* 57 Mo. L. Rev. 569, 576-77 (1992) (citing Powers v. Ohio, 499 U.S. 400 (1991)). In *Powers*, the petitioner, a white male, was indicted for aggravated murder, and in the course of the voir dire, the prosecutor exercised peremptory challenges to strike seven of ten black venire members. *Powers*, 499 U.S. at 421-22. Convicted by the jury, petitioner claimed his equal protection rights were violated, and the Court ruled that restricting the holding in *Batson* to instances where the defendant and the challenged juror are of the same race "conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause . . . ." *Id.* at 422.

44. 111 S. Ct. 2077 (1991). It has been proposed that, due to the fact that "*Powers* focused broadly on the harm the discriminatory exercise of peremptory challenges causes to the excluded venire members as well as to the entire community, the decision invited an extension of *Batson* to civil actions." Hinton, cited at note 43, at 577.

45. *Edmonson*, 111 S. Ct. at 2087. The Court proceeded to examine the requirement of state action necessary to construe a private litigant as a state actor for the purposes of the Fourteenth Amendment. *Id.* at 2083-86. However, a discussion of the state action requirements for an equal protection challenge of peremptory strikes is beyond the scope of this comment.

46. *See, for example,* United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992); People v. Irizarry, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990); Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993).

V. The Basis For Equal Protection Challenges Involving Gender

The Supreme Court, attempting to rectify the abuse of the peremptory challenge, invoked the principles of the Fourteenth Amendment Equal Protection Clause, causing commentators to speculate whether the Court had taken the first step toward the elimination of the challenge.[47] Chief Justice Burger, dissenting in *Batson*, contended that the Court, although basing its holding on the Fourteenth Amendment, was not employing conventional equal protection principles to the peremptory challenge issue when it limited its holding to race.[48] However, if such traditional principles are to be applied, the Chief Justice maintained, then "presumably defendants could object to exclusions on the basis of not only race, but *also sex*."[49]

Traditional Equal Protection Clause[50] analysis calls for an intermediate level of scrutiny for quasi-suspect classes,[51] and gender is included in the definition of such a class.[52] Thus, where the *Batson* Court employed an equal protection analysis when confronted with a peremptory challenge based upon race, it appears logical that the Fourteenth Amendment would similarly mandate protection for other classes which have been included within its purview, including gender. Such an extrapolation of the Court's holding is the logical step in an analysis of the limitations upon the peremptory challenge, unless the Court intended that *Batson* apply only in cases of race, thereby drawing an arbitrary line when it granted protection of the Fourteenth Amendment. Hence, several courts have followed this line of reasoning in the absence of a Supreme Court determination as to whether Equal Protection Clause analysis of peremptory challenges is exclusively limited to racial groups.

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47. *See* Denise J. Arn, Batson: *Beginning of the End of the Peremptory Challenge*, May Army Law. 33 (1990).

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

49. *Id.* at 124 (Burger, C.J., dissenting) (emphasis added). The Chief Justice pointed to Craig v. Boren, 429 U.S. 190 (1976), in which the Court held gender-based differentials in an Oklahoma statute constituted a denial of equal protection. *Craig*, 429 U.S. at 210.

50. See note 17 and accompanying text for a discussion of the Equal Protection Clause.

51. Dave Harbeck, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to all Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 Minn. L. Rev. 689, 694-95 (1993). This level of review requires a demonstration that the action in question is substantially related to an important governmental purpose. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

52. Reed v. Reed, 404 U.S. 71, 75 (1971).

Chief Justice Burger recognized the possibility of this occurrence when, dissenting in *Batson*, he warned against turning "the voir dire into a Title VII proceeding in miniature."[53]

VI. Federal Court Decisions

In 1988, two years after the Supreme Court's decision in *Batson*, the Fourth Circuit Court of Appeals handed down its opinion in *United States v. Hamilton*.[54] In that case, the court was faced with the question of whether the Equal Protection Clause compels an extension of *Batson* to situations in which peremptory challenges are exercised on the basis of gender.[55] Although the government stated that it struck the venire members in question because they were female and it desired to have more males on the panel,[56] the court rejected the contention that the commands of the Equal Protection Clause extend the holding of *Batson* to gender-based peremptory strikes.[57]

The *Hamilton* court asserted that there was "no authority support[ing] an extension of *Batson* to instances other than racial discrimination."[58] An examination of the opinion in *Batson*, the court claimed, lent no credence to the argument that the Supreme Court intended traditional equal protection analysis to be applied to peremptory challenges on bases other than race.[59] Reading *Batson* in a narrow fashion, the court concluded that, "if the Supreme Court . . . had desired, it could have abolished the peremptory challenges or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification,"[60] but it opted in-

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53. *Batson*, 476 U.S. at 126 n.7 (Burger, C.J., dissenting) (citations omitted).

