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The Functional Effect of Eliminating Gender Bias in Jury Selection: A Critique and Analysis of *J.E.B. v. Alabama*

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The Functional Effect of Eliminating Gender Bias in Jury Selection: A Critique and Analysis of *J.E.B. v. Alabama*

> *The two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.*
>
> — Justice William O. Douglas[1]

I. Introduction

Equal protection under the laws is an ideal for which, we as Americans, are taught to strive. Yet there are instances when even members of the legal profession fail to realize this ideal. One such instance is when gender bias plays a role in the selection of a jury. The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying to any person within its jurisdiction the equal protection of the laws.[2] Essentially, this amendment guarantees protection of potential jurors and defendants from governmental action which differentiates between persons because of their classification in certain cognizable groups.[3]

The United States Supreme Court in *Batson v. Kentucky*,[4] held that the Equal Protection Clause of the Fourteenth Amendment prohibits state actors from using peremptory strikes based solely on race.[5] This purposeful discrimination in the jury selection process violates a defendant's rights to equal protection because it denies him or her the protection that a trial by jury is intended to secure.[6]

Gender bias is an analogous unconstitutional proxy for juror competence and impartiality.[7] The United States Supreme Court, in *J.E.B. v. Alabama*, took a needed step toward improving equal protection by holding that intentional discrimination on the basis of gender by state actors using peremptory strikes in jury selection violated the Equal Protection Clause.[8]

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1. Ballard v. United States, 329 U.S. 187, 193-94 (1946).
2. U.S. CONST. amend. XIV, § 1.
3. Ballard v. United States, 329 U.S. 187 (1946) (extending this range of cognizable groups to include women).
4. 476 U.S. 79 (1986).
5. *Id.* at 85-86.
6. *Id.* at 86.
7. J.E.B. v. Alabama, 114 S. Ct. 1419, 1421 (1994).
8. *Id.* at 1421. Particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. *Id.*

The *J.E.B.* opinion clearly expanded the role of the Equal Protection Clause in the jury selection process. However, application of this principle may severely limit the use of the peremptory strike as a means of striking any juror on any basis. Nevertheless, the impact of gender discrimination in jury selection is somewhat suspect in that it is unclear how much gender discrimination in the selection of the jury actually plays a part in the jury's decision. Furthermore, the expansion of this principle is unimaginable.

This note analyzes what impact, if any, *J.E.B.* could have on jury selection. Part I of this note traces the historical development and gradual acknowledgement that race and now gender discrimination in jury selection is prohibited. Part III analyzes the facts, issue, holding and reasoning of *J.E.B. v. Alabama.* Part IV develops an analytical framework in which to evaluate the impact of gender discrimination in jury selection and to determine the validity of the assumptions upon which such biases are based. Finally, part V provides a critique of the *J.E.B.* holding and argues that, while the holding is correct, its implementation will be very impractical. Furthermore, there now seems to be no barrier to stop the courts from extending of the Equal Protection Clause to prohibit the use of peremptory strikes in jury selection for any reason which remotely seems as if it was motivated by a juror's characteristics.

II. Historical Background

Gender Bias — the predisposition to treat people according to sex stereotypes[9] is not a new concept. However, prior to the early 1980s, gender bias' effect and place in the legal system was not an important concept.[10] Gender bias was so dominate in the nineteenth century that a gender-based peremptory strike was nonexistent because women were ineligible to serve on juries. In *Strauder v. West Virginia,*[11] while finding that the exclusion of African-American men from juries violated the Fourteenth Amendment, the Supreme Court expressed no doubt that a State "may confine the selection of [jurors] to males."[12]

Women first became eligible for jury service in the landmark 1946 decision of *Ballard v. United States.*[13] In *Ballard,* the Supreme Court held that women could not be excluded from jury service in the federal courts in a state where women had the right to serve.[14] However, gender discrimination in jury selection persisted, as fifteen years later in *Hoyt v. Florida,*[15] The Supreme Court upheld a state statute that excluded women from jury service unless they waived this privilege by indicating a desire to be placed on a jury list.[16]

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9. Hon. Shirley S. Abrahamson, *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias,* 61 U. CIN. L. REV. 1209 (1993).

10. *Id.*

11. 100 U.S. 303 (1879).

12. *Id.* at 310.

13. 329 U.S. 187 (1946).

14. *Id.* at 193.

