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ABSTRACT

"Update on the Courts," a resource for civic education, helps teach secondary school students about today's important Supreme Court and other judicial decisions, the legal issues involved, and the impact of the decisions on the students' lives. This issue features a lesson on copyright laws, a case overview and lesson on sexual harassment, and an overview of a case dealing with jury selection. (RJC)

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[Copyright, Jury Selection, and Sexual Harrasment]

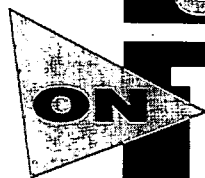
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## UPDATE



## THE COURTS

American Bar Association Special Committee on Youth Education For Citizenship

## Editor's Note

As the Supreme Court takes up the work of its new term, veteran Court watchers are also hard at work, attempting to discern where the Court might be headed, and trying to see if old alliances will hold or give way to new ones.

One early decision that surprised many—more for its swiftness than its result—was *Harris v. Forklift Systems*. Whether or not this unanimous decision signals a return to consensus-building, it was an indication that the Court was willing to take a stand that was clear, definite and unequivocal. This issue of *Update on the Courts* includes treatment of this case as well as a classroom activity that helps teachers approach the subject of sexual harassment in a thoughtful and relevant manner.

Of the cases that the Court has agreed to hear as this issue goes to press, one of the most closely watched will be *Kiryas Joel Village v. Grumet*. This case involving a New York school allows the Court once again to revisit (as it did last term in

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## Copyright

### 2 Live Crew v. Acuff-Rose Music, Inc.

Docket No. 92-1292, argued November 9, 1993

by Jack C. Doppelt

Federal copyright law is intended to give creators exclusive rights to their works, which they can then sell or license for financial gain. The "fair use" provision in the copyright law allows others to use parts of an original creation without infringing the copyright for such purposes as "criticism, comment, news reporting, teaching, scholarship or research."

This case involves a musical parody of a song in which the parody simulates the name, the sound, and one verse of the original while poking fun at it and making money off it. The Supreme Court is being asked to resolve whether the parody constitutes "fair use."

## ISSUE

The sole issue in the case is whether a commercial parody of the song "Oh, Pretty Woman" by the rap music group 2 Live Crew was a "fair use" under federal copyright law.

## FACTS

For three decades, "Oh, Pretty Woman" has been a rock and roll

classic and a moneymaker. In 1964, the co-authors, Roy Orbison and William Dees, assigned their rights to the song to Acuff-Rose Music, Inc. ("Acuff-Rose") which registered the song for copyright protection. Twenty-five years later, in June 1989, the well-known rap music group 2 Live Crew released an album entitled "As Clean As They Wanna Be." The album included a parody of "Oh, Pretty Woman" entitled "Pretty Woman."

The melodies were substantially the same, as were the first verses. The remaining three verses were purposely grittier than the original. The pretty woman in the 2 Live Crew version became a "big hairy woman," then a "bald headed woman," and, finally, a "two timin' woman."

In July 1989, a representative of 2 Live Crew notified Acuff-Rose of the parody. Over Acuff-Rose's written objection, 2 Live Crew continued to sell the album containing the parody.

Acuff-Rose filed suit in federal district court alleging that 2 Live Crew willfully infringed and commercially exploited its copyright.

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## Editor's Note

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*Zobrest* and *Lamb's Chapel*) the delicate relationship between church and state.

The Court also gets another chance to take on the highly charged issue of abortion, but in a rather roundabout way. In *NOW v. Scheidler*, the Court is asked to decide if the federal Racketeer Influenced and Corrupt Organizations Act (RICO) can be used to stop attempts by antiabortion forces to shut down abortion clinics.

Be sure to watch our next issue for coverage of these and other significant cases of the 1993-94 Term.



## UPDATE ON THE COURTS

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## Copyright

(continued from page 1)

The district court granted 2 Live Crew's motion for summary judgment and dismissed the complaint, finding that the parody was a non-infringing "fair use" of the original. 754 F. Supp. 1150 (M.D. Tenn.1991).

A divided Sixth Circuit Court of Appeals reversed and remanded, holding that the "blatantly commercial purpose of the derivative work... prevents this parody from being a fair use." The dissent argued that the "hopelessly vulgar" parody was "criticism" with a vengeance" whose message should not be suppressed through copyright protection. That message "(done in an African-American dialect) was clearly intended to ridicule the white bread original." 972 F.2d 1429 (6th Cir.1992). After the Court of Appeals denied 2 Live Crew's petition for rehearing *en banc*, the Supreme Court granted their petition for certiorari on March 29, 1993.

## BACKGROUND

Parody has always given copyright protection a run for the money. On the one hand, its bite and wit convey just the criticism and comment that "fair use" is intended to exempt from copyright protection. On the other hand, its derivative nature and intended sting leave behind the mark of a parasite, sucking some of the creative juices from the original.

Federal copyright law provides statutory guidance for the factors to be considered in determining if a particular use of copyrighted material—parody or otherwise—is fair and, therefore, not infringing. The factors include (1) the purpose, character and commercial nature of the use, (2) the nature of the copyrighted work, (3) the extent of the portion

used, and (4) the effect on the market for the copyrighted work.

In weighing these factors, the district court and the Sixth Circuit dissent came out in favor of fair use; the Sixth Circuit majority came out for infringement. The parties ask the Court simply to reset the scale and consider the factors anew. Only one of the *amicus* briefs urges the Court to venture beyond a re-balancing to draw First Amendment considerations into the calculus.

If the Court chooses only to reweigh the factors or to defer to the balancing struck by either of the lower courts, its decision may be of minimal precedential significance. If it puts its imprimatur on one factor over the others or if it singles out the genre of parody for special treatment, the decision could be of greater consequence.

2 Live Crew and the *amici* supporting them argue that the appellate court gave too much weight to the commercial nature of the parody and not enough weight to the unproven and unlikely effect on the existing or potential market for Roy Orbison's original song. They argue that, imitation being a high form of flattery, a commercially successful 2 Live Crew parody would, if anything, enhance the value of Orbison's original.

Acuff-Rose argues that it would be a mistake for the Court to give parody special copyright treatment beyond that given news reporting and scholarship. It maintains that the four statutory factors for "fair use" must be heeded for parodies to ensure that they do "not unfairly appropriate the commercial value of copyrighted music merely because they make humorous modifications to the lyrics."

