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Constitutional Law - The United States Supreme Court on Gender-Based Peremptory Jury Challenges - Constitutionality Correct but Out of Touch with Reality: Litigants Beware - J.E.B. v. Alabama ex rel. T.B.

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Casenotes

CONSTITUTIONAL LAW—THE UNITED STATES SUPREME COURT ON GENDER-BASED PEREMPTORY JURY CHALLENGES—CONSTITUTIONALLY CORRECT BUT OUT OF TOUCH WITH REALITY: LITIGANTS BEWARE! *J.E.B. v. Alabama ex rel. T.B.*, 114 S. CT. 1419 (1994).

INTRODUCTION

On October 21, 1991, jury selection began in the civil paternity action against J.E.B.[1] The State of Alabama had filed a complaint for paternity and child support on behalf of T.B., alleging that J.E.B. was the father of T.B.'s minor child.[2] The Circuit Court of Jackson County, Alabama assembled a panel of thirty-six potential jurors, twelve males and twenty-four females.[3] The court struck two men and one woman for cause, leaving only ten male jurors out of the remaining total of thirty-three.[4] The State's attorney then used nine of its ten peremptory strikes to remove male jurors.[5] J.E.B.'s attorney used his first ten strikes to eliminate women from the jury, and exercised his eleventh strike to eliminate the last remaining male.[6] As a result, the petit jury consisted exclusively of females.[7]

Before the jury was empaneled, J.E.B's attorney challenged the State's peremptory strikes.[8] He argued, using *Batson v. Kentucky*[9] and its progeny,[10] that these strikes violated the Equal Protection Clause of the

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1. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994).

2. *Id.* This complaint was filed in the District Court of Jackson County. After a hearing the District Court entered an order adjudicating paternity and ordered the father to pay child support. Then, the father appealed to the Circuit Court. J.E.B. v. State of Alabama *ex rel.* T.B., 606 So. 2d 156 (Ala. Civ. App. 1992).

3. *J.E.B.*, 114 S. Ct. at 1421.

4. *Id.* at 1421-22.

5. *Id.* at 1422.

6. Brief for Respondent at 2, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239) [hereinafter Brief for Respondent].

7. *J.E.B.*, 114 S. Ct. at 1422.

8. Brief for Petitioner at 3, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239) [hereinafter Brief for Petitioner].

9. 476 U.S. 79 (1986).

10. *See infra* notes 33-35 and accompanying text.

Fourteenth Amendment because they were exercised against male jurors solely on the basis of gender.[11] The trial judge rejected these arguments and empaneled the all-female jury, based on the holding that *Batson* does not apply to gender discrimination.[12]

The jury found that J.E.B. was the father of T.B.'s child and the court entered an order directing J.E.B. to pay child support.[13] J.E.B. filed a post-judgment motion requesting a *JNOV*, or, in the alternative, a trial *de novo*.[14] J.E.B. again argued that under the *Batson* rationale Alabama's peremptory strikes based on gender violated the Fourteenth Amendment.[15] The circuit court rejected the motion, and repeated its ruling that *Batson* does not extend to gender-based peremptory challenges.[16]

On appeal, the Alabama Court of Civil Appeals affirmed,[17] based on Alabama precedent.[18] The Alabama Supreme Court subsequently denied certiorari.[19] The United States Supreme Court granted certiorari[20] and reversed, holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[21]

This casenote will examine the shortcomings of the *J.E.B.* opinion, predictions regarding the Court's future attitude on peremptory challenges,[22] the practical implications of this decision on trial practice,

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11. J.E.B.'s counsel additionally argued that, since approximately 75% of the venire consisted of women, and "virtually" none of the stricken jurors answered any questions which would show any prejudice, the inference of gender-based peremptory challenges was even stronger. Brief for Petitioner, *supra* note 8, at 3-4. The trial judge simply rejected these arguments on the following grounds: race was not the issue; *voir dire* started with 62 potential jurors but the judge thought he did not need all 62 so he instructed his clerk to take every other name until they arrived at the 36 jurors. According to the judge, "[t]hat's the way these people wound up where they [were]." *Id.* at 4.

12. *J.E.B.*, 114 S. Ct. at 1422.

13. *Id.*

14. Brief for Petitioner, *supra* note 8, at 4.

15. *Id.*

16. *Id.* at 5.

17. *J.E.B. v. State*, 606 So. 2d at 157.

18. *See, e.g., Ex parte* Murphy, 596 So. 2d 45 (Ala. 1992).

19. J.E.B. v. State of Alabama *ex rel.* T.B., 606 So. 2d 156 (cert. denied by the Alabama Supreme Court on October 23, 1992, No. 1911717).

20. J.E.B. v. Alabama *ex rel.* T.B., 113 S. Ct. 2330 (1993).

21. *J.E.B.*, 114 S. Ct. at 1421.

22. The essential nature of the peremptory challenge is that it is exercised without a reason stated, without inquiry, and without being subject to the court's control. Swain v. Alabama, 380 U.S. 202, 220 (1965). Each litigant is allowed to use a limited number of peremptory strikes, which can be used to remove jurors who the litigant believes is somehow favorable to the other side. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 145 (1977).

In the trial of civil cases in the Wyoming district courts, each side is allowed three peremptory challenges. WYO. STAT. § 1-11-202 (1977). WYO. R. CIV. P. 47(e) (Supp. 1995) also allows three peremptory strikes on each side.

and what litigants need to be aware of before commencing the *voir dire* process. The casenote finds that *J.E.B.* was correctly decided as a constitutional matter but criticizes the majority's reasoning as unpersuasive. The casenote concludes that adherence to the *Batson/J.E.B.* line of cases is undesirable.

BACKGROUND

United States Supreme Court

Race-based Peremptory Challenges

The development of Equal Protection rights under the Fourteenth Amendment regarding discrimination in jury selection began in a criminal context with *Strauder v. West Virginia*.[23] Although the Supreme Court did not clearly base its decision on the equal protection rights either of black criminal defendants or of the prospective jurors, the Court recognized that the exclusion of prospective jurors because of their race is "an assertion of their inferiority."[24] Although *Strauder* recognized the right for black males to be called for jury service, it did nothing to prevent their peremptory dismissal solely because of their race.[25]

Nearly a century later, the Supreme Court in *Swain v. Alabama*[26] extended *Strauder* to peremptory challenges. However, the Court limited the scope of the protection against race-based dismissal by requiring a claimant to show systematic racial discrimination in jury selection over a period of time.[27] The Court stated that when a prosecutor, case after case,

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In the trial of criminal cases, WYO. R. CRIM. P. 24(d) (Supp. 1995) contains the following provisions:

> 24(d)(1) Felony cases punishable by death: each defendant gets twelve peremptories; felony punishable by more than one year: eight peremptories.
>
> 24(d)(2) Misdemeanor cases punishable by one year or less: the defendant gets four peremptories; juvenile delinquency cases: each juvenile gets four peremptories.
>
> The prosecution gets the same number of peremptories as the total number allowed to all defendants.

23. 100 U.S. 303 (1879) (struck down a state statute that restricted jury service to white men as a violation of the Equal Protection Clause of the Fourteenth Amendment).

24. *Id.* at 308.

25. *See* Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 955 (1994).

26. 380 U.S. 202 (1965).

