William & Mary Journal of Race, Gender, and Social Justice

Volume *21 (2014-2015)*
Issue 1 *William & Mary Journal of Women and the Law: 2014 Special Issue: Twenty Years of Feminism*

Article 7

December 2014

Procedurally Criminal: How Peremptory Challenges Create Unfair and Unrepresentative Single-Gender Juries

Chelsea V. King

PROCEDURALLY CRIMINAL: HOW PEREMPTORY CHALLENGES CREATE UNFAIR AND UNREPRESENTATIVE SINGLE-GENDER JURIES

INTRODUCTION

Peremptory juror challenges are an everyday function of criminal procedure.[1] Attorneys may no longer use peremptory challenges to strike a juror on gender grounds; however; leading to unfair and unrepresentative single-gender juries.[2] The creation of a single-gender jury is procedurally criminal.

This Note will discuss gender-based peremptory challenges throughout history and how the challenges function in practice. This Note also will examine compositions of single-gender juries in criminal

1. *See* PAUL MARCUS ET AL., THE RIGHTS OF THE ACCUSED UNDER THE SIXTH AMENDMENT: TRIALS, PRESENTATION OF EVIDENCE, AND CONFRONTATION 71–72 (2012).
2. *See id.* at 74.

cases, most notably in the 2013 George Zimmerman trial. Further examination shows that a single-gender jury is not an accurate representation of a defendant's peers, especially in Florida, where juries are comprised of only six jurors in a second-degree murder trial.[3] Thus, there is a tension between the Supreme Court's majority opinion in *J.E.B. v. Alabama ex rel. T.B.*, which advocates that gender is unrelated to partiality,[4] and the constitutional all-female (or all-male) jury, because the resulting jury is biased due to jury's composition of the same sex.

In summary, the prohibition on gender-based peremptory challenges, while based on sound jurisprudence, do not reflect that gender plays an important part in criminal jury trials. When single-gender juries are permitted, society is not represented, and even though the jury may be "impartial" on its face, the jury is not a diverse collection of the defendant's peers.

I. THE GENDER-BASED PEREMPTORY CHALLENGE

A. In General: Peremptory Challenges

Juror selection is a key part of trial, because the jurors determine the facts of the case, evaluate the reliability of witnesses, and decide whether a criminal defendant will be convicted or acquitted.[5] Both the prosecutor and defense attorney therefore should carefully select jurors.[6] Attorneys select jurors through *voir dire*, the "process by which an impartial jury is selected from a larger group of prospective jurors."[7] During *voir dire* each attorney asks each prospective juror questions, hoping to elicit information that permits the attorney to figure out whether the juror would help or harm his or her case.[8] If the attorney finds that the prospective juror does not have the ability to be an adept and impartial member, then that

3. FLA. R. CRIM. P. 3.270.

4. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

5. *See* CRAIG HEMMENS ET AL., CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE 255–56 (2010). Further, a juror views everything at trial through the lens of his or her own biases and life experiences.

6. MARCUS ET AL., *supra* note 1, at 71. The prosecutor and the defense take this approach to award their client the best chance of a successful trial.

7. *Id.* at 69.

8. D. SHANE READ, WINNING AT TRIAL 31–33 (2007). Common voir dire questions delve into the subject matter of the prospective juror's pretrial knowledge of the case, such as knowledge of the case due to new reports, being involved in a similar event to the charge against the defendant, general bias against law enforcement or the criminal justice system, "anything to elicit a preconceived notion or bias." MARCUS ET AL., *supra* note 1, at 70.

juror will be dismissed "for cause."[9] Each attorney has an unlimited amount of juror challenges for cause.[10] These challenges, however, must be accompanied by the attorney's explanation of the ground for the challenge.[11]

In addition to just cause challenges, attorneys may make use of peremptory challenges.[12] These peremptory challenges permit both the prosecutor and defense counsel to strike potential jurors "without cause and without disclosure of their strategy or rationale."[13] Statutes govern the number of peremptory challenges each side is allotted.[14] The Federal Rules of Criminal Procedure grant each side three peremptory challenges for a minor crime, six to ten for a crime punishable by more than one year of imprisonment, and twenty in a capital punishment case.[15] State statutes can differ on how many challenges each side may have, but are otherwise similar to the Federal Rules.[16] Peremptory challenges are subject to two prohibitions: attorneys may not use a peremptory challenge solely on the basis of race, nor may they challenge on the basis of gender.[17]

B. Batson*: Equal Protection Protects Jurors from Racial Discrimination*

Peremptory challenges were not subject to judicial review until the landmark 1986 Supreme Court decision *Batson v. Kentucky*, when the Supreme Court examined whether peremptory challenges could be used to strike jurors in a regular pattern of racial discrimination through an equal protection analysis.[18] Prior to *Batson*, the Supreme Court first examined equal protection claims on grounds of racial discrimination relating to a jury in 1880, and stated, "The very idea

---

9. MARCUS ET AL., *supra* note 1, at 71.

10. *Id.*

11. *Id.* Common challenges for cause have resulted from the potential juror's obviously biased or prejudiced responses to voir dire questions and a stated inability to serve. Sometimes even the mere appearance and expressions of the potential juror will elicit a challenge for cause.

12. *Id.*

13. *Id.*

14. *Id.* at 72.

15. FED. R. CRIM. P. 24(b).

16. MARCUS ET AL., *supra* note 1, at 72. Florida, for example, permits: ten peremptory challenges when the criminal case involves a crime punishable by death or life imprisonment; six challenges for all other felonies; and three challenges for a misdemeanor. Fla. R. Crim. P. 3.350.

17. READ, *supra* note 8, at 37.

18. 476 U.S. 79, 80–83 (1986). The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[19] The Court expanded on this reasoning in *Batson*: "Those on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'"[20]

In *Batson*, an African American man was on trial before an all-white jury.[21] During jury selection, the prosecutor in the case struck all four African Americans from the venire through the use of peremptory challenges.[22] The Supreme Court held, on the basis of the equal protection clause, that a prosecutor cannot challenge jurors exclusively on the basis of race.[23] Discriminating against the potential juror because of his or her race not only harms the defendant by denying them the right to a fair trial, but also "[t]he harm from discriminatory jury selection extends . . . to touch the entire community . . . [and] undermine[s] public confidence in the fairness of our system of justice."[24]

The Court established a three-step inquiry to examine if a prosecutor's peremptory challenge was racially discriminatory: (1) "determine whether the defendant had made a prima facie showing that the prosecutor's peremptory challenge had been based on the prospective juror's race"; (2) if that showing was made, the burden shifts to the prosecutor "to present a race-neutral explanation for striking the juror"; and (3) determine "whether the defendant had met [his or] her burden of proving purposeful discrimination."[25] In so providing a method to combat racially discriminatory peremptory challenges, *Batson* therefore solidified the idea that a specific group or societal class could not be prevented from serving on a jury.

C. Extension of Batson *Rationale, Prohibiting Discriminatory Peremptory Challenges to Gender*

The Equal Protection Clause also prohibits discrimination on the basis of gender.[26] *J.E.B. v. Alabama ex rel. T.B.* extended the

19. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

20. *Batson*, 476 U.S. at 86–87 (quoting Duncan v. Louisiana, 391 U.S. 145, 152 (1968)) (citing *Strauder*, 100 U.S. at 309)).

21. *Id.* at 83.