## SIGNIFICANCE

A Supreme Court decision against 2 Live Crew's parody would not likely

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# TEACHING STRATEGY

by Jack Hanna

## OVERVIEW

In this lesson, students will define property and identify different types of property. They will consider whether it is appropriate to use other people's property, and they will apply fair use considerations to the parody of Roy Orbison's song, "Oh Pretty Woman," recorded by 2 Live Crew, an issue now before the Supreme Court in the case of Luther W. Campbell, Christopher Wongwon, Mark Ross and David Hobbs, professionally known as The 2 Live Crew, and Luke Skywalker Records v. Acuff-Rose Music, Inc.

## OBJECTIVES

At the end of this lesson, students will be able to:

1. Understand and identify types of real, personal, and intellectual property.
2. Understand what "fair use" means as an exception to the copyright laws.
3. Apply fair use standards to a parody of a popular song and decide if it violates the song's copyright.

## RESOURCES

Copies of the Student Handout for each student and tapes of both of the songs at issue will be needed. An English or literature teacher could provide help in identifying and explaining some well-known parodies. In addition, a local attorney and/or the school district attorney will be helpful in providing insight and background.

## PROCEDURES

1. Read students the following definitions:

*Real Property:* Buildings, land and things attached to land.

*Personal Property:* Moveable property, articles associated with a person, tangible items that often can be worn or carried.

2. Write "Real Property" and "Personal Property" at the top of the blackboard. Ask students to identify as many items of personal and real property as they can. List the items under the appropriate heading.

3. Ask students if it is OK to take or use the property of another in the following situations:

a. Shaquille takes Michael's basketball without asking and returns it without Michael ever missing it. Is it OK? Is it a crime?

b. Billy takes Barbara's bicycle and uses it to deliver newspapers, a job for which Billy is paid. Barbara never finds out. Is it OK? Is it a crime?

- c. Tasha takes Wilhelm's car and uses it to deliver pizzas because her car is broken down. She returns the car with the same amount of gas, and Wilhelm never knows. Is it OK? Is it a crime?
  - d. Sam, a house party DJ, secretly records a song by the local rap group, "True II Form," which he incorporates into his house party mix. The song becomes the signature of his parties, and his business increases substantially. "True II Form" never knows. Is it OK? Is it a crime?
4. Write "Intellectual Property" on the blackboard, and read the following definition.

*Intellectual property:* Property generated through the creation of discoveries, inventions and works of art. The creator of such work usually owns a copyright in the work which gives him or her the right to control the copying, distributing, performing, displaying and adapting of the work. A copyright can be sold.

## VOCABULARY/CONCEPT LIST

*Copyright*—the right belonging to the creator of an intellectual property to control the copying, distributing, performing, displaying, and adapting of the work

*Intellectual property*—property generated through the creation of discoveries, inventions, and works of art

*Melody*—musical sounds in agreeable succession or arrangement

*Parody*—a humorous imitation of an original work designed to make fun of it

*Personal property*—moveable property that can usually be worn, carried or transported

*Real property*—buildings and land

*Riff*—a melodic phrase constantly repeated

5. Ask students to identify examples of intellectual property and list them on the blackboard. The list will probably include records, inventions, books, CDs, plays, sculpture pieces, songs, videotapes, etc.
6. Read students the definition of parody: a humorous imitation of an original work designed to poke fun at the original work.  
If possible, invite an English or literature teacher to read from selected parodies and explain their meaning.  
Ask students to identify any parodies of popular songs they have heard. One example is Weird Al Yankovic's "Eat It," a parody of Michael Jackson's "Beat It."
7. Distribute the Student Handout which explains the "fair use" exception to the copyright owner's exclusive control of the use of his/her work product. Discuss it with the class. If possible, have your school district's attorney come to your class to explain "fair use."
8. Divide the class into four groups. Help each group select a recorder to jot down the important parts of the group's discussion, a reporter to announce the groups findings, a timekeeper, and a facilitator to insure that everyone gets a chance to participate.

Tell each group that it must determine whether the rap group 2 Live Crew violated copyright laws when it recorded a parody of Roy Orbison's song "Oh, Pretty Woman."

#### *Facts of the Case:*

In 1989, 2 Live Crew released an album, "As Clean As They Wanna

## STUDENT HANDOUT

### *FAIR USE*

Section 107 of the Copyright Act, 17 U.S.C. § 107 (Supp. 1993) provides:

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- a. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- b. the nature of the copyrighted work;
- c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Be," which included a version of the song "Oh, Pretty Woman," written by Roy Orbison and William Dees. The 2 Live Crew version of the song featured the same melody and used the same first verses as the 1964 original, as well as the guitar riff that opens the song and is repeated throughout. They also are making money though sales of this song. Acuff-Rose Music, Inc., the company that bought the copyright to the original song from Orbison and Dees, objected to the use of their song as a parody, the purpose of which, according to 2 Live Crew, was to make fun of the "white bread" original. Acuff-Rose sued for copyright infringement, claiming violation

of all four fair use standards, especially number four.

2 Live Crew claim their parody has no effect on the potential market for, or value of, Acuff-Rose's song and that parodists will not survive if they have to seek approval from those whose works they parody.

Ask students, with parents' permission, to listen to the songs at home, or seek permission to play parts of the songs in class prior to completing this activity.

9. Have each group apply the fair use guidelines to the 2 Live Crew song and report its decision. Again, an attorney would be a valuable resource. Discuss the decisions.

## ADDITIONAL ACTIVITIES

1. Ask students to identify ways copyright and "fair use" might interact in a school setting.
2. Invite a school administrator to your class to discuss your school's copyright guidelines.
3. This case is now being considered by the Supreme Court. Bring in magazine and newspaper articles about the case. After your groups have completed steps 8 and 9, and after the Court has announced its decision, tell the class what the Court decided and have them compare their decision and rationale with the Court's. Discuss the differences and similarities.

## ISSUES FOR DISCUSSION

1. Should designation of a work as parody be an automatic qualifier as "fair use"?
2. Is the audience for rap music so different from the audience for Roy Orbison's "Oh, Pretty Woman" that there could be no economic infringement?
3. Should fair use be construed to mean that if you make money making fun of a work of art by using part of that work, it's wrong?
4. Is the 2 Live Crew version a real stinging social criticism or just a good way to make a dollar?
5. If such parodies are found to be copyright infringements and not fair use would free speech under the First Amendment be in danger?

