"What's so Magic[al] About Black Women?" Peremptory Challenges at the Intersection of Race and Gender

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This Article addresses the evolving constitutional restraints on the exercise of peremptory challenges in jury selection. Approximately ten years ago, in the landmark case of 

Batson v. Kentucky, the United States Supreme Court held that the Equal Protection Clause forbids prosecutors to exercise race-based peremptory challenges, at least when the excluded jurors and the defendant share the same race. Over the next ten years, the Court extended Batson’s reach.

The first of several extensions occurred five years after Batson in Powers v. Ohio. In that case, the Court clarified that a prosecutor’s race-based peremptory challenges violate the Equal Protection Clause even when the defendant and the excluded jurors do not share the same race. The same year, in Edmonson v. Leesville Concrete Co., the Court held that race-based peremptory challenges by private civil litigants also violate the Equal Protection Clause. The following year, in Georgia v. 
McCollum, the Court held that the Equal Protection Clause precludes even criminal defendants from exercising race-based peremptory challenges. Most recently, in J.E.B. v. Alabama ex rel. T.B., the Court held that the Equal Protection Clause forbids gender-based peremptory challenges.

Appellate litigation regarding Batson's scope is likely to continue. We can anticipate, for instance, that the Court will eventually consider whether religion-based peremptory challenges offend the Equal Protection Clause.


J.E.B. restricts the Batson rule of nondiscrimination in jury selection to classifications subject to strict and heightened scrutiny. J.E.B., 114 S. Ct. at 1429 (noting that parties may use their peremptory challenges to exclude any group normally subject to "rational basis" review). In Larson v. Valente, 456 U.S. 228 (1982), the Court, applying the First Amendment, subjected religion-based discrimination to strict scrutiny. Larson, 456 U.S. at 244–46. It arguably follows that religion-based peremptory challenges offend Batson. Mason, supra, at 522. Indeed, Justice Scalia
exercise of peremptories that can be conceptualized as challenges based on the intersection of race and gender—challenges based on intersectionality. Such challenges purposely exclude jurors of a particular race and a particular gender, for example, African American women or Latino men.

This Article explores Batson's future, and in particular, the extension of Batson to claims of intersectional discrimination in jury selection. Part I examines the peremptory challenge as modified by Batson and its progeny. The discussion confronts the assertions of Batson critics and relies in part on original empirical work, a survey of trial lawyers regarding their impressions of the pre- and post-Batson peremptory challenge and Batson's burden on the courts. The results of the survey indicate that the peremptory challenge retains its vitality despite the evolving constitutional restraints on its exercise. The results of the survey also indicate that Batson procedures are not consuming an excessive amount of court time. With this backdrop set, Part II explores the appropriateness of extending Batson to intersectional discrimination in jury selection and the likely impact of that extension on the peremptory challenge and the courts. The Article concludes that as a doctrinal and normative matter Batson should be extended, and as a practical matter can be extended, to intersectional discrimination in jury selection without dire consequences for the peremptory challenge or the courts.

I. PEREMPTORY CHALLENGES: PRE- AND POST-BATSON

Peremptory challenges give a litigant the opportunity to shape the jury that will decide the litigant's case at trial. Procedures vary from

has assumed that J.E.B. effectively extended Batson to religion-based peremptory challenges. J.E.B., 114 S. Ct. at 1438 (Scalia, J., dissenting).

In Davis v. Minnesota, 114 S. Ct. 2120 (1994), however, the United States Supreme Court denied certiorari in a case raising religion-based peremptory challenges. Davis, 114 S. Ct. at 2120. In that case, the petitioner, an African American, argued that the prosecutor's race-neutral reason for striking a black juror—that the juror was a Jehovah's Witness—violated the Equal Protection Clause. Davis, 114 S. Ct. at 2120. Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari. Davis, 114 S. Ct. at 2120.

jurisdiction to jurisdiction, but generally jury selection proceeds as follows. A panel of potential jurors (the venire) is summoned into the courtroom for questioning by the court and litigants (voir dire). The court typically inquires into the general background of the jury panelists: residential area, occupation, marital status, and prior jury service. Then the litigants question the panelists, probing for any biases that could have a bearing on the case. Following the examination of the jury panelists, the litigants exercise challenges for cause\textsuperscript{14} by asking the court to exclude certain jury panelists for specific, legally recognized reasons. The grounds for challenges for cause are usually statutorily enumerated and often include actual bias (a jury panelist admits during questioning that he or she cannot be fair and impartial in the particular case),\textsuperscript{15} implied bias (familial or business ties exist between a jury panelist and one of the litigants or witnesses),\textsuperscript{16} and disqualifications based on citizenship, age, residence, and English language ability.\textsuperscript{17} Following the exercise of unlimited challenges for cause, the litigants exercise their peremptory challenges. Peremptory challenges differ from challenges for cause in two respects. Peremptory challenges are limited in number,\textsuperscript{18} and they do not require the litigant to articulate a reason for excluding a particular jury panelist.\textsuperscript{19}

The peremptory challenge serves at least four widely recognized purposes. First, the peremptory challenge allows the litigants to “eliminate extremes of partiality” on the venire.\textsuperscript{20} Accordingly, at least in theory, the peremptory challenge operates to secure the litigants a fair and impartial jury.\textsuperscript{21} Second, the peremptory challenge gives the parties

\textsuperscript{14} A challenge for cause allows a litigant to exclude a demonstrably biased or otherwise unqualified jury panelist from the jury during jury selection.

\textsuperscript{15} See, e.g., CAL. CIV. PROC. CODE § 225(b)(1)(C) (West 1996).

\textsuperscript{16} See, e.g., CAL. CIV. PROC. CODE §§ 225(b)(1)(B), 229 (West 1996).

\textsuperscript{17} See, e.g., CAL. CIV. PROC. CODE §§ 203, 225(b)(1)(A) (West 1996).

\textsuperscript{18} See, e.g., CAL. CIV. PROC. CODE § 231 (West 1996) (allowing the prosecution and the defense twenty peremptory challenges each in cases involving the possibility of a life or death sentence and ten peremptory challenges each for other cases). See also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 347 (Dawsons of Pall Mall 1966) (1769) (observing that peremptory challenges must have “some reasonable boundary” and noting that the common law allowed a prisoner thirty-five such challenges).

\textsuperscript{19} Swain v. Alabama, 380 U.S. 202, 220 (1965) (describing the “essential nature of the peremptory challenge” as “one exercised without a reason stated”).

\textsuperscript{20} Swain, 380 U.S. at 219.

\textsuperscript{21} See Batson, 476 U.S. at 91 (observing that peremptory challenges “traditionally have been viewed as one means of assuring the selection of a qualified and unbiased
some control over the jury selection process and thereby enhances the litigants’ confidence in the proceedings and respect for the jury’s ultimate verdict.\textsuperscript{22} Third, the peremptory challenge permits litigants to probe for biases during voir dire without fear of alienating a potential juror.\textsuperscript{23} Even if no grounds for a challenge for cause appear, the litigant can exercise a peremptory challenge to exclude a juror who may have been antagonized by the litigant’s questioning. Fourth, the peremptory challenge serves as a safety net when the jury panelist harbors bias, but the challenge for cause cannot satisfactorily be demonstrated.\textsuperscript{24}


22. Edmonson, 500 U.S. at 630 (observing that “the role of litigants in determining the jury’s composition provides one reason for wide acceptance of the jury system and of its verdicts”); Swain, 380 U.S. at 219 (observing that the “function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure 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.”). See also BLACKSTONE, supra note 18, at 347 (emphasizing “that a prisoner . . . should have a good opinion of his jury”); Babcock, supra note 21, at 552 (observing that “the peremptory challenge teaches the litigant, and through him the community, that . . . [the jury’s] decision should be followed because in a real sense the jury belongs to the litigant: he chooses it.”); Saltzburg & Powers, supra note 21, at 356 (observing that the provision of peremptory challenges, allowing the litigant to remove unwanted jury panelists, is a means of insuring that a litigant has “a good opinion of the jury”); Underwood, supra note 12, at 771 (observing that the peremptory challenge provides the litigant “an opportunity to participate in the construction of the decision-making body”).

23. Swain, 380 U.S. at 219–20 (noting the possibility of incurring a jury panelist’s hostility during voir dire); Lewis v. United States, 146 U.S. 370, 376 (1892) (quoting Blackstone regarding the need to exclude jury panelists offended by voir dire). See also BLACKSTONE, supra note 18, at 347 (observing that “the bare questioning [of a jury panelist’s] indifference may sometimes provoke a resentment”); Babcock, supra note 21, at 554–55 (recognizing the need to exclude jury panelists alienated by voir dire); Saltzburg & Powers, supra note 21, at 356 (observing that extensive voir dire regarding possible biases can alienate a jury panelist); The Supreme Court, 1991 Term—Leading Cases, 106 Harv. L. Rev. 163, 247 (1992) (observing that inquiries into potential bias can insult and alienate jury panelists).

24. See Babcock, supra note 21, at 549–50 (describing the reluctance of judges to find bias and grant challenges for cause); Saltzburg & Powers, supra note 21, at 355–56 (describing jury panelists as reluctant to admit bias and judges as reluctant to find bias); Underwood, supra note 12, at 771 (describing the peremptory challenge as “an essential fallback for use when a challenge for cause is rejected”).
Prior to \textit{Batson}, in \textit{Swain v. Alabama},\textsuperscript{25} the United States Supreme Court condoned the exercise of group-based peremptory challenges, including peremptory challenges based on race.\textsuperscript{26} In \textit{Swain}, the black male defendant demonstrated that there were eight blacks on his venire but that none actually served, two being exempt and six having been challenged peremptorily by the prosecutor during jury selection.\textsuperscript{27} The defendant claimed that the prosecutor had purposely excluded the black jury panelists in violation of the Equal Protection Clause.\textsuperscript{28} The Court, however, declined to hold that purposely excluding black jury panelists in a particular case violates the Equal Protection Clause.\textsuperscript{29} Instead, it reasoned that "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."\textsuperscript{30} Indeed, the Court reasoned that the pluralistic nature of American society necessitated the opportunity to make race-based peremptory challenges.\textsuperscript{31} Of course, since \textit{Swain}, the Court has reconsidered its position on the subject of race-based peremptory challenges in a particular case.

