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Roberta K. Flowers

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Cover Page Footnote

Assistant Professor of Law, Stetson University College of Law.

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DOES IT COST TOO MUCH? A 'DIFFERENCE' LOOK AT *J.E.B. v. ALABAMA*

*Roberta K. Flowers**

> I tell you, it's *queer*, Mrs. Peters. We live close together, and we live far apart. We all go through the same things—it's all just a different kind of the same thing! If it weren't—why do you and I *understand*?[1]

INTRODUCTION

A female defense attorney stares at the faces in front of her. These individuals will decide her client's fate, a woman who shot her husband seven times, including three times in the back. The attorney must convince the jury that the defendant killed her husband because she feared for her life and the life of her daughter.[2] In asserting that her client suffers from the battered woman syndrome,[3] the attorney must make the jury understand the helplessness and fear the defendant felt and why the defendant believed she had to kill her husband. Each juror must view the defendant's life as a whole, not simply apply an abstract principle of law. If the members of the jury cannot empathize with the defendant, they cannot fairly evaluate her defense.[4]

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* Assistant Professor of Law, Stetson University College of Law. I wish to thank Professors Robert Batey, Becky Morgan, Tom Marks, Mike Finch, Pat Longan, and Marleen O'Connor for their comments and suggestions on earlier drafts of this Article. A special thank you goes out to Lorna Solomon, Whitney Glasser, and Julie Walbroel for their assistance in researching and editing.

1. Susan Glaspell, *A Jury of Her Peers*, *in* Law and Literature: Legal Themes in Short Stories 124, 137 (Elizabeth V. Gemmette ed., 1992).

2. This scenario is based on the case, *Florida v. Soubielle*, in the Circuit Court of Seminole County, Florida. On April 22, 1988, Soubielle was convicted of second degree murder with a firearm and sentenced to 30 years imprisonment. *See* Diane Mason, *A Marriage Ends in Murder*, St. Petersburg Times, May 26, 1991, at 1F, 6F-7F (describing the facts of the case and reporting on the guilty verdict).

3. The battered woman syndrome was first defined by Lenore Walker in 1979. Walker defines a battered woman as one who is subject to repeated physical or psychological abuse "by a man in order to coerce her to do something he wants her to do without any concern for her rights." Lenore E. Walker, The Battered Woman at xv (1979). The battered woman syndrome is a form of post-traumatic stress experienced by battered women and is characterized by a feeling of helplessness, which causes the battered woman to believe she cannot escape the three-phase cycle of violence often observed in battering relationships. Lenore E. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 48-49 (1989). For a criticism of the use of the battered woman syndrome as a defense to murder, see Anne M. Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1 (1994).

4. One could imagine other scenarios involving cases that require the jury to view facts in a broader context and not just apply abstract rules of law. The following are two examples:

(a) A prosecuting attorney begins jury selection in a rape case. The defense asserts that the victim, a young high school student, consented to sexual intercourse with the

Attorneys have an ethical duty to zealously represent clients within the bounds of the law.[5] That duty includes determining which jurors are most suitable for the case.[6] Prior to voir dire,[7] the attorney has only general information about each juror, such as name, address, employment, prior jury service, and involvement in lawsuits. In addition, the judge places constraints on the voir dire of the jury panel. After briefly questioning the jury, the attorney must determine which jurors will best understand the client's position. Armed with the knowledge that men and women view the same information differently, the experienced trial attorney selects female or male jurors accordingly.

The U.S. Supreme Court, however, in *J.E.B. v. Alabama* ex rel. *T.B.*,[8] held that litigants[9] may not strike potential jurors solely on the basis of gender.[10] The *J.E.B.* Court addressed the issue of gender-

defendant. The prosecuting attorney is concerned that not all potential jurors will understand the victim's decisions. Unless the victim and her actions are viewed in context, the defendant's actions may be deemed excusable.

(b) A plaintiff's attorney in a sexual harassment case faces an all-male jury. These jurors will decide the legitimacy of the female plaintiff's claim. The attorney wonders if any of them will understand the humiliation his client felt at the hands of her harasser. In all likelihood, none of these jurors has faced harassment and some may even be guilty of such behavior. Regardless, the plaintiff's case is in their hands.

5. The ABA Model Code of Professional Responsibility provides that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ." Model Code of Professional Responsibility EC 7-1 (1980).

6. The attorney's duty is not to obtain an impartial jury, but to select jurors who will understand his or her client's perspective. The adversarial system is founded on the premise that truth is discovered by each side putting forth its version of the truth. This idea is analogous to the jury selection process. By eliminating those jurors he or she believes are partial to the other side, or are not in the best position to evaluate the client's position, the attorney helps achieve the goal of seating a jury which can decide the case fairly. Each juror need not be impartial; however, the goal sought is an impartial jury as a whole. *See generally* Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy*, *in* The Trial Process No. 69 (Bruce D. Sales ed., 1981) (discussing several key issues presented by the voir dire and juror challenge practices and advocating further empirical study of these issues to improve the process of jury selection).

7. *See infra* text accompanying notes 33-36.

8. 114 S. Ct. 1419 (1994).

9. Although *J.E.B.* dealt with the prosecutor's use of gender-based peremptory challenges, the Court discussed litigants in general and did not tailor the discussion to prosecutors in criminal cases. If precedent is any indication, *J.E.B.* will be extended to criminal defendants and civil litigants. *See* Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that the defendant's use of race-based peremptory challenges in criminal trials violates the Equal Protection Clause); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (holding that race-based peremptory challenges violate equal protection rights in a civil case).

10. This Article uses the term "gender" instead of "sex." There has been much controversy over the use of these terms. Some scholars distinguish them by indicating that sex refers to biological characteristics and gender refers to cultural distinctions. Deborah L. Rhode, Theoretical Perspectives On Sexual Differences 3 (Yale Univ. Press 1990). In Justice Scalia's dissent in *J.E.B.*, he states that it is a case of sex discrimination because "[t]he present case does not involve peremptory strikes exercised on the basis of femininity or masculinity." 114 S. Ct. at 1436 n.1 (Scalia, J., dissenting).

based peremptory challenges in the context of a criminal paternity suit. The Court held that the use of gender-based peremptory challenges constituted a violation of the Equal Protection Clause under *Batson v. Kentucky*.[11]

Although the *J.E.B.* Court followed the reasoning of *Batson* and its progeny, the decision was unwise because it failed to recognize the differences between men and women and how these differences impact the deliberation process. At a time when courts are attempting to eliminate gender considerations in the jury selection process, the differences in the sexes are being discovered in the fields of social science and biology.[12] For example, the sciences have recognized that women view a moral problem in the context of all the facts; men, on the other hand, are more likely to view the dilemma based on abstract principles.[13] Also, women are inclined to view individual decisions in light of the effect those decisions have on relationships.[14] The attorney, faced with jurors about which she has limited information, might wish to have individuals who are more likely to judge a case in view of the relationships of those involved. Scientific knowledge demonstrates that those persons are more apt to be women.[15]

A segment of the feminist movement has advocated for a recognition of the differences between men and women.[16] The "difference" feminists demand not that the differences between men and women be ignored, but that they be valued.[17] The only way to value these

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This Article, however, discusses the use of peremptory challenges based on the characteristics which are "feminine" and "masculine," not merely the sex of the individual.

11. *J.E.B.*, 114 S. Ct. at 1421 (referring to the holding in Batson v. Kentucky, 476 U.S. 79 (1986)).

12. *See infra* part IV.A.

13. *See infra* text accompanying notes 238-51.

14. *See infra* text accompanying notes 238-51.

15. *See infra* part IV.A.

16. Among those feminists advocating a recognition of gender differences are Robin West and Christine Littleton. *See* Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279 (1987). Many feminists throughout the country, however, applauded the Court's decision in *J.E.B.* as a step forward for the women's movement. The National Women's Law Center characterized this ruling as a " 'landmark decision for women's rights' that recognizes 'the shared history of discrimination faced by women and racial minorities in this country.' " David G. Savage, *Supreme Court Bars Sex Bias in Jury Selection*, L.A. Times, Apr. 20, 1994, at A1, A19. "Women's groups praised the ruling, saying that stereotypes have long kept women out of the jury box." Joan Biskupic, *Supreme Court, 6-3, Prohibits Sex Bias in Jury Selection*, Wash. Post, Apr. 20, 1994, at A1, A13. Deborah Ellis, the legal director of the NOW Legal Defense and Education Fund in New York, said of the decision, the Court "has written a final chapter to end discrimination against women in the jury system, and that's important because there has been a lot of discrimination." Steve McGonigle, *Court Rejects Gender-Based Jury Selection: Women's Groups Hail Decision by Justices*, Dallas Morning News, Apr. 20, 1994, at 1A.

17. Cynthia Fuchs Epstein, Book Review, 79 Cal. L. Rev. 577, 586 (reviewing Deborah Rhode, *Justice and Gender* (Harvard University Press 1989)) ("These differ-

differences is to acknowledge their existence and allow their use in decision making. To disregard these differences is to devalue them. As Justice Sandra Day O'Connor[18] stated in her concurring opinion, the cost of *J.E.B.* is high.[19]

Race discrimination has been dealt with differently throughout history. The "strict scrutiny" test[20] was specifically created in recognition of the need to guard against race-based laws.[21] Classifications based on gender require a heightened scrutiny, however such classifications are not inherently suspect and do not trigger the strict scrutiny test.[22] In jury selection, the prohibition against the exclusion of individuals based on race is founded on the rights of individual citizens. The Court, when considering race-based peremptory challenges, has elevated the juror's rights over those of the litigants. Elevation of black jurors' rights makes sense in light of the unique role race has played in this country's history,[23] and given that African-Americans were previously refused the opportunity to serve on a jury. In contrast, the Court has historically prohibited the exclusion of women from juries based on a different justification—a recognition that women bring a different perspective to the jury. The constitutional history emphasizes the difference that gender makes in the selection of jurors.[24] Un-

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ence feminists, as Rhode calls them, have exhorted the public to favor women's values, women's styles, and women's biological functions . . . ."); *see also* West, *supra* note 16, at 18 ("Cultural feminists, to their credit, have reidentified these differences as women's strengths, rather than women's weaknesses.").

18. Justice O'Connor agreed with the majority that the prosecution had failed to provide an "exceedingly persuasive" justification for its gender-based peremptory challenges, as required by Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). *J.E.B.*, 114 S. Ct. at 1430. Justice O'Connor wrote the majority opinion in *Hogan* which held that Mississippi's refusal to admit a male into its women's nursing school was unconstitutional. 458 U.S. at 733. Feminist scholars debate whether Justice O'Connor herself speaks with a feminine perspective. For contrasting views of Justice O'Connor, see Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 Harv. Women's L.J., Spring 1992, at 37 and Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543 (1986).

19. 114 S. Ct. at 1431 (O'Connor, J., concurring).

20. The "strict scrutiny" test was devised by the court to test the legality of disparate treatment based on an individual's race. Race-based discrimination is inherently suspect. "[I]n 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.' " Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (citations omitted).

21. *J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).

22. *Id.* (Rehnquist, C.J., dissenting); *Hogan*, 458 U.S. at 724.

23. *See* 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting) (citing Justice O'Connor who recognized that "*Batson* does not apply 'outside the uniquely sensitive area of race.' " (citation omitted)).

24. *See infra* part III.A (discussing women and the venire).

fortunately, in following *Batson* without question, the *J.E.B.* Court failed to recognize the distinction between race and gender.[25]

The Court in *J.E.B.* was faced with facts clearly indicating that the individual juror's gender was the only factor the prosecution considered.[26] Many experienced attorneys use gender, however, along with other characteristics, in deciding which jurors are most likely to understand a specific case. In future decisions, the Court should recognize the differences between the genders and refuse to extend its decision to require gender dryness in the jury selection process. Furthermore, the Court should limit the prohibition adopted in *J.E.B.* to peremptory strikes which are based solely on gender and not strikes which are based on gender in addition to individual characteristics.[27]

This Article explores the path the Court should take to limit the prohibitions in *J.E.B.* because of the differences between men and women, and to save the peremptory challenge from extinction. Part I discusses the history and current use of the peremptory challenge from both legal and practical perspectives. Part II reviews the constitutional developments in the area of race-based jury exclusion. The history reflects the Court's actions which ultimately placed jurors' rights ahead of litigants' rights. Part III chronicles the case law addressing the historical exclusion of women from juries. Additionally, part III identifies the basis of the case law that recognizes the different perspective women bring to the jury. Part IV discusses why *J.E.B.* is incorrectly based on a premise that female and male jurors are not different. Part IV also includes the development of feminist thought on the issue of "difference" and the contribution of social science to the difference debate. Part V discusses the role of gender in jury selection, and concludes that *J.E.B.* should be limited to allow gender to be a factor in the jury selection process.

I. The Role of the Peremptory Challenge

A. *Jury Selection Process*

The peremptory challenge is the final step in the jury selection process.[28] Before the lawyers assert any peremptory challenges, the jurors have been qualified in several different ways. Initially, the jury pool is comprised of individuals living within the jurisdiction who

25. The majority in *J.E.B.* stated, "Today we reaffirm what, by now, should be axiomatic . . . ." 114 S. Ct. at 1422.

26. *Id.* at 1426.

27. For a discussion on the use of gender as a single factor in deciding whether to use a peremptory strike, see discussion *infra* notes 323-27.