27. *Id.* at 227. The Court adhered to this high "systematic discrimination" standard, reasoning that if the barrier would be lowered, "[t]he challenge, *pro tanto*, would no longer be peremptory." *Id.* at 222 (emphasis in original). The Court held that the presumption in every case must be that the prosecutor's peremptories are based on fair, nondiscriminatory reasons. *Id.*

The evidentiary standard established in *Swain* was heavily criticized for its insurmountability. *See* George B. Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks From*

is responsible for the removal of qualified black jurors, with the result that no blacks ever serve on petit juries, "the Fourteenth Amendment claim takes on added significance."[28]

In 1985, the Supreme Court in *Batson v. Kentucky*[29] overruled *Swain*'s requirement of a showing of systematic discrimination in more than just the case at hand.[30] The Court held that establishing purposeful discrimination in the case at bar is sufficient to invalidate the particular challenges at issue.[31] A defendant has no right to a petit jury composed in whole or in part of his own race but does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.[32]

Subsequently, in *Powers v. Ohio*,[33] *Edmondson v. Leesville Concrete Co.*,[34] and *Georgia v McCollum*,[35] the Court recognized that race-based peremptories also violate the equal protection rights of the excluded jurors and significantly extended the reach of *Batson*. The court held that white persons have standing to challenge discriminatory strikes of blacks,[36] and that *Batson* applies to civil as well as criminal cases,[37] and to strikes by private parties as well as the state.[38]

Juries, 27 HOW. L.J. 1571, 1576-77 (1984). Smith rightfully argued that the standard is difficult to apply because most jurisdictions do not keep track of the exact times, frequency and circumstances of the prosecutors' strikes. *Id. See also* Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 196-235 (1978).

28. *Swain*, 380 U.S. at 223.

29. 476 U.S. 79 (1985).

30. In *Batson*, a prosecutor used his peremptory challenges to remove the only four blacks from the venire in a routine criminal case. *Id.* at 82-83. The all-white jury convicted the black defendant on charges of second degree burglary and receipt of stolen goods. *Id.* at 83. However, the *Batson* Court reversed. *Id.* at 100.

31. *Id.* at 89. The Court expressly declined to give its view on the applicability of the Equal Protection doctrine to peremptory challenges by defense counsel. *Id.* at 89 n.12. The Supreme Court later addressed this issue in Georgia v. McCollum, 112 S. Ct. 2348 (1992), and held that *Batson* does apply to defense peremptories. *See infra* note 35.

32. *Batson*, 476 U.S. at 85.

33. 499 U.S. 400 (1991) (removed *Batson* requirement that excluded juror be of same race as the complaining criminal defendant).

34. 111 S. Ct. 2077 (1991) (stretched Equal Protection Clause to find state action in race-based peremptory strikes by private party in civil litigation).

35. 112 S. Ct. 2348 (1992) (went even further and extended the *Batson* doctrine to race-based peremptory challenges by criminal defendants).

36. *Powers*, 499 U.S. at 402.

37. *Edmondson*, 111 S. Ct. at 2088.

38. *McCollum*, 112 S. Ct. at 2359.

Gender-based Peremptory Challenges

The gender issue as to peremptory challenges did not present itself until long after *Strauder* because juries typically consisted exclusively of men[39] until the last decades.[40] In *Ballard v. United States*,[41] the Court for the first time exercised its supervisory authority over the administration of justice in the federal courts to reverse an exclusion of women from jury service.[42] The Court held that a federal court errs when it systematically excludes women from service in a federal jury panel in a state where women are eligible for jury service under state law.[43] In 1975, the Court in *Taylor v. Louisiana*[44] struck down a Louisiana statute which excluded women from jury service unless they had previously filed a written declaration of willingness to serve.[45] The Court found that women are an identifiable group sufficiently numerous and distinct from men and that their systematic elimination from juries violates the Sixth Amendment.[46]

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39. The prohibition of women on juries was derived from the English common law, which excluded women from juries under the doctrine of *propter defectum sexus* (=the defect of sex). 3 W. BLACKSTONE, COMMENTARIES *362.

Not only is the defect of sex doctrine done away with in England; the Parliament abolished the whole institution of peremptory challenges in 1988. STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 223 (1994).

40. As late as 1965, in Swain v. Alabama, 380 U.S. 202, the Court addressed the equal protection principles as to the exclusion of potential jury members in terms of "[j]ury*men*," *Id.* at 204 (emphasis added) (citations omitted), and "venire*men*," *Id.* at 221 (emphasis added).

41. 329 U.S. 187 (1946).

42. *Id.* at 193.

43. *Id.* The court noted: "[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." *Id.* at 194.

44. 419 U.S. 522 (1975).

45. *Id.* at 525. In Hoyt v. Florida, 368 U.S. 57 (1961), the Court upheld a Florida statute which automatically exempted women from jury service unless they voluntarily registered, reasoning that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years . . . woman is still regarded as the center of home and family life." *Id.* at 61-62.

In 1961, women were still not eligible for jury service in three states: Alabama, Mississippi, and South Carolina. *Id.* at 62 n.5.

46. *Taylor*, 419 U.S. 531. The Court reaffirmed Duncan v. Louisiana, 391 U.S. 145 (1968), holding that the Sixth Amendment provision for an impartial jury is binding on the states through the Fourteenth Amendment. *Taylor*, 419 U.S. at 526. Thus, the Court's ruling was based on the Sixth Amendment right to an impartial jury trial in criminal prosecutions, rather than on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 525. Because of this distinction, the Court did not overrule *Hoyt*. *See supra* note 45.

However, the Court also held that while Sixth Amendment applied to the drawing of jurors from a community, it did not apply to the formation of the jury panel itself. *Taylor*, 419 U.S. at 533-37. Recently, the Supreme Court reaffirmed its belief that the Sixth Amendment is not aimed at the exercise of peremptory challenges by either party. Holland v. Illinois, 493 U.S. 474, 480 (1990).

Tenth Circuit Court of Appeals

In *U.S. v. Brown*,[47] the Tenth Circuit reasoned that although *Batson* proscribed the exercise of peremptory strikes for purely racial reasons, it did not forbid challenges of prospective jurors for legitimate reasons "tangentially connected with their race."[48] In *Brown*, the court held that the prosecution's strikes of two black jurors violated *Batson*.[49] The prosecution declared they were afraid, based on past experience with the black opposing counsel, that black jurors would be influenced to acquit the defendant because of the mere presence of this counsel.[50] Since the prosecution's concern was based on surmise rather than fact, the court found this "precisely the kind of presumption that will not withstand [the *Batson* test]."[51]

Shortly before *J.E.B.* was decided, the Tenth Circuit again addressed the extent of the *Batson* doctrine in *U.S. v. Johnson*.[52] The defendant claimed that the prosecution violated *Batson* by striking two black venirepersons.[53] The prosecution stated that they expected the first juror to be unable to pay attention to the evidence because this juror was inattentive during *voir dire*.[54] The second juror, a schoolteacher, was struck because the prosecution believed, based on its past experience, that teachers did not make good jurors.[55] The Tenth Circuit held that these explanations were facially race neutral, because they were based on some reason other than race.[56] The justifications were also not pretextual since the prosecution did not use its opportunity to strike a third black woman[57] who served as the jury foreperson.[58]

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47. 817 F.2d 674 (10th Cir. 1987).