*Jack Hanna is an attorney and Project Director at the Phi Alpha Delta Public Service Center in Washington, DC.*

## Copyright

*(continued from page 2)*

mean an end or chill to musical parodies or other artistic satire. Most parodies do not implicate copyright laws because they do not copy or reproduce even parts of the original. Others would still be exempt from copyright infringement through a case-by-case analysis of "fair use" considerations.

By presenting the case as a fact-specific exercise, the parties and *amici* invite the Court to a spirited debate that may seem better suited for the late night college dorm than the rarefied chambers of the Court. Is the sting of rap music a sincere form of social criticism or just a clever way to mix music to make a buck? Was 2 Live Crew's "Pretty Woman" more parody than a contemporary re-arrangement of "Oh, Pretty Woman?" Should a derivative version be more protected from copyright infringement if it's truer to the original or if it's a brutal bastardization? Is the audience for rap music sufficiently similar to Roy Orbison fans that the 2 Live Crew version will dilute "Oh, Pretty Woman's" sales and reputation? How much of the original was lifted—just enough to conjure up the

song and mood, or the beating heart itself, guitar riff and all? Who's to say? Apparently, the Supreme Court.

## ARGUMENTS

2 Live Crew (Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs, professionally known as the 2 Live Crew, and Luke Skywalker Records) argue that:

- 1) Their parody was a "fair use" under federal copyright laws.
- 2) The parody would not adversely affect the potential market for, or value of, the copyrighted song.

Acuff-Rose Music, Inc. argues that:

- 1) The issue of "fair use" should be determined on a case-by-case basis.
- 2) 2 Live Crew's "Pretty Woman" is not a "fair use" of "Oh, Pretty Woman."

(Editor's note: This article is condensed from "Parody as 'Fair Use' or Foul Play?" which appeared in the American Bar Association publication *Preview of United States Supreme Court Cases*, 1993-94 Term, pages 45-46.)

*Jack C. Doppelt, an attorney, is associate professor at Northwestern University's Medill School of Journalism in Chicago.*

## For More Information

The Winter 1983 issue of *Update on Law-Related Education* "Law and Creativity" contains additional background information about intellectual property. It includes:

"Parody: Not Always a Laughing Matter," an article that reviews a number of cases where the tension between parody and copyright was at issue; "Life Beyond Copyright," which looks at intellectual property from a comparative law perspective; and "Invisible Property," a series of classroom strategies on intellectual property themes.

Copies of the issue are \$6 each plus \$2 for shipping and handling. To order, send a check payable to the ABA to: ABA/YEFC, 541 N. Fairbanks, Chicago, IL 60611-3314.

# Jury Selection

## J.E.B. v. T.B.

Docket No. 92-1239, argued November 2, 1993

by Leonard Mandell

This case involves a paternity action in which the State of Alabama, representing the mother, exercised peremptory challenges to strike male prospective jurors, creating an all-female jury. Historically, peremptory challenges used during jury selection were exercised with unfettered discretion. However, in the 1986 case of *Batson v. Kentucky*, the Supreme Court employed the Equal Protection Clause of the Fourteenth Amendment to prohibit peremptory challenges based on the race of a prospective juror. Now the Supreme Court confronts gender-based strikes and is asked to determine whether or not such strikes also violate the Fourteenth Amendment.

One of the most critical stages in any trial is the selection of the jury. The process begins when government officials compile jury lists. From these lists, panels known as venires are drawn and summoned to court for jury duty. Potential jurors are then questioned during voir dire and may be removed for cause. In addition, each side can use a predetermined number of peremptory challenges to strike jurors without an articulated reason, based upon suspicions, perceptions, hunches, or mere whim.

In its long-awaited decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), a criminal case, the Supreme Court held that the prosecution's exercise of peremptory challenges is limited by the Equal Protection

Clause of the Fourteenth Amendment, which forbids the use of peremptory challenges to remove potential jurors solely on the basis of race. *Batson* set out a formal procedure to implement its holding, the "contours" of which were to be worked out in later cases.

Since *Batson*, courts have struggled with a Pandora's Box of unresolved issues. *Batson* was first scrutinized for retroactivity; it then was applied to a defendant's exercise of challenges and to civil trial juries. Now the Court is called upon to resolve one of the most significant issues left open by *Batson*—should the guidelines established to prohibit race-based discrimination in jury selection be extended to gender-based discrimination in selection. One of the most closely watched and widely anticipated cases of this term, *J.E.B. v. T.B.* will have significant implications for jury selection in future cases.

## ISSUE

Does a male defendant, in a civil action brought by the State of Alabama to determine paternity, have the right, under the Equal Protection Clause of the Fourteenth Amendment, to challenge the state's use of

its peremptory jury strikes to exclude all males from his jury?

## FACTS

The State of Alabama, on behalf of T.B. (Teresa Bible), filed a civil complaint for paternity and child support against J.E.B. (James E. Bowman, Sr.) in the District Court of Jackson County, Alabama. The state alleged that J.E.B. was the father of a child (Phillip Rhett Bowman Bible), born to T.B. on May 6, 1989.

At the hearing on the state's complaint, a blood test was entered into evidence which showed, by a cumulative probability of 99.92 percent, that J.E.B. was the child's father. J.E.B. admitted having intimate relations with T.B. in February 1988 and T.B. testified she did not have sexual relations with anyone but J.E.B. from February 1988 until after the birth of her son in May 1989. The state district court entered an order adjudicating paternity and also ordered J.E.B. to pay child support. J.E.B. filed a notice of appeal to the

Circuit Court of Jackson County seeking a trial *de novo* or a jury trial.

The case was called for trial on October 21, 1991, and the court proceeded to select a jury. From a list of potential jurors, a panel of 36 was drawn as the jury

venire from which the actual jury would be selected. This panel consisted of 24 females and 12 males.

Three jurors were dismissed for cause. Of the remaining 33 jurors, 10 were males. During voir dire, J.E.B. was allowed 11 peremptory challenges and the state was allowed 10. Nine of the state's peremptory challenges were exercised as to male prospective jurors, six of whom had not responded to

**Should the guidelines established to prohibit race-based discrimination in jury selection be extended to gender-based discrimination in selection?**



any of the voir dire questions. The state did not strike any women who did not respond to voir dire questions.