54. 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed*, Washington v. United States, 489 U.S. 1094 (1989), *cert. denied*, 493 U.S. 1069 (1990).

55. *Hamilton*, 850 F.2d at 1042. Five of the fourteen defendants in the case were female, and all of the defendants were black persons. *Id.* at 1039, 1041. The government exercised seven of its eight peremptory challenges to exclude black members of the venire, and the district court concluded that the government had articulated a racially neutral explanation. *Id.* at 1041. On appeal, the defendants maintained that the government's use of three peremptory challenges to strike females was a violation of the Equal Protection Clause. *Id.* at 1040-41. The government stated that it wanted more men on the jury, and that it had, in fact, struck three potential jurors because they were female. *Id.* at 1041.

56. *Id.*

57. *Id.* at 1042.

58. *Id.*

59. *Id.*

60. *Hamilton*, 850 F.2d at 1042. The court considered the Supreme Court's restriction of the challenge to race to indicate an intent to carve out a single exception to the practice, reaffirming the "important position of the peremptory challenge in our jury system." *Id.* at 1042-43.

stead to limit its holding only to race.[61]

Conversely, the Ninth Circuit reached the opposite conclusion in *United States v. De Gross*,[62] decided in 1992. The issue before the *De Gross* court was whether equal protection prohibited a criminal defendant from exercising peremptory strikes on the basis of gender,[63] and whereas the Fourth Circuit espoused a narrow interpretation of *Batson*, the Ninth Circuit considered the fact that "the Court's language was couched in racial terms" to be irrelevant, and concluded that *Batson*'s rationale applies equally well to gender-based peremptory strikes.[64]

In expanding the racial limitation on the exercise of peremptory challenges to include gender, the Ninth Circuit engaged in an examination of past gender discrimination in the judicial system. The jury system, the court maintained, has served as a forum for "government sanctioned exclusion of women,"[65] dating from common law juries' exclusion of women based upon the doctrine of *propter defectum sexus*, or a defect of sex.[66] Even the Supreme Court partook in this discrimination when it held that, although jury service could not be made exclusive of black persons, it could discriminate against women.[67] Rejecting this historical discrimination against women, the court noted that, like race, a person's gender does not impact upon one's ability to be impartial, but rather, exclusions based on sex are predicated upon an assumption that the class itself is incompetent to serve.[68] Thus, the court concluded that equal protection principles safeguard against the use of pe-

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61. Two other circuits have rejected the expansion of *Batson* to peremptory challenges based upon gender. *See* United States v. Broussard, 987 F.2d 215 (5th Cir. 1993); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992).

62. 960 F.2d 1433 (9th Cir. 1992). Juana Espericueta De Gross was convicted of aiding and abetting the transportation of an alien within the United States. *De Gross*, 960 F.2d at 1435. During voir dire, the defendant peremptorily struck seven male venire members, and the government objected that the defendant was exercising the challenges in a gender-based discriminatory manner. *Id.* at 1435-36. When the defendant offered no explanation, the court disallowed the challenge, yet when the government struck a Hispanic woman, stating that it desired a "more representative community of men and women on the jury," the trial court permitted the strike. *Id.* at 1436.

63. *Id.*

64. *Id.* at 1438.

65. *Id.*

66. *Id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *362).

67. *De Gross*, 960 F.2d at 1438 (citing *Strauder*, 100 U.S. at 310).