48. *Id.* at 676.

49. *Id.*

50. *Id.* at 675.

51. *Id.* at 676. The court indicated "[i]f the *voir dire* had disclosed an affinity between a potential juror and defense counsel, even if that affinity is linked to race, it is logical to presume defense counsel would have an advantage with that juror." *Id.* (emphasis added). In such a situation, the use of a peremptory strike against that juror would be justifiable. *Id.*

52. 4 F.3d 904 (10th Cir. 1993).

53. *Id.* at 912.

54. *Id.* at 913.

55. *Id.*

56. *Id.* at 913-14.

57. *Id.* at 913. The court had already held in United States v. Esparsen, 930 F.2d 1461 (10th Cir. 1991), that the presence of members of the subject race on the petit jury is a relevant factor in negating an alleged *Batson* violation when the state had the opportunity to strike the juror. *Id.* at 1468.

58. *Johnson*, 4 F.3d at 913. The court noted, in dictum, that the removal of this last black juror would have established a *prima facie* case of discrimination. *Id.* at 914. The court based this conclusion on United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987). In *Chalan*, an American-

Wyoming Supreme Court

In the criminal context, the Wyoming Supreme Court has dealt with the issue of the Equal Protection doctrine as it applies to peremptory challenges on several occasions.[59] The court focused in these decisions on the rights of the criminal defendants.

The court gave its most illustrative interpretation of *Batson* in *Bueno-Hernandez v. State*.[60] The prosecution in this case used three of its peremptory challenges to strike venire members who were apparently of Mexican-American heritage.[61] The prosecution declared they struck the first juror because she was known to the prosecution's office and after discussing her "in great length," they decided she would not be a good juror.[62] As to the second juror, the prosecution claimed that because its office sued this juror for collection, the person might have a bias against them.[63] Finally, the prosecution merely stated that the third juror was known to the office to be "anti-law enforcement."[64] The court concluded that even if the three stricken venire members were of Hispanic ethnicity, the prosecution offered a sufficiently race-neutral explanation for striking them.[65] As other appellate courts, the Wyoming Supreme Court accords great deference to the trial court's assessment of the credibility of the striking attorney's declarations.[66]

Indian defendant was, among other things, convicted of first-degree murder and robbery. *Id.* at 1304. There were three, or possibly four American-Indians on the venire. Three of them were removed for cause and the prosecutor peremptorily struck the last one. *Id.* at 1313-14. According to the court, the striking of this last American-Indian established a *prima facie* case of intentional discrimination under *Batson*. *Id.* at 1314.

59. In Engberg v. State, 686 P.2d 541 (Wyo. 1984) (*Engberg I*), the court noted it could not see people who have inhibitions about the death penalty as a distinctive group requiring specific representation on the jury panel. *Id.* at 550. Such groups had to be "objectively identifiable." *Id.* The groups which fit these criteria "almost universally" had been racial, ethnic or sexual in nature. *Id. See also* Jahnke v. State, 682 P.2d 991, 1003 (Wyo. 1984); Jennings v. State, 806 P.2d 1299 (Wyo. 1991). The Wyoming Supreme Court has not yet addressed cases concerning the use of gender-based strikes.

60. 724 P.2d 1132 (Wyo. 1986).

61. *Id.* at 1133. During *voir dire*, no questions were asked to establish the race of the excluded veniremembers. Thus, there was no indication in the record that the three stricken jurors were of actual Hispanic ethnicity, other than their Spanish surnames. *Id.* at 1134.

62. *Id.* at 1135. The prosecution did not explain how, or on what basis, they came to that conclusion.

63. *Id.*

64. *Id.* Again, the prosecution did not give any explanation as to how they knew this.

65. *Id.*

66. *See infra* note 115 and accompanying text.

PRINCIPAL CASE

Justice Blackmun, who wrote the majority opinion in *J.E.B.*,[67] started by reaffirming "what [at that point in time] should be axiomatic:"[68] the Equal Protection Clause does not allow intentional gender discrimination by state actors.[69] Applying the heightened scrutiny standard,[70] Justice Blackmun concluded that the state offered virtually no support for the conclusion that gender alone is an accurate predictor of jurors' attitudes.[71] Furthermore, Justice Blackmun stressed that the right of individual jurors to have a nondiscriminatory jury selection procedure applied to both men and women.[72] According to Justice Blackmun, the Court's majority ruling did not abhor the institution of peremptory strikes nor did it interfere with a state's interest in using such challenges in an effort to secure a fair and impartial trial.[73] He noted that a proper conduct of the *voir dire* procedure can lead to a firm basis for intelligent use of peremptory challenges.[74]

In her concurrence,[75] Justice O'Connor emphasized her conviction that the majority's holding should be limited to the *government's* use of gender-based peremptory strikes.[76] Justice O'Connor strongly preferred a limited view of the term "state actor" because she was concerned that the majority's decision would further erode the role of peremptory challenges

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67. In his opinion, Justice Blackmun almost exclusively focused on the past exclusion of women from the jury and voting process. *J.E.B.*, 114 S. Ct. at 1422-25. Therefore, one might forget *J.E.B.* came up because the state used all but one of its peremptories to strike *males* from the petit jury. *Id.* at 1422.

68. *Id.* at 1422.

69. *Id.* This is especially true "where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.*

70. Justice Blackmun formulated this standard as "whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." *Id.* at 1426. He stated this approach was warranted because of the "long and unfortunate history of sex discrimination [in this country]." *Id.* at 1425.

71. *Id* at 1427. Justice Blackmun reasoned the state's rationale for its strikes "is reminiscent of the arguments advanced to justify the total exclusion of women from juries." *Id.* at 1426.

72. *Id.* at 1428. Justice Blackmun added: "It denigrates the dignity of the excluded juror and, for a woman, reinvokes a history of exclusion from political participation." *Id.*

73. *Id.* at 1429.

74. *Id.* In addition, Justice Blackmun made a practical argument, stating that many jurisdictions who extended *Batson* to gender before *J.E.B.* were capable of adhering to the rule proscribing gender-based peremptory strikes. *Id.* at 1429 (referring to 1422 n.1, which lists the jurisdictions who extended or refused to extend *Batson* to gender).

In conclusion, Justice Blackmun observed that because gender and race are overlapping categories, the danger that gender-based peremptory strikes will be used as a pretext for racial discrimination is present if such strikes are allowed. *Id.* at 1430. If this would be allowed, the core guarantee of the Equal Protection Clause would become meaningless. *Id.*

75. *Id.* at 1430 (O'Connor, J., concurring).

