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J.E.B. v. Alabama Ex Rel T. B.: Discrimination by Any Other Name ...

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Introduction

In 1986, the Supreme Court ruled in *Batson v. Kentucky*[1] that peremptory challenges[2] motivated by race violated the Fourteenth Amendment's Equal Protection Clause.[3] In 1994, in *J.E.B. v. Alabama ex rel T.B.*,[4] the Court extended *Batson* to include gender-based peremptory challenges. Pursuant to *Batson* and *J.E.B.*, once a litigant demonstrates a prima facie case of race or gender discrimination, the party accused of discrimination must come forward with a race or gender-neutral explanation for exercising the peremptory challenge. Lower court implementation of *Batson* and lower court proscription of gender-based peremptory challenges motivated by gender prior to *J.E.B.* indicate, however, that courts readily accept explanations for peremptory challenges that are merely pretexts[5] for discrimination. This history suggests that *J.E.B.* will not, in fact, eliminate gender discrimination in the exercise of peremptory challenges. In order to rid the jury selection process of this and all types of discrimination, the peremptory challenge system should be abolished and replaced with a procedure that will prevent the injection of bigotry into American courtrooms.[6]

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1. 476 U.S. 79 (1986).

2. A peremptory challenge is the right to challenge a juror without assigning, or being required to assign, a reason for the challenge. In most jurisdictions each party to an action, both civil and criminal, has a specified number of such challenges. After a party has used all her peremptory challenges, she is required to utilize challenges for cause to eliminate potential jurors. Black's Law Dictionary 1136 (6th ed. 1990).

3. *See* U.S. Const. amend. XIV, § 1 (providing that "[n]o state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws").

4. 114 S. Ct. 1419 (1994).

5. While trial court acceptance of litigants' pretextual explanations serves as a justification for the elimination of the peremptory challenge system, the argument for elimination is further supported by the fact that the *Batson* and *J.E.B.* decisions failed to address many important issues which will undoubtedly give rise to substantial litigation and judicial inefficiency. These issues include the absence of an adequate standard by which to determine whether a party has established a prima facie case of improper exclusion, the appropriate remedy upon a finding of improper exclusion, and the ability of a litigant to raise a *Batson* challenge where the opposing party excluded members of the panel who were of a particular race or gender, but where the petit jury nevertheless included members of the excluded class. *See generally* 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 (1989).

6. While this Comment calls for the abolition of the peremptory challenge system because it engenders discrimination in the jury selection process, at least one commentator has suggested that peremptories should be eliminated because the Supreme Court cannot limit the application of *Batson* to race and gender. Eventually, argues this commentator, the Court will "have to protect everyone," and because the peremptory challenge will no longer be exercised with full freedom, it must be eliminated. J. Christopher Peters, Note, Georgia v. McCollum: *It's Strike Three for Peremptory Challenges, but Is it the Bottom of the Ninth?*, 53 La. L. Rev. 1723, 1757-58 (1993).

Part I of this Comment provides a brief background of the jury selection process and the role of the peremptory challenge. Part I also explores the history of race and gender discrimination in the jury selection process. Part II offers an in-depth discussion of the Supreme Court's decision in *J.E.B.* Part III discusses the purposes supposedly served by the peremptory challenge, as well as the harms suffered by those who are excluded from jury service due to the discriminatory exercise of this device. Additionally, Part III examines the inability of courts to distinguish between legitimate reasons for peremptory strikes and those that serve as mere pretexts for discrimination. Finally, Part IV suggests the replacement of the peremptory challenge system with an affirmative selection system that will serve to rid the jury selection process of discrimination.

I. BACKGROUND

A. *The Jury Selection Process and the Peremptory Challenge*

The concept of trial by jury has its origins in early Roman law.[7] In the Anglo-Saxon tradition, the concept first appeared in 1166 A.D. with the Assize of Clarendon,[8] which required inquiry into robbery and murder by "the twelve most lawful men."[9] In early England the members of the jury were chosen based upon their knowledge of the event at issue. This principle developed into the view that, in order to assure an impartial jury, members of the jury pool should know nothing of the instant litigation.[10] The trial by jury system immigrated to America with the colonists who traveled from England.[11] Subsequently, it became a protected right in the United States under the Sixth Amendment[12] for criminal proceedings and under the Seventh Amendment[13] for many civil proceedings.

In order to implement properly this constitutional safeguard, a fair procedure for selecting a jury is necessary.[14] While the Jury Selection and Service Act of 1968,[15] which governs jury selection, does not dictate a particular method of assembling a venire or jury panel, courts most often utilize voter registration lists to select randomly a cross section of the community. Once the venire or jury panel is selected, the judge, often with

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7. *See id.* at 1725; *see also Batson*, 476 U.S. at 119 (Burger, C.J., dissenting) (discussing trial procedure in ancient Rome).

8. The "Assize of Clarendon" was a series of ordinances initiated by King Henry II of England in an assembly of lords at the royal hunting lodge of Clarendon. These ordinances attempted to improve procedures in criminal law and established the grand jury system consisting of twelve men. 3 ENCYCLOPEDIA BRITANNICA 348 (1985); *see also* S. Alexandria Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305, 1306 n.7 (1991).

9. Peters, *supra* note 6, at 1725-26.

10. *Id.* at 1726.

11. *Id.*

12. *See* U.S. CONST. amend. VI (providing that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury" in all criminal prosecutions).

13. *See* U.S. CONST. amend. VII (providing that "the right of trial by jury shall be preserved" for all suits at common law where the value at controversy exceeds twenty dollars).

14. Peters, *supra* note 6, at 1726.

15. 28 U.S.C. §§ 1861-78 (1988).

the aid of counsel, conducts a voir dire[16] examination of the prospective jurors. Voir dire is conducted to ascertain whether the prospective jurors are acquainted with the facts of the case or the parties involved in the dispute.[17] The parties aim, through voir dire, to determine whether the prospective jurors have a predisposition regarding the merits of the case.[18] The jurors primarily are asked questions regarding their backgrounds, work, and families.[19] With this information, the litigants strive to discern whether the potential jurors harbor any biases that would hinder their ability to serve fairly and impartially as jurors.

After voir dire, the parties may strike a potential juror from the panel for cause.[20] Cause challenges must be exercised on the basis of articulated bias.[21] Such challenges allow parties to eliminate jurors for "narrowly specified, provable, and legally cognizable" reasons.[22] Pursuant to cause challenges, jurors who have exhibited actual or implied bias may be excluded. Actual bias refers to the potential juror's subjective state of mind, while implied bias is presumed by law from the existence of relationships or interests of the juror.[23] Permissible justifications for cause challenges are often codified, limiting removal of jurors to situations where, for instance, the juror has been convicted of a felony[24] or will be a witness in the litigation.[25] Trial judges are given the discretion to grant or deny cause challenges.[26]

The parties may also exercise a limited number of peremptory challenges.[27] A peremptory challenge is the right to challenge a juror without assigning, or being required to assign, a reason for the challenge. The parties may employ peremptory challenges "without a reason stated, without inquiry and without being subject to the court's control."[28]

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16. Voir dire literally means "speak the truth." 2 WAYNE R. LAFAVE & JEROLD H. ISREAL, CRIMINAL PROCEDURE § 21.3, at 718 (1984).

17. Jo, *supra* note 8, at 1307.

18. *Id.* at 1307.