68. *Id.* at 1438-39. The court analogized the rationale for race-based exclusion with that for gender, and concluded that their similarities warranted the abolition of the attorney's right to use either of such classifications which do not reflect individual ability, but rather reflect prejudice and bias against the group as a whole. *Id.* at 1439.

remptory challenges based upon gender, just as those principles prohibit race-based strikes.[69]

VII. State Court Decisions

On the state court level, several jurisdictions likewise began to expand the *Batson* limitation to gender, preceding the Ninth Circuit's decision in *De Gross*. One of the earliest of these opinions was handed down by the Appellate Division of the Supreme Court of New York in *People v. Irizarry*,[70] in which that court held that the equal protection rationale employed in *Batson* should apply to other cognizable groups, including gender.[71] The *Irizarry* court based its holding upon the fact that, because the Supreme Court had based *Batson* upon the Equal Protection Clause, the full range of protection granted under its traditional analysis should apply.[72] The brief opinion in *Irizarry* did not reflect an exhaustive exploration of the issue of gender discrimination, nor did it analyze whether *Batson* was a narrow equal protection exception. Instead, the court assumed that such was the case and then merely applied the traditional equal protection analysis to the matter.

More recently, the Supreme Court of North Dakota also maintained that gender-based peremptory strikes violate the Fourteenth Amendment Equal Protection Clause in *Mandan v. Fern*.[73] In *Mandan*, the court addressed the striking of male venire members on the basis of gender, and, while recognizing that the Supreme Court had not ruled as to the extension of *Batson* to such instances, the North Dakota court chose to follow the lead set by the Ninth Circuit in *De Gross*.[74] Labelling gender-based peremp-

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69. *Id.* The court thereby noted and rejected the Fourth Circuit's contrary holding in *Hamilton*. *Id.* at 1438 n.6.

70. 560 N.Y.S.2d 279 (N.Y. App. Div. 1990).

71. *Irizarry*, 560 N.Y.S.2d at 280. The prosecutor peremptorily struck nine female jurors, and the court found that the defendant had made a prima facie showing of discriminatory conduct. *Id.* at 279-80. The court then issued a written decision upon the defendant's motion for a mistrial, noting that only two of the strikes appeared to be pretextual, and denied the motion. *Id.* at 280.

72. *Id.* at 280-81. Analogizing the case at hand to *Batson*, the court stated that exclusion based on sex alone harms the challenged juror as well as the community as a whole, thereby following the Supreme Court's reasoning for limitations on race-based challenges. *Id.* at 280.

73. 501 N.W.2d 739,746 (N.D. 1993).

74. *Mandan*, 501 N.W.2d at 744-45. The court examined the split between the circuits upon this issue, and rejected the rationale in the Fifth Circuit's opinion in *Broussard*. *Id.* at 747. *Broussard*, in refusing to extend *Batson* to gender-based exclusions, stated that, "[i]n equal protection terms, the contributions to a perception of fairness in the petit jury of

tory strikes "a bad remnant of the historical denial of women's rights," the court asserted that "[s]ex discrimination, like race discrimination, 'has no place in the courtroom.' "[75]

Engaging in a more complete review of the case law on this issue, the court pointed to the continuing discrimination on the basis of gender as evidenced by the prevalence of attorneys' manuals on jury selection.[76] The court deplored the manuals' reliance upon "crude stereotypes and categorical assumptions about the influence of gender,"[77] and pointed out that these types of stereotypes are of the class "that the Court has previously struck down when relied upon by state actors in allocating rights, benefits, or burdens."[78] Thus, the North Dakota Supreme Court chose to apply traditional Equal Protection Clause analysis to the issue of gender-based peremptory challenges based upon a reading of *Batson* similar to that of the Ninth Circuit in *De Gross*.[79]

VIII. The Expansion of *Batson* Heralds the Abolition of the Peremptory Challenge

The Supreme Court decisions in *Strauder* and *Batson* clearly made reference to the Equal Protection Clause as the basis for

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peremptory challenges is an important governmental interest. . . . That interest would be frustrated by extending *Batson* to gender because it would require, on demand of counsel, an explanation for every strike." *Id.* (quoting *Broussard*, 987 F.2d at 220) (footnotes omitted).

Mandan similarly rejected its perception of the Fifth Circuit's reasoning that:

> [S]ex discrimination in jury selection, unlike race discrimination, will not succeed because it will not prevent members of the discriminated-against class from serving on most juries, because there are too many in that class to be totally excluded, and so there is no justification or need for extending *Batson* to gender discrimination.