22. *Id.*

23. *Id.* at 90.

24. *Id.* at 87.

25. *See id.* at 96–98; MARCUS ET AL., *supra* note 1, at 73.

26. U.S. CONST. amend. XIV, § 1; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) (citing Reed v. Reed, 404 U.S. 71, 75 (1971)).

Supreme Court's Equal Protection analysis in *Batson* to gender-based peremptory challenges.[27] Historically, the peremptory challenge gender issue did not arise before the Supreme Court, due to the complete exclusion of women from jury service.[28] The Court in *Strauder* had even explicitly stated that jury selection "may [be] confine[d] . . . to males."[29] Even after the passage of the Nineteenth Amendment, which granted women the right to vote, women in many states were still excluded from jury service or were subjected to other barriers aimed at preventing women from serving on juries.[30] Clearly, there has been "historical prejudice" against women, which the Court finally unambiguously recognized: "our Nation has had a long and unfortunate history of sex discrimination."[31]

J.E.B. originated from a Complaint brought by a minor child's mother for paternity and child support against J.E.B.[32] Out of thirty-six potential jurors (twelve male and twenty-four female), females composed the entire jury at trial.[33] The prosecutor used nine out of ten peremptory strikes to eliminate male jurors, and the defense attorney used nine out of ten strikes to eliminate female jurors.[34] Against J.E.B.'s objections, the trial court decided, "*Batson* does not extend to gender-based peremptory challenges."[35] The Alabama Court of Civil Appeals affirmed that ruling; however, the Supreme Court reversed in a six-to-three decision.[36]

On appeal, the issue in *J.E.B.* was "whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury."[37] The respondent argued that men on a jury in this case would be more sympathetic to the father in the paternity action, while women would be more sympathetic to the mother.[38] The Court rejected this argument outright, stating that it perpetuates "the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box."[39] The

27. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145–46 (1994).
28. *Id.* at 131–33.
29. Strauder v. West Virginia, 100 U.S. 303, 310 (1880).
30. Such as "registration requirements and automatic exemptions." *J.E.B.*, 511 U.S. at 131.
31. *Id.* at 128, 136.
32. *Id.* at 129.
33. *Id.*
34. *Id.*
35. *Id.*
36. *J.E.B.*, 511 U.S. at 127, 129, 146.
37. *Id.* at 137.
38. *Id.* at 137–38.
39. *Id.* at 139. The Court continued, "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *Id.* at n.11.

Court stressed the dangers of perpetuating gender stereotypes in the judicial system: because when such challenges are employed through gender stereotypes, "they ratify and reinforce prejudicial views of the relative abilities of men and women"—indeed, such gender stereotypes which "have wreaked injustice in so many spheres of our country's public life . . . ."[40]

The ultimate holding eradicated peremptory challenges based on gender, due to the need for "fair and nondiscriminatory" jury selection procedures, and protection against "historical prejudice."[41] As a result, gender can no longer "serve as a proxy for bias."[42] In order to avoid appearances of gender bias, the Court instructed that attorneys should use the *voir dire* process to find actual or implied bias amongst the venire members.[43] That way, both parties will be able to "exercise their peremptory challenges intelligently."[44] After *voir dire*, if a defendant desires to bring a gender discrimination case, he or she "must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike."[45] The explanation required is not complicated, as an explanation founded in a "juror characteristic other than gender," that is not pretextual, will suffice.[46]

Not all the Justices agreed with the Court's holding, however. Justice O'Connor thought the *J.E.B.* result negatively changed the role of peremptory challenge, which is "a practice of ancient origin," that "helps produce fair and impartial juries."[47] She also proposed that a defendant's use of peremptory challenges based on gender should "be limited to the government's use of gender-based peremptory strikes."[48] Others disagreed entirely with allowing peremptory challenges at all, arguing:

> [T]he Court's legal reasoning . . . invalidates much more than sex-based strikes. After identifying unequal treatment (by separating individual exercises of peremptory challenge from the process as a whole), the Court applies the "heightened scrutiny"

40. *Id.* at 140.
41. *J.E.B.*, 511 U.S. at 128, 146.
42. *Id.* at 143.
43. *Id.* at 143–44.
44. *Id.* at 144.
45. *Id.* at 144–45.
46. *Id.* at 145.
47. *J.E.B.*, 511 U.S. at 147 (O'Connor, J., concurring).
48. *Id.* at 147 (O'Connor, J., concurring) (emphasis omitted); Justice Scalia also recognized this, calling it "preposterous" for a prosecutor to not be able to strike nine out of ten men because the defense attorney struck nine out of ten women. *Id.* at 159–60 (Scalia, J., dissenting).

> mode of equal protection analysis used for sex-based discrimination, and concludes that the strikes fail heightened scrutiny because they do not substantially further an important government interest. The Court says that the only important government interest that could be served by peremptory strikes is "securing a fair and impartial jury." It refuses to accept respondent's argument that these strikes further that interest by eliminating a group (men) which may be partial to male defendants, because it will not accept any argument based on "the very stereotype the law condemns."[49]

A line of criticism has evolved in furtherance of this dissent, arguing that peremptory challenges no longer serve a functional purpose. In fact, after the *J.E.B.* decision, many experts predicted that the Court could possibly eliminate peremptory challenges entirely.[50] Notwithstanding this criticism, the Court has since "increased scrutiny" of *Batson* peremptory challenges.[51]

Others, still, argue against peremptory challenges themselves. Some believe that peremptory challenges no longer exist in practice, since the Court's mandate for an explanation of each proposed strike effectively eliminates the point of peremptory challenges as initially imagined: allowing attorneys to remove potential jurors without stating a cause.[52] Professor Erwin Chemerinsky believes that the rationale behind peremptory challenges is "that the fairest jury will result if each side is able to exclude the jurors that it perceives to be most biased in favor of its opponent," and thus, peremptory challenges

---

49. *Id.* at 160–61 (Scalia, J., dissenting) (citation omitted).

50. *See, e.g.*, Karen L. Cipriani, Note, *The Numbers Don't Add Up: Challenging the Premise of* J.E.B. v. Alabama ex rel. T.B., 31 AM. CRIM. L. REV. 1253, 1259 (1994). Justice Scalia, the textualist that he is, worried that the majority opinion in *J.E.B.* came dangerously close to eliminating the peremptory challenge. He viewed peremptory challenges as an essential part of a fair jury trial, as it has been "since the dawn of the common law." *J.E.B.*, 511 U.S. at 163 (Scalia, J., dissenting).

51. John P. Bringewatt, Note, Snyder v. Louisiana: *Continuing the Historic Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1299 (2010). Bringewatt proposes that the Court, through *Snyder*, has imposed a new, stricter standard for judging peremptory challenges: that unless the trial judge explains his or her decision behind a prosecutor's proffered justification for a peremptory challenge, the justification is rejected. *Id.*; *see also* Snyder v. Louisiana, 552 U.S. 472, 479, 485–86 (2008).

