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A NEW FORMULA FOR PEREMPTORY CHALLENGES: XX=XY

by Susan Y. Soong*

On April 19, 1994, the Supreme Court held in *J.E.B. v. Alabama ex rel. T.B.*¹ that peremptory challenges based on gender are prohibited by the Equal Protection Clause of the Fourteenth Amendment. The Court expanded the rule of *Batson v. Kentucky*,² which prohibited race discrimination in the use of peremptory challenges under the Equal Protection Clause. As a result of *J.E.B.*, peremptory challenges to strike jurors on the basis of gender-related stereotypes are unconstitutional. "[G]ender, like race, is an unconstitutional proxy for juror competence and impartiality."³

This article will analyze the opinion in *J.E.B. v. Alabama ex rel. T.B.* and will consider the impact of the decision in light of three gender constructs: formal equality theory, substantive equality theory, and different voice theory.

FACTS AND PROCEDURAL HISTORY

The respondent, the State of Alabama, used peremptory challenges to strike men from a jury hearing a paternity and child support suit in the District Court of Jackson County, Alabama. The panel of prospective jurors was composed of twelve men and twenty-four women. Three jurors were excused for cause, leaving ten men and twenty-three women. The State used nine of its ten peremptory strikes to remove men from the jury and the petitioner, J.E.B.,⁴ used one of his strikes to remove the remaining man from the jury. The end result was a jury composed entirely of women.⁵

J.E.B. objected twice, once before the jury was empaneled and once again after the judgment against J.E.B. was entered. In both objections, J.E.B. argued that the reasoning of *Batson*⁶ and the unconstitutionality of peremptory challenges based on race similarly prohibit peremptory challenges based on gender. The District Court of Jackson County overruled J.E.B.'s objections, ruling that nondiscrimination in peremptory challenges under *Batson* did not include gender discrimination.⁷ The Alabama Court of Civil Appeals affirmed the lower court's finding and the Supreme Court of Alabama denied certiorari.⁸ The United States Supreme Court granted certiorari and reversed, finding that the Equal Protection Clause prohibits peremptory challenges on the basis of gender as well as on the basis of race.⁹

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¹ 114 S. Ct. 1419 (1994).

² 476 U.S. 79 (1986).

³ 114 S. Ct. at 1421.

⁴ The petitioner, J.E.B., is the putative father in the action. 114 S. Ct. 1419 (1994).

⁵ 114 S. Ct. at 1421-2.

⁶ 476 U.S. 79 (1986).

⁷ 114 S. Ct. at 1422.

⁸ 606 So.2d 156 (Ala. Civ. App. 1992), *cert. denied*, No. 1911717 (Ala. Oct. 23, 1992).

⁹ Justice Blackmun wrote the opinion for the majority, joined by Justices Stevens, O'Connor, Souter, and Ginsburg. Justices O'Connor and Kennedy wrote separate concurring opinions. There were two dissenting opinions, one by Chief Justice Rehnquist and another by Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

ANALYSIS

I. Formal Equality Theory

The theory of formal equality mandates equal treatment of similarly situated individuals.¹⁰ A person should be treated according to his or her actual characteristics, not according to stereotypical assumptions based on his or her gender.¹¹ Formal equality insists that, in the jury selection process, similarly situated male and female prospective jurors may not be treated differently on the basis of gender-based stereotypes.

The decision in *J.E.B.* is consistent with the theory of formal equality. In the majority opinion of *J.E.B.*, Justice Blackmun noted that there is a "promise of equality under the law . . . all citizens, regardless of race, ethnicity, or gender have the chance to take part in our democracy."¹² In accordance with formal equality, the majority found that gender-based stereotypes are unacceptable bases for striking a prospective juror.

The Court considered and rejected these gender-based assumptions about jurors, presented by the State:

[M]en otherwise totally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.¹³

The Court called the State's gender-based stereotypes about sympathies and receptiveness "gross generalizations"¹⁴ and refused to accept them as sufficient justification for peremptory challenges.

The Court further recognized that the use of gender-based stereotypes in jury selection is especially invidious because it perpetuates and reinforces those stereotypes.¹⁵ "When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women."¹⁶

J.E.B. is a victory for those who advocate race-blind and gender-blind equality under the nondiscrimination clause of the Fourteenth Amendment. "[A]ny correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law."¹⁷ A person has a right to serve on a jury and a right to be free from peremptory strikes regardless of the stereotypes associated with that person's race or gender.¹⁸

¹⁰ See Robin West, *Equality Theory, Marital Rape, and the Promise of the First Amendment*, 42 FLA. L. REV. 45, 56-7 (1990).

¹¹ See Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201.

¹² 114 S. Ct. at 1430.

¹³ Brief for Respondent at 10, *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (quoted in 114 S. Ct. 1419, 1426 (1994)).