Id. at 747-48.

75. *Id.* at 746 (quoting *Edmonson*, 111 S. Ct. at 2088).

76. *Mandan*, 501 N.W.2d at 746.

77. *Id.* Some manuals state, for example, that "women make more sympathetic jurors when children are involved, that male jurors are preferable when 'clearly demonstrated blackboard figures' are involved, and that men are 'hardboiled' and women 'emotional.' " *Id.* (citing Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 Harv. L. Rev. 1920, 1932 (1992) [hereinafter *Beyond* Batson] (footnotes omitted)).

78. *Mandan*, 501 N.W.2d at 746 (citing *Beyond* Batson, 105 Harv. L. Rev. at 1932).

79. *Mandan*, 501 N.W.2d at 746-47. Various other state courts have held *Batson* to be applicable to gender-based peremptory challenges by virtue of individual state constitutions. *See* State v. Levinson, 795 P.2d 845 (Haw. 1990); DiDonato v. Santini, 283 Cal. Rptr. 751 (Cal. Ct. App. 1991).

Other state courts have refused to extend the limits on the challenge to include gender. *See* State v. Oliviera, 534 A.2d 867 (R.I. 1987); State v. Culver, 444 N.W.2d 662 (Neb. 1989); Ex parte Murphy, 596 So.2d 45 (Ala. 1992), *cert. denied*, Murphy v. Alabama, 113 S. Ct. 86 (1992).

those holdings, and it is likewise evident that the motivation behind those opinions was to remedy racial discrimination in the courtroom.[80] Similarly, the *De Gross* court employed equal protection analysis in an attempt to rectify what it perceived as gender discrimination in voir dire through the use of peremptory strikes.[81] As previously noted, state courts have likewise put equal protection principles to use in restricting the use of the challenge. Thus, the extension of *Batson* to gender-based challenges has been couched in terms of whether *Batson* was a narrow exception to the general rule of peremptory challenges, or rather one aspect of full Equal Protection Clause analysis of the practice.[82] However, given the predicted chilling effect of the application of traditional equal protection principles to the peremptory challenge,[83] the ultimate issue is not one of equal protection. Rather, the question is whether the peremptory challenge should continue to be countenanced in the American judicial system, or whether such unexplained strikes based upon the internal biases and gut reactions of attorneys have outlived their usefulness in the modern courtroom.

In practice, the expansion of *Batson* to embrace sex-based challenges will lengthen the voir dire, as virtually every strike may be challenged on the basis of suspected gender discrimination. A series of such miniature hearings on peremptory strikes will undoubtedly protract an already painfully slow litigation process, thereby burdening the administration of justice to a great degree. Should, or indeed can, the judicial system sustain such a heavy burden at the infant stages of every trial? If not, perhaps the proper response to such a result should be the elimination of the practice in favor of challenges for cause as the sole court-sanctioned strike. Therein lies the hidden agenda behind the trend of extending *Batson* to encompass the full ambit of equal protection principles and analysis.

Some commentators have decried the very existence of the peremptory challenge in the American court system.[84] Judge Broderick has stated that "the peremptory challenge is offensive to both the federal Constitution and basic concepts of justice," and that

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80. *See Strauder*, 101 U.S. at 312; *Batson*, 476 U.S. at 86.

81. *De Gross*, 960 F.2d at 1348.

82. *See Brown*, 479 U.S. at 941 (O'Connor, J., concurring); *Hamilton*, 850 F.2d at 1042; *De Gross*, 960 F.2d at 1438; *Mandan*, 501 N.W.2d at 746.

83. *Batson*, 476 U.S. at 126 n.7 (Burger, C.J., dissenting).