In \textit{Batson}, the Court held that purposely excluding black jury panelists in a particular case violates the Equal Protection Clause.\textsuperscript{32} In \textit{Batson}, the defendant, a black man, objected when the prosecutor used his peremptory challenges to exclude all four black persons on the venire, leaving an all white jury.\textsuperscript{33} \textit{Batson} was framed in terms of a criminal defendant's equal protection right not to have members of the defendant's race excluded because of their race.\textsuperscript{34} Subsequent cases, however, framed the issue in terms of the right of jury panelists not to be excluded because of their race, a right that could be asserted by a

\textsuperscript{25} 380 U.S. 202 (1965).
\textsuperscript{26} \textit{Swain}, 380 U.S. at 220–21.
\textsuperscript{27} \textit{Swain}, 380 U.S. at 205.
\textsuperscript{28} \textit{Swain}, 380 U.S. at 210.
\textsuperscript{29} \textit{Swain}, 380 U.S. at 221, 223. However, the Court observed that the prosecutor's exclusion of black jury panelists in case after case such that no black panelist ever serves on a jury would violate the Equal Protection Clause. \textit{Swain}, 380 U.S. at 223.
\textsuperscript{30} \textit{Swain}, 380 U.S. at 221.
\textsuperscript{31} \textit{Swain}, 380 U.S. at 218, 222.
\textsuperscript{32} \textit{Batson}, 476 U.S. at 89.
\textsuperscript{33} \textit{Batson}, 476 U.S. at 82–83.
\textsuperscript{34} \textit{Batson}, 476 U.S. at 85–86.
\textsuperscript{35} \textit{McCollum}, 505 U.S. at 48–49 (prohibiting a criminal defendant's exercise of race-based peremptory challenges); \textit{Edmonson}, 500 U.S. at 618–19 (prohibiting a civil litigant's exercise of race-based peremptory challenges); \textit{Powers}, 499 U.S. at 406–09
litigant on behalf of the excluded jury panelist(s). For example, Powers makes clear that race cannot serve as a proxy for determining juror bias or competence. \(^{37}\) J.E.B. holds that gender cannot serve as a proxy for determining juror bias or competence. \(^{38}\) In contrast to Swain, the Court in both Batson and J.E.B. reasoned that the pluralistic nature of our society requires the prohibition of race- and gender-based peremptory challenges, respectively. \(^{39}\)

J.E.B. clarified the reach of Batson's prohibition. \(^{40}\) In J.E.B., the Court compared the history, nature, and extent of women's exclusion from American political life to that of African Americans. The opinion cited laws specifically excluding women and compared them to laws specifically excluding African Americans. \(^{41}\) The laws at issue deprived women of various rights associated with citizenship, such as jury service, \(^{42}\) voting, holding political office, bringing suit, and owning

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36. McCollum, 505 U.S. at 55–56 (holding that the state has standing to challenge a criminal defendant's discriminatory use of peremptory challenges); Edmonson, 500 U.S. at 628–30 (holding that a civil litigant has standing to challenge an opposing litigant's discriminatory use of peremptory challenges); Powers, 499 U.S. at 410–15 (holding that a white criminal defendant has standing to challenge the state's use of peremptory challenges to exclude black jury panelists).


38. J.E.B., 114 S. Ct. at 1421.

39. Batson, 476 U.S. at 99 (noting that “[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race”); J.E.B., 114 S. Ct. at 1430 (observing that “[w]hen persons are excluded from participation in our democratic processes solely because of race or gender, the promise of equality dims, and the integrity of our judicial system is jeopardized”). See also Edmonson, 500 U.S. at 630–31 (admonishing that, “[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress”); Nancy S. Marder, Beyond Gender: Peremptory Challenges and the Roles of the Jury, 73 Tex. L. Rev. 1041, 1083 (1995) (observing that peremptory challenges based on group identity are inconsistent with democratic ideals).

40. The reasoning in Batson is somewhat obscure, perhaps because the defendant-petitioner, apparently discouraged by the Court’s equal protection clause analysis in Swain, based his claim on the Sixth Amendment; as a result, the briefs and argument failed to develop an equal protection analysis. Batson, 476 U.S. at 112–18 (Burger, C.J., dissenting).

41. J.E.B., 114 S. Ct. at 1425.

42. J.E.B., 114 S. Ct. at 1422–24.
property. The Court reasoned that, under equal protection analysis, this history of exclusion required the heightened scrutiny of gender-based discrimination. The Court concluded that gender-based peremptory challenges could not survive the heightened scrutiny. Although historically men have been favored for inclusion on juries and in other aspects of American political life, the Court in J.E.B. made clear that they, like women, are a cognizable group and that the state's intentional exclusion of them from the jury panel violates the Equal Protection Clause. The Court also made clear, however, that peremptory challenges may be exercised to "remove from the venire any group or class of individuals normally subject to 'rational basis' review." The Court cited occupation-based challenges as an example of permissible group-based discrimination in the exercise of peremptory challenges.

Post-Batson and its progeny, a litigant may not exercise race- or gender-based peremptory challenges. If a litigant establishes a prima facie case of purposeful discrimination in jury selection, the opponent must articulate a race- or gender-neutral reason for excluding the jury panelist(s), a burden of proof scheme based on Title VII disparate

43. J.E.B., 114 S. Ct. at 1425 (citing Frontiero v. Richardson, 411 U.S. 677, 685 (1973)).
44. J.E.B., 114 S. Ct. at 1425.
45. J.E.B., 114 S. Ct. at 1425–30 (assessing whether gender discrimination in jury selection substantially furthers the state's legitimate interest in a fair and impartial jury and concluding that it does not).
46. J.E.B., 114 S. Ct. at 1428. While the result may seem absurd (forbidding the purposeful exclusion of male jury panelists when it is women who historically have been excluded from American political life), it stems from the Court's focus on discrimination as opposed to subordination. The Court apparently believed that affording women protection from gender-based peremptory challenges but not extending the same protection to men would deny men the equal protection of the laws. See Powers, 499 U.S. at 423–24 (Scalia, J., dissenting).
47. J.E.B., 114 S. Ct. at 1429.
49. In deciding whether the litigant has established the requisite prima facie case, "the trial court should consider all relevant circumstances." Batson, 476 U.S. at 96–97. For example, if a litigant and the excluded jury panelist share a common racial identity, this shared racial identity may raise the necessary inference of purposeful discrimination. Powers, 499 U.S. at 416. In any event, the litigant objecting to the peremptory challenge is entitled to "rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
treatment cases. Assuming the facial validity of the opponent's explanation, the trial court determines whether the litigant opposing the peremptory challenge(s) has carried his or her burden of proving purposeful discrimination. The trial court can find that a facially valid explanation is a pretext for purposeful discrimination.

Batson jurisprudence has had its critics. The dissenting and concurring justices in Batson and its progeny spotlight the pedigree of the peremptory challenge and extol its role in securing a fair and impartial jury. These critics lament that despite the history and function of the peremptory challenge, Batson and its progeny restrict the exercise of peremptory challenges to prevent the intentional exclusion of certain groups from juries. They also predict that Batson's implementation

L. Rev. 888, 904 (1995) (observing that trial courts frequently require an explanation for peremptory challenges without analyzing whether the objecting party has demonstrated a prima facie case of discrimination).

51. See Batson, 476 U.S. at 94 n.18 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

52. Purkett, 115 S. Ct. at 1771 (rejecting the notion that the proffered neutral explanation must be persuasive or plausible, because that would shift the burden of persuasion regarding racial motivation from the opponent to the maker of the challenge(s)).


55. J.E.B., 114 S. Ct. at 1431 (O'Connor, J., concurring) (observing that the "peremptory's importance is confirmed by its persistence: it was well established at the time of Blackstone and continues to endure in all the States"); id. at 1439 (Scalia, J., dissenting) (describing Batson jurisprudence as a "vandalizing of our people's traditions"); Batson, 476 U.S. at 112, 118–21 (Burger, C.J., dissenting) (lamenting that "the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years"); id. at 137 (Rehnquist, J., dissenting) (declining to "subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge"). For a history of the peremptory challenge, see Swain, 380 U.S. at 212–19.

56. Batson, 476 U.S. at 125 (Burger, C.J., dissenting) (observing that "[p]eremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of
will fail. Specifically, critics assert that *Batson*: interjects racial matters into the jury selection process;\(^5^7\) diminishes the ability of litigants to act on sometimes accurate group-based assumptions (stereotypes);\(^5^8\) forces "the peremptory challenge to collapse into the challenge for cause;"\(^5^9\) effectively abolishes the peremptory challenge;\(^6^0\) and lengthens trials that are already too long.\(^6^1\)

Their appeal to history in defense of the peremptory challenge (versus *Batson*) seems wrongheaded. Because blacks and women

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\(^{57}\) *Batson*, 476 U.S. at 129 (Burger, C.J., dissenting).

\(^{58}\) *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring) (observing that "like race, gender matters," but *J.E.B.* renders "any correlation between a juror's gender and attitudes . . . irrelevant as a matter of constitutional law"); *Batson*, 476 U.S. at 138–39 (Rehnquist, J., dissenting) (describing group affiliations, including race, as a legitimate proxy for potential juror partiality in the exercise of peremptory challenges).

\(^{59}\) *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting) (quoting U.S. v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

\(^{60}\) *Powers*, 499 U.S. at 425 (Scalia, J., dissenting). See also *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring) (observing that the prohibition on gender-based discrimination in jury selection means "a step closer to eliminating the peremptory challenge"). Some legal commentators have joined the Justices in their more extreme assertions about *Batson's* effect on the peremptory challenge. See, e.g., J. Christopher Peters, Note, Georgia v. McCollum: It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth? 53 La. L. Rev. 1723, 1757 (1993) (asserting that "under the stricture imposed by the Court, peremptory challenges have outlived their usefulness"); Susan A. Winchurch, Note, *J.E.B.* v. Alabama ex rel. T.B.: The Supreme Court Moves Closer to Elimination of the Peremptory Challenge, 54 Md. L. Rev. 261, 262–63 (1995) (asserting that "the Court's extension of *Batson* principles to gender-based peremptory challenges has compromised the peremptory challenge to such a degree that it is no longer an effective litigation tool"). *But see* Underwood, supra note 12, at 768–73 (arguing that *Batson* limits but does not destroy the value of the peremptory challenge).

\(^{61}\) *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring) (describing *Batson* mini-hearings as "routine"); *Id.* at 1439 (Scalia, J., dissenting) (observing that *Batson* and its progeny spawn "extensive collateral litigation"); *Edmonson*, 500 U.S. at 645 (Scalia, J., dissenting) (noting that "the amount of judges' and lawyers' time devoted to implementing [*Batson* and its progeny] will be enormous" and that "[t]hat time will be diverted from other matters"); *Batson*, 476 U.S. at 126 n.7 (Burger, C.J., dissenting) (predicting that voir dire will become "'Title VII proceeding[s] in miniature'") (quoting Clark, 737 F.2d at 682).
historically were excluded from jury service, the use of peremptory challenges to exclude them as jurors was formerly simply not an issue. Once blacks and women began to serve as jurors, the peremptory challenge assumed a new and historically unprecedented role as an instrument of race and gender discrimination. Perhaps the peremptory challenge was unquestioned in an earlier society with different values, a society in which only affluent white males sat on juries. Contemporary American society apparently values more heterogeneous juries. The use of peremptory challenges to exclude certain groups from juries renders the prospect of heterogeneous juries elusive, perpetuates stereotypes and prejudices, and subordinates socially significant minority groups. Similarly, to say that Batson interjects race into the jury selection process misses the point. The exercise of race-based peremptory challenges interjects race into the jury selection process.

The balance of the assertions by Batson critics are not so easily dismissed. Batson and its progeny arguably diminish the ability of litigants to act on sometimes accurate group-based assumptions. Concurring in J.E.B., Justice O'Connor observed the following:

62. See J.E.B., 114 S. Ct. at 1428 n.15 (recognizing that various traditions, like "de jure segregation and the total exclusion of women from juries, are now unconstitutional even though they once co-existed with the Equal Protection Clause"); Toni M. Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. Rev. 501, 504–10 (1986) (showing how the jury and jury selection have changed over time); Marder, supra note 39, at 1093–94, 1096–98 (showing that who can serve on the American jury has changed only recently).

63. Until the mid-twentieth century, jury lists in most jurisdictions contained only the names of affluent white men. Paula DiPerna, Juries on Trial 80 (1984). See also 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, 165 (1989) (observing that peremptory challenges historically determined "which members of a reasonably elite group of property owners served on juries"); Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1183 (1995) (describing the peremptory challenge as a "relic of an imperfectly democratic past" and arguing that it has outlived its purpose given that jury pools are no longer homogeneous); Marder, supra note 39, at 1094 (describing the jury as formerly a "preserve of white, male property owners").

