



**CENTER
FOR
CIVIC
EDUCATION
THROUGH
LAW**

... And Justice For All

**a project of the
State Bar of Michigan Open Justice Commission
and the
Center for Civic Education through Law**





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Lesson One: Introduction and Vocabulary

Abstract:

The purpose of this lesson is to introduce or reacquaint students with the concept of due process, and to prepare them to view the videotape *...And Justice For All: An Open Justice Round Table*. The lesson begins with a review of the fourth, fifth, sixth, and eighth amendments by having students identify both the benefits and burdens that the criminal justice amendments provide to individuals and society. This is followed by a discussion of the expectations of fairness and equity that we have for court proceedings. Finally, in groups, students study the new vocabulary they will encounter in the videotape.

Benchmarks:

Identify benefits and challenges of diversity in American life (III, 2, HS, 1).

Using actual cases, evaluate the effectiveness of civil and criminal courts in the United States (III, 3, HS, 1).

Key Concepts:

- due process of law
- limited government

Instructional Resources:

Handout 1A and 1B
Chalk/White Board



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Sequence of Activities

1. Start the lesson by reviewing, or introducing, the basic content of the criminal justice amendments. Distribute the handout 1A, and have students work in pairs to complete the table.
2. Review the handout with the entire class, checking for understanding of the due process rights as well as recognition of the tension these rights create between the core democratic values of, for example, *liberty* and *the common good*.
3. On the chalk/white board, write, “What do you expect from our courts?” Ask each student to write a brief response. Elicit a sampling of student thoughts on the matter, and record them on the board. Possible responses include: truth, fairness, justice, equal treatment, and to be presumed innocent until proven guilty. Next, ask if they believe the courts are meeting their expectations. Probe for prior knowledge of controversial issues arising over court procedures: treatment of suspected terrorists, the exclusionary rule, *Gideon v. Wainwright*, and so on. Explain that protection of individual rights is not accomplished simply by the passage of constitutional amendments, but by never-ending diligence in recognizing injustice and seeking solutions. The courts are not any more immune to the challenges of diversity, the corruptions of power, or the contamination of individual prejudice, than the rest of society’s institutions. The lesson that follows will ask them to watch for examples of injustice and to propose remedies.
4. Divide students into groups. Distribute handout 1B. Tell students that this preliminary exercise will give them a better understanding of the videotape. Have students work together to complete their individual handout using textbook glossaries and dictionaries. When groups are finished, review answers to the exercise, clarifying any questions about concepts on the handout.

Assessment:

Each student should complete his or her own handout. These can be collected and checked for thoroughness and accuracy.



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Lesson Two: Video Analysis

Abstract:

In this lesson students will view a series of fictional courtroom proceedings and identify possible due process violations. Following a class discussion, students will hear the reactions of legal experts taking part in a round-table discussion. The lesson ends with students answering follow-up questions that address additional issues of fairness in the courtroom.

Benchmarks:

Identify benefits and challenges of diversity in American life (III, 2, HS, 1).

Using actual cases, evaluate the effectiveness of civil and criminal courts in the United States (III, 3, HS, 1).

Key Concepts:

- due process of law
- limited government

Instructional Resources:

Videotape: *...And Justice For All: An Open Justice Round Table*

TV/VCR

Handouts 2A, 2B, and 2C

Follow-up Questions

Sequence of Activities:

1. Distribute handouts 2A, 2B, and 2C (or pass them out one at a time). Instruct students that they will be watching three segments of a fictional trial. Each segment is followed by a round-table discussion by legal experts. While watching the first segment, students should use Handout 2A to record any action or event which they believe is a violation of due process. Stop the tape before the experts' analysis.
2. In groups, have students briefly share their observations.



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3. Expand the group discussion to a full class discussion to compare concerns, then watch the experts' discussion. Instruct students to add anything the experts note that the groups or class did not discuss.
4. Repeat with handouts 2B and 2C and the remaining segments on the videotape.
5. The final discussion should focus on these follow-up questions:
 - a) Several experts in the film mentioned that the perception of fairness in courtroom proceedings might be just as important as the reality. Why?
 - b) Why is it important to make juries as accurate a cross-section of the community as possible? How are states and the federal government trying to improve this? What are the possible advantages and disadvantages of these reforms?
 - c) In a trial, what are the responsibilities of the following participants to ensure that due process is achieved: judges, lawyers, jurors, witnesses? What can institutions such as law schools do to promote due process in court proceedings?
 - d) What are the goals of the adversarial system and how may these goals conflict with the goals of due process?

Assessment:

Each student should complete his or her own handout. These can be collected and checked for thoroughness and accuracy.

Follow-up questions can be assigned as homework before class discussion.

This lesson serves as background for a related lesson that will be assessed through individual position papers.



