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Gender and Jury Deliberations: The Contributions of Social Science

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GENDER AND JURY DELIBERATIONS: THE CONTRIBUTIONS OF SOCIAL SCIENCE

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INTRODUCTION

Women were not permitted to serve on juries for most of United States history.[1] As recently as 1961, the United States Supreme Court upheld a state jury selection scheme that permitted women to serve on juries *only* if they filed a written declaration expressing their desire to be eligible for service.[2] Part I of this article traces this history of women's exclusion from jury service in the United

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1. *See* Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 59-60 (1986).

2. *See* Hoyt v. Florida, 368 U.S. 57, 58, 69 (1961).

States, ending with *J.E.B. v. Alabama*, the Court's decision in 1994 that prohibited the use of gender-based peremptory challenges.[3] Responses to *J.E.B.* have been mixed, and this article discusses criticisms of the opinion in detail.

Part II of this article explores social science research on gender dynamics in simulated jury trials. Although the Supreme Court based its decision in *J.E.B.* partly on the principle that generalizations about male and female jurors are overbroad and invidious, research has identified gender differences in the decision-making of mock jurors.[4] In addition, male and female jurors behave differently in the quantity and substance of their contributions to group deliberations.

Part III makes several recommendations based on the social science research concerning gender and jury dynamics. Ultimately, this article argues that male and female jurors are *not* fungible, and that the criminal justice system should not pretend that they are.

I. HISTORY AND CURRENT LAW

A. Women and Jury Service in America: An Historical Overview

The history of women and jury service in the United States is one of systematic exclusion,[5] dating back to the English common law.[6] This tradition continued with the founding of the United States. With the First Judiciary Act of 1789, Congress established that federal jurors must meet the qualifications required by the state in which the federal court was sitting.[7] Because every state at that time disqualified women from jury service, the first Congress clearly did not interpret the Sixth Amendment of the Constitution to require that women sit on jury panels.[8]

There were many justifications for the exclusion of women from jury service. Because most women were confined to the domestic sphere of the household during the eighteenth and nineteenth centuries, opponents of women's jury service argued that women lacked the worldly experience necessary to make informed decisions

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3. J.E.B. v. Alabama, 511 U.S. 127, 146 (1994).

4. *Id.* at 131.

5. *See* Weisbrod, *supra* note 1, at 59-60 ("[F]or most of American history, jury service was restricted to men.") (citation omitted).

6. Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 38 (1992).

7. 1 Stat. 73 (1789). *See also* Taylor v. Louisiana, 419 U.S. 522, 536 (1975).

8. *Id.*

as jurors.[9] Some opponents also argued that "the indelicacies of jury service would interfere with women's ability to maintain the purity required by their [domestic] role in the home."[10] Proponents of women's jury service did not challenge their opponents' presumption that a woman's proper place was in the home.[11] Unlike their opponents, however, these advocates argued that women occupy a unique role that would contribute positively to the legal world by bringing their voice of "domestic virtue" into the courtroom.[12] As late as 1961, the Supreme Court used this argument to uphold a jury system allowing women to serve as jurors only if they volunteered, stating that a "woman is still regarded as the center of home and family life."[13]

Eventually, the proponents of women's jury service prevailed. In 1898, Utah became the first state to authorize women to participate on juries.[14] The tradition of excluding women from jury service, however, was slow to change. During the Second World War, twenty years after the passage of the women's suffrage amendment in 1920,[15] twenty-one states still prohibited female jurors.[16] Three states (Alabama, Mississippi, and South Carolina) continued to ban women from juries as late as 1962.[17] With the Civil Rights Act of 1957, Congress finally provided that all citizens, including women, were competent to serve as federal jurors, regardless of state law.[18]

B. Supreme Court Jurisprudence on Women and Jury Service

The Supreme Court first addressed the issue of female jury service in 1946.[19] In *Ballard*, women were systematically excluded, for reasons that are unclear in the decision, from the defendants' trial in federal court in California.[20] The defendants alleged that this exclusion was improper because California law would allow women to serve on juries, thereby establishing women's eligibility

9. *See* Weisbrod, *supra* note 1, at 68.
10. *Id.* at 66.
11. *Id.* at 67.
12. *Id.* at 71.
13. Hoyt v. Florida, 368 U.S. 57, 62 (1961).
14. Taylor v. Louisiana, 419 U.S. 522, 533 n.13 (1975).
15. U.S. CONST. amend. XIX.
16. *See* Weisbrod, *supra* note 1, at 60-61.
17. *Id.*
18. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 28 U.S.C. § 1343 and 42 U.S.C. §§ 1971, 1975a to 1975e (2005)). *See also Taylor*, 419 U.S. at 536.
19. Ballard v. United States, 329 U.S. 187 (1946).
20. *Id.* at 191.

for jury service in federal courts in California.[21] The Supreme Court agreed with the defendants, holding that "the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted,"[22] and dismissed the indictment.[23]

Some of the rhetoric in *Ballard* adopted the same tone as the early proponents of jury service for women, portraying female jurors as contributing a valuable perspective to the judicial process.[24] Because their viewpoint is so important, the Court found that the exclusion of women from jury service was unacceptable.[25] The Court wrote:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men — personality, background, economic status — and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[26]

The Court's justification for its decision in *Ballard* rested on a theory that views each sex as contributing something unique to the process of jury deliberations.[27]

Notably, the Court did not ground its analysis upon the idea that women are equal to men, and therefore, deserve the same civic rights enjoyed by men. Rather, the Court stated that female jurors

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21. *Id.* at 190-91.
22. *Id.* at 193.
23. *Id.* at 196.
24. *Id.* at 194-95.
25. *See id.* at 193.
26. *Id.* at 193-94 (citations omitted).
27. *See id.* at 194-95.

bring a distinct voice to the jury room, one that must be heard for the jury to be truly representative of the community.[28] In discussing the importance of creating a "broad base" for the jury system, and thereby ensuring representativeness, the Court compared women, as a group, to a racial group or an economic or social class.[29] The female perspective, like the contributions of diverse racial and social groups, is so important that the Court wrote that "the exclusion of women from jury panels may at times be highly prejudicial to the defendants."[30]

The Supreme Court applied the rhetoric of the original opponents of female jury service to another case, *Hoyt v. Florida*,[31] in 1961. The appellant in *Hoyt*, a woman convicted of second-degree murder by an all-male jury, argued that Florida's jury statute violated her rights under the Fourteenth Amendment by unconstitutionally excluding women from jury service.[32] The Florida statute provided that women would not be called for jury service unless they registered their desire to be eligible to serve on juries with the clerk of the circuit court.[33] Rejecting Hoyt's claim and upholding the Florida statute constitutional on its face and as applied, the Supreme Court identified the relevant inquiry as "whether the exemption [of women from jury service unless they affirmatively registered for that duty] itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation."[34] In analyzing the purpose of the Florida jury statute, the Court concluded that it rested upon a reasonable classification when it wrote:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[35]

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28. *See id.* at 194.
29. *Id.* at 195.
30. *Id.*
31. 368 U.S. 57 (1961).
32. *See id.* at 58.
33. *Id.*
34. *Id.* at 58, 61.
35. *Id.* at 61-62.

With this reasoning, the Court upheld the Florida statute using the same rhetoric the original opponents of jury service for women espoused: Women may be reasonably exempted from jury service based on the unique domestic role they play in society.[36]

Only fourteen years later, in the case of *Taylor v. Louisiana*,[37] the Supreme Court essentially reversed its decision in *Hoyt v. Florida*. *Taylor* involved a constitutional challenge to Louisiana's statutory scheme for jury selection.[38] At that time, Louisiana law provided that a woman should not be selected as a juror unless she had previously filed a written declaration stating her desire to be eligible for jury service.[39] The appellant, Taylor, appealed his conviction for aggravated kidnapping on the grounds that Louisiana's jury selection system violated his rights under the Sixth and Fourteenth Amendments to a fair and impartial jury.[40] The Supreme Court held that Taylor had, indeed, been deprived of his right to an impartial jury and reversed his conviction.[41]

The Court in *Taylor* relied heavily on the importance of selecting a "petit jury from a representative cross section of the community,"[42] holding that such a right "is an essential component of the Sixth Amendment right to a jury trial."[43] Justice White, writing for the majority, reasoned that the purpose of the jury is to protect citizens from the government's exercise of arbitrary power.[44] This protection could not be guaranteed "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[45] Quoting extensively from *Ballard*, the Court concluded that excluding women from jury service violates the goal of securing representativeness in the jury pool.[46] The Court also relied on social science research to support the proposition that "women bring to juries their own perspectives and values that influence both jury deliberation and result."[47]

Despite its emphasis on the fair cross section requirement, the Court cautioned that this requirement "must have much leeway in

36. *Id.*
37. 419 U.S. 522 (1975).
38. *Id.* at 523.
39. *Id.* (citing LA. CONST. art. VII, § 41; LA. CODE CRIM. PROC. ANN. art. 402 (repealed 1974)).
40. *Id.* at 524-25.
41. *Id.*
42. *Id.* at 528.
43. *Id.*
44. *Id.* at 530.
45. *Id.*
46. *See id.* at 531-32.
47. *Id.* at 532 n.12.

application" and recognized that the states retain broad discretion in this area.[48] A resulting significant limitation to the holding in *Taylor* is that petit juries need not actually reflect diverse populations in the community; rather, the jury must be drawn only from a pool that is "fairly representative" of the community.[49] Defendants, therefore, "are not entitled to a jury of any particular composition."[50]

In finding the jury selection scheme in Louisiana unconstitutional, the Supreme Court in *Taylor* seemingly overruled its holding in *Hoyt v. Florida*. The Court distinguished its prior holding by stating that "*Hoyt* did not involve a defendant's Sixth Amendment right to a[n impartial] jury [that is] drawn from a fair cross section of the community."[51] The challenge in *Hoyt*, based on due process and equal protection grounds, was unsuccessful because the State of Florida demonstrated that there was a sufficiently rational basis for its statute.[52] Taylor's challenge, based on the Sixth Amendment, could not be defeated by the rational basis test.[53] Although the Court did not articulate the precise showing needed to justify Louisiana's law, it did note that there must be "weightier reasons" than a demonstration of a mere rational basis.[54]

Although the majority in *Taylor* tried to distinguish *Hoyt*, it nonetheless disavowed a crucial part of the analysis supporting the *Hoyt* decision.[55] In *Hoyt*, the Court relied heavily on the notion that a "woman is still regarded as the center of home and family life" to support the rationality of Florida's regulation regarding women and juries.[56] The *Taylor* court, however, cited statistics from the Department of Labor to support the view that a majority of women in 1974 were in the labor force, including nearly half of all women with children under eighteen years of age.[57] This changing reality in women's lives, the Court stated, "put[s] to rest the suggestion that all women should be exempt from jury service based solely on their sex and [their] presumed role in the home."[58]

The Supreme Court in *Taylor* rested uneasily on a conflicted notion of the nature of women's participation on juries. Following

48. *Id.* at 538.
49. *Id.*
50. *Id.*
51. *Id.* at 534.
52. *Id.* at 533-34.
53. *Id.* at 534.
54. *Id.*
55. *Id.*
56. Hoyt v. Florida, 368 U.S. 57, 62 (1961).
57. *See Taylor*, 419 U.S. at 535 n.17.
58. *Id.*

the analysis of *Ballard*, the Court stated that differences between the two sexes require that women, as well as men, be represented in jury pools to ensure a fair cross section of the community.[59] This view of a woman's perspective comports with the historical notion that women offer a different voice because of their unique position in the home.[60] At the same time, however, the *Taylor* Court explicitly disagreed with the idea, articulated in *Hoyt*, that a woman's role is presumptively, and exclusively, within the home.[61] In this regard, *Taylor* marked the beginning of a shift in rhetoric about women and their contribution to jury deliberations. The Supreme Court affirmed women's different voices to support its view that juries must be drawn from a representative sample of the community, yet expressed discomfort with the idea that women remained limited by their traditional domestic role.[62] With this latter concept, and the accompanying acknowledgment that women's roles were evolving, the Court began to conceive of male and female jurors as equal contributors to the deliberation process.