28. For a summary of jury procedures in the federal system, see Jody George et al., Handbook on Jury Use in the Federal District Courts (1989).

qualify under the state or federal statutes to serve on a jury.[29] Jury pool lists are compiled from a variety of sources including voter registration lists, telephone directories, property tax rolls, and driver's license registrations.[30] The jury commissioner then randomly selects several hundred jurors[31] to serve for a specified court term.

The venire is assembled on the first day of trial and the court and the lawyers begin the process of selecting jurors to serve on the petit jury. First, the court and the litigants question the jurors[32] in a process called voir dire.[33] In recent years, federal and state courts have lim-

29. The Federal Jury Selection and Service Act governs the selection of jurors in the Federal Courts. Title 28 of the United States Code sets forth the criteria which will disqualify individuals from being part of the jury pool:

> (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
>
> (3) is unable to speak the English language;
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury services; or
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

28 U.S.C. § 1865 (b) (1988).

30. James J. Gobert & Walter E. Jordan, Jury Selection: The Law, Art, and Science of Selecting a Jury 150-52 (2d ed. 1990).

31. Individuals may also be excused or exempted from service prior to the actual jury selection process. *See* 28 U.S.C. § 1863 (b) (5), (6) (1988).

32. The voir dire process differs from jurisdiction to jurisdiction in several different ways. The court can conduct the entire questioning of the panel and may permit the attorneys to supplement the oral questioning with written questions. Many federal courts conduct voir dire in this manner. Some state courts provide for the primary questioning to be conducted by the lawyers themselves. The most common rule permits initial examination of the jury by the court, followed by examination by the lawyers. *See* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 548-49 (1975).

Additionally, the jurisdictions differ on the scope of the examination. Some jurisdictions limit the voir dire to the narrow area of challenges for cause. Other jurisdictions allow more extensive questioning. Finally, the questioning can be directed to individual jurors or to the entire venire as a whole. However, the trend has been to reduce the time devoted to this part of the trial by limiting the amount of questioning allowed. *See id.* at 546-49. A 1977 survey of the federal courts conducted by the Judicial Conference of the United States revealed that 77% of the responding judges permitted no direct attorney participation in voir dire. Thomas A. Wiseman, Jr., *From the Bench: Lawyer Voir Dire*, Litig., Winter 1985, at 5, 5; *see also* Hans Zeisel and Shari S. Riamond, *The Effect of the Peremptory Challenge of Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491, 512 (1978) (observing that the voir dire process itself has an effect on the final jury in impressing upon the jurors the "importance of their task" and enhancing "their awareness of their duty to decide the case fairly and impartially").

33. This Article does not address the purposes and goals of voir dire (the question and answer portion of the jury selection process). One article enumerated the following eight goals:

> (1) To reveal grounds for potential challenges for cause. . . .

ited the ability of attorneys to question prospective jurors regarding the information necessary to make an intelligent peremptory challenge.[34] One court observed that "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."[35] Even when the court permits questioning, empirical studies have shown that the information given by prospective jurors is misleading for a variety of reasons.[36]

After questioning the jurors, the lawyers may then exercise a challenge for cause or a peremptory challenge.[37] Challenges for cause are unlimited in number,[38] however, the court must find that cause ex-

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(2) To reveal information that will help the attorney exercise peremptory challenges intelligently. . . .

(3) To prepare the jurors for the proof, and in so doing to emphasize favorable facts and downplay unfavorable ones. . . .

(4) To prepare the jurors for the law by emphasizing favorable law and attempting to limit the effect of unfavorable law. . . .

(5) To develop rapport with the jury. . . .

(6) To obtain commitments from the jury. . . .

(7) To personalize the client. . . .

(8) To advocate the client's case. . . .

Judge David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of* Batson, 23 Tex. Tech. L. Rev. 407, 433-34 (1992).

34. *See supra* note 32 (discussing the voir dire process).

35. United States v. Ible, 630 F.2d 389, 395 (5th Cir. 1980) (quoting United States v. Ledee, 549 F.2d 990, 993 (5th Cir. 1978)).

36. *See, e.g.*, Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1965) (stating that reasons for prospective jurors' lack of candor include: desire to serve on jury; nervousness; and lack of follow-up questions); *see also* Susan E. Jones, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 Law & Hum. Behav. 131 (1987) (concluding that attorneys rather than judges can elicit more candor from venire members because the members are less concerned with pleasing attorneys than judges).

37. Commentators, and the majority in *J.E.B.*, suggest that the answer to the slow elimination of peremptory challenges is to expand voir dire. There are several problems, however, with attempting to elicit the information required to exercise a peremptory challenge based on the differences described in part IV of this Article. First, devising questions that will reveal a person's way of reasoning and thinking is difficult for social scientists and almost impossible for practicing attorneys. Second, studies determining an individual's reasoning take hours to perform while attorneys have limited time to question jurors. Third, the juror in most respects will not be consciously aware of how he or she analyzes a moral dilemma and, therefore, will be unable to communicate this information to the attorneys. *See* William T. Pizzi, Batson v. Kentucky: *Curing the Disease But Killing the Patient*, 1987 Sup. Ct. Rev. 97, 127-28; *see also J.E.B.*, 114 S. Ct. at 1438-39 (Scalia, J., dissenting); *infra* part IV (discussing, in part, that jurors are unaware of their unconscious biases).

38. In most states, peremptory challenges are limited in number by statute. For examples of statutes that limit the number of permissible peremptory challenges see Fed. R. Crim. P. 24(b); Fla. Stat. Ann. § 913.08 (West 1985); Ill. Ann. Stat. ch. 725 para. 115-4 (Smith-Hurd 1992); N.Y. Crim. Proc. Law § 270.15 (McKinney 1992); *see also* Annotation, *Number of and Procedure for Exercising Peremptory Challenges Allowed in Federal Criminal Trial for Selection of Regular Jurors—Modern Cases*, 110 A.L.R. Fed. 626 (1992).

ists.[39] Challenges for cause are usually statutorily based and very limited in scope.[40] Critics have suggested that, due to the narrow definition of the challenge for cause, it is effective in eliminating only "the most blatant biases."[41]

While challenges for cause are based on an objective standard, peremptory challenges are based on a subjective standard.[42] Lawyers exercise peremptory challenges "without a reason stated, without inquiry and without being subject to the court's control."[43] Because of the scarcity of information on prospective jurors, stereotyping is an essential ingredient in exercising peremptory challenges. Lawyers often base decisions on past jury experience and jury selection literature describing how jurors are likely to view the client's case. When a lawyer must exercise peremptory challenges based on a limited amount of individualized information, stereotypes may be a "plausible . . . basis for [their] action . . . ."[44] Barbara Babcock[45] asserts that peremptory challenges are beneficial because they allow the system to avoid "trafficking in the core of truth in most common stereotypes."[46] Although the use of benign stereotyping in peremptory challenges has been approved by the Court,[47] *J.E.B.* has now limited the scope of what is "permissible" stereotyping.[48]

B. *History of the Peremptory Challenge*

In *Swain v. Alabama*,[49] the Court recognized the long history of the peremptory challenge, describing it as "one of the most important of

39. Judges usually will not excuse jurors for cause unless the showing of bias is blatant. *See* Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 243-44 (1968). To excuse a juror for bias, the court must find that the juror cannot put aside bias and decide the case based on the evidence and the instructions. State v. Deaner, 334 S.E.2d 627, 629 (W. Va. 1985); Caldwell v. Commonwealth, 634 S.W.2d 405, 407 (Ky. 1982).

40. Most statutes enumerate the limited scope of the challenge for cause. The grounds for cause usually include: blood relationship; business relationship or friendship with the parties or attorneys; preconceived ideas about the merits of the case; prior personal experience on a jury involving the case; or sympathy. Gobert & Jordan, *supra* note 30, at 199-200.

41. Stephen A. Saltzburg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 340 (1982).

42. 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, 953 (1994).

43. Swain v. Alabama, 380 U.S. 202, 220 (1965) (citations omitted).

44. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 211 (1989).

45. Babcock, *supra* note 32.

46. *Id.* at 553.

47. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1428 n.14 (1994) (holding that peremptory challenges made on the basis of a group's characteristics other than race or gender are generally permitted).

48. *See id.* at 1429; *see also infra* part V.

49. 380 U.S. 202 (1965).

the rights secured to the accused."[50] The first recorded use of these challenges dates back to Roman history.[51] Its use continued throughout the English Common law and was brought to the United States on the Mayflower.[52] Use of the peremptory challenge in America was originally based on common law adopted from England.[53] The right to a peremptory challenge survived virtually without question until the twentieth century.[54] Congress established peremptory challenges in the 1790 Act for all felonies punishable by death.[55] Where the offense was not punishable by death, the government and the defendant were always considered to have the right to peremptory challenges, although the source of this right is not clear.[56] Although subsequent Acts of Congress changed the number of peremptory challenges available, the viability of the peremptory challenge was never seriously questioned until 1965.[57]

The right to peremptory challenges in criminal cases has always been well-recognized. The Supreme Court cases addressing peremptory challenges deal almost exclusively with the prosecutor's right to peremptory challenges and limitations on that right.[58] In *Hayes v. Missouri*,[59] the Court stated that "[i]t is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."[60]

In *Swain*, the African-American defendant argued that his constitutional right to a fair trial was violated when the state exercised its peremptory challenges to exclude all African-American members of the venire.[61] The defendant supported his claim with statistics demonstrating that although African-Americans constituted twenty-six percent of the population in Talledega County, Alabama, no African-American had served on a petit jury in that county in more than fifteen years.[62] Despite these astonishing statistics, the Court held that

50. *Id.* at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

51. Under Roman law, both parties proposed up to one hundred jurors each. The opposing party could strike fifty jurors which left one hundred jurors to decide the case. Carlson, *supra* note 42, at 953 n.24 (citation omitted).

52. Charlan Nemeth et al., *From the '50s to the '70s: Women in Jury Deliberations*, 39 Sociometry 293, 293 (1976).

53. *Swain*, 380 U.S. at 213-14.

54. *See id.* at 216-17.

55. 1 Stat. 119 (1790).

56. *Swain*, 380 U.S. at 214 (citations omitted).

57. *See id.* at 209 (discussing the petitioner's claim "relating to the exercise of peremptory challenges to exclude Negroes from serving on petit juries").

58. *See, e.g., id.* at 202 (objecting to the prosecutor's use of peremptory challenges to strike African-American members of the venire); *see also* Hayes v. Missouri, 120 U.S. 68 (1887).

59. 120 U.S. 68 (1887).

60. *Id.* at 70.

61. *Swain*, 380 U.S. at 205, 210.

62. *Id.* at 202.

the defendant's constitutional rights had not been violated, emphasizing that peremptory challenges are a vital part of the voir dire process.[63] Commentators echoed this sentiment in the following years.[64] Although the Court has continued to give lip service to the importance of the peremptory challenge, its actions elevating the juror's rights to serve on the jury, and disregarding the issues of difference, imply that the peremptory challenge's importance has declined.

C. *Purposes and Functions of Peremptory Challenges*

1. Perception of Fairness

Blackstone recognized that a primary purpose for peremptory challenges was to allow a defendant to participate in the selection of the individuals who will decide his or her fate. A "prisoner . . . should have a good opinion of his jury,"[65] and "the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike."[66] The peremptory challenge allows a party to remove jurors who may be inclined toward the opposing party, regardless of the basis.[67] The courts have long recognized that a defendant "should not be held to accept a juror, apparently indifferent, whom he distrusted for any reason or for no reason."[68]

By increasing the litigants' participation in the selection of their jury, the system ensures that verdicts are more acceptable to the parties.[69] As one commentator stated, "[I]n a real sense the jury belongs to the litigant: he chooses it."[70] Some have acknowledged that assuring the litigants of the jury's fairness is the peremptory challenge's "most important function."[71] As Justice Frankfurter notes, "The appearance of impartiality is an essential manifestation of its reality."[72]

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63. *Id.* at 202, 219, 221-22. "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." *Id.* at 222.

64. Babcock, *supra* note 32, at 555.

65. 4 William Blackstone, Commentaries *353. As Blackstone notes, a prisoner's discomfort may be based on "impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." *Id.*

66. *Id.*

67. *See* Pizzi, *supra* note 37.

68. Lamb v. State, 36 Wis. 424, 426 (1874).

69. Frederick V. Olsen, Note, Edmonson v. Leesville Concrete Co.: *Reasoned or Result-Oriented Jurisprudence?* 12 N. Ill. U. L. Rev. 497, 499-500 (1992).

70. Babcock, *supra* note 32, at 552.

71. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1438 n.3 (1994) (Scalia, J., dissenting).

72. Dennis v. United States, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting). In contrast, Professor Amar, observes, "But what about the legitimacy of the verdict for the rest of society—We the People who see weird juries, chosen in weird and expensive ways, generate weird outcomes? And the trial judge, appellate court, legislature, and grand jury are legitimate even though the defendant didn't hand pick any

2. Protection of Voir Dire

Blackstone reasoned that the peremptory challenge also served as protection for attorneys attempting to establish challenges for cause. If an attorney fails in asserting a challenge for cause, "perhaps the bare questioning [of] his indifference may sometimes provoke a resentment."[73] In *United States v. Hamilton*,[74] the court recognized the necessity of peremptory challenges in enabling "counsel to ascertain the possibility of bias through probing questions . . . by removing the fear of incurring a juror's hostility."[75] When the court finds a challenge for cause insufficient, a peremptory challenge may be used to exclude that person because the attorney believes the challenge for cause was sufficient or the person being questioned was insulted merely by the questioning of his impartiality. Challenges for cause will become unworkable if peremptory challenges are rendered extinct.