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Lesson Three: Jury Selection and Peremptory Challenges (case analysis)

Abstract:

In this lesson students will learn about the process of voir dire and the use of peremptory challenges. Through the study of three actual Supreme Court cases, students will gain the necessary background information for a later moot court lesson. As part of their case analysis, students will identify the key legal issues and summarize the major arguments. Finally, the students will debate the results of the three cases and discuss the impact of the decisions upon the U.S. court system.

Benchmarks:

Identify benefits and challenges of diversity in American life (III, 2, HS, 1).

Using actual cases, evaluate the effectiveness of civil and criminal courts in the United States (III, 3, HS, 1).

Explain why people may agree on democratic values in the abstract but disagree when they are applied to specific situations (III, 3, HS, 2).

Engage each other in elaborated conversations that deeply examine public policy issues and help make reasoned and informed decisions (VI, 2, HS, 1).

Key Concepts:

- due process
- equal protection
- individual rights
- justice
- limited government

Instructional Resources:

Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom*, Times Books-Random House, New York, 1994.

Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992.



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Jerold H. Israel, Yale Kamisar and Wayne R. LaFave, *Criminal Procedure and the Constitution*, American Casebook Series, West Group, St. Paul, 1999.

<http://caselaw.lp.findlaw.com>

<http://www.miclimb.net/content/main.html>

Handouts 3A, 3B, 3C, 3D, 3E, and 3F

Sequence of Activities:

1. While this lesson can stand alone, it is best used following the previous lesson where students view and analyze the "... And Justice For All" video.
2. Research shows that the use of outside resource people in teaching law-related concepts is very beneficial. Consider inviting an experienced trial attorney or judge to participate in this lesson, or the next. Their assistance explaining voir dire, peremptory challenges, and challenges for cause would be very beneficial. For assistance locating such a resource person, contact your local bar association, the State Bar of Michigan, or the Center for Civic Education through Law.
3. Distribute handout 3A, to be read either in class or assigned for homework.
4. Review the main points of the article with these guide questions:
 - a. What does the Sixth Amendment guarantee with regard to the right to a jury?
 - b. How do state and federal laws protect this right?
 - c. Define: voir dire, peremptory challenge and challenge for cause?
 - d. What is the purpose of the peremptory challenge process?
 - e. Why is there no limit on the number of challenges for cause and a limit on the number of peremptory challenges?
 - f. Why have some criticized the peremptory challenge process?
5. Distribute handouts 3B and 3C.
6. Divide the class into equal size groups of three or four students, providing each group with one of the three case summaries (handouts 3D, 3E, 3F). Obviously, individual case summaries can be assigned to multiple groups if necessary.



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7. Explain to the class that in the next lesson, they will be participating in a simulation of an actual case that went before the U.S. Supreme Court having to do with voir dire, and the use of peremptory challenges, *J.E.B. v. Alabama*. Tell them that before moving to that case, they will first examine three other cases that the Court decided before *J.E.B. v. Alabama*, each of which is similar in many ways, but also have important differences.
8. Explain that in the United States, appeals courts follow past decisions, or precedent, when they make new ones. In order for the law to be seen as stable and predictable, it is important that similar cases be decided in the same way.
9. Ask the class, “why is it necessary for the decision in a case before the courts to be predictable?” Or, ask the class to imagine a society where all court decisions are made in a vacuum, with no reference to previous decisions. Discuss the impact that this would have on the way individuals, businesses, and the government would behave.
10. Explain that there are times when the courts will reject precedent, and decide a case in a new way. *Brown v. Board of Education* (1954) is a classic example of the U.S. Supreme Court rejecting the precedent of “separate but equal,” which had been established in the earlier *Plessy v. Ferguson* (1896).
11. Instruct the groups that everyone should read the case summary assigned to the group, and then work together to prepare answers to the questions on handout 3B. Using those answers, everyone in each group will then complete the chart on handout 3C, and explain their answers to representatives of the other groups. Inform them that the information from all three cases will be useful as background material for the position paper that they will be assign concerning *J.E. B. v. Alabama*.
12. When all groups are finished, have groups share information on the three cases. One approach would be to form new groups, assigning at least one member of each of the three previous groups to each of the new groups. Each new group would spend time sharing their information with their new partners. Alternatively, each of the original groups could simply present their findings to the class as a whole.
13. Conclude the lesson with full-class discussion of these questions:
 - a. How do various Court members regard the peremptory challenge process?
 - b. From these three cases, what does the class see as the pros and cons of the peremptory challenge process?
 - c. Which of the three cases is the most important precedent with regard to peremptory challenges? Why?
 - d. How does the Equal Protection clause relate to the use of peremptory challenges?



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Assessment:

1. Student participation in the group and class discussions
2. Handout 3B.
3. The next lesson's moot court and position paper assignments can also be used to assess the students' understanding of the concepts from this lesson.