19. *Id.* at 1307.

20. Robert L. Harris, Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1030 (1991).

21. Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 519 (1992).

22. *Id.* at 519.

23. Susan L. McCoin, Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1226 n.5 (1985).

24. ALA. CODE § 12-16-150(5) (1986); *see also* Bray, *supra* note 21, at 569 & n.4.

25. TEX. CRIM. PROC. CODE ANN. § 35.16(a)(6) (West 1989); *see also* Bray, *supra* note 21, at 569 & n.5.

26. Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 227 (1986).

27. Harris, *supra* note 20, at 1030-31.

28. Swain v. Alabama, 380 U.S. 202, 220 (1965). Generally, jurisdictions utilize one of two general challenge procedures: the "struck system" and the "sequential system." In jurisdictions that employ the struck system, the size of the jury pool is equivalent to the size of the petit jury plus the sum of peremptories allotted to both parties. If, for example, the required jury is twelve and each side is allowed five peremptory challenges, the jury pool will consist of twenty-two individuals. After the jury pool is assembled and subjected to voir dire, the parties exercise their cause challenges. Those removed for cause are replaced by other prospective jurors who also are examined in voir dire. The parties then alternate exercising their per-

Unlike the jury system as a whole, the Framers did not expressly incorporate peremptory challenges into the Sixth Amendment.[29] Despite this exclusion, the Supreme Court traditionally has given the practice an elevated position. In 1887, in *Hayes v. Missouri*,[30] the Supreme Court found that

> [e]xperience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him.[31]

More recently, in the 1965 case *Swain v. Alabama*,[32] the Court implied that peremptory challenges effectuate a fair trial:

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.[33]

This formidable history and the strong rhetoric adhered to by Supreme Court justices throughout American jurisprudential history served to fortify the lofty position the peremptory challenge has held in courtrooms in this country.[34] Recently, however, a majority of Supreme Court justices have recognized the potential and actual abuse engendered by the exercise of peremptory challenges. With the decisions in *Batson* and *J.E.B.*, the Court has begun to chip away at a legal device that no longer has a place in American society.

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emptories against the twenty-two members of the jury pool or use all their peremptories at once, depending on the jurisdiction. *See* Gurney, *supra* note 26, at 228.

In "sequential system" jurisdictions, the number of people assembled for voir dire equals the size of the petit jury. After each individual is examined, the parties exercise both for cause and peremptory challenges. The process continues until the parties exhaust their peremptories and, after completion of the challenges for cause, enough jurors remain to form a petit jury. *Id.*

29. Harris, *supra* note 20, at 1031.

30. 120 U.S. 68 (1887).

31. *Id.* at 71; *see also* Pointer v. United States, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . . Any system for the empaneling of a jury that pre[v]ents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.").

32. 380 U.S. 202 (1965).

33. *Id.* at 219.

34. While the judiciary in the United States has concentrated on eliminating racial and gender discrimination in the use of the peremptory challenge, Canada has recently equalized the number of challenges given to each side and England has eliminated the peremptory challenge entirely. Except for special circumstances, jurors under English and Canadian systems cannot be questioned about their beliefs and prejudices during voir dire nor can they be investigated prior to trial. *See* Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L.J. 201, 205-206 (1993) (comparing the history and current status of peremptory challenges in the United States, England, and Canada).

B. *The History of Racial Discrimination in Jury Selection*

In 1879, the Supreme Court in *Strauder v. West Virginia*[35] held that a West Virginia statute[36] that excluded blacks from service on grand and petit juries[37] violated the Equal Protection Clause.[38] This landmark decision established for the first time that a state could not exclude deliberately a racial group from jury service. For almost a century after *Strauder*, the Court upheld the right of racial minorities to serve on juries through proper inclusion in the jury selection process.[39] In 1965, however, the Court held in *Swain v. Alabama*[40] that a prosecutor's discriminatory intent in the use of peremptory challenges could only be demonstrated by evidence of the systematic removal of African-Americans from juries over a period of time.[41] This "crippling burden of proof"[42] effectively rendered the peremptory challenge immune from equal protection challenges.[43] The Court subsequently recognized, however, an excluded juror's interest in nondiscriminatory jury selection[44] and the harm to the judicial process caused by such discrimination.[45]

In 1986, in line with these developments, the Court overruled *Swain* in *Batson v. Kentucky*.[46] In *Batson*, the Court eased the defendant's burden of proof, ruling that evidence of a discriminatory pattern of peremptory challenges in a defendant's own trial may be sufficient to establish a prima facie case of discrimination.[47] Once a defendant establishes a prima facie case, the state must come forward with race-neutral explanations for peremptorily challenging racial minorities.[48] Since the *Batson* decision, the

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35. 100 U.S. 303 (1879).

36. The West Virginia statute provided: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Id.* at 305.

37. It is the duty of a grand jury to receive "complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and find bills of indictment in cases where they are satisfied a trial ought to [occur]." A petit jury is the ordinary jury called for the trial of civil or criminal actions. BLACK'S LAW DICTIONARY 855-56 (6th ed. 1990).

38. *See* U.S. CONST. amend. XIV, § 1.

39. *See* Patton v. Mississippi, 332 U.S. 463 (1947) (holding that once a prima facie case has been established, the burden is on the state to prove that the exclusion is not racially motivated); Norris v. Alabama, 294 U.S. 587 (1935) (ruling that testimony of witnesses establishing the total exclusion of blacks from jury service made out a prima facie case of the denial of equal protection). *See generally* William D. Griggs, Recent Development, 50 TENN. L. REV. 385, 389 (1983) (examining the history of racial discrimination in the jury selection process).

40. 380 U.S. 202 (1965).

41. *Id.* at 227.

42. *Batson*, 476 U.S. at 92 (overruling the burden of proof established in *Swain*).

43. Warren D. Hayes, Recent Development, State v. Knox*: The Louisiana Supreme Court Expands Equal Protection on Racially Motivated Peremptory Challenges*, 68 TUL. L. REV. 713, 715 (1994).

44. *See, e.g.*, Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970).

45. *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 502-03 (1972).

46. 476 U.S. 79 (1986).

47. *Id.* at 96.

48. *Id.*

Court has repeatedly affirmed and expanded the application of the Equal Protection Clause to race-based peremptory challenges.[49]

C. *The History of Gender Discrimination in Jury Selection*

During the second half of the nineteenth century, the Supreme Court held that exclusion of African-American males from jury service was unconstitutional.[50] The total exclusion of women from juries, however, endured well into the twentieth century.[51] Derived from English common law,[52] this exclusion was justified as a means by which women could be shielded from the gruesome and shocking realities of the courtroom,[53] because women were thought too delicate and naive to witness the brutal scenes depicted within the courtroom.[54]

To advance gender-motivated jury selection claims, criminal defendants have utilized both the Sixth Amendment's right to a "fair and impartial jury"[55] and the Fourteenth Amendment's Equal Protection Clause.[56] Prior to 1990, it appeared the Court would employ Sixth Amendment logic to eliminate gender-based peremptory strikes, just as criminal defendants had effectively utilized Sixth Amendment jurisprudence to rid the jury selection process of other types of gender-based discrimination.[57]

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49. *See* Georgia v. Carr, 113 S. Ct. 30 (1992) (requiring defense to supply race-neutral explanations for peremptorily striking all white persons from the jury); Georgia v. McCollum, 112 S. Ct. 2348 (1992) (applying *Batson* to defense peremptories in criminal cases); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending the protection of the Equal Protection Clause to private litigants in a civil case); Hernandez v. New York, 500 U.S. 352 (1991) (accepting the parties' categorization of the excluded juror as "Latino" or "Hispanic" and holding that, where members of such identifiable groups were excluded for reasons of ethnicity, the use of peremptory strikes would violate Equal Protection as interpreted by *Batson*); Powers v. Ohio, 499 U.S. 400 (1991) (ruling that a defendant could raise a *Batson* challenge even though he was not the same race as the defendant).