3. Elimination of Fringe Jurors

The peremptory challenge is more than a mere custom[76] or supplement to the challenge for cause.[77] It is the method for obtaining a fair and impartial body to sit as the trier of fact. The judicial system does not anticipate that each juror will be impartial, but seeks an impartial jury as a whole in order to achieve the ultimate goal of fairness.[78] Fairness is guaranteed to parties under the ideology that they are entitled to a jury selected from a fair cross-section of the community. The alternative strikes provided to the parties enable each side to strike extremes[79] and, therefore, be left with an "impartial jury."[80] The real purpose of the peremptory challenge is to eliminate the extremes of the spectrum. The process is an attempt to "winnow[ ] out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible."[81] By eliminating

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of them . . . ." Akhil R. Amar, *Reuniting Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1182-83 (1995) (Edward L. Bassett, Jr. Lecture on Constitutional Law).

73. Blackstone, *supra* note 65, at *346.

74. 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990).

75. *Id.* at 1042 (citation omitted).

76. *See supra* part I.B (discussing the history of peremptory challenges).

77. *See supra* part I.C.2 and accompanying text.

78. Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. L. Rev. 1115, 1120 (1994).

79. In my Trial Advocacy class, I use a continuum to demonstrate the obtainment of an impartial jury. On one end of the continuum are those jurors with extreme bias for the defendant. On the other end are those jurors who would be viewed as extremely biased for the prosecutor. In the middle are those jurors likely to be chosen in light of each side striking those jurors at the ends of the continuum.

80. James J. Gobert, *In Search of the Impartial Jury*, 79 J. Crim. L. & Criminolgy 269 (1988).

81. Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting).

the extremes, the selection of an impartial or unbiased jury is ensured.[82]

Justice O'Connor, in her concurring opinion in *J.E.B.*, opines that the peremptory challenge is an invaluable tool for eliminating the "extremes of partiality on both sides."[83] At the core of that tool is the recognition that the challenge is often based on intuition, "experienced hunches and educated guesses."[84] Justice O'Connor believes that the peremptory challenge loses its effectiveness when lawyers are forced to articulate the reasons for a challenge.[85] When peremptory challenges become less discretionary and more akin to challenges for cause, lawyers are deterred from challenging jurors they believe are partial to the other side.[86] Lawyers become concerned that if the challenge is not accepted, the juror may feel animosity toward the litigant based on the lawyer's attempt to exclude the juror from the jury.[87]

The peremptory challenge does not address the competency or qualifications of an individual juror. To the contrary, it addresses litigants' legitimate concerns in having their cases judged by individuals who are open to the litigants' perspectives. The peremptory challenge "enabl[es] each side to exclude those jurors it believes will be most partial toward the other side."[88] In his dissent in *J.E.B.*, Justice Scalia stated that "[w]omen [are not] categorically excluded from juries because of doubt that they [are] competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case."[89]

Historically, the peremptory challenge has been an important part of the American justice system. It has served not only to provide litigants with the sense that they participated in the process, but also to eliminate bias from the jury as a whole. The peremptory challenge has survived two hundred years because it is an essential part of the system. Recent jurisprudence restricts the unhampered exercise of peremptory challenges. A review of that history reveals that the restrictions placed on race-based peremptory challenges stemmed from the recognition of the rights of similarly situated individuals to be treated alike.[90] On the other hand, the cases[91] addressing the presence of women on the jury involve the recognition that men and women bring distinct perspectives and thought processes to the jury.

82. Holland v. Illinois, 493 U.S. 474, 484 (1990) (citing Batson v. Kentucky, 476 U.S. 79, 91 (1986)).
83. J.E.B. v. Alabama, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. Holland v. Illinois, 493 U.S. 474, 484 (1990).
89. *J.E.B.*, 114 S. Ct. at 1437 (Scalia, J., dissenting).
90. *See infra* part II.
91. *See infra* part III.

II. THE EROSION OF THE PEREMPTORY CHALLENGE

A. *Pre-*Batson*: The Unlimited Peremptory Challenge*

The Supreme Court first considered the constitutional parameters of jury composition in *Strauder v. West Virginia*.[92] In *Strauder*, an African-American defendant was convicted of murder by an all-white, all-male jury.[93] On appeal, the Court addressed a state statute prohibiting African-American males from serving on grand juries or petit juries in West Virginia and discussed a defendant's right to be tried by a jury drawn from a venire including members of his race.[94] The Court determined that, under the Fourteenth Amendment, the defendant was denied equal protection because he was not tried by a jury selected from a panel including African-American males.[95] The Court compared the rights of African-American defendants[96] to the rights enjoyed by white male defendants. The Court found each group to be entitled to a jury selected from a pool which included persons of their respective race.[97] Although the Court held that under the Equal Protection Clause a defendant is entitled to a jury selected from a pool consisting of individuals from his race, the defendant is not entitled to be tried by a jury that is "composed in whole or in part of persons of his own race or color."[98] The composition of the venire cannot consist entirely of white males, but apparently the jury can.[99]

The Court first addressed whether the use of race-based peremptory challenges violated the Equal Protection Clause in *Swain v. Alabama*.[100] The Court held that the Equal Protection Clause is violated if the defendant demonstrates the consistent, absolute exclusion of African-American jurors.[101] To prove that the government violated the defendant's rights in the use of its peremptory challenges under *Swain*, however, the defendant must show systematic exclusion of

92. 100 U.S. 303 (1879). This case actually dealt with the jury pool, not the composition of the petit jury.

93. *Id.* at 304.

94. *Id.* at 305.

95. *Id.* at 310.

96. Courts and commentators often incorrectly cite *Strauder* for the proposition that it is the juror who is injured by the race-based peremptory challenge. A prime example is *Batson v. Kentucky*, where the Court explained that "[a]s long ago as *Strauder*, . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." 476 U.S. 79, 87 (1986). Actually, the holding of *Strauder* was based on the rights of the defendant. It was only in dicta that the court recognized that the excluded juror was affected, stating that "[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them . . . ." *Strauder*, 100 U.S. at 308.

97. *Id.* at 305.

98. *Id.*

99. *Id.*

100. 380 U.S. 202 (1965). *See supra* notes 49-50 and accompanying text.

101. 380 U.S. at 223-24.

blacks over a period of time in addition to their exclusion in the defendant's case.[102] Evidence of the discriminatory use of peremptory challenges against African-Americans in a single case is not sufficient to bring a constitutional claim against the state.[103] To prove systematic exclusion, the Court required a use of peremptory challenges that would cause the same situation prohibited in *Strauder*—the total exclusion of African-Americans from jury service.[104] As a result of the defendant's heavy burden, few were successful in asserting the equal protection argument.

B. Batson v. Kentucky: *Limiting Peremptory Challenges to Protect the Defendant*

In 1986, the Court readdressed the requirements of *Swain*, and overruled that decision. In *Batson v. Kentucky*,[105] an African-American man was convicted of second degree burglary and receipt of stolen goods.[106] At trial, he objected to the prosecutor's use of peremptory challenges to exclude all four of the African-Americans in the venire.[107] The trial court overruled his objections and Batson was convicted by an all-white jury.[108] The Court held that the Equal Protection Clause[109] is violated if the prosecutor in a criminal case "challenge[s] potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[110]

Although the Court in *Batson* referred to "the harm that discriminatory jury selection inflicts upon the excluded juror,"[111] the language used by the Court indicates that it based its finding of an equal protection violation[112] solely on the rights of the defendant.[113] In *Batson*, the Court articulated a test for trial judges to follow in determining whether a prosecutor has violated the Equal Protection Clause in his

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102. *Id.* at 227.
103. *Id.*
104. *Id.* at 223-24.
105. 476 U.S. 79 (1986).
106. *Id.* at 82-83.
107. *Id.* at 83.
108. *Id.*
109. In a dissenting opinion, Chief Justice Burger and Justice Rehnquist noted that the petitioner in *Batson* specifically declined to use the Equal Protection Clause as a basis for his argument at the trial court and first appellate level, relying instead on the Sixth Amendment. *Id.* at 112 (Burger, C.J. and Rehnquist, J., dissenting).
110. *Id.* at 89.
111. Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. at 87) (internal quotations omitted).
112. The Court failed to recognize that in fact the petitioner did not base his equal protection claim on the prospective juror's rights.
113. In his dissent in *Powers*, Justice Scalia stated that *Batson* recognized that a defendant had the right to be tried by juries from which members of their own race have not been intentionally excluded. 499 U.S. at 425. (Scalia, J., dissenting).

or her use of a peremptory challenge.[114] The test itself is evidence of the Court's basis for the violation. First, the defendant must be a member of a cognizable group.[115] If the equal protection violation was centered on the rights of the juror to sit on a jury, the race of the defendant would be of little or no consequence.[116] The test also requires that the juror who was stricken be a member of the same cognizable group as the defendant.[117] Again, such a requirement is inconsistent with a violation arising from the rights of the juror, but is consistent with the defendant's right to be tried by people similar to himself.

Clearly, in *Batson*, the violation stemmed from the rights of the accused and not from the rights of the juror. The Court merely mentioned the right to serve on a jury in dicta, yet it has been elevated by case law and commentary to a basic right that must be protected.[118] The parties' rights to a fair trial, including the right to due process and equal protection, are the rights that should be given the most weight. The death of the peremptory challenge became inevitable when the courts shifted the focus from litigants' rights to third parties' rights. As Justice Thomas observed in his dissenting opinion in *Georgia v. McCollum*,[119] the limiting of peremptory challenges based on the juror's rights is "a serious misordering of our priorities," for it means "we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death."[120]

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114. Under the *Batson* three-part test, the defendant must initially show that he or she is a member of a "cognizable racial group" and the prosecution used one of its peremptory challenges to remove a member of that group. Secondly, the defendant must show that "relevant circumstances" raise an inference of discrimination. The trial judge then decides whether the defendant has made a *prima facie* case of purposeful discrimination. If the trial court finds that the defendant met the standard, the prosecutor must proffer a nondiscriminatory explanation for the allegedly race-based peremptory challenge. Although the reason must be related to the case, it "need not rise to the level justifying exercise of a challenge for cause." The trial judge must again weigh the evidence to determine if the defendant has established purposeful discrimination. Batson v. Kentucky, 476 U.S. 79, 96-98 (1986). Recently, the Supreme Court reiterated the three-part test in determining validity of a peremptory challenge. Purkett v. Elem, 115 S. Ct. 1769 (1995).

The above is the test in theory. My experience as a prosecutor, however, is different. In most instances, the criminal defendant must only point out that a member of a cognizable group has been excluded and then the prosecutor has the burden of proving that his or her peremptory challenge was race-neutral. At the trial level, the prosecutor is required to prove a negative, that the challenge was not based on race. This is almost impossible. Therefore, the judge is inclined to leave the juror on the jury. In addition, the prosecutor is unable to appeal the trial court's decision to deny a peremptory challenge.

115. *Batson*, 476 U.S. at 96.

116. *See Powers*, 499 U.S. at 420 (Scalia, J., dissenting).

117. *Batson*, 476 U.S. at 96.

118. Grossman, *supra* note 78, at 1128.

119. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

120. *Id.* at 2360 (Thomas, J., concurring in the judgment).

C. *Extension of* Batson *Prior to* J.E.B: *Shifting the Rationale to Protection of the Juror*

In *Powers v. Ohio*,[121] the Court elevated the rights of prospective jurors, which it had merely acknowledged in dicta in *Batson*. During the trial, Powers, a white criminal defendant, objected to the prosecution's exercise of six of its nine peremptory challenges to remove African-Americans from the jury.[122] The defendant was convicted of murder.[123] On appeal, he asserted that the prosecutor had violated his Fourteenth Amendment equal protection rights and his Sixth Amendment right to a jury selected from a fair cross-section of the community.[124] Citing *Holland v. Illinois*,[125] the Court summarily dismissed the Sixth Amendment claim, stating that it did not apply to peremptory challenges.[126] The Court further held that a criminal defendant, no matter what his or her race, had "third party standing"[127] to assert the equal protection rights of African-American jurors, who had been excluded by the government through use of peremptory challenges.[128] Accordingly, the Court reversed the defendant's conviction based on his assertion of the third party rights of the jury.[129] *Powers* is a landmark decision in that it is the first time the Court explicitly recognized the equal protection rights of a juror.[130]

In *Powers*, the Court also discussed the "multiple ends"[131] served in *Batson*. The defendant's rights are only one set of rights to be pro-

121. 499 U.S. 400 (1991).

122. *Id.* at 403. The composition of the jury that convicted the defendant is unclear. It is also unclear whether the defense exercised any of its peremptory challenges against African-American members of the venire. The Court did not require a showing of any injury to the defendant as a result of the exclusion of the juror. It reversed the defendant's conviction as a sanction for the State's violation of the individual juror's equal protection rights.

123. *Id.* at 403.

124. *Id.*

125. 493 U.S. 474 (1990). In *Holland*, the white, male petitioner objected to the prosecution's use of peremptory challenges to strike two black venire members from the jury. *Id.* at 476. On appeal, the petitioner asserted only that his Sixth Amendment right to be tried by a representative cross-section of the community had been violated. *Id.* at 477-78. The Court held that both the Sixth and Fourteenth Amendments offer distinct protection to the parties and to the judicial system itself. *Id.* at 488. Specifically, the Sixth Amendment mandates an impartial jury, not a representative one. *Id.* For this reason, the Court held that a party may not invoke the Sixth Amendment to contest the discriminatory use of peremptory challenges. *Id.* at 487.