52. *See* Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should it Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451–52, 471 (2000) (declaring that the state of Florida has functionally eliminated peremptory challenges by disallowing strikes based upon findings of pretext. Peremptory challenges are therefore no longer a useful tool in jury selection in Florida); *see also* Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 961 (1998) (arguing that peremptory challenges no longer exist because they require a proffered explanation for the challenge now, thereby undercutting the initial without cause peremptory challenge at its inception).

should be eliminated if they are not necessary to ensure a fair trial.[53] Further, the respondent in *J.E.B.* has a point: women and men do generally have predispositions to be more sympathetic to the defendant or complainant in different cases, like in J.E.B.'s paternity case; the Court even recognized that, while perpetuating a stereotype, J.E.B.'s argument may contain a "shred of truth."[54] This will be discussed later on in this Note.[55]

D. Peremptory Challenges in Practice

For the most part, claims of gender discrimination in peremptory challenges do not succeed because attorneys may state any reason, other than gender, for excluding the juror. Often, this reason will be the juror said something the attorney finds fault with, or the attorney can point to the juror's experiences or jobs.[56] Being able to express a gender-neutral reason for one's peremptory challenge is therefore crucial to surviving a *J.E.B.* challenge.[57] During *voir dire*, attorneys should ask more specific questions in order to elicit further information from potential jurors, because applying a peremptory challenge "will require greater consideration of the jurors' opinions, beliefs, and experiences."[58] Attorneys on each side must therefore now utilize more "sophisticated rationales" when proffering explanations for peremptory challenges.[59]

Jury selection after *J.E.B.* now requires a more effective *voir dire* by each of the attorneys in order to maximize the information gained in the short time spent with each venire member. Attorneys need to: (1) discover "information beyond basic demographics"; (2) utilize "open-ended questions"; (3) employ personable traits that will encourage jurors to open up and "disclose information about their experiences and opinions"; and (4) "pursue questions in a consistent manner."[60]

This intensive and lengthy process has increased the costs of litigation.[61] In fact, many dissenting Justices since *J.E.B.* have expressed

53. Erwin Chemerinsky, *Gender-Based Juries?*, 31 TRIAL 34, 34, 35 (1995).

54. *J.E.B.*, 511 U.S. at 140 n.11.

55. *See infra* Part III.

56. *Exercising Peremptory Challenges in Light of* J.E.B., NAT'L LEGAL RESEARCH GROUP (Aug. 24, 2014, 2:38 PM), http://www.nlrg.com/our-services/jury-research-division/jury-research-publications/-exercising-peremptory-challenges-in-light-of-jeb/, *archived at* http://perma.cc/566U-7MW5.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (noting that attorneys will need to conduct more research in advance of *voir dire* and spend more time questioning the venire members); *see also* J.E.B. v. Alabama

concern about the enormous amount of time and effort that will be spent on adjudicating peremptory challenge discrimination claims.[62] Justice Scalia howled that extending *Batson* to sex "will provide the basis for extensive collateral litigation."[63] Not only would criminal defendants take advantage of this litigation, but civil litigants too, since "every case contains a potential sex-based claim."[64]

These worries about the increased costs of litigation have largely not come to fruition. Compared to the collateral litigation in the aftermath of *Batson*, *J.E.B.* resulted in minuscule amounts of extra litigation.[65] Hightower's 2000 empirical analysis of the five years after *J.E.B.* shows that while *Batson* was cited 2,474 times in the five years after it was decided, *J.E.B.* was cited just 459 times.[66] Hightower also found that 127 complaints alleging a violation of *J.E.B.* were filed in those five years after the decision, resulting in only twenty-three reversed decisions.[67] Therefore, when comparing *J.E.B.* to the legacy of *Batson*, race-based peremptory challenges, instead of gender-based challenges, have presented a much larger undertaking for courts.[68] The Justices' concerns about eliminating gender-based peremptory challenges thus have been largely overblown.

II. THE "RIGHT" TO AN IMPARTIAL JURY OF ONE'S PEERS

A. "Composed of the Peers . . . ."[69]

Single-gender juries are not constitutionally proscribed. The Sixth Amendment only grants the right to an "impartial jury," not a right

---

ex rel. T.B., 511 U.S., 127, 149–50 (O'Connor, J., concurring) (noting lengthier trials, an increase in complex issues on appeal, and a "diminished . . . ability of litigants to act on . . . gender-based assumptions . . . .").

62. *See J.E.B.*, 511 U.S. at 147 (O'Connor, J., concurring) ("[J]ury selection—once a sideshow—will become part of the main event."); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (the time devoted by judges and lawyers to litigate peremptory challenge discrimination claims will be "enormous"); Batson v. Kentucky, 476 U.S. 79, 102 (1986) (White, J., concurring) (the *Batson* holding will require "much litigation" to "spell out [its] contours").

63. *J.E.B.*, 511 U.S. at 162 (Scalia, J., dissenting).

64. *Id.* Justice Scalia was also worried about lengthening the already burdensome *voir dire* process.

65. Susan Hightower, *Sex and the Peremptory Strike: An Empirical Analysis of* J.E.B. v. Alabama*'s First Five Years*, 52 STAN. L. REV. 895, 896 (2000) [hereinafter Hightower, *Sex and the Peremptory Strike*].

66. *Id.* at 905. Hightower used the Westlaw ALLCASES database to gather her statistics.

67. *Id.* at 906.

68. *Id.*

69. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

to a jury of one's "peers."[70] Interpretation of the Sixth Amendment since its inception, however, tells a different story.[71] Historians originally believed the Sixth Amendment was rooted in the Magna Carta, though historians no longer accept that.[72] Instead, the Sixth Amendment's interpretation to include "peers" is attributed to the laws of David of Scotland: "[n]o man shall be judged by his inferior who is not his peer."[73] Criminal defendants in England finally enjoyed the safeguards of a jury in the Seventeenth Century, leading to the immortalization of the jury's composition by Blackstone in the Eighteenth Century.[74] This principle immigrated to the United States through English common law,[75] and was henceforth incorporated into the U.S. Constitution.[76]

During the process of ratifying the Constitution, the idea of a jury of one's peers and the right to that jury trial "was so jealously guarded that States refused to ratify the original constitution until it was guaranteed by the Sixth Amendment."[77] This attitude has remained in the minds of Americans today.[78] The general belief of Americans is

---

70. U.S. CONST. amend VI states as follows:

> 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.

The right to trial by jury is also found in the main text of the Constitution. *See* U.S. CONST. art. III, § 2, cl. 2.

71. *See e.g.*, People v. McGray, 443 N.E.2d 915, 919 (N.Y. 1982) (citing Taylor v. Louisiana, 419 U.S. 522, 543 n.19 (1975)); Matter of Welfare of J.K.B., 552 N.W.2d 732, 733 (Minn. Ct. App. 1996).

72. U.S. GOVERNMENT PRINTING OFFICE, *Sixth Amendment: Rights of Accused in Criminal Prosecutions* 1397, 1406, 1406 n.42, *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-7.pdf, *archived at* http://perma.cc/DT4D-VML4 [hereinafter *Rights of Accused*].

73. *Id.* at 1406 n.42 (citing Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968)); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 173 n.3 (2d ed. 1898).

74. *Rights of Accused*, *supra* note 72, at 1406 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *349–*350 (T. Cooley 4th ed. 1896) ("The truth of every accusation . . . [must] be confirmed by . . . his equals and neighbors indifferently chosen. . .")).

75. *Id.* at 1406–07, 1407 n. 47 (citing Thompson v. Utah, 170 U.S. 343, 349–50 (1898)).

76. *Id.* at 1406–07.

77. HOLLY J. MCCAMMON, THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADOPTION: A MORE JUST VERDICT 1 (2012) (quoting Susan B. Anthony, Declaration of Rights of the Women of the United States by the National Woman Suffrage Association (July 4th, 1876)).