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Lesson Four: Moot Court

Abstract:

Using a case summary of *J.E.B. v. Alabama*, students will conduct a moot court simulation of the U.S. Supreme Court case that decided whether the precedent prohibiting the use of race as a basis for peremptory challenges extends to gender. Students will work in groups to prepare arguments on both sides of the case or will act as justices deciding the case. As a final assessment, students will write their own opinion about the Court's decision in a position paper structured in accordance with the MEAP extended response.

Benchmarks:

Identify benefits and challenges of diversity in American life (III, 2, HS, 1).

Using actual cases, evaluate the effectiveness of civil and criminal courts in the United States (III, 3, HS, 1).

Explain why people may agree on democratic values in the abstract but disagree when they are applied to specific situations (III, 3, HS, 2).

Engage each other in elaborated conversations that deeply examine public policy issues and help make reasoned and informed decisions (VI, 2, HS, 1).

Compose extensively elaborated essays expressing and justifying decisions on public policy issues (VI, 3, HS, 1).

Key Concepts:

- due process
- equal protection
- individual rights
- justice
- limited government



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Instructional Resources:

Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992.

Jerold H. Israel, Yale Kamisar and Wayne R. LaFave, *Criminal Procedure and the Constitution*, American Casebook Series, West Group, St. Paul, 1999.

<http://caselaw.lp.findlaw.com>

<http://www.miclimb.net/content/main.html>

Handouts 4A, 4B, 4C, 4D

Sequence of Activities:

1. Distribute handout 4A, the case summary of *J.E.B. v. Alabama*, read with students or assign as homework. It may be worth mentioning that in cases where there is a special interest in protecting the privacy of a party, in this case the involvement of a minor, courts have allowed cases to be captioned as with “J.E.B.” in place of a full name.
2. Discuss the facts and lower court opinions of the *J.E.B.* case using the following questions as guides:
 - a. What was the reason for the first trial in this case?
 - b. How did the state use its peremptory challenges in the case? Why do you think the state wanted an all-female jury?
 - c. Who is the petitioner in this case? What legal argument did he make about the use of peremptory challenges by the State?
 - d. How did the trial court rule on this argument and what was the result of the jury’s decision?
 - e. Why do you think the U.S. Supreme Court agreed to hear arguments in this case?
3. With this background, explain that students will now work in groups to present the arguments of the petitioner (J.E.B.) or the respondent (State of Alabama). Another group of students will act as U.S. Supreme Court Justices, and will hear the arguments presented by the attorney groups. The Justices group will render a decision regardless of the ruling of the actual Court.



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4. Divide the class into three groups.
5. Distribute handouts 4B and 4C to the appropriate groups. Instruct them that everyone is required to complete his/her own chart. The completed chart will be very helpful when writing their essays.
6. Alert the petitioner group that they will have the opportunity to deliver a rebuttal, and that they will need to prepare to do so.
7. Give the groups enough time to prepare a response to each question on the instruction guide and chart (at least ½ hour).
8. There are a few different ways to proceed with the moot court. The first would be to conduct one session involving the entire class. Using this scenario, all of the “justices” would be seated across the front of the room, facing the two groups of “attorneys.” Each side in the case would have a limited amount of time to make their arguments (in an actual Supreme Court session each side is limited to thirty minutes). “Justices” are allowed to interrupt with questions as long as it is done politely just as happens in actual Supreme Court proceedings (except for the polite part). After each side presents their arguments, the justices retire to deliberate and vote. The vote is then announced, and each justice will explain why they voted the way they did.

Another way to conduct the moot court would be to, following step 7, form triads by grouping one student from each of the three larger groups into new threesomes. Each triad would conduct their own moot court following the same procedures as the larger version, with the justices still sharing their opinions with the entire class at the end to share different arguments heard and perspectives.

9. After everyone has had a chance to share their opinions, tell the class that the actual decision of the Court was given April 19, 1994. By a vote of 5 – 4, the Court ruled that the Constitution's guarantee of equal protection bars the exclusion of potential jurors on the basis of their sex, just as it bars exclusion on the basis of race. Reassure those in the class who decided differently from the Court that minority opinions are not seen as “wrong answers,” but simply as a different interpretation of the facts of the case and the Constitution. Today’s minority opinion can become tomorrow’s opinion of the Court with only the change of a Justice or two.
10. Debrief the activity by discussing the following questions with the class:
 - a. The goals of the judge, and each side in a trial are often quite different. What differences might they have regarding jury selection in general, as well as in relation to this case in particular?



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- b. What do you see as being the strongest arguments given by each side? Weakest? Defend your answers with substantive reasons from the related precedents, or the case itself, as well as your own experiences.
 - c. Should the Supreme Court ban peremptory challenges based on religion or disability? Why or why not?
11. Finally, in preparation for the culminating writing assignment, have students read the opinions issued by the Court regarding *J.E.B.* Of particular interest for purposes of the writing assignment are the majority opinion written by Justice Blackmun, the concurring opinion by Justice O'Connor, and the dissenting opinions by Chief Justice Rehnquist and by Justice Scalia. All can be found at <http://laws.findlaw.com/us/000/u10411.html>. You may need to forewarn your students about the sarcastic tone with which Justice Scalia opens his dissent.