126. *Powers*, 499 U.S. at 409.

127. The issue of third party standing, and the dangers inherent in holding that a litigant has standing to assert the rights of a juror, is outside the purview of this Article. The issue of third party standing initially requires a determination that the first party has a right upon which the third party can stand. This Article discusses the creation of the first party right of the juror to the detriment of the litigants.

128. *Powers*, 499 U.S. at 415.

129. *Id.* at 416.

130. *Id.* at 417-27 (Scalia, J., dissenting) (providing a history of cases which focus on the rights of the defendant as opposed to the rights of the juror).

131. *Id.* at 406.

tected. The extension of *Batson* to cover all litigants, irrespective of their status in the case or relationship to the juror, was designed to remedy the harm to the "dignity of the persons" and to the "integrity of the system."[132] The Court found the right to serve on a jury to be one of the basic rights of citizenship.[133] The continued use of the jury system is justified, according to the Court, because it is an "opportunity for ordinary citizens to participate in the administration of justice."[134] As with other rights and obligations of citizenship, the purpose of the jury system is not to serve the citizens; on the contrary, citizens serve the jury system.[135] To reason otherwise would be to put the cart before the horse.

The expansion of *Batson*, and resulting decline of the peremptory challenge, continued with the Court's decisions in *Edmonson v. Leesville Concrete Co.*[136] and *Georgia v. McCollum.*[137] Both cases extended the *Batson* limitation to other litigants: the civil litigant in *Edmonson*,[138] and the criminal defendant in *McCollum.*[139] These cases actually dealt with the expansion of the definition of "state actor," however, they also served to reinforce litigants' third party standing to assert the equal protection rights of jurors.

Beginning with *Powers*, the Court elevated the rights of the juror above the rights of the litigant—basing the decisions on the Equal Protection Clause and emphasizing the rights of similarly situated people to be treated equally. The prohibition against the exclusion of individuals from jury service based on race has historically been premised on different rights than the prohibition against gender-based exclusion. Throughout women's history of jury service, the courts have emphasized the different perspective women bring to the courtroom. Unfortunately, in *J.E.B.*, the Court lost sight of this vital distinction.

III. Women and Jury Selection

A. *Women on the Venire*

In 1946, the U.S. Supreme Court first addressed the presence of women on juries[140] in a case involving the Court's supervisory powers over lower federal courts. In *Ballard v. United States*,[141] the Court

132. *Id.*
133. *Id.* at 407.
134. *Id.* at 406.
135. *See supra* text accompanying note 117.
136. 111 S. Ct. 2077 (1991).
137. 112 S. Ct. 2348 (1992).
138. 111 S. Ct. at 2089.
139. 112 S. Ct. at 2359.
140. For a history of women's struggle to sit on juries, see Barbara A. Babcock, *A Place in the Palladium: Women's Rights And Jury Service*, 61 U. Cin. L. Rev. 1139, 1160-71 (1993).
141. 329 U.S. 187 (1946).

ruled that in a state where women were eligible to serve as jurors, a federal court could not exclude female jurors from the venire.[142] In addressing the defendant's right to a fair trial, the Court focused on Congress' intent to provide defendants a representative jury[143] which reflects a fair cross-section of the community.[144] A citizen's right to sit on a jury was not at issue, rather, the Court focused on the right of the litigant to be tried by a representative jury.[145]

The underlying rationale of the representative jury requirement is that women bring something different to the jury. In *Ballard*, the Court stated, "The truth is that the two sexes are not fungible. . . ."[146] The Court further acknowledged that "a distinct quality is lost" if women are excluded from a jury.[147] The *Ballard* Court distinguished the exclusion of females from the exclusion of jurors based on race or economic status and stated, "The exclusion of one [sex] may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."[148] Thus, from the very beginning the Court recognized that the jury service issues involving race and gender differ.[149]

In *Taylor v. Louisiana*,[150] the Court reiterated its finding that female jurors bring a distinctive quality to the jury and prohibited the systematic exclusion of females from the venire.[151] In *Taylor*, the defendant was indicted for aggravated kidnapping.[152] Prior to trial, he moved to quash the petit jury venire, alleging that women were systematically excluded from the pool, therefore depriving him of his constitutional right to "a fair trial by jury of a representative segment of the community."[153] The defendant's motion was denied, and after being convicted and sentenced to death, he appealed.[154] Although the Louisiana Criminal Code permitted female jurors, it required women

142. *Id.* at 193-95.

143. This case, like *Strauder*, discussed the venire or jury pool instead of the actual make up of the petit jury which heard the case. The Court in *Ballard* concentrated on the qualifications of women to sit on juries, not the preference of women over men on juries. *Id.* at 193.

144. *Id.* at 191.

145. *Id.*

146. *Id.* at 193.

147. *Id.* at 194.

148. *Id.*

149. Grossman defines the difference between race and gender in the area of juror service as the Court applying a model of citizenship rights to the issue of race-based jury exclusion, and a model of representative juries to the gender-based jury exclusion. Grossman, *supra* note 78, at 1123-36. While this is certainly a legitimate characterization, it is important to realize why this model of difference existed. I believe such a difference arose out of a basic understanding of human nature that women are distinct from men.

150. 419 U.S. 522 (1975).

151. *Id.* at 533.

152. *Id.* at 524.

153. *Id.*

154. *Id.*

to affirmatively register to be eligible to sit on a jury.[155] The operation of this statute had a systematic, negative impact on the number of women that were actually called to jury service.[156] The Court also addressed whether a "jury-selection system which operates to exclude from jury service an identifiable class of citizens constituting 53% of eligible jurors in the community comports with the Sixth and Fourteenth Amendments."[157] The Court answered this question in the negative and found a violation of the fair cross-section requirement of the Sixth Amendment due to the systematic exclusion of women from the venire.[158]

In *Taylor*, the Court recognized that controlled studies of women jurors indicate that they bring to the jury unique perspectives and values that influence jury deliberations and results.[159] The Court's decision clearly acknowledges that women constitute a large part of the community and are distinct from men;[160] thus, their systematic exclusion violates the fair cross-section requirement of the Sixth Amendment.[161]

The Court in *Taylor* dealt with the qualifications of jurors to be included in the jury pool and found that women could not be disqualified based on a belief that they were incapable of performing as jurors.[162] The Court recognized that women had historically been considered unqualified for jury service by virtue of the doctrine of

155. *Id.* at 523.

156. *Id.* at 525.

157. *Id.* at 525-26.

158. *Id.* at 531. Although the Court again required that the venire be a fair cross-section of the community (to include women in the jury pool), it did not require that the jury actually chosen mirror the community and reflect the distinctive groups represented in the population. *Id.* at 530.

159. *Id.* at 532 n.12.

160. There are risks whenever someone takes on the role of being distinct. A good example of a case where the distinction between males and females leads to the exclusion of women is Hoyt v. Florida, 368 U.S. 57 (1961). In that case, the Supreme Court upheld an affirmative registration statute requiring women to register voluntarily for jury duty before their name would be placed on the venire list. *Id.* at 69. The Court focused on the rights of the litigant and found that no violation of the Fourteenth Amendment had occurred in the automatic exemption for female jurors. *Id.* at 65. It distinguished between male and female jurors based on their separate political and domestic spheres. *Id.* at 61-62. The Court stated that despite the "enlightened emancipation of women" in most respects a "woman is still regarded as the center of home and family life." *Id.*; *see also* Carol Weisbrod, *Images of the Woman Juror*, 9 Harv. Women's L.J., Spring 1986, at 59, 66. Historically, the distinction between males and females has been used to completely disqualify women from juries. Today, instead of trying to act as though the differences do not exist, we must work toward valuing those differences and using them to effect change and proper results.

161. 419 U.S. at 531.

162. *Id.* at 537. Again, in Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), the Court addressed the issue of qualifications. In *Thiel*, the jury commissioner and the clerk of the court systematically excluded any juror from the venire who worked for a daily wage. *Id.* at 221-22. The Court in *Thiel* reasoned that a juror's competence to render a verdict is not necessarily based on his or her employment; a daily wage

"*propter defectum sexus*, a 'defect of sex.' "[163] The Court further noted that women could no longer be excluded from jury service on the premise that they serve a distinctive role in society and jury service would substantially interfere with that function.[164] "If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed."[165]

B. *Women and Peremptory Challenges Prior to* J.E.B.

During the years between *Taylor* and *J.E.B.*, the focus shifted from composition of the venire to selection of the petit jury and use of peremptory challenges. In *Batson*, and its pre-*J.E.B.* progeny, the Court's analysis of prohibited uses of peremptory challenges focused primarily on race and relied on equal protection analysis.[166] Several lower courts, however, considered whether *Batson* also prohibits gender-based peremptory challenges, applying the equal protection analysis formerly reserved to race-based peremptory challenges to gender-based peremptory challenges. The results varied.[167]

United States v. Hamilton[168] is representative of cases where courts declined to extend *Batson*. The Fourth Circuit rejected the defendant's argument that the government violated the Equal Protection Clause by using its peremptory challenges to exclude women from the jury. In *Hamilton*, several defendants, males and females, were tried on various drug-related offenses.[169] The government used three of its peremptory challenges to exclude women, claiming female jurors might be "overly sympathetic" to female defendants.[170] The jury that

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earner is fully competent to be a juror, and the systematic exclusion of such persons from jury service cannot be justified by federal or state law. *Id.* at 222-23.

163. 419 U.S. at 533 n.13.

164. *Id.* at 533-34.

165. *Id.* at 537.

166. *See supra* part II.

167. 114 S. Ct. at 1422 n.1. In *J.E.B.*, the Court recognized that the federal circuits were divided on whether *Batson* applies to gender-based peremptory challenges. *See* United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), *reh'g* 960 F.2d 1433, 1437-43 (9th Cir. 1992) (en banc) (extending *Batson* to prohibit gender-based peremptory challenges in both criminal and civil trials); *cf.* United States v. Broussard, 987 F.2d 215, 218-20 (5th Cir. 1993) (declining to extend *Batson*); United States v. Nichols, 937 F.2d 1257, 1262-64 (7th Cir. 1991) (declining to extend *Batson* to gender), *cert. denied*, 502 U.S. 1080 (1992); United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (declining to extend *Batson*), *cert. dismissed*, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990). The *J.E.B.* court also recognized that state courts which considered the constitutionality of gender-based peremptory challenges were split on the issue. 114 S. Ct. at 1422 n.1.

168. 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed*, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990).

169. *Id.* at 1039.

170. *Id.* at 1041. The prosecution was required to explain its peremptory challenges because the excluded jurors were also black. These peremptory challenges were race-

ultimately convicted the defendants in *Hamilton* consisted of nine females and three males.[171]

In *Hamilton*, the court acknowledged the Equal Protection Clause's application to gender discrimination in other contexts, yet found nothing to suggest that "the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges."[172] Although the court did not define what was unique about peremptory challenges, its recitation of the benefits of such challenges implies a recognition that a juror's gender makes distinctive contributions to jury deliberations.[173]

The Fourth Circuit also reasoned that if the Supreme Court desired to limit the exercise of peremptory challenges based on "gender, age or other group classification[s]," it would have done so.[174] The Fourth Circuit concluded, however, that "in light of the important position of the peremptory challenge in our jury system," the Court did not intend that *Batson* be extended to gender-based peremptory challenges.[175]

Not all courts considering the extension of *Batson* to gender-based peremptory challenges reached the same conclusion. *United States v. De Gross*[176] is the leading pre-*J.E.B.* case where *Batson* was extended to gender-based peremptory challenges. The defendant in *De Gross* was convicted of aiding and abetting the transportation of an alien.[177] The district court in *De Gross* required the defendant to explain its

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neutral according to the prosecutor because he based them on the juror's gender, not race. *Id.*

171. *Id.* Five women and one man had been seated on the jury when the prosecution challenged the first of three questioned jurors. The seated jury consisted of seven women and one man when the next juror was challenged. Lastly, the number of female jurors had increased to nine when the prosecutor challenged the third and final juror. *Id.*

Theorists were concerned that if *Batson* was not extended to gender-based peremptory challenges, prosecutors could mask the prohibited race-based peremptory challenges in the cloak of a permitted gender-based peremptory challenge. *See* Shirley S. Sagawa, Batson v. Kentucky: *Will It Keep Women on the Jury?*, 3 Berkeley Women's L.J. 14, 37 (1987-88).

172. 850 F.2d at 1042.

173. *See id.* at 1042. The *Hamilton* court approvingly quoted Chief Justice Burger's dissenting opinion in *Batson* which recognized that "[c]ommon human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases." *Id.* (quoting Batson v. Kentucky 476 U.S. 79 (1986) (Burger, C.J. and Rehnquist, J., dissenting)). While Chief Justice Burger referred to race, the quote is much more applicable to what is generally known about women jurors. *See infra* part IV. Again, the issue is not the qualification of jurors, but rather the litigants' preferences. The adversary system creates an impartial jury by allowing each side to strike jurors not because they are unqualified but because they are not preferred by the advocate. *See infra* part IV.

174. 850 F.2d at 1042.

175. *Id.* at 1042-43.

176. 913 F.2d 1417 (9th Cir. 1990).