78. *See* Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837, 851–52 (2014).

that juries should be a collection of a group of diverse people, so that no one factor or class will tip the scales of impartiality towards partiality and a biased jury trial.[79]

The Supreme Court has also spoken on how a jury's composition is expected to be more than just an impartial group: "[A] jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[80] A jury of one's peers is important because such a jury protects a criminal defendant from "the corrupt or overzealous prosecutor[,] and . . . the compliant, biased, or eccentric judge."[81] A jury's diversity of viewpoints and status therefore provides criminal defendants with a more just trial.

The Supreme Court continually references the rationale of a "representative cross-section of the community" making up a jury in support of their holdings over the last decades.[82] The Court ruled in *Taylor v. Louisiana* that a "representative cross-section of the community" is part of the fundamental right to a jury trial under the Sixth Amendment.[83] Further, a jury should number enough members to allow for this "representative cross-section of the community."[84]

There is therefore a substantial quantity of support throughout history and Supreme Court jurisprudence to support the principle that juries ought to be comprised of the criminal defendant's peers.

B. Single-Gender Juries Do Not Fulfill This "Peers" Requirement

Single-gender juries do not result in an impartial jury when the defendant is a member of the opposite sex, because the jury is not comprised of a varied group of the defendant's peers. A "representative cross-section" reasonably encompasses all types of groups, classes, and factors of people.[85] As the Court decided in *J.E.B.*, it was potentially unfair to try a male with an all-female jury in a paternity

79. *See id.*

80. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

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

82. *See, e.g.,* Williams v. Florida, 399 U.S. 78, 100 (1970).

83. 419 U.S. 522, 528 (1975) (quoting *Williams*, 399 U.S. at 100). In referring to the Senate and House of Representative Committee Reports for the Federal Jury Selection and Service Act of 1968, the Court further states that "the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice." *Id.* at 530.

84. Williams v. Florida, 399 U.S. 78, 100 (1970); *see also* Brown v. Allen, 344 U.S. 443, 474 (1953) (stating that a jury must "reflect[] a cross-section of the population").

85. *See Williams*, 399 U.S. at 100.

suit.[86] To use another example, it would be wholly unfair to try a Catholic priest in a sexual abuse suit before a jury of Muslims, or Jewish rabbis, or atheists. It was outrageously unconstitutional to try an African American criminal defendant before an all-white jury in *Batson*.[87] Likewise, it is procedurally criminal to permit criminal defendants of one gender to be tried by a single sex jury of the opposite gender, especially in rape cases and murder trials, due to the heightened severity of the crime, punishment, and the importance of juror opinions when determining the reliability of evidence.[88]

There is a fine line, however, between that statement and advocating that gender has no impact on the partiality of the jury, like the Court in *J.E.B.* states. It is not this author's intention to perpetuate the same stereotypes which the Supreme Court condemned in *J.E.B.* People of different genders do view cases differently nevertheless, and this should be accounted for in criminal jury trials by enjoining juries comprised of both sexes.

III. THE TENSION BETWEEN AN IMPARTIAL JURY AND A SINGLE-GENDER JURY

A. The Inclusion of Women in Juries

Once the right to vote was won, the Women's Rights movement turned its focus to inclusion in jury duty participation as a part of citizenship.[89] In 1868, a woman named Hester Vaughan was put on trial in Philadelphia for allegedly killing her newborn infant, and was sentenced to death.[90] Leading feminists, organized by Susan B. Anthony and Elizabeth Cady Stanton, disputed Vaughan's conviction, arguing that she had not received a fair trial.[91] They alleged that, in addition to the jury not weighing the facts carefully at trial, the trial was unjust because it was before a jury of all men.[92] Susan B. Anthony proclaimed in disgust: "And yet the women of this nation have never been allowed a jury of their peers. . . . Young girls have

86. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994).

87. Batson v. Kentucky, 476 U.S. 79, 82–83 (1986).

88. Jurors of different genders demonstrate a proclivity to think and feel a certain way as a whole about different subjects, e.g., rape; in murder trials; and when the victim is a minor, mothers will obviously enter the jury box with an inclination towards victim sympathy. *See infra* Part III.

89. MCCAMMON, *supra* note 77, at 1–2.

90. *Id.* at 1.

91. *Id.*

92. *Id.*

been arraigned in our courts for the crime of infanticide; tried, convicted, hanged—victims, perchance, of judge, jurors, advocates—while no woman's voice could be heard in their defense."[93] Despite this blatant discrimination against women, state legislatures refused to include women in jury service, citing yet another English common law doctrine, "*propter defectum sexus*, literally, the 'defect of sex.'"[94]

The argument that an all-male jury was unjust and completely partial eventually resonated within the judicial system, and women were ultimately included in juries.[95] This same rationale, however, also applies to male defendants. An all-female jury is equally as unjust and partial to a man as an all-male jury is to a female defendant.[96]

B. Gender Matters in Juror Decision-Making

Chemerinsky has queried, "In a society where gender matters so much, does it make sense to say that in jury selection gender shouldn't matter at all?"[97] He is right: gender matters. This is because both men and women's reasoning and perception of events contrast.[98] A juror's gender could thereby make an impact on how the juror acts, especially in cases concerning rape or sexual harassment, for instance.[99]

This sentiment has been echoed by many other legal minds. For example, the Supreme Court has stated that because jurors do not "leave behind all that their human experience has taught them" upon entering the jury box, they cannot be expected to do so.[100] Justice O'Connor has recognized that "[a] plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors."[101] Additionally, it is instinctual to believe that one's gender "and resulting life experiences" will alter one's view of a case.[102] Similarly, Justice Rehnquist in his dissenting opinion in *J.E.B.* recognized the difference of the sexes,

---

93. *Id.*

94. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 132 (1994) (citing United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (citation omitted). Our nation's adherence to English common law is clearly erroneous at times.

95. Although some states dragged their feet: at least sixteen states prohibited women from juries in 1947, and three states—Alabama, Mississippi, and South Carolina—refused to grant women the right to serve on juries as late as 1961. *Id.* at 131 n.3.

96. For example, in a rape case with a male defendant before an all-female jury.

97. Chemerinsky, *supra* note 53, at 37.

98. *Id.* at 34.

99. *Id.*

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

101. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 148–49 (1994) (O'Connor, J., concurring).

102. Chemerinsky, *supra* note 53 (quoting *id.* at 149).

"both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room."[103] These differences in the reasoning and life experiences between male and female jurors prove that ultimately, a single-gender jury may "no longer . . . reflect[] the diversity of the community[,]" because an entire group (males, or females) has been excluded from the jury.[104]

Women are most commonly thought to be better jurors for the prosecution than men.[105] Each gender, however, contributes a unique view to jury deliberations that is not interchangeable:

> [I]f the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? *The truth is that 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 [*sic*] 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. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[106]

The Supreme Court has compared the "female perspective" to the views of diverse racial and social groups.[107] This female perspective is significant, so much so that keeping women from juries "may at times be highly prejudicial to the defendants."[108] One example of this is in a second-degree murder case where the female defendant's self-defense claim rests entirely on the jury's acceptance of Battered Women Syndrome.[109] One would also think that excluding men from a jury could put the defendant at a disadvantage, for instance, in a rape case.[110]

---

103. *J.E.B.*, 511 U.S. at 156 (Rehnquist, J., dissenting).

104. Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1044 (Apr. 1995).

105. *J.E.B.*, 511 U.S. at 138 n.9.

106. Ballard v. United States, 329 U.S. 187, 193–94 (1946) (emphasis added).

107. *See* Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J.WOMEN & L. 1, 5 (2005).

108. *Ballard*, 329 U.S. at 195.

109. *See* Roberta K. Flowers, *Does It Cost Too Much? A 'Difference' Look at* J.E.B. v. Alabama*,* 64 FORDHAM L. REV. 491, 491, 491 n. 2 (1995).

110. *See id.* at 493, 517. Flowers proposes that the *J.E.B.* holding was flawed because the Supreme Court failed to take into account the differences amongst men and women, which manifest themselves in the deliberation process. While "women view a moral

While the Supreme Court in *J.E.B.* attempted to dispel gender considerations while selecting a jury, social scientists and biological researchers are continually learning about the differences between the two genders. Each piece of research and report that is published strengthens the argument that gender considerations matter.[111] There are some researchers, however, that have found no correlation between juror gender and the jury's verdict.[112] Nonetheless, just because the end result—the verdict—is the same, it does not mean that gender played no part in the jury's decision-making.

The Supreme Court flaunted its *J.E.B.* holding as anti-discriminatory and a win for impartial juries.[113] As Fowler points out, however, the Court remarkably left out any analysis of how gender-based peremptory challenges could negatively affect a defendant's right to a fair and impartial jury.[114] The Court further failed to recognize that differences in the genders of men and women do indeed impact decision-making, instead suggesting, "any assumption about juror behavior, based on the fact that the two sexes are not fungible, constitutes an invidious stereotype in violation of the Equal Protection Clause."[115] Herein lies the tension between the Court's view that gender has no relation to partiality, and the realities that gender *does* impact jury decision-making. So far, Supreme Court decisions have not combined these two views successfully, with the

---

problem in the context of all the facts," men "are more likely to view the dilemma based on abstract principles." *Id.* at 493. Additionally, "women are inclined to view individual decisions in light of the effect those decisions have on relationships." *Id.* Flowers also uses an excerpt from the play *A Jury of Her Peers*, by Susan Glaspell, to demonstrate her point about the differences between men and women. In the play, women characters discover evidence that was invisible to men due to a different way of looking at things. Because the women noticed that key evidence, but the men did not, police were not able to charge the main character with the murder of her husband. *Id.* at 517–18.

111. *Id.* at 518–20. Men and women employ different judging processes. Flowers, *supra* note 109, at 518. An empirical study found that while boys grouped objects together based on intrinsic characteristics, girls grouped objects together due to their function. Further, "women are more attuned to . . . emotions," allowing them to view facts within the entire context of an event, unlike men. *Id.* at 519. Even biologically, there are differences in men's and women's brains (albeit subtle differences). *Id.*

112. *See* SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS 11 (2009), *available at* http://lawlib.shirazu.ac.ir:8080/pdfTemp/ebooksclub[1].org__The_Juror_Factor__Race_and_Gender_in_America__039_s_Civil_Courts__Law_and_Society___Law_and_Society__Recent_Scholarship_.pdf, *archived at* http://perma.cc/DJS9-PY5S. Overland's book recognizes problems with analyzing the impact of jurors' gender upon verdicts: (1) lack of reliable data; (2) studies used inapt statistical methods; (3) conflating the task of decision-making; and (4) an unwillingness to admit a relationship between a juror's demographics and jury verdicts. *Id.* at 11–12.

113. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994).

114. Fowler, *supra* note 107, at 11.

115. *Id.* at 14 (citing *J.E.B.*, 511 U.S. at 133–36).

procedurally criminal consequence that peremptory challenges can, and often times do, result in single-gender juries.

C. Gender Matters—Examining Different Types of Criminal Cases

The gender of each juror affects how each juror synthesizes information and evidence, and judges the credibility of witnesses.[116] Gender also impacts jury decision-making as a whole.[117] Therefore, it is important to examine how jury make-up affects jury behavior and verdicts in the most gender-charged cases of battered women cases, rape cases, and murder cases. Also, while not the focus of this Note, juror gender also impacts civil jury trials, for instance: suits for sexual harassment; employment discrimination; and wrongful termination, and other civil cases involving civil rights, like *United States v. Windsor*, the notable Supreme Court case regarding same-sex rights in marriage and spousal benefits.[118]

1. Women Acting in Self-Defense and Battered Women Cases

The gender composition of juries matters when female criminal defendants claim self-defense, and in battered women cases.[119] Battered Women Syndrome describes the mindset and emotional state of a battered woman, defined as "a woman who has experienced at least two complete battering cycles as described in dating and domestic violence."[120] Battered women are perpetual domestic violence victims who share certain common characteristics, including fearing for one's life and her children's lives.[121] The battered women syndrome defense strives to demonstrate that living in perpetual domestic violence alters women's state of mind to the point where homicide is justifiable.[122]

Between ten and fifteen percent of homicides in the United States result from a woman killing her abuser in the act of self-defense or defense of others, usually her children.[123] Battered women

116. *See supra* notes 108–11 and accompanying text.

117. *See supra* notes 105, 108–11 and accompanying text.

118. *See. e.g.*, 133 S. Ct. 2675, 2682 (2013); s*ee also* OVERLAND, *supra* note 112, at 41–44, for an analysis of juries in civil suits.

119. Flowers, *supra* note 109, at 532.

120. *Battered Woman Syndrome*, RAINN: RAPE, ABUSE, AND INCEST NAT'L NETWORK, https://www.rainn.org/get-information/effects-of-sexual-assault/battered-woman-syndrome, *archived at* http://perma.cc/AP9U-8P4S (last visited Nov. 4, 2014).

121. *Id.*

122. Lenore Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J. L. ETHICS & PUB. POL'Y 321, 321 (1992) [hereinafter Walker, *Self-Defense*].

123. LENORE WALKER, THE BATTERED WOMAN SYNDROME 202 (2d ed. 2000) [hereinafter WALKER, SYNDROME].

cases therefore have large opportunity to be impacted by the gender of jurors, and potentially a single-gender jury. Not all jurisdictions, however, recognize battered women syndrome, and only some jurisdictions permit expert testimony about battered women syndrome; most do not permit testimony about this at all, instead titling it self-defense.[124] In many cases, even if expert testimony is permitted, studies have shown a failure of that testimony to help a battered woman defendant.[125] A large cause of this is the stereotypical view both men and women share about self-defense cases, of "two strangers fac[ing] off in a street or barroom brawl."[126] Juror perceptions therefore play an integral part in judging whether the act truly was self-defense, because juror's subjective views alter how they view the syndrome.[127] Too often, juror misconceptions result in a guilty verdict; these misconceptions largely are preconceived notions relating to gender.[128]

Like all affirmative defenses, Battered Women defendants bear the burden of proof by a preponderance of the evidence, which the Government then must essentially disprove when proving the charge beyond a reasonable doubt.[129] Thus, in battered women cases, "[t]he female victim faced with explaining her version of the truth must overcome many obstacles due to the constraints of a male defined system."[130] Justice O'Connor in her *J.E.B.* concurring opinion specifically noted that battered women cases are gender-specific: in a trial where you desire to pick as many jurors as possible to be on your side, battered women should be allowed to obtain as many female jurors as possible.[131] Peremptory challenges prohibit this.[132]

The resulting jury may still be all-female or all-male; in that event, gender plays a dominant role in juror decision-making. Studies have found that juries which are the same sex as the defendant can be more likely to be biased in *favor* of the defendant.[133] The gender

---

124. Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 40 (2009). Opponents of the battered women defense view it as an "abuse excuse." *Id.* at 43.