15. 368 U.S. 57 (1961).

16. The Warren Court upheld a Florida state law which excluded women from jury service unless

Although *Ballard* allowed women to serve on juries, or at least did not prohibit them from serving, it was not until 1971 in *Reed v. Reed*[17] that the Court recognized that gender discrimination fell within the purview of the Equal Protection Clause.[18] However, the Court was unable to articulate a standard of review under which gender classifications should be judged.[19] Two years later, in an attempt to articulate this standard, the Court in *Frontiero v. Richardson*,[20] struck down a gender-based classification by using the strict scrutiny standard of review holding that in order for a gender-based classification to stand, it must be "narrowly tailored to serve a compelling governmental interest."[21]

However, the Court quickly corrected itself and concluded in *Craig v. Boren*[22] that the appropriate standard of review for classifications based on gender was heightened scrutiny.[23] Under this standard, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[24] The heightened scrutiny given to gender-based classification was based on the face that these policies may be based on "outdated misconceptions" concerning the role of females in the home rather than in the marketplace and the world of ideas.[25] Furthermore, this heightened scrutiny has been construed to recognize that these government policies, which are professedly based on reasonable considerations, may be more reflective of "archaic and overbroad" generalizations about gender.[26]

In 1975, the Supreme Court in *Taylor v. Louisiana*[27] explicitly rejected its decision in *Hoyt v. Florida* by ruling that women could not be categorically excluded from jury service or given automatic exemptions based on sex alone.[28] The Court found that "such exemptions resulted in juries that do not represent a cross-section of the community, and thus violated the 6th Amendment guarantees of a fair jury trial."[29] Ultimately though, the gender-based protection of the

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they waived an emption from this service and dismissed as irrelevant the problem that this exemption produced only a minimal number of women jurors. *Id.* at 58.

17. 404 U.S. 71 (1971).

18. *Id.* at 74.

19. *Id.* The court found that in order not to violate the Equal Protection Clause, statutory classification must be reasonable, not arbitrary, and must rest on some ground of difference having fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike.

20. 411 U.S. 677 (1973).

21. *Id.* at 688.

22. 429 U.S. 190 (1976).

23. *Id.* at 203.

24. *Id.* at 204.

25. *Id.* at 198-99; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (finding that differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women").

26. Schlesinger v. Ballard, 419 U.S. 498, 506-07 (1975).

27. 419 U.S. 522 (1975).

28. *Id.* at 537.

29. Adeline Levine & Claudine Shweber-Koon, *Jury Selection in Erie County: Changing a Sexist System*, 11 LAW & SOC'Y REV. 43, 52 (1976).

Fourteenth Amendment does not only apply to females, males are also protected against gender discrimination under the amendment.[30]

Although gender was recognized as a protected class under the Equal Protection Clause in the early 1970s, it was not until 1986 in *Batson v. Kentucky*, that the groundwork was laid for preventing discrimination on the basis of race in jury selection. In *Batson*, the Court held that the use of peremptory challenges by prosecutors for the purpose of excluding blacks from juries violated the equal protection rights of black defendants, as well as those of the excluded jurors.[31]

In order to prove a prima facie case of purposeful discrimination in a prosecutor's use of peremptory challenges, the *Batson* court articulated a three-part standard[32] which has since been extended by *Powers v. Ohio*,[33] *Edmonson v. Leesville*,[34] and *Georgia v. McCollum*.[35] Under *Batson*, the defendant first had to show that the excluded juror or jurors shared the defendant's race.[36] Second, the defendant had to show the prosecutor exercised her peremptory challenges to exclude members of this cognizable racial group.[37] Third, the defendant had to show that these facts, and any other relevant circumstances, created an inference that the prosecutor used the peremptory challenges to exclude the venireperson from the jury because of race.[38]

The *Batson* Court held that these three elements created "the necessary inference of purposeful discrimination."[39] However, to come to its decision, lower courts were instructed to consider all relevant circumstances.[40] Once these three elements are shown, the burden shifts to the prosecution to show a race-neutral reason for the alleged discriminatory strike.[41] If the prosecution can not show a race-neutral

30. Craig v. Boren, 429 U.S. 190, 204 (1976).

31. Batson v. Kentucky, 476 U.S. 79, 87 (1986) (considering case of all white jury convicting defendant of second degree burglary and receipt of stolen goods after prosecutor used peremptory challenges to strike all four black persons on venire).