Assessment:

Handout 4D describes a writing assignment on the *J.E.B.* case. Students are asked to give their own opinions about the decision. Review each required section of the assignment with the class. This assignment follows the MEAP extended response format.

Handouts

Due Process Rights in the Constitution*



Read through the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution. For each one, rewrite the underlined portions in your own words, then determine the advantages and disadvantages of including such a protection for the accused. Amendments Six and Eight are on the back.

	In Your Own Words	Benefit for Individual/Society	Drawback for Individual/Society
<p>FOURTH AMENDMENT The <u>right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and</u> no <u>Warrants shall issue, but upon probable cause,</u> supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.</p> <p>FIFTH AMENDMENT <u>No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...;</u> <u>nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;</u> <u>nor shall be compelled in any criminal case to be a witness against himself,</u> <u>nor be deprived of life, liberty or property, without due process of law;</u> <u>nor shall private property be taken for public use, without just compensation.</u></p>			

Due Process Rights in the Constitution* (*continued*)



	In Your Own Words	Benefit for Individual/Society	Drawback for Individual/Society
<p>SIXTH AMENDMENT In all criminal prosecutions, <u>the accused shall enjoy the right to a speedy and public trial, by an impartial jury</u> of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,</p> <p>and <u>to be informed of the nature and cause of the accusation;</u></p> <p><u>to be confronted with the witnesses against him;</u></p> <p><u>to have compulsory process for obtaining witnesses in his favor,</u> and</p> <p><u>to have the assistance of counsel for his defense.</u></p> <p>EIGHTH AMENDMENT <u>Excessive bail shall not be required, nor excessive fines imposed,</u></p> <p><u>nor cruel and unusual punishments inflicted.</u></p>			

*Handout from *Lessons In Law: Homicide, Life on the Street*, an excellent resource for teachers produced by Street Law, Inc. in partnership with Court TV. Clips from the popular television series *Homicide: Life on the Street* are used to portray issues involving aspects of the law. For information go to www.streetlaw.org/homicide.html.

Vocabulary Inquiry

Match the words or phrases in Column A with the definitions in Column B

Column A

- _____ decedent
- _____ adversarial
- _____ grand jury
- _____ voir dire
- _____ damages
- _____ probative
- _____ challenge for cause
- _____ jury pool
- _____ peremptory challenge
- _____ deep pockets
- _____ circumvent
- _____ precedent
- _____ canon
- _____ petit jury
- _____ due process
- _____ bar association
- _____ prejudicial

Column B

1. professional organization of lawyers
2. a judicial decision which serves as a rule for future decisions in similar cases
3. likely to form bias or opinion without evidence or proof
4. to detour or go around
5. a group of jurors who hear preliminary evidence to decide if there is sufficient reason to charge a person with a crime
6. a deceased person
7. legal proceedings are run in accordance with established rules designed to protect individual rights
8. money paid to make up for injuries suffered
9. the person or organization best able to pay damages in a lawsuit
10. examining a potential juror to determine competence or possible bias
11. a prospective juror is removed for not meeting the government's legal requirements or is biased.
12. concerning two parties working against each other
13. a number of potential jurors chosen randomly from the community
14. excluding a potential juror without giving a reason
15. designed to provide proof or evidence
16. a general rule or law
17. citizens selected to determine the facts in a trial

Vocabulary Inquiry

Match the words or phrases in Column A with the definitions in Column B

Column A

- 6 decedent
- 12 adversarial
- 5 grand jury
- 10 voir dire
- 8 damages
- 15 probative
- 11 challenge for cause
- 13 jury pool
- 14 peremptory challenge
- 9 deep pockets
- 4 circumvent
- 2 precedent
- 16 canon
- 17 petit jury
- 7 due process
- 1 bar association
- 3 prejudicial

Column B

- 1. professional organization of lawyers
- 2. a judicial decision which serves as a rule for future decisions in similar cases
- 3. likely to form bias or opinion without evidence or proof
- 4. to detour or go around
- 5. a group of jurors who hear preliminary evidence to decide if there is sufficient reason to charge a person with a crime
- 6. a deceased person
- 7. legal proceedings are run in accordance with established rules designed to protect individual rights
- 8. money paid to make up for injuries suffered
- 9. the person or organization best able to pay damages in a lawsuit
- 10. examining a potential juror to determine competence or possible bias
- 11. a prospective juror is removed for not meeting the government's legal requirements or is biased.
- 12. concerning two parties working against each other
- 13. a number of potential jurors chosen randomly from the community
- 14. excluding a potential juror without giving a reason
- 15. designed to provide proof or evidence
- 16. a general rule or law
- 17. citizens selected to determine the facts in a trial

Video Analysis



As you watch the courtroom scenes from the videotape, record any actions or events that you think violate due process in the “student observations” column. Use the other column to record the opinion given by the experts during the discussion segments.