177. *Id.* at 1419.

peremptory challenges when the prosecution objected to the defendant's use of its seventh peremptory challenge to strike the seventh male venireperson.[178] The defendant offered no explanation,[179] and the district court disallowed the challenge and the venireperson sat on the jury.[180] The defendant was convicted by a jury of three men and nine women.[181]

On appeal, the Ninth Circuit applied an equal protection standard and extended the prohibitions in *Batson* to gender-based peremptory challenges.[182] Although the court recognized the different treatment afforded race and gender under the Equal Protection Clause, it found that gender-based peremptory challenges were not substantially related to the goal of achieving an impartial and fair jury.[183] The court extended *Batson* based on alleged "harm [to] the excluded venireperson."[184] In *De Gross*, the court found that "a person's gender is unrelated to her ability to serve as a juror."[185] The *De Gross* court confused the qualifications of a juror with the litigant's preference of one juror over another. The peremptory challenge deals with the latter, not the former.[186] Had the courts not begun to gloss over the distinctions between race-based and gender-based peremptory challenges, the litigant's right to participate in jury selection would have remained intact.

C. J.E.B. v. Alabama *ex rel.* T.B.

Twenty years after *Taylor*, the Supreme Court revisited the issue of gender and jury selection in *J.E.B. v. Alabama* ex rel. *T.B.*,[187] where it addressed gender-based peremptory challenges for the first time. In *J.E.B.*, a male petitioner claimed his Fourteenth Amendment equal protection rights were violated when the prosecution struck male jurors in a paternity and child support trial.[188] The all-female jury found the petitioner to be the father of the child.[189] The jury composition resulted from the prosecution striking male jurors and the petitioner

178. *Id.* at 1419-21. Although the defendant challenged the prosecution's use of a peremptory challenge to strike a Hispanic female, the court addressed the defendant's use of peremptory challenges to strike males. *Id.* at 1419-20.

179. *Id.* at 1419.

180. *Id.*

181. *Id.* at 1420.

182. *Id.* at 1423.

183. *Id.* at 1422.

184. *Id.*

185. *Id.* (citations omitted).

186. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1437 (1994) (Scalia, J., dissenting).

187. *Id.* at 1419.

188. *Id.* at 1421-22.

189. *Id.* at 1422.

striking female jurors.[190] The Court held the prosecution's striking of male jurors based on gender to be in violation of the Fourteenth Amendment Equal Protection Clause. After a lengthy recitation of the Equal Protection Clause's history, the Court ruled that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[191] The petitioner argued that *Batson* should be extended to gender and the Court agreed, holding that the Equal Protection Clause prohibits gender-based peremptory challenges.[192] The majority "recognized that . . . potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[193]

By focusing on the rights of citizens to participate in the judicial process, the majority in *J.E.B.* elevated the individual's right to serve on a jury over the litigant's right to participate in jury selection. The Court held that "[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[194] The Court was persuaded that gender-based peremptory challenges perpetuate women's historical exclusion from juries.[195] The decision is premised on the idea that women are disproportionately excluded from juries when gender-based peremptory challenges are permitted. "Gender-based peremptories . . . reinvoke the historical denial of women's civic rights."[196] This idea, however, is simply not borne out in the cases or statistics.

Although the Court fails to recognize the distinction,[197] the petitioner in *J.E.B.* was tried by an all-female jury and complained of the exclusion of males.[198] Additionally, a survey reveals that in approximately half of the cases decided under *Batson*, males, not females,

190. *Id.* at 1421-22. Interestingly, the defense in *J.E.B.* struck the last male juror, thereby perfecting the defendant's appeal under the Court's holding in *Batson*.

191. *Id.* at 1422.

192. *Id.* at 1421.

193. *Id.* (citations omitted).

194. *Id.* at 1428.

195. *Id.*

196. Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 Harv. L. Rev. 1920, 1922 (1992).

197. The Court in *J.E.B.* explained, "In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. . . . Contrary to respondent's suggestion, this right extends to both men and women." *J.E.B.*, 114 S. Ct. at 1427-28.

198. *Id.* at 1422.

were excluded from the jury.[199] Further, data recently compiled from the District of Columbia suggest that men, not women, are excluded from juries.[200] The study revealed that women were more likely to be seated as jurors while men were apt to be struck from the jury.[201] In reality, women are not being told they are unqualified jurors, but rather that they are actually preferred.

The Court in *J.E.B.* was seemingly unconcerned with the number of women on the jury, stating that the "exclusion of even one juror for impermissible reasons harms that juror . . . ."[202] The Court was not persuaded by respondent's argument that male and female jurors react differently to particular issues.[203] Further, the Court held that even if there is truth to the assertion that males and females are different, it does not justify the use of that information in choosing jurors.[204]

In Justice O'Connor's concurring opinion, she opined that the majority has created a new rule of relevancy in which gender is irrelevant in jury selection.[205] She believed that "to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact."[206] Justice O'Connor correctly recognized that women and men bring distinct perspectives and life experiences to the courtroom. "[O]ne need not be a sexist to share the intuition

199. The research has shown that such statistics are true outside the area of *Batson* cases. "Almost every sex discrimination case which has been won at the Supreme Court level has been brought by a man." Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination [1984], in* Feminist Legal Theory: Readings in Law and Gender 5 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter Feminist Legal Theory]; *see* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 Law & Ineq. 33, 34 & n.4 (1984) (listing the sex discrimination cases heard by the Supreme Court).

200. Karen L. Cipriani, Note, *The Numbers Don't Add Up: Challenging The Premise of* J.E.B. v. Alabama *ex rel.* T.B., 31 Am. Crim. L. Rev. 1253, 1264-68 (1994).

201. The study included 4302 persons who were called to jury service for criminal and civil trials. A total of 105 juries were studied during the six-month period between January 1993 and June 1993. Of the women who were called to jury service, 34% participated as jurors, while of the men called only 25.2% ultimately served as jurors. *Id.* at 1265-67.

202. 114 S. Ct. at 1428 n.13.

203. *Id.* at 1426 n.9.

204. *Id.* at 1427 n.11. The court in *J.E.B.* 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 in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause . . . .

Id.

205. *Id.* at 1432 (O'Connor, J., concurring). Justice O'Connor's concurring opinion discusses three "costs" of the majority's ruling. First, the trial process will be extended by requiring a *Batson* hearing in almost every case. Second, the opinion further erodes, and ultimately eliminates, the role of the peremptory challenge in the trial process. Finally, the opinion substantially limits the use of peremptory challenges even when based on accurate assumptions regarding gender. *Id.* at 1431-33.

206. *Id.* at 1432.

that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."[207] According to Justice O'Connor, the majority opinion is "a statement about what this Nation stands for, rather than a statement of fact"[208] and an attempt to further eliminate discrimination at the cost of limiting litigants' ability to act on "sometimes accurate gender-based assumptions."[209]

In a scathing dissent, Justice Scalia called the majority's opinion an "inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes."[210] He opined that the majority is damaging a historically essential part of the trial process for the sole purpose of showing disapproval of "male chauvinist attitudes."[211] To further the goal of a "unisex" society, Justice Scalia said the majority is willing to act inconsistently with past findings in *Taylor v. Louisiana*.[212] Justice Scalia reminded the majority that in *Taylor*, the Court found that "controlled studies . . . have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result."[213] Justice Scalia asserted, however, that the majority would characterize any acknowledged differences between male and female jurors as "hateful 'stereotyping.' "[214] The dissent further suggests that a determination of whether female and male jurors are different would be important if the Court considered the litigant's rights instead of the rights of the individual jurors.[215]

J.E.B. is premised on the theory that men and women are the same, even as jurors. If women and men are different as jurors, however, the Equal Protection Clause should not require litigants to disregard these differences[216] for the sake of an institutional good. Two questions arise from this dilemma: first, whether male and female jurors

207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 1436 (Scalia, J., dissenting).
211. *Id.*
212. *Id.* (citing Taylor v. Louisiana, 419 U.S. 522 (1975)); *see supra* text accompanying notes 149-64.
213. *J.E.B.*, 114 S. Ct. at 1436 (Scalia, J., dissenting) (quoting *Taylor*, 419 U.S. at 532 n.12).
214. *Id.*
215. Justice Scalia recognized that if the juror's gender has no effect on the juror's perception, then the petitioner would be unable to show any injury. Thus, the only basis for his claim can be the injury suffered by the stricken jurors. Justice Scalia dissented from the majority's application of the third party standing of the petitioner in light of his use of peremptory challenges to strike jurors based on gender. *Id.* at 1436-37.
216. The Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, thereby requiring government entities to treat individuals who are "similarly circumstanced" alike. Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The Equal Protection Clause does not require, however, that "things which are different in fact . . . be treated in law as

are the same, and therefore interchangeable, or different; second, whether courts should value the differences by acknowledging them. A review of the feminist jurisprudence, sociological experiments, and biological studies assists in answering these questions.

IV. Male and Female Jurors are Distinct

A. *Social Science Perspective*

The feminist perspective was originally defined by the work of Carol Gilligan,[217] whose studies recognize striking differences between men's and women's moral analysis. According to Gilligan, women focus on context, relationships, and responsibility when resolving moral conflicts, while men emphasize abstract justice and logical deductions.[218] Gilligan based her findings on the *Rights and Responsi-*

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though they were the same." Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

Historically, courts have upheld gender classifications where they found a real difference between the sexes forming the basis for the distinction. *See* Parham v. Hughes, 441 U.S. 347, 354 (1979); Califano v. Webster, 430 U.S. 313, 316-18 (1977); Schlesinger v. Ballard, 419 U.S. 498, 507-10 (1975); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974); Thomas Marks, *Three Ring Circus: The Supreme Court Balances Interests*, 18 Stetson L. Rev. 301, 341 (1989). The Court has recognized that a gender classification based on clear differences between the sexes is not invidious. In Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), the Court upheld a gender-based classification based on a finding that males and females were not similarly situated. The Court reviewed legislation that distinguished male and female naval officers in which Congress had provided female naval officers a longer period of time to be promoted from lieutenant to lieutenant commander. *Id.* The Court found that male and female naval officers were not "similarly situated" for purposes of promotion because, at the time, females were not afforded the opportunity to serve in combat or in most sea duties. *Id.* The Court clearly based its holding on the fact that the female and male naval officers—as groups, not individuals—were not similarly situated.

Similarly, in Michael M. v. Superior Court, 450 U.S. 464 (1981), the Court upheld a gender-based classification because it found there was a substantial difference between males and females. *Id.* at 473. The California rape law at issue in the case held males, but not females, criminally liable for sexual intercourse with underage individuals. The Court upheld the statute based on the determination that "[b]ecause virtually all of the significant harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences." *Id.*; *see also* Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162 (1994).

217. Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

218. *See generally id.* (referring to a number of psychological studies which demonstrate these distinctions). The distinction between the moral problem solving abilities of women and men is not new to the field of human development. Even in the first studies of human psychology, psychologists noted the difference between male and female problem solving. Prior to Gilligan, however, this difference was defined as a problem of female development. For a history of the use of the male norm being applied to women, see *id.* at 5-23.

bilities Study.[219] In this study, she analyzed the responses of males and females to hypothetical moral dilemmas.

An example of this basic distinction emerged in interviews[220] where Gilligan posed a hypothetical problem[221] to Jake, an eleven-year-old male, and Amy, an eleven-year-old female. The problem required the subjects to resolve "Heinz's dilemma," in which a man named Heinz must decide whether to steal a drug that will save his wife's life.[222] The subjects are told that Heinz cannot afford the drug and the druggist will not reduce the price.[223] Jake[224] sees a conflict between life and property that can be resolved by logical deduction.[225] He approaches the problem "like a math problem with humans," setting it up like an equation and applying logical reasoning.[226] He assumes that since he resolved the problem logically, a judge will reach the same conclusion if Heinz is prosecuted for stealing.[227] In contrast, Amy "considers neither property nor law, but rather the effect that theft could have on the relationship between Heinz and his wife."[228] Amy sees the dilemma as a "narrative of relationships that extends over time"[229] not a math problem.

A Jury of Her Peers,[230] a short story taken from Susan Glaspell's one-act play, also illustrates the different perspectives men and women bring to any given situation. As the story begins, the characters proceed to the abandoned farmhouse of John Wright, a hard, cold man, who was recently strangled in his sleep.[231] Wright's wife, Minnie, has been arrested and charged with the murder.[232] Three men, the sheriff, county attorney, and a neighbor, and two women, the wives of the sheriff and a neighbor, examine the house in the hopes of

219. *Id.* at 3 (emphasis omitted). Gilligan conducted three studies which involved interviewing males and females of different ages to obtain information on their conception and judgment of certain moral dilemmas. *Id.* at 2-3.

220. The other studies are the *College Student Study* and the *Abortion Decision Study*. *Id.* In the *College Student Study*, Gilligan "explored [the] identity and moral development in the early adult years." *Id.* at 2. She interviewed twenty-five people during their senior year of college and again five years after graduation. *Id.* In the *Abortion Decision Study*, Gilligan studied "the relation between experience and thought and the role of conflict in development." *Id.* at 3. She interviewed twenty-nine women in the first trimester of pregnancy who were contemplating abortion. *Id.*

221. The hypothetical was devised by Lawrence Kohlberg. *Id.* at 25.

222. *Id.*

223. *Id.* at 25-26.

224. Jake is determined at the outset that Heinz should steal the drug, reasoning that "human life is worth more than money." *Id.* at 26.

225. *Id.* at 26.

226. *Id.* at 26-27.

227. *Id.*

228. *Id.* at 28. Amy reasons that if Heinz steals the drug he may save his wife's life now, but he would not be able to help her in the future if he is imprisoned. *Id.*

229. *Id.*

230. *See* Glaspell, *supra* note 1, at 124-39.

231. *Id.* at 128.