32. *Id.* at 96-97.

33. 499 U.S. 400 (1991) (holding that challenging party only had to show that excluded juror was member of cognizable group, not that juror shared defendant's race).

34. 500 U.S. 614 (1991) (extending *Batson* to prohibit private civil litigants from using peremptory challenges to excluded jurors based on race).

35. 505 U.S. 42 (1992) (holding that *Batson* also prohibits criminal defendants from using racially based peremptory strikes).

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

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 96-97.

41. *Id.* at 97. The Court assumed that the exclusion of black jurors affects black defendants differently than white defendants, heightening the risk of an adverse effect. The Court also explained:

> The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . . Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.

Id. at 86.

reason for the strike against those jurors, the court may not allow those strikes.[42]

Since *Batson*, this test has been modified and expanded many times to focus both on the discrimination against the excluded juror as well as the effect the discrimination has on the defendant. In *Powers v. Ohio*[43] the second part of the three-prong test was changed. This decision made it such that the challenging party only had to show that the excluded juror was a member of a cognizable group and not that the juror shared the defendant's race.[44] Then, in 1991, the *Batson* test was extended to prohibit private civil litigants from using peremptory challenges to exclude jurors on the basis of race.[45]

Again in 1992, the Supreme Court expanded *Batson* in *Georgia v. McCollum*,[46] holding that *Batson* prohibited criminal defendants from using racially based peremptory strikes.[47] The Court justified this expansion by arguing that "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice — our citizens' confidence in it."[48]

Ultimately this expansion and shift in focus led the Ninth Circuit to decide in *United States v. De Gross*,[49] that the Equal Protection Clause also prohibits any party from striking venirepersons on the basis of gender.[50] In this opinion, the court applied the heightened-scrutiny standard and ruled that the Constitution tolerates gender discrimination if it is substantially related to the achievement of an important governmental objective.[51] Moreover, the *De Gross* court reasoned that peremptory strikes were a necessary means for achieving the important governmental objective of impaneling a fair and impartial jury.[52]

However, the *De Gross* court further reasoned that challenges explained solely by a venireperson's gender are not based on a party's sudden impression of a venireperson's ability to be impartial.[53] Rather, similar to racial challenges, gender-based strikes are predicated either on the false assumption that members of a certain group are unqualified to serve as jurors,[54] or on the false assumption that members of certain groups are unable to consider impartially a case against a member or nonmember of their group.[55] Therefore, if the decision to exclude a juror is based solely on the juror's sex, this decision must necessarily be based on these false

42. *Id.* at 99.
43. 499 U.S. 400 (1991).
44. *Id.* at 415.
45. Edmonson v. Leesville, 500 U.S. 614 (1991).
46. 505 U.S. 42 (1992).
47. *Id.* at 60.
48. *Id.* at 49-50.
49. 960 F.2d 1433 (9th Cir. 1992).
50. *Id.*
51. Craig v. Boren, 429 U.S. 190, 197 (1976).
52. *De Gross*, 960 F.2d at 1439.
53. *Id.*
54. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citing Norris v. Alabama, 294 U.S. 587, 599 (1935)).
55. *De Gross*, 960 F.2d at 1439.

assumptions and does not aid in achieving the important governmental objective of an impartial jury.[56] The *De Gross* decision was the immediate stepping stone to the Supreme Court's opinion in *J.E.B. v. Alabama.*

III. J.E.B. v. Alabama

A. Facts

The State of Alabama, on behalf of Theresia Bible, the mother of a minor child, filed a complaint against James E. Bowman Sr. (J.E.B.) for paternity and child support.[57] The trial court assembled a jury panel of thirty-six potential jurors, twelve males, and twenty-four females. The court excused three jurors for cause leaving only ten males in the remaining venire.[58] The State then used nine of its ten peremptory strikes to remove male jurors, while Petitioner used all but one of his eleven peremptory strikes to remove female jurors. As a result, all of the twelve selected jurors were female.[59]

Prior to the jury being empaneled, Petitioner objected to the State's use of its' peremptory challenges on the basis that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause.[60] The District Court of Jackson County, Alabama rejected this claim and empaneled the all-female jury which found Petitioner to be the father of the child and ordered him to pay child support of $415.71 per month.[61] The Alabama Court of Civil Appeals affirmed, holding that as long as gender did not serve as a proxy for bias, unacceptable jurors could still be removed including those who exhibit characteristics that are disproportionately associated with one gender.[62] The Supreme Court of Alabama denied certiorari[63] while the Supreme Court of the United States reversed the lower courts' decisions.[64]