64. See supra note 39 and accompanying text.


66. The argument that Batson has interjected race into the jury selection process is reminiscent of the argument that affirmative action has stigmatized and demeaned its intended beneficiaries. "[A]ffirmative action did not cause stigma to attach to selected racial groups; society already had taken care of that." John E. Morrison, Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action, 79 Iowa L. Rev. 313, 343 (1994).
like race, gender matters. . . . [O]ne need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." 

The majority opinion does not contest the observation that race and gender matter; it merely prohibits a litigant from acting on race- or gender-based assumptions to strike jurors. In the case of each individual jury panelist for whom the opponent demonstrates a prima facie case of purposeful discrimination, information or observations gained from voir dire (apart from the excluded jury panelist's race or gender) must evidence the jury panelist's partiality or prejudice or otherwise support a permissible reason for excluding the jury panelist. The reason: race and gender may matter, but the reason that they may matter—centuries of discrimination and subordination based on these characteristics—makes exclusion from jury service based on race or gender particularly intolerable. Moreover, while race and gender may matter, how they matter is often unknowable. Race and gender characteristics may interact with each other (the essence of intersectionality) and with a host of other characteristics, like age, income, occupation, education, political affiliation, and religion, to make any one characteristic an unreliable indicator of bias.

For instance, a male defendant in a sexual harassment case could assume that women as a group are more likely than men to have


68. J.E.B., 114 S. Ct. at 1427 n.11 (acknowledging that a "shred of truth may be contained in some stereotypes" but asserting, nevertheless, that state actors must "look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination").

69. See J.E.B., 114 S. Ct. at 1429 (observing that "voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise"). See also Edmomon, 500 U.S. at 631 (observing that a litigant's belief that a prospective juror harbors biases "can be explored in a rational way . . . without the use of classifications based on ancestry or skin color").

70. See supra note 39 and accompanying text.

71. Holland v. Illinois, 493 U.S. 474, 512 (1990) (Stevens, J., dissenting); Marder, supra note 39, at 1081 (rejecting the idea that "people can[ ] be reduced to one characteristic").
suffered sexual harassment, and that women who have suffered sexual harassment would be biased in favor of the female plaintiff. Defense counsel might therefore seek to exclude women jury panelists. However, in the case of any individual woman panelist, the opposite could just as well be true. For instance, polls conducted during the Clarence Thomas confirmation hearings demonstrated that women who have been harassed may be skeptical of another woman's claims.\textsuperscript{72} Professor Martha Minow considers the possibilities:

Perhaps the complainant did not respond the way the adjudicator did or would have; perhaps the complainant appears disloyal or otherwise blameworthy in the eyes of the adjudicator. These alternatives simply point to the multiple directions that bias may take, but not to its absence. Would restricting decisionmaking to a man or group of men be any better?\textsuperscript{73}

The answer is that the bias of male jury panelists in a sexual harassment claim may also run in multiple directions:

[Men] might identify with the accused and might worry about being accused themselves. They might worry about false accusations and the difficulty of rebutting them. They might worry about true accusations, yet not believe them serious enough to warrant public sanction. They also might worry about true accusations and seek to show their ability to overcome any appearance of bias by coming down hard on the accused.\textsuperscript{74}

For the same reason, it would be overly simplistic to assume that black jurors are biased in favor of other blacks and therefore exclude black jury panelists in a case involving a black defendant. While some members of minority groups may be sympathetic to members of their own group, others "respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority."\textsuperscript{75} In


\textsuperscript{73} Minow, \textit{supra} note 72, at 1208.

\textsuperscript{74} Minow, \textit{supra} note 72, at 1208–09.

\textsuperscript{75} Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (citing social science evidence at nn.2–3). Professor Babcock cites the 1969 criminal trial of
addition, blacks sometimes witness and are victimized by black-on-black crime and as a result may actually be prejudiced against the black defendant. For example, a black woman juror, commenting on jury service in the District of Columbia, made the following observation:

Some defense lawyers may feel that the predominantly middle aged, predominantly black jury most often chosen in the District is more sympathetic to the black defendant. But they are espousing... another bit of folklore. In fact, quite the opposite is true. Enough crime is enough, such juries feel. We are the victims. You see it on the unsigned exit questionnaires handed out at month’s end in the early-sunset wintertime. “Give us more protection walking from the Courthouse to the bus.” Or “This is a high crime neighborhood; don’t hold us in the court past dark.”

If working properly, then, the post-Batson peremptory challenge functions as follows. Assume a charge of battery on a law enforcement officer. The defense is self-defense in response to the use of unreasonable force by the law enforcement officer. The defense would exercise its challenges to exclude law enforcement officers, the friends and relatives of law enforcement officers, and anyone who might be perceived as a “law-and-order” type. The prosecution would exercise its peremptory challenges to exclude anyone who has had a bad experience with law enforcement officers, the friends and relatives of others who have had negative experiences with law enforcement officers, and anyone who might be perceived as an “anti-establishment” type. Once each side exercises its peremptory challenges to exclude anyone who has had a bad experience with law enforcement officers, the friends and relatives of others who have had negative experiences with law enforcement officers, and anyone who might be perceived as an “anti-establishment” type. Once each side exercises its peremptory challenges, what theoretically would remain is an impartial jury, composed of panelists who have had no personal

21 Black Panthers on multiple charges of violent crimes in New York for the proposition that “black males as a class can be biased against young alienated blacks who have not tried to join the middle class...” Babcock, supra note 21, at 553. In that litigation, the defendants challenged “about as many” black jury panelists as did the prosecution. Babcock, supra note 21, at 553 n.30.


77. Proponents of the peremptory challenge system value the ignorance or “impartiality” of jurors, jurors who will be free from “bias” to base their decision on the evidence presented by the parties at trial. Mark Cammack, In Search of the Post-Positivist Jury, 70 Ind. L.J. 405, 428–34 (1995). This model, however, is arguably flawed. It
experience or familiarity with police brutality or law enforcement. What litigants cannot do after *Batson* is to exclude black or any other race of jury panelists on the assumption that they are biased in favor of

assumes that truth is objective and that the human observer and external world are separable. Modern cognitive theory posits different conceptions of truth and the human observer:

the mind has come to be seen not as a mirror reflecting exact images of reality, but as a lens through which external reality is refracted. . . . All experience is mediated by preexisting knowledge structures, constellations of assumptions, interests, and purposes that filter and organize perception as it occurs. And because the minds that take the world in are a product of their time and place, their representations of reality are likewise socially conditioned and partial to some degree. . . .

. . . . Because all perception is dependent on the interpretive apparatus of the observer, truth is invariably relative to a community that shares the same conventions of interpretation. No perspective can claim priority on the basis of privileged access to the truth.


The modern conceptions of truth and the human observer do not support excluding the biased as peremptory challenges do, for everyone is biased. Instead, they support including as many perspectives as possible, provided that the jurors are “willing to suspend judgment, to attempt to see things from another perspective, and to learn.” Cammack, *supra*, at 485. As Professor Martha Minow puts it:

None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments.

Minow, *supra* note 72, at 1217.

78. In reality, “in a diverse society the peremptory challenge is actually a stacking tool that favors majority interests while handicapping the party who would benefit from minority representation on the jury.” Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 Stan. L. Rev. 781, 800 (1986). Stacking can occur because in all jurisdictions, peremptory challenges are limited in number. See *supra* note 18 and accompanying text. If a jury panel is likely to have more “law-and-order” types than “anti-establishment” types, the likelihood is that the prosecutor will be able to eliminate the “anti-establishment” types, but the defense will not be able to eliminate the “law-and-order” types.
the defendant or prejudiced against law enforcement. However, assuming no showing of pretext to discriminate against black jury panelists, litigants could lawfully exclude panelists who have had negative experiences with law enforcement officers, even if that process excluded all black jury panelists.\textsuperscript{79}

Thus, \textit{Batson} theoretically diminishes the ability of parties to act on sometimes accurate group-based assumptions, but the cost to the parties perceived by \textit{Batson} critics is somewhat elusive. \textit{Batson} critics assume that the group-based assumption is empirically accurate, that the individual jury panelist fits the group-based assumption, and that the panelist’s bias will not be exposed during voir dire.\textsuperscript{80} Any one of these assumptions might not hold true. If the group-based assumption is not empirically accurate, if an individual jury panelist does not fit the stereotype, or if the jury panelist’s bias is exposed during voir dire, then the litigant who would otherwise rely on the stereotype loses nothing.

\textit{Batson} critics also assert that the post-\textit{Batson} peremptory challenge has collapsed into the challenge for cause or has been effectively abolished.\textsuperscript{81} \textit{Batson} and its progeny undeniably alter the exercise of the peremptory challenge. Because the challenge for cause requires a litigant to articulate a basis for excluding a jury panelist, the hallmark of the pre-\textit{Batson} peremptory challenge was the ability to exclude a jury panelist without articulating a reason.\textsuperscript{82} \textit{Batson} and its progeny restrict the use of the peremptory challenge insofar as a litigant cannot exclude jury panelists on the basis of race or gender. Additionally, \textit{Batson} works a change in the exercise of peremptory challenges insofar as a litigant must articulate the basis for his or her peremptory challenges when the

\begin{itemize}
\item \textsuperscript{79} To exclude these jurors, however, is arguably to exclude a black perspective on police conduct. Inclusion advocates would argue that this exclusion undermines truth-seeking insofar as it excludes this black perspective. Only the elimination of peremptory challenges could prevent this sort of exclusion.
\item \textsuperscript{80} Dissenting in \textit{J.E.B.}, Justice Scalia opined that even expanded voir dire would not help litigants to select a fair and impartial jury in a post-\textit{Batson} trial: “[t]he biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers.” \textit{J.E.B.}, 114 S. Ct. at 1438–39. However, assuming that subliminal prejudice cannot be demonstrated, do we allow parties to assume bias and exclude on the basis of race and gender? The answer of \textit{Batson} and its progeny is clear: such assumptions should not be tolerated.
\item \textsuperscript{81} See supra notes 59–60 and accompanying text.
\item \textsuperscript{82} See supra note 19 and accompanying text.
\end{itemize}
opponent establishes a prima facie case of purposeful discrimination.\footnote{See \textit{supra} notes 49–50.} Nevertheless, \textit{Batson} states that while a litigant cannot rebut a prima facie case of discrimination “merely by denying that he had a discriminatory motive or ‘affirming his good faith in making individual selections,’”\footnote{\textit{Batson}, 476 U.S. at 98 (citing \textit{Alexander v. Louisiana}, 405 U.S. 625, 632 (1972)).} “the [litigant’s] explanation need not rise to the level justifying exercise of a challenge for cause.”\footnote{\textit{Batson}, 476 U.S. at 97.}

Since the \textit{Batson} critics are far removed from the trial court procedures that they have condemned, I explored their more extreme assertions about the demise of the peremptory challenge and \textit{Batson’s} burden on the courts in a survey of state and federal trial lawyers. Specifically, in the summer of 1994, I drafted and distributed a written survey\footnote{See Appendix A for the survey. Of course, surveys rely on self-reporting to gather information, and the value of survey research is highly dependent on the reliability of the survey subjects. Successful survey research depends on the survey subject being knowledgeable, self-aware, honest, and cooperative. The results of survey research should be considered with this limitation in mind.} to 664 San Diego trial attorneys,\footnote{The survey was distributed to criminal law practitioners in public service because these practitioners typically have substantial trial experience and are easy to identify on various agency rosters.} including: 92 Assistant U.S. Attorneys—Criminal Division, 259 Deputy District Attorneys, 65 Deputy City Attorneys—Criminal Division, 23 Federal Public Defenders, 195 Deputy Public Defenders, and 30 Alternate Public Defenders.\footnote{Alternate Public Defenders handle cases, primarily conflicts of interest, which are not accepted by the Public Defender.} These trial attorneys received surveys because their names appeared on the attorney rosters of the various agencies.