¹⁴ 114 S. Ct. at 1426.

¹⁵ KATHARINE T. BARTLETT, *GENDER AND LAW* 72 (1993).

¹⁶ 114 S. Ct. at 1427.

¹⁷ 114 S. Ct. at 1432 (O'Connor, J., concurring).

¹⁸ Peremptory strikes remain valid if based upon factors other than gender or race. The *J.E.B.* decision "does not imply the elimination of all peremptory challenges." 114 S. Ct. at 1429.

II. Beyond Formal Equality

The concern with using a formal equality framework is that it does not take into account a history of gender that has been fraught with complications arising from misconceptions, biases, and real difference. Substantive equality theory and different voice theory have emerged as alternatives to formal equality. Each theory takes into account sociological and historical constructs and applies a different analysis to the same gendered issue. As Justice O'Connor wrote in her concurring opinion in *J.E.B.*, "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."¹⁹ Because men and women are socialized in different ways in American society, definite differences exist between them.

But can one give gendered labels to attitudes about the death penalty or automobile accident lawsuits? Is impartiality dependent upon one's gender? Is impartiality impossible simply because everyone has a gender? Justice Blackmun's majority opinion in *J.E.B.* answered all of these questions in the negative, yet many, including Justice O'Connor, would hesitate before answering. Differences between men and women do exist in experience, perception, and attitude.²⁰ Differences relied upon in peremptory strikes are often assigned and labeled in gender terms. Substantive equality theory and different voice theory recommend that society begin to recognize and incorporate these differences into the legal system.

A. Substantive Equality Theory

The theory of formal equality relies upon treatment, not results, for its justification. Substantive equality theory, on the other hand, focuses on the results of treatment.²¹ Therefore, an analysis of peremptory challenges using substantive equality theory would look to the results of the treatment of jurors, or the resulting gender representation on empaneled juries. To guarantee fair outcomes, substantive equality theory incorporates the history of discrimination into the analysis.

The majority in *J.E.B.* offered examples of past discrimination against women in jury service as evidence of outdated stereotypes. Because historically women were presumed too fragile or too easily upset to withstand the indecencies of the courtroom, they were excluded or excused from jury service.²² In 1872, a Supreme Court opinion even invoked God and biology as the basis for excluding women from court proceedings.²³ Stereotypes about women "as the center of home and family life"²⁴ persisted up until the 1970s.

Since 1975, women have had formal equality in jury service,²⁵ remedying the past discrimination that the Court referred to in *J.E.B.*. Under substantive equality theory, past discrimination would support an affirmative action program based on gender for jury service to eliminate the effects of the previously

¹⁹ 114 S. Ct. at 1432 (O'Connor, J., concurring).

²⁰ See West, *supra* note 10, at 58.

²¹ See ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980). Women's "right to substantive equality conflicts with their right to formal equality." Frances Olsen, *Statutory Rape: A Feminist Critique of Rape Analysis*, 63 TEX. L. REV. 387 (1984) (reprinted in FEMINIST LEGAL THEORY: FOUNDATIONS 487 (D. Kelly Weisberg, ed. 1993)).

²² 114 S. Ct. at 1423.

²³ "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman [sic] are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (concurring opinion).

²⁴ *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

²⁵ *Taylor v. Louisiana*, 419 U.S. 522 (1975) (prohibiting restrictions on jury service).

male-dominated jury pool. The affirmative introduction of women in the jury pool would help to ease or to reverse the history of discrimination which kept women out of jury service.

To take the analysis one step further, assume that there was a history of gender discrimination in jury selection -- not in jury service generally, but in the actual selection process. To allow women to be in a jury pool does not immediately put women in the jury box. Discrimination in the jury selection process could still prevent women from actually serving on juries. Substantive equality theory dictates the use of affirmative measures to assure women, rather than men, a place in the jury box. For instance, if there was a venire of impartial men and impartial women²⁶ for a trial of a male rapist, evidence of past discrimination against women in jury selection would justify a jury comprised of all women.

The past discrimination against women in jury service could be remedied by giving women a greater opportunity to serve as jurors. One such remedy would be to protect only women from being struck through the use of a peremptory challenge regardless of the basis for the strike. Another remedy would be to allow peremptory strikes against men based on gender but not against women based on gender. The intended result of these remedies would be to achieve a balance of genders in impartial juries.

The application of substantive equality to jury selection and peremptory challenges can exist in theory only. The realities of the population of a community, the composition of a jury pool, and the unpredictable nature of impartiality and bias combine to form a formidable obstacle to equal gender representation on juries under substantive equality theory. Most importantly, as the majority opinion in *J.E.B.* emphasized, formal equality dominates current constitutional analysis to the exclusion of alternative theories such as substantive equality.