B. Holding in J.E.B.

In *J.E.B.*, the Supreme Court finally decided to rule on whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race.[65] This decision came after many state and Circuit courts had reached polar opposite opinions on this issue.[66] In *J.E.B.*, the Court identified two

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56. *Id.*
57. J.E.B. v. Alabama, 114 S. Ct. 1419, 1421 (1994).
58. *Id.* at 1421-22.
59. *Id.*
60. *Id.*
61. *Id.*
62. 606 A.2d 156 (D.C. 1992).
63. *J.E.B.*, 114 S. Ct. at 1422.
64. *Id.* at 1421.
65. *Id.* at 1422.
66. *See* United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992). *But see* United States v. Broussard, 987 F.2d 215 (5th Cir. 1993); United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987).

reasons for not allowing gender discrimination in jury selection and also discussed the implications of this decision on the use of peremptory strikes.[67]

Justice Blackmun began his analysis by reaffirming what he now thinks should be axiomatic: "Intentional 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."[68] In analyzing this decision, the Court posed the question of whether discrimination on the basis of gender in jury selection substantially furthered the State's legitimate interest in achieving a fair and impartial jury.[69] In order to make this determination, the court found that is was necessary to consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.[70]

The State of Alabama argued that it had a special state interest in establishing the paternity of a child born out of wedlock.[71] The State contended that its interest justified using peremptory challenges on the basis of gender, because illegitimate children are victims of historical discrimination and entitled to heightened scrutiny under the Equal Protection Clause.[72] Conversely, the Court decided that the only legitimate interest the State of Alabama could possibly have in the exercise of its peremptory challenges was in securing a fair and impartial jury.[73] The Court reasoned that the State's interest in every trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner.[74]

Obviously, the Supreme Court was not persuaded by the State of Alabama's attempted justification for striking almost all of the males from the jury. Furthermore, the Respondent's reasoning was based on a gender-biased assumption that men might be more sympathetic to the arguments of a male alleged to be the father of an out-of-wedlock child, while women might be more sympathetic to the mother of the child.[75]

The Supreme Court rejected this assumption as being the "very stereotype the law condemns."[76] In addition, the Court held that even if there was any truth to some of the gender stereotypes used to justify gender-based peremptory challenges, that alone could not support discrimination on the basis of gender in jury selection.[77] These impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.[78]

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67. *J.E.B.*, 114 S. Ct. at 1422.
68. *Id.*
69. *Id.* at 1425.
70. *Id.*
71. *Id.* at 1426.
72. *Id.*
73. *Id.*; *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (holding that the sole purpose [of the peremptory challenge] is to permit litigants to assist government in selection of an impartial trier of fact).
74. *Id.* at 619.
75. Respondent's Brief at 10, *J.E.B.* (No. 92-1239).
76. *J.E.B.*, 114 S. Ct. at 1426 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).
77. *J.E.B.*, 114 S. Ct. at 1427.
78. *Id.* The generalization advanced by Alabama in support of its asserted right to discriminate on

Justice Blackmun reasoned further that discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors.[79] This discrimination causes these three groups of the population to be wrongfully excluded from participation in the judicial process in three ways. First, the litigants are harmed by the risk that the prejudice which was the motivation behind the discrimination in selecting the jury will extend throughout the entire proceeding.[80] Second, the community is harmed by the State's participation in the perpetuation of group stereotypes and the "inevitable" loss of confidence in the judicial system.[81] Finally, the Court concluded that "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."[82] Active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."[83] In applying this reasoning, Justice Blackmun acknowledged that the right to nondiscriminatory jury selection extends to both men and women.[84]

Ultimately, the Court decided that its conclusion in this case does not imply that peremptory challenges should be eliminated.[85] Parties may still exercise their peremptory challenges to remove from the venire any jurors whom they feel might be unacceptable or those whom are normally subject to a rational basis review.[86] The Court went one step further in stating that even strikes based on characteristics that are disproportionately associated with one gender could be appropriate unless a pretextual reason for discrimination is shown.[87] Therefore, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike.[88] If an explanation is required for the peremptory strike, the party must show that the strike is based on a juror characteristic other than gender.[89]

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the basis of gender is overbroad, and serves only to perpetuate the same "outmoded notions of the relative capabilities of men and women." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

79. *J.E.B.*, 114 S. Ct. at 1427.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)).