Of the 664 surveys sent, 197 anonymous surveys were returned in pre-addressed, pre-stamped return envelopes.\footnote{The returned surveys are on file with Professor Montoya. See Appendix A, Question 16, asking responding attorneys to describe their professional experience. See Appendix B, Table 1, for a profile of the attorneys who returned the survey.} Of the 197 returned surveys, 98 were completed by prosecutors, 96 by defense attorneys, and 3 by attorneys who did not identify themselves as either prosecutors or defense attorneys.\footnote{For unknown reasons, not all questions were answered on a few of the returned surveys.} Of the 197 returned surveys, 9 were completed by exclusively federal court practitioners, 150 were completed by exclusively state court practitioners, and 36 were completed by lawyers
who had practiced in both federal and state courts. The lawyers who responded to the survey had extensive trial experience: 20 had conducted 0–10 trials, 30 had conducted 11–25 trials, 66 had conducted 26–50 trials, 50 had conducted 51–100 trials, and 29 had conducted over 100 trials. Significantly, 23 of the lawyers with federal court experience spent some time practicing pre-Batson and 73 of the lawyers with state court experience spent some time practicing pre-Wheeler (California’s Batson counterpart). These lawyers therefore were able to compare pre- and post-Batson and pre- and post-Wheeler practice, respectively.

The surveyed attorneys were asked, among other things, to indicate: the value of peremptory challenges to litigants; whether peremptory challenges were of any more value pre-Batson or pre-Wheeler (for attorneys practicing in California’s state courts); how often a Batson or Wheeler motion had been made in cases which they had personally tried; and whether Batson/Wheeler motions consumed too much court time. The surveyed attorneys were also asked to explain particular answers.

91. Predating Batson, the California Supreme Court had distinguished peremptory challenges based on “specific bias” from challenges based on “group bias” in Wheeler, 583 P.2d at 760–61. In that case, the court defined specific bias as a bias relating to the particular case on trial and defined group bias as the presumption that certain jurors are biased merely because of their membership in an identifiable group distinguished on racial, religious, ethnic, or similar grounds. Wheeler, 583 P.2d at 761. Wheeler held that the use of peremptory challenges to exclude prospective jurors on the basis of group bias violated the state constitutional right to trial by a jury drawn from a representative cross-section of the community. Wheeler, 583 P.2d at 761–62. Like Batson, however, Wheeler held that a showing of specific bias could support a peremptory challenge. Wheeler, 583 P.2d at 762.

Some legal scholars and commentators have advocated the applicability of the Sixth Amendment fair cross-section requirement to the government’s discriminatory use of peremptory challenges in jury selection. See, e.g., Marder, supra note 39, at 1128–34, 1138; Massaro, supra note 62, at 536–39; Widder, supra note 77, at 2331–32. However, the Court has limited the Sixth Amendment fair cross-section requirement to the empaneling of jury venires. Holland, 493 U.S. at 478.

92. See Appendix A, Questions 1 and 2.
93. See Appendix A, Questions 3 and 4.
94. See Appendix A, Question 5.
95. See Appendix A, Question 6.
96. The answers to relevant survey questions were assigned a numerical value and two formulas were used to determine statistical significance: the t-test for those questions asking respondents to choose from four or more possible answers, and a Chi Square test for those questions asking respondents to choose from three or fewer possible answers. See Dean J. Champion, Basic Statistics for Social Research 171–76, 234–39, 243–46 (2d ed. 1981).
Of the 193 lawyers who answered the question regarding the value of peremptory challenges, 157 (81.35%) described peremptory challenges as being of great value. An additional 35 (18.13%) described peremptory challenges as being of some value. Only one attorney described peremptory challenges as having no value. When asked to explain the value of peremptory challenges, lawyers most frequently cited the following reasons: to exclude a juror with whom the attorney has “bad chemistry;” to exclude jurors on the basis of “gut feeling;” to exclude the “screwballs;” to exclude jurors when challenges for cause should have been granted but were not; to exclude jurors with attitudes and experiences that would not support a challenge for cause but which support an inference of bias against the client or the client’s case theory; to exclude jurors on the basis of unprotected group membership (e.g., occupation); to skew the panel in the client’s favor; to allow the lawyer and client some control over the composition of the jury; and for prosecutors who must obtain a unanimous verdict, to shape a working group of jurors. Lawyers indicating that peremptory challenges have only “some value” often commented that time and other constraints on the examination of the panelists limited the lawyer’s ability to discover biases.

Thus, despite the constitutional restrictions on the exercise of peremptory challenges, and despite the impressions of the *Batson* critics, practitioners overwhelmingly described peremptory challenges as valuable. Moreover, prosecutors and defense attorneys generally shared this view, as did federal court and state court practitioners.

In the related question of whether peremptory challenges were of any more value pre-*Batson* or pre-*Wheeler*, 75 (56.82%) said that they

97. See Appendix B, Table 2, for a detailed breakdown of the responses to this question.

98. All percentages are based on the total number of attorneys answering the particular question.

99. See Appendix B, Table 2.

100. Regarding the value of peremptory challenges, 81 (82.65%) of the prosecutors thought that peremptory challenges were of great value, 74 (80.43%) of the defense attorneys thought they were of great value, 120 (82.19%) of the state court practitioners thought they were of great value, and 30 (83.33%) of the lawyers who had practiced in both federal and state courts thought they were of great value. In contrast, only 5 (55.56%) of the federal court practitioners thought that they were of great value. The sample of exclusively federal court practitioners was small, however; and the balance of the federal court practitioners, 4 (44.44%), thought that peremptory challenges were of some value.

101. See Appendix B, Table 3, for a detailed breakdown of the responses to this question.
were equally valuable, 30 (22.73%) said that they had been slightly more valuable, and 21 (15.91%) said they had been significantly more valuable. Only 6 (4.55%) said that they had been less valuable. However, the lawyers who practiced pre-Batson or pre-Wheeler attributed more value to the pre-Batson and pre-Wheeler peremptory challenge. Of the lawyers practicing pre-Batson in federal courts, only 8 (42.11%) thought that peremptory challenges were equally valuable today, 7 (36.84%) thought that they had been slightly more valuable, and 2 (10.53%) thought that they had been significantly more valuable. Of the lawyers practicing pre-Wheeler in state courts, only 33 (47.83%) thought that peremptory challenges were equally valuable today, 18 (26.09%) thought that they had been slightly more valuable, and 15 (21.74%) thought that they had been significantly more valuable. Thus, 47.37% of the pre-Batson attorneys and 47.83% of the pre-Wheeler attorneys recognized that the peremptory challenge depreciated in value following Batson and Wheeler, respectively, while only 38.64% of the general population of surveyed attorneys recognized the depreciation of the peremptory challenge.102

Lawyers provided telling reasons for assigning a particular value to pre-Batson and pre-Wheeler peremptory challenges. The reasons most often cited by lawyers assigning a higher value to these challenges included the following: the lawyer did not have to explain any challenges; the lawyer could challenge jurors on the basis of race and sex (e.g., “there is obviously a tendency for people to sympathize with those from the same race”); less questioning was necessary to remove a juror; Batson deters even non-discriminatory challenges that lawyers will not be able to explain (i.e., because they are based on gut feeling); lawyers now take more notes during voir dire and spend more time comparing the responses of jurors;103 and lawyers’ discretion has been curtailed.

102. The difference between pre-Wheeler and post-Wheeler attorneys reached statistical significance. Attorneys who practiced pre-Wheeler were more likely to say that peremptory challenges had more value pre-Wheeler. The difference between defense attorneys and prosecutors also reached statistical significance. Prosecutors were more likely to say that peremptory challenges had more value pre-Batson and pre-Wheeler.

103. This response probably reflects the fact that, although a prima facie case of discrimination is fairly easy to explain away, trial courts may conclude that the explanation is pretextual if the lawyer excluding the subject jury panelist(s) fails to exclude other jury panelists who share the objectionable characteristic (e.g., blacks with facial hair are excluded but whites with facial hair are not). See Michael J. Raphael & Edward J. Ungvarskey, Excuses, Excuses: Neutral Explanations under Batson v. Kentucky, 27 U. Mich. J.L. Rev. 229, 239, 243, 254, 260–61, 264 (1993) (examining how lower courts have evaluated neutral explanations in Batson hearings).
The lawyers who stated that peremptory challenges are equally valuable today cited the following reasons: \textit{Batson} motions are rarely granted, leaving peremptory challenge practice virtually unchanged; the lawyer has never exercised a peremptory challenge on the basis of race or sex; and as defense attorneys, they typically have no interest in challenging panelists who belong to one of the cognizable groups.

Although the lawyers who practiced pre-\textit{Batson} and pre-\textit{Wheeler} were more likely to recognize the depreciation of the peremptory

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challenge following Batson and Wheeler, these lawyers described the current value of the peremptory challenge in terms comparable to the general population of surveyed lawyers.\textsuperscript{105} Of the 23 lawyers practicing pre-Batson, 19 (82.61\%) thought that peremptory challenges were of great value, 3 (13.04\%) thought that they were of some value, and only 1 (4.35\%) thought that they were of no value. Of the 71 lawyers practicing pre-Wheeler, 57 (80.28\%) thought that peremptory challenges were of great value, 14 (19.72\%) thought that they were of some value, and none thought that they were of no value.

Thus, not only did the general population of surveyed trial lawyers highly value the current peremptory challenge, but lawyers who currently practice and also practiced pre-Batson and pre-Wheeler indicated that they highly value the current peremptory challenge. These lawyers continue to value the peremptory challenge despite the constitutional limits imposed on the challenge. Given that the state court practitioners have been living with Wheeler since 1978 and therefore have substantial experience with the limits that Wheeler and its progeny impose on jury selection, these results are particularly significant. Moreover, that the post-Batson peremptory challenge continues to be valuable to trial lawyers disproves the Batson critics’ more extreme claims. Batson has not forced the peremptory challenge to collapse into the challenge for cause and has not effectively abolished the peremptory challenge.

In addition to reaching unfounded conclusions about Batson’s effects on the peremptory challenge, some of Batson’s critics have condemned Batson for prolonging trials.\textsuperscript{106} To test the validity of this criticism, the survey inquired into the burden associated with the implementation of Batson and its progeny.

According to the surveyed trial lawyers, Batson and Wheeler are infrequently invoked,\textsuperscript{107} and when invoked, the motions do not take up too much court time.\textsuperscript{108} When asked how often Batson or Wheeler motions were made by the attorney, co-counsel, or the opposition attorney in cases personally tried by the surveyed attorney, only 2 of 195 attorneys (1.03\%) said that such motions were made in all cases, and 10 (5.13\%) said that such motions were made in most cases.

\textsuperscript{105} See Appendix B, Table 2.

\textsuperscript{106} See supra note 61 and accompanying text.

\textsuperscript{107} See Appendix B, Table 4, for a detailed breakdown of the responses to this question.