76. *Id.* at 1431.

and further proliferate mini-hearings and appeals on discriminatory use of peremptory strikes.[77] In addition, if carried to its full extent, this development would force lawyers to attempt to articulate instinctive, often inarticulable reasons for their use of peremptories.[78] Moreover, it would increase the possibility that biased jurors would be allowed on the jury.[79]

Justice Kennedy wrote a concurring opinion to explain his more textual and traditional understanding as to the basis of the majority's holding.[80] According to Justice Kennedy, the Equal Protection Clause and the constitutional tradition in this country are based on the belief that *an individual* possesses rights which are protected against unlawful governmental actions.[81] In this regard, Justice Kennedy thought it important to note that a juror sits as an individual citizen, not as a representative of a racial or sexual group.[82] In Justice Kennedy's view, the only logical inference could be that the Equal Protection Clause prohibits discrimination on the basis of race or gender.[83]

In his dissenting opinion,[84] Chief Justice Rehnquist contended even if *Batson* was correctly decided,[85] race and gender discrimination are such different phenomena that the *Batson* principle should not be extended to peremptory challenges based on gender.[86] First, the Court's equal protection jurisprudence revealed different levels of scrutiny for race (strict) and gender (heightened).[87] In addition, Justice

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77. *Id.* This discussion regarding the meaning of the term "state actor" goes back to *Edmondson* and *McCollum*. *See supra* notes 34-35 and accompanying text. Justice O'Connor, who wrote dissents to both of those opinions, argued that the *Edmondson* court made "the mistake" of including private civil litigants as state actors when they exercise peremptory challenges. *J.E.B.*, 114 S. Ct. at 1432. Subsequently, in her view, the *McCollum* court "compounded the mistake" by stretching the meaning of "state actor" to criminal defendants. *Id.*

78. *J.E.B.*, 114 S. Ct. at 1431.

79. *Id.* at 1431-32. According to Justice O'Connor, the *J.E.B.* opinion increased this possibility because "sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic." *Id.* at 1431.

80. *Id.* at 1433 (Kennedy, J., concurring).

81. *Id.* at 1433-34.

82. *Id.* at 1434.

83. *Id.*

84. *Id.* at 1434 (Rehnquist, C.J., dissenting).

85. *Id.* Justice Rehnquist wrote a dissenting opinion in *Batson*, 476 U.S. at 112 (Burger, C.J., joined by Rehnquist, J., dissenting). In his dissent to *J.E.B.*, Justice Rehnquist assumed, arguendo, that *Batson* was correctly decided. However, he also joined Justice Scalia's dissent, which indicated a desire to overrule *Batson*. *J.E.B.*, 114 S. Ct. at 1434.

86. *J.E.B.*, 114 S. Ct. at 1434-35. According to Justice Rehnquist, *Batson*, in its core meaning, was meant to apply solely to "the uniquely sensitive area of race." *Id.* at 1435 (quoting Brown v. North Carolina, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring)).

87. *J.E.B.*, 114 S. Ct. at 1435. Justice Rehnquist qualified the heightened scrutiny standard as a "less searching standard of review." *Id.*

Rehnquist argued that the two sexes differ, both biologically, and, to a decreasing extent, in experience.[88]

Justice Scalia wrote a fuming dissent[89] in which he said that the Court's reasoning was "largely obscured by anti-male-chauvinist oratory"[90] which was "utterly irrelevant"[91] to the case at hand. He stated the Court's "unisex approach" seemed to put it at odds with *Taylor*[92] and its progeny.[93] Moreover, Justice Scalia intimated that the Court's reasoning was disingenuous because if the Court really thought gender played no identifiable role in juror's attitudes, the error in this case would have been harmless.[94] Justice Scalia further thought the majority's opinion focused unrealistically upon individual exercises of peremptory challenges, and ignored the totality of the practice.[95] Finally, he argued that *voir dire* cannot fill the gap left by the restrictions on peremptory strikes, even if the *voir dire* process expands.[96]

ANALYSIS

Viewing the Supreme Court's Equal Protection jurisprudence on peremptory challenges from *Batson* to *J.E.B.*, two images emerge. First, any race- or gender-based peremptory strike by any party will presumably constitute state action for equal protection purposes.[97] Second, the Constitutional principle that a violation of the Equal Protection Clause may occur when the government discriminates against a suspect class[98] or

88. *Id.*

89. *Id.* at 1436 (Scalia, J., dissenting).

90. *Id.* at 1438.

91. *Id.* at 1436.

92. 419 U.S. at 532 n.12 ("women bring to juries their own perspectives and values that influence both jury deliberation and result."). But, according to Justice Scalia, times and trends change, "and unisex is unquestionably in fashion." *J.E.B.*, 114 S. Ct. at 1436.

93. *J.E.B.*, 114 S. Ct. at 1436.

94. *Id.* at 1437. Justice Kennedy in his concurrence in effect answered this argument by stressing the injury the juror suffers when stricken because of his or her gender. *Id.* at 1434. In this context, Justice O'Connor warned that the Court should not weigh the criminal defendant's interest too lightly. *Id.* at 1432-33. According to Justice O'Connor, limiting the accused's use of the peremptory is "a serious misordering of . . . priorities." This limitation means the Court considers the right of citizens to perform jury service to override the rights of the criminal defendant, "even though it is the defendant, not the jurors, who faces imprisonment or even death." *Id.* (quoting Justice Thomas in *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring)).

95. *J.E.B.*, 114 S. Ct. at 1437.

96. *Id.* at 1438-39. Justice Scalia concluded that the majority's reasoning placed all peremptory strikes based on any group characteristic at risk, since they all can be denominated "stereotypes." *Id.* at 1438.

97. *See generally* United States v. Annigoni, 57 F.3d 739, 744 (9th Cir. 1995).

98. A "suspect class" is a class of individuals who have historically suffered discrimination.

when the government interferes with the exercise of a fundamental right also applies to the exercise of peremptory strikes.

Requirements to Establish J.E.B. Violation

As with race-based *Batson* claims, the party bringing the *J.E.B.* motion must establish a *prima facie* case of gender discrimination. The party first must show that the opposing party used peremptory strikes to remove individuals of a cognizable group from the venire. Secondly, the party must show that these strikes, together with other relevant circumstances,[99] raise an inference that the striking party challenged the venireperson on account of gender.[100]

In short, courts require a showing of a pattern of discrimination[101] in order to establish a *prima facie* case of gender discrimination.[102] Statistics may strengthen or weaken a *prima facie* case but are not by themselves dispositive.[103] There is no magic number as to the minimal amount of strikes required in order to establish a *prima facie* case under either *Batson* or *J.E.B.*[104] Presumably, it is more difficult to establish a *prima facie* case based on gender than on race when the venire contains few

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For an introduction to the term "suspect class," *see* Korematsu v. United States, 323 U.S. 214, 216 (1944).

99. These relevant circumstances include: a pattern of strikes against members of a particular sex; a disproportionate use of peremptory strikes against members of that sex; the level of representation of that sex in the venire as compared to the jury; the moving party's questions and statements during *voir dire* and while exercising peremptory challenges; whether the excluded persons is a heterogeneous group, sharing their gender as only common characteristic; the gender of the defendant, victim and witnesses. People v. Figgs, 654 N.E.2d 555, 559 (Ill. App. 1995).

100. United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990).

101. *See supra* notes 27-31 and accompanying text. A pattern implies that the striking party chose this action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) (citations omitted).

The South Carolina Supreme Court, in State v. Chapman, 454 S.E.2d 317 (S.C. 1995), went as far as, in effect, dispensing with the *prima facie* case-requirement and shifting the burden immediately to the striking party to come up with a race or gender neutral reason. The Court reasoned that "requesting a *Batson* hearing in effect sets out a *prima facie* case of discrimination . . . the striking of any juror can raise the inference of race- and/or gender-based discrimination." *Id.* at 320. It is unclear whether more courts will take this drastic step.