84. *J.E.B.*, 114 S. Ct. at 1427; *see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (finding that state practice which discriminates against males rather than against females does not exempt it from scrutiny or reduce standard of review).

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

86. *Id.*

87. *Id.*

88. This is the same as with race-based *Batson* claims. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

89. *J.E.B.*, 114 S. Ct. at 1430.

IV. Evaluating J.E.B.: The Actual Impact of Gender Discrimination

A. Assumptions upon Which Gender Biases Are Based

Peremptory strikes aimed specifically at women or men are unlawful, as the court has previously remarked; "sex is an immutable characteristic determined solely by the accident of birth."[90] Gender differences exist in the attitudes of jurors, their perception of evidence, and their participation in deliberations.[91] In every trial, the makeup of the jury has an impact on the outcome of the proceeding. However, does the actual gender composition affect the jury's decision, and are judges able to measure this if it does?[92]

The following assumptions are some of the most common gender generalizations about jurors: (1) women favor the criminal defendant more than men, except in cases involving threats to a child or the family; (2) women are more likely to favor the plaintiff in civil cases, but will make smaller awards than men; (3) women are less likely than men to favor female defendants or plaintiffs because they are intolerant to the complaints of their own sex;[93] (4) women are more apt to convict rape defendants, unless there is some indication that the victim encouraged her own victimization or was "not respectable";[94] (5) women and men are both likely to be affected by physically attractive parties;[95] and (6) a woman juror is more likely to be emotional and sympathetic than a male juror.[96]

Rape and death penalty cases may possibly show the strongest gender differences.[97] Several studies support the idea that women are more likely than men to see rape as a serious crime and to sentence rapists to longer prison terms. However, women are less influenced by the victim's reputation than men are, and appear only slightly more likely to convict.[98] Furthermore, other studies have found that women are more likely than men to impose the death penalty.[99]

Studies have also shown that not only is it possible to differentiate on the basis of gender, but there are also differences within the genders themselves as to how certain juror groups will vote. For example, in an incest trial, there was a clear difference between the verdicts of women who worked outside of the home and

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90. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

91. Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 50 (1992).

92. Nancy J. King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 64 (1993).

93. RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 33 (1980).

94. Ann R. Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection*, *in* WOMEN IN THE COURTS 121 (Winifred L. Hepperle & Laura Crites eds., 1978).

95. *Id.* at 121-22. This is not a comprehensive list of generalizations about women jurors.

96. *Id.*

97. *See* Forman, *supra* note 91, at 52-53 (citing HANS ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT (1968)).

98. Forman, *supra* note 91, at 52.

99. *See* Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 605 n.60 (1987).

those who were housewives.[100] The study showed that the housewives were more likely to vote guilty than were the working women. Furthermore, housewives were more likely to vote guilty than were any other group of jurors considering occupational, educational, ethnic and racial categories.[101]

These are just a few of the gender-based assumptions that prosecutor's and defense attorneys use as the basis for striking female or male jurors solely on the basis of their immutable characteristic of gender. However, there has been little empirical support to show that the juror's gender actually impacts jury verdicts and attitudes.[102] There is no real evidence that women are biased toward plaintiffs in civil trials, but are against large damage awards. Empirical research also refutes the claim that women discriminate against other women and seems to support the notion that each gender favors its own when on trial.[103] Moreover, there is no real support for the claim that women are more favorable to attractive male defendants.[104]

As a result of this lack of evidence to support gender-based assumptions, many people are left needing some justification for limiting the use of peremptory challenges to gender-neutral reasons. The question at the heart of this discussion is: If there is no real support for any of these gender-based assumptions, why does it matter if an attorney strikes a venireperson solely on the basis of his or her gender? Is the answer,"because it sounds like the moral and modern thing to do?"