JURY SELECTION

Student Observations

What the Experts Saw

Video Analysis



As you watch the courtroom scenes from the videotape, record any actions or events that you think violate due process in the “student observations” column. Use the other column to record the opinion given by the experts during the discussion segments.

TESTIMONY

Student Observations

What the Experts Saw

Video Analysis



As you watch the courtroom scenes from the videotape, record any actions or events that you think violate due process in the “student observations” column. Use the other column to record the opinion given by the experts during the discussion segments.

CLOSING ARGUMENTS

Student Observations

What the Experts Saw

Jury Selection, Voir Dire and Peremptory Challenges

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The authors of the 6th Amendment established that 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...*” State and federal laws outline the procedures for selecting such impartial juries. Jury pools, or lists of prospective jurors, are prepared randomly from rolls of registered voters, and drivers, and are now starting to include those with I.D. cards and those receiving a variety of social services.

A process called *voir dire* (vwär dēr’, “to speak the truth”) is used to select a panel of jurors to hear a particular case. Prospective jurors in a trial are questioned by attorneys, or the judge, to reveal any potential for the lack of impartiality. If it is believed that the potential juror cannot be impartial, they could be *challenged for cause*. In addition, each side has a specified number of *peremptory challenges*, for which no reason ordinarily is given for dismissing the potential juror. While the Constitution does not guarantee the right to peremptory challenges, the practice... “has very old credentials”¹ and was an established practice under English common law, which was then transplanted to the American colonies.

The purpose of peremptory challenges is to eliminate extremes of partiality on both sides by allowing jurors to be excused for a possible partiality that does not fit the provable and legally recognized bias of a challenge for cause. Through the years, however, some have reached the courts claiming improper use of peremptory challenges to exclude groups of people from participation on juries. At risk is equal protection for the defendant and potential jurors, as well as the necessity of maintaining the public’s perception of due process in the courts.²

1. What does the Sixth Amendment guarantee with regard to the right to a jury?
2. How do state and federal laws protect this right?
3. Define: voir dire, peremptory challenge and challenge for cause?
4. What is the purpose of the peremptory challenge process?
5. Why is there no limit on the number of challenges for cause and a limit on the number of peremptory challenges?
6. Why have some criticized the peremptory challenge process?

¹ <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=380&invol=202#221>, p. 3.

² Stephn J. Adler, *The Jury*, Random House, New York, 1994, p. 4

Reviewing Precedent

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Before turning to the case of *J.E.B. v. Alabama* (1994), it is necessary to review prior cases dealing with similar issues, much the way actual appeals courts do. The cases for review are *Swain v. Alabama* (1965), *Batson v. Kentucky* (1986), and *Hernandez v. New York* (1991).

Instructions:

Read the summary of the case your group has been assigned. Working together, prepare answers to the questions below. Each member of the group should record their answers in the spaces provided on handout 3C, and be prepared to explain them to others.

Questions for Case Analysis¹:

1. What are the facts of the case?
2. What were the lower courts' decisions?
3. What is the constitutional issue the Supreme Court must decide in this case?
4. What was the Supreme Court's decision in the case (e.g. who won? What was the vote?)?
5. What reasons did the majority use to support its decision in the case?
6. If there were important concurring or dissenting opinions, what reasons did the justice(s) use to support their views?
7. Do you think the Court made a wise decision in the case? Why or why not? [Your group does not have to agree on the answer to this question, but you must be able to explain the various positions of your group members to others.]

¹ *Wisconsin v. Mitchell Unit*, Constitutional Rights Foundation Chicago, 1993, p. 9-10.

Precedents for *J.E.B. v. Alabama*



	<i>Swain v. Alabama</i>	<i>Batson v. Kentucky</i>	<i>Hernandez v. NY</i>
Facts and Rulings of Lower Courts			
Legal Issues			
Supreme Court's Decision and Vote			
Reasons Given by the Majority			
Concurring/Dissenting Reasons			
Wise Decision? Why? Why Not?			

Swain v. Alabama (1965)

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The petitioner, Robert Swain, a 19-year old black man, was indicted and convicted of the rape of a 17-year old white girl in Talladega County, Alabama. An all-white Circuit Court jury convicted Swain and sentenced him to death. Swain appealed to the Alabama Supreme Court, claiming that Talladega County had a record of exclusion of black jurors from jury panels. His claim was based on statistics such as the following:

1. While black males over 21 constituted 26% of all males in that age group in the country, only 10-15% of jury panels from 1953 – 1965 were black.
2. Although there had been an average of 6 to 7 blacks in criminal petit jury pools, no black had ever actually served on a petit jury since 1950.
3. In Swain’s case, there were 8 blacks in the petit jury pool, but none actually served, 2 being exempt and 6 being struck by the prosecutor in the process of selecting the jury.