125. *Id.* at 44–45.

126. *Id.* at 46.

127. *Id.* at 53 nn.91–92.

128. *Id.* at 46; *see also* Walker, *Self-Defense*, *supra* note 122, at 334 (finding that battered women are more likely to receive a fair trial when the jury listens to what the woman and other witnesses say, and when an expert witness is permitted to testify).

129. *See* Sack, *supra* note 124, at 42, 42 n.43.

130. Flowers, *supra* note 109, at 532. The author continues, "*J.E.B.* does not protect her rights; on the contrary it eliminates them." *Id.*

131. J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 151 (1994) (O'Connor, J., concurring) (using battered women syndrome as a defense may be a legitimate reason to strike jurors due to their gender).

132. *See id.* at 140.

133. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research*

of the defendant's attorney may also impact the verdict: another study has discovered that male defense attorneys have a higher acquittal rate than females.[134]

Particularly related to battered women cases, one study has found that mock jurors favor a same-sex defendant when determining whether the defendant killed her spouse.[135] Another study shows that jurors determine guilt in battered women cases based on their pre-existing beliefs about domestic violence.[136]

These results show that gender is an obvious component in a jury deliberation and verdict in homicide trials where a female defendant presents a defense centered around battered women syndrome. A single-gender jury of women has a proclivity to side with the defendant. A single-gender jury of men, however, may be stacked against the defendant before the trial even begins. In either case, a single-gender jury impermissibly permits gender to affect the result of the trial due to the jury's inherent gender biases.

2. Rape Cases

Gender impacts rape cases in all aspects, both when the defendant is a male or a female, and when the victim is a male or a female. Rape cases are highly contentious, often due to the parties' genders. In a case where gender is such a factor, it is once again possible for the gender of the jurors, victim, and defendant to play a role in juror decision-making, the verdict, and sentencing.[137]

In rape case experiments, women were more prone to find the defendant guilty than men are.[138] Women also express greater certainty in the verdict than men.[139] Additionally, women are more in favor of longer sentences for defendants convicted of rape than are men.[140] Fowler suggests that these results are because a female juror feels more sympathy and identifies with a female victim, and therefore judges a male defendant more severely.[141] Differences in juror gender are clear in rape cases because men and women react differently to rape cases in defensive ways, "particularly when the

---

on Deliberating Groups, 7 PSYCHOL. PUB. POL'Y & L. 622, 673 (2001); Fowler, *supra* note 107, at 20.

134. Devine et al., *supra* note 133, at 683.
135. Fowler, *supra* note 107, at 20.
136. *Id.* at 23.
137. *See* discussion, *supra* Parts III.B–C.1.
138. Fowler, *supra* note 107, at 21.
139. *Id.*
140. *Id.*
141. *Id.*

evidence is ambiguous."[142] Men bring their own biases and views to rape cases; often, men "exculpate defendants by shifting the blame to the victim . . . ."[143]

Another juror gender experiment has found that the preferences and biases which males and females bring into the jury box may change the verdict due to the way jurors deliberate in groups.[144] While there were "significant gender differences" between the jurors when they determined guilt independently, the same jurors deliberating in a group behaved differently.[145] These jurors exhibited a significant tendency to find the defendant guilty only when the jury was comprised of mostly females, such as when ten out of twelve jurors were female.[146]

It is hard to determine the true effect of gender upon jury decision-making and verdicts in actual criminal cases due to the confidential nature of jury deliberation.[147] Social science experiments discussed above, however, do identify important trends and tendencies which male and female jurors bring into the jury box and use to judge a defendant's guilt.[148] In a rape case, where oftentimes the only evidence is the female victim's word against the male defendant's, the composition of the jury plays an integral part in assessing the reliability of witnesses and the defendant's guilt.[149] A single-gender jury in a male-defendant rape case would therefore be almost criminal to the victim, if an all-male jury, or to the defendant, in an all-female jury.

3. Murder Cases

Gender likewise can impact murder cases, and surprisingly so.[150] In Hightower's five-year empirical analysis after *J.E.B.*, she found that *J.E.B.* discrimination claims to peremptory challenges were most common in murder cases, especially in capital cases when prosecutors struck women members, instead of the expected "gender-sensitive" cases.[151] Murder was the most prevalent type of case containing a *J.E.B.* claim, sixty cases in all out of one hundred twenty-five cases.[152]

142. *Id.* at 22.
143. *Id.*
144. Fowler, *supra* note 107, at 21.
145. *Id.*
146. *Id.*
147. *Id.* at 29.
148. *Id.* at 20.
149. *Id.* at 21.
150. Fowler, *supra* note 107, at 22.
151. Hightower, *Sex and the Peremptory Strike*, *supra* note 65, at 895.
152. *Id.* at 913.

This may be an unexpected statistic; it certainly was not predicted by the Supreme Court in *J.E.B.*, where the Justices predicted that rape, sexual harassment, paternity, and child custody cases would be the ones most affected by the Court's holding.[153] However, Hightower's study found that prosecutors unconstitutionally struck women from the venire in sixty-eight percent of homicide cases, and a whopping eighty-seven percent in death penalty cases.[154] These prosecutors seemingly either felt that women are more sympathetic towards victims, or are sympathetic towards young defendants due to their motherly instincts.[155]

Juror gender does have the ability to impact murder trial verdicts.[156] For example, jurors split evenly down the middle on the basis of sex in the 1994 murder trial of Erik Menendez for killing his parents, with the six men voting to convict the defendant of murder, while the six women wanted to convict the defendant of manslaughter.[157]At trial, the defendant had testified that his father sexually abused both him and his older brother, causing them to fear for their lives.[158] That the testimony and evidence at trial lead the jury to split down the middle based on gender shows a proclivity for gender to affect not only jury deliberations, but verdicts as well.[159] Single-gender juries therefore impact murder cases, and should be avoided.

D. Zimmerman Trial

In July 2013, the State of Florida was on trial against George Zimmerman for the second-degree murder of Trayvon Martin.[160]

---

153. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring). This is surprising because murder is not a gender-specific crime, and "death is comprehensible to all," even if sexual abuse was involved. Hightower, *Sex and the Peremptory Strike*, *supra* note 65, at 913.

154. Hightower, *Sex and the Peremptory Strike*, *supra* note 65, at 913.

155. This is a common stereotype. *See id.* at 913 n.112 for more information on case specifics.

156. *See* Fowler, *supra* note 107, at 22–23.

157. Mary B.W. Tabor, *The Nation; Stereotyping Men, Women and Juries by Trial and Error*, N.Y. TIMES (Feb. 6, 1994), http://www.nytimes.com/1994/02/06/weekinreview/the-nation-stereotyping-men-women-and-juries-by-trial-and-error.html, *archived at* http://perma.cc/58C5-9Q67. "[J]urors later told reporters [the split by sexes] was not a coincidence." In Lyle Menendez's (the elder Menendez brother) trial, the jury was also split, though not by sex. The author suggested this result came from differences in the facts of the case, e.g., that the abuse of the older brother stopped sooner. *Id.*

158. *Id.* Prosecutors in the case suggested that the defendant was gay, which turned the male jurors against leniency. *Id.*

159. *See id.*

160. *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 22, 2014), http://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/, *archived at* http://perma.cc/9A3C-5C3R.