\textsuperscript{108} See Appendix B, Table 5, for a detailed breakdown of the responses to this question.
Notably, 133 (68.21%) said that such motions were made in only some cases, and an additional 50 (25.64%) said that they were never made. Moreover, prosecutors and defense attorneys largely shared this view.\textsuperscript{109}

When asked if \textit{Batson}/\textit{Wheeler} motions take up too much court time, 158 of 182 attorneys (86.81\%) thought that they did not, and 24 (13.19\%) thought that they did. Interestingly, prosecutors and defense attorneys answered this question somewhat differently: 65 of 87 prosecutors (74.71\%) thought that these motions did not take up too much court time, and 22 (25.29\%) thought that they did, while 90 of 92 defense attorneys (97.83\%) thought that these motions did not take up too much court time, and only 2 (2.17\%) thought that they did.\textsuperscript{110} The difference between prosecutors and defense attorneys' responses may result from the fact that defense attorneys bring these motions more often than do prosecutors.\textsuperscript{111} Defense attorneys who make these motions would be unlikely to think (or say) that they burden the system.

The results of the survey thus challenge and refute the criticisms directed against \textit{Batson} and its progeny. Fears that \textit{Batson} would change the nature of the peremptory challenge, deter its use, effectively collapse it into the challenge for cause, and excessively prolong jury trials appear alarmist in the face of the data. Given the continued vitality of the peremptory challenge and the apparent viability of the \textit{Batson}
procedures, we can assume that the two will continue to coexist. Assuming that the peremptory challenge and *Batson* will continue to coexist, *Batson*'s scope must be considered.

**II. Peremptory Challenges and Intersectionality**

Distinct from purposeful race or gender discrimination is purposeful intersectional discrimination: discrimination targeting a particular combination of race and gender (e.g., African American women or Latino men). Although the United States Supreme Court has yet to address the issue, purposeful intersectional discrimination in jury selection occurs and has arisen as an issue before state and lower federal courts. *United States v. Nichols* illustrates the problem of intersectional discrimination in jury selection.

In *Nichols*, the defendant complained that the government had exercised its peremptory challenges to exclude all black females from the jury. The venire consisted of thirty-seven persons, eight of whom were black. Although one black man was challenged for cause, three black men served on the jury. The government exercised four of its seven peremptory challenges to exclude the four black women on the venire. *Nichols* objected to each of these challenges, noting that his only witness was a black woman and that the government's witnesses were white. *Nichols* also noted that there was speculation that the juror who had hung the jury in the first trial of the same case was a...

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112. See Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1132 (1994) (observing that "nothing . . . in the *Batson* line suggests that the Court is actually likely to abolish the peremptory challenge soon").


115. *Nichols*, 937 F.2d at 1260.


117. *Nichols*, 937 F.2d at 1262–63 & n.2.

118. *Nichols*, 937 F.2d at 1263.

119. *Nichols*, 937 F.2d at 1263.
These facts support an inference that the prosecutor purposely excluded the intersectional group of black women. Nevertheless, the court declined to find a *Batson* violation.\(^\text{121}\)

The existence of intersectional discrimination in jury selection raises the question: what, if anything, should be done about it? Courts considering this question have provided different answers. The following discussion attempts to bring some coherence and insight to the subject.

**A. Recognizing Peremptory Challenges Based on Intersectional Status as Impermissible Intersectional Discrimination**

One approach to the problem treats peremptory challenges based on intersectional status as a distinct category of group-based challenges. The question becomes whether intersectional status is like race and gender, an impermissible proxy for bias, or like occupation, the sort of group-based proxy for bias that remains permissible following *Batson*.

Given this approach to the problem of intersectional discrimination in jury selection, one argument is that intersectional status is unlike race and gender since the same history of exclusion, at least as evidenced by laws, is arguably lacking for intersectional groups. That is, while laws may have targeted women and African Americans for exclusion from American political life, laws arguably have not targeted African American women or other intersectional groups for exclusion. Arguably, if no such history of exclusion exists, then intersectional groups are not entitled to heightened scrutiny and the use of peremptory challenges to exclude them is permissible. Pre-*J.E.B.*, in *United States v. Dennis*,\(^\text{122}\) the Eleventh Circuit declined to recognize black males as a cognizable group for *Batson* purposes for precisely this reason.\(^\text{123}\)

In *Dennis*, the defendants, who were black, objected when the government used peremptory challenges to strike three black males from

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120. *Nichols*, 937 F.2d at 1263.
121. The court declined to extend *Batson* to gender-based discrimination and declined to recognize black women as a cognizable group. *Nichols*, 937 F.2d at 1262. Accordingly, the court limited its inquiry to the issue of racial discrimination. *Nichols*, 937 F.2d at 1262. However, if black women were targeted for exclusion by the prosecution, then racial discrimination necessarily occurred. See infra part II.B.
122. 804 F.2d 1208 (1986).
123. *Dennis*, 804 F.2d at 1210.
Two black women sat on the jury that convicted the defendants. On appeal, the defendants urged the court to recognize black males as a cognizable group. Declining to do so, the Eleventh Circuit defined a cognizable group as "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." The court asserted that the defendants failed to show that black males constituted a distinct, recognizable subclass of individuals, historically singled out for different treatment under the laws not simply as blacks, but as black males. The court reasoned that it therefore would be "inappropriate" to narrow the cognizable group to include only black males and exclude black females.

_Dennis_, however, can be criticized on at least two grounds. First, the court's analysis begs the question. If the _Dennis_ defendants were correct, the prosecution's exclusion of black males but not black females constituted a singling out of a recognizable, distinct class for different treatment under the peremptory challenge laws as applied. Second, to the extent that evidence of historical exclusion from American political life (as distinct from exclusion in the particular case) is the relevant concern for the courts, the United States Supreme Court has documented a long history of intersectional discrimination. Indeed, the case law is replete with references to statutory and constitutional laws advantaging white males to the exclusion of all other intersectional groups in such areas as jury service, voting, holding political

124. _Dennis_, 804 F.2d at 1209.
125. _Dennis_, 804 F.2d at 1209.
126. _Dennis_, 804 F.2d at 1210.
127. _Dennis_, 804 F.2d at 1210 (citing _Castaneda_, 430 U.S. at 494).
128. _Dennis_, 804 F.2d at 1210.
129. _Dennis_, 804 F.2d at 1210.
130. See, e.g., _Neal v. Delaware_, 103 U.S. 370, 387–88 (1880) (regarding an 1848 Delaware statute); _Strauder v. West Virginia_, 100 U.S. 303, 305 (1879) (regarding an 1873 West Virginia statute); _Clinton v. Englebrecht_, 80 U.S. (13 Wall.) 434, 443 (1871) (regarding a Territory of Missouri law).
131. See, e.g., _Myers v. Anderson_, 238 U.S. 368, 376, 382–83 (1915) (regarding the Maryland constitution adopted in 1867); _Boyd v. Nebraska ex rel. Thayer_, 143 U.S. 135, 167, 171–72 (1892) (regarding the Territory of Michigan constitution adopted in 1835, and 1856 and 1862 Territory of Nebraska statutes); _Hannibal v. Fauntleroy_, 105 U.S. 408, 412 (1881) (regarding an 1851 Hannibal, Missouri city law); _Neal_, 103 U.S. at 387 (regarding the Delaware constitution adopted in 1831); _Georgia v. Stanton_, 73 U.S. (6 Wall.) 50, 64–65 (1867) (regarding the Georgia constitution adopted in 1865); _Cohens v. Virginia_, 19 U.S. (6 Wheat.) 264, 270, 277 (1821) (regarding 1802 and 1812 Congressional acts governing elections in
office, militia service, and land grant eligibility—significant incidents of American citizenship. After J.E.B., the identification of cognizable groups for Batson purposes begins with a showing that a group has been historically excluded from American political life. It follows from the pervasiveness of laws exclusively advantaging the intersectional group of white males that the other intersectional groups, such as African American women and Latino men, should enjoy protection from discrimination in jury selection.

If the Court nevertheless declined to recognize that intersectional groups have been the target of discriminatory laws, the Court could still conclude that Batson prohibits intersectional discrimination. The Court in J.E.B. recognized that discriminatory laws historically targeted women and racial and ethnic minorities. These laws undeniably have created social cross-currents as old as the laws themselves. These social cross-currents support treating intersectional status the same way race and gender are treated under equal protection analysis.

Washington, D.C.). See also Ex parte Garland, 71 U.S. (4 Wall.) 333, 395 (1866) (observing that "[t]he constitutions of nearly all the States require as a qualification for voting that the voter shall be a white male citizen").

132. Boyd, 143 U.S. at 170–71, 172 (regarding 1854 and 1856 Territory of Nebraska laws); Cohens, 19 U.S. at 277, 279 (regarding an 1812 Congressional act governing elections in Washington, D.C.).

133. See, e.g., Scott v. Sandford, 60 U.S. (19 How.) 393, 420, 587 (1856) (regarding a 1792 Congressional act); Wise v. Withers, 7 U.S. (3 Cranch) 330, 331 (1806) (regarding an 1803 Congressional act).


135. See supra notes 40–45 and accompanying text.

136. Of course, white males would also enjoy that protection. See supra note 46 and accompanying text.

137. See supra notes 41–43 and accompanying text.

138. The concept of social cross-currents is illustrated well by an analogy to traffic in an intersection. Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 149 [hereinafter Demarginalizing the Intersection of Race and Sex]. The black experience (in part the product of discriminatory laws) flows in one direction and women's experience (also in part the product of discriminatory laws) flows in another, but at the intersection of these two experiences is the unique experience of black women. The intersection down the road, where the black experience intersects with men's experience, will have its own unique attributes.
Professor Kimberlé Crenshaw has demonstrated that intersectionality is a condition of social and historical significance. Professor Crenshaw proclaims that the "intersectional experience" of African American women is "greater than the sum of racism and sexism." She argues that "dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us." She makes this point by showing that feminist theory is typically grounded in white women's experience, and thereby marginalizes black women:

Statements such as "men and women are taught to see men as independent, capable, powerful; men and women are taught to see women as dependent, limited in abilities, and passive," are common within this literature. But this "observation" overlooks the anomalies created by crosstexts of racism and sexism. Black men and women live in a society that creates sex-based norms and expectations which racism operates simultaneously to deny; Black men are not viewed as powerful, nor are Black women seen as passive. . . . Given this understanding, perhaps we can begin to see why Black women have been dogged by the stereotype of the pathological matriarch or why there have been those in the Black liberation movement who aspire to create institutions and to build traditions that are intentionally patriarchal.

She further illustrates this point by noting that "Black women have traditionally worked outside the home in numbers far exceeding the labor participation rate of white women." Thus, Professor Crenshaw demonstrates that the African American woman's life experiences will often differ from the experiences of both African American men and white women.

Professor Crenshaw was not the first to make this observation. Over a hundred years ago, at an 1851 women's rights conference,

139. Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 138, at 140.
141. Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 138, at 155-56.
142. Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 138, at 156.
Sojourner Truth responded to arguments that women were “too frail and delicate to take on the responsibilities of political activity” by declaring:

Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me—and ain’t I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain’t I a woman? I have born thirteen children, and seen most of ‘em sold into slavery, and when I cried out with my mother’s grief, none but Jesus heard me—and ain’t I a woman?\[143\]

Recent empirical research demonstrates the continued social significance of intersectionality, not only for African American women but for other intersectional groups as well. For example, one recent study reveals that white women, black men, and black women cannot buy the same car for the same price as can white men using identical bargaining strategies.\[144\] In this study, the final offers given white females reflected forty percent higher markups than those given white males, and final offer markups for black males were twice as high and for black females three times as high as that for white males.\[145\] The researcher also observed that the race and gender discrimination in retail car sales was “synergistic or ‘superadditive,’” that is, the discrimination against black females was greater than the combined discrimination against both white females and black males.\[146\]

Various economic measures also indicate that intersectional status can mean real differences in material conditions.\[147\] For instance, while only 9.8% of white men lived in poverty in 1991, 12.7% of white women did, 26.2% of Hispanic men did, 28.5% of black men did,
31.2% of Hispanic women did, and 36.5% of black women did.\footnote{Russell & Ambry, supra note 148, at 51–52.} Similarly, median earnings varied depending on intersectional status. While the median earnings of white men working full-time, year-round, in 1991 was $30,266, the median earnings of black men was $22,075, the median earnings of white women was $20,794, the median earnings of Hispanic men was $19,771, the median earnings of black women was $18,720, and the median earnings of Hispanic women was $16,244.\footnote{Russell & Ambry, supra note 148, at 51–52.}

Accordingly, assuming that African American women and other intersections of race and gender have not been specifically excluded from American political life by historically discriminatory laws, they arguably have been uniquely affected by the social cross-currents of widely recognized race- and gender-based laws. If so, intersectional status would be similar enough to the status of race and gender that it should be treated similarly and enjoy the same protection from purposeful discrimination in jury selection. At least the California Supreme Court seems to agree.