232. *Id.*

discovering the murderer's identity and motive.[233] The men conclude there is nothing in the kitchen that points to the motive because all they see are "kitchen things."[234]

As the men continue searching the house, the women remain in the kitchen, uncovering clues to the murderer's identity and motive in the small details framing the context of Minnie Wright's life.[235] They discover a strangled bird wrapped neatly in a piece of fine silk,[236] and one woman comments that "[i]f there had been years and years of nothing, then a bird to sing to you, it would be awful still after the bird was still."[237] The dead bird and a broken stove are symbols of John Wright's cruelty and Minnie Wright's life without joy, symbols that enable the women to conclude Minnie killed her husband. The men are unable to "see" these symbols, and the women do not disclose their findings to the men. Without the evidence discovered by the women, Minnie cannot be charged with the crime.[238]

This story illustrates the different judging processes employed by women and men.[239] Studies in a variety of academic disciplines concur with Glaspell's conclusions that women have a world-view significantly different from men's.[240] Psychological studies suggest that women look at the circumstances and context of a situation, rather than abstract principles.[241]

The concept of feminine reliance on context and circumstances is further supported by empirical studies. In an experiment where boys and girls were asked to group related objects, boys tended to group pictures of objects with similar intrinsic characteristics.[242] Girls, on the other hand, grouped pictures of objects based on their functional or relational characteristics.[243] Boys grouped pictures of cars, trucks, and ambulances, while girls grouped the ambulance with a doctor and a hospital bed.[244] Other studies reveal that males separate objects

233. *Id.*
234. *Id.*
235. *Id.* at 130-38.
236. *Id.* at 136.
237. *Id.* at 137.
238. *Id.* at 138.
239. Robert M. Cover et al., Procedure 1167-68 (1988). Other commentators have suggested that use of the message in Glaspell's story can differ. Grossman, *supra* note 78, at 1142 (arguing that the story captures the strategy of the fight for jury service as being an emphasis on gender difference); Marcia Noe, Susan Glaspell: Voice from the Heartland 33-34 (1983) (noting that the story illustrates "that the female mode of perception. . . serves as a bond to unite women in sisterhood").
240. Sherry, *supra*, note 18, at 580.
241. *See* Gilligan, *supra* note 217, at 38.
242. Merrill B. Hintikka & Jaakko Hintikka, *How Can Language Be Sexist?*, *in* Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science 139, 145-46 (Sandra Harding & Merrill B. Hintikka eds., 1983) (footnote omitted).
243. *Id.*
244. *Id.* at 145.

from the background, while females see the entire picture,[245] and males are less field-dependent and can ignore the influence of context.[246]

Other researchers have discovered that women are more attuned to other people's emotions.[247] A recent study conducted at the University of Pennsylvania,[248] found that subtle expressions of sadness, especially by women, are detected more frequently by women than men.[249] Jean Baker Miller found that women have a "much greater sense of the emotional components of all human activity than most men."[250] This awareness of the emotional side of life allows women to view facts in the context of events and the emotions attached to those events.[251] This ability and awareness is valuable in society as a whole,[252] and invaluable on a jury that must judge the credibility of parties and witnesses.

Ironically, at a time when courts are attempting to eliminate gender considerations in the jury selection process, the differences in the sexes are being reinforced in the areas of social science and biology. Utilizing recent technological advances,[253] researchers have found that the brains of the sexes are subtly, but significantly different.[254] Recent studies also discovered biological signs that may be consistent

245. *Id.* at 145-46. *See* Eleanor E. Maccoby, *Sex Differences in the Intellectual Functioning*, *in* The Development of Sex Differences 25-55 (Eleanor E. Maccoby ed., 1966).

246. Julia A. Sherman & Florence L. Denmark, On the Psychology of Women: A Survey of Empirical Studies 21 (1971); *see* Herman A. Witkin & Donald R. Goodenough, *Field Dependence and Interspousal Behavior*, 84 Psychol. Bull. 661, 662 (1977) (explaining the concept of field dependence).

247. *See generally* Roland J. Erwin et al., *Facial Emotion Discrimination: I. Task Construction and Behavioral Findings in Normal Subjects*, 42 Psychiatry Res. 231, 238 (1992) (discussing the results of a series of facial emotion discrimination tasks experiments performed on males and females and concluding that there is a "sex difference in performance that is specific to both the valence of the emotion portrayed and the sex of facial stimuli"). This has often been seen by the dominant society as a weakness. The judicial system has attempted to minimize the effects of emotionalism. When considering jurors who must decide the credibility of witnesses, however, the ability to detect emotions in others is a trait that a litigant should seek in jury selection.

248. *Id.*

249. *Id.*

250. Jean B. Miller, Toward a New Psychology of Women 39 (1986).

251. *Id.*

252. To value these qualities, women must be willing to risk acknowledging the differences.

253. This advanced technology is called functional magnetic resonance imaging and allows the brain to be photographed while the subjects are performing an assigned task.

254. Bennett A. Shaywitz et al., *Sex Differences in the Functional Organization of the Brain for Language*, 373 Nature 607 (1995); Ruben C. Gur et al., *Sex Differences in Regional Cerebral Glucose Metabolism During a Resting State*, 267 Sci. 528 (1995).

with the social science discoveries.[255] Thus far, no studies have specifically tested the applicability of Gilligan's theory to the jury process.

The empirical research regarding gender differences on juries has centered on verdict outcome and participation during deliberations.[256] Differences between male and female jurors, however, have been verified. Men, for example, are more likely to overestimate an eyewitness's ability to identify a suspect.[257] One commentator suggested this difference may be due to women's tendency to view the "world from a multiplicity of perspectives."[258]

Most studies involved simulated juries; however, the studies of actual jury verdicts are inconclusive.[259] The method of reasoning used by the jurors in arriving at a verdict has not yet been studied. Until jury process studies testing the theories of Gilligan and others are conducted, the law and the courts should rely on the available psychological studies which overwhelmingly indicate that men and women speak in a different voice.

B. *Feminist Perspective on Difference*

The concept of difference is not foreign to feminist jurisprudence.[260] Feminist thought has revolved around the debate of how to define "woman,"[261] therefore, the feminist movement has been consistently

255. Researchers stress caution in drawing conclusions about what the experiments mean. "[S]cientists say nonetheless that the groundwork [is] being laid for determining what the differences really mean." Gina Kolata, *Man's World, Woman's World? Brain Studies Point to Differences*, N.Y. Times, Feb. 28, 1995, at C1, C7. *See also* Anne Moir and David Jessel, Brain Sex, The Real Differences Between Men & Women (1991).

256. *See generally* Grossman, *supra* note 78 (providing a sampling of the articles regarding jury studies).

257. Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 601 (1987) (citing Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 26-27 (1983)). This information would obviously be an important consideration for the attorney defending a man accused of robbery where the only evidence which ties him to the crime is the victim's identification.

258. *See id.* at 601 n.38.

259. *See* Cookie Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts*, *in* The Jury System in America 97, 115 (Rita J. Simon ed., 1975) (concluding that much of the data on the difference between male and female jurors is contradictory and lacking).

260. Feminist jurisprudence is the "examination of the relationship between law and society from the point of view of all women." Lynn H. Schafram, *Lawyers' Lives, Clients' Lives: Can Women Liberate the Profession?*, 34 Vill. L. Rev. 1105, 1113 (1989) (quoting Catherine MacKinnon, Developing Feminist Jurisprudence, Panel Discussion at the 14th National Conference on Women and Law in Washington, D.C. (Apr. 9, 1983), *quoted in* Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 Berkeley Women's L.J. 64, 64 (1985)).

261. Simone de Beauvoir noted that in asking the question of what is a woman, we place ourselves in the position of being the "Other." Men, she observed, are the masculine and the neutral, while women are the peculiar, the different. Woman is defined in relation to man. Simone de Beauvoir, The Second Sex at xvii-xviii (1974).

concerned with issues of difference.[262] Should women be defined as the same as or different from men? A review of the history of feminist legal thought is essentially a study of the development of the difference principle.[263]

Under the formal equality theory, feminists originally adopted the approach that women were not different from men.[264] Formal equality[265] assumes that women can achieve equality by defining themselves as the same as men.[266] Formal equality theorists argue that women would act and be like men if given equal opportunities.[267] Consequently, the focus is on women's similarities to men and the belief that "women and men are in all important respects the same and should be treated the same under law."[268]

Under the formal equality theory, women achieved several victories in the legal arena[269] and many overt forms of discrimination seemed to disappear. Feminists soon realized, however, that formal equality would not end subordination of women.[270] Feminists discovered that

262. Anne C. Dailey, *Feminism's Return to Liberalism*, 102 Yale L.J. 1265, 1266-67 (1993) (reviewing Feminist Legal Theory, *supra* note 199).

263. *Id.* at 1266.

264. This doctrine emerged in the 1960s when women began to enter the legal community in growing numbers. *Id.* at 1266-67. *See* Feminist Legal Theory, *supra* note 199, at 5.

265. Dailey, *supra* note 262, at 1267. Other authors have named this theory differently. Mary Becker calls it "formal equality." Mary E. Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 Stetson L. Rev. 701, 701 (1994). Others call it the "sameness theory" or "equality doctrine." *See* John E. Morrison, *Viva La Diferencia: A Non-Solution to the Difference Dilemma*, 36 Ariz. L. Rev. 973 (1994). *See also*, Feminist Legal Theory, *supra* note 199, at 5.

266. The early feminists' "efforts were directed at uncovering the ways in which law discriminated against women by denying them rights accorded to men." Dailey, *supra* note 262, at 1267.

267. Marcia M. Boumil & Stephen C. Hicks, Women and the Law 25 (1992).

268. Dailey, *supra* note 262, at 1267. What is troublesome about the sameness model is that it defines women as the same as men—using men as the comparison point. Feminist Legal Theory, *supra* note 264, at 5. As Mary Joe Frug points out, "Although neutral in form, the equality guarantee is functionally male-biased." Frug, *supra* note 18, at 42; *see also* Dailey, *supra* note 262, at 1269 (noting that to ignore differences in the name of formal equality is to exclude women who do not fit the universal male standard).

269. *See, e.g.*, Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175 (1982) (discussing formal equality theory). The success of this method is demonstrated in three Supreme Court cases. *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984); Davis v. Passman, 442 U.S. 228 (1979); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

270. Many feminists continue to seek equality by defining men and women as the same. *See* Williams, *supra* note 269. Proponents of the formal equality theory, however, point out that history demonstrates that distinctions drawn between men and women have traditionally been be used to disadvantage women. Cipriani, *supra* note 200, at 1268-69. They argue that recognition of differences merely reinforces stereotypes that have historically been used to disadvantage women. *See* Williams, *supra* note 269, at 196-97. Additionally, they urge that this method is the only way to eliminate the cultural limitations of gender. *Id.*

in many cases, formal equality hurts rather than helps women.[271] This recognition led a substantial number of theorists to challenge the underlying assumption of formal equality.[272] These "difference" theorists recognize the differences between men and women and strive to value these differences by ensuring that women are not disadvantaged by them.[273]

Robin West espouses the differences between men and women in a theory often referred to as "relational feminism."[274] West asserts that women and men are different "because women are actually or potentially" connected physically to other human life.[275] West argues that this potential for human connection defines women.[276] Relational feminists assert that "women are more empathetic to the lives of others because women are physically tied to the lives of others in a way which men are not."[277] Relational feminists believe the legal system should recognize and value these differences.[278]

While relational feminists find the essence of women's difference in the joys of human connection, the subordination theorists[279] find the essence of difference in the "pain and deprivation of subordination."[280] Catharine MacKinnon, the subordination theory's leading supporter, seeks to redefine the issues so the discussion does not revolve around differences.[281] She argues that any rationalization for differences or determination that there are differences, however reasonable they may be, is part of the systematic subordination of women to men.[282] Although MacKinnon rejects any theory which attempts to define the differences between men and women, her theory is nonetheless based on the "fundamental difference of women's subordination."[283] The source of the distinction is different, yet the essence of

271. Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 Sup. Ct. Rev. 201, 214-15.

272. Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA Women's L.J. 35, 36-37 (1992).

273. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 19-20 (1988); Littleton, *supra* note 16, at 1312-37.

274. This theory is also called "relational theory" or the "relational feminist." West refers to it as "connectedness thesis." West, *supra* note 16, at 3.

275. *Id.* at 14. West discusses three experiences that connect women to others: intercourse, pregnancy, and mothering. Each provides the potential to be connected to another human life which is distinct from the way men are physically connected. *Id.*

276. *Id.*

277. *Id.* at 16.

278. *Id.* at 18.

279. This theory is usually called the dominance theory. However, for purposes of symmetry, I chose to focus on women's characteristics in describing each of these theories.

280. Dailey, *supra* note 262, at 1271.

281. Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 32-45 (1987).

282. *Id.*; *see also* Becker, *supra* note 271, at 229 (referring to Catharine A. MacKinnon, Sexual Harassment of Working Women 116-17 (1979)).

283. Dailey, *supra* note 262, at 1269.

subordination theory is that men and women are different.[284] Central to both the relational theory and the subordination theory is the claim that women have a unique viewpoint and experience.[285]

The most recent feminist theory is "postmodern feminism." Postmodernists recognize the variety of perspectives among women[286] and acknowledge the existence of basic core issues and experiences of women.[287] The postmodern feminist develops generalizations about women based on their experiences, rather than "universal truths."[288] These feminists recognize that acknowledging and using "women's lived experiences . . . can 'deploy the commonalities among real women' and 'at the same time challenge the conventional meanings of "woman" that sustain the subordinating conditions of women's lives.' "[289]

The source of the female perspective has been debated for centuries. Some point to biological differences,[290] while others argue that women are innately connected to others by their ability to have children and, therefore, reason differently then men.[291] Some attribute the creation of the feminine perspective to society. This last group

284. *Id.* (noting that "for MacKinnon the only *real* difference—the only difference that matters—is that women are oppressed and men are their oppressors").

