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Jury Selection in an Aging America: The New Discrimination?

A fresh look at the judicial system reveals the possibility that entrenched stereotypes of the elderly may be working to drive discriminatory laws, policies, and practices that serve to disenfranchise them of their right to participate in the judicial system by serving as jurors.

By Max B. Rothman, Burton D. Dunlop, and Gretchen M. Hirt

Various countries, particularly the United States, are beginning to acknowledge the increased diversity, vitality, and longevity that characterize the older population. In response, employers, health care providers, various governmental agencies, family members, and older adults are beginning to rethink entrenched stereotypes and attitudes about aging. It is not surprising then that the justice system must do the same.

This article expands on issues initially addressed by Pamela Entzel, Burton D. Dunlop, and Max B. Rothman in Elders and Jury Service: A Case of Age Discrimination? Entzel, Dunlop, and Rothman review elders’ perceptions of the judicial process, their participation in civil and criminal jury panels, and the relationship between older citizens and the justice system. Evidence strongly suggests that people age sixty-five and over face discrimination throughout all phases of jury selection—from summons to the venire to final empanelling. This is detrimental to not only older persons but also the parties to lawsuits and society as a whole.

By the late 1990s there were approximately 34.1 million Americans over the age of sixty-five, accounting for 12.7% of the total population. Current projections are that individuals age sixty-five and older will comprise 20% of the population by 2030, possibly exceeding 70 million in number. The older population also is expected to become dramatically more diverse between 1997 and 2030: white, non-Hispanics sixty-five and over will increase by 79%, while those of Hispanic descent will expand 368%. Black, non-Hispanic elders are projected to grow in number by approximately 134%, and Asians and Pacific Islanders by 354%.

As the number of older people in American society increases, so does the probability that many will be summoned to jury service. A growing number of states have modified their jury selection systems by broadening the pool of potential jurors from registered voters to those with a valid driver’s
license. This responds to concerns that juries had been, among other things, “too old.”

Older citizens are predominantly a non-working group, making them less likely to seek work-related excuses frequently sought by younger individuals.

Furthermore, although grandparents increasingly are raising grandchildren, fewer older Americans are engaged with childcare responsibilities, a circumstance that may prevent a substantial number of younger persons from fulfilling jury service duty. On the other hand, elders do serve as caretakers for spouses or parents, creating a potential conflict with jury service.

Several studies suggest that older citizens are well-represented on jury panels and that, as discussed below, most Sixth Amendment cases involve criminal defendants arguing that their constitutional rights were violated by having too few individuals in the loosely and variously defined category of young adult. Nonetheless, in contrast to the argument that older adults are disproportionately represented on jury panels, other evidence suggests that older Americans are too frequently intimidated and not accommodated in, the judicial process. Research indicates that at least twenty-one states provide older citizens with exemptions from jury duty, offering individuals the opportunity to avoid a summons if they meet an arbitrary age threshold.

Federal courts do not offer age-based exemptions or excusals from jury service. Of the twenty-one states that do so, most limit eligibility to individuals over age 60. For example:

- Wyoming uses a cut-off age of seventy-two.

- Nevada added an exemption in 1997 for all individuals over age sixty-five who live sixty-five or more miles from the court.

- New Jersey does not automatically exempt its elder citizens from jury service, but allows age-based excusal for individuals age seventy-five or older.

Courts assess the validity of excusals on a case-by-case basis, thus differentiating them from exemptions available to all eligible jurors who claim or seek them.

California has an unconventional method of handling older potential jurors. Individuals age seventy and over with certain physical or mental limitations may request excusal from jury service on disability-related grounds—although, inexplicably, persons claiming such a disability-related excusal cannot be required to provide proof to the court. Minnesota and Florida offer a flat-out, age-based exemption for all citizens over age seventy. However, in all states honoring age-based exemptions, older potential jurors are not denied the right to serve on juries after reaching the legislatively determined age threshold, but are instead afforded the opportunity to avoid service, an option that only they may exercise.

In contrast, elder jurors have not been called for service or have been summarily excluded in some jurisdictions. In Williams v. State, court proceedings revealed that a jury commission clerk excluded all persons over the age of sixty-five from the jury roll pursuant to an age-based exemption that Alabama then had in place. In People v. McCoy, a California state appellate court found that officials at the trial court level routinely excluded potential jurors age seventy and over from the jury pool before receiving excusal requests.

Rationales

Dicta, legislative committee hearings, or other sources that explain why senior citizens require specially crafted exemptions and excusals from performing their civic duty as jurors are difficult to find. A 1986 book, Anatomy of a Jury: The System on Trial, presents a credible theory regarding the use of exemptions for elders. Its author opines that society is proceeding on the assumption of disability and senility in individuals of a certain age group. Entzel and colleagues note that, “states have argued (and courts have agreed) that exemptions are reasonable in light of increased rates of ‘infirmities’ among older people.” While older people are more likely to suffer infirmities, disability levels not only vary enormously among older individuals, but rates of disability among this group have dropped significantly in recent years.