C. Gender and the Use of the Peremptory Challenge

1. J.E.B. v. Alabama

Recent debates about women and their contributions in the jury room have centered around the use of the peremptory challenge.[63] In 1986, the Supreme Court ruled in *Batson* that a prosecutor's use of peremptory challenges for the purpose of excluding jurors solely on the basis of race violates the Equal Protection Clause.[64] The principle of *Batson* later was extended to other cases.[65] Following conflicting federal opinions regarding the applicability of *Batson* to

59. *See id.* at 530-32.

60. *See* Weisbrod, *supra* note 1, at 67, 71. *See also supra* text accompanying note 10.

61. *See Taylor*, 419 U.S. at 534, 535 n.17.

62. *See id.* at 530, 534-35 n.17.

63. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986).

64. *Id.* at 88-89.

65. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42 (1992) (prohibiting criminal defendants, as well as government prosecutors, from engaging in purposeful racial discrimination through the use of peremptory challenges); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending the principle of *Batson* to civil cases as well as criminal cases); Powers v. Ohio, 499 U.S. 400 (1991) (holding that a criminal defendant could object to peremptory challenges used to exclude jurors of a particular race, regardless of whether the defendant and the excluded jurors are of the same race).

gender-based peremptory strikes,[66] as well as competing recommendations from academia,[67] the Supreme Court ruled in *J.E.B. v. Alabama* that intentional gender discrimination through the use of peremptory strikes violates the Equal Protection Clause.[68]

J.E.B. involved a paternity suit brought by the State of Alabama to obtain an order compelling the petitioner, J.E.B., to pay child support.[69] The all-female jury made a finding of paternity, and J.E.B. appealed.[70] J.E.B. argued that the State had violated the Equal Protection Clause of the Fourteenth Amendment by using nine of its ten peremptory challenges to strike men from the jury panel.[71] In a six to three split, the Supreme Court agreed with J.E.B., reversing the judgment of the Court of Civil Appeals of Alabama and holding that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man."[72]

In its ruling, the Court described the history of excluding women from juries in the United States and summarized its prior decisions regarding gender and jury selection.[73] Given this history of gender discrimination, Justice Blackmun, writing for the majority, framed the "only question" raised by *J.E.B.* as "whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial."[74] The State of Alabama argued that its decision to strike virtually all males from the jury was based on a legitimate perception that females would be more receptive to the State's arguments in favor of a finding of paternity.[75] The Court dismissed this argument in a footnote, finding that "[t]he majority of studies suggest that gender

66. *Compare* United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), *rev'd en banc*, 960 F.2d 1433 (9th Cir. 1992) (concluding that gender-based peremptory strikes are impermissible), *with* United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988) (declining to extend the protection of *Batson* to gender).

67. *Compare* Forman, *supra* note 6, at 56-67 (arguing that the holding in *Batson* should not be extended to prohibit gender-based peremptory challenges), *with* Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1922 (1992) (proposing that the holding in *Batson* should be extended to prohibit gender-based peremptory challenges).

68. 511 U.S. 127, 130-31 (1994).

69. *Id.* at 129.

70. *Id.*

71. *Id.*

72. *Id.* at 127, 146.

73. *Id.* at 131-36.

74. *Id.* at 136-37.

75. *Id.* at 137-38.

plays no identifiable role in jurors' attitudes."[76] Even if the State could demonstrate some level of empirical validity behind its strategy of striking male jurors, the Court stated that such a "measure of truth" would not justify the use of gender stereotypes in choosing a jury because "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."[77] The decision also noted that generalizations about the perceived attitudes of male and female jurors are overbroad.[78] Furthermore, the Court in *J.E.B.* relied heavily on the notion that gender stereotypes are unwarranted and that gender alone is not predictive of a juror's attitudes.[79] In doing so, however, the Court ignored a body of social science research indicating that gender may affect how a person makes decisions, particularly in the jury room.[80]

Another criticism of *J.E.B.* stems partly from the posture of the case: *J.E.B.* was a lawsuit brought by a *defendant* to challenge the use of peremptory strikes by the *State*.[81] In its opinion, the Court never addressed whether a defendant might persuasively argue that the use of gender-based peremptory challenges was necessary to preserve his or her right to a fair and impartial trial under the Sixth Amendment. Indeed, in *J.E.B.* the Court gave little attention to the Sixth Amendment at all, aside from noting in a brief paragraph that "voir dire can inform litigants about potential jurors."[82] Justice Blackmun wrote that "[d]iscrimination in jury selection, whether based on race or on gender, causes harm *to the litigants*, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[83] The Court supported its "harm to the litigants" rationale by stating merely that "the prejudice that motivated the discriminatory selection of the jury will

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76. *Id.* at 138 n.9. Although the works cited by the Court in *J.E.B.* support the proposition that gender is not a factor in jurors' decisions, other psychological studies indicate otherwise. *See infra* Part II.B-C.

77. *J.E.B.*, 511 U.S. at 139 n.11.

78. *Id.*

79. *Id.* at 138 n.9, 139 n.11.

80. *See infra* Part II.B-C.

81. *J.E.B.*, 511 U.S. at 129.

82. *Id.* at 143. In noting that "[v]oir dire provides a means of discovering actual or implied bias and a firmer basis [than stereotypical notions] upon which the parties may exercise their peremptory challenges intelligently," the Court presumably recognized that some jurors, regardless of their gender, may have certain notions about gender issues that might prejudice a defendant. *Id.* at 143-44. For example, a battered woman accused of killing her husband might strike, for cause, a juror expressing the belief that any woman choosing to remain in an abusive relationship deserves what she gets.

83. *Id.* at 140 (emphasis added).

infect the entire proceedings."[84] Rather than focusing on fairness for a criminal defendant, the Court in *J.E.B.* seemed more concerned with the rights of jurors who might be removed from the jury pool on the basis of gender, noting that "individual jurors . . . have a right to nondiscriminatory jury selection procedures."[85] The Court also stated that a litigant's assumption that jurors hold certain views because of their gender "denigrates [their] dignity."[86] Finally, in Part V of the opinion, which summarized the ruling and concluded the decision, the Court emphasized only the importance of affording all citizens an equal opportunity to participate in the justice system:

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law — that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.[87]

Interestingly, the Court made no mention of how a defendant's right to a fair and impartial jury might be compromised through the use of gender-based peremptory challenges.[88]

2. J.E.B.: *Justice O'Connor's Concurrence*

Justice O'Connor wrote a forceful concurrence in *J.E.B.*, noting that the outcome of the case "is not costless."[89] Criticizing the majority on two grounds, Justice O'Connor argued that criminal defendants warrant special protection in the justice system, entitling them to privileges the prosecution might not be granted.[90] Justice O'Connor also argued that decisions by male and female jurors are necessarily informed by their life experiences, including

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84. *Id.* In support of this proposition, the Court cites a case stating that "discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Id.* (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991)).

85. *Id.* at 140-41.

86. *Id.* at 142.

87. *Id.* at 145-46 (citations omitted).

88. *Id.*

89. *Id.* at 147 (O'Connor, J., concurring).

90. *Id.* at 150-51.

their gender.[91] Consequently, Justice O'Connor would have limited the holding in *J.E.B.* to disallowing the government's use of gender-based peremptory challenges, leaving criminal defendants free to strike jurors on the basis of gender.[92]

Justice O'Connor agreed with the majority that the Equal Protection Clause prohibits the government from striking a juror solely on the basis of his or her gender.[93] She disagreed, however, with the majority's analysis when she stated that "[t]he Equal Protection Clause prohibits only discrimination by state actors."[94] Because criminal defendants are not state actors and the peremptory challenge remains an important right to an accused defendant, Justice O'Connor opposed limiting a defendant's use of gender-based peremptory challenges.[95]

In another departure from the majority's reasoning, Justice O'Connor noted that "like race, gender matters."[96] After citing social science studies finding gender differences in juror's attitudes in rape cases, Justice O'Connor articulated a common-sense view of how gender might affect a juror's behavior:[97]

> [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. . . . Individuals are not expected to ignore as jurors what they know as men — or women. Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes

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91. *Id.* at 149.

92. *Id.* at 151 (stating "that the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants"). With respect to gender, Justice O'Connor did not require a particularized showing that gender issues would be crucial to the defense of the accused. *Id.* Nonetheless, Justice O'Conor did mention the example of a battered woman, on trial for murdering her husband, as a particularly compelling instance where gender-based peremptory challenges should be allowed. *Id.* This example suggests that Justice O'Connor's argument may have more significance in trials where gender issues play a pivotal role in the jurors' consideration of the case. *Id.*

93. *Id.* at 146.

94. *Id.* at 150.

95. *Id.* Justice O'Connor also stated that "[the Court] made the mistake of concluding that private civil litigants are state actors when they [were] exercis[ing] peremptory challenges," and in extending that reasoning to the use of peremptory challenges by criminal defendants. *Id.* She concluded that "[the Court] should not . . . forget that not all that occurs in the courtroom is state action. Private civil litigants are just that — private litigants." *Id.*

96. *Id.* at 148.

97. *Id.* at 149 (citing REID HASTIE ET AL., INSIDE THE JURY 140-41 (1983)).

> no difference as a matter of law is not to say that gender makes no difference as a matter of fact.[98]

With this reasoning, Justice O'Connor strengthened her conclusion that criminal defendants should be allowed to use gender-based peremptory strikes because gender-based assumptions about juror attitudes are "sometimes accurate."[99] In a pointed conclusion to her concurrence, Justice O'Connor imagined one scenario where the holding of *J.E.B.* might harm a criminal defendant:

> Will we, in the name of fighting gender discrimination, hold that the battered wife — on trial for wounding her abusive husband — is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible? I assume we will, but I hope we will not.[100]

Like Justice O'Connor, this article argues that the Court's emphasis in *J.E.B.* on the rights of the juror, and its relative silence on the rights of the defendant, is misplaced. Ironically, the Court invoked *Taylor v. Louisiana* to support the proposition that women had been unfairly excluded from juries, but it notes only in passing that *Taylor* involved a Sixth Amendment challenge, brought by a defendant, to Louisiana's statutory scheme for jury selection.[101] The holding in *Taylor* was thus used as precedent that guided the Court's decision in *J.E.B.*, but *J.E.B.* addresses none of the Sixth Amendment concerns that informed the Court's decision in *Taylor*.[102] Ultimately, this article asserts that any analysis concerning the use of peremptory strikes should focus on the rights of the defendant and the harm incurred by a defendant if the prosecution uses peremptory challenges improperly. In grounding its decision on an equal protection analysis with respect to harm to potential jurors, the majority in *J.E.B.* omitted an important point and did little to advance the understanding of how gender differences affect conceptions of the right to a fair and an impartial jury under the Sixth Amendment.