84. *See, e.g.*, Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369 (1992).

therefore "peremptory challenges should be abolished."[85] Explaining his position, Broderick labels the strike as "typically misdirected at the outset," and geared toward fostering the "prerogative of using peremptory challenges to deny persons the constitutional right to be jurors in order to accomplish their [(the attorneys and their clients)] objective of obtaining, not an impartial jury, but a jury which would be partial."[86] More importantly, Judge Broderick suggests that empirical evidence lends no credence to the presumption that peremptory challenges further the goals of fair trials.[87]

For example, Judge Broderick cited the findings of Hans Zeisel and Shari Seidman Diamond in their study of the use of peremptory challenges in the United States District Court for the Northern District of Illinois.[88] Zeisel and Diamond examined the correlation between the use of peremptory challenges and success at trial by seating peremptorily-struck venire members in the courtroom as "shadow jurors."[89] The shadow jurors revealed how they would have voted in the case,[90] rendering "essentially the same proportion of guilty votes . . . as the real jurors . . . ."[91] Zeisel and Diamond therefore concluded that the attorneys using peremptory challenges were unable to identify potential bias,[92] contradicting the central justification for the use of the strike and lending credence to the argument for its abolition.

With practitioners arguing for the total elimination of the peremptory challenge, it is clear that the essence of the debate over the extension of *Batson* to gender-based challenges is but one facet of the drive to eliminate the strike altogether. Should the Supreme Court expand *Batson* to gender discrimination, the logical step would be to afford the entire scope of equal protection to the practice, maiming the challenge to the point that it is, in effect, abolished.

IX. Conclusion

Since the Supreme Court rendered its decision in *Batson*, the

85. Broderick, cited at note 84, at 371.
86. *Id.* at 411.
87. *Id.* at 413.
88. *Id.* at 412-13 (citing Hans Zeisel and Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491 (1978)).
89. Zeisel and Diamond, cited at note 88, at 492.
90. *Id.*
91. *Id.* at 513.
92. *Id.* at 528.

courts of the nation, both state and federal, have engaged in a continuing debate as to whether the full range of equal protection analysis is to be applied to the peremptory challenge. Many courts have viewed the slow erosion of the challenge in the jury selection process dating from *Strauder* to be an indication that the peremptory challenge is facing its demise at the hands of the Equal Protection Clause. Other courts, and indeed some Supreme Court justices, have maintained that the *Batson* limitation is based exclusively on the unique history of racial discrimination in America, and should therefore be confined to a single exception to the peremptory challenge.

Although the Supreme Court has observed, without judgment, the split among the courts on this issue since *Batson* was decided, it may finally be prepared to resolve the issue in *J.E.B. v. T.B.*[93] Directly faced with the question of whether *Batson* was a narrow exception to the peremptory challenge based upon race, or was rather one facet of full, traditional Equal Protection Clause analysis of the utilization of the strike, the Court may well render a decision amounting to the emasculation or complete elimination of the peremptory challenge. The Court has been given the opportunity to address the issue of the necessity of the peremptory strike, and should recognize the chance to either affirm or abolish the practice. The question of the propriety of the extension of *Batson* to gender-based strikes is secondary to the issue of the existence of the challenge, as future cases revolving *Batson's* applicability to alienage, national origin, or age, for example, will most assuredly arise, mounting new challenges to the use of the peremptory strike. A firm landmark decision by the Court will preempt such developments and demonstrate the Court's sensitivity to the trends and practices of trial advocacy. The Court should resist the temptation to carve out another exception to the challenge, and leave unanswered the question of inclusion of other classes, for such an action

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93. J.E.B. v. State, 606 So.2d 156 (Ala. Ct. Civ. App. 1992), *cert. granted*, J.E.B. v. T.B., 113 S. Ct. 2330 (1993), wherein the Alabama court refused to extend *Batson* to a civil action to establish paternity and to recover child support when peremptory challenges were exercised on the basis of gender.

During oral argument held on November 3, 1993, the petitioner called upon the Supreme Court to extend *Batson* not only to gender, but to all groups warranting Fourteenth Amendment protection. *Arguments Before the Court*, 62 LAW WEEK (BNA) § 3, at 3329 (Nov. 9, 1993). The Court questioned the applicability of such a broad rule in practice, noting the Ninth Circuit's adoption of the system. *Id.* at 3330. The respondent, in turn, contended that *Batson* is unique to race, and that, if the struck jury method does have problems, perhaps the only solution is to eliminate the challenge altogether. *Id.* at 3330-31.

would result in a long, litigious road in which lawyers argue the application of the Fourteenth Amendment principles to every class within the purview of the Equal Protection Clause on a case-by-case basis.

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