In \textit{People v. Motton},\footnote{Motton, 704 P.2d at 179 n.*. The court noted that the true racial identity of the challenged jurors was less important than their apparent racial identity, since “discrimination is more often based on appearances than verified racial descent.” Motton, 704 P.2d at 180.} defense counsel objected to the prosecutor’s exercise of peremptory challenges to exclude black women and blacks generally from the jury.\footnote{Motton, 704 P.2d at 177.} When defense counsel first objected, the prosecutor had exercised eight peremptory challenges—four against black women, and one against a black man—leaving no blacks on the panel.\footnote{Motton, 704 P.2d at 178, 180.} The California trial court denied the defendant’s motion for relief, concluding that counsel had failed to make out a prima facie case of discriminatory exclusion.\footnote{Motton, 704 P.2d at 178.} The prosecutor subsequently exercised five more peremptory challenges, one against a black man and another against a black woman.\footnote{Motton, 704 P.2d at 179, 180.} Defense counsel again objected to no avail.\footnote{Motton, 704 P.2d at 179.} Both the prosecution and defense assumed that no blacks were seated on the jury as finally selected; however, it was later “discovered” that a black woman had served on the jury.\footnote{Motton, 704 P.2d at 179 n.*. The court noted that the true racial identity of the challenged jurors was less important than their apparent racial identity, since “discrimination is more often based on appearances than verified racial descent.” Motton, 704 P.2d at 180.}
In addressing defense counsel’s objection to the prosecutor’s exclusion of black women, the trial court asked counsel: “What’s so magical about Black women? . . . I’d like to hear from you what it is about the Black women that has some special quality in it . . . You have got women on the jury. What function does a Black woman fulfill that the White woman doesn’t?” Defense counsel responded by describing black women as a group involving a unique “concurrence of racial and sexual identity.” Defense counsel’s apparent tactic was to cast the prosecutor’s exclusion of black women from the jury as an illegal exclusion on the basis of group bias.

The California Supreme Court reversed the conviction in Motton, holding that both blacks generally and black women are cognizable groups and that the defendant had established a prima facie case of discriminatory exclusion on both grounds. In holding that black women are a cognizable group, the court observed that “black women face discrimination on two major counts—both race and gender—and their lives are uniquely marked by this combination.” The court further observed that

It is not a question of the merits of one group in contrast to another. At the very core of Wheeler is the notion that diversity ‘[in] beliefs and values [that] jurors bring from their group experiences’ must be encouraged in order ‘. . . to achieve an overall impartiality’ in their decision-making processes.

The court explained that it was not assuming that black women jurors would necessarily vote the same way, but rather that their inclusion on the jury “enhance[s] the likelihood that the jury will be representative of significant community attitudes.” The court further found that their exclusion from the jury “deprives the jury of a perspective on

158. Motton, 704 P.2d at 178.
159. Motton, 704 P.2d at 178.
160. See supra note 91.
162. Motton, 704 P.2d at 181.
164. Motton, 704 P.2d at 182.
165. Motton, 704 P.2d at 181 (quoting People v. Harris, 679 P.2d 433, 441 (Cal. 1984), cert. denied, 469 U.S. 965 (1984)).
human events that may have unsuspected importance in a[ ] case.”

In sum, jury deliberations stand to gain from the inclusion of black women and suffer from their exclusion.

B. Recognizing Peremptory Challenges Based on Intersectional Status as Impermissible Race and Gender Discrimination

If “[c]ategories [and subcategories] have meaning and consequences,” as Motton acknowledges, we should recognize them for purposes of defining unconstitutional jury selection and should extend Batson to forbid discrimination on the basis of intersectional status. However, even if courts refuse to recognize peremptory challenges based on intersectional status as a distinct category of group-based challenges, there is another approach to the problem of intersectional discrimination in jury selection. Instead of arguing that Batson extends to intersectional discrimination, it could be argued that no extension of Batson is necessary because intersectional or race and gender discrimination is necessarily race discrimination and gender discrimination. In State v. Gonzales, the appellate court of New Mexico apparently applied this approach.

During the first day of jury selection in Gonzales, the prosecutor used three of his five available peremptory challenges to exclude Hispanic men from the jury. During the second and final day of jury selection, the prosecutor used all five of his available peremptory challenges to exclude Hispanic men from the jury. In terms of race and ethnicity, the jury ultimately selected by this process consisted of four Hispanics, one Native American, and seven Anglos. In terms of gender, the jury consisted of eleven women and one man. Both defendants, like the excluded jurors, were Hispanic men. The defendants objected to the prosecutor’s systematic use of peremptory

169. Gonzales, 808 P.2d at 43.
170. Gonzales, 808 P.2d at 43.
171. Gonzales, 808 P.2d at 43.
172. Gonzales, 808 P.2d at 43.
173. Gonzales, 808 P.2d at 49.
challenges to exclude Hispanics, and particularly Hispanic men, from the jury. The trial court denied the defendants' motion for relief.

The New Mexico appellate court concluded that the defendants had established a prima facie case of discriminatory exclusion of Hispanics generally and Hispanic men in particular. The opinion noted that the New Mexico Supreme Court had adopted the Wheeler doctrine in interpreting the right to a jury trial in New Mexico. Citing Motton, the court found the exclusion of Hispanic men to be discriminatory. Citation to Motton notwithstanding, however, it is not clear that the New Mexico appellate court shared the Motton court's appreciation of intersectionality.

Gonzales lacks Motton's acknowledgment that the combination of race and gender gives rise to a unique human experience of social-historical import. In Gonzales, the court did not find that Hispanic men are a unique, cognizable group. Instead, the court concluded that "Hispanics and men are cognizable groups." On the basis of that conclusion, the court remanded the case to the trial court for a hearing on whether the prosecution had used its peremptory challenges to exclude jurors "on the basis of their race or gender." The court added that if the exclusion of jurors occurred "on the basis of either their race or their gender or both," the defendants' convictions were to be reversed. However, even when the court refers to the exclusion of jurors "on the basis of either their race or their gender or both," nothing about the "both" suggests a special category meriting protection as such. At most, Gonzales reads as if Hispanic men, both as Hispanics and as men, are entitled to protection from exclusion on the basis of their "race or gender." The "both" merely acknowledges the possibility that the prosecution impermissibly excluded the Hispanic men on two independent, impermissible bases: their race and their gender.

Judge Murnaghan, dissenting, makes a similar point in United States v. Hamilton. In Hamilton, the government exercised seven

174. Gonzales, 808 P.2d at 43.
175. Gonzales, 808 P.2d at 43.
176. Gonzales, 808 P.2d at 46-47.
177. Gonzales, 808 P.2d at 50.
179. Gonzales, 808 P.2d at 49.
180. Gonzales, 808 P.2d at 50.
181. Gonzales, 808 P.2d at 50 (emphasis added).
182. Gonzales, 808 P.2d at 50.
peremptory challenges to exclude seven black jury panelists, but only three of those challenges were at issue on appeal. The government had directed these three challenges against black women and had offered the same explanation for each of the three challenges: the excluded jury panelists were female. Of the twelve jurors eventually seated, six were white women, three were black women, and three were white men. In this pre-J.E.B. case, the 4th Circuit declined to extend Batson to gender-based discrimination and accepted the government’s explanation as a race-neutral, albeit troubling, explanation. In contrast, Judge Murnaghan emphasized that the prosecution challenged black women panelists while not challenging white women panelists and observed that the government’s discrimination “if sexual, [was] also indubitably racial.” Judge Murnaghan reasoned that the government’s sex discrimination did not excuse conduct that was “racially as well as sexually discriminatory.” The judge insisted that the conduct had to be viewed as “racially and sexually discriminatory” and not “either racially or sexually discriminatory.” Thus, applying reasoning similar to that in Gonzales, Judge Murnaghan found that discrimination against black women constituted both race and sex discrimination.

After J.E.B. the point is simple: two wrongs do not make a right. A litigant who purposely excludes black males from the jury panel, purposely excludes blacks and purposely excludes men from the jury, and both exclusions are illegal. If a jury panelist would not have been excluded but for his or her race (as, for example, when black men are excluded but white men are not) or but for his or her gender (as, for example, when black men are excluded but black women are not), then

184. Hamilton, 850 F.2d at 1039.
185. Hamilton, 850 F.2d at 1041.
186. Hamilton, 850 F.2d at 1041.
187. Hamilton, 850 F.2d at 1041.
188. Hamilton, 850 F.2d at 1042.
189. Hamilton, 850 F.2d at 1043 (Murnaghan, Circuit Judge, dissenting).
190. Hamilton, 850 F.2d at 1044 (Murnaghan, Circuit Judge, dissenting).
191. Hamilton, 850 F.2d at 1044 (Murnaghan, Circuit Judge, dissenting).
192. Hamilton, 850 F.2d at 1044 (Murnaghan, Circuit Judge, dissenting).
193. The California Supreme Court made a similar point in Motton, when it noted that, “[e]ven if Black women were not a cognizable group, the systematic exclusion of Black women would inevitably result in disproportionate underrepresentation of Black persons generally on the jury.” Motton, 704 P.2d at 182 n.2.
both impermissible race and gender discrimination have occurred.\textsuperscript{194} This approach to intersectional discrimination, apparently applied in \textit{Gonzales}, holds true whether or not one recognizes the subcategory of black males as a cognizable group for \textit{Batson} purposes, as \textit{Motton} apparently would.

\textit{C. Recognizing Intersectional Discrimination in Jury Selection as the More Compelling Approach to Peremptory Challenges Based on Intersectional Status}

Although discrimination based on intersectional status is rightly considered race and gender discrimination, \textit{Batson} should be extended to forbid intersectional discrimination. Litigants sometimes do direct their peremptory challenges at the intersection of race and gender, and these challenges are no more supportable than challenges directed solely at race (African Americans), solely at gender (women), or simultaneously at both race and gender (African Americans and women). In the analogous context of Title VII litigation, legal scholars\textsuperscript{195} and courts\textsuperscript{196}

\textsuperscript{194} Similar reasoning should apply in the “mixed motive” context; that is, when a jury panelist is excluded for permissible and impermissible reasons. Thus, in \textit{Riley v. Commonwealth}, 464 S.E.2d 508 (Va. Ct. App. 1995), the court held that the prosecutor’s exclusion of older women was impermissibly based on gender and violated \textit{J.E.B. See also} \textit{Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle}, 429 U.S. 274, 285–87 (1977) (regarding mixed motive in the employment discrimination context).


have generally supported the recognition of claims based on intersectional discrimination.