J.E.B. is also noteworthy for its characterization of the differences between male and female jurors. In its review of previous decisions regarding gender and jury selection, the Court quoted the famous passage from *Ballard v. United States* stating that "the two

98. *Id.*
99. *Id.* at 150.
100. *Id.* at 151.
101. *See id.* at 135; Taylor v. Louisiana, 419 U.S. 522, 523 (1975).
102. *See J.E.B.*, 511 U.S. at 135.

sexes are not fungible."[103] Indeed, the earliest arguments promoting jury service for women were premised on the notion that women, as a gender class, have something to offer that is different from what men bring to the jury room.[104] The Court in *J.E.B.* suggested, however, that any assumption about juror behavior, based on the fact that the two sexes are not fungible, constitutes an invidious stereotype in violation of the Equal Protection Clause.[105] In this manner, the analysis in *J.E.B.* completed the shift in rhetoric begun in *Taylor*, moving from an argument characterizing gender as a unique voice in *Ballard,* to one characterizing any distinction between the genders as discrimination in *J.E.B.*

D. Responses to J.E.B.

Although support for the Supreme Court's decision in *J.E.B.* has been widespread,[106] other scholars have criticized the decision for failing to recognize which gender actually is harmed through the use of gender-based peremptory challenges.[107] For example, Karen L. Cipriani performed an empirical study of the District of Columbia Circuit jury pool from January to June of 1993.[108] From a sample of 4302 people called for jury service, Cipriani found that the government or the defense struck thirty percent of women with peremptory strikes, while thirty-seven percent of the men were peremptorily stricken.[109] Based on the sample, prospective female jurors had a higher chance of being seated on the jury than men who were more likely to be struck on the basis of a peremptory challenge.[110] Although Cipriani concedes that the data cannot conclusively indicate whether the peremptory strikes were exercised based on gender, she notes that "this data . . . does belie the belief that women jurors are excused disproportionately."[111] The study "calls into question the traditional dogma that female jurors are vulnerable and male jurors are privileged."[112]

Certainly generalizations cannot, and should not, be made about the use of peremptory strikes on the basis of one small study in one

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103. *Id.* at 133 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)).

104. *See supra* note 10 and accompanying text.

105. *J.E.B.*, 511 U.S. at 133-36.

106. *See, e.g.*, Karen L. Cipriani, Note, *The Numbers Don't Add Up: Challenging the Premise of* J.E.B. v. Alabama, 31 AM. CRIM. L. REV. 1253, 1261 (1994).

107. *See id.* at 1261-64.

108. *Id.* at 1265.

109. *Id.* at 1265, 1267.

110. *Id.* at 1265-67.

111. *Id.* at 1267.

112. *Id.* at 1268.

judicial district. Cipriani's findings, however, prompt reconsideration of the assumption that gender-based peremptory strikes will be exercised in a manner that excludes women from jury service. Additionally, as Cipriani notes at the end of her article, the Supreme Court's decision in *J.E.B.* "may not be an appropriate or effective way to redress a prior history of discrimination."[113] Although the Court ultimately decided *J.E.B.* on equal protection grounds, the majority's lengthy discussion of women's historical exclusion from jury service suggests that its decision was also motivated by a fear that gender-based peremptory strikes disadvantage female jurors.[114] Clearly, as Cipriani's research suggests, more empirical research should be done to determine whether the Court's assumption in *J.E.B.* is accurate.

Another critique of *J.E.B.* emphasizes the cost of the decision to female litigants who might need to use gender-based peremptory strikes to secure their right to a jury of their peers.[115] Noting that the Court in *J.E.B.* overlooked crucial differences between male and female jurors, Roberta Flowers suggests that the decision sacrificed the right of the litigant to determine who sits on the jury in favor of elevating the rights of the jurors themselves.[116] Contrary to the majority's analysis in *J.E.B.*, litigants are not hurt by the use of gender-based peremptory strikes if they are using those challenges in a manner they believe necessary to obtain a fair trial.[117] Furthermore, Flowers alleges that voir dire is an inadequate substitute for the peremptory challenge because it fails to uncover the subtle, gender-based cognitive differences that the social sciences have discovered.[118] In a statement echoing Justice O'Connor's concurring opinion, Flowers ends her analysis of *J.E.B.* by stating that "the effect of this decision must be assessed in terms of the cost to female litigants and victims."[119] Flowers also suggests that, rather than protecting the rights of female litigants, *J.E.B.* eliminates them.[120]

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113. *Id.* at 1277. Cipriani also writes in a footnote that Justice Scalia made this precise point in his dissent in *J.E.B.* when he stated that women are stricken by peremptory challenges not because of doubts regarding their competence, but "because of doubt that they are well disposed to the striking party's case." *Id.* at 1277 n.113 (quoting J.E.B. v. Alabama, 511 U.S. 127, 160 (1994) (Scalia, J., dissenting)).

114. *See id.* at 1253-54.

115. *See* Roberta K. Flowers, *Does It Cost Too Much? A "Difference" Look at* J.E.B. v. Alabama, 64 FORDHAM L. REV. 491, 532-33 (1995).

116. *See id.* at 529-30.

117. *Id.*

118. *Id.* at 530.

119. *Id.* at 532.

120. *Id.*

II. CONTRIBUTIONS OF SOCIAL SCIENCE

As described above in Part I, the issue of women's jury service in the United States has always involved the question of whether women bring a unique perspective to the jury box. Early proponents of jury service for women grounded their argument upon the notion that a valuable perspective would be missing if women continued to be excluded.[121] The more recent rhetoric, however, most notably in the Supreme Court's decision in *J.E.B. v. Alabama*, seemingly denies the possibility that men and women might think differently about important moral and legal questions.[122] Given the historical tendency to label women's perceived 'differences' as inferior when compared to a male standard, this position is understandable.[123] Social science research, however, indicates that this argument is simply not supported by the reality of differences between men and women's cognitive processes.[124]

A. Carol Gilligan: Gender and Moral Reasoning

Carol Gilligan's book, *In a Different Voice*,[125] contributes significantly to psychologists' understanding of gender differences in moral reasoning. As Gilligan notes in the beginning of her book, previous studies of moral reasoning had implicitly adopted the male experience of moral thinking as the norm, ignoring the experiences of women or labeling such experiences as deviant because they did not match the research done on men.[126] For example, Sigmund Freud believed that women's superego, the part of the brain responsible for moral reasoning, was less developed than men's, and that women accordingly exhibit less of a sense of justice.[127] Another psychologist, Erik Erikson, "turns repeatedly to the lives of men" in his analysis of human development across the life span.[128] Finally, even Lawrence Kohlberg, arguably the foremost scholar on moral development, based his formulation of the six stages that illustrate the development of moral judgment entirely upon an empirical

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121. *See* Weisbrod, *supra* note 1, at 71.
122. *See* J.E.B. v. Alabama, 511 U.S. 127, 138-39 (1994).
123. *See, e.g., id.* at 139 n.11, 142.
124. *See, e.g., id.* at 138 n.9.
125. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).
126. *See id.* at 2, 6.
127. *Id.* at 7.
128. *Id.* at 107.

study of eighty-four *boys* whose development he followed over the course of twenty years.[129]

Gilligan's book fills the void left by these scholars by analyzing the results of three different studies regarding women and moral thinking.[130] In the first study, male and female college students were selected at random from a group of students who studied moral and political choice.[131] Interviewers questioned these students when they were seniors in college and again five years later about their view of self and thoughts regarding morality when presented with moral conflicts and life choices.[132]

The second study in Gilligan's book examines the role of conflict in the development of women considering having an abortion.[133] Researchers interviewed women who were considering an abortion during their first trimester of pregnancy and contacted them again one year later.[134] Finally, the third study, labeled the "rights and responsibilities study," matched men and women for age, intelligence, education, occupation, and social class at nine points across the life cycle.[135] The participants were interviewed about their conceptions of self and morality, their experiences of moral conflict and choice, and their resolutions of hypothetical moral dilemmas.[136]

In her rights and responsibilities study, Gilligan used a hypothetical dilemma constructed by Kohlberg to assess differences in the moral development of male and female participants.[137] The hypothetical situation, called 'Heinz's dilemma,' involves a man, Heinz, whose wife is fatally ill, but who cannot afford to buy a drug to save her life.[138] The standard format of Kohlberg's interview technique requires a participant to decide, after being told that the pharmacist refuses to lower the price of the medicine, whether Heinz should steal the drug.[139] Two eleven-year-old participants in the study, Amy and Jake, illustrate Gilligan's conclusion about gender differences in moral thinking.[140] Gilligan writes that "[Amy and Jake] see, in the same dilemma, two very different moral problems. Though current theory brightly illuminates the line and

129. *Id.* at 18.
130. *Id.* at 2-3.
131. *Id.* at 2.
132. *Id.*
133. *Id.* at 3.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 25.
138. *Id.*
139. *Id.* at 25-26.
140. *Id.* at 32.

the logic of the boy's thought, it casts scant light on that of the girl."[141]

When asked whether Heinz should steal the drug, Jake constructs the dilemma, as Kohlberg did, as a struggle between the values of life and property.[142] Jake decides that life has logical priority over property and uses that logic to defend his judgment that Heinz should steal the medicine.[143] The interviewer also asks Jake about the consequences of breaking the law.[144] Jake states that "laws have mistakes," and "[the judge] should give Heinz the lightest possible sentence" because the judge would probably consider Heinz's actions "the right thing to do."[145] Jake's view that Heinz should steal the drug, despite a law prohibiting theft, and his assumption that the judge would agree with Heinz, manifests his understanding that there is a social consensus about the "right thing to do" in that situation.[146] Jake's ability to use deductive logic in reasoning about a moral dilemma, his differentiation of morality from law, and his understanding that laws are subject to error and change all illustrate movement toward Kohlberg's definition of a principled conception of justice.[147]

In contrast to Jake, who contrues Heinz's dilemma as a hierarchy of rights, Amy sees the situation as "a narrative of relationships that extends over time."[148] When asked whether Heinz should steal the drug, Amy considers the effect of the theft on the relationship between Heinz and his wife, reasoning that his wife might become more gravely ill if Heinz were thrown in jail and unable to care for her.[149] Amy, therefore, suggests that Heinz and his wife discuss ways to obtain money or communicate with the druggist and explain the importance of the medicine.[150] Instead of a conflict between life and property, Amy sees "a world comprised of relationships . . . that coheres through human connection rather than through systems of rules, [and] she finds the puzzle in the dilemma to lie in the failure of the druggist to respond to the wife."[151]

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141. *Id.* at 25.
142. *Id.* at 26.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 27.
148. *Id.* at 28.
149. *Id.*
150. *Id.* at 28-29.
151. *Id.* at 29.