285. *Id.* at 1270.

286. Martha Minow espouses the idea that each individual must be looked at from her personal perspective. Martha Minow, *Feminist Reason: Getting It and Losing It*, *in* Feminist Legal Theory, *supra* note 199, at 357. This theory requires sensitivity to a wide variety of differences beyond gender. Dailey, *supra* note 262, at 1272. Many have come to believe that "the female subject, has no core identity but rather is constituted through multiple structures and discourses that in various ways overlap, intersect, and contradict each other." Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 877 (1990).

287. Ruth Colker, *The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug*, 105 Harv. L. Rev. 1084, 1085 (1992). Professor Colker recognizes that the anti-essentialism perspective does not make it impossible to generalize about women. *Id.* However, she warns that feminists must be cautious about generalizations. *Id.*

288. Marion Smiley, *Gender Justice Without Foundations*, 89 Mich. L. Rev. 1574, 1576 (1991).

289. Martha Minow, *Incomplete Correspondence: An Unsent Letter to Mary Joe Frug*, 105 Harv. L. Rev. 1096, 1099 (1992) (quoting Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 Harv. L. Rev. 1045, 1059 (1992)).

290. Mary Joe Frug observed that "[m]ost feminists are committed to the position that however 'natural' and common sex differences may seem, the differences between women and men are not biologically compelled; they are, rather, 'socially constructed.' " Frug, *supra* note 289, at 1048. She concludes, however, that the source of these differences is irrelevant to the importance of these differences in today's society. *See id.*

Recently, the Speaker of the U.S. House of Representatives Newt Gingrich, articulated his own theories as to the biological differences between men and women. He observed that men are "biologically driven to go out and hunt giraffes" and that women are incapable of surviving in combat because they cannot stay in a fox hole for thirty days because of "infections." Lois Romano, *The Reliable Source*, Wash. Post, Jan. 18, 1995, at B3.

291. *See* West, *supra* note 16.

asserts that, because of a woman's historical role in society, she is forced to depend on men and must accordingly develop "fluid ego boundaries."[292] The source of this perspective, however, is irrelevant to the practicing attorney faced with the awesome duty of selecting the best jury for his or her client.

If women speak in a "different voice" and bring a distinct vision to moral dilemmas, courts should expect women to bring a different perspective to the process of judging cases as jurors.[293] Social science and feminist theories of difference suggest that viewing gender as completely irrelevant to the jury process disregards the significant complexity of jury selection.

V. *J.E.B.* Fails to Recognize the Role Gender Plays in Jury Selection

A. *Gender Differences Affect Jury Selection*

If there is a gender dichotomy regarding moral analysis, the "implications for jury selection are obvious."[294] Women's viewpoint of connectedness is a factor that attorneys should be permitted to consider. If they determine that this perspective is beneficial to the client, attorneys should be permitted to exercise a peremptory challenge based on that determination. From a practical standpoint, there are numerous considerations to make in determining whether to use a peremptory challenge. As Professor Pizzi indicates, what really happens with peremptory challenges is comparison shopping during which litigants attempt to determine which jurors are more sympathetic to their case.[295] It is no wonder that the effective use of peremptory challenges has been described as "art, as science, and as [a] guessing game."[296] Communication is a gestalt process, that is, the sum of all of the parts or the sum of each part does not equal the total.[297] The same is true of jury selection.

As in all areas of trial advocacy, jury selection has become more refined throughout the years.[298] Many broad generalizations that

292. Sherry, *supra* note 18, at 585 n.177. Rather than being separate from others, women tend to view others as an extension of themselves—as connected to others. *Id.*; *see also* Miller, *supra* note 250, at 71-73; Nancy Chadorow, The Reproduction of Mothering: Psychoanalysis and the Sociology Of Gender 67-99 (1978).

293. Forman, *supra* note 272, at 50.

294. *Id.*

295. Pizzi, *supra* note 37, at 126.

296. Eugene I. Pavalon, *Jury Selection Theories: Art? Science? Guessing Game?*, 23 Trial, June 1987, at 26.

297. James Rasicot, Jury Selection, Body Language & The Visual Trial 4 (1983).

298. "[Jury selection] experts view the old folklore about desirable and undesirable jurors as too crude and unsophisticated." Pizzi, *supra* note 37, at 132. The field of "jury science" is catching the attention of lawyers, judges, and legal scholars. Some lament that this science has the potential to "undermine some of the fundamental values" of our jury system because the jury of the future may be highly susceptible to

were once used to determine the best juror are now more narrowly tailored.[299] Library shelves are bursting with jury manuals[300] suggesting the characteristics lawyers should consider in exercising peremptory challenges. A competent attorney does not rely on blanket exclusions or inclusions of female jurors.[301] Rather, in selecting a jury, the attorney must consider all the facts and subtle nuances of the case[302] and the potential jurors.

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manipulation. Jeremy W. Barber, Note, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 Am. Crim. L. Rev. 1225, 1251 (1994).

The jury consultant is clearly the newest member of the litigation team. If the policy reason behind the cases limiting the peremptory challenge is a belief that individuals cannot be judged as a group, but must be judged individually, then any tool which enables attorneys to ascertain the characteristics of jurors based on the limited information available should be heralded, not discouraged.

In addition to the use of consultants, jury science also attempts to identify successful trial strategies. Surrogate juries and focus groups are utilized to evaluate the attorneys and arguments. Surrogate juries actually listen to evidence and then deliberate on the facts. Immediately after the deliberation, the jurors are interviewed concerning their reactions to the evidence and attorneys. The survey results are used to evaluate the case. *See generally* Walter F. Abbott, Surrogate Juries 3-10 (1990) (describing the use of surrogate juries).

Focus groups differ from surrogate juries in that the evidence is presented in a reactive group setting which enables the attorney to listen to the information that is important to the group in the deliberation process. *See* Harvey A. Moore & Jennifer Friedman, *Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making*, 11 Clinical Soc. Rev. 123 (1993).

299. One author suggests that the juror's favorite color will determine the juror's conviction rate and encourages the use of color psychology during jury selection to predict favorable or unfavorable jurors. Rasicot, *supra* note 297, at 98-99.

300. For a sample of the manuals see Cathy E. Bennett & Robert B. Hirschhorn, Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation (1993); Jeffrey L. Kestler, Questioning Techniques and Tactics (2d ed. 1992); Bill Colson et al., Jury Selection: Strategy & Science (1986).

301. *See* Stephen Saltburg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 385 (1982).

302. The factors to be considered include the sex of the juror and the sex of the attorney. *See* Nora K. Villemur & Janet S. Hyde, *Effects of Sex of Defense Attorney, Sex of Juror, and Age and Attractiveness of the Victim on Mock Juror Decision Making in a Rape Case*, 9 Sex Roles 879 (1983).

In a recent California case, Eric and Lyle Menendez were charged with the first degree murder of their parents. *See* Maura Dolan, *Jury is Out on the Role of Gender*, L.A. Times, Feb. 14, 1994, at A1. The brothers claimed they were abused by their parents and the only way they could end the abuse was to kill their parents. *Id.* The fact that their parents were merely eating ice cream at the time they were shot did not deter the defendants from asserting a self-defense claim. *Id.* They were tried separately. *Id.* The jury who heard Eric Menendez's case split along gender lines: the six male jurors voted for first or second degree murder; the six female jurors voted for lesser offenses. *Id.* Some analysts felt the actions of the defense attorneys, both women, affected the jury. *Id.* at A14. One source stated that Eric Menendez's female defense attorney was very maternal toward her client and this may have negatively influenced the male jurors. *Id.*

Experienced attorneys are aware of their effect on certain kinds of jurors, including the gender with which they are most likely to "connect." Nonetheless, under *J.E.B.*, an attorney is not permitted to consider gender in selecting a juror. As Justice Scalia hypothesizes in his dissent:

The attorney defending a battered woman must consider the type of abuse the defendant endured prior to killing her husband.[303] The attorney seeks jurors who can see the case from the abused woman's perspective and consider all the circumstances, not just abstract principles. The attorney must also consider if the individual juror herself is, or has been, part of an abusive relationship and how she dealt with that relationship.[304] All these factors are inextricably linked to, and cannot be separated from, the juror's gender.

Similarly, the attorney presenting a sexual harassment case must consider whether the harassment involved coercive demands for sexual intercourse, casual touching, or verbal abuse. Although males and females are apt to agree on the existence of sexual harassment in the former scenario, men are less likely to view the acts in the latter situation as sexual harassment.[305] Men and women simply view the types of harassment differently.[306] A litigant must consider the type of harassment in conjunction with the juror's gender and any additional information available.

Ultimately, the juror's perspective is relevant to the attorney's decision. An attorney cannot expect to "draw[ ] . . . jurors who have no opinions that they will bring to bear on the evidence or on what happens in the courtroom and jury room. All people, [including those on jury duty], have biases and opinions that will inevitably influence their decisions and perceptions. . . ."[307] The Supreme Court has acknowledged that "[j]urors are not expected to come into the jury box, and

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> [T]he prosecutor presumably violates the Constitution when he selects a male or female police officer to testify because he believes one or the other sex might be more convincing in the context of the particular case, or because he believes one or the other might be more appealing to a predominantly male or female jury.

J.E.B., 114 S. Ct. at 1439 (Scalia, J., dissenting). The question then becomes whether the age-old strategy of public defenders selecting a female lawyer to defend a brutal rapist will withstand the equal protection requirements of *J.E.B.*

303. If the abuse was more physical then emotional, a male juror may be able to better understand and agree with the killing of the husband. If the abuse was emotional, however, involving intimidation or humiliation, a female juror is more likely to understand the defendant's feelings. This idea was developed through discussions with Lloyd King, Assistant United States Attorney for the Southern District of Florida and a veteran state prosecutor. The distinction reflects women's position in society and the fact that they are subordinated. As a group, women can better understand the feeling of total subordination.

304. For example, if the juror herself was able to escape a battering relationship without killing her batterer, she may be less sympathetic to the defendant. Lois Heaney, a trial consultant in California, observed that "[i]n some ways, the dangerous person is the person who says 'I was abused, but I am fine' . . . . People tend to judge people like themselves harshly." *See* Dolan, *supra* note 302, at A14.

305. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1206 (1989).

306. *Id.*

307. Babcock, *supra* note 32, at 551.

leave behind all that their human experience has taught them."[308] Nor do we want jurors who "strip[ ] down like a runner" and "shed the baggage of ideology."[309] The jurors' prejudice must be excluded, not their perception.[310]

The idea of a "feminine" perspective has been recognized by courts in other areas.[311] In *Ellison v. Brady*,[312] the Ninth Circuit recognized this unique perspective and adopted a "reasonable woman" standard for evaluating "hostile environment" in sexual harassment cases. The court observed that "there is a broad range of viewpoints among women as a group, but [it] believe[d] that many women share common concerns which men do not necessarily share."[313] The court concluded that "[m]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a women may perceive."[314] It is evident that the court echoed the general sentiment that women perceive events in distinctly different ways than men.

Finally, an attorney must always consider the leadership qualities of individual jurors.[315] Because jury deliberations are a group exercise, an attorney must consider the group as a whole and determine which individuals will act as leaders or followers.[316] An attorney must avoid wasting peremptory challenges on followers in order to preserve a sufficient number of strikes to challenge questionable leaders.[317] Therefore, an attorney considers both the gender and the leadership factors in exercising a peremptory challenge. If an attorney wants individuals who are more likely to view the case in the context of all the circumstances (women), but there are several men who appear from voir dire to be followers, the attorney may choose not to strike those men because they would likely follow the female jurors' viewpoints. In order to zealously represent the client,[318] an attorney should be permitted to

308. 114 S. Ct. at 1432 (O'Connor, J., concurring) (quoting Beck v. Alabama, 447 U.S. 625, 642 (1980)).

309. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 Wm. & Mary L. Rev. 1201, 1201 (1992).

310. *See generally id.* (arguing that judges and jurors can remain impartial without completely abandoning their life's experiences).

311. For a survey of other courts who have adopted the feminine perspective, see Robert S. Adler and Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 Fordham L. Rev. 773 (1993); *see also* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 Harv. C.R.-C.L. L. Rev. 623, 630-38 (1980).

312. 924 F.2d 872 (9th Cir. 1991).

313. *Id.* at 879.

314. *Id.*

315. *See* Bennett & Hirschhorn, *supra* note 300, at 280-309.

316. *Id.* at 314-17; *see also* Tracy L. Treggar, Note, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 Chi.-Kent L. Rev. 549 (1992).

317. Bennett & Hirschhorn, *supra* note 300, at 319.

318. *See supra* note 5 (describing a lawyer's duty to the client according to the ABA Model Code of Professional Responsibility).

consider this information, act accordingly, and not be required to justify the exclusion of a juror on purely gender-neutral grounds.[319]

Common sense and empirical data suggest that people cannot and do not ignore gender in dealing with other individuals.[320] *J.E.B.*, however, requires prosecutors to ignore gender in dealing with jurors. People do not ignore gender in choosing companions, and should not be expected to ignore it in selecting those who will make the most important decision in their life—one involving their freedom.[321] When an attorney selects jurors based on an assessment of their reasoning styles, this selection does not perpetuate "invidious" stereotypes.