One of J.E.B.'s strikes was exercised to remove a male prospective juror; he used his remaining 10 peremptory strikes to remove female prospective jurors. The resulting jury consisted of 12 females.

Prior to empaneling the jury, J.E.B. challenged the state's use of its peremptory challenges to eliminate male jurors from the panel based solely on their gender. J.E.B. asked the trial court to hold a hearing on the state's use of its challenges pursuant to the procedures established in *Batson*. The trial court overruled the objection and the case proceeded to trial. Because the state was not required to provide non-gender-based reasons for the use of its peremptory strikes, there was never any determination that the state had used these challenges in a discriminatory manner.

On October 22, the jury returned a verdict finding that J.E.B. was the father of T.B.'s child, and the trial court entered judgment accordingly. The court also ordered J.E.B. to pay child support in the amount of \$415.71 per month. J.E.B. filed a post-judgment motion seeking a judgment notwithstanding the verdict or a new trial, raising the *Batson* issue among others. The motion was denied because the trial court concluded that the *Batson* doctrine does not extend to gender-based strikes.

J.E.B. then appealed to the Alabama Court of Civil Appeals. The state appellate court rejected his *Batson* argument on the ground that the Alabama Supreme Court previously had decided not to extend the *Batson* principle to gender-based strikes. A motion for rehearing was denied and a writ of certiorari filed before the Alabama Supreme Court was also denied. J.E.B. then filed a

petition for writ of certiorari with the United States Supreme Court which was granted.

## BACKGROUND

The use of peremptory challenges during jury selection to exclude jurors based on their race has had a long and tortured history. In 1965, in *Swain v. Alabama*, 380 U.S. 202 (1965), the Court held that racially-based peremptory challenges violated the defendant's Fourteenth Amendment right of equal protection only if shown to occur in a pattern of cases—not just a single case. For 20 years, this virtually insurmountable burden of proof withstood repeated challenge.

Finally, in 1986, the Court overturned *Swain*, holding that prosecutors violate a defendant's Fourteenth Amendment rights by dismissing potential jurors based solely on race in a single case. *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court reaffirmed *Swain's* pronouncement that excluding members of the defendant's race on racial grounds violated the defendant's rights. However, the Court lowered the "case after case" hurdle, holding that, once a defendant establishes a *prima facie* case that members of a cognizable racial group have been excluded by peremptory challenges in only that defendant's case, the prosecutor must come forward with a neutral explanation for his or her use of peremptory challenges. If the judge accepts the prosecutor's reasons, the case proceeds to trial. If not, a new jury must be selected. Thus, in *Batson*, the defendant's case was sent back to the trial court for a review of the jury selection in his case. J.E.B. seeks similar relief.

### The use of peremptory challenges during jury selection to exclude jurors based on their race has had a long and tortured history.

J.E.B. begins by arguing that the equal protection principles which support *Batson* and its progeny also prohibit peremptory strikes based solely on gender. He insists that he is entitled to a new trial or, at least, to an evidentiary hearing at which the prosecutor would be required to articulate a non-gender-based reason for each challenged peremptory strike.

J.E.B. acknowledges that *Batson* applied strict scrutiny to hold that peremptory jury strikes could not be used by a prosecutor to exclude individuals from jury service based solely on race. However, *Batson* has since been expanded to prohibit the use of peremptory strikes to exclude racial groups not of the same race as the defendant, *Powers v. Ohio*, 111 S. Ct. 1364 (1991); to prohibit the use of racially discriminatory strikes by the defendant in a criminal case, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992)); and to prohibit race-based peremptory strikes in a civil action, *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). J.E.B. contends that expanding *Batson* further to prohibit gender-based peremptory strikes is the next logical step.

J.E.B. notes that, under the Equal Protection Clause, the Court extends a heightened level of scrutiny to cognizable groups which have been subject to historical discriminatory practices. State-supported action which makes a distinction based solely on gender is subject to such heightened scrutiny. Accordingly, J.E.B. argues that, for the gender-based distinction in this case to survive, Alabama must show that it is substantially related to a sufficiently important governmental interest.

J.E.B. asserts that no substantial

state interest is advanced by allowing jurors to be peremptorily eliminated solely because of the "accident of their birth." According to J.E.B., the state's interest in a jury trial, whether criminal or civil, is to see that the individual jurors are selected in a fair, impartial, and non-discriminatory manner. This interest is not advanced by allowing gender-based peremptory strikes, just as it is not advanced by allowing race-based peremptory strikes. In both instances, the rights of the excluded juror are violated. He asserts that the use of peremptory challenges based solely on race or gender impairs the perception that a litigant is receiving a fair trial. In short, gender-based strikes have an adverse impact not only on the excluded juror, but on the judicial system and society as a whole.

While J.E.B. concedes that earlier Supreme Court decisions have addressed only the issue of race-based challenges, he claims that those decisions are not limited to the specific context in which they were decided. He points out that in *McCullum*, the Court discussed "group bias" and "the accident of birth," 112 S. Ct. at 2354, 2359, while, in *Edmonson*, the Court was concerned with prohibiting "discriminatory" peremptory challenges, 111 S. Ct. at 2085. This language, he contends, is broad enough to encompass the discriminatory use of gender-based peremptory strikes.

J.E.B. cites the Ninth Circuit which specifically prohibits gender-based peremptory strikes based on equal protection principles. *United States v. DeGross*, 913 F.2d 1417, 1422 (9th Cir. 1990). He bolsters his argument by noting that Chief Justice Burger, in his *Batson* dissent, reasoned that traditional equal pro-

tection principles would apply to other protected classifications, including gender. 476 U.S. at 124.

J.E.B. then turns to the *Batson* test in which a court applies a burden-shifting analysis to peremptory strikes challenged by the non-striking party. First, the challenging party must establish that the excluded jurors belong to a cognizable group entitled to protection under the Equal Protection Clause. J.E.B., a white male, claims that white males are such a group, citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), and *Craig v. Boren*, 429 U.S. 190 (1976).