The Alabama Supreme Court heard Swain’s case, but affirmed his conviction for the following reasons:

1. The defendant in the case is not constitutionally entitled to a proportionate number of his race on the trial jury or in the jury panel.
2. The defendant did not prove any evidence of discrimination by the county’s jury commissioners or the prosecutors.

The U.S. Supreme Court heard arguments in the case to determine if exclusion of black jurors from jury panels, and specifically the petitioner’s, was the result of racial discrimination. In the 6-3 decision for the respondent, the State of Alabama, Justice White upheld the time-honored common-law method of peremptory challenges that Alabama contended afforded “a suitable and necessary method of securing juries which in fact and in opinion of the parties are fair and impartial.”¹ The Court went on to observe, however, that the prosecutor could not use these peremptory challenges to exclude blacks from the jury for reasons unrelated to the case, but that the burden of proof was on the petitioner to prove that the prosecutor had been purposefully discriminatory in eliminating blacks from the panel.

In his dissent, Justice Goldberg wrote that while peremptory challenges are commonly used in this country, there is no constitutional guarantee to challenge peremptorily. In fact, the Court has permitted numerous limitations upon the use of the peremptory challenge, for instance, allowing Congress and state legislatures to limit the number of peremptory challenges on both sides. To conclude he restated the importance of upholding the 14th Amendment due process rights, and quoted a previous U.S. Supreme Court decision from *Smith v. Texas*: “*It is part of the established tradition...that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution...but is at war with our basic concepts of a democratic society...The Fourteenth Amendment requires that equal protection to all must be given – not merely promised.*”²

¹ <http://caselaw.lp.findlaw.com>, Swain v. Alabama, 380 U.S. 202 (1965), p. 3

² findlaw.com, Swain v. Alabama, p. 11

Batson v. Kentucky (1986)

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Batson, a black man, was tried for second-degree burglary and receiving stolen goods. During the *voir dire*, the prosecutors' peremptory challenges removed all four black jurors on the jury panel after hearing instructions from the judge that they were entitled to use their peremptory challenges "to strike anybody they want to."¹ Batson moved for a discharge of the jury, asserting that the removal of all black panelists violated his 6th Amendment right to a jury drawn from a cross-section of the community as well as his 14th Amendment right to equal protection of the law. The trial judge denied the motion and Batson was convicted on both counts. The Supreme Court of Kentucky denied Batson's appeal and affirmed the lower court's verdict.

The U.S. Supreme Court agreed to hear the case to decide this issue: does the use of peremptory challenges to remove blacks from juries on the basis of their race violate the Equal Protection clause? The U.S. Supreme Court ruled 7-2 in favor of Batson. In his majority opinion, Justice Powell wrote that "the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection clause"...and that the prosecutor cannot "challenge potential jurors solely on account of their race or the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."² Further responding to Kentucky's argument that "unfettered use of the peremptory challenge is of vital importance to the criminal jury system."³ Justice Powell stated that "the reality of practice...shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors...In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."⁴ The Batson decision was limited in three ways. It applied only to the prosecution, criminal trials and only to challenges in which the excluded juror was the same race as the defendant.⁵

In his concurring opinion, Justice Marshall went so far as to advocate banning all peremptory challenges, stating that it was easy for prosecutors to assert facially neutral reasons for striking a juror that would be very difficult to challenge.⁶

Chief Justice Burger dissented, stating that this new rule against challenges "on the basis of race" could be extended to exclusions on the basis of sex, age, religious or political affiliation, mental capacity, number of children, living arrangements and employment in a particular industry or profession." Justice Rehnquist joined Burger's dissent, writing that he did not see a threat to Equal Protection, as long as the State excluded potential jurors of any race, white, Hispanic, Asian and black equally in cases involving defendants of the same race.⁷

¹ Jerold H. Israel, Yale Kamisar and Wayne R. LaFave, Criminal Procedure and the Constitution, American Casebook Series, West Group, St. Paul, Minn., 1999 p. 611

² Israel, Kamisar and LaFave, p. 612

³ Israel, Kamisar and LaFave, p. 615

⁴ Israel, Kamisar and LaFave, p. 616

⁵ Kermit L. Hall, ed., The Oxford Companion to the Supreme Court, Oxford, New York, 1992, p. 67.

⁶ Israel, Kamisar and LaFave, p. 617

⁷ Israel, Kamisar and LaFave, p. 618 and 620

Hernandez v. New York (1991)

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The petitioner, Dionisio Hernandez, was convicted on two counts of attempted murder and two counts of criminal possession of a weapon. The defense counsel objected that the prosecutor used four peremptory challenges to exclude Latino potential jurors. Two of the Latino jurors who were challenged had brothers who had criminal convictions, one being prosecuted by the same District Attorney's office. The focus of the claim was on the other two Latino jurors. The prosecutor defended his challenges of these two jurors by maintaining that, as Spanish speakers, they would be unable to accept the interpreter's translation of what was said by each witness and that this would have an undue impact upon the jury. He also pointed out that because all complainants and witnesses in the trial were Hispanic, there would be "absolutely no reason for me to want to exclude Hispanics..."¹ The trial court rejected the defense counsel's motion and the N.Y. Appellate courts affirmed the lower court's decision, holding that the prosecutor had offered a legitimate, race-neutral basis for challenging the jurors in question.