50. Strauder v. West Virginia, 100 U.S. 303 (1879).

51. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 62 (1961) (holding that the exclusion of women from jury service was neither a due process nor an equal protection violation because women were "still regarded as the center of home and family life").

52. *See, e.g.*, United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (noting that, at common law, women were excluded from juries under the doctrine of propter defectum sexus, literally the 'defect of sex') (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *362).

53. J.E.B. v. Alabama *ex rel* T.B., 114 S. Ct. 1419, 1423 (1994).

54. *Id.*

55. U.S. CONST. amend. VI. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

56. U.S. CONST. amend. XIV, § 1.

57. *See* Duren v. Missouri, 439 U.S. 357 (1979) (ruling that excluding women from jury venires so that they may tend to their domestic responsibilities is not a sufficiently valid interest to deprive the defendant of his or her constitutional rights guaranteed by the Sixth Amendment); Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down, under the Sixth Amendment, an affirmative registration requirement that exempted women from mandatory jury service unless they volunteered to serve); Ballard v. United States, 329 U.S. 187 (1946) (holding that women may not be excluded from the venire in federal trials in states where women were eligible for jury service under local law).

In *Holland v. Illinois*,[58] however, the Court refused to extend the application of the Sixth Amendment to peremptory challenges, effectively closing the door on the possibility that the Sixth Amendment could be utilized to rid the jury selection process of gender-based peremptory strikes.[59]

Unable to eliminate gender-based peremptory strikes through application of Sixth Amendment jurisprudence, proponents of eliminating such strikes looked to the Fourteenth Amendment's Equal Protection Clause. This proved to be a difficult task. Unlike race, gender is not considered a suspect class for purposes of judicial review.[60] The Equal Protection Clause does not, therefore, subject gender-based classifications to strict scrutiny.[61] Such classifications are subject merely to intermediate review.[62] Undoubtedly influenced by the fact that gender is not a suspect classification, the Court seemingly had proscribed the application of the Equal Protection Clause to gender-motivated peremptory strikes when it refused to review the issue in three post-*Batson* cases.[63] By granting certiorari in *J.E.B.*, however, the Court agreed to examine the issue in depth.

II. J.E.B. v. ALABAMA *EX REL* T.B.

A. *Facts and Procedural History*

J.E.B. v. Alabama ex rel T.B.[64] originated in 1991 when the state of Alabama initiated a paternity and child support action against J.E.B.[65] The State alleged that J.E.B. was the father of a child born to T.B.[66] During voir dire, the state used nine of its ten peremptory challenges to strike men from the jury.[67] Subsequently, a jury of twelve women found J.E.B. to

58. 493 U.S. 474 (1990).

59. *Id.* at 480. The Court stated that although the Sixth Amendment requires a representative venire panel in order to be considered an impartial jury drawn from a fair cross section of the community, "[i]t has never included the notion that, in the process of drawing the jury, . . . initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interest." *Id.*

60. While sex is not a suspect class, a plurality of justices agreed that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." Fontiero v. Richardson, 411 U.S. 677, 682 (1973) (citations omitted).

61. Strict scrutiny requires that state legislation be narrowly tailored to further a compelling governmental interest. Shaw v. Reno, 113 S. Ct. 2816, 2818 (1993).

62. Under intermediate review, classifications must serve important governmental objectives and must be substantially related to achievement of those objectives. Craig v. Boren, 429 U.S. 190, 197 (1976).

63. United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990); State v. Brown, 345 S.E.2d 393 (N.C.), *cert. denied*, 479 U.S. 940 (1986) (O'Conner, J., concurring) (noting that as *Batson* depends on this country's profound commitment to racial equality, it should not be applied outside of the context of race-based discrimination).

64. 114 S. Ct. 1419 (1994).

65. *Id.* at 1421.

66. *Id.*

67. *Id.* at 1422. The trial court assembled 36 potential jurors consisting of 12 males and 24 females. After the court excused three jurors for cause, 10 of the remaining jurors were male. The state then used 9 of its 10 peremptory strikes to remove male jurors. Since J.E.B. used all but one of his strikes to remove female jurors, all the selected jurors were female. *Id.* at 1421-22.

be the father of the child.[68] J.E.B. argued the state's gender-based peremptory strikes violated the Equal Protection Clause and urged the court to afford him the procedures required under *Batson*.[69] The trial court refused, concluding that *Batson* did not extend to gender-based peremptory strikes.[70]

B. *The Majority Opinion*

In *J.E.B.*, the Supreme Court affirmed the principle that in both criminal and civil litigation, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored intentional discrimination based upon group stereotypes that endorse and fortify prejudicial views.[71] The Court held that the Equal Protection Clause prohibits discrimination in jury selection based on gender or on the presumption that a potential juror will be biased simply because the person is a man or a woman.[72] According to the Court, gender, like race, is an unconstitutional "proxy" of juror capability and objectivity.[73] Utilizing the heightened scrutiny standard traditionally afforded gender-based classifications, the Court required "an exceedingly persuasive justification" for the classification.[74] The Court held that the challenges failed heightened scrutiny because they did not substantially further the state's interest in achieving a fair and impartial jury.[75] The Court refused to accept the state's argument that gender-based peremptory challenges further this interest by eliminating a group that may be partial to a particular defendant.[76] The state's stereotypic assertion, the Court opined, would not serve as justification for gender-based peremptory challenges.[77] Just as the state's generalizations would be impermissible if made on the basis of race, they were impermissible when made on the basis of gender.[78]

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68. *Id.* at 1422. The scientific evidence presented at trial established J.E.B.'s paternity with 99.92% accuracy. *Id.* at 1437 (Scalia, J., dissenting).

69. *Id.*

70. *Id.*

71. *Id.* at 1422.

72. *Id.* at 1430.

73. *Id.* at 1421.

74. *Id.* at 1425 (citations omitted).

75. *Id.* at 1426.

