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Peremptory Strikes and Picking a Jury

In a *Washington Post* newspaper article Gregory Mize, an associate judge of the D.C. Superior Court, told the story of a man kicked off of a jury in an obvious display of the gender bias that is currently permitted by the jury selection system. The man had been dismissed from the jury along with four other white men and one African American woman. Just before the trial started, he returned and spoke to the judge:

[The man said:] "If I understood you correctly, you said race and gender should not be used as selection criteria. It doesn't take a rocket scientist to realize that both gender and race were an issue in the selection of this jury. It was unmistakable to me and, I'm sure, to everyone else here."

He then added a haunting plea, "I want you all to look inside yourselves . . . to consider what the implications of this are for impartial justice."

I [(the judge)] told him that my own perceptions coincided with his and about my earlier challenges to one of the lawyers in that regard. This John Q. Citizen thanked me. "It is some consolation," he said of my explanation. . . . [But] [sic] I think we need to get beyond the assumption that race and gender discrimination only work in the conventional historic directions. . . . That does little to further real justice and real race and gender equity in this country." (B08)

This “John Q. Citizen” is one of many who have been dismissed from juries by what is known as a peremptory strike. Peremptory strikes constitute the final part of voir dire. “Voir dire, literally ‘to see, to tell,’ is the first phase of a trial in which prospective jurors are questioned and selected to sit on the impaneled jury” (Simon, 49). During the peremptory strikes portion of voir dire, both defending and prosecuting attorneys are given the option to have prospective jurors removed from the jury box and replaced, without being required to provide a reason. Each side is given a limited number of these strikes, which varies based on factors such as the size of the jury, the type of court, and the levels of crimes with which the defendant has been accused. These strikes come after the judge has dismissed any jurors who display overt biases during the initial questioning process.

Peremptory strikes are designed to give attorneys a chance to remove from the panel any juror who seems to be harboring a hidden bias. The strikes allow attorneys to exercise their intuition in a final attempt to create an impartial jury – a jury that will be able to put aside any personal opinions and judge the case in the light of the laws and the evidence only. A completely impartial jury is, of course, nearly un-attainable, but removing those jurors whose pre-conceived opinions will significantly impact their ability to judge fairly is generally considered sufficient.

Although the idea of peremptory strikes is a noble one, they can easily be misused or even abused. Since peremptory strikes require no explanation, attorneys often dismiss a juror unnecessarily, perhaps because of beliefs generally associated with other members of that juror’s ethnicity, gender, or religion. In addition, attorneys sometimes deliberately dismiss impartial jurors, favoring those who *are biased* toward their side of the issue. The current system is unjust in that it allows attorneys to unnecessarily dismiss these jurors and to thereby manipulate the bias of the jury as a whole.

Many would say that peremptory strikes are not unjust, arguing that they are crucial to the system and that jurors are not removed unnecessarily. Henry Kopel, an assistant U.S. attorney, made the following comment regarding peremptory strikes:

Even with our array of procedures designed to ferret out biased or insufficiently "deliberative" jurors, accounts of jurors disregarding their oath to fairly apply the law to the facts are disturbingly common. Even in trials involving murders and rapes, deadlocked panels have emerged from the jury room, later telling attorneys that one juror refused to participate in deliberations. Often in these instances, the holdout juror turns out to have announced, at the start of deliberations, an undisclosed bias that had nothing to do with the facts of the case on trial. As a result, the murder victim's family--and witnesses who may fear for their lives--must endure another trial. (B08)

Kopel argues that peremptory strikes are our only means of preventing the un-deliberative juries he mentions. Others would argue that there is no backing to the belief that peremptory strikes affect jury proportions and thus bias as a whole. A study done by Mary Rose observing the system in several cases stated that "the peremptory had no 'disparate impact' upon the minority participation in juries" (700) in the county she was studying.

There are safeguards in place to prevent attorney manipulation of juries. Such safeguards include the Supreme Court's decision in the 1986 case *Batson vs. Kentucky*, stating that peremptory strikes based strictly on a juror's race are unconstitutional. This was followed by a similar decision in 1994 stating that strikes based on gender were likewise unconstitutional. These safeguards give opposing attorneys the right to challenge another attorney's request for a

peremptory strike, which then gives the judge the responsibility of deciding whether the striking attorney's reasoning is acceptable.

On the other side of the issue, opponents of peremptory strikes argue that attorneys often unnecessarily dismiss jurors due to stereotypes associated with their ethnic or gender group. In doing so attorneys sometimes overlook the fact that the jurors' opinions may differ from that of the stereotype commonly associated with them. One should not be dismissed as impartial and denied the opportunity to serve on a jury simply because of a thing that he cannot control, such as race or gender. Such things do not dictate a person's ability to judge impartially and thus should not be valid criteria for a peremptory strike.

The Supreme Court agreed with this reasoning in *Batson v. Kentucky* and *J.E.B. v. Alabama*, declaring it unconstitutional to make a peremptory strike on the basis of race or gender. An attorney accused of making such a strike is required to explain his reasoning to the judge, who will then determine whether the strike should be upheld or rejected. While this may seem to solve the problem, "a lawyer with an ounce of resolve . . . can easily ensure that no minorities will appear on a jury The advocate can simply use peremptory strikes to remove all of the blacks and Hispanics from the jury. Her peremptory challenges are constrained only by one trifling limitation: she must make sure to find something unrelated to race that could conceivably explain the strike" (Gannaway 377). It is obvious, then, that racial and gender discrimination in peremptory strikes can still exist, despite Supreme Court decisions to the contrary.