Both parties in *J.E.B.* seemed to base their peremptory strikes on gender assumptions as they used the vast majority of their strikes against people of one gender: the Plaintiff against men, the Defendant against women.[105] These actions were probably based on the two perceptions that men, who are otherwise qualified to serve on a jury, are more sympathetic and receptive to the arguments of a man alleged to be the father of an out-of-wedlock child in a paternity action, while women might be more sympathetic and receptive to the woman who bore the child.[106] Although there may not be much empirical justification for prohibiting the use of gender-based peremptory strikes, the Constitutional thread linking these types of discrimination to the *Batson* line of cases is that "equal protection principles protect jurors against invidious discrimination and the community from a biased judicial system, either in fact or perception.[107]"

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100. *See* Forman, *supra* note 91, at 52.

101. *Id.*

102. *Id.* at 53.

103. *Id.* at 52.

104. *Id.*

105. Respondent's Brief at 9-10, *J.E.B.* (No. 92-1239).

106. *Id.* at 10; *see* REID HASTIE ET AL., INSIDE THE JURY 140, 141 (1983) (stating that "female jurors appear to be somewhat more conviction-prone than male jurors" in rape cases, while males "were more inclined to think that a rape victim made a casual contribution to the rape, attributed more fault to the victim, and characterized her more negatively, than did females").

107. Marcia Coyle, *High Court May Strike Sex-Based Challenges: Will the Court take the Next Step in its Revolution in Jury Selection?*, NAT'L L.J., Nov. 8, 1993, at 1, 3.

B. What is Gender Bias v. Female or Male Stereotypes?

The respondent in *J.E.B.* argued that it was unclear what evidence indicated that male or female members of the jury venire were struck because of their gender.[108] Perhaps, this unclarity is the most important problem in deciding or arguing that there was discrimination on the basis of gender in the jury selection process. Under some conceivable standards, every characteristic which a person possesses could be said to be a gender characteristic. It is simply not possible for a juror to come into the jury box without any characteristics that are classic to men or women. Furthermore, individuals are not expected to ignore as jurors what they know as men — or women.[109]

Sometimes it is impossible for an attorney to even give a reason for using a peremptory strike, much less a reason that has nothing to do with that person being a male or a female. Applying this new standard literally "will allow biased jurors to be allowed on the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic."[110]

Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them,[111] including their stereotypical views concerning different people and different situations. Jurors, like all of us, are influenced by stereotypes about groups of which we are not a member.[112] As one commentator indicated:

> Stereotypes operate as a source of expectancies about what a group as a whole is like . . . as well as about what attributes individual group members are likely to possess. . . . Their influence can be pervasive, affecting the perceiver's attention to, encoding of, inferences about, and judgments based on that information. And the resulting interpretations, inferences, and judgments typically are made so as to be consistent with the preexisting beliefs that guided them.[113]

These stereotypical views that affect both litigants and jurors are the premise for the Equal Protection doctrine as applied to gender-based jury selection. Neither race

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108. Respondent's Brief at 6, *J.E.B.* (No. 92-1239).

109. J.E.B. v. Alabama, 114 S. Ct. 1419, 1432 (1994).

110. *Id.* at 1431 (O'Connor, J., concurring).

111. Beck v. Alabama, 447 U.S. 625, 642 (1980).

112. *See* King, *supra* note 92, at 77 (commenting that members of negatively stereotyped groups are assumed to possess negative traits, and positive information about them is devalued). *Id.*

113. David Hamilton et al., *Stereotype-Based Expectancies: Effects on Information-Processing and Social Behavior*, 46 J. SOC. ISSUES, 35, 42 (1990); *see also* Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871, 878-89 (1987) (concluding that stereotypes lead to selective attention toward stereotype-consistent information; that inconsistent information is overlooked, poorly integrated, or reinterpreted in a way that reconciles it with stereotyped expectancies; and that "stereotypes can bias the mental representation that is constructed by subjects, thereby biasing subsequent judgments and recall performance").

nor gender seem relevant to whether a juror is competent to serve on the jury or can act impartially.[114] The practice of discriminating in jury selection reflects and perpetuates stereotypical notions that members of one race or gender will inevitably favor litigants that belong to the same group or are otherwise unable to judge the case fairly.[115]

C. Heightened Scrutiny v. Strict Scrutiny

While classifications based on gender are entitled to an intermediate, heightened standard of review for Fourteenth Amendment purposes, they are not subject to the strict scrutiny applied to race-based classifications.[116] It is a well-established principle that when State actions are taken based on race, and perhaps alienage or national origin, or when State actions impinge upon personal rights protected by the Constitution, those actions are subject to strict scrutiny. Thus, these actions "will be sustained only if they are narrowly tailored to serve a compelling state interest."[117] However, the standard for gender classifications is not nearly as harsh as strict scrutiny. In order for a gender classification to survive, it must be substantially related to a sufficiently important governmental interest.[118] The State must show that gender based strikes serve important governmental objectives and the discriminatory means used are substantially related to achieving those objectives.[119]