102. *See, e.g.*, People v. Blackwell, 646 N.E.2d 610, 614 (Ill. 1995); Nelson v. U.S., 649 A.2d 301, 310-11 (D.C. 1994); *cf.* Tursio v. United States, 634 A.2d 1205, 1210 (D.C. 1993).

103. *See* Jackson v. State, No. CR-93-391, 1995 WL 127112, at *2 (Ala. Crim. App. Mar. 24, 1995); Folsom v. State, No. CR-93-1835, 1995 WL 217580, at *1 (Ala. Crim. App. Apr. 14, 1995).

104. *See* Hemphill v. State, No. CR-93-2136, 1995 WL 490600, at *4 (Ala. Crim. App. Aug. 18, 1995) (use of six of twelve peremptory strikes to remove members of one particular sex without more not sufficient to establish prima facie case); Morris v. Dothan, 659 So. 2d 979, 980 (Ala. Crim. App. 1995) (use of eight of nine peremptory strikes to remove men from the jury, leaving one or two males on the jury, may be enough).

racial minorities.[105] In some *Batson* situations, a *prima facie* case can be established when one juror is stricken, or it is at least a strong indication of discrimination.[106] It is unlikely that a venire will consist of only one member of either sex, even after the strikes for cause.

Once the moving party establishes a *prima facie* case of gender discrimination, the burden shifts to the opposing party to give a facially valid gender-neutral reason for the strikes.[107] In *Hernandez v. New York*,[108] the Supreme Court held that unless a discriminatory intent is inherent in the opposing party's explanation, the reason offered will be deemed race neutral.[109] In *Purkett v. Elem*,[110] the Court indicated that this facial validity requirement does not demand an explanation that is persuasive, or even plausible.[111]

If such a facially neutral reason is tendered, the movant then ultimately has to prove the peremptory strike was a pretext for discrimination.[112] At this stage, the plausibility and persuasiveness of the justifica-

105. In order for the peremptory challenges to retain any meaning, courts will have to impose much higher standards to find a *prima facie* case in the gender setting than they have done in the race context.

106. *See, e.g., Chalan*, 812 F.2d at 1313-14; In re Paternity of Codey M.R., 522 N.W.2d 222, 225 (Wis. Ct. App. 1994) (race- or gender-based elimination of even one juror violates the Equal Protection Clause but the fact of that elimination, without more, does not establish a *prima facie* case that the juror was struck pursuant to a discriminatory purpose).

107. *J.E.B.*, 114 S. Ct. at 1429.

108. *Hernandez*, 500 U.S. at 360.

109. *Id.* For circumstances in which there can be (in)sufficient rebuttal, *see* State v. Starks, 533 N.W.2d 134, 142 (Neb. Ct. App. 1995) (litigant may not justify peremptory challenges to venire members of one gender unless venire members of other gender with comparable or similar characteristics are also challenged); *cf.* Davidson v. Harris, 30 F.3d 963 (8th Cir. 1994); Allen v. State, 659 So. 2d 151, 152 (Ala. Crim. App. 1994) (purely speculative and remote reasoning is inadequate to rebut the presumption of gender-based discrimination); Koo v. State, 640 N.E.2d 95, 99 (Ind. Ct. App. 1994) (defendant's explanation that he struck juror because she was young and attractive and he sensed electricity between her and male prosecutor not gender neutral, even when mixed with neutral reasons); *see also* People v. Dixon, 615 N.Y.2d 904, 908 (N.Y. App. Div. 1994) (gender-neutral explanation must be reasonably definite; conclusory assertion of good faith generally considered inadequate).

110. 115 S. Ct. 1769 (1995) (per curiam).

111. *Id.* at 1771.

112. *Hernandez*, 500 U.S. at 359. *See* State v. Gill, 460 S.E.2d 412, 415 (S.C. Ct. App. 1995) (a showing of pretext does not automatically result in a finding of discrimination; the determinative issue in any *Batson/J.E.B.* claim is whether, in light of the totality of the circumstances, a party engaged in purposeful, invidious discrimination); Nelson v. U.S., 649 A.2d 301, 311 (D.C. 1994) (conclusory assertions without supporting references insufficient to support claim that facially neutral reasons given by striking party were pretextual); People v. Allen, 616 N.Y.2d 672, 673 (N.Y. App. Div. 1994) (use of facially neutral reason to strike members of one gender but not similarly situated members of other gender is strong indication that purported reason was not the true basis for the strike).

tion does become relevant.[113] The trial judge may "*choose to disbelieve* a silly or superstitious reason,"[114] and the appellate courts accord great deference to this choice.[115] The burden to show pretext is difficult to meet,[116] because purposeful discrimination is hard to prove.[117]

The Court: Constitutionally Correct But Out of Touch With Reality

The Supreme Court in *J.E.B.* explicitly refused to engage in a balancing test between peremptories as an institution and the Court's battle to ban all forms of discrimination from the courtroom.[118] Instead, the Court considered whether gender-based peremptory strikes provide substantial aid to a trial attorney's "effort to secure a fair and impartial jury."[119] The Court concluded they do not, based on its view that "gender plays no identifiable role in jurors' attitudes."[120] While the Court's holding is correct as a constitutional matter, the majority's reasoning is largely unrealistic, inconsistent, and prone to have a paralyzing effect on peremptories.

The Court's focus on a trial attorney's effort to secure a fair and impartial jury is unrealistic. A litigant strives for a *favorably biased jury*, rather than an unbiased one.[121] By taking the more sensible balancing

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113. *Purkett*, 115 S. Ct. at 1771.

114. *Id.* (emphasis in original).

115. *See* U.S. v. Johnson, where the Tenth Circuit Court held that whenever the prosecutor offers an explanation for peremptory challenges which is accepted by the trial court, the court of appeals reviews the trial court's ultimate factual ruling under the clearly erroneous standard. 941 F.2d 1102, 1108-1109 (10th Cir. 1991).

116. *Hernandez*, 500 U.S. at 365. Since there will seldom be much evidence on that issue, the best indication often will be the demeanor of the attorney exercising the challenge. Evaluation of a striking party's state of mind lies "peculiarly within a trial court's province." *Id.*

117. The difficulty of establishing pretext is illustrated by the Supreme Court's reasoning in *Purkett*, 115 S. Ct. at 1771. The Court held the striking party's reason must be "legitimate," which merely means that the reason should not deny Equal Protection. *Id.* The offered reason does not have to make sense. *Id.* The trial court believed the prosecutor when he declared he struck two black males from the venire because one of them had long, unkempt hair and they both had goatee type beards and mustaches that looked "suspicious" to the prosecutor. *Id.* at 1770. The Court upheld the trial judge's judgment. *Id.* Justice Stevens' stinging dissent heavily criticized the majority for partly overruling *Batson*, for only requiring a facially neutral, but not a persuasive or plausible explanation at the rebuttal stage. *Id.* at 1774. Although the majority opinion is difficult to parse, it should not be read as overruling *Batson* in any way, for that would turn the *Batson* doctrine into a charade.

118. *J.E.B.*, 114 S. Ct. at 1425-26.

119. *Id.* at 1426.