As demonstrated, Amy and Jake exhibit two different kinds of moral understanding.[152] Jake responds to Heinz's dilemma by articulating a hierarchy of values while Amy advocates communication to sustain "a web of relationships" between Heinz, his wife, and the druggist.[153] Gilligan's analysis notes that these two modes of moral understanding are complementary, rather than oppositional.[154] Given this complementary construction of differences, Gilligan questions the bias of traditional theory, which orders gender differences in a hierarchy that prefers Jake's principled logic over Amy's network of human connection.[155]

Gilligan's study of women contemplating abortion provides further support for the gender differences exemplified in Amy and Jake's moral thinking. Based upon women's responses regarding their choice to obtain an abortion, Gilligan discovered "the centrality of the concepts of responsibility and care in women's constructions of the moral domain, [as well as] the close tie in women's thinking between conceptions of the self and of morality."[156] The women Gilligan interviewed equated concerns regarding their individual survival (i.e., a feeling that, because of adverse life circumstances, these women could not simultaneously have a baby and ensure their own survival) with selfishness, while emphasizing "the 'responsibility' of a life lived in relationships."[157] Gilligan notes that many of these women confused responsibility "with a [blind] responsiveness to others that impedes a recognition of self."[158] Founded upon a sense of responsibilities to others in their network of relationships, the conception of morality of many of the women in Gilligan's abortion study voiced a denial of self.[159]

Ultimately, Gilligan emphasizes the importance of recognizing that two different modes of moral reasoning exist.[160] A danger of miscommunication between the sexes arises because "men and women . . . speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships."[161] Understanding the different moral perspectives of men and women addresses this communication problem, minimizing the likelihood that there will be "systematic

152. *Id.* at 32.
153. *Id.*
154. *Id.* at 33.
155. *Id.*
156. *Id.* at 105.
157. *Id.* at 127.
158. *Id.*
159. *See id.*
160. *See id.* at 173.
161. *Id.*

mistranslation" in communications between the sexes.[162] Ultimately, Gilligan argues, these two different modes of moral reasoning, while distinct, are connected as two parts of a complex understanding of human experience.[163] She writes:

> While an ethic of justice proceeds from the premise of equality — that everyone should be treated the same — an ethic of care rests on the premise of nonviolence — that no one should be hurt. In the representation of maturity, both perspectives converge in the realization that just as inequality adversely affects both parties in an unequal relationship, so too violence is destructive for everyone involved. The dialogue between fairness and care not only provides a better understanding of relations between the sexes but also gives rise to a more comprehensive portrayal of adult work and family relationships.[164]

Gilligan's theory is relevant to a discussion of gender and jury dynamics. If men and women use different methods of moral reasoning, they should bring these differences into the jury room and use distinct modes of thinking to decide upon a verdict. For example, based on Gilligan's work, one might hypothesize that men tend to view crimes in the context of hierarchies of principles, while women tend to examine crimes within a broader context of human relationships. Crucial to the ultimate question of the guilt or innocence of the accused, perhaps, is the question of gender composition's influence on a jury's verdict. Although no one has empirically tested Gilligan's theory with respect to jury dynamics,[165] other social science scholarship has considered whether jurors' gender affects their behavior during their jury service.

B. Other Social Science Research

Social science research on jury behavior supports the hypothesis that gender affects the outcome of jury verdicts. Many researchers have utilized mock trial experiments to test the effect of certain variables on verdict outcomes. For example, one study found that mock jurors favored same-sex defendants in their judgments of whether a defendant murdered his or her spouse.[166] The mock jurors

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162. *Id.*

163. *See id.* at 173-74.

164. *Id.* at 174.

165. Forman, *supra* note 6, at 51 ("[N]o one has tested the applicability of Gilligan's theory to the jury process."); Flowers, *supra* note 115, at 520 ("[N]o studies have specifically tested the applicability of Gilligan's theory to the jury process.").

166. *See* Cookie Stephan, *Sex Prejudice in Jury Simulation*, 88 J. PSYCHOL. 305, 308 (1974).

also revealed attitudes that seem to substantiate Gilligan's theory regarding the differential thought processes of men and women. For example, female jurors reported feeling more empathy for the defendant than male jurors, and female jurors were more likely to mention that the defendant should receive psychiatric care.[167] These results are consistent with Gilligan's conclusion that women are more likely to consider the network of human relationships in their judgments of moral or, in this case, legal problems.[168] Additionally, men perceived the defendant as somewhat more evil than the women did.[169] Again, Gilligan's research would predict this outcome: Because men tend to organize their thinking in terms of a hierarchy of rights, men, understandably, would be more likely than women to state that a defendant, accused of violating the order of civil and legal rights by killing another person, is evil.

Perhaps because of the gendered nature of the crime, rape cases have been a particular focus of research about gender and jury verdicts.[170] Indeed, possibly the "safest generalization" about gender differences is that women are more likely than men to find the defendant guilty in a rape case.[171] In several experiments asking jurors to render decisions in a hypothetical rape trial, women were more likely than men to find the defendant guilty.[172] Women have also suggested longer sentences for rape defendants than men, and women expressed greater certainty about their verdicts in rape cases.[173] One obvious explanation for these results is that women tend to identify with the female rape victim, leading them to judge the alleged attacker more harshly.[174] Similarly, men may be reluctant to pronounce a verdict of guilty on a defendant who, like

167. *See id.* at 309.

168. *See* GILLIGAN, *supra* note 125, at 29.

169. Stephan, *supra* note 166, at 309.

170. REID HASTIE ET AL., INSIDE THE JURY 141 (1983).

171. *See id.* at 141.

172. *See* James H. Davis et al., *Victim Consequences, Sentence Severity, and Decision Processes in Mock Juries*, 18 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 346, 354 (1977); Gloria J. Fischer, *Gender Effects on Individual Verdicts and on Mock Jury Verdicts in a Simulated Acquaintance Rape Trial*, 36 SEX ROLES 491, 496 (1997); Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOL. 282, 290 (1976); Michael G. Rumsey & Judith M. Rumsey, *A Case of Rape: Sentencing Judgments of Males and Females*, 41 PSYCHOL. REP. 459, 462 (1977).

173. *See* Kathleen McNamara et al., *Verdict, Sentencing, and Certainty as a Function of Sex of Juror and Amount of Evidence in a Simulated Rape Trial*, 72 PSYCHOL. REP. 575, 579 (1993). *But see* Rumsey & Rumsey, *supra* note 172, at 462 (finding no gender difference in length of suggested sentences for rape defendants in a mock trial scenario).

174. *See, e.g.*, McNamara, *supra* note 173, at 582.

themselves, is male.[175] Another explanation may be that men and women have opposite defensive reactions to rape, particularly when the evidence is ambiguous.[176] Men exculpate defendants by shifting blame to the victim, while women are reluctant to moderate their judgment of the defendant's guilt.[177]

Several articles describe subtler gender differences in juror decisions about rape cases. For example, one study found that females, more than males, shifted in their assessment of the defendant's guilt, when their judgment was recorded before and after group deliberation.[178] Another experiment reported significant gender differences when jurors were asked to judge guilt individually, but the same jurors, deliberating in groups, were significantly more likely to render a guilty verdict only when the number of females on the jury approached an overwhelming majority (i.e., ten female jurors out of twelve).[179] Consequently, differences in individual male and female verdict preferences may not always be predictive of verdict outcomes when those same jurors deliberate in groups.[180] These results suggest a need for further research to determine whether men or women are more likely to change their initial assessment of guilt following discussions with fellow jurors. Because female jurors participate at lower rates than male jurors in group deliberations,[181] this shift in judgment possibly occurs in part because women's views are not discussed adequately in the jury room.

Like rape trials, murder trials involving a defense of battered woman syndrome have a highly gendered component. Indeed, one study reports that female jurors viewed more favorably than male jurors a defense of battered woman syndrome in a hypothetical trial

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175. At least one study has found that both men and women tend to be less likely to find a defendant of their sex guilty than they are to find a defendant of the opposite sex guilty. Stephan, *supra* note 166, at 308. Although Stephan's experiment involved a hypothetical murder case, common sense suggests that this tendency may be a factor in jury decisions for other crimes as well. Other research, however, suggests that this theory of same-sex identification cannot adequately explain all juror decisions. *See, e.g.*, Cathaleene Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 26 J. PERSONALITY & SOC. PSYCHOL. 415, 418 (1973) (finding no sex differences in the attribution of fault to a female rape victim).

176. *See* Rumsey & Rumsey, *supra* note 172, at 464.

177. *See id.* Rumsey and Rumsey state that subjective factors, such as the extent that a juror reacts defensively to a hypothetical situation or identifies with a same-sex victim, become more significant in a juror's decision-making process when the evidence is inconclusive. *Id.*

178. *See* Davis et al., *supra* note 172, at 359.

179. *See* Fischer, *supra* note 172, at 496.

180. *See id.*

181. *See infra* Part II.C.

of a woman who killed her allegedly abusive husband.[182] With the exception of the jurors' recommendations regarding punishment, this gender difference was mediated by the influence of gender on the jurors' pre-existing beliefs about spousal abuse.[183] Thus, the gender difference in verdict outcome appeared not because of gender per se, but rather because women were more likely than men to hold favorable beliefs about the defense of battered woman syndrome prior to the simulated trial.[184] This evidence regarding battered woman syndrome is particularly important given Justice O'Connor's comment in her concurrence to *J.E.B. v. Alabama* that a woman using battered woman syndrome as a defense to a murder charge may have a legitimate reason to strike potential jurors solely on the basis of their gender.[185]

Other studies have addressed specific factors that produce gender differences in verdict outcomes. For example, one study found that women were more likely than men to find a defendant accused of rape and murder guilty if the women had been exposed to "high-heinous" publicity that dramatized the violent nature of the crime.[186] Women were also more likely to vote guilty if they had been exposed to "high-prejudgment" pre-trial publicity, which strongly suggested that the particular defendant had committed the act, but this effect was significant only for women with a low IQ.[187] The authors discuss several explanations for these gender differences.[188] Prior to the study, they hypothesized that women might be more vulnerable to pre-trial publicity because they would identify with the victim more than men.[189] Contrary to this expectation, however, women actually identified with the victim less than men did.[190] The authors also cite several studies suggesting that women may be generally more susceptible to social influences than

182. *See* Regina A. Schuller et al., *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCHOL. 316, 332 (1994).

183. *Id.*

184. *Id.*

185. *See supra* note 100 and accompanying text.

186. *See* Bruce C. Hoiberg & Lloyd K. Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCHOL. 267, 269, 271 (1973). The term "high-heinous" refers to "the degree to which [the publicity] contained lurid descriptions of the crime." *Id.* at 269.

187. *Id.* at 271.

188. *Id.* at 272-74.

189. *Id.* at 268.

190. *Id.* at 272. The authors speculate that this result can be explained by the fact that women, assumed to be more vulnerable to crime than men, may feel a greater need to differentiate themselves from the victim. *Id.* at 273. Additionally, women's need to believe in a "just world" may lead them to derogate the victim so they can conclude that "tragedies like that may happen to bad girls like her, but not to (good) persons like me." *Id.*

men.[191] Finally, they hypothesized that men may have been less affected by the publicity because they perceived it as manipulative and reacted unfavorably to it.[192]

Numerous articles in journals of social psychology examine the effect of a defendant's attractiveness on verdict outcome and sentencing recommendations.[193] Here, too, researchers have found gender differences.[194] In one study, mean sentences suggested by male jurors decreased from 3.24 to .95 years in prison, on a scale of zero to seven, depending on whether the male defendant was considered attractive.[195] Conversely, mean sentences given by female jurors remained unchanged, at 2.90 years, by the factor of the defendant's attractiveness.[196] A similar result was obtained in another experiment; men's evaluations of guilt and sentencing recommendations were significantly less punitive when they were asked to recommend sentences for attractive female defendants.[197] Again, the level of the defendant's attractiveness did not have a significant effect on the sentencing recommendations made by women in the study.[198] An intuitive explanation for these results is that males are simply more responsive to physical attractiveness than females.[199]

Gender differences have also been discovered in mock juries for civil trials.[200] In one experiment, the superior status litigant won seventy-four percent of the cases tried before of an all-male jury, and only fifty percent of the cases before a mixed gender jury.[201] The author of this study hypothesized that women might favor inferior

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191. *Id.* at 274.

192. *Id.* The authors do not cite authority indicating that men may be more likely than women to view publicity as manipulative. They do, however, state that the male gender of the defendant may have made male jurors more sensitive to the potentially prejudicial effects of publicity on their attributions of guilt. *Id.*

193. *E.g.*, David B. Gray & Richard D. Ashmore, *Biasing Influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOL. REP. 727, 727, 732 (1976).

194. *E.g., id.*

195. *Id.* at 732.

196. *Id.*

197. *See* Michael G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY 45, 50-51 (1974).

198. *Id.* at 50.

199. *Id.*

200. *See* Eloise C. Snyder, *Sex Role Differential and Juror Decisions*, 55 SOC. & SOC. RES. 442 (1971). Although Snyder's article examines only the results of actual civil trials, not criminal trials, the gender differences Snyder describes are relevant in the criminal context as well. For example, if, as Snyder states, women are more likely to favor the inferior status litigant, women may be more likely to favor a defendant whom they perceive as socially disadvantaged.