76. *Id.* The state maintained that its use of gender-based peremptory strikes was based upon the belief that men, although otherwise qualified to serve on a jury, might be more sensitive and responsive to the arguments of a man alleged to be the father of a child in a paternity action, while women might be inclined to favor the complaining woman in such suits. *Id.*

77. *Id.*

78. *Id.* at 1427. Explanations for exercising peremptory strikes against people of color that were found by lower courts to be impermissibly based on race include: United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (holding that type of employment, age, and residence were not sufficient non-race reasons under the circumstances); Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987) (refusing to accept the argument that potential jurors were struck because their knowledge of electronics, bookkeeping, and computers may prevent them from accepting the reasonable doubt standard), *cert. denied*, 489 U.S. 1052 (1989); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (holding that general references to a juror's unsatisfactory background and unspecified dissatisfaction with answers in

The Court was quick to note, however, that its decision did not imply the elimination of all peremptory challenges.[79] The Court held that its ruling was not inimical to the state's legitimate interest in utilizing such challenges to secure a fair and impartial jury.[80] In other words, parties may still use peremptory challenges to strike individuals whom they feel are less suitable than other potential jurors or who are members of a group or class not subject to heightened scrutiny.[81] The Court's decision simply disallows parties from using gender as a proxy for bias.[82] Once a prima facie showing of intentional discrimination based on gender has been made, the party exercising the strike must offer a gender-neutral explanation for the strike.[83] The party's justification need not rise to the level of a cause challenge.[84] Instead, the explanation must simply be gender-neutral and may not serve as a pretext for discrimination.[85]

C. *Concurring Opinions*

Justice O'Connor concurred in judgment with the majority but wrote separately to discuss the costs associated with the Court's ruling against gender discrimination. According to Justice O'Connor, the Court's decision will, like *Batson*, result in the proliferation of mini-hearings[86] concerning peremptory challenges and will further erode a device that plays an essential role in securing a fair and impartial jury.[87] She also asserted

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juror's questionnaire fail to satisfy *Batson*); Pacee v. State, 816 S.W.2d. 856, 859 (Ark. 1991) (striking juror because of "demeanor" was not a sufficiently specific race-neutral explanation); People v. Arrington, 843 P.2d 62, 64-65 (Colo. Ct. App. 1992) (removing juror peremptorily because juror had pending race discrimination suit against his employer was not race-neutral and was invalid); State v. Slappy, 522 So.2d 18, 22 (Fla.) (ruling that peremptorily striking two African-Americans because they were "liberal" was not sufficiently race-neutral explanation when party failed to question the stricken jurors about their alleged bias), *cert. denied*, 487 U.S. 1219 (1988); Tolbert v. State, 553 A.2d 228, 232 (Md. 1989) (rejecting prosecution's claim that it generally strikes young females where stricken jurors were 38 and 54 years of age respectively); Commonwealth v. Harris, 567 N.E.2d 899, 904 (Mass. 1991) (holding that prosecution failed to articulate a race-neutral explanation for peremptory challenge of sole black juror when the prosecutor claimed that juror reminded him of the defendant's mother; that juror lived in location where defense witnesses lived; and that because defendant's mother had become hysterical during the arraignment, as a black woman, the juror might not be impartial); State v. Goode, 756 P.2d 578, 582 (N.M. Ct. App.) (stating that "[b]y far the most common factor noted by courts holding a state's explanations to be pretextual is a varying treatment of white and nonwhite panel members"), *cert. denied*, 756 P.2d 1203 (N.M. 1988); State v. Walker, 453 N.W.2d 127, 135-36 (Wis.) (reversing defendant's conviction where prosecution's stated reason for striking prospective juror was that the prosecution had no information about the prospective juror), *cert. denied*, 498 U.S. 962 (1990). *See* Douglas B. Dykes, Comment, *Articulation of Non-Race Based Reasons for Peremptory Challenges After* Batson v. Kentucky, 17 AM. J. TRIAL ADVOC. 245, 264-65 & n.142 (1993) (examining unacceptable reasoning in the justification of purportedly race-based peremptory challenges).

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

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1429-30.

84. *Id.* at 1430.

85. *Id.*

86. *Id.* Justice O'Connor stated that "[i]n further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event." *Id.* at 1431 (O'Connor, J., concurring).

87. *Id.* (O'Connor, J., concurring).

that by disallowing peremptory challenges based on gender, the Court decreases the litigants' ability to base their strikes on what are often accurate gender-based assumptions about juror views.[88] Justice O'Connor concluded that the prohibition of gender-based peremptory strikes should not be applied to private civil litigants or criminal defendants because they are not, in her view, state actors when they exercise peremptory challenges.[89]

Justice Kennedy, concurring in the judgment of the Court, wrote separately to explain that, pursuant to the legal framework required by equal protection analysis, precedent leads to the conclusion that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges.[90] According to Justice Kennedy, just as the Equal Protection Clause forbids sex discrimination in the selection of jurors, it prohibits peremptory challenges based on sex.[91] His concurrence emphasized the importance of individual rights in equal protection analysis, including the right of an individual to participate in the political process.[92]

D. *Dissenting Opinions*

Chief Justice Rehnquist authored a dissenting opinion in which he asserted that race and gender discrimination are different.[93] In *Batson*, the Court balanced the practice of peremptory challenges with the commands of equal protection and held that in the case of race-based peremptories equal protection was superior.[94] Chief Justice Rehnquist concluded that the differences between race and gender discrimination, however, indicate that when sex, not race, is at issue, the scales should tilt in favor of peremptory challenges.[95]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, also dissented. Justice Scalia asserted that since all groups are subject to peremptory challenges, gender-based peremptories do not result in the denial of equal protection.[96] According to Justice Scalia, the Court's decision simply demonstrates the Justices' politically correct views in matters pertaining to the sexes.[97] The result of this decision, which is neither

88. Justice O'Connor noted studies indicating that in rape cases, female jurors are somewhat more likely to convict than male jurors. Furthermore, she asserted that while there have been no definitive studies, it is clear that a person's gender and resulting life experience will impact an individual's view in sexual harassment, child custody, and spousal and child abuse cases. *Id.* at 1432 (O'Connor, J., concurring).

89. *Id.* at 1432-33 (O'Connor, J., concurring).

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

91. *Id.* (Kennedy, J., concurring).

92. *Id.* at 1433-34 (Kennedy, J., concurring).

93. *Id.* at 1435 (Rehnquist, C.J., dissenting). The Chief Justice argued that while race-based classifications are subject to strict scrutiny, gender-based classifications are reviewed under a heightened, but less strict standard. Furthermore, while racial groups make up numerical minorities in American society, the population is nearly equally divided between men and women. Finally, according to the Chief Justice, racial equality has proven to be a more difficult goal to achieve than gender equality. *Id.* (Rehnquist, C.J., dissenting).

94. *Id.* (Rehnquist, C.J., dissenting) (citing *Batson*, 476 U.S. at 98-99).

95. *Id.* (Rehnquist, C.J., dissenting).

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

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

mandated nor permitted by the Constitution, is the erosion of a practice that historically has been an essential aspect of the right to a fair jury trial.[98]

III. ANALYSIS

A. *The Benefits and Harms Engendered by the Use of the Peremptory Challenge*

Proponents of the peremptory challenge point to its two distinct purposes. First, it serves as a "safety net" for challenges exercised for cause.[99] The peremptory allows the parties to reject a juror for a partiality they cannot name or explain.[100] Thus, because it enables the parties to remove presumably biased jurors, the peremptory challenge is considered one of the most effective means of securing a fair and impartial jury.[101]

Furthermore, the peremptory challenge furthers the symbolic legitimacy of a fair jury trial.[102] This view finds its roots in fourteenth century England, when Parliament eliminated the power of the king's attorneys to exercise peremptory challenges.[103] This action demonstrated the symbolic significance of a defendant's opportunity to play an active role in the determination of the composition of the jury.[104] The peremptory challenge is:

> 'a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.' With this tool, the defendant may dismiss from the jury, for any unspoken reason, those he most hates or fears so that he is left with a 'good opinion of the jury, the want of which might totally disconcert her.'[105]

Pursuant to this principle, the defendant, who helped choose the jury, will be satisfied with its composition and, therefore, the verdict will appear fair. Further, because the verdict appears fair to the defendant, the community will also be confident that the judgment is just.[106] Although the modern American judicial system allows prosecutors, as well as defendants, to exercise peremptory challenges, the peremptory challenge still, in some respects, retains the symbolic character first recognized in medieval England.