The U.S. Supreme Court took the case to decide if the test laid down in *Batson v. Kentucky* applied to this case. That test required these two rules: 1. the defendant had the burden of proof to show that the prosecutor exercised peremptory challenges on the basis of race and 2. If shown, the burden shifts to articulate a race-neutral explanation for striking jurors.

In a 6-3 decision for New York, Justice Kennedy wrote: "The prosecutor here offered a race-neutral basis for these peremptory strikes...the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos...While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a ...violation of the Equal Protection Clause."²

Blackmun, Stevens and Marshall, dissenting, concluded that the prosecutor's explanation "was insufficient for three reasons. First the justification would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons...the prosecutor's concern could easily have been accommodated by less drastic means...the jury could have been instructed that the official translation alone is evidence...if the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause."³

¹ <http://caselaw.lp.findlaw.com>, Hernandez v. New York (1991), p. 3

² Jerold H. Israel, Yale Kamisar and Wayne R. LaFave, Criminal Procedure and the Constitution, American Casebook Series, West Group, St. Paul, Minn., 1999, p. 615

³ Israel, Kamisar and La Fave, p. 615; Findlaw.com, Hernandez, p. 8

***J.E.B. v. Alabama ex rel, T.B. (1994)*¹**

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On behalf of the mother (referred to in the case simply as “T.B.”) of a minor Child, the State of Alabama filed a complaint for paternity and child support against J.E.B. Jury selection for the trial began on October 21, 1991. The pool of 36 potential jurors consisted of 12 males and 24 females. Two of the men and one woman were excused for cause, leaving only 10 males out of the 33 potential jurors. Nine of the remaining ten men were then removed by the State, using peremptory challenges. J.E.B. used all but one of his challenges to remove female jurors, the result of which was an all female jury. The attorney for J.E.B. objected to the State’s use of peremptory challenges, claiming that they were used only against men and only on the basis of gender, thus violating the Equal Protection Clause of the Fourteenth Amendment. The court denied the claim and the trial proceeded with an all-female jury. J.E.B. was found by the jury to be the father of the child and ordered him to pay child support. The Alabama Court of Appeals upheld the jury’s decision, and the Supreme Court of Alabama declined to review the case. J.E.B.’s appeal to the U.S. Supreme Court was accepted, and oral arguments were heard on November 2, 1993.

J.E.B. (referred to as the petitioner) argued that the use of peremptory strikes based solely on the issue of gender is a violation of the Fourteenth Amendment’s Equal Protection Clause, just as the Court had ruled in *Batson v. Kentucky* regarding their use solely on the basis of race. If allowed, the use of peremptory challenges based solely on sex would perpetuate a long history of discrimination against women and their exclusion from the jury.

The State of Alabama (the respondent) argued that the level of gender-based discrimination over the nation’s history was not the same as that of race-based discrimination. While issues of race deserved the Court’s strict scrutiny, the respondent argued that the gender issues in this case did not. The Fourteenth Amendment, argued the State, was specifically addressing the issue of race, not gender. Furthermore, the respondent argued, the use of peremptory challenges based on gender was essential to protecting T.B.’s right to a fair and impartial jury. The respondent argued that men on the jury would be far more sympathetic than women to the arguments of another man defending himself against accusations of fathering a child out of wedlock. Using gender as the basis for a peremptory challenge, the state argued, was merely recognition of the differences in the experiences of the two sexes, and was not degrading as in the case of racial discrimination.

Finally, the respondent argued that the Court taking the side of the petitioner would serve to destroy the peremptory challenge as an essential tool for securing fairness in trials. Such challenges, the State said, exist so that potential jurors can be dismissed without giving a reason. Not meant to be devious or discriminating, the very old practice allows the trial lawyer to determine a potential juror’s sympathies through experienced hunches and educated guesses based upon a juror’s responses at voir dire. Forcing the lawyer to prove that a challenge was not based on the sex of the juror, would require the lawyer to provide some other reason, which would make the peremptory challenge no different than a challenge for cause.

Question for the Court:

Was the use of peremptory challenges to exclude jurors solely because of their gender a violation of the equal protection clause of the Fourteenth Amendment?

¹ <http://laws.findlaw.com/us/000/u10411.html>

Moot Court: Attorney Instructions

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Attorneys for the petitioner (J.E.B.):

Arguments will center on the position that the State of Alabama unfairly used its peremptory challenges to remove all males from the jury during the petitioner's paternity and child support trial. Petitioner will also argue that the Court's previous ruling prohibiting peremptory strikes based on race extends to gender.