120. *Id.* at 1426 n.9 (citations omitted). *See also supra* note 71 and accompanying text.

121. The Supreme Court has conceded that having a jury panel consisting of literally unbiased people is impossible. Irvin v. Dowd, 366 U.S. 717, 722-23 (1961). What is left is the assumption of impartiality by having a jury with equally balanced biases, or, in other words, "diffused impartiality." FRANKLIN D. STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 133 (1995). According to Strier: "This is just an aspirational fiction . . . An inexorable reality of the trial is that

approach,[122] the Court could have made its reasoning more acceptable while maintaining its adherence to the ideal of a fair and impartial jury system. Instead, by merely stating that the only important government interest that could be served by peremptories is securing a fair and impartial jury, the court made the unfortunate choice of basing its decision on "one of the law's convenient but illusory chimeras."[123]

Moreover, the Court's stern attachment to the view that gender and race do not influence jurors' attitudes denies the human nature of jurors.[124] Many trial attorneys strongly disagree with the Court's position.[125] In *Batson* and its progeny, there has been an ongoing battle between the majority and the dissents on the question whether gender and race do matter to jury decisions. The majority says no, mainly because it does not want to recognize challenges based on "the very stereotypes the law condemns."[126] The dissenters say yes, and therefore want to allow an unfettered use of peremptories.

In her concurrence to *J.E.B.*, Justice O'Connor took the middleground. She indicated that gender and race can lead to attitudinal differences, contingent upon the circumstances.[127] Further, she noted the

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who decides the case is just as important to the outcome as what is to be decided." *Id.* at 135-36. *See also* ADLER, *supra* note 39, at 53 (1994); VALERIE P. HANS AND NEIL VIDMAR, JUDGING THE JURY 74 (1986); CLARENCE DARROW, VERDICTS OUT OF COURT 316 (1963).

122. This is the approach Justice O'Connor took in her concurrence. *J.E.B.*, 114 S. Ct. 1430-32. *See infra* notes 127-130 and accompanying text.

123. STRIER, *supra* note 121, at 133.

124. Justice Scalia, in his dissent, may be correct that the majority approach puts the Court at odds with *Ballard*, 329 U.S. at 194 (stating that either sex brings "a flavor, a distinct quality" to the jury room), and *Taylor*, 419 U.S. at 532 n.12 (reasoning that women bring to juries their own values and perspectives that influence both jury deliberation and result.). *J.E.B.*, 114 S. Ct. at 1436. However, as Justice Scalia indicated, the Court may have decided that changing times called for a unisex-approach, not so much, as Justice Scalia purports, because such an approach is "in fashion," but rather to help the Court maintain its ideal of a fair and impartial jury system.

The *J.E.B.* Court shed some more light on this apparent inconsistency when it stated: "Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender." *Id.* at 1427 n.11. This seems to indicate the Court involved itself, at least in part, in the very balancing test it purported to avoid. *See supra* note 118 and accompanying text.

125. Many litigants, especially attorneys who conduct criminal trials, have their own favored collection of stereotypes. Stephen Adler, writing about the Imelda Marcos trial, said the following about Wyoming defense attorney Gerry Spence's preferences when he represented a criminal defendant: as to gender, Spence preferred men to women because "men had more experience with hell-raising and were more forgiving of it." ADLER, *supra* note 39, at 55. As to race, Spence indicated the Marcos defense team struck an Asian juror at least in part because of his Asian origin. Spence felt that such a juror would believe in hierarchies and respect authorities like the federal prosecutors. *Id.* at 57. As to religion, Spence declared he favored having Jews on his juries because he viewed them as sensitive to persecution and suspicious of government power. *Id.* at 58.

126. *J.E.B.*, 114 S. Ct. at 1426 (quoting *Powers*, 499 U.S. at 410).

127. In this regard, Justice O'Connor rightfully remarked: "[O]ne need not be a sexist to share

litigants' interest in use of peremptories.[128] However, she also recognized the Court's effort to ban discrimination from the courtroom.[129] In balancing these interests, she concluded that the battle against discrimination overrides the litigant's interest in an unfettered use of peremptories.[130] By engaging in this balancing approach, Justice O'Connor's opinion offers a more sensible explanation than the majority as to why the Court's holding is constitutionally required.[131]

However, Justice O'Connor's opinion has its own shortcomings. She did not offer alternatives or solutions to deal with the situation created by the Court's position in *J.E.B.* Further, she dedicated a substantial part of her opinion[132] to a repetition of her disagreement with *Edmondson* and *McCollum* though these cases concern an analytically separate issue.[133]

In addition, the Court's approach in *J.E.B.* and its progeny seems inconsistent. By banning race- and gender-based peremptories from the courtroom while race and gender traditionally received different levels of scrutiny, the Court in *J.E.B.* opened the door for an extension of the *Batson* rationale to other suspect classes.[134] These include religion,[135] national origin,[136] and mixes of suspect classes, such as race

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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." *J.E.B.*, 114 S. Ct. at 1432. *See also* Barbara A. Babcock, *Voir Dire: Preserving 'Its Wonderful Power'*, 27 STAN. L. REV. 545, 554 (1976).

128. *J.E.B.*, 114 S. Ct. at 1431.

129. *Id.* at 1432.

130. *Id.* at 1430.

131. A striking detail of the *J.E.B.* case is that J.E.B.'s counsel complained of gender discrimination by the state while he peremptorily struck ten females *and* the last remaining male. *See supra* note 6 and accompanying text. Based on these facts, one could conceivably argue that J.E.B.'s counsel was estopped from bringing a *Batson* claim based on gender discrimination. In addition, one could assert that when there is strong statistical evidence of discriminatory challenges on both sides, the moving party must establish that as a result of the peremptory battle between the parties the sexual composition of the jury differed significantly from that of the venire, to movant's prejudice. Nelson v. U.S., 649 A.2d 301, 314 (D.C. 1994) (concurring opinion); *cf.* U.S. v. Sangineto-Miranda, 859 F.2d 1501, 1521-22 (6th Cir. 1988).

132. *J.E.B.*, 114 S. Ct. at 1432-33.

133. *See supra* notes 34-35 and accompanying text.

134. The Supreme Court, however, did seem to indicate that notwithstanding its broad approach, peremptory challenges based on group characteristics not specifically addressing suspect classes, like occupation, are not covered by the Equal Protection Clause. *J.E.B.*, 114 S. Ct. at 1428 n.14.

135. *See, e.g.*, Casarez v. State, No. 1114-93, 1994 WL 695868 at *7 (Tex. Crim. App. Dec. 14, 1994); *but see* Thurman v. State, 887 S.W.2d 411, 413 (Mo. Ct. App. 1994); *cf.* State v. Hlavaty, 871 S.W.2d 600, 604 (Mo. Ct. App. 1994).

A split of authority exists as to whether *voir dire* inquiry of a potential juror's religious affiliation is proper if not relevant to the parties or issue in the particular case. *See* Davis v. Minnesota, 114 S. Ct. 2120 (1994) (Ginsburg, J., concurring); Elaine Carlson, *supra* note 25, at 973-75.