Although the peremptory challenge may serve these important purposes, litigants' continued discriminatory exercise of this device and the resultant harms of this discrimination call for the elimination of the peremptory challenge altogether. When a litigant is allowed to exercise her

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98. *Id.* at 1439 (Scalia, J., dissenting).
99. Hayes, *supra* note 43, at 721.
100. *See, e.g.*, MICHAEL SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 55 (1978) (asserting that jury selection was, for centuries, the product of "hunches, unsymptomatic past experience, intuition, [or] stabs in the dark"); *see also Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting) (asserting that peremptory challenges are based on "seat of the pants instincts").
101. *Swain*, 380 U.S. at 217-18.
102. Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 794 (1986).
103. *Id.*
104. *Id.*
105. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353) (citations omitted).
106. *Id.*

peremptory challenges in a discriminatory manner several harms result. First, without the broad range of social experiences often found in groups comprised of both sexes, juries may be ill-equipped to evaluate the facts presented.[107] For example, all male juries may not understand the fear and helplessness felt by battered wives who, in self defense, wound or murder their batterers.[108] Misunderstanding important testimony relating to gender issues, such as spousal abuse, can create the opportunity for unconscious prejudice.[109]

Secondly, when potential jurors are excluded from juries because of their gender, those excluded are deprived of their basic democratic right to participate in the community's administration of justice.[110] Like the right to vote, jury service is one of the most fundamental ways an individual citizen can participate in the democratic process.[111] Serving as a juror can be an empowering experience, especially for women who historically have been subjected to gender discrimination. When women are excluded from jury service because of their gender they are stigmatized by the implication that they are not equals and that they are unable or unwilling to be impartial.[112]

Finally, discriminatory use of peremptory challenges undermines the legitimacy of and confidence in the fairness of the justice system.[113] Women who are excluded because they are women see that the law is treating them unequally with respect to jury service, and they may come to believe that the law will treat them unfairly in other contexts as well.[114] Fairness to litigants, inclusion of citizens of both sexes, and the integrity of the justice system all demand that discrimination be recognized and eliminated in the exercise of peremptory challenges. As the following discussion demonstrates, in order to achieve this goal, peremptory challenges must be abolished.

B. *Pretextual Reasoning*

J.E.B. will not eradicate gender discrimination in the exercise of peremptory challenges. Lower courts applying *Batson* and lower courts attempting to ban gender-based peremptory challenges prior to *J.E.B.* have found it difficult to distinguish between legitimate race and gender-neutral reasons for peremptory strikes and mere pretexts for discrimination. When lower courts implement *J.E.B.*, they necessarily will have similar difficulties. While the *J.E.B.* decision is a historic step toward the elimination

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107. Theodore McMillan & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 362 (1990).

108. *See, e.g.*, Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35 (1992).

109. Note, *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1559 (1988).

110. McMillan & Petrini, *supra* note 107, at 352.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

of gender discrimination in the jury selection process, it will simply eliminate the most blatant discriminatory peremptory challenges. Thinly disguised pretexts for gender discrimination, on the other hand, may survive judicial examination. In light of this difficulty, the effort to remove discrimination from the jury selection process would be best served if peremptory challenges were eliminated altogether.

1. Pretextual Reasoning in Race-Based Peremptory Challenges

The evidentiary analysis required by *J.E.B.*[115] is identical to the analysis established by the Court in *Batson.*[116] Lower courts have had difficulty, however, implementing *Batson,* which suggests that the application of *J.E.B.* will be equally problematic. The difficulty arising from the application of *Batson* stems from litigants' use of pretextual reasoning in the justification of peremptory challenges. Litigants have become proficient at offering acceptable reasons for their strikes,[117] and the courts have readily accepted these often pretextual explanations, which enables attorneys to avoid the commands of *Batson.*[118]

Significantly, the Supreme Court has provided almost no guidance to the lower courts in assessing purportedly race-neutral explanations offered by litigants.[119] In *Batson,* the Court merely noted that a litigant "must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges."[120] While the Court held that a litigant's reasons must be related to the particular case to be tried,[121] this requirement has failed to provide the lower courts with an adequate standard by which to examine a litigant's proffered explanations.

Pursuant to this indefinite standard, lower courts have accepted justifications based on non-racial characteristics that are, in fact, merely racial and ethnic surrogates.[122] Justifications for peremptories are clearly proxies for race and ethnicity when there is a dramatic statistical correlation between the trait and race or ethnicity.[123] Studies, for example, have indicated that residence, especially in urban areas, often serves as a surrogate

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

116. *Batson*, 476 U.S. at 97.

117. *Id.* at 106 (Marshall, J., concurring).

118. Andrew G. Gordon, Note, *Beyond* Batson v. Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 694 (1993) (discussing lower court acceptance of pretextual explanations).

119. *Id.*; *see* Hernandez v. New York, 500 U.S. 352, 371-72 (1991) (finding it unnecessary to address the issue of pretext where prosecutor struck jurors because of their Spanish-speaking ability).

120. *Batson*, 476 U.S. at 98 n.20 (internal quotation marks omitted).

121. *Id.* at 98.

122. Alschuler, *supra* note 5, at 175.

123. *See* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups From Jury Service*, 1993 WIS. L. REV. 761, 789-91 (discussing Hernandez v. New York, 500 U.S. 352, 371-72 (1992), and the statistical impact of excluding spanish-speaking latino jurors).

for race or ethnicity.[124] As one court has stated, "[r]esidence . . . acts as an ethnic badge . . . [and] can be the most accurate predictor of race."[125]

In *United States v. Uwaezhoke*,[126] for example, an African-American defendant was on trial for participation in a drug conspiracy.[127] The defendant objected when the prosecutor peremptorily challenged an African-American woman.[128] The prosecutor explained that the woman was stricken because, as a postal worker and a single parent who rented an apartment in Newark, New Jersey, she "may be involved in a drug situation where she lives."[129] The court held that the explanation was facially race-neutral.[130] The prosecutor's explanation, however, was clearly based upon unfounded stereotypes. He simply assumed that a single, black woman living in Newark would reside in low income housing and that areas of low-income housing are drug infested.[131] Thus, the potential juror's race, her neighborhood, and crime and violence became amalgamated, one serving as a surrogate for another.[132]

Additionally, lower courts have accepted justifications for peremptory strikes against people of color where white jurors, exhibiting the same characteristics that presumably prompted the peremptory strikes, remain on the jury.[133] While some courts have held that the unequal application

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124. *See, e.g.*, Michael F. Potter, Note, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance"*, 63 S. CAL. L. REV. 1151, 1154 (1990) (finding that race determines housing patterns); Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 Nw. U. L. REV. 874, 875 (1988) (stating that "[e]very major metropolitan area in the United States still has a large ghetto; in many cities, over eighty percent of the black population lives in virtually all-black neighborhoods").