201. *Id.* at 444.

status litigants because, like a minority group, they are more likely than men to identify with those who belong to minority groups.[202] In contrast, women have not been found to reward inferior status litigants with increased damages; at least two studies found that women award less money than men.[203] One explanation for women's reluctance to award damages is the "rigidly conservative economic positions" that they have historically maintained, despite their traditional affiliation with the underdog.[204]

In another study, women were more likely to vote for the plaintiff in various scenarios taken from actual sexual harassment cases, regardless of whether the behavior in question was perceived as innocuous, ambiguous, or severe.[205] Gender alone, however, did not affect the award of damages in the same experiment; only those jurors who had been victims of sexual harassment were likely to award the plaintiff increased money damages.[206] Because female participants were more likely to report having been sexually harassed,[207] the result is that women, on average, award more money to sexual harassment plaintiffs than men.[208] This result is caused directly by previous experience with sexual harassment and only indirectly by gender.[209]

On the other hand, some research finds no support for the idea that males and females behave differently as jurors. One study of mock jurors, whose participants were undergraduate psychology students, concluded that men and women did not differ in their verdicts for a murder case, nor in their beliefs about actual guilt or innocence of defendant.[210] Similarly, *Inside the Jury* cites several other studies that found no difference between male and female verdict preferences.[211] British researchers have also concluded, based on data from actual jury outcomes, that "as a rule, the

202. *Id.* at 447.

203. *See id.* at 446; Cookie Stephan & Judy Corder Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. SOC. PSYCHOL. 149, 150 (1977).

204. *Snyder*, *supra* note 200, at 446.

205. Mary A. Gowan & Raymond A. Zimmermann, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCHOL. 596, 613 (1996).

206. *Id.*

207. Specifically, 54% of Hispanic females, 56% of Caucasian females, 16% of Hispanic males, and 17% of Caucasian males participating in the study indicated that they had been victims of sexual harassment. *Id.*

208. *Id.*

209. *Id.*

210. Charlan Nemeth et al., *From the '50s to the '70s: Women in Jury Deliberations*, 39 SOCIOMETRY 293, 296-97 (1976).

211. HASTIE ET AL., *supra* note 170, at 140.

presence of women in any numbers is not likely, *per se*, to change the nature of the verdict returned."[212]

C. Women's Participation in Jury Deliberations

Research about the effect of gender on individual verdict preferences is revealing, but a jury verdict is not the sum of individual verdict preferences; rather, it is the product of a group deliberation process.[213] Therefore, information about male and female rates of participation in the jury room is crucial to understanding how gender affects verdict outcomes. In an early study of mock jury deliberations, researchers at the University of Chicago Law School discovered "a continuance in jury deliberations of [the] sex role specialization observed in adult family behavior."[214] Their data revealed that men "pro-act" by initiating "relatively long bursts of acts directed at the solution of the task problem," while women display a tendency to react to the contributions of others.[215] Specifically, men exceeded women in the "attempted answers" categories of giving suggestions, opinions, or orientations, while women exceeded men in the "positive reactions" categories of showing solidarity, tension release, or agreement.[216] The authors conclude that sex-role differentiation can be reliably demonstrated in jury deliberations.[217] Dating from 1956, this study could be criticized because the authors began their research with the hypothesis that jurors would display traditional sex roles in the jury room, as they do within their family interactions.[218] Therefore, their scorers, particularly considering the strong gender roles characteristic of the 1950s culture, may have been predisposed to observe the sex-typed behaviors that the researchers assumed they would find.

A more recent study notes that the role of women has changed considerably since 1956 and questions the interpretations of Strodtbeck and Mann, finding significant gender differences in juror

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212. JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 101 (1979). Baldwin and McConville found, based on jury trials in Birmingham, England, that the acquittal rate for cases where four or more women were on the jury "corresponds pretty well exactly to the city average." *Id.*

213. *See* Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 594 (1987).

214. Fred L. Strodtbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3, 8 (1956).

215. *Id.* at 9.

216. *Id.* at 7-8.

217. *Id.* at 11.

218. *Id.* at 4.

behavior.[219] The results of this study revealed that men were more likely to take a position at the head or foot of the table in the deliberation room.[220] Additionally, men tended to communicate more frequently than women and were the target of more communications from others.[221] The authors also discovered gender differences in the way jurors perceived their fellow jurors.[222] Men were rated higher than women on the following adjectives: intelligent, influential, independent, confident, rational, strong, courageous, aggressive, active, and persistent.[223] The men were also seen more as leaders, while the women were better liked.[224] Finally, researchers found no gender differences in juror reports of the adjectives: good, honest, friendly, tolerant, consistent, or trustworthy.[225] Interestingly, men were rated as possessing more characteristics traditionally associated with the law and legal actors, including intelligence, influence, leadership, and rationality.[226] The authors noted that the gender differences reflected in their results "make clear that [their] subjects, much like the folklore of attorneys, tended to assume that women are relatively more passive, weak and non-influential."[227]

Hastie et al. report similar differences regarding the participation of men and women in their mock jury study.[228] For example, male jurors, on average, made forty percent more remarks than female jurors during deliberations.[229] Men and women also differed regarding the substance of their comments.[230] Men made more references to case facts, legal issues, disputed key facts, and organizational matters, while women made more verdict statements and statements irrelevant to the case.[231] The authors of this study caution, however, that these differences should not be ascribed solely to gender, without further analysis, because the jurors differed in other areas, including education, occupation, and experience in decision-making contexts.[232]

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219. Nemeth, *supra* note 210, at 294, 296.
220. *Id.* at 296.
221. *Id.* at 297.
222. *Id.* at 299.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 304.
228. HASTIE ET AL., *supra* note 170, at 141-42.
229. *Id.*
230. *Id.* at 142.
231. *Id.*
232. *Id.*

Based upon this evidence of women's relative silence in jury deliberations, it appears likely that many juries render a verdict without the equal participation of male and female jurors. As research has shown, "the domination of a few and the silence of others increase the likelihood of erroneous group decisions."[233] Although some jurors, for various reasons, likely will not actively participate in deliberations, the danger of reaching erroneous verdicts probably increases when a certain class of society consistently remains silent in the jury room. Indeed, ensuring that jury discussions are truly "group" deliberations means that "[w]omen need to speak more and men need to listen more."[234]

D. Implications of the Research

The social science research described above has many implications for theories about juries. The importance of this research, however, lies in an evaluation of its ability to predict actual jury deliberations. Next, consideration is warranted regarding how a theory proposing that women bring a unique and distinct voice to the jury box can be reconciled with the ideal of equality between the sexes.

1. Assessment of the Research

Most of the studies cited above can be criticized on predictable grounds. These studies, performed mostly by psychologists and sociologists, did not target the attitudes and decisions of actual jurors.[235] Rather, the vast majority of these studies used college students as subjects.[236] Clearly, college students do not form the exclusive population from which jury venires are drawn. Consequently, the findings of psychologists regarding juror decisions in mock trials can be generalized to actual jury behavior only if college students are sufficiently representative of the larger population. Although the representativeness of the samples used in these

233. Marder, *supra* note 213, at 600.

234. *Id.* at 599.

235. *But see* Snyder, *supra* note 200, at 443 (using actual jurors).

236. Of the nearly twenty psychological studies cited in this paper, only five appear to have used subjects that were not college students. *See* Gowan & Zimmermann, *supra* note 205, at 602 (using individuals called for jury duty, students in business law or human resources management courses, and friends and relatives); Gray & Ashmore, *supra* note 193, at 729 (using senior citizens and members of a lay religious service group); Hoiberg & Stires, *supra* note 186, at 268 (using high school students); Snyder, *supra* note 200, at 443 (using actual jurors); and Strodtbeck & Mann, *supra* note 214, at 4 (using a range of individuals fully established in their sex and occupational roles).

studies may be questioned, psychologists have relied extensively on similar research, drawing exclusively on college students as subjects. Additionally, this problem of representativeness would be more compelling if the five studies using non-college students as subjects had reported results that markedly differed from the other studies. To the contrary, all five studies found gender differences in jury decisions or style of deliberations, suggesting that college students are not unique in their manifestations of gender differences as jurors.[237]

Another concern about drawing generalizations from these findings is that individuals may behave differently when they are actual jurors, whose determinations carry greater legal and social significance, than when they are mock jurors in an elaborately designed experiment. This shortcoming, however, is applicable to most social science research. This criticism notwithstanding, the findings of psychologists regarding juror behavior should be accepted as the best current approximation of juror attitudes and decisions, or, at least, the best alternative to recording actual jury deliberations, a practice that is not permissible because it raises other concerns.[238] Furthermore, regardless of whether the results of the social scientists are accurate in every case confronting an attorney at trial, their research provides valuable insight into juror behavior based upon mock jurors' behavior in similar situations.

Moreover, the gender differences found in these studies are more significant because the gender differences were found in so many different aspects of juror decision-making and deliberative behavior. Although common sense might predict gender differences in trials of cases where gender is a prominent issue, such as rape cases, numerous studies have found that male and female jurors respond differently in other contexts as well.[239] These results became even more compelling when considered in light of the evidence compiled by psychologists, such as Carol Gilligan.[240] Because men and women approach moral dilemmas differently and do not always share the same conception of justice,[241] a hypothesis that male and

237. For the conclusions reached in these five studies, that gender differences exist in juror behavior, see Gowan & Zimmermann, *supra* note 205, at 611, 613; Gray & Ashmore, *supra* note 193, at 732; Hoiberg & Stires, *supra* note 186, at 271-72; Snyder, *supra* note 200, at 446; and Strodtbeck & Mann, *supra* note 214, at 7-8.

238. *See, e.g.*, Abraham Abromovshy & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precendent*, 28 ARIZ. ST. L.J. 865 (1996).

239. For a more extensive discussion of these studies, particularly those that did not involve juror decisions about rape trials, see *supra* Part II.B-C.

240. For an explanation of Gilligan's theories regarding gender and moral reasoning, see *supra* Part II.A.

241. *See supra* notes 161-64 and accompanying text.

female jurors might think differently about the same body of evidence in a criminal trial is reasonable. Indeed, consideration of Gilligan's theory in conjunction with the mock jury studies is crucial; Gilligan provides a cognitive and psychological explanation for why gender differences might exist in juror decisions,[242] supported by the empirical evidence presented in the mock jury studies. Taken together, these two bodies of research provide powerful support for the conclusion that gender plays a significant role in the decisions that jurors make in actual criminal cases.

2. Distinctiveness Versus Equality

The observation that jurors tend to make different decisions in the courtroom depending upon their gender[243] has a puzzling impact on the issue of gender equality in the legal system. If women do, indeed, bring a unique voice to the jury room, contributing a different perspective from the insight offered by men, this distinctiveness may affect the attempt to achieve ideal equality between men and women. The notion that women bring distinctiveness into the courtroom is difficult to reconcile with the goal of achieving gender equality. In considering this issue, an examination of the differences between the two traditionally competing strains of feminist legal theory is helpful.

Liberal feminists adopt perhaps the most intuitive understanding of feminism: They believe that men and women should be treated alike and that all gender-based classifications are impermissible.[244] This reasoning appeared to underlie the Supreme Court's decision in *J.E.B. v. Alabama*, in which the Court ruled that gender-based peremptory challenges are unconstitutional because they require classifying jurors on the basis of their gender.[245] In its decision, the Court disavowed the idea that any predictable differences exist in decisions made by male and female jurors.[246] This rationale is consistent with the philosophy of liberal feminism. Liberal feminists argue that men and women should be treated equally in all respects, and therefore, they believe that no principled reason exists to distinguish between the sexes when exercising peremptory challenges.[247]

242. *See supra* notes 161-64 and accompanying text.
243. *See supra* Part II.B.
244. *E.g.*, Cipriani, *supra* note 106, at 1268-69.
245. *See supra* notes 85-87 and accompanying text.
246. *See supra* notes 76-78 and accompanying text.
247. *See* Cipriani, *supra* note 106, at 1269.