136. The famed defense attorney Clarence Darrow put forth strong viewpoints on national origin, religion, and gender in the context of the *voir dire* process:

and gender.[137] Classification based on religion is subject to heightened judicial review[138] and therefore would logically fit in the *J.E.B.* rationale.[139] However, shortly after *J.E.B.*, the Supreme Court in *Davis v. Minnesota*[140] declined to grant certiorari to review a Minnesota Supreme Court decision which refused to extend *Batson* to the exercise of religion-based peremptory strikes.[141]

In *Batson* and *J.E.B.*, the Court was apparently concerned with banning discriminatory practices from the courtroom, and attempting to make it more likely that juries will be fair and impartial rather than favorably biased. While this concern might be laudable conceptually, the Court in *J.E.B.* and its progeny has not acted consistently in pursuit of its ideals. Ultimately, the only way the Court could reach its ideals would be to do away with peremptories.[142] Imposing more limitations on peremptories destroys the character of peremptory challenges,[143] proliferates appeals,[144] and leads attorneys and judges into the

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[If an Irishman is called for examination, t]here is no reason for asking about his religion; he is Irish; that is enough . . . You would be guilty of malpractice if you got rid of him, except for the strongest reasons . . . If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave . . . Get rid of him with the fewest possible words before he contaminates the others . . . Luckily . . . my services were almost over when women invaded the jury box.

DARROW, *supra* note 121, at 317-320.

137. An example of such a mixed class, potentially forming a cognizable group, is African-American men. In Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995), the prosecution used five out of nine peremptories to exclude African-Americans (three men and two women). *Id.* at *2. At the time the defendant, an African-American male, brought his *Batson* motion, four African-American women remained on the jury. Therefore, the defendant focused on the exclusion of black *men* from the jury as the basis for his motion. *Id.* The Ninth Circuit declared the issue of whether African-American men could constitute a *Batson* class "likely is worthy of consideration in light of recent holdings that gender as well as race is an impermissible basis for peremptory challenges." *Id.* at *3. The court, however, declined to address the issue, since any new rule on what constitutes a 'cognizable group' could not be applied retroactively to the case at hand. *Id.*

138. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

139. *J.E.B.*, 114 S. Ct. at 1425.

140. 114 S. Ct. 2120 (1994).

141. *Id.* Justice Thomas, joined by Justice Scalia, dissented to the denial of certiorari as inconsistent with the Court's holding in *J.E.B.* *Id.* at 2120-22. In *Davis*, the prosecutor used a peremptory strike to remove a black man from the venire. *Id.* at 2120-21. The prosecutor's race-neutral explanation for the strike was that the struck juror was a Jehovah's Witness and that in his experience Jehovah's Witnesses "are reluctant to exercise authority over their fellow human beings in this Court House." *Id.* at 2121 (citing State v. Davis, 504 N.W.2d 767, 768 (Minn. 1993)).

142. Justice Marshall already intimated this measure in his concurrence to *Batson*, 476 U.S. at 105-108. Of course, this complete abolition of peremptories might be hard to accomplish given that peremptories have been a part of American trial practice since its initiation, the strong lobby of trial attorneys, and that the Court or legislator would take away an enormous business (jury-packing) from jury consultants. *See* ADLER, *supra* note 39, at 223-24.

143. In Evans v. State, 653 P.2d 308 (Wyo. 1982), the Wyoming Supreme Court noted: "There is a contradiction between assigning a reason of any kind to peremptory challenges when the very

unclear waters of reasons, not having to rise to justifications for cause.[145]

Litigants beware!

J.E.B.'s General Effect on The Conduct of Voir Dire

According to the *J.E.B.* Court, a proper use of the *voir dire* process can inform attorneys about jurors, give them viable reasons to strike that juror, and make reliance on stereotypical notions unnecessary.[146] This way, counsel can use their peremptory challenges intelligently.[147] Indeed, trial attorneys should try to get a feel for *Batson* and *J.E.B.* issues that could come up in the case at bar, or the sensitivity of the case to those issues. Litigants should conduct *voir dire* aimed at eliciting sufficient information to be able at any time to give a race- or gender-neutral reason to strike a juror they do not want on the petit jury.[148]

A responsible use of *voir dire* has a twofold effect. In addition to the possibility that it may reveal a basis for a challenge for cause, it may help the party using the peremptory challenge to bring forward race- or gender-neutral reasons. On the other hand, *voir dire* may help the party bringing the *Batson/J.E.B.* motion to establish a *prima facie* case of discrimination, or to show pretext.[149] The *voir dire* process may further help an appellate court determine, on basis of the record, whether the trial court's decision on the *Batson/J.E.B.* motion was clear error.[150]

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definition of 'peremptory challenge' is the right to challenge a juror without assigning a reason for the challenge." *Id.* at 310 n.2 (citations omitted).

144. *See Annigoni*, 57 F.3d at 744.

145. *See J.E.B.*, 114 S. Ct. at 1430.

146. *Id.* at 1429.

147. *Id.*

148. In Matthew L. Larrabee and Linda P. Drucker, *Adieu Voir Dire: The Jury Questionnaire*, 21 No. 1 LITIG. 37 (1994), the authors suggest the use of written questionnaires as a complement or supplement of oral *voir dire*. *Id.* at 38. The use of such questionnaires might lead to limitation by judge of oral *voir dire* time. *Id.* However, written questionnaires could lead to more frankness from the jurors. *Id.* at 37. This would enable counsel to shift out biased jurors on cause and to conduct oral *voir dire* much more efficiently. *Id.* at 38. A list of general questions which should be included in such questionnaires is provided. *Id.* at 39-42.

149. The difficulty of proving pretext is illustrated in People v. Allen, 653 N.E.2d 1173 (N.Y. 1995). In *Allen*, defendant claimed the gender-neutral reasons the prosecutor had for using 14 of her 15 peremptories to strike males were pretextual because these reasons were not applied equally to the women from the jury who exhibited the same characteristics. *Id.* at 1175. The court concluded while this circumstance could be identified as an inference of discrimination, it could also be an incomplete understanding of the full reasons for the prosecutor's decision to seat some jurors while challenging others. *Id.* at 1178. To determine this, the court needed a fuller factual inquiry by the trial court. *Id*

150. A clear example of the importance of a complete *voir dire* document on appeal is Acklin v. State, 896 S.W.2d 423 (Ark. 1995) (court could not reach the merits of defendant's appeal to peremp-

Litigants should conduct their questioning in an appropriate and efficient manner. They should try to avoid unnecessary prolongation of the *voir dire* process and procrastination of the actual trial.[151] This sifting process can discourage potential jurors from serving and can cause resentment in those who do.[152] The litigant's possible success in ejecting a biased juror has to be weighed against the possible setback of alienating essentially fair-minded jurors.[153]

J.E.B.'s Effect on Voir Dire in Wyoming

Wyoming practitioners need to take notice of recent amendments of the civil and criminal rules on *voir dire*.[154] New Wyoming Rule of Civil Procedure (WRCP) 47 accords a much greater potential power to the trial judge to assume control over the *voir dire* process.[155] WRCP 47(c) provides that litigants are entitled to conduct the examination of prospective jurors, but this examination will take place under supervision and control of the judge. The judge may conduct such further examination as she deems proper. Indeed, she may assume the complete examination if she determines that litigants fail to conduct the *voir dire* properly.[156]

WRCP 47 (c) also contains a 'checklist' of things that litigants are not allowed to ask or do.[157] The consequences of not following this strict rule

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tory challenges "because of his failure to sufficiently abstract the record.") *See also* Pacee v. State, 816 S.W.2d 856, 858 (Ark. 1991) (a record of *voir dire* is "that critical portion of the trial proceedings which would enable [the appellate court] to consider 'all relevant circumstances.'")