Litigants have argued that other characteristics also serve as racial and ethnic surrogates. *See, e.g.*, United States v. Mixon, 977 F.2d 921, 923 (5th Cir. 1992) (insufficient education); United States v. Hinojosa, 958 F.2d 624, 631-32 (5th Cir. 1992) (same); United States v. Hughes, 970 F.2d 227, 231 (7th Cir. 1992) (relatives with criminal records); United States v. Johnson, 941 F.2d 1102, 1106-07 (10th Cir. 1991) (same); United States v. Payne, 962 F.2d 1228, 1233 (6th Cir.) (group membership), *cert. denied*, 113 S. Ct. 811 (1992); United States v. Clemmons, 892 F.2d 1153, 1157 (3d Cir. 1989) (religion), *cert. denied*, 496 U.S. 927 (1990); United States v. Woods, 812 F.2d 1483, 1487 (4th Cir. 1987) (same); United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (lack of substantial income); *see also* Gordon, *supra* note 118, at 699-705 (discussing courts' willingness to accept explanations for peremptories that are racial or ethnic surrogates).

125. United States v. Bishop, 959 F.2d 820, 828 (9th Cir. 1992).

126. 995 F.2d 388 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

127. *Id.* at 389.

128. *Id.*

129. *Id.*

130. *Id.* at 393.

131. Gordon, *supra* note 118, at 700-01.

132. "Through mental association, African-Americans, their neighborhoods, crime and violence all become amalgamated, giving rise to tenacious stereotypes—innocent and unintentional perhaps, but stereotypes nonetheless." *Bishop*, 959 F.2d at 828 (9th Cir. 1992). *Bishop* held that the peremptory challenge of an African-American woman because she lived in Compton, a neighborhood in South Central Los Angeles where seventy-five percent of the residents were African-American, was a discriminatory racial proxy. *Id.* at 822, 827; *see also* Gordon, *supra* note 118, at 702, 740 (discussing purportedly neutral explanations that are, in fact, racial and ethnic surrogates).

133. Gordon, *supra* note 118, at 706.

of peremptory challenges is unacceptable,[134] other courts have allowed such strikes even though they are clearly pretextual.[135]

In *United States v. Alvarado*,[136] for example, the prosecutor peremptorily struck an African-American juror with children the age of the defendant, claiming she might be unduly sympathetic.[137] The prosecutor, however, failed to strike white members of the venire with children of an age similar to the defendant's.[138] The trial court accepted the proffered rationale.[139] Although the Second Circuit noted that the force of a challenger's explanation for strikes against people of color is substantially weakened by evidence that white members, to whom the same explanation applies, were not challenged, the judicial officer was entitled to assess each explanation in light of all the relevant evidence.[140] Despite evidence indicating the explanation was pretextual, the Second Circuit upheld the trial court's finding.[141]

Finally, peremptory challenges based on attorneys' subjective impressions are often accepted by lower courts.[142] As such impressions are essen-

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134. *See, e.g.*, Jones v. Ryan, 987 F.2d 960 (3d Cir. 1993) (refusing to accept the prosecution's proffered explanations because they were applied only to African-American jurors); United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (disallowing strike against Hispanic who resided in La Mesa, California because prosecutor failed to strike a white juror who lived in La Mesa); *see also* Gordon, *supra* note 118, at 706-07, 719 n.230 (citing *Jones v. Ryan*).

135. *See, e.g.*, United States v. Clemons, 941 F.2d 321, 324 (5th Cir. 1991) (accepting proffered explanation of youth, although nineteen-year-old white juror remained unchallenged); United States v. Williams, 936 F.2d 1243, 1246 (11th Cir. 1991) (accepting rationale for strike of African-American woman because of her previous association with defense counsel, even though several white jurors also had contact with defense counsel), *cert. denied*, 112 S. Ct. 1279 (1992); United States v. Bennett, 928 F.2d 1548, 1551 (11th Cir. 1991) (allowing youth, unemployment, and relatives with drug convictions as reasons for strikes of African-American jurors, although one white juror was young and unemployed and another had been convicted of drug charges); Barfield v. Orange County, 911 F.2d 644, 648-49 (11th Cir. 1990) (allowing strike of African-American woman because she worked for the school board, while white women who worked for the school board were not stricken), *cert. denied*, 500 U.S. 954 (1991); United States v. Alston, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990) (accepting strikes against African-Americans based on age, family drug problems, and misunderstanding voir dire questions, although white jurors exhibiting the same characteristics were not stricken); United States v. Lance, 853 F.2d 1177, 1180 (5th Cir. 1988) (allowing strike of African-American, who was young and single, even though white juror exhibited the same characteristics); *see also* Gordon, *supra* note 118, at 719 n.231.

136. 951 F.2d 22 (2d Cir. 1991).

137. *Id.* at 24.

138. *Id.* at 25.

139. *Id.*

140. *Id.* at 25-26.

141. *Id.* at 26.

142. Courts have accepted a variety of subjective impressions as explanations. *See, e.g.*, Brown v. Kelly, 973 F.2d 116, 119 (2d Cir. 1992) (impressions of attitude; nervousness and tone of voice), *cert. denied*, 113 S. Ct. 1060 (1993); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.) (same), *cert. denied*, 484 U.S. 928 (1987); Dunham v. Frank's Nursery & Crafts, Inc., 967 F.2d 1121, 1124-25 (7th Cir. 1992) (impressions of eye contact); Reynolds v. Benefield, 931 F.2d 506, 512 (8th Cir.) (same), *cert. denied*, 501 U.S. 1204 (1991); United States v. Clemons, 941 F.2d 321, 323-24 (1991) (impressions of dress); United States v. Sherrills, 929 F.2d 393, 395 (8th Cir. 1991) (impressions of inattentiveness during voir dire); United States v. Rudas, 905 F.2d 38, 41 (2d Cir. 1990) (same); United States v. Hendrieth, 922 F.2d 748, 749-50 (11th Cir. 1991) (jurors' facial expressions); United States v. Ruiz, 894 F.2d 501, 506 (2d Cir.) (same), *aff'd*, 894 F.2d 501 (2d Cir. 1990); United States v. Terrazas-Carrasco, 861 F.2d

tially unverifiable, they can easily hide discriminatory intent.[143] Judges rarely notice a particular juror's mannerisms and trial courts are not in a position to assess an explanation based upon a subjective opinion.[144] Furthermore, appeals of such challenges are difficult, as written records cannot support or negate an attorney's subjective impression.[145]

In *Barfield v. Orange County*,[146] for instance, a prosecutor claimed that an African-American juror was peremptorily struck because she "was looking at me, and looking at my client, and looking at the Defendant's table with an expression that conveyed to me some hostility, and it was my gut feeling, based on her facial expression that she was likely to not be fair and impartial to the [defendant]."[147] The trial court accepted the prosecutor's explanation, and the Eleventh Circuit affirmed, ruling that "[h]ostile facial expressions and body language are legitimate" rationales for the exercise of a peremptory challenge.[148] Subjective impressions, however, such as that offered by the prosecutor in *Barfield*, are often affected by an attorney's realized or unrealized racism.[149] Similarly, a judge's own bigotry may lead her to accept an attorney's rationale as plausible.[150]

Because of the similarities between race and gender discrimination present in both the character of the prejudice and the analysis required by the court, the problematic nature of the *Batson* decision necessarily foreshadows the difficulties lower courts will encounter in the application of *J.E.B.* Under *Batson*, litigants satisfy their rebuttal burdens by reciting unreviewable explanations that are merely pretexts for racial discrimination. Because it is simply too difficult to review intelligently and accurately litigants' motives in the peremptory exclusion of jurors in the racial context and, by implication, in the gender context, the peremptory challenge system should be eliminated.