In *J.E.B. v. Alabama*, the State's substantial interest was in freely exercising its peremptory strikes in order to establish the paternity of a child.[120] The State struck nine of the ten remaining males on the jury pool. This differential treatment of the male and female venirepersons was probably based on "outmoded notions of the relative capabilities of men and women"[121] and their ability to determine the paternity of a child.

However, even if this was the basis for the State striking the nine men from the jury, arguably the capabilities of the stricken men and the actual women jurors to serve on this jury was a substantially important interest of the government in exercising its perernptory strikes. The job of the State's attorney was to establish the paternity of the child and to order the father to pay child support to the mother. Thus, the true goal of the State was to try to empanel a jury sympathetic to the mother's and child's interests while keeping in mind that the ultimate goal in jury selection is to empanel a fair and impartial jury.

The State's argument failed because the Supreme Court did not, and will not, accept as a defense to gender-based peremptory challenges, "the very stereotype the

114. *See* Forman, *supra* note 91, at 53.
115. *Id.*
116. Respondent's Brief at 4, *J.E.B.* (No. 92-1239).
117. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
118. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
119. *See* Coyle, *supra* note 107, at 4.
120. Respondent's Brief at 9, *J.E.B.* (No. 92-1239).
121. *City of Cleburne*, 473 U.S. at 441.

law condemns."[122] In *J.E.B.*, the State's peremptory strikes failed to meet the heightened scrutiny standard applied to gender classifications as the Court found that they were not made to empanel a fair and impartial jury but to empanel an all female jury in the hopes that they would be sympathetic to the mother and child. Furthermore, the State offered almost no support for its conclusion that gender alone was an accurate predictor of a juror's attitudes.

The gender-based peremptory strikes ultimately seemed to fail because Justice Blackmun felt they were reminiscent of the historical exclusion of women from juries. Blackmun stated that he "refused to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box."[123] The Court found that:

> The Equal Protection Clause, as interpreted by decisions of this court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as perpetuate historical patterns of discrimination.[124]

Therefore, although there may be some important reasoning for the State to strike the nine male venirepersons, this reasoning was not substantially related to the important governmental interest of establishing the paternity of the child. The Court felt like this gender classification was motivated by stereotypical views of men and women in violation of the Equal Protection Clause.[125]

V. Critique of J.E.B. v. Alabama

The Supreme Court appears unable to decide if jury discrimination actually affects jury decisions. Prior to 1991, the Court reasoned that jury discrimination could violate the individual constitutional rights of criminal defendants because defendants who were sentenced, tried, or indicted by illegally selected juries faced a risk of an adverse outcome not faced by defendants judged by properly chosen juries.[126] Furthermore, in 1991 and 1992, the Court shifted its focus to the discrimination against the excluded jurors.[127] This shift in focus seemed to put distance between the Court and the idea that jury discrimination affects jury decisions.[128]

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122. Powers v. Ohio, 499 U.S. 400, 410 (1991).

123. J.E.B. v. Alabama, 114 S. Ct. 1419, 1427 (1994).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991). Previously, concern about the injury to those excluded by discriminatory practices had only been a supplementary factor in deciding whether to grant relief to criminal defendants. *See* Swain v. Alabama, 380 U.S. 202, 224 (1965); Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880).

128. *J.E.B.*, 114 S. Ct. at 1427.

In the gender discrimination analysis, we are left with the same two questions which are continuously asked in cases of racial discrimination: Does gender composition affect jury decisions, and, if so, are judges able to measure that effect?[129] This question is purely empirical and, as shown earlier, has some support in different situations because the jury composition affects decisions differently in each case. The second question is more subjective: Assuming judges are able to predict when changes in gender composition will influence jury decisions, should the law permit judges to act upon those predictions?[130] Judges make these type of predictions all the time and such discretion seems necessary for a fair method of selecting a jury. However, these predictions allow the judges to bring to the courtroom their own ideas, life experiences, emotions and prejudices in order to rule on whether potential jurors have been discriminated against on the basis of their own life experiences, ideas, emotions and prejudices. Ultimately, these are the different experiences associated with being male or female that they bring with them into the courtroom.