Attorneys for the respondent (Alabama):

Will argue that the Supreme Court's previous ruling prohibiting peremptory challenges based on race does not extend to gender. Respondent will also highlight the danger of undermining the very practice of peremptory challenges.

All Attorneys:

Must include the following components in oral arguments to the court (use the accompanying chart to list your arguments):

- Introduce yourself and other presenting colleagues and tell which side you are representing.
- Summarize the legal issue before the court.
- Make a clear, brief statement of your position on the key legal issue.
- Use at least two facts from the case summary or from your own general knowledge and explain how these facts support your position.
- Review your notes on related cases and explain how majority or dissenting opinions in these cases support your position.
- Anticipate arguments the other side might make and be prepared to rebut them.
- Choose at least one core democratic value, explain what it means and explain how this value supports your position.
- End your argument by explaining how a decision would benefit your client and society as a whole.

(over)

**..And Justice For All
Handout 4B**

Name _____

Facts				
Precedents				
Opposing Arguments				
Rebuttals				
Core Democratic Values				

Moot Court: Supreme Court Justice Instructions

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In preparation to hear arguments in a case, Supreme Court Justices review cases and documents, and identify the questions they want to ask each side. During the oral arguments, Supreme Court Justices often ask lawyers questions, interrupting their arguments with probing questions. Working with your fellow justices, prepare your questions by completing the tasks below. Use the accompanying chart to assist your organization:

- Identify the key legal issue to be decided by you.
- What are the main arguments you expect each side to make?
- What facts do you want clarified in the case?
- Review your notes on related cases and identify which decisions would be used to support each side’s position. You may also want to review the content of the Sixth Amendment and the Equal Protection clause of the Fourteenth Amendment.
- Identify core democratic values that could be used to support each side.

(over)

**..And Justice For All
Handout 4C**

Name _____

Main Arguments				
Precedents (petitioner)				
Precedents (respondent)				
Core Democratic Values				
Questions				

Writing Assignment



Now you have the opportunity to tell what you really think about the J.E.B. decision.

Tell whether you agree or disagree with this statement:

“The U.S. Supreme Court made a wise decision in *J.E.B. v. Alabama*.”

Your response to the statement above must include the following points:

1. Do you agree or disagree with the decision of the Court? Make sure you include a clear statement of the legal issue before the Court. (10 points)
2. List two facts or arguments from the case that supports your statement and explain how these facts or arguments support your position. (20 points)
3. Explain a U.S. Supreme Court majority or dissenting opinion that is related to this issue and explain how that opinion supports your position. (20 points)
4. Present an argument that could be used by the opposing position and explain why the opposing, or alternative, argument would be less effective. (10 points)
5. Give at least one argument that demonstrates how your decision would benefit American society as a whole. *Refer to core democratic values in your answer, making sure to explain the meaning of the specific core democratic value you choose.* (20 points)

Writing Requirements: (15 points)

1. Complete all of the above points.
2. Your paper must be written in full sentences and paragraphs with correct grammar, spelling and punctuation. (PROOFREAD!)
3. The paper should be typed or written legibly and double-spaced.

Total: 95 points



... And Justice For All



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Acknowledgments

The videotape *...And Justice For All: An Open Justice Round Table*, was produced by the Open Justice Commission of the State Bar of Michigan, in cooperation with WKAR-TV in East Lansing. Additional copies of the tape are available for purchase at \$20 per copy, and may be ordered online at http://www.michbar.org/oj/OJC_reports.html.

The accompanying lessons were written by teacher Cheryl Grace, Ann Arbor Community High School, and edited by Jim Troost, Director of Programs, Center for Civic Education through Law.

The project was supported by a grant from the Michigan Bar Foundation.

For more information on *Lessons In Law: Homicide, Life on the Street*, and other fine materials and resources for teachers of law-related subjects go to <http://www.streetlaw.org/homicide.html>.

Teachers interested in more information and resources about the American jury system should enjoy exploring <http://www.crfc.org/americanjury>, produced by the Constitutional Rights Foundation Chicago.

For those teachers and students intrigued by the moot court simulation contained in these lessons, the Center for Civic Education through Law conducts the annual *Michigan High School Mock Trial Tournament*. Part of the *National High School Mock Trial Championship*, the program gives students the opportunity to try their hands as attorneys or witnesses while arguing a case in real courtrooms, with members of the legal community serving as judges. More information can be found on the Center's website www.miciviced.org, listed under *Programs*.

Finally, the Center conducts an annual law-related civic education conference, *Educating for Citizenship: Content and Strategies*, in the first week of December. The conference features sessions for teachers, attorneys, school resource officers, elected officials, in short... everyone involved in educating Michigan's young people in how to be responsible citizens. Attendees learn from the finest in the field from around the state, around the country, and around the world. More information, including registration details, can be found on the Center's website www.miciviced.org, listed under *Educating for Citizenship*.