Indeed, it is difficult, if not impossible, to reconcile the spirit of Batson and its progeny with the abandonment of jury panelists who suffer discrimination because of their intersectionality. Reflecting its specific facts, Batson used the term "cognizable racial group[s]" and required the defendant to show that the "prosecutor" had exercised peremptory challenges to exclude from the venire "members of the defendant's race."197 However, Batson was grounded on the Equal Protection Clause in the spirit of ending invidious discrimination in jury selection. Because the Equal Protection Clause is to be construed liberally,198 the Court has since extended Batson to gender-based peremptory challenges,199 to challenges made by private, civil litigants and criminal defendants,200 and to race-based challenges whether or not the defendant and the excluded jurors share the same race.201 That is to say, Batson has been read broadly to provide litigants and jury panelists protection from discriminatory jury selection. Courts should read Batson similarly broadly when analyzing peremptory challenges based on the intersectional status of the jury panelist.

Certainly, black feminist jurisprudence supports the recognition of intersectionality by rejecting the idea of compartmentalized identity and advancing the idea of indivisible identity. For instance, Professor Regina Austin poses the following satirical questions:

When was the last time someone asked you to choose between being a woman and being a minority person or asked you to assess the hardships and the struggles of your life in terms of your being a woman on top of being black (or whatever color you are) or a black on top of being a woman, as if

black women are a protected class without addressing the issue of intersectionality).

But see DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976), aff'd in part and rev'd in part, 558 F.2d 480 (8th Cir. 1977) (asserting that "[t]he prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.").

197. Batson, 476 U.S. at 96 (emphasis added).
198. Strauder, 100 U.S. at 307.
199. See supra notes 10–11 and accompanying text.
200. See supra notes 6–9 and accompanying text.
201. See supra notes 4–5 and accompanying text.
being a woman or being black were like icing on a cake? As if you and your kind were not an integrated, undifferentiated, complete whole.\textsuperscript{202}

Professor Angela Harris similarly rejects the idea of black women as “women plus,”\textsuperscript{203} the idea that “Black women are . . . white women with color.”\textsuperscript{204} She describes the compartmentalization of identity as a form of violence to black women:

The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: “racism + sexism = straight black women’s experience. . . .” Thus, in an essentialist world, black women’s experience will always be forcibly fragmented before being subjected to analysis, as those who are “only interested in race” and those who are “only interested in gender” take their separate slices of our lives.\textsuperscript{205}

Finally, the recognition and prohibition of intersectional discrimination in jury selection does not destroy the peremptory challenge as a valuable litigator’s tool. The two can and do coexist despite assertions to the contrary, most notably those made in \textit{People v. Washington}.\textsuperscript{206}

At approximately 2:30 a.m., the defendant, Artra Washington went to the home of his wife’s grandmother, knocked on her door, and screamed.\textsuperscript{207} According to the grandmother’s testimony, she told the defendant that his wife and children were not staying with her, and the defendant left.\textsuperscript{208} The defendant returned at approximately 4:00 a.m., and again screamed for his wife and children.\textsuperscript{209} Anthony, one of the grandmother’s sons, chased the defendant with a pool stick and used

\textsuperscript{202} Regina Austin, \textit{Sapphire Bound!}, 1989 Wis. L. Rev. 539, 540 (advancing and applying black feminist jurisprudence).
\textsuperscript{204} Harris, \textit{supra} note 203, at 601 (quoting Barbara Omolade, \textit{Black Women and Feminism, in The Future of Difference} 247, 248 (H. Eisenstein & A. Jardine eds., 1980)).
\textsuperscript{205} Harris, \textit{supra} note 203, at 588-90 (recognizing that categorizing is necessary but advocating a jurisprudence based on “multiple consciousness”).
\textsuperscript{206} 628 N.E.2d 351 (1993).
\textsuperscript{207} \textit{Washington}, 628 N.E.2d at 353.
\textsuperscript{208} \textit{Washington}, 628 N.E.2d at 353.
\textsuperscript{209} \textit{Washington}, 628 N.E.2d at 353.
the pool stick to break the defendant’s front windshield.210 The defendant left.211 At approximately 5:30 a.m., the defendant returned and broke the grandmother’s windshield.212 The defendant also pulled a shotgun out of his car and fired two shots at the grandmother’s house.213 Both shots hit Terrance, one of the grandmother’s grandchildren, and Terrance died.214 According to the defendant’s testimony, he returned to the grandmother’s house because he was mad and did not believe that his family was not in her house.215 He further testified that he had brought the gun for protection and fired it because he saw Anthony running toward him with “a club.”216 The defendant was charged with Terrance’s death and was convicted of first-degree murder.217

In Washington, the state used four of its peremptory challenges after the first panel of fourteen jury panelists was questioned.218 Two of those challenges were exercised against black men.219 The defendant, a black male,220 objected that the state was purposely excluding black males from the jury.221 The judge overruled the objection.222 The jury ultimately chosen consisted of six white males, one white female, and five black females.223

In making the case that the prosecutor had discriminated against black males during jury selection, the defendant made the following arguments: the prosecutor peremptorily challenged 100% of the black males questioned during jury selection; although 8% of the jury panelists were black males, no black males sat on the jury; the white men accepted as jurors had backgrounds similar to the challenged black males; he, the defendant, was a black male; and most of the state’s

211. Washington, 628 N.E.2d at 353.
212. Washington, 628 N.E.2d at 353.
218. Washington, 628 N.E.2d at 352.
220. Washington, 628 N.E.2d at 356.
221. Washington, 628 N.E.2d at 352.
222. Washington, 628 N.E.2d at 352.
main witnesses were black females.\textsuperscript{224} The defendant further argued that the prosecutor’s actions exploited the stereotype of the “overbearing strong matriarchal black woman [who] has emasculated the black man and made him obsolete as a social member of the family.”\textsuperscript{225} The prosecutor also obviously exploited the stereotype of the black male as the derelict father when in summation the prosecutor argued to the jury that the defendant should not have squandered money on a shotgun when his family could not even afford a telephone.\textsuperscript{226} These facts strongly support the inference that the prosecutor was purposely excluding black men.

On appeal, the defendant did not argue that the challenged black males were excluded solely because of their race or solely because of their sex.\textsuperscript{227} Instead, the defendant argued that the state excluded black males because of both their race and their sex, that is, because of their intersectionality.\textsuperscript{228} The state in turn argued that \textit{Batson} did not extend to the category of black males.\textsuperscript{229} Although the Illinois appellate court assumed in this pre-\textit{J.E.B.} case that it would be a violation of the Illinois constitution to challenge potential jurors solely on account of their gender,\textsuperscript{230} the court declined to recognize a claim of intersectional discrimination.\textsuperscript{231}

In reaching its conclusion, the court warned that the recognition of “subcategories of race and gender” would create new hybrid groups, increase the number of \textit{Batson} hearings, and effectively destroy the peremptory challenge and the \textit{Batson} decision.\textsuperscript{232} The court predicted that defendants would no longer claim simple race discrimination or gender discrimination because “all challenged jurors could easily fit into some subcategory. . . . Establishing a \textit{prima facie} case of discrimination

\textsuperscript{224} \textit{Washington}, 628 N.E.2d at 356.
\textsuperscript{225} \textit{Washington}, 628 N.E.2d at 356.
\textsuperscript{226} \textit{Washington}, 628 N.E.2d at 359. The defendant argued on appeal that this comment was improper because no evidence had been presented regarding the reason the defendant’s family did not have a telephone. \textit{Washington}, 628 N.E.2d at 359. The appellate court, however, described the prosecutor’s comment as “inconsequential and harmless beyond a reasonable doubt.” \textit{Washington}, 628 N.E.2d at 359.
\textsuperscript{227} \textit{Washington}, 628 N.E.2d at 355-56.
\textsuperscript{228} \textit{Washington}, 628 N.E.2d at 356.
\textsuperscript{229} \textit{Washington}, 628 N.E.2d at 355.
\textsuperscript{230} \textit{Washington}, 628 N.E.2d at 355.
\textsuperscript{231} \textit{Washington}, 628 N.E.2d at 356.
\textsuperscript{232} \textit{Washington}, 628 N.E.2d at 356.
would always be easier when a challenged juror belongs to a subcategory rather than a general category.”

The argument is a curious one. Washington basically declines to extend Batson to intersectional discrimination because such an extension could destroy the peremptory challenge. However, if the elimination of the peremptory challenge is the price for nondiscrimination in jury selection, the Constitution requires that we pay that price. As Justice Marshall, concurring in Batson, observed, “[w]here it necessary to make an absolute choice between the right of a defendant [or prospective juror] to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.” Indeed, the basis of Justice Marshall’s observation is well settled: “peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial.” In any event, applying Batson to intersectional discrimination in jury selection will not destroy the peremptory challenge as Washington predicts. Rather, the extension of Batson to intersectional discrimination is fully compatible with the continued existence and vitality of the peremptory challenge.

Recognizing “subcategories of race and gender” arguably could make it easier to establish a prima facie case of discrimination because the subcategories of prospective jurors (e.g., black males) would likely include fewer prospective jurors than the more general categories of males or blacks. With only one black male on a panel of five males and four blacks, it would be difficult to show either race or sex discrimination if the single black male were challenged: only 20% of the males and 25% of the blacks would have been challenged. However, if the

235. McCollum, 505 U.S. at 57. See also Stilson v. United States, 250 U.S. 583, 586 (1919) (observing that “nothing in the Constitution of the United States . . . requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured”).
236. One method of proving a prima facie case of discrimination is to show that a party has challenged most or all of the members of a cognizable group. Wheeler, 583 P.2d at 764; Motion, 704 P.2d at 182. See also Batson, 476 U.S. at 97 (noting that a “pattern” of strikes may give rise to an inference of discrimination). For a discussion and critique of the “numbers game” in raising the inference of discrimination in jury selection, see Serr & Maney, supra note 104, at 27–37.
category of black males were recognized, the moving party could establish that 100% of all black males on the panel had been excluded. If, as a result, a prima facie case of discrimination were demonstrated when it otherwise would not be, *Batson* hearings could very well increase. Nevertheless, the litigant claiming a *Batson* violation must demonstrate a prima facie case of purposeful discrimination. The percentage of any category or subcategory of jury panelists who are excluded is only one factor among others that the trial court may consider. Statistical evidence alone is unlikely to support a claim of intersectional discrimination since the number of jury panelists in any subcategory is likely to be too small to demonstrate purposeful discrimination.

In fact, while recognizing “subcategories of race and gender” is unlikely to make it easier to establish a prima facie case of discrimination, the failure to recognize subcategories may make it particularly difficult to establish discrimination when a jury panelist is excluded because of his or her intersectional status. First, courts may not detect the race and gender discrimination that occurs when jury panelists are excluded because of their intersectional status. For instance, the *Gonzales* approach to discrimination in jury selection could result in proof problems for the Hispanic male defendant who faces a jury of Hispanic women and white men, the Hispanic men having been excluded by the prosecutor. The Hispanic male defendant may fail to establish the requisite prima facie case of purposeful race or sex discrimination to the court’s satisfaction since both Hispanics and men are represented on the jury, even if Hispanic men are not.