Another important question associated with the impact of gender bias in jury selection is how well the *Batson* standard will apply to gender bias? On a pragmatic level, *Batson* may be a very unworkable standard because it is possible that an attorney would always be able to come up with some reason other than gender bias for striking a person. However, this leads to another problem in deciding what strikes are purely motivated by a person's gender and what strikes are taken because of certain male or female characteristics. The judge is forced to draw a very thin, almost impractical line.

Assuming judges should have the discretion to decide when an attorney is making a gender-based strike, judges will probably have a harder time recognizing a gender-based peremptory strike than one based on race. A judge is likely to constantly keep an eye open for an attorney who is trying to empanel an all black or all white jury. However, as *J.E.B.*, when the ratio of men to women on the venire is so disparate, it could be very difficult for the judge to determine if gender discrimination is taking place or if there was no other choice but to strike all members of one sex. Therefore, sexual stereotyping might be harder to identify than racial stereotyping except in extreme cases such as sexual assault cases.[131]

This decision also threatens the existence, much less the effect of the peremptory strike. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[132] The peremptory challenge also serves the purpose of giving the litigants an opportunity to remove jurors whom they believe are likely to be biased, without meeting the stringent requirements of challenges for cause. In this sense, the peremptory strike acts as a safeguard enabling litigants to remove those jurors

129. *See* King, *supra* note 92, at 64.
130. *Id.*
131. Stephanie B. Goldberg, *Batson and the Straight-Face Test*, A.B.A.J., Aug. 1992, at 82, 85.
132. Swain v. Alabama, 380 U.S. 202, 220 (1965).

who may harbor an unconscious or hidden bias However, in practice, the peremptory strike is really used to select jurors who will favor their side.[133]

Simply because a trial attorney's instinctive assessment of a juror and his or her predisposition might fail to meet the high standards of striking a juror "for cause," does not mean that the attorney's instinct is erroneous.[134] In every trial, women, just like men, are stricken from juries by peremptory challenges because of an attorney's doubt that they are well disposed to the striking party's case.[135] This does not mean that they are being stricken simply because they are male or female, but because, based on the lawyer's experience and gut feelings, that juror would not be beneficial to the client and the case. After all, is that not the attorney's purpose — to represent the client to the best of their ability?

Extending the Equal Protection Clause to include gender-based jury selection, as far as a moral philosophy, seems like the correct thing to do. In the evolution of gender discrimination, the next logical step would seem to by the elimination of peremptory strikes when they are based on gender. However, the flip side of this extension does not seem practical or easy to implement and control.

VI. Conclusion

The underlying principle in jury selection is that attorney's should make assessments of each prospective juror's competence and impartiality.[136] Furthermore, the essential nature of peremptory challenges is that they should be exercised without a reason and without inquiry.[137] The actual impact of *J.E.B.* in prohibiting gender-based peremptory challenges will force attorneys to think more critically about the attributes that make for a desirable or undesirable juror.[138] Although extending the Equal Protection Clause to prohibit gender-based peremptory challenges is a morally commendable decision, empirical data has yet to show that gender actually plays a major role in jury verdicts.[139]

Following *J.E.B.*, judges and attorneys face a more difficult duty when faced with exercising peremptory challenges. Now attorneys are forced to articulate a reason for striking a juror when this "reason" is often inarticulable.[140] This decision severely limits the litigant's ability to act on their intuition.[141] The *J.E.B.* holding seems to find irrelevant any correlation between a juror's gender and attitude.[142] Moreover, this holding places yet another layer on top of the already heavily

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133. *See* Forman, *supra* note 91, at 53.

134. J.E.B. v. Alabama, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring).

135. *Id.* at 1437 (Scalia, J., dissenting).

136. Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1931 (1992).

137. Swain v. Alabama, 380 U.S. 202, 219-20 (1965).

138. JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY 312-13 (2d ed. 1990).

139. *See* Forman, *supra* note 91, at 52.

140. J.E.B. v. Alabama, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring).

141. *Id.* at 1432.

142. *Id.*

burdened peremptory challenge and diminishes the attorney's ability to act on sometimes accurate gender-based assumptions about juror attitudes.[143]

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143. *Id.*