Cultural feminists, on the other hand, argue that gender differences do exist and that "these differences must be acknowledged and embraced.... [in] recognition of the unique contributions women make to the social and legal world."[248] Cultural feminists, such as Carol Gilligan, believe that women speak in a voice that is distinct from that of men and advocate for greater acceptance and value for this unique quality.[249] A common critique of cultural feminism identifies the paradox between recognizing women's distinctness and striving for equality between the sexes.[250] Acknowledging that women have a distinct perspective implies the existence of a standard from which they differ.[251] This standard is generally defined by men.[252] Thus, embracing the theory that "women are distinct" risks accepting a male standard against which to measure women's experience, a situation that arguably reinforces existing power inequities between men and women.[253] Cipriani notes that "[c]ultural feminism . . . risks reinforcing separate sphere identities and their accompanying stigmas."[254]

The theory of gender differences in juror decisions presented in this article is consistent with the philosophy of cultural feminists and, therefore, creates a tension between the distinctness and equality of men and women. As cultural feminists have argued, however, the solution to this problem lies in valuing the distinct voice that women have and avoiding valuing women's unique experiences in a way that confines them to the separate, gendered sphere of domesticity that defined women's role for centuries.[255] Cultural feminism is, thus, a theory with two important components: women's voices are acknowledged as distinct from those of men, and they are valued for the contribution they make to a fuller understanding of the human experience by incorporating more than the traditional male viewpoint.[256] Placing special emphasis on the value of the female perspective may help overcome the problem of potential inequalities stemming from an understanding of women as distinct from men. In this way, the tension between distinctiveness and equality may be resolved, and a theory that women and men bring unique voices to the jury room can be embraced without sacrificing the ideal of equality between the sexes.

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248. *Id.* at 1270.
249. *Id.* at 1272-73.
250. *See id.* at 1272.
251. *See id.*
252. *See id.*
253. *See id.*
254. *Id.*
255. *Id.* at 1272-73.
256. *Id.* at 1270, 1272.

III. WHAT DIFFERENCE SHOULD GENDER MAKE?

As the preceding discussion demonstrates, gender can affect both verdict outcome and sentencing recommendations,[257] and women bring a different voice to the jury room.[258] In light of the research regarding women's rate of participation in jury deliberations,[259] reason for concern exists that this "different voice"[260] may be lost in the group deliberative process, leading to verdicts that are made without the full input of female jurors. More disturbing, however, is that Supreme Court jurisprudence and most legal policies and procedures ignore the difference that gender can make in the jury process.[261] As the Court notes in *J.E.B. v. Alabama*, the "generalization" made by the State of Alabama, when using peremptory challenges to exclude men from the jury, is "overbroad."[262] Accordingly, the Court in J.E.B. found male and female jurors to be functional equivalents; therefore, any peremptory strike based on gender alone is impermissible.[263]

Acknowledging, however, that male and female jurors are *not* fungible raises the obvious question of what effect this information should have on a system of administering fair and impartial justice. Specifically, the question arises how this understanding of gender differences in juror decisions contributes to the current system of trial by jury in the United States. In addressing these questions, this article begins with the perspective that jurors necessarily bring individual biases and experiences, some of which are created by gender, into the courtroom. In this manner, jurors are removed from "[t]oday's guiding image of the ideal juror [that] has its source in Enlightenment beliefs about the independence of the objective world."[264]

In an article questioning traditional conceptions of jurors, Mark Cammack writes that "recent [research] on human cognition . . . contradicts the assumptions that underlie the legal system's definition of the ideal juror," because "our contact with reality is mediated by the assumptions and expectations we have about it."[265] Understanding how individuals, including jurors, perceive reality

257. *See supra* Part II.B.
258. *See supra* note 248 and accompanying text.
259. *See supra* notes 222, 229 and accompanying text.
260. GILLIGAN, *supra* note 125, at 2.
261. *See supra* Part II.A-B.
262. *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994).
263. *Id.*
264. Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 427 (1995).
265. *Id.* at 462.

and make decisions is particularly relevant to the experience of women and other minorities. Cammack writes:

> Finally, the thesis that the fundamental assumptions which shape our constructions of reality are not randomly distributed in the population but follow ethnic, gender, racial, and class lines is supported by a large body of literature, much of it written by women and racial and ethnic minorities whose main message is that the standard account of life in the United States does not comport with how they experience it.[266]

This article asserts that jurors, as Cammack argues, do bring unique perspectives to the jury box. Women and other minorities must have a distinct voice as jurors because their life experiences differ from the traditional male experience. In formulating suggestions for ensuring that women's voices are heard in the jury room, this article proceeds from the assumption that female jurors, like male jurors, make decisions based upon their unique life experiences. Additionally, as the research in Part II.C suggests, it is important to recognize that jurors do not report their own individual decisions to the trial judge about the guilt or innocence of the accused. For this reason, the group deliberative process is critical because that process affects whether every juror's voice will be heard. Thus, the second part of the theory proposed in this article assumes that the group decision-making process is an important factor in examining how gender affects jury dynamics.

In the proposals for reforming the current jury system, this article first argues that the criminal jury must be understood as an instrument that safeguards the rights of the accused in his or her attempt to defend against the charges brought by the State. Next, this article analyzes four proposals, in order of most controversial to least controversial,[267] that could account for gender differences in the jury room and that ultimately increase the likelihood that a criminal defendant will receive a fair and impartial trial.

A. Whose Jury Is It?

In *Duncan v. Louisiana*,[268] the Supreme Court explained why the right to trial by jury is fundamental to the system of justice in

266. *Id.* at 482.

267. In analyzing the four proposals, this article considers possible critiques of each reform.

268. 391 U.S. 145 (1968).

the United States and guaranteed to criminal defendants in state court under the Fourteenth Amendment.[269]

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.[270]

As stated, the primary purpose of trial by jury is to protect the rights of the criminal defendant.[271] Although a jury system also affords citizens the opportunity to participate in the administration of justice and teaches them about the legal system,[272] the function of the jury as a safeguard for the defendant's rights must be paramount.

Instead of focusing on the rights of criminal defendants, recent Supreme Court decisions about peremptory challenges have emphasized the rights of prospective jurors, and specifically their right not to be discriminated against in the selection of a petit jury.[273] Decisions limiting the use of peremptory challenges similarly have been based largely upon the rights of the excluded jurors. In *J.E.B.*, for example, the Court stated that to exclude a juror because of his or her gender "denigrates the [juror's] dignity."[274] Academic literature has reiterated this view.[275] One proponent of eliminating gender-based peremptory strikes states that "the exclusion of individuals based on gender signals that the targeted gender does not belong to the political community."[276] Drawing an analogy to "the status or dignitary harm suffered by jurors excluded because of race,"[277] the author argues that excluding a woman solely because

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269. *Id.* at 155-56.

270. *Id.* (footnote omitted).

271. *Id.*

272. Marder, *supra* note 213, at 599.

273. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 145-46 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. . . . When persons are excluded from participation . . . solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.") (footnote omitted); Georgia v. McCollum, 505 U.S. 42, 48 (1992) ("[D]enying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror.").

274. *J.E.B.*, 511 U.S. at 142.

275. *See, e.g.*, Note, *supra* note 67.

276. *Id.* at 1937.

277. *Id.*

of her gender "essentializes [her,] based on gender[,] and ignores her ability to act as an autonomous individual."[278] Even worse, some argue, gender-based peremptory challenges "harm[] not only the dignity of the excluded juror, but also indirectly denigrate[] other members of the group."[279]

This analysis about the rights of excluded jurors makes two unwarranted assumptions. First, the reasoning of most opponents to gender-based peremptory strikes assumes that women are more likely than men to be struck from juries during peremptory challenges.[280] To the contrary, research about the use of peremptory challenges in one jurisdiction reveals that "men, and not women, are more vulnerable to exclusion from modern juries."[281] Although women were undeniably excluded from jury venires for many years,[282] the proposition that women were systematically excluded from modern juries via the use of the peremptory challenge, prior to the *J.E.B.* decision in 1994, is unwarranted. Indeed, *J.E.B.* embodied a challenge not to *women's* exclusion from the appellant's petit jury, but rather to the State of Alabama's system of striking *men* from the jury in an effort to find jurors more receptive to the State's claims regarding paternity and child support.[283]

Additionally, many proponents of prohibiting gender-based peremptory strikes assume that such challenges denigrate women by sending the message that women are not qualified to participate in the civic forum of the courtroom.[284] One scholar, however, has recognized that "[t]he peremptory challenge is not a determination of qualification, but a determination of preference."[285] When prospective jurors are dismissed on a peremptory challenge, instead of judging the jurors' qualifications, the party striking them is striving to obtain a jury that will be most receptive to that party's theory of the case.[286] If prospective jurors are educated about the jury

278. *Id.* at 1936. The author of this note, like other proponents of prohibiting gender-based peremptory challenges, assumes that women, not men, are the primary victims of gender-based strikes, and that such strikes are a commentary on the female juror's ability to serve in the jury box. For reasons explained below, this article asserts that both of the assumptions are faulty.

279. *Id.* at 1936-37.

280. *See, e.g.*, Cipriani, *supra* note 106, at 1294 (discussing the *J.E.B.* Court's reliance on this erroneous assumption).

281. *Id.* at 1254.

282. *See supra* Part I.A and I.B.

283. *See* J.E.B. v. Alabama, 511 U.S. 127, 129, 137-38 (1994).

284. *See, e.g.*, Flowers, *supra* note 115, at 532.

285. *Id.* at 531-32.

286. See *infra* Part III.C for a discussion of the extent to which the legal system should condone litigants' attempts to seat a jury most favorable to their case.

selection process,[287] and realize that peremptory challenges are not a reflection of their qualifications, the belief that peremptory challenges denigrate either male or female jurors is completely unfounded. As one commentator has noted, "[t]he system degrades jurors when it assumes they are not intelligent enough to understand the difference between men and women and recognize that litigants are acting on that reality."[288]

When considering the implications of research by Carol Gilligan and other academics, recognition that such research must be analyzed in terms of how it contributes to an understanding of a defendant's right to an impartial jury is crucial. Although prospective jurors have the right not to be excluded from jury venires, and purposeful discrimination in choosing a jury should be avoided,[289] this article asserts that the right of the defendant to receive a fair trial should be the most compelling consideration. The following discussion of four suggestions for improving gender representation and interactions on juries is structured with this principle in mind.