Florida state prosecutors filed charges against Zimmerman in April 2012 for the February 26, 2012 fatal shooting of seventeen-year-old Martin.[161] The case was in the news constantly because of the horrible tragedy (which initially went unprosecuted), race issues, and due to the gun control debate.[162] The issue of a single-gender jury flew under the radar in comparison.[163]

During jury selection, out of five hundred venire members, forty made it past the initial cut: sixteen men and twenty-four women.[164] The government used a peremptory challenge on four jurors, while the defense attorney used one peremptory challenge.[165] Neither of

---

161. *Id.*

162. Vivian Kuo, *Fatal Shooting of Florida Teen Turned Over to State Attorney*, CNN (Mar. 15, 2012), http://edition.cnn.com/2012/03/14/justice/florida-teen-shooting, *archived at* http://perma.cc/SXD8-95XR (regarding the racial issues); *Trayvon Martin Shooting Sparks "Hoodie" Movement*, CBS NEWS, http://www.cbsnews.com/pictures/trayvon-martin-shooting-sparks-hoodie-movement/ (last visited Nov. 4, 2014), *archived at* http://perma.cc/FK7T-ZBJN (regarding the "hoodie movement"). Even the President weighed in: Matt Williams, *Obama: Trayvon Martin Death a Tragedy that Must be Fully Investigated*, THE GUARDIAN (Mar. 23, 2012), http://www.theguardian.com/world/2012/mar/23/obama-trayvon-martin-tragedy, *archived at* http://perma.cc/79YY-EEEC.

163. Hardly any news outlets focused on the jurors' gender at all; most focused on each juror's race. *See, e.g.*, Kyle Hightower, *No Black Jurors Chosen for George Zimmerman's Trial*, NEW PITTSBURGH COURIER (June 21, 2013), http://newpittsburghcourieronline.com/2013/06/21/no-black-jurors-chosen-for-george-zimmermann-s-trial/, *archived at* http://perma.cc/YW7V-LWCZ [hereinafter Hightower, *No Black Jurors Chosen*]; Debra C. Weiss, *Six Jurors Picked for Zimmerman Trial; None Are Male and None Are Black*, ABA JOURNAL (June 21, 2013), http://www.abajournal.com/news/article/six_jurors_picked_for_zimmerman_trial_none_are_male_and_none_are_black/, *archived at* http://perma.cc/3Y93-S3ZP [hereinafter Weiss, *Six Jurors Picked*]; Andrea Torres, *African American Jurors Absent in George Zimmerman Trial*, LOCAL 10 (June 23, 2013), http://www.local10.com/news/no-african-american-jurors-in-trial-of-trayvon-martins-killer/20653812, *archived at* http://perma.cc/Q4PX-HRQP [hereinafter Torres, *African American Jurors Absent*]. *But see* Michael Smerconish, *Zimmerman: Gender Not Race*, HUFFINGTON POST (July 29, 2013), http://www.huffingtonpost.com/michael-smerconish/zimmerman-gender-not-race_b_3670743.html, *archived at* http://perma.cc/L855-R67L [hereinafter Smerconish, *Gender Not Race*].

164. *40 Candidates Retained for George Zimmerman Jury Pool*, WESH (June 18, 2013), http://www.wesh.com/trayvon-martin-extended-coverage/8-people-still-needed-to-fill-george-zimmermans-potential-jury-pool/-/14266478/20608612/-/item/0/-/kr52pdz/-/index.htm, *archived at* http://perma.cc/G5T2-Z9WB.

165. *Jury Selected In George Zimmerman Murder Trial*, CLICK ORLANDO (June 20, 2013), http://www.clickorlando.com/news/jury-seated-in-george-zimmerman-murder-trial/20648712, *archived at* http://perma.cc/9Y8A-X63P. The defense struck a female African American for not disclosing her pastor's previous advocacy for Trayvon Martin. The state struck an African American male because he was a gun owner who watched Fox News. Yamiche Alcindor, *Zimmerman Consultant Wanted All-Female Jury*, USA TODAY (July 18, 2013), http://www.usatoday.com/story/news/nation/2013/07/17/zimmerman-trayvon-martin-jury-consultant-killing-sanford/2530151/, *archived at* http://perma.cc/FWE9-TM4F. The state also attempted to strike two potential jurors for a stating a difficulty in sending someone to prison and for asking why Martin was out at night, respectively. Both of those jurors eventually became part of the selected jury. *Jury Selected In George Zimmerman*

the peremptory challenges were for gender reasons.[166] At the end of venire, the jury was comprised of six women.[167] This jury was wholly unrepresentative of the general community, as Seminole County has just a fifty-one and a half percent majority of females.[168] Legal experts noted this, stating that it was unusual for the final jury to be composed solely of women.[169]

Because the jury was solely comprised of women, many believed that the jury was predisposed to favor the government.[170] An associate professor at Widener University School of Law postured, "[w]omen as a group might be less receptive to Zimmerman's behavior than men," and sympathize more with the death of a minor.[171] Conversely, one criminal lawyer believed that since many of the female jurors were older, "they might identify with Mr. Zimmerman's claim of self-defense more."[172]

Ultimately, the trial resulted in a verdict of not guilty on the charge of second-degree murder, meaning that gender predisposition did not affect the jury's verdict in a negative way for the defendant.[173] However, this case is still a high-profile example of a single-gender jury, due to: (1) the lack of coverage the single-gender jury received; (2) the way the attorneys approached *voir dire*; and (3) juror statements after the trial's verdict.

The gender of the jurors kept a relatively low profile in the face of the larger racial issues.[174] This is significant because it removes the importance of the jury's gender from the national discussion. The country missed an important opportunity to discuss single-gender

---

Murder Trial, CLICK ORLANDO (June 20, 2013), http://www.clickorlando.com/news/jury-seated-in-george-zimmerman-murder-trial/20648712, *archived at* http://perma.cc/9Y8A-X63P.

166. *Jury Selected In George Zimmerman Murder Trial*, *supra* note 165.

167. Tom Winter et al., *6 Women Chosen As Jurors in George Zimmerman Trial*, NBC NEWS (Jun. 20, 2013), http://usnews.nbcnews.com/_news/2013/06/20/19060246-6-women-chosen-as-jurors-in-george-zimmerman-trial?lite, *archived at* http://perma.cc/NE7Z-ELLF. There were four alternates: two men and two women.

168. Amanda Sloane, *Zimmerman Jurors All Women: Does it matter?*, HLNTV (June 24, 2013), http://www.hlntv.com/article/2013/06/21/george-zimmerman-trial-female-jurors-trayvon-martin, *archived at* http://perma.cc/7AB3-LGCB.

169. Cara Buckley, *6 Female Jurors Are Selected for Zimmerman Trial*, N.Y. TIMES (June 20, 2013), http://www.nytimes.com/2013/06/21/us/6-female-jurors-are-selected-for-zimmerman-trial.html?_r=0, *archived at* http://perma.cc/34SG-64YG.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Trayvon Martin Shooting Fast Facts, supra* note 160.