Next, the party making a *Batson* challenge must make a sufficient showing that an inference is raised that the striking party exercised its peremptory challenges to remove many or all members of this cognizable group. Here, J.E.B. points to the jury venire which consisted of 36 prospective jurors, 12 males and 24 females and to the fact that

Alabama exercised nine of its 10 peremptory strikes to eliminate males. Of those eliminated, six had not responded to any of the voir dire questions. Alabama did not strike any of the female jurors who did not respond to the voir dire questions. J.E.B. maintains that this pattern of strikes against males gives rise to a *Batson* inference of discrimina-

tion and constitutes a *prima facie* case of purposeful discrimination requiring Alabama to articulate a gender-neutral explanation for excluding these males. J.E.B. concludes that, if the *Batson* test is applied, the state cannot meet its burden and a new jury should be empaneled.

J.E.B. closes by recognizing that the peremptory challenge has been

changed and modified by legislative enactment over the past 200 years. From *Swain* to *Batson*, the exercise of the challenge has adapted to the protections of the Fourteenth Amendment. With these protections in place, even if the challenge is limited further by prohibiting gender-based strikes, the "challenge without cause" will remain a vital part of the jury selection process.

The State of Alabama, on behalf of T.B., responds by arguing that the equal protection principles set out in *Batson* and its progeny do not prohibit peremptory challenges based on a person's gender. According to the state, the *Batson* rule is limited to race as a product of the unique history of racial discrimination in the country.

Alabama notes that race-based challenges are subject to the strict scrutiny standard, while classifications based on gender are entitled only to an intermediate standard of scrutiny. Alabama asserts that, under this intermediate standard, the state's interest in exercising its peremptory strikes freely in attempting to establish the paternity of its out-of-wedlock children is substantial and, in light of the historical prejudice against such children and their mothers, clearly meets the standard of heightened scrutiny for gender-classification analysis.

Alabama acknowledges that *Batson* has been extended in some cases. However, the state notes that the Court drew its opinion narrowly and has consistently declined to extend the holding beyond race. Alabama advances several cases that have declined to extend *Batson* to gender-based strikes. *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988).

Alabama concedes that there is an extensive history of gender discrimination in this country, but con-

**According to the state, the *Batson* rule is limited to race as a product of the unique history of racial discrimination in the country.**

tends that it has never reached the level of discrimination which has historically been exercised against African-Americans. Moreover, gender discrimination has historically been directed against women, not against men. Alabama insists that J.E.B. should not now be able to claim heightened protection for men in an area in which such protection has not been granted to women.

Alabama then turns to the vitality of peremptory challenges and asserts that, if *Batson* is extended to gender-based strikes, it would lead to the erosion and ultimate demise of peremptory challenges. Alabama reasons that, if the rule is extended, it must be applied to all classifications entitled to strict scrutiny or heightened scrutiny, including age, alienage, and national origin. In effect, the non-striking party could require an explanation for almost every peremptory strike and, if so, such strikes are no longer peremptory. Such a system, Alabama asserts, would result in longer trials and more appeals. The state also stresses that in cases such as paternity and rape, in which prior discrimination based on gender has existed, it is crucial that both parties be able to exercise their challenges freely in order to eliminate extremists on both sides.

Alabama next argues that, if the *Batson* rule is applied to gender-based strikes, such a ruling should have purely prospective application. This new application of *Batson* would be an extension of the rule which could not have been foreseen by the parties. In addition, application of the rule to J.E.B. would not further the interest of overcoming the historic discrimination against women because J.E.B. alleges dis-

crimination against men.

Alabama asserts that prospective application would not harm J.E.B. because a remand for a new trial will only postpone the inevitable result—that J.E.B. is the father of T.B.'s child. In support of this contention, Alabama points to the conclusive blood test and the testimony of the parties concerning their intimate relations. Alabama concludes that if prospective application is rejected and a retrial is ordered, T.B. and the child would be harmed because they would continue to be deprived of J.E.B.'s financial support.

**J.E.B. v. T.B. presents the Supreme Court with an opportunity to further define the constitutional limits of peremptory challenges during jury selection.**

**SIGNIFICANCE**

*J.E.B. v. T.B.* is a critically important case because it presents the Supreme Court with an opportunity to further define the constitutional limits of peremptory challenges during jury selection. The Court's response will provide guidance to all parties and will affect jury selection in many cases.

A decision for J.E.B. will protect all jurors from gender-based exclusion from a jury. However, it may sound the death knell for peremptory challenges. A decision for T.B. will reinforce the historical purpose of peremptory challenges and reinforce the argument that *Batson* restrictions apply only to race-based strikes. Either way, *J.E.B.* can be expected to be a major, if not landmark, case.

**ARGUMENTS**

J.E.B. argues that:

- 1) The equal protection principles upon which *Batson* and its progeny are founded also prohibit

peremptory challenges based solely upon a person's gender.

- 2) The use of discriminatory, gender-based jury strikes has a substantial adverse impact upon the excluded juror, the judicial system and society as a whole.
- 3) Applying the standards of *Batson* to gender-based peremptory jury strikes, the facts of the case presently before the Court establish a violation of the Equal Protection Clause such that a remand is required.
- 4) The state's historical right to use its strikes in a peremptory manner must yield to a challenge based upon the Equal Protection Clause.

T.B. argues that:

- 1) The Equal Protection principles set out in *Batson v. Kentucky* and its progeny do not prohibit peremptory challenges based upon a person's gender.
- 2) The extension of *Batson* to gender-based strikes would lead to the erosion and, ultimately, to the demise of peremptory challenges.
- 3) If this Court should decide to extend the *Batson* rule to encompass gender-based strikes, such a ruling should have purely prospective application.

(Editor's note: This article is condensed from "Extending *Batson v. Kentucky*: Do Gender-Based Peremptory Challenges Violate the Constitutional Guarantee of Equal Protection?" which appeared in the American Bar Association publication *Preview of United States Supreme Court Cases*, 1993-94 Term, pages 57-60.)

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# Employment Law

## Teresa Harris v. Forklift Systems, Inc.

62 U.S.L.W. 4004, decided November 9, 1993

### FACTS

**T**eresa Harris was employed as a rental manager by Forklift Systems, Inc. ("Forklift") at its office in Nashville, Tennessee. Her immediate supervisor was Charles Hardy, the president of the company. During her tenure with the company, Hardy made sexually derogatory and demeaning remarks to Harris as well as to other female employees. When Harris eventually complained to Hardy about his comments, he apologized, said he was only joking, and promised that he would no longer make such remarks.