B. Proportional Representation

At least one academic article has proposed requiring proportional representation of men and women on petit juries.[290] Although proportional gender representation seems like a radical idea, and admittedly is open to criticism on numerous grounds, it would not be necessarily a difficult system to administer.[291] Because men and women each comprise approximately half of the population, equal numbers of men and women would comprise randomly-selected venires.[292] Under this system, assuming that juries are generally composed of twelve people, six men and six women would ultimately be seated, as well as at least one alternate for each gender.[293] Litigants would possess an equal number of peremptory challenges to exercise for men and women.[294] One obvious advantage of this system is that it eliminates the possibility that peremptory challenges could be exercised on the basis of gender.[295] If an attorney exercised a peremptory challenge against a juror, that individual

287. *See infra* Part III.D.
288. Flowers, *supra* note 115, at 532.
289. J.E.B. v. Alabama, 511 U.S. 127, 145-46 (1994).
290. *See* Forman, *supra* note 6, at 75.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 75-76.
295. *Id.* at 76.

would be replaced by someone from the venire of the same gender.[296] In light of the current law on peremptory challenges, including the fact that gender-neutral reasons for striking jurors easily are offered and accepted,[297] a system of proportional representation is significantly advantageous because it ensures that jurors truly are seated without being subjected to discrimination based upon their gender.[298]

Another benefit of the proportional representation system is that it "would leave open the possibility that women indeed do bring a different voice or vision to the jury room, without the need to traffic in denigrating or inaccurate stereotypes and without prejudice to the litigant's right to an impartial jury."[299] Because women would automatically compose half of the jury, thereby ensuring that their perspective is reflected in the deliberations,[300] no opportunity would exist for litigants to strike them from the panel solely on the basis of their gender. Litigants would not need to make creative use of peremptory challenges to ensure that more men or more women were chosen for the petit jury. Ideally, proportional representation "would more accurately present a microcosm of the real world, and thus further ensure that a defendant would be tried by a true jury of her peers."[301]

Any proposal for proportional gender representation on juries likely will be criticized on many grounds and ultimately defeated. First, when the Supreme Court held in *Taylor v. Louisiana* that the Sixth Amendment requires that jury venires be composed of a fair cross section of the community, it explicitly stated that its holding did not require that petit juries be representative of the actual population.[302] As a result, some critics may argue that, absent a constitutional need dictated by the Sixth Amendment, the administrative difficulties and other potential problems[303] would render any benefits of a system of proportional gender representation on juries too costly.

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296. *Id.*

297. *See, e.g., id.* at 60 (noting that the Supreme Court has implied in recent decisions that "explanations for peremptory challenges need not be scrutinized too closely" and indicating that a "danger of pretext" exists when sex discrimination manifests in gender-based peremptory challenges).

298. *Id.* at 76.

299. *Id.*

300. The benefits of a system of proportional gender representation are partly contingent upon women's actual participation in the deliberations. A jury composed of six men and six silent women does not advance the unique perspective of women any further than the current system.

301. Forman, *supra* note 6, at 76.

302. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

303. For further discussion of difficulties with proportional representation, see *infra* notes 312-16 and accompanying text.

A second objection to a system of proportional representation is that the system violates the Equal Protection Clause because it is a state classification based on gender.[304] As Forman notes in her article proposing this system, however, the Equal Protection Clause prohibits only those gender classifications that "are not substantially related to an important government purpose."[305] Proponents may argue that proportional gender representation meets this standard because "it is substantially related to two government purposes — the need to eradicate gender discrimination in jury selection and specifically in the use of peremptory challenges, and the need to affirmatively promote inclusion of women on juries."[306] Moreover, this system lacks many of the objectionable characteristics of traditional affirmative action or quota programs because ensuring equal numbers of men and women on the jury "does not deny individuals of either gender any benefit which they otherwise would have to earn, nor does it favor either gender."[307] If such a system were ever challenged, however, Forman's argument regarding the two "important government purposes" of proportional gender representation would not pass Supreme Court scrutiny.[308] The Court would likely respond that it eradicated gender discrimination in jury selection in *J.E.B. v. Alabama*, thus rendering Forman's first justification moot. Similarly, the Court would probably reject her argument favoring affirmatively promoting the inclusion of women on juries, because Supreme Court precedent is clear that the inclusion of racial, ethnic, and gender groups is required only for the jury venire, not for the petit jury itself.[309]

Finally, critics argue that instituting proportional gender representation would set a precedent for proportional racial and ethnic representation on juries.[310] If men and women were required to serve on juries in equal numbers, making a principled distinction between proportional gender representation and proportional representation for minority groups would be difficult. This argument carries particular significance because fluctuating racial and ethnic populations in the United States would render the jury system more difficult to administer if proportional representation were extended to racial and ethnic groups.[311] Furthermore, proportional gender

304. Forman, *supra* note 6, at 80.
305. *Id.*
306. *Id.*
307. *Id.* at 82.
308. *Id.* at 80.
309. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).
310. *See, e.g.*, Forman, *supra* note 6, at 79.
311. *Id.* at 79-80.

representation might immediately call to mind racial quotas in other areas of society, the system may seem distasteful on its very face, and many people may be disinclined to take the proposal seriously.

In her article advocating a system of proportional gender representation for jury service, Forman provides a thorough discussion of, and response to, the criticism that racial and ethnic representation would follow closely behind a policy of equal representation for the sexes.[312] Numerous administrative barriers exist to proportional racial or ethnic representation. For example, because racial and ethnic populations vary in different parts of the United States, each jurisdiction would need to design its own jury selection scheme based, one supposes, upon the latest census data. This data, unlike the data on the gender division, which tends to hover near fifty percent men and fifty percent women in most areas of the country,[313] might be subject to frequent fluctuations, making it necessary to revise the proportionality scheme at least every few years. Additionally, many jurisdictions may lack sufficient numbers of a minority group necessary to provide a jury pool that would ensure the selection of an impartial jury.[314] Another problem is that variations in minority populations across different jurisdictions may lead to forum-shopping based on race, a situation Forman contends is likely to reinforce racism.[315] Finally, guaranteed racial and ethnic representation on juries would require jurors to classify themselves as members of a single racial or ethnic group, "forc[ing] them to choose between multiple identities."[316] Although the gender classification is close to a simple bifurcation, in most cases requiring jurors to classify themselves as one race or ethnicity presents a far more complex choice.

Administrative difficulties aside, a principled reason may exist against extending proportional representation on juries to racial and ethnic groups. As the research discussed in Part II of this paper indicates, theoretical and empirical research supports the claim that men and women are likely to behave differently as jurors. Whether a similar claim could be made about jurors belonging to particular racial or ethnic groups is unclear at this point. The life experiences of any juror are shaped by numerous factors, including race, gender,

312. *Id.*

313. *See* United States Census Data (2000), http://factfinder.census.gov (last visited Aug. 31, 2005).

314. Forman, *supra* note 6, at 79.

315. *Id.*

316. *Id.* at 80.

and social class.[317] Considering the differences that already appear to exist based on gender, a similar assertion that race or ethnicity per se would lead a juror to vote a certain way in the jury room is unsupportable.

Certainly the same could be said of gender: A woman's behavior as a juror cannot be ascribed to the juror's experience as a woman instead of other factors in her life and personal identity.[318] The fact remains that existing research provides a basis for concluding that men and women bring unique perspectives to the jury room,[319] while research on racial and ethnic categories is not necessarily conclusive. Given the administrative barriers to proportional racial and ethnic representation on juries, a compelling argument for limiting proportional representation in jury selection to gender can be made.[320]

C. Limiting J.E.B. *to Only Government Strikes*

Another proposal for jury reform could be made, arising from the premise that women bring a different voice to jury deliberations. Such a proposal would limit the prohibition articulated in *J.E.B. v. Alabama* to the government's use of gender-based peremptory challenges. Such a system would allow a criminal defendant to eliminate potential jurors strictly on the basis of gender.

As discussed in Part I.C, Justice O'Connor advocated this idea in her concurring opinion in *J.E.B.*[321] She based her opinion on the premise that criminal defendants and their attorneys do not violate the Equal Protection Clause when they strike a juror solely because of gender.[322] As Justice O'Connor wrote, "The Equal Protection Clause prohibits only discrimination by state actors. . . . Private civil litigants are just that — *private* litigants."[323] Because there is no state action when a defendant strikes a potential juror, the defendant does not violate the guarantee of equal protection.

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317. Cammack, *supra* note 264, at 482.

318. *See, e.g.*, GILLIGAN, *supra* note 125, at 2.

319. *See supra* Part II.B.

320. If these administrative barriers could be significantly minimized, nothing would preclude extending proportional representation on juries to racial and ethnic groups. Regardless of the situation with racial and ethnic minorities on juries, however, there is a strong argument that moving to a system of proportional gender representation would not necessarily have the "slippery slope" effects claimed by its critics.

321. J.E.B. v. Alabama, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring).

322. *Id.* at 150.

323. *Id.*

Justice O'Connor made a similar argument in her dissent to *Georgia v. McCollum*.[324] In *McCollum*, the Supreme Court extended the principle of *Batson v. Kentucky*[325] when it held that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."[326] In determining whether state action exists, Justice O'Connor wrote that the Court must ask two questions.[327] First, it must consider "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority,"[328] and second, "whether . . . the parties who allegedly caused the deprivation of a federal right can appropriately and in all fairness be characterized as state actors."[329] Justice O'Connor conceded that the peremptory challenge is a creation of state authority but disagreed with the majority regarding the second half of this analysis.[330]

In determining whether criminal defendants are state actors when they exercise peremptory strikes, O'Connor stated that "[w]hat our cases require, and what the Court neglects, is a realistic appraisal of the relationship between the defendants and the government that has brought them to trial."[331] The adversarial system of justice requires that a criminal defense attorney act on behalf of her client's interests, not on behalf of the state.[332] Based upon this reasoning, and the fact that a state can be held responsible for a private decision only when it has exercised considerable coercive power over that choice, Justice O'Connor concluded that peremptory strikes used by defendants do not constitute state action.[333] She also described how racism, both conscious and unconscious, might affect the way a white juror makes decisions about a black defendant at trial, explaining that there might be important reasons to allow criminal defendants to exercise unrestricted peremptory challenges.[334] A parallel argument could be made about the unconscious sexism of male jurors in a case involving sexual harassment or a defense of battered woman syndrome. Finally, Justice Scalia, in a separate dissent, summarized the

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324. 505 U.S. 42, 63 (1992) (O'Connor, J., dissenting).
325. 476 U.S. 79 (1986).
326. *McCollum*, 505 U.S. at 59 (O'Connor, J., dissenting).
327. *Id.* at 63.
328. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).
329. *Id.* (internal quotations omitted).
330. *Id.* at 64.
331. *Id.*
332. *Id.*
333. *Id.* at 66.
334. *Id.* at 68.

"terminally absurd" proposition of the majority in *McCollum* by stating that "[a] criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state."[335]

For these reasons and others, this article argues that allowing criminal defendants to use gender-based peremptory challenges without restriction would be consistent with the Equal Protection Clause. Such a system would allow a defendant to consider a prospective juror's gender in cases where gender issues are particularly important. For example, Roberta Flowers, arguing that the costs of the *J.E.B.* holding are too high, writes that the complicated factors involved in understanding a defense of battered woman syndrome "are inextricably linked to, and cannot be separated from, the juror's gender."[336] Similarly, she states that because men and women view types of sexual harassment differently, "[a] litigant must consider the type of harassment in conjunction with the juror's gender."[337] Social science research on male and female reactions to evidence in rape cases lends further support for the idea that a defendant might wish to take gender into account when exercising peremptory challenges.[338] Additionally, permitting criminal defendants to exercise gender-based peremptory strikes could help ensure that the jury is composed of individuals likely to contribute a variety of perspectives in the jury room.

This proposal, however, could be criticized as resulting in juries hand-picked by defendants to be impermissibly partial to their case. Although the criminal jury is primarily a safeguard for the rights of the defendant, the jury also serves a powerful function in legitimating the criminal tribunal and increasing public confidence in the outcome of the trial.[339] A jury chosen entirely by the defendant, with *no* input from the prosecution, might be excessively biased towards the defendant and viewed as illegitimate for that reason. In contrast, this proposal allows the prosecution to retain the right to challenge jurors for cause, as well as to use peremptory challenges without regard for race or gender. The system retains the essential adversary nature of the selection process for the petit jury. Allowing defendants to exercise gender-based peremptory challenges would ensure that they maximize their input in the jury selection process, particularly in sensitive cases where gender issues are crucial to the

335. *Id.* at 69-70 (Scalia, J., dissenting).