See also CATHY E. BENNETT AND ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION §17.14, at 331 (1993). If the trial court does not grant the motion, the litigant must make sure to object before the jury is installed and sworn in; preserve the record for appeal; make sure there is sufficient evidence in the record, through preserved testimony or written materials such as jury questionnaires. *Id.*

If the judge rules on a motion alleging both race and gender discrimination, but fails to rule on one of those allegations, this issue is lost on appeal if the attorney does not object to that failure. *See Hemphill*, 1995 WL 490600, at *3.

151. *See supra* note 148, where it is pointed out that jury questionnaires can lead to a much more efficient use of the oral *voir dire* process.

152. VAN DYKE, *supra* note 22, at 163.

153. *Id.*

154. WYO. R. CIV. P. 47 was amended on November 30, 1992, and was effective February 25, 1993; WYO. R. CRIM. P. 24 was amended October 30, 1992, and was effective January 19, 1993.

155. The new WYO. R. CIV. P. 47(a)-(c) contain essentially the same language as old WYO. R. CRIM. P. 24(a)-(c). New WYO. R. CRIM. P. 24(c)-(d) apparently were merely amended to modernize the statutory language. Therefore, the amendment of this rule virtually had no effect on the potential power of a judge in a criminal trial. The language in new WYO. R. CIV. P. 47(c) is identical to new WYO. R. CRIM. P. 24(c).

156. The judge's power to assume the complete examination was absent in old WYO. R. CIV. P. 47.

157. WYO. R. CIV. P. 47 (c) provides in pertinent part:

may be serious. First, counsel might lose the ability to conduct *voir dire* personally and elicit desired information from jurors. Moreover, counsel might lose the chance to learn more about jurors and base their trial strategy on that knowledge. Also, the opportunity to establish early favorable contact with jurors might be lost. Finally, by not following the rule, counsel might make an unfavorable impression upon at least some of the jurors.[158]

If the judge at the initial stage of the *voir dire* process wants to assume control, trial attorneys can argue they should personally conduct the questioning. Counsel would have to make clear that there are potential *Batson* or *J.E.B.* issues as to specific prospective jurors and that they want to elicit more relevant information from these jurors in order to use peremptories wisely.[159] This argument should be easier to make now that *J.E.B.* has extended the equal protection doctrine to gender.

The Future of Peremptory Challenges: Possible Responses

Several authors have suggested possible responses to the *Batson/J.E.B.* line of cases. Stephen Adler[160] proposed to limit the number of peremptory challenges to reduce the impact of "the 'lawyers' ultimate poker game"[161] and achieve a more random selection of jurors. As an alternative, he suggested banning peremptories entirely from our jury system, either by the Court or by Congress.[162]

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47 (c)(2) The court shall not permit counsel to attempt to precondition prospective jurors to a particular result, comment on the personal lives and families of the parties or their attorneys, or question jurors concerning the pleadings, the law, the meaning of words, or the comfort of jurors.

47 (c)(3) In voir dire examination, counsel shall not:

(A) Ask questions of an individual juror that can be asked of the panel or a group of jurors collectively;

(B) Ask questions answered in a juror questionnaire except to explain an answer;

(C) Repeat a question asked and answered;

(D) Instruct the jury on the law or argue the case; or

(E) Ask a juror what the juror's verdict might be under any hypothetical circumstances.

WYO. R. CRIM. P. 24(c) contains similar provisions.

158. A discussion of the pros and cons of having the judge or attorney conduct the *voir dire* is beyond the scope of this casenote. For a comprehensive discussion of this issue, *see* STRIER, *supra* note 121, at 134-36; VAN DYKE, *supra* note 22, at 164-66.

159. The judge has a wide discretion when he decides whether to believe a striking party's justification for its peremptory challenge, especially after the amendments to WRCP 47(c). In this sense, the focus already shifted from attorneys to judges.

160. ADLER, *supra* note 39, at 220-224.

161. *Id.* at 221.

162. The English Parliament did so in 1988. *Id.* at 223. In England, potential jurors are picked at random from voter lists. The lawyers are not permitted to ask the jurors questions or to begin arguing the case before the jury is sworn in. *Id.*

Jeffrey Abramson[163] concluded that all peremptory challenges based on a person's group identity should be ended under *J.E.B.*, thus potentially leading to the effective demise of peremptories.[164]

According to Barbara Babcock,[165] eliminating peremptory challenges from our system would be difficult to accomplish and ill-advised. This measure would focus jury selection entirely on the challenge for cause and allow the judge in practically unreviewable decisions to shape the jury in every case.[166] Instead, Babcock proposed the enactment of a comprehensive statute.[167] This statute would broaden the jury pool beyond voter registration lists,[168] supplement juror questionnaires to facilitate the *voir dire* process. Further, it would let the parties give their opening statements to the whole venire and then make inquiries afterward for both cause and peremptory challenges.[169]

CONCLUSION

Almost fifty years ago, the United States Supreme Court recognized for the first time that women should be allowed on juries, because "a flavor" is lost if either sex is excluded. It is exactly this "flavor" that trial attorneys want to add or subtract from a jury by using peremptories. This process is primarily based on intuition and on inexplicable "hunches." That is why a system of unfettered use of peremptories was enacted.

If *Batson* was correctly decided, the *J.E.B.* Court made the right move constitutionally to extend the *Batson* rationale to gender. However, in the process, the Court made the awkward assertion that gender does not have any identifiable influence on jurors' attitudes. In addition, the Court compromised the supposedly peremptory character of certain challenges. Moreover, it opened the door to a further limitation on the use of peremptories, without establishing boundaries to this potentiality. The Court therefore has created a potentially completely paralyzing effect on the peremptory strike.

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163. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 137 (1994).

164. *Id.*

165. Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1175-79 (1993).

166. *Id.* at 1175.

167. *Id.* at 1176.

168. The argument is often made that jury selection based solely on voter lists leads to underrepresentation. ABRAMSON, *supra* note 162, at 125-27. Additional sources could include licensed drivers, utility users and people listed in the city directory. BABCOCK, *supra* note 164, at 1176.

169. Babcock, *supra* note 165, at 1177-78.

The Court's decision could conceivably lead to a situation where *every* peremptory strike would raise equal protection concerns. In order for the peremptory strike to retain any significance, trial judges will have to impose much higher standards to find a *prima facie* case of discrimination in the gender setting than they have done in the race context. However, the likelihood of inconsistent jurisprudence in the lower courts is great because judges, attorneys, and clients are caught in the unclear waters of reasons not having to rise to justifications for cause.

The adherence to the *Batson/J.E.B.* line of cases is undesirable, because if followed consistently, it will in the end lead to unworkability of peremptories[170] and destruction of their character. The Court needs to make a clear choice. It should either take the unlikely road back to *Swain* or it should abolish peremptories entirely.

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170. Even the most crafty trial attorney will, at some point, only be able to deal with the peremptories favorably toward his client through a large expenditure of time and money.