A few weeks later, however, Hardy resumed his offensive behavior, which included a remark that Harris used sex to land an account. Several weeks later, Harris quit.

Harris subsequently filed a lawsuit alleging that Forklift had violated Title VII by, among other things, creating a sexually hostile working environment and that the environment was so bad that she was constructively discharged, i.e., forced to quit. A hearing was held before a federal magistrate who found that Hardy had indeed engaged in a continuing pattern of sex-based derogatory conduct.

The magistrate specifically found that, in the presence of other employees, Hardy said to Harris, "You're a woman, what do you know" and called Harris "a dumb

ass woman." Hardy also remarked that the company needed "a man as the rental manager" and suggested to Harris that they go to the Holiday Inn to negotiate her raise. The magistrate also found that Hardy made sexually suggestive comments about the clothing worn by Harris and other female employees, and commented on aspects of their anatomy. The magistrate further found that Hardy asked Harris and other female employees to retrieve coins from his front pants pocket and threw objects on the ground in front of female employees and asked them to pick up the objects, making comments about their clothing.

Having found that Hardy engaged in this conduct, the magistrate, nonetheless, concluded that it was not so severe as to create a hostile work environment. In reaching this result, the magistrate relied on the test set forth by the Sixth Circuit in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), for determining when sexual harassment rises to the level of a hostile work environment.

The *Rabidue* court held that a hostile environment is created where the harassing conduct "would interfere with that hypothetical reasonable individual's work performance and affect the psychological well-being of that reasonable person." In applying this test to the facts of Harris' case, the magistrate concluded that Hardy's conduct would not have interfered with a reasonable person's work performance

and that Harris did not suffer any psychological injury as a result of Hardy's harassment. Following *Rabidue*, the magistrate dismissed the hostile-environment sexual harassment claim.

The magistrate also concluded that, because Harris was not subjected to a hostile environment, she was not constructively discharged because of the Hardy's actions. Accordingly, the magistrate dismissed Harris' constructive-discharge claim.

The U.S. District Court for the Middle District of Tennessee adopted the magistrate's report in an unpublished opinion, and the Sixth Circuit Court of Appeals affirmed. The Supreme Court granted Harris' petition for writ of certiorari to decide the question whether proof of psychological injury is a necessary element in a hostile-environment sexual harassment case.

### BACKGROUND

The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), recognized a cause of action under Title VII where sexual harassment creates a hostile work environment. The Court held that a hostile environment is created when harassing conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment.

In focusing on the issue of when harassing conduct is sufficiently severe to alter employment conditions, the lower courts have developed two tests: 1) did the conduct interfere with the plaintiff's work performance when viewed from the perspective of a reasonable employee in the plaintiff's position; and 2) did the conduct cause psychological injury to the plaintiff.

### SIGNIFICANCE

Mandating a requirement of proof of psychological injury could adversely

affect plaintiffs in several ways. Whenever a court imposes an additional proof factor on a party, it makes the case that much more difficult for a party to win. This effect is exacerbated in sexual harassment cases, where studies have shown that only a small percentage of sexually harassing behavior is even reported to begin with.

Moreover, requiring proof of psychological injury could deter individuals from bringing valid harassment claims because of an unwillingness to portray themselves as mentally impaired. Furthermore, if there were a psychological-injury requirement, a plaintiff's mental condition would be a fact "in controversy" and the defendant, as a matter of course, would seek an order requiring the plaintiff to undergo a psychological examination as part of pre-trial discovery. Such a forced psychological examination, with the results available to defendant, would serve as an additional deterrent to plaintiffs in these cases.

## ARGUMENTS

Teresa Harris argued that:

- 1) Proof of serious psychological injury is not necessary to establish hostile-environment liability on the basis of sex under Title VII.
- 2) Neither Harris' hostile-environment claim nor her constructive-discharge claim should have been dismissed.

Forklift Systems, Inc., argued that:

- 1) Sexual harassment is actionable only where there is a demonstrable effect on the victim's working conditions evaluated from the objective standpoint of a reasonable person in the victim's position.
- 2) The magistrate applied the correct test in this case and properly concluded that the work performance of a reasonable person in

Harris' position would not have been affected by Hardy's conduct.

## DECISION

In one of the most closely watched cases of the Term, a unanimous Court held that to show an "abusive work environment," harassment need not "seriously affect [an employee's] psychological well-being," or lead that employee to "suff[er] injury." Rather, Title VII of the Civil Rights Act of 1964 is violated when discriminatory behavior in the workplace creates a working environment that would be objectively hostile and abusive to a reasonable person, as well as perceived as such by the victim of sexual harassment.

Writing for the Court, Justice O'Connor noted that the phrase in the law which forbids discrimination with regard to "terms, conditions, or privileges of employment" was intended to strike at the entire spectrum of disparate treatment of men and women in employment, and included requiring people to work in a discriminatorily hostile or abusive environment. The standard of proof adopted by the Court, Justice O'Connor observed, "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Title VII would not be violated if the conduct was such that a reasonable person would not find it hostile or abusive, nor would it be violated if the victim did not perceive the environment to be abusive. "But," added Justice O'Connor, "Title VII comes

into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."

Justice O'Connor then specified some of the elements that need to be examined in each case to help determine if the work environment is hostile or abusive: "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." While psychological harm, like any other relevant factor, may be taken into account, "no single factor is required."

Justice Ginsberg, in her first written opinion, concurred in the judgment. Her concurrence held that a worker claiming harassment would not have to prove a tangible decline in productivity, but only that the environment "so altered working conditions as to make it more difficult to do the job."

(Editor's note: Portions of this article are adapted from "Does Sexual Harassment Require Proof of Psychological Injury?" by Barbara J. Fick which appeared in the American Bar Association publication *Preview of United States Supreme Court Cases*, 1993-94 Term, pages 28-30.)

**The standard of proof adopted by the Court, Justice O'Connor observed, "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."**

# TEACHING STRATEGY

by Sandra J. Anderson

## OBJECTIVES

At the end of this activity, students will be able to:

1. Understand Title VII and the illegality of sexual harassment in the workplace.
2. Recognize, define and discuss sexual harassment affecting high school students.
3. Focus on the importance of respecting one another and avoiding offensive or abusive behavior.

## TIME REQUIRED

Two to three class periods should be allowed for this activity.