336. Flowers, *supra* note 115, at 526.

337. *Id.*

338. *See supra* notes 169-79 and accompanying text.

339. See *supra* Part III.A for a more extensive discussion of this point. *See also* Duncan v. Louisiana, 391 U.S. 145, 156-57 (1968) (discussing the important functions of the jury trial).

defense, and allows the government to remain confident in the legitimating functions of the jury.

A critic of this proposal might counter that juror challenges for cause are currently sufficient to ensure that defendants achieve a fair and impartial jury. Assuming that a litigant could strike every biased juror for cause, a litigant would not need peremptory challenges that rest on racial or gender classifications and that are considered impermissible by the Supreme Court. Challenges for cause may fail to remove truly biased individuals from the petit jury because these challenges rely on the efficacy of voir dire in identifying the prejudices of prospective jurors. Unless questions asked during voir dire elicit information indicating that the prospective juror is biased, no challenge for cause may be made.[340] As at least one commentator has noted, "voir dire has proven singularly ineffective in revealing bias sufficient to sustain a challenge for cause."[341] If jurors are reluctant to reveal their true prejudices, or if the questioning is not sufficiently extensive or subtle to elicit such information, challenges for cause are rendered effectively useless.

Even assuming that the biases of potential jurors become apparent during voir dire, the showing necesssary to make a successful challenge for cause is very high. Generally, a challenge for cause "depends on a showing of actual or clearly implied bias. . . . Even where a [prospective] juror indicates she has formed an opinion about a case, the [judge] may seat her on the jury, as long as she indicates that she believes she can judge the case fairly."[342] The decision about whether to excuse a juror for cause rests solely within the discretion of the trial judge.[343] Challenges for cause, therefore, are difficult to secure because the standard for demonstrating a juror's prejudice is so high.[344] For this reason, challenges for cause do not always sufficiently protect defendants seeking an impartial jury.

D. Jury Education on Full and Fair Deliberations

Assuming that men and women bring unique perspectives to jury deliberations, arguably the nature of the deliberations themselves, and not the absence of female jurors, silences women's perspectives in the jury room. Male jurors "speak more often, at

340. Forman, *supra* note 6, at 67.

341. *Id.* at 68. See also *infra* Part III.E for a discussion of the potential shortcomings of voir dire.

342. *Id.* at 68-69 (citations omitted).

343. *Id.* at 68.

344. *Id.*

greater length, and are more likely to interrupt other speakers than women."[345] Even if women appear on the petit jury in sufficient numbers, their presence may have little impact if they do not actively participate. This problem might be partially alleviated if all jurors were educated about the effects of gender dynamics in their deliberations.

Courts could use the handbook currently sent to prospective jurors in most states to begin teaching them about gender dynamics in group decision-making.[346] The videotape that introduces prospective jurors to the legal process could also discuss strategies to promote effective group deliberations.[347] The judge could reinforce these messages by instructing the jury on the importance of full participation by all jurors, as well as respectfully listening to others' point of view.[348] Additionally, the selection of a female foreperson could challenge the stereotype that women are not leaders in the jury room and increase the likelihood that the foreperson would be concerned with group dynamics and ensure that all jurors are allowed to speak.[349]

Educating jurors on the characteristics of effective group deliberation is a relatively uncontroversial way to increase the likelihood that women's voices will be heard in the jury room. This proposal also will likely have benefits beyond its implications for gender; racial and ethnic minorities might be encouraged to participate more actively, as well as men who may not participate as fully as the gender averages indicate. Teaching jurors the importance of listening carefully to their fellow jurors is an inexpensive proposal, and it has the potential to improve the quality of deliberations, as well as the accuracy of the verdicts rendered.

E. Effective Use of Voir Dire

Voir dire can be used strategically to question jurors about potential gender bias on sensitive issues. Indeed, proponents of

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345. Marder, *supra* note 213, at 597.

346. *Id.* at 607. In a note describing the relative participation rates of male and female jurors and the importance of ensuring that women's voices are heard, Nancy Marder proposes that juror handbooks should be utilized for this purpose. *Id.* She further states that updating the handbook of the federal courts "would be particularly timely" as the discussion regarding juror behavior had not been updated in the twenty-five years prior to 1987, when Marder's note was published. *Id.*

347. *Id.* at 608.

348. *Id.*

349. *Id.* at 609-10. Marder states that men are currently more likely to be selected as the foreperson of the jury and that women are more likely to elicit participation from all members of the group. *Id.* at 595, 603.

restrictions on gender-based peremptory challenges advocate relying on voir dire, rather than generalizations based on gender stereotypes, to eliminate jurors with gender biases.[350] For example, an attorney defending a woman accused of murdering her abusive husband could probe jurors' attitudes about spousal abuse or ask the judge conducting voir dire to do so, thus eliciting information that is useful for deciding which jurors to strike with peremptory challenges. Even in trials where gender is a subtler issue, voir dire can effectively minimize sex-based discrimination by eliminating jurors with certain prejudices.[351]

Expanding the use of voir dire has several advantages. First, information gathered during voir dire can help defense attorneys use peremptory challenges more effectively. In a murder trial involving a defense of battered woman syndrome, for example, the defense attorney may choose to strike a male juror based upon the assumption that the juror would be less receptive to her client's defense. The particular male juror, however, may defy the odds of social science research and actually may be sympathetic to the defense of a woman abused by her husband. Through effective use of voir dire, the defense lawyer could avoid striking a juror who is receptive to her client's case. Assuming that gender-based peremptory challenges were still available to the criminal defendant, voir dire could help the defense attorney more effectively use those strikes. Alternatively, given the reality of the law on peremptory challenges since *J.E.B.*, voir dire still provides litigants the opportunity to question prospective jurors on gender issues, which may critically affect the outcome of the trial.

Despite its usefulness in combating gender discrimination, the expansive use of voir dire is not without shortcomings. Extensive voir dire costs valuable time in courtrooms with already overcrowded dockets. Lawyers, when permitted to question jurors themselves,[352] might be under pressure to conduct their questioning efficiently to conserve the court's time. One scholar notes that "judges' hostility toward extensive voir dire may discourage lawyers

350. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 143-44 (1994) ("Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently."); Note, *supra* note 67, at 1934 (arguing that "attorneys can rely on voir dire to detect the 'situation-specific' bias of prospective jurors," rather than assuming that prospective jurors are biased because of their gender) (citation omitted).

351. For a discussion of how voir dire can be used to accomplish these goals, see Mark Soler, *"A Woman's Place . . .": Combating Sex-Based Prejudices in Jury Trials Through Voir Dire*, 15 SANTA CLARA L.R. 535 (1975).

352. *See* Forman, *supra* note 6, at 69-70 ("In the federal courts and in many state courts, the judge conducts the voir dire, although usually with joint participation by the attorneys.").

from full questioning."[353] Attorneys have another incentive to be expedient in their questioning because lengthy questioning of prospective jurors may risk irritating the jurors who end up in the jury box.[354]

Additionally, voir dire may not effectively identify the biases of potential jurors.[355] Jurors may be particularly disinclined to be forthcoming about their personal opinions when questioned about sensitive topics like gender discrimination. One study found a correlation between evaluation anxiety, defined as the jurors' desire to perform positively, and the degree of honesty in jurors' responses to questions during voir dire; the more the jurors reported feeling tense or anxious during the questioning, the more dishonest they reported being in their answers.[356] Sensitive topics like gender discrimination are particularly likely to produce anxiety.

Even if prospective jurors intend to be completely honest in their responses to voir dire, they may be influenced by subtler interactions in the questioning. Through a tone of voice or the phrasing of a question, the questioner may communicate the 'correct' answer to the jurors.[357] Moreover, jurors harboring *unconscious* sexist opinions may seem sensitive to gender issues when questioned in voir dire but subsequently bring their sexist views into the jury room nonetheless. Questions posed to prospective jurors by the judge may be less effective than those posed by attorneys.[358] Due to the "desire to please the person in the most authoritative position, jurors questioned by judges during voir dire may not respond honestly. Rather, cued by the form of the questions or the judge's demeanor, the jurors may provide the answer they believe the judge wants to hear."[359]

Despite the many potential problems with voir dire, it remains an effective tool for attorneys in their effort to secure an impartial jury for their clients. Particularly for defense lawyers, whose use of race- and gender-based peremptory challenges remains prohibited, voir dire provides a valuable opportunity to educate prospective jurors and identify those individuals with the most biased opinions.

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353. *Id.* at 72.

354. *Id.* at 74.

355. *Id.* at 72.

356. *Id.* at 73 (citing Linda L. Marshall & Atthea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205, 214 (1986).

357. *Id.* at 72.

358. *Id.* at 72 n.227 (citing Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131 (1987)).

359. *Id.* at 72.

Furthermore, the intelligent use of voir dire is the least controversial of the proposals discussed in this article, making it potentially the most convenient strategy for minimizing gender discrimination on juries and maximizing the opportunity for women's voices to be heard.

CONCLUSION

Research by Carol Gilligan suggests, and the work of countless other social scientists has confirmed, that gender does affect jury deliberations.[360] Although it is impossible to predict, based upon an individual's gender, how that person will behave as a juror, clear gender patterns have emerged from the research on juror behavior.[361] As Justice Douglas wrote for the majority in *Ballard v. United States*, "the two sexes are not fungible"[362] as jurors, and any pretense to that effect ignores reality. Men and women, as two distinct groups in society, bring different perspectives to the jury room, and the legal system should account for this fact in its construction of rules about criminal and civil juries.

Since *Taylor v. Louisiana*, the Supreme Court has recognized that a criminal defendant must be tried before a jury selected from a fair cross section of the community, if the Sixth Amendment guarantee to a jury of one's peers is to have any practical significance.[363] A jury drawn from a fairly representative venire, however, cannot be *truly* a jury of one's peers if the perspective of women is absent or silenced. One article on juror behavior, authored by psychologists instead of lawyers, aptly concluded that "[i]f racial imbalance on a jury can violate the civil rights of a defendant, it is likely that male-female imbalance can violate something of the same."[364]

The research finding gender differences in juror behavior affects our understanding of what constitutes an 'impartial' juror for certain trials involving complex gender issues. The classic example is a woman on trial for murder who claims battered woman syndrome as a defense. If research indicates that men tend to be less favorable to this defense,[365] regardless of what the male jurors might profess in voir dire, a plausible argument is that an impartial jury would include only jurors who are fairly inclined to accept a

360. *See supra* Part II.A-B.
361. *See supra* Part II.C.
362. Ballard v. United States, 329 U.S. 187, 193 (1946).
363. 419 U.S. 522, 537 (1975).
364. Davis et al., *supra* note 172, at 364.
365. *See supra* note 182 and accompanying text.

defense that is recognized by law. At the very least, such a defendant ought to be allowed to use peremptory challenges, even if they are based solely on gender, in a manner likely to maximize the chance of producing an impartial jury.

For these reasons, and others discussed in this article, the prohibition on gender-based peremptory challenges should be limited to the government. The urge to achieve absolute parity in the privileges afforded to each side in a criminal trial is tempting. Instead, allowing defendants to exercise peremptory strikes, even in a manner that takes gender into account, is a better system, considering the accused is relatively disadvantaged in defending against the State, which has substantial resources. Criminal defendants should apply the research of social scientists and, regardless of the information elicited from jurors during voir dire, make peremptory challenges on the basis of gender alone. A defendant always risks relying on generalizations that do not apply in an individual case, and accepting a juror who is actually biased, or rejecting a juror who might have been impartial. If, however, a defendant and her attorneys believe that using gender-based challenges will help obtain a true jury of her peers, then the gender-based peremptory challenges should be permitted. The most recent research indicates that gender matters in the jury room. Accordingly, criminal defendants should be allowed to account for gender in their selection of a jury.