Another area of concern involves peremptory strikes based on a juror's religion. At this point there is no specific Supreme Court decision regarding the constitutionality of such actions, so attorneys are free to use religion as a valid reason for a peremptory strike. There are two areas

of concern with regard to peremptory strikes based on religion, the first involving strikes based strictly on a person's affiliation with a religion.

Mere affiliations with a religious group can constitute as few grounds for believing a person to be biased as his ethnicity. Often, a person may consider himself affiliated with a given religion, yet not practice the same belief system that the majority of his religion does. Strikes based purely on affiliation don't have much basis, and many would argue that the principles the Supreme Court used when denouncing strikes based on ethnicity would carry over to strikes based on religious affiliations. In support of this argument, according to an article by Robert T. Miller in *First Things*, "The court of appeals for the Third Circuit confirmed, holding that, while challenges based on mere affiliation with a particular religious denomination may violate the constitution, challenges based on a juror's 'heightened religious involvement' do not." The court basically stated that strikes based on religious affiliation are indeed unconstitutional, while those based on significant involvement in one's religion, the second area of concern, are not.

Striking a juror based on his dedication to his religion (i.e. his heightened religious involvement) is a bit more reasonable than striking for religious affiliations, but is still not just. To dismiss a juror, one should have good reason to believe that the juror will be unable to judge the case with impartiality. The following is from Sara Hoffman's article in *Trial* regarding the Third Circuit Court decision to approve peremptory strikes based on "heightened religious involvement":

Judge Walter Stapleton wrote in his dissent that "a prosecutor may undoubtedly strike a juror for being unwilling to sit in judgment of another human being. However, a prosecutor may not, consistent with the Equal Protection Clause, infer solely from a prospective juror's race, gender, or religion that he will

be unwilling to sit in judgment of another, and then offer that unwillingness as a permissible basis for a peremptory challenge.” (74)

A recent decision by a Florida appellate court ruled that it was constitutional to have ministers stricken from juries because, according to an article by Jonathan Turley, clergymen were “inherently too soft on defendants” (M5). Turley also pointed out that “there is no statistical proof that clergy members are more sympathetic to defendants” (M5). On the other side of the issue, the Connecticut Supreme Court ruled in 1999 that religion-based peremptory challenges are unconstitutional. According to an article by Jean Hellwege in *Trial*, the Connecticut Court said that “although one’s religious beliefs may render a prospective juror unsuitable for service in a particular case, one’s religious affiliation, like one’s race or gender, bears no relation to that person’s ability to serve as a juror” (qtd. in 16). The court is effectively saying that strikes based on religious affiliations or involvement are unconstitutional, and only actual beliefs held by the individual that may impair his ability to pass a fair verdict can be used as a basis for a peremptory strike against him. The disagreement between rulings passed by various high courts on the issue of religion-based peremptory strikes will likely force the Supreme Court to pass a ruling on the matter in the near future.

The final unjust aspect of peremptory strikes involves the ability of an attorney to use strikes to affect the bias of a jury as a whole. By methodically striking jurors who are not biased toward his cause, an attorney can effectively slant the opinion of a jury to his side of an issue. The goal of the jury selection process should be to create an impartial jury, removing those jurors who would possess a significant bias. The process should not allow an attorney to give himself an edge in the case by filling the jury with jurors who are, in actuality, biased toward his cause.

Another effect of such jury manipulation can be to deny a defendant the right to be judged by a jury of his peers. According to *Jury Selection Procedures* by John M. Van Dyke, disagreement exists over the definition of “peer,” “disagreement that must be analyzed in terms of both the purpose of the jury—to render a reliable judgment that will be accepted by the community—and the social and political character of that community today” (9). Van Dyke implies that the definition of “peer” goes beyond the Supreme Court’s definition: “Persons having the same legal status” (qtd. in 9). If an attorney chooses, he can easily manipulate a jury by having all jurors of the same ethnicity, economic status, or religious beliefs as the defendant removed. Such action skews a jury into a false representation of the defendant’s peers – an uneven sampling. Jonathan Turley commented with regard to the manipulation of juries:

The rulings on clergy and Italian Americans only deepen the debate over the purpose of such peremptory challenges in jury selection. While defendants are assured of a randomly selected jury of their peers, we allow lawyers to remove people based on personal characteristics that do not show bias or conflicts with a particular defendant or case. Lawyers are allowed to pick and prune a jury into a more appealing image for their clients. At the end of this process, American juries often look as natural and random as coiffed French poodles.

We can hardly guarantee a jury that reflects a community when we actively exclude whole categories of that community. (M5)

In conclusion, it has been shown that fair-minded jurors are often prevented unnecessarily and even deliberately from serving on a jury. Some attorneys have taken peremptory strikes beyond their intended use of creating impartial juries and have actually used them to create a jury biased toward their viewpoint. Unfortunately, the peremptory strike system

cannot simply be done away with because of the critical role it plays in the selection of un-biased juries. Perhaps stricter restrictions should be enforced as to what grounds for strikes are acceptable, or perhaps the number of strikes available should be reduced, allowing attorneys only enough strikes to remove those jurors deliberately hiding bias from the judge. Despite the necessity of the current system, the fact remains that it denies many citizens the constitutional opportunity to apply the laws of our great country and simultaneously denies others the right to a trial by their peers. Such denials characterize the glaring injustice of the current jury selection system.

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