2. Pretextual Reasoning in Gender-Based Peremptory Challenges

Prior to the Court's decision in *Batson*, state courts, unable to utilize Sixth Amendment jurisprudence in the examination of the validity of gender-based peremptories,[151] "turned to their own state constitutions and an analysis of the Equal Protection Clause of the United States Constitution."[152] Therefore, years before the Supreme Court decided *Batson* and *J.E.B.*, numerous state courts disallowed the use of both race-based and

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93, 95 n.1 (5th Cir. 1988) (impressions of body language); United States v. Lance, 853 F.2d 1177, 1181 (5th Cir. 1988) (impressions of demeanor); United States v. Forbes, 816 F.2d 1006, 1010-11 (5th Cir. 1987) (same); United State v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (same); *see also* Gordon, *supra* note 118, at 719 nn.243-252 (citing court decisions where peremptory challenges based on litigants' subjective impressions were accepted).

143. Gordon, *supra* note 118, at 709.
144. *Id.*
145. *See id.*
146. 911 F.2d 644 (11th Cir. 1990), *cert. denied*, 500 U.S. 954 (1991).
147. *Id.* at 646.
148. *Id.* at 648.
149. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring).
150. *Id.*
151. *See* discussion *supra* Part I.C.
152. *See, e.g.*, Jo, *supra* note 8, at 1315.

gender-based peremptories.[153] Furthermore, after the Court's decision in *Batson*, several state and federal courts held that the *Batson* rationale extended to peremptory strikes motivated by gender.[154] Thus, while lower courts have not yet specifically applied *J.E.B.*, an analysis of lower court cases that proscribed the use of gender-based peremptory challenges demonstrates that, while *J.E.B.* may eliminate the most flagrant instances of gender discrimination, the implementation of the decision will prove problematic because courts routinely accept the pretextual explanations offered by attorneys in defense of discriminatory peremptory challenges.

Like many purportedly race-neutral explanations, facially neutral rationales offered for the peremptory removal of women are often simply surrogates for gender. Justifications for peremptories are surrogates for gender when there is a high statistical correlation between the trait and gender. Just as residence may serve as a proxy for race, employment in a particular field often serves as a surrogate for gender. For example, women enter the field of nursing in dramatically higher numbers than men, demonstrating a correlation between gender and nursing.[155]

In *State v. Burch*,[156] a pre-*J.E.B.* decision, the Washington Court of Appeals held that peremptory challenges on the basis of gender violated both federal equal protection and the state's equal rights amendment.[157] The *Burch* court held that, under the circumstances, the defendant had established a prima facie case of purposeful gender discrimination.[158] During rebuttal, the prosecutor claimed that one of the excluded women jurors had been stricken because, as a nurse who worked at a women's clinic, she would find the defense witness, also a woman, "extremely credible."[159] The court found this explanation sufficiently gender-neutral.[160]

The prosecutor's rationale, however, was the product of uncorroborated stereotypes about women. She assumed that a nurse in a women's clinic who acted as a caregiver to women would be sympathetic towards a female witness and unable to be impartial. This explanation is not gender neutral because it is "founded on gender stereotypes which view women as generally governed by emotion, instinct, and feeling rather than reason, judgment or common sense."[161] In this sense, the court allowed the fu-

153. *See, e.g.*, People v. Wheeler, 583 P.2d 748 (Cal. 1978); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979).

154. *See, e.g.*, United States v. De Gross, 913 F.2d 1417, 1426 (9th Cir. 1990); New York v. Irizarry, 195 N.Y.S.2d 279, 280 (N.Y. App. Div. 1990). *But see* United States v. Hamilton, 850 F.2d 1038, 1041 (4th Cir. 1988), *cert. denied*, 493 U.S. 1069 (1990); State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987).

155. Telephone interview with Lori Brotzman, Program Assistant, Office of Student and Academic Support, University of Colorado School of Nursing, (June 2, 1994) (stating that 647 women and 43 men are enrolled in the University of Colorado School of Nursing).

156. 830 P.2d 357 (Wash. Ct. App. 1992).

157. *Id.* at 361-63.

158. *Id.* at 365.

159. *Id.* at 366.

160. *Id.*

161. *Id.*

sion of the potential juror's sex, her profession, and a particular set of characteristics, enabling one to serve as a surrogate for another.[162]

Furthermore, as in the context of race-based peremptory challenges,[163] courts have accepted justifications for peremptories against women where men jurors with the same characteristics remain on the jury. Although the mere presence of the unequal application of peremptories evidences pretextual reasoning, courts continue to rule that such application does not warrant a finding of improper use of peremptories.

The court in *People v. Irizarry*[164] found, pursuant to state prohibitions and the federal constitution, gender-based peremptory challenges were unlawful.[165] The court held that the prosecution's challenges against female jurors established a prima facie case of gender-based discrimination.[166] Against a panel of an unusually high number of men, the prosecutor challenged nine women and only one man.[167] Furthermore, the manner in which the peremptories were exercised showed an apparent attempt to rid the jury of women.[168]

The challenged women had diverse employment and family backgrounds, and, for the most part, the voir dire provided no anti-prosecution inclination.[169] In fact, several of the women had relatives who were police officers, and others had been crime victims.[170] The men who were not challenged disclosed information about themselves similar to the facts revealed by the challenged women.[171] After the prosecution gave specific explanations for the removal of the female jurors, the court ruled that seven of the nine peremptory challenges were exercised for reasons independent of gender.[172] Despite the prosecutor's failure to strike male members of the venire with characteristics similar to those of the challenged females, the court ruled that the prosecutor's use of peremptory challenges was not pretextual and, thus, not unlawful.

Finally, courts have accepted explanations for the peremptory removal of prospective jurors based on litigants' subjective impressions. As in the context of race,[173] subjective impressions can camouflage unlawful motives. Litigants wishing to keep jurors of a particular sex off the jury can merely provide the court with a subjective rationale based on an unverifiable impression, and, as noted above, courts are not equipped to judge the validity of such impressions.

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162. *See supra* note 132 and accompanying text.
163. *See supra* notes 133-41 and accompanying text.
164. 536 N.Y.S.2d 630 (N.Y. App. Div. 1988).
165. *Id.* at 638.
166. *Id.* at 643.
167. *Id.* at 644.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 645.
173. *See supra* notes 142-50 and accompanying text.

In *Mouzon v. Philadelphia Housing Authority*,[174] a woman employee brought suit against her employer alleging gender bias and sexual harassment.[175] The plaintiff claimed the defendant's three peremptory challenges were exercised against female jurors on the basis of gender in violation of the Equal Protection Clause.[176] During voir dire, one of the excluded female jurors said she would find sexually explicit testimony embarrassing.[177] The defendant claimed that, due to this statement and her demeanor at the time she made the statement, the juror was hypersensitive and an unacceptable juror.[178] The court found this explanation to be gender neutral.[179] It is possible, however, that the juror appeared hypersensitive, especially with respect to sexual matters, simply because traditionally women are seen as virginal and innocent. Thus, the attorney's subjective impression of the juror, and the court's subsequent acceptance of his explanation, may have been affected by sexist attitudes.