## BACKGROUND FOR THE TEACHER

The topic of sexual harassment is gaining increasing attention in the media and the courts. Recent events, particularly the United States Supreme Court's November 9, 1993 decision regarding "abusive work environment" harassment, and the survey of high school students by the American Association of University Women (AAUW), make this topic particularly compelling for classroom discussion.

In *Harris v. Forklift Systems Inc.*, the Supreme Court reaffirmed earlier law that Title VII of the Civil Rights Act of 1964 is violated "when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment." The standard for finding an abusive or hostile environment is both objective

and subjective—that is, whether a reasonable person would find the environment to be abusive or hostile and whether, in fact, the victim subjectively perceived abuse or hostility. The Supreme Court rejected the decisions of some appellate courts that severe psychological harm must be suffered before sexual harassment is found to exist. The Supreme Court held: "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive,... there is no need for it also to be psychologically injurious." The Court also wrote: "Title VII comes into play before the harassing conduct leads to a nervous breakdown."

The sexual harassment described in the *Harris* case included these behaviors by the male boss of the female plaintiff: insults based on gender ("You're a woman, what do you know"); unwanted sexual innuendos; asking female employees to retrieve coins from his front pants pocket; and throwing objects on the ground and asking female employees to bend down and pick them up.

Sexual harassment is not limited to the workplace. The AAUW survey demonstrates that "hostile hallways" exist in the nation's schools. The survey questioned more than 1,600 public school students in grades 8 through 11. In a press release, the AAUW emphasized these three points from the results:

- 1) *Epidemic*: Sexual harassment has reached epidemic proportions in America's schools. Every day, girls and—surprisingly—boys must confront hostile hallways.
- 2) *Impact*: While sexual harassment impacts all students, it impacts a greater toll on girls. The negative

educational, emotional, and behavioral ramifications are devastating.

- 3) *Schools*: By ignoring the existence of sexual harassment in schools, we are in effect condoning it. Parents, teachers, and administrators need to send a message that classrooms and hallways in our public schools must be a safe place to learn and that sexual harassment will not be tolerated.

In response to the problem of sexual harassment, many school districts have created written policies to prohibit and punish misconduct. However, policies alone are not enough. One writer expressed this thought:

A big challenge facing educators is that many boys and young men do not understand why their behavior is defined as harassment. They may consider catcalls and leers harmless, or even complimentary. For that reason, a policy that is merely punitive and not aimed at changing behavior won't work. Ideally, classroom activities should encourage students to examine sexist behavior and to figure out for themselves why it is offensive. "If there is no education in advance," says Nan Stein [of the Center for Research on Women at Wellesley College], "if students don't know when their own behavior is harassing, punishing them doesn't make sense."

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Students may find it easiest to talk about sexual harassment at first by recounting their own experiences or simply by offering their own opinions on what con-

stitutes harassment and then arguing about them. They also may find the issue more relevant if harassment is first discussed in the context of their own school. Later the discussion can move to harassment in the workplace and in society in general.

(Susan Eaton, "Sexual Harassment at an Early Age: New Cases Are Changing the Rules for Schools," *The Harvard Education Letter*, Vol. IX, No. 4, July/August 1993, pp. 3,4.)

The law that has developed through Title VII and cases such as *Harris v. Forklift Systems* focuses on the workplace and makes the employer responsible for "hostile work environments." Who is responsible for "hostile hallways" in high schools? What is the law that may apply in the school setting to protect students from sexual harassment?

The law regarding "hostile hallways" in schools is unsettled and developing, case by case. Plaintiffs (students and their parents) have sued school districts and officials under various legal theories. On the plaintiffs' side, the Fourteenth Amendment to the Constitution is cited for its guarantees of liberty, due process and equal protection. Also, plaintiffs cite the federal statute, 42 U.S.C. § 1983, which makes state officials liable for action taken under color of state law to deprive a person's rights, privileges or immunities guaranteed by the Constitution. How, then, does sexual harassment in the schools translate into a constitutional violation for which school officials might be liable? On the plaintiffs' side, at least two theories have been presented to argue that the school owes students a duty to protect them from "hostile hallways": (1) that the state-affiliated public school has a "special relationship" or even "custody" of the students, in part because of compulsory attendance laws, and so the school

owes a duty to provide a reasonably safe environment; and (2) that if the school knows or should know that a "hostile environment" exists which is damaging students, and if the school's action or lack of action permits the sexual harassment to continue, the school has effectively created the danger and should be liable.

## RESOURCES

1. A copy of the Supreme Court's decision in *Harris v. Forklift Systems Inc.*, 62 U.S.L.W. 4004, the summary of the decision appearing on page 10 of this issue, or newspaper or magazine articles which summarize the decision.
2. Excerpt from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.:

Title VII makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1).

3. Excerpt from Title XI of the Educational Amendments of 1972, 20 U.S.C. § 1681:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

4. Excerpt from the Fourteenth Amendment to the United States Constitution (Due Process and Equal Protection Clauses):  
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any per-

son of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. Excerpt from 42 U.S.C. § 1983:

Every person who, under color of [state law] ... subjects, or causes to be subjected, any citizen of the United States or any person within its jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured....

6. Definitions of sexual harassment, such as:

(A) Unwanted or unwelcome sexual behavior that interferes with your life. Sexual harassment is not behaviors that you like or want (for example: wanted kissing, touching or flirting). (American Association of University Women Educational Foundation, used in a survey by Louis Harris and Associates.)

- (B) EEOC definition relating to the workplace:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex).

7. Hostile Hallways: The AAUW (American Association of University Women) Survey on Sexual Harassment in America's Schools, 1993. Key findings included:

- Four in five (81%) of students in grades 8 through 11 have experienced sexual harassment at school.
- While both boys (76%) and girls (85%) have been sexually harassed at school, girls experience harassment much more often.
- Girls are more likely than boys to be sexually harassed in public places.
- Harassment has a significantly negative effect on girls' academic participation and performance.

(Copies of the report are available from the AAUW Educational Foundation, 1111 16th Street, N.W., Washington, DC 20036; 1-800-225-9998.)

## PROCEDURES

All or any combination of the following suggested exercises can be used in the classroom:

1. Before presenting any background materials to the class, ask the students to define sexual harassment. You may wish to divide the class into small groups, perhaps even divided by gender, and have each group prepare its own definition of sexual harassment. Then compare the students' definitions with the EEOC and AAUW definitions, or with other definitions that you have gathered.
2. Discuss with the students

## STUDENT HANDOUT

Brandy Noble is a shy eighth grader. Physically, she is well-developed for her age. Her parents are strict disciplinarians.