174. *See, e.g.*, Hightower, *No Black Jurors Chosen*, *supra* note 163; Torres, *African American Jurors Absent*, *supra* note 163. *But see* Smerconish, *Gender Not Race*, *supra* note 163.

juries because of the other high profile issues. Furthermore, single-gender jury issues quickly became irrelevant after trial because the verdict was in favor of the defendant.

Regarding the attorneys' approach to *voir dire*, Florida law permits each side to have six peremptory strikes in cases involving a felony that could not result in a capital or life sentence.[175] Florida jurisprudence has expounded on the Supreme Court's rulings in *Batson* and *J.E.B.*, in *State v. Slappy* and *State v. Neil*.[176] Courts in Florida have expanded protected groups of venire members, increasing protection to ethnic groups and religious groups.[177]

An additional consideration in Florida is how the state has practical difficulties with exercising peremptory challenges.[178] According to Montz and Montz, the peremptory challenge has been functionally eliminated in Florida.[179] This is because Florida judges generally disallow the peremptory challenge strike.[180] In the Zimmerman case, prosecutors attempted to strike two women, which the court overruled, despite a non-gender explanation for each strike.[181] Because the court overruled the challenges, both women became part of the jury.[182] This is a perfect example of how difficult it is to proffer a gender-neutral explanation when using a peremptory challenge.

Juror statements after the verdict also provide insight into the impact of gender in the Zimmerman trial. After the verdict, a couple jurors spoke out in public about their experience.[183] One juror, "B-37," stated that half the jury initially believed Zimmerman was guilty, and that two of the jurors wanted to convict him of manslaughter.[184] One thing that potentially impacted Juror B-37's ultimate belief in an acquittal was how she judged the state's witness, Rachel Jeantel, interpreting her unsophistication as unreliability.[185]

---

175. FLA. R. CRIM. P. 3.350(a)(2).

176. 522 So. 2d 18, 22 (Fla. 1998); 457 So. 2d 481, 486–87 (Fla. 1984); s*ee also* Montz & Montz, *supra* note 52, at 471–72.

177. Montz & Montz, *supra* note 52, at 473.

178. *Id.* at 471.

179. *Id.*

180. *Id.*

181. *Jury Selected in George Zimmerman Murder Trial*, *supra* note 165.

182. *Id.*

183. Matt Pearce, *Zimmerman Juror: Half the Jury Initially Thought He Was Guilty*, CHICAGO TRIBUNE, July 15, 2013, http://www.chicagotribune.com/news/la-na-nn-zimmerman-juror-20130715-story.html, *archived at* http://perma.cc/4DDV-ZA7U.

184. *Id.* Four other jurors subsequently released a statement, however, saying that they did not support Juror B-37's views. Eyder Perlata, *4 Zimmerman Jurors: Juror B37 Does Not Speak For Us*, NPR (July 27, 2013), http://www.npr.org/blogs/thetwo-way/2013/07/17/202914162/4-zimmerman-jurors-juror-b37-does-not-speak-for-us, *archived at* http://perma.cc/J8S-8WSS.

185. Anderson Cooper, *Juror B37: Rachel Jeantel Wasn't A Good Witness*, CNN

Logically, it does not seem just that in a murder case involving a male victim and a male defendant, not one single male was on the jury to provide a male's perspective. Importantly to the defendant, it is not fair and impartial that the jury was wholly comprised of the opposite gender. Likewise, to the state's case, not having a male perspective on the jury did not do justice as instructed in the "jury of one's peers" constitutional mandate. In this case, there were many facts that could have been viewed differently by men; for instance, the focus on George Zimmerman's mixed martial arts training and neighborhood watch habits.[186] It is also easy to imagine a scenario where, had the facts in the case been tilted further away from self-defense, for instance, had the defendant not had a gash on the back of his head, the all-women jury could have shifted towards a guilty verdict.[187] Here, however, like the 1994 Lyle Menendez case, other factors in the case removed gender further from the equation.[188]

In Florida, a jury only has six members.[189] The small amount of jurors makes the single-gender jury even more glaring. *Williams v. Florida* established that a jury of six is sufficient; however, anything less will deprive the defendant of a jury trial.[190] Still, while constitutionally permissible, a jury of just six members gives a heavier weight to the preconceptions and tendencies that a juror brings into the jury box on account of his or her gender.

In sum, the Zimmerman trial's six-women single-gender jury most certainly had an impact upon the case. Because the verdict was in favor of the defendant and the national media focused mainly on other controversial issues like race, stand your ground laws, and gun control, the issue of a single-gender jury flew under the radar. It is therefore hard to tell how much the single-gender jury impacted the verdict.

(July 16, 2013), http://ac360.blogs.cnn.com/2013/07/16/juror-b37-rachel-jeantel-wasnt-a-good-witness/, *archived at* http://perma.cc/EW5Z-W2U4.

186. Rachel Quigley, *Medical Assistant Reveals Zimmerman Had Been Training "Intensely" in Mixed Martial Arts After Neighbor Tells Court Trayvon Martin Was Straddling and Punching Him in MMA 'Pound and Ground' Move*, DAILY MAIL (June 28, 2013), http://www.dailymail.co.uk/news/article-2350807/George-Zimmerman-trialNeighbor-tells-court-Trayvon-Martin-straddling-George-Zimmerman-MMA-pound-ground-position-shot.html, *archived at* http://perma.cc/QJT2-DN4M; James Novograd et al., *The Zimmerman Trial: Halftime Highlights*, NBC NEWS (July 6, 2013), http://www.nbcnews.com/news/us-news/zimmerman-trial-halftime-highlights-v19306124, *archived at* http://perma.cc/8TEZ-F9UN.

187. Quigley, *supra* note 186.

188. *See* Tabor, *supra* note 157.

189. *See* FLA. R. CRIM. P. 3.270. Only capital punishment cases require a twelve-member jury.

190. 399 U.S. 78, 86 (1970).

CONCLUSION

Single-gender juries are constitutionally permissible, and made possible through the use of peremptory challenges. Peremptory challenges are a function of criminal procedure. However, the peremptory challenge can create unfair and unrepresentative single-gender juries, which are procedurally criminal.

Although a prosecutor or defense attorney may not use gender on its face as a basis for a peremptory challenge, in practice, attorneys merely create and utilize a more sophisticated explanation for striking the potential witness. The resulting jury may be composed of a single gender. Therefore, despite the only constitutional requirement being an "impartial jury," an impartial jury may yet be an unrepresentative one.

Single-gender juries are not fair to the defendant because these juries are not an accurate representation of a defendant's peers. Although, the Supreme Court advocates in *J.E.B.* that gender has no relation to partiality, there are many studies that show gender does impact juror decision-making.

The differences in gender proclivities between men and women can impact juror decision-making and the jury's verdict, and especially so in rape cases, battered women defense cases, and murder cases. Single-gender juries are thus not a collection of the defendant's peers, and are inherently unjust. Additionally, the single-gender jury in the Zimmerman case was an optimal time for a national discussion regarding whether single-gender juries should continue, but the opportunity was overshadowed by the heated debates over racial discrimination and gun control.

CHELSEA V. KING*

* J.D. Candidate 2015, William & Mary Law School; B.A. Politics, The Catholic University of America. The author would like to thank her family and friends for their love and support throughout law school and during the process of writing this Note, and Haynes Professor of Law Paul Marcus for his mentorship and suggestions. She would also like to thank her fellow *William & Mary Journal of Women and the Law* staff members for all their help and hard work throughout the publication process.