The Court in *J.E.B.* failed to recognize the real differences between male and female jurors. It elevated the rights of jurors over the rights of the litigant to determine who sits on the jury. The basis of this decision was a desire to purge the system of "invidious" stereotyping.[322] Unfortunately, the Court sacrificed common sense in exchange for aspirational goals.

The *J.E.B.* decision should be limited to those challenges which are based solely on gender. Peremptory challenges based on gender plus an additional factor were not addressed in *J.E.B.* There is support, however, for the argument that if a non-gender-based reason for a strike is coupled with a gender-based reason, the strike may be permitted. The *J.E.B.* Court stated that its "conclusion that litigants may not strike potential jurors *solely* on the basis of gender does not imply the elimination of all peremptory challenges."[323] The Court's use of the word "solely" may have signaled its willingness to distinguish those challenges based entirely on gender and those challenges in which gender is merely a factor.[324]

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319. In addition to leadership, the juror's individual characteristics intersect with gender in several areas. For example, the juror's gender may affect the way a litigant views the juror in light of his occupation. Individuals who are employed in jobs which have traditionally been undertaken by the opposite sex may have a perspective that is relevant to their selection as jurors. A litigant may determine that a female construction worker is less likely to understand his client's perspective in a sexual harassment case due to her involvement in a male-dominated workplace. A strike of the juror is not based on the fact that she is a construction worker, because a male construction worker would not necessarily be struck. Rather, it is the combination of the juror's occupation and gender that forms the basis for the peremptory strike. Under a strict reading of *J.E.B. v. Alabama*, however, such a strike is prohibited.

320. Becker, *supra* note 271, at 209.

321. A colleague reminded me of a popular "Saturday Night Live" skit in which an androgynous individual named Pat baffles all of its co-workers by confusing them as to its gender. The skit revolves around the attempts of others to determine Pat's sex, in order to know how to respond to him/her.

322. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1429 (1994).

323. *Id.* (emphasis added).

324. *See* Holder v. Welborn, 60 F.3d 383 (7th Cir. 1995) (upholding a prosecutor's peremptory challenge which was not based solely on race but a combination of race plus case specific race-neutral factors). *But see* Howard v. Senkowski, 986 F.2d 24, 28

Under race-based equal protection, outside of the area of peremptory challenges, the Court has undertaken a "mixed motive analysis"[325] in instances where the party's actions are based on a combination of permissible and impermissible factors. The Court has not addressed the application of the mixed motive analysis to peremptory challenges.[326] Peremptory challenges jurisprudence, however, is an area where the courts should distinguish race and gender and not require a "mixed motive analysis."[327] Here, the Court should acknowledge the difference between male and female jurors and find that if the gender of the juror is only one factor in the strike, the strike survives under the intermediate scrutiny test.[328] This limitation on *J.E.B.* is justified by the finding that male and female jurors are different. The reasoning process of a juror is of legitimate concern to a litigant. The voir dire process is ill-equipped to determine characteristics that are still being studied in controlled experiments. Therefore, the litigant should be allowed to use gender as a factor in the peremptory challenge equation.

B. *Who is Hurt by the Use of Gender As a Factor in Peremptory Challenges?*

Who is hurt by the use of gender as a factor in peremptory challenges? In *J.E.B.*, the Court held 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."[329] *J.E.B.* found that liti-

(2d Cir. 1993) (noting the dangers of basing a theory of equal protection on one word).

325. In employment discrimination cases, the Court has recognized a defense to liability if the defendant can show that although there were impermissible factors, the challenged action would have occurred even absent the improper consideration. Under this analysis, however, the disputed action violates the Equal Protection Clause if it would not have occurred "but for" the impermissible factor. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-87 (1977). Under a "gender plus analysis" the action of striking a juror would not violate the Equal Protection Clause even if gender was a factor as long as it was not the only factor in the challenge.

326. *See* Wilkerson v. Texas, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting) (suggesting that the "mixed motive analysis" is inappropriate in the context of a *Batson* inquiry because of the difficulty in separating permissible and impermissible motivations in jury selection).

327. As Chief Justice Rehnquist acknowledges in his dissenting opinion in *J.E.B.*, "In balancing the dictates of equal protection and the historical practice of peremptory challenges, long recognized as securing fairness in trials, the Court [in *Batson*] concluded that the command of the Equal Protection Clause was superior." 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting). Due to the difference in the level of scrutiny in the area of gender-based peremptory challenges, however, the balance may shift the other way. *See id.*

328. Rehnquist stated in his dissenting opinion in *J.E.B.*, the fact that "race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups." *Id.*

329. *Id.* at 1427.

gants were hurt because the discrimination motivating the jury selection procedure could infect the whole system.[330] Litigants are not hurt, however, when they are using their peremptory challenges in a way they believe necessary to obtain a fair jury. The appearance of justice has been said to be as important as the reality of justice.[331]

Additionally, under *J.E.B.*, the legal system takes one more step toward the elimination of peremptory challenges. The litigants are little served by the elimination of "one of the most important of the rights secured to the accused."[332] There is no substitution for the peremptory challenge. Although voir dire may be expanded as a consequence of this decision, it cannot replace the peremptory challenge because the ways of thinking that sociologists have identified are not easily ascertained without the use of controlled empirical tests.

The differences between men and women are not merely a group bias,[333] but are fundamental to the genders and at the heart of what make males "male" and females "female." The difference is in the way the genders solve problems and view the world—differences that a two-minute voir dire will not reveal.[334] The harm to litigants in slowly eradicating the peremptory challenge is more harmful than a general suspicion that the entire trial will be infected by the idea that men and women are different.

Additionally, by eliminating the peremptory challenge, the Court is slowly seizing the power of jury selection from the litigants. In discussing the importance of jury trials, Justice White recognizes that "[p]roviding an accused the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[335] The same can be said of the peremptory challenge. Its elimination will place jury selection in the hands of a trial judge applying sometimes vague or broad definitions of "challenge for cause." The parties will lose and so will the public.

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330. *Id.*

331. In *J.E.B.*, Justice Scalia recognized the appearance of impartiality as an important goal of peremptory challenges:

> [T]he appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. In point of fact, that may well be its greater value.

Id. at 1438 n.3 (Scalia, J., dissenting) (citations omitted).

332. Pointer v. United States, 151 U.S. 396, 408 (1894).

333. *See* Pizzi, *supra* note 37, at 129-30 (discussing the group bias studies).

334. According to the Court:

> Voir dire . . . cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers.

J.E.B., 114 S. Ct. at 1438-39.

335. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

In *J.E.B.*, the Court was concerned that the public will lose confidence in a system where the state participates "in the perpetuation of invidious group stereotypes."[336] The Court's reasoning is circuitous. The Court finds that a "verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means at the outset."[337] Yet, the use of gender-based peremptory challenges is only unlawful if the Court determines that the practice violates the Constitution. Therefore, the public will not lose faith in the jury system unless the Court holds that gender challenges are unlawful.

The community is harmed when it loses confidence in the system and the question becomes whether the public will remain confident in a dishonest system. Although *J.E.B.* prohibits the use of gender-based peremptory challenges, it does not prohibit peremptory challenges that are "disproportionately associated with one gender."[338] Additionally, the explanations the litigants are required to put forth can further undermine the public's confidence in the system.[339] The community is far more likely to accept that the litigants perceive a difference in men and women and are acting on that belief. Since the community at large accepts that these gender differences exist,[340] the Court should also.

The Court strives to purge the system of "invidious" stereotyping at the expense of common sense. It describes gender stereotyping as impermissible. If women do reason differently, however, as the psychological and biological studies demonstrate, this should not be impermissible stereotyping. Apparently stereotyping is impermissible only if it is "invidious." Yet the difference in reasoning is only invidious if society values one type of reasoning while devaluing another. The denial of difference essentially belittles the difference. Society must not be afraid to acknowledge proven differences simply because people may devalue those differences.

Finally, the Court is concerned that "[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their inferiority.' "[341] The majority in *J.E.B.* indicates that gender-based peremptory challenges are degrading to women.[342] Unfortunately, the Court misconstrues the role of the peremptory challenge. The peremptory challenge is not a determination of qualification, but

336. *J.E.B.*, 114 S. Ct. at 1427.
337. *Id.* (quoting Powers v. Ohio, 499 U.S. 400, 413 (1991)) (alteration in original).
338. *Id.* at 1429.
339. *See* Michael Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. Mich. J.L. Ref. 229 (1993) (discussing the full range of possible neutral explanations for striking a particular juror).
340. *See supra* note 273 and accompanying text.
341. *J.E.B.*, 114 S. Ct. at 1428 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).
342. *Id.*

a determination of preference. The 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.[343] As Justice Rehnquist observed in his dissenting opinion in *J.E.B.*, "The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room."[344] This is different than the derogatory and invidious stereotyping that was directed at black jurors.[345]

Ultimately, the effect of this decision must be assessed in terms of the cost to female litigants and victims. Justice O'Connor, in her concurring opinion in *J.E.B.*, recognized the effect of this decision on female defendants. She questioned the rightness of prohibiting a battered woman on trial for murdering her batterer from attempting to obtain as many female jurors as possible.[346] The female victim faced with explaining her version of the truth must overcome many obstacles due to the constraints of a male defined system. *J.E.B.* does not protect her rights; on the contrary it eliminates them.

One article[347] has suggested that an attorney, faced with the awesome task of selecting a jury for the battered woman described in the introduction to this Article, has various alternatives: (1) conclude that because the challenge is based in part on gender, the attorney must decline to exercise her peremptory strikes, thereby not selecting a jury she believes to be the best for her client;[348] (2) employ a "mental quota system," striking one woman for every man to avoid the appearance of gender-based discrimination;[349] or (3) attempt to explain

343. *See* Alschuler, *supra* note 44, at 161-63 (noting that the system treats jurors like children, and not very bright ones at that).

344. 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).

345. *Id.*

346. Justice O'Connor inquires, "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?" *Id.* at 1433 (O'Connor, J., concurring). She suggests the limiting of the majority opinion in *J.E.B.* to the prosecution only. *Id.* Such a solution, however, would tip the scales toward the defense. It also fails to recognize the State's need to determine whether certain reasoning would be desirable.

347. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 901 n.179 (1994).

348. *Id.* This is an occasion when an attorney's duty to zealously represent his or her client is limited by the laws which provide that the rights of a third party supersede the rights of the defendant.

349. *Id.* This may not be feasible because courts do not require multiple strikes to find discrimination. The majority in *J.E.B.* stated that "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *J.E.B.*, 114 S. Ct. at 1428 n.13. Also, because the right at stake rests in the individual juror, even one strike could be challenged.

her strikes on a basis other than gender.[350] None of these alternatives further the selection of an impartial jury. Nor do they further the rights of the individual litigants. The only accomplishment is a so-called "landmark decision for women's rights."[351] Quite simply, the costs are too high.

CONCLUSION

The case law and constitutional principles espoused in *Batson* and *J.E.B.* do not warrant the conclusion that gender should be prohibited as a basis for peremptory challenges.[352] Under the equal protection doctrine, the courts are not required to disregard the difference between the genders. As Justice Sandra Day O'Connor recognized in her concurring opinion in *J.E.B.*, the principle underlying *J.E.B.* is more a policy as a matter of law rather than a reflection of the real world.[353] In the real world,[354] women and men react differently, reason differently, and think differently.[355] This belief is supported by scientific and sociological research.[356]

A defendant's position will not be understood if jurors are unable to relate to his or her perspective. An attorney may legitimately believe that a woman or a man would be better able to understand the argument being presented. The courts should not sacrifice the litigants' right to select the jurors who will decide their fate merely to promote a broader interest regarding discrimination.[357] To demand genuine gender neutrality or "dryness," as the U.S. Supreme Court apparently

350. *Id.* The Supreme Court permits stereotypes if the classification is not subject to strict scrutiny or heightened scrutiny. *See id.* at 1430. Also, the use of group-based peremptory challenges is acceptable even if it may have a disparate impact on women or men. *Id.* at 1429 n.16.

351. *See* Savage, *supra* note 16, at A9 (quoting the National Women's Law Center regarding the *J.E.B.* decision).

352. *See* Forman, *supra* note 272, at 37.

353. *See J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring).

354. "The institutional context within which a feminist must practice law creates a tension between the immediate interest of her clients and the broader interest of women, generally." Feminist Legal Theory, *supra* note 199, at 3; *see* Coughlin, *supra* note 3, at 3.

355. Some may argue that by holding that gender can be used because of perceived differences, race should also be useable based on perceived differences. Race, however, is distinguishable from gender in several important ways. First, race has been treated differently from a strict scrutiny standpoint throughout its equal protection history. *See J.E.B.*, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting). Additionally, another distinction between race and gender is the desirability of a world where a distinction between the sexes exists. As Mary Becker said "[w]ith race, we can at least imagine a world in which . . . race is no more important than eye color. . . . Most of us would not want to live in a world in which sex was no more important or relevant than eye color." Becker, *supra* note 271, at 234.

356. *See supra* part IV.

357. As Justice Scalia observed in his dissenting opinion, "unisex is unquestionably in fashion." *J.E.B.*, 114 S. Ct. at 1436.

does, is to demand the impossible.[358] "[V]iewing gender as completely irrelevant to the jury process may obscure [the] significant complexity [of the jury selection process] and thus lead to inappropriate policy responses."[359]

358. *See* Alschuler & Deiss, *supra* note 347, at 901.
359. Forman, *supra* note 272, at 51.