B. Different Voice Theory

Different voice theory recognizes that women have been socialized in a particular way in this culture, which results in a unique perspective upon social issues.²⁷ The difference between the way men view the world and the way women view the world necessitates a recognition and incorporation of this difference into the legal system. This variation in viewpoint is ironically the exact type of difference that Justice Blackmun and the majority in *J.E.B.* would condemn and label "invidious group stereotypes."²⁸ In direct conflict with formal equality theory, different voice theory seeks to embrace, acknowledge, and even reinforce gender-based difference.

Justice O'Connor tried unsuccessfully to incorporate different voice theory into her concurring opinion in *J.E.B.*. She cited studies (and her ungendered intuition) which found definite attitudinal differences between genders on issues relevant to a jury. For instance, a study found empirically that "female jurors are somewhat more likely to convict than male jurors" in rape cases.²⁹ Justice O'Connor also noted that "in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."³⁰ A tension then arises between Justice O'Connor's attempt to acknowledge the gender

²⁶ A guarantee of impartiality, objectivity, or neutrality is impossible, considering that every prospective juror is affected in some way by society, through personal experience, or by the mass media. See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (reprinted in FEMINIST LEGAL THEORY: FOUNDATIONS 571 (D. Kelly Weisberg, ed. 1993)).

²⁷ CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). See also Robin West, *Jurisprudence and Gender*, 55 U.CHI. L. REV. 1, 14-18 (1988); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373, 1380-4 (1986).

²⁸ 114 S. Ct. at 1427.

²⁹ 114 S. Ct. at 1432 (citing R. Hastie, S. Penrod & N. Pennington, *INSIDE THE JURY* 140-1 (1983)).

³⁰ 114 S. Ct. at 1432.

stereotypes about jurors and her vote with the majority to prohibit discrimination based on those stereotypes.

Justice O'Connor tried to appease this tension by making the prohibition on gender discrimination in peremptory challenges applicable only to state actors and not to criminal defendants and private civil litigants. However, she failed to recognize the very differences about which she purports to be concerned. The variable application of nondiscrimination in jury selection does not recognize the differences between male jurors and female jurors. Under the different voice theory, it is illogical to allow a public defender to recognize gender-based attitudes and, at the same time, prohibit a state prosecutor from recognizing similar gender-based attitudes. Such gender-based attitudes should be acknowledged from the outset and should be allowed as a basis for peremptory challenges by every lawyer. Therefore, the fact that female jurors are more prone to convict in rape cases should be allowed as an explanation for a peremptory strike against a female juror by the defense and as an explanation for a peremptory strike against a male juror by the prosecution.

Unexpectedly, an analysis under different voice theory might resemble part of the reasoning by Chief Justice Rehnquist and Justice Scalia in their dissents. Rather than using the framework of formal equality and paying "obsequiousness to the equality of the sexes,"³¹ different voice theorists might prefer to adopt Chief Justice Rehnquist's view, that "[t]he 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."³² Under the different voice theory, therefore, peremptory challenges based on a prospective juror's gender, found unconstitutional under *J.E.B.*, would be acceptable.

CONCLUSION

Decisions such as *J.E.B.* invariably spark inconsistent reactions, harsh words of criticism coupled with celebratory words of justice done.³³ There is no universal consensus on how and where equality between the sexes should be realized.

Formal equality theory, substantive equality theory, and different voice theory are all valid frameworks for analyzing the rights and positions of men and women in America's democracy. All three theories contribute to the developing gender history, and analysis of gender issues in light of the three theories highlights the successes and the shortcomings of current constitutional analysis. There is no doubt that gender issues in the future, through the use of various theoretical frameworks, will continue to underscore the complexity of gender history and gender relations.

³¹ 114 S. Ct. at 1439 (Scalia, J., dissenting).

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

³³ Compare, for example, newspaper articles on the *J.E.B.* decision. See Bruce Fein, *Engendering juries by PC*, WASH. TIMES, Apr. 27, 1994 at A16 (the opinion "bugle[s] the currently fashionable view that men and women are interchangeable") and George Will, *Court Foolish to Bar Sex as Jury Factor*, HOUSTON CHRONICLE, Apr. 26, 1994 at A16 (characterizing the majority opinion as "flimsy" and "foolish"). Cf. *Equality in the Jury Box*, ST. LOUIS DISPATCH, Apr. 25, 1994 at 6B ("Until a nation can look beyond race, gender, age, or any factors that breed prejudice and inequality, its residents will not be truly free. The Supreme Court's latest ruling is a welcome step towards that goal") and *Fairer Juries, Male and Female*, N.Y. TIMES, Apr. 23, 1994 at 24 (gender-based discrimination in peremptory challenges "offends the dignity of the potential juror and threatens an injustice to the contestants").