Second, some courts may not agree that intersectional discrimination is also race and gender discrimination. In *Hernandez v. New* 

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238. See Christy Chandler, *Race, Gender, and the Peremptory Challenge: A Postmodern Feminist Approach*, 7 YALE J.L. & FEMINISM 173, 183–84 (1995) (arguing that *Batson* will fail to protect women of color unless they are recognized as a class).
239. Nevertheless, the *Gonzales* court found a prima facie case of exclusion based on race even though four Hispanics sat on the jury. The court reasoned: “[a] single prospective juror may be stricken for a racially motivated reason and the jury still retain its ‘representative’ character. This, nevertheless, offends equal protection.” *Gonzales*, 808 P.2d at 45. See also *Batson*, 476 U.S. at 95 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977), the Court observed: “‘[a] single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable decisions.’”.)
York, the Court held that the exclusion of Spanish-speaking Latino jurors who could not unequivocally agree to defer to the official English translation of Spanish-language testimony did not exclude Latino jurors in violation of Batson. The Court reasoned, in part, that "[e]ach category [jurors who could unequivocally agree to defer and jurors who could not] would include both Latinos and non-Latinos." In a jurisdiction that does not prohibit intersectional discrimination, a lawyer who excludes black men could use the Hernandez rationale to argue that he or she excludes neither on the basis of race nor sex, since each category [black men and everyone other than black men] will include both blacks and men. That is, the exclusion of black males is not race or gender discrimination, because black women and non-black men are not excluded. In those courts that did not agree that intersectional discrimination is also race and gender discrimination, intersectional discrimination could serve as a pretext for illegal race and gender discrimination.

Finally, the attorney survey discussed in Part I dispels the concern that prohibiting intersectional discrimination will destroy the peremptory challenge and instead demonstrates the feasibility of extending Batson to intersectional discrimination. The study generally concludes that trial lawyers value the post-Batson and post-Wheeler peremptory

241. Hernandez, 500 U.S. at 361 (finding race-neutral the prosecutor's explanation for excluding the Latino jury panelists). The Court's decision generated much controversy. See, e.g., Juan F. Perea, Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish, 21 Hofstra L. Rev. 1, 3, 15-21, 44 (1992) (arguing that the exclusion of bilingual jurors is not race-neutral and should be held to violate the Equal Protection Clause); Deborah A. Ramirez, Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service, 1993 Wis. L. Rev. 761, 771-85 (using psycholinguistic research to demonstrate that Hernandez effectively permits the exclusion of all Spanish-speaking bilingual jurors in every case where there is likely to be Spanish language testimony).
243. In concluding that the Equal Protection Clause forbids gender-based discrimination, the Court similarly reasoned that, because gender and race are overlapping categories, gender could be used as a pretext for racial discrimination and effectively insulate racial discrimination from judicial scrutiny. J.E.B., 114 S. Ct. at 1430. The Court noted that "[t]he temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending Batson to gender involve the use of peremptory challenges to remove minority women." J.E.B., 114 S. Ct. at 1430 n.18. Importantly, the Court apparently assumed that minority women would be protected from discriminatory exclusion by its J.E.B. ruling.
challenge despite the constitutional limitations placed upon it. These lawyers do not believe that Batson or Wheeler hearings (the mechanisms for enforcing those constitutional limitations) occur too frequently or take up too much court time. Considering that Motton has prohibited peremptory challenges based on intersectionality since 1985 and that most of the surveyed attorneys are California state court practitioners subject to Motton's dictates, their assessments of the peremptory challenge's value and Batson's burden deserve some deference. Their assessments indicate that extending Batson to intersectional discrimination is more than viable.

**Conclusion**

The United States Supreme Court has yet to address the recurring problem of peremptory challenges based on intersectional status. This sort of discrimination occurs when a litigant's peremptory challenges target a particular combination of race and gender, such as African American women, as opposed to targeting race (African Americans), gender (women), or race and gender (African Americans and women). This Article has demonstrated that the peremptory challenge can more

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244. See supra notes 97–100, 105 and accompanying text.
245. See supra notes 107–111 and accompanying text.
246. See Underwood, supra note 12, at 769 (noting that more than a decade of experience with Batson and related state rules suggests that administering the rule is not cost prohibitive).
247. We can also anticipate "the triple play": a peremptory challenge directed at a jury panelist who falls into three (or more) protected categories. For instance, assume a domestic violence case with a black male defendant and a black female complainant. Assume further that Batson has been extended to prohibit religion-based peremptory challenges. See supra note 12 and accompanying text. The prosecutor might challenge a black Muslim woman while accepting other black women panelists on the assumption that the black Muslim woman is more likely to support patriarchal notions of family than other black women and women generally.

For practical reasons, Shoben would not permit the consideration of more than two categories in a Title VII disparate impact case. Shoben, supra note 195, at 807, 821. However, a Batson motion requires a showing of purposeful discrimination; disproportionate impact will not suffice. See supra note 53. Because of the more difficult proof requirement in Batson hearings, the practical concerns in the Batson context are not as great as those in the Title VII disparate impact context, and setting limits on the number of protected categories that may be considered is therefore less compelling. Even Shoben distinguishes the Title VII disparate treatment cases and would not restrict the number of protected categories that are considered in that context. Shoben, supra note 195, at 821, 835.
than withstand the extension of *Batson* to intersectional discrimination in jury selection. The Article has further shown that *Batson* and normative considerations require that extension. In the event that courts refuse to recognize peremptory challenges based on intersectional status as a distinct category of impermissible challenges, this sort of discrimination in jury selection remains both race and gender discrimination and should be impermissible on both counts. $\S$
APPENDIX A

SURVEY

1. Given the judicial limits on the exercise of peremptory challenges, are peremptory challenges of any value to the litigants?*

   Peremptory challenges are of great value / some value / no value. (Please circle one.)

2. Why?

   

   

   

   

3. Were peremptory challenges of any more value pre-Batson (or pre-Wheeler for attorneys practicing in the state courts)?

   Peremptory challenges were of significantly greater value / slightly more value / the same value / less value. (Please circle one.)

4. Why?

   

   

   

   

*Although I circulated a draft survey for comments with no negative feedback, this question turned out to be imprecisely worded. It should have read, “Given the constitutional limits . . .” Some attorneys indicated that they thought the question was vague. Some noted that any limits were statutory and not judicial. In any event, I believe that the answers regarding the value of peremptory challenges remain well taken.
5. How often has a Batson or Wheeler motion been made by you, your co-counsel, or the opposition attorney in cases which you have personally tried?

Such motions were made in all cases / most cases / some cases / no cases. (Please circle one.)

6. Do Batson/Wheeler motions take up too much court time?**

Batson/Wheeler motions do / do not take up too much court time. (Please circle one.)

* * *

16. How would you describe yourself?

I am a prosecutor / defense attorney. (Please circle one.)

I have practiced as a trial attorney only in federal court / only in state court / in both federal and state courts. (Please circle one.)

FOR ATTORNEYS WHO HAVE PRACTICED IN THE FEDERAL COURTS:

I was / was not practicing pre-Batson. (Please circle one.)

FOR ATTORNEYS WHO HAVE PRACTICED IN THE STATE COURTS:

I was / was not practicing pre-Wheeler. (Please circle one.)

I have personally tried approximately _____ jury trials. (Please indicate number.)

**The question calls upon the responding trial lawyer to evaluate the amount of time spent on Batson/Wheeler motions given the lawyer's professional appreciation of the purpose of these motions and how these motions fit into the larger picture of jury selection and the complete trial.
APPENDIX B

TABLE I

Returned Surveys

A profile of the attorneys:

<table>
<thead>
<tr>
<th>Attorneys</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors</td>
<td>98</td>
</tr>
<tr>
<td>Defense Attorneys</td>
<td>96</td>
</tr>
<tr>
<td>Federal Practice Only</td>
<td>9</td>
</tr>
<tr>
<td>State Practice Only</td>
<td>150</td>
</tr>
<tr>
<td>Both Federal and State Practice</td>
<td>36</td>
</tr>
<tr>
<td>0–10 trials</td>
<td>20</td>
</tr>
<tr>
<td>11–25 trials</td>
<td>30</td>
</tr>
<tr>
<td>26–50 trials</td>
<td>66</td>
</tr>
<tr>
<td>51–100 trials</td>
<td>50</td>
</tr>
<tr>
<td>Over 100 trials</td>
<td>29</td>
</tr>
<tr>
<td>Pre- <em>Batson</em> Federal Practice</td>
<td>23</td>
</tr>
<tr>
<td>Pre- <em>Wheeler</em> State Practice</td>
<td>73</td>
</tr>
<tr>
<td>Peremptory Challenges are of...</td>
<td>Entire Pool</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-------------</td>
</tr>
<tr>
<td>great value</td>
<td>157</td>
</tr>
<tr>
<td>some value</td>
<td>35</td>
</tr>
<tr>
<td>no value</td>
<td>1</td>
</tr>
</tbody>
</table>
### TABLE 3

The Value of the Pre-Batson/Pre-Wheeler Peremptory Challenge

<table>
<thead>
<tr>
<th>The Pre-Batson/Pre-Wheeler Peremptory Challenge was of...</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
<th>Pre-Batson Federal Court Practice</th>
<th>Pre-Wheeler State Court Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>significantly greater value</td>
<td>21</td>
<td>17</td>
<td>4</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>15.91%</td>
<td>22.97%</td>
<td>7.14%</td>
<td>10.53%</td>
<td>21.74%</td>
</tr>
<tr>
<td>slightly more value</td>
<td>30</td>
<td>18</td>
<td>11</td>
<td>7</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>22.73%</td>
<td>24.32%</td>
<td>19.64%</td>
<td>36.84%</td>
<td>26.09%</td>
</tr>
<tr>
<td>the same value</td>
<td>75</td>
<td>38</td>
<td>36</td>
<td>8</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>56.82%</td>
<td>51.35%</td>
<td>64.29%</td>
<td>42.11%</td>
<td>47.83%</td>
</tr>
<tr>
<td>less value</td>
<td>6</td>
<td>1</td>
<td>5</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>4.55%</td>
<td>1.35%</td>
<td>8.93%</td>
<td>10.53%</td>
<td>4.35%</td>
</tr>
</tbody>
</table>
### TABLE 4

**The Frequency of Batson/Wheeler Motions**

<table>
<thead>
<tr>
<th>Such motions were made in...</th>
<th>Entire Pool</th>
<th>Prosecutors</th>
<th>Defense Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>all cases</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>1.03%</td>
<td>1.04%</td>
<td>1.04%</td>
</tr>
<tr>
<td>most cases</td>
<td>10</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>5.13%</td>
<td>7.29%</td>
<td>2.08%</td>
</tr>
<tr>
<td>some cases</td>
<td>133</td>
<td>55</td>
<td>77</td>
</tr>
<tr>
<td></td>
<td>68.21%</td>
<td>57.29%</td>
<td>80.21%</td>
</tr>
<tr>
<td>no cases</td>
<td>50</td>
<td>33</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>25.64%</td>
<td>34.38%</td>
<td>16.67%</td>
</tr>
<tr>
<td></td>
<td>Pre-Batson Practice</td>
<td>Only Post-Batson Practice</td>
<td>Post-Wheeler Practice</td>
</tr>
<tr>
<td>------------------------------</td>
<td>---------------------</td>
<td>---------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td><strong>Defense Attorneys</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entire Pool</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Batson/Wheeler motions...</td>
<td>24</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>take up too much court time</td>
<td>21.19%</td>
<td>20%</td>
<td></td>
</tr>
<tr>
<td>do</td>
<td>22</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>do not</td>
<td>73.83%</td>
<td>80%</td>
<td></td>
</tr>
<tr>
<td>25.29%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>26.09%</td>
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<tr>
<td>97.83%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>74.71%</td>
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<td></td>
</tr>
<tr>
<td>90</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>158</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>86.81%</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>56</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>100%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>73.91%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>