In light of lower court experience concerning the evaluation of litigants' purportedly gender-based explanations, it is apparent that *J.E.B.* is an imperfect remedy for gender discrimination in the exercise of peremptory challenges. Lower courts are not equipped to assess explanations that are surrogates for gender-based classifications. The eradication of gender discrimination in the context of the peremptory challenge can only be achieved through the elimination of this device.

IV. AFFIRMATIVE SELECTION

As discussed above, the peremptory challenge serves as a "safety net" for challenges exercised for cause and represents the symbolic legitimacy of the jury system.[180] As the preceding discussion illustrates, however, despite judicial regulation of peremptory challenges, such challenges allow litigants to discriminate in the jury selection process.[181] A new system should be introduced into American courtrooms that will serve the valid goals of peremptory challenges and preclude discrimination in the jury selection process. An affirmative selection[182] system will accomplish these tasks.

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174. No. CIV.A.93-3686, 1994 WL 197165 (E.D. Pa. May 19, 1994).
175. *Id.* at *1.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at *2.
180. *See* discussion *supra* Part III.A.
181. *See* discussion *supra* Parts III.B.1. and III.B.2.
182. This method was originally proposed in Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781 (1986). Since the publication of Altman's Note, numerous scholars have endorsed this method, including Alschuler, *supra* note 5; Harris, *supra* note 20; Heinz, *supra* note 34; and Hans Zeisel, *Affirmative Peremptory Jury Selection*, 39 STAN. L. REV. 1165 (1987).

A number of commentators have suggested alternatives other than affirmative selection, including the replacement of peremptories with a system of cause challenges, Gurney, *supra* note 26, at 257-62; the expansion of the jury pool, *id.* at 262-66; the improvement of the effectiveness of cause challenges, *id.* at 266; disallowing reliance on jurors' self-assessment of bias, *id.* 266-68; the improvement of voir dire, *id.* at 268-73; the reduction of the number of peremptories given to each side, *id.* at 274; the enactment of statutes that would restrict the

A. *The Procedural Requirements*

Like the current jury selection process, in an affirmative selection system, twenty-four venirepersons would be drawn randomly from the jury pool.[183] These twenty-four individuals would then be subject to voir dire and challenges for cause.[184] After challenges for cause, each party would choose twelve jurors and list them in order of preference. The lists would be submitted to the judge. Regardless of their rank, the judge would seat on the petit jury those venirepersons who appear on both lists.[185] Next, alternating between the lists, the judge would seat each party's selections in descending order until the proper number of jurors is reached.[186]

B. *Affirmative Selection Satisfies the Traditional Objectives of the Peremptory Challenge*

While the peremptory challenge system acts as a "safety net" for challenges exercised for cause and presumably allows the parties to secure an impartial jury,[187] the affirmative selection system also allows for the selection of an impartial jury. First, affirmative selection guarantees a fair contest between the litigants. Since the parties have equal power to select jurors, neither party has the opportunity to stack the jury in her favor.[188] Furthermore, because jurors who appear on the lists of both parties are seated first, jurors who are suitable to both parties become part of the petit jury. Finally, because the parties have equal ability to choose acceptable

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application of peremptory challenges, Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1176 (1993); the incorporation of an ethical rule into the American Bar Association's Model Rules of Professional Conduct that would prohibit discrimination against members of the venire during jury selection, Gordon, *supra* note 118, at 713; and the adoption of a due process standard, Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989).

183. Altman, *supra* note 182, at 806.

184. *Id.*; *see* discussion *supra* Part I.A.

185. Altman, *supra* note 182, at 806.

186. *Id.* One commentator, in an effort to expand Altman's affirmative selection system, recommends that after the judge seats those jurors who appear on both parties' lists the remaining jurors should be subject to removal if, to the court's satisfaction, the moving party provides a neutral explanation justifying their dismissal. The trial judge should permit these challenges alternately, allowing each side to utilize as many strikes as the peremptory challenge system allows. Under this system, the trial judge should assess the similarities and differences between the challenged and unchallenged venirepersons to determine whether the explanations for removal are based on specific biases not shared by other panel members. It is in this manner, argues the commentator, that the trial judge should determine whether the explanations are merely pretexts for discrimination. If both parties expend their challenges and the petit jury has not been empaneled, the judge should randomly select the remaining jurors from the jury panel. Harris, *supra* note 20, at 1063.

This variation on Altman's affirmative selection system fails to remedy the problem of pretextual reasoning engendered by peremptory challenges. As in the peremptory challenge context, courts are not equipped to evaluate the validity of a litigant's purportedly neutral explanation. A superficial examination of the similarities and differences between challenged and unchallenged venirepersons will not enable the judge to ferret out explanations that are, in fact, surrogates for race or gender-based classifications, unequally applied to individuals on the venire panel, or based on a litigant's subjective impression of a particular panel member. *See* discussion *supra* Parts III.B.1. and III.B.2.

187. *See* discussion *supra* Part III.A.

188. Altman, *supra* note 182, at 807.

jurors if there is an insufficient number of mutually acceptable jurors, each has the opportunity to seat those individuals whom she thinks may be partial toward her case.[189] Therefore, assuming the litigants' choice of jurors is influenced by their respective interests, affirmative selection produces a balanced jury. It "lets the parties determine which biases or community members are important to their cases, and their competing interests should affect a balance of biases on the jury."[190]

While the symbolic legitimacy engendered by the defendant's ability to shape the composition of the jury through the exercise of peremptory challenges is an important purpose of the challenge, this objective can be accomplished in an equally satisfactory manner through the implementation of an affirmative selection system. Through this system, the defendant has the opportunity to choose one half of the jury and the jury will not be seen as merely an extension of the prosecution.[191] Furthermore, to the extent that affirmative selection allows for the inclusion of more minorities and for a more equal representation of both genders, "it promotes public confidence in the jury since popular participation instills respect for the system."[192] The replacement of peremptory challenges with affirmative selection will not destroy the confidence litigants and the public have in the jury system, but will, in fact, promote it. Like the peremptory challenge system, affirmative selection produces an impartial jury and promotes the symbolic legitimacy of the jury trial. Unlike the peremptory challenge system, however, affirmative selection does not create a forum in which pretexts for discrimination are accepted as reasonable explanations for the exclusion of individuals from petit juries.[193]

CONCLUSION

Eliminating gender-motivated peremptory challenges will take more than the pronunciation by the Court in *J.E.B.*, because, despite the law, attorneys will continue to employ peremptories in a discriminatory manner. The case of race-based peremptory challenges provides an unfortunate example of the persistence of racial stereotypes in courtrooms through the use of pretextual reasoning. Similarly, in state and federal courts where gender-motivated peremptory challenges have been disallowed, explanations given by attorneys and subsequently accepted by judges to justify the removal of women jurors echo attempts to exclude African-American jurors while presumably adhering to the mandates of *Batson*. Experience, thus, demonstrates the necessity of abolishing the peremptory challenge system in order to rid our jury selection process of discrimination, not just in theory, but in fact.

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189. *Id.*
190. *Id.*
191. *Id.* at 808.
192. *Id.*
193. *See* discussion *supra* Parts III.B.1. and III.B.2.