Brandy attends Katiesburg High School, which combines the middle school and high school in one facility. A group of senior boys call themselves "The Posse" and make a game of flirting with, teasing, touching and (if their tales are true) sexual conquests with the younger girls. One popular senior boy, Dave Patson, targets Brandy in particular. At first, she is flattered and confused about his attention. When he becomes more aggressive in his language and behavior, she is frightened. He kisses her, touches her in embarrassing places, says lewd things that make other students laugh, and leaves notes and pictures at her locker. This kind of behavior is not unique to Dave, but is typical of what other students do in the hallways of the high school. Over time, Brandy becomes so upset that she fakes illness to avoid school and her grades drop.

Because she is shy and confused, Brandy finds it hard to tell anyone what Dave is saying and doing to her. She fears that her parents would blame her for the problem. Some of her friends tell her to "laugh it off" or to "enjoy it." Eventually, she does speak with a favorite teacher and with a guidance counselor. The teacher is shocked at Dave's misconduct and lectures Dave about being a gentleman, which only makes his behavior worse. The guidance counselor believes that Brandy may be overreacting and tells her that she needs to learn how to handle the natural attentions of boys. Eventually, Brandy meets with the principal. She is so shy and nervous that she is unable to tell her whole story. The principal knows and likes Dave, who is a popular athlete and a good student, and concludes from what little Brandy says that this is just a case of harmless flirting.

Each spring, the middle school students attend a three-day retreat at a nearby camp. Along with teachers, several seniors are chosen to serve as "supervisors" for the younger students. Dave Patson is one of the "supervisors." Something happens at the camp between Brandy and Dave. Brandy is so emotionally distraught that she must be hospitalized. When questioned, Dave denies that he did anything wrong.

After Brandy's parents learn more about what their daughter has experienced at school and at the camp, they sue the school district, claiming that the school knew or should have known that their daughter was being sexually harassed and that it failed to protect her. Their lawyers argue two theories: (1) that the school had a duty to protect students but was recklessly indifferent to the growing problem of sexual harassment at the school; and (2) that the school's policies, practices and customs permitted the abuse of girls like Brandy.

Lawyers for the school argue that Brandy never let the school—or even her parents—know the full extent of the harassment. Also, they argue that schools are not required by the Constitution to protect students from the insensitive and offensive behavior of other students. They argue that the wrongdoers, not the school, are responsible for what has happened to Brandy.

What do you think?



whether they believe sexual harassment is a problem in your school. Why or why not? As a class, or in small groups, ask the students to make lists of comments or behaviors (1) which they believe are offensive or harassing and (2) which they believe are harmless or normal. For those comments or behaviors which the majority of the class agrees fall within the definition of sexual harassment, ask the students to suggest guidelines for how to handle those situations. For example, what can you say or do to stop the harassment yourself? When is it appropriate to tell a teacher, counselor or other adult? What if you are the only one who is offended? Should you just "laugh it off" or ignore it? How do you know whether your own conduct is offensive or unwelcome?

3. Assign the students, again perhaps in small groups, to write a school policy on sexual harassment. If your school has policies which affect this subject, compare those policies with what your students have created and discuss the differences or similarities. Are school sexual harassment policies important or useful? Does, or would, a school policy make a difference at your school?
4. Assign the class to read the *Harris v. Forklift Systems* case, or a summary of it. You may also pass out copies of Title VII, Title XI, the Fourteenth Amendment and § 1983. Inform the class about the AAUW survey. Class discussion could then include these questions: Why are special laws needed to protect people from discrimination in the workplace? Why should an employer be held responsible for the wrongdoing of one of its employees against another employee? Should the law in the *Harris* case also apply

to the school setting? Since Title VII does not apply to schools, only to the workplace, how might other laws (such as the Fourteenth Amendment, Title XI and § 1983) apply to protect people from discrimination at school? Does every wrong or offense mean that constitutional rights are at stake?

5. In connection with study of the *Harris* case, invite an attorney who specializes in labor and employment law to speak to the class and answer their questions.
6. Use the Student Handout as the basis for class debate or moot court. Assign the roles of Brandy, Dave, Brandy's parents, lawyers for both sides, school officials and judges. First, Brandy, her parents and her lawyers should meet in a role-playing exercise before the class, and discuss the facts and legal theories in favor of their lawsuit. Then, the school officials and their lawyers should meet in a separate role-playing exercise to discuss the facts and legal theories in favor of the defense. This exercise could also include an interview by the lawyers with Dave, to find out more about his side of the alleged harassment. Next, the lawyers for both sides will debate the case in front of a judge, or a panel of several judges, who will ask questions of the lawyers. The "bottom-line question" for the argument to the judges is whether or not the case should be dismissed. The issues for the debate are (1) did sexual harassment occur or is Brandy overreacting; (2) did the school know, or should it have known, about the problem of sexual harassment at school; (3) did the school have a duty under the law to protect Brandy, or should she and her parents have done more themselves; and (4) if there was sexual harassment, who is really responsible?

## Some Role-Playing Tips

1. Keep the role play simple, but be sure that students have enough information to play their roles convincingly.
2. Get the class involved as quickly as possible—don't spend a lot of time on the introduction.
3. Role reversal can be a useful device when students appear unsympathetic to the opposing viewpoint or when a student has been stereotyped by his or her peers.

(Adapted from *The Methods Book: Strategies for Law-Focused Education*. Arlene Gallagher, ed. Law in American Society, Inc. 1979.)

Each member of the class should then write a one-page paper explaining his or her own decision on each of these issues.

For this exercise, it is recognized that the factual summary provided in the Student Handout is just that—a summary. The students playing the roles may wish to embellish the facts based on their own experiences, or you may wish to add more facts.

7. Assign a research project, asking the students to gather copies of newspaper and magazine articles about the subject of sexual harassment and to report, either orally or in writing, about what they have found.

*Sandra J. Anderson is an attorney in Columbus, Ohio, and chair of the Ohio Mock Trial Case Committee. (Editor's note: the Student Handout is adapted from the 1993-94 Ohio Mock Trial Case materials, prepared by the Ohio Center for Law-Related Education.*

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