Relying on assumptions and stereotypes relating to the condition of elders detracts from representativeness and eliminates vigorous, capable individuals from offering a valuable service and glean-
ing rewards from participation in the judicial system. In fact, older potential jurors may seek exemption or excusal from jury duty at least in part because they perceive that a state’s offer of an exemption or excusal is an implicit request that they not be present.

**Perceptions**

A survey of Florida residents age sixty-five and over who had been summoned for jury service evaluated perceptions of the jury selection process. Individuals who were summoned and did report as well as those who were summoned and did not report were questioned. Survey results found no variance between the two groups in their perception of the importance of participating in the jury process: they overwhelmingly agreed that it is important to the functioning of a democracy. Despite their agreement regarding the value of jury service, however, a significant number of study participants did not report for jury service. Less educated, older, and more infirm citizens were more likely to have failed to report for jury duty in the past, and to indicate that they would make the same decisions again if requested to report in the future.

Service by elders on a jury panel provides not only an opportunity to make a valuable contribution to the community, but also has ramifications for the accused in a criminal case. Under the Sixth Amendment, defendants are entitled to an impartial jury drawn from a fair cross section of the community. Common sense dictates that not every jury must contain representatives of all groups in a community; rather, no group should be systematically excluded during the jury selection process. However, it appears that older adults are being excluded, quite intentionally, from the jury selection process, not just in criminal cases but civil trials as well. Questions regarding the representativeness of the jury panel and thus runs counter to the fair cross-section ideal as well.

Perhaps the use of peremptory strikes to eliminate older jurors is more insidious than exemption. At least a potential juror must affirmatively request to be excluded from the process in the case of exemptions and excusals. Alternatively, lawyers use peremptory challenges to eliminate unfavorable jurors—those who would not, based upon stereotypes, prejudices, and firmly entrenched presuppositions of the legal community and society as a whole, be sympathetic to claims by the side exercising the strike. Elders are by no means the only group to be peremptorily challenged based on preconceived notions of their attitudes; however, there is to date no legal protection from the use of this practice against them.

**Implications of a Discriminatory Legal System**

A recent informal survey of trial attorneys in the South Florida area conducted by one of the authors revealed a surprising willingness to admit discriminatory practices against various groups, most notably, older potential jurors. Opinions about older jurors were varied, of course, with two attorneys expressing no preconceived notions about the way a particular person would vote on a jury based solely on that individual’s age. Several lawyers questioned were adamant that use of the term older juror was insufficient, and that there was a definite disparity among the old. After completing the survey, it was evident that lawyers viewed people in the sixty to seventy age range as having “wisdom,” while those over seventy were considered a hindrance on the jury panel. As one former public defender now in private civil practice remarked, “I would question their [persons over seventy] capacity to serve.”

Several criminal defense attorneys justified their feelings about older jurors by citing personal experiences. One attorney expressed dissatisfaction with the attentiveness of older jurors, while another asserted that older people were more prejudiced and conservative. Finally, there was overwhelming agreement that older potential jurors expressed little sympathy for criminal defendants, particularly those who were convicted of drug-related charges.
These same attorneys claimed that young adults, around twenty-five to thirty were less likely to convict on drug-related charges, while older jurors held stronger beliefs regarding the necessity of incarceration for drug-related offenses.

Stereotypes that attach to the old likewise affect the very young. A public defender revealed that he was very likely to strike individuals under the age of twenty-five because "they don't have enough life experience." Several attorneys based their opinions of the young on courtroom experiences; most cited dissatisfaction with their attention span, as well as their lower levels of interest in trials.

Interestingly, plaintiffs' attorneys demonstrated a prejudice in favor of older jurors, especially when seeking money damages for injuries, or pain and suffering. Moreover, one civil defense lawyer explained that he used his peremptory strikes to remove virtually all older jurors from the panel in a case involving condominium controversies. His justification rested on a belief that elders would be sympathetic to the positions held by the condominium association (comprised of predominantly older individuals), while the very young would find the claims "petty and ridiculous."

Results from this small, informal survey are consistent with findings of several other researchers, as well as the American Bar Association (ABA). For example, one commentator describes the process by which undesirable jurors are eliminated as a highly unscientific mixture of preconceived notions, hunches, intuition, biases, and stereotypes about aging and older people. The ABA stated that peremptory strikes are used against older potential candidates for the panel because attorneys view elders as "stubborn, indecisive, or cantankerous."24

Judges have written on the subject as well, with one even arguing that older jurors are less receptive to new ideas and information than the young.25 A statement intended to direct jury selection in civil cases notes that older jurors generally are more tolerant of human frailty and more sympathetic to the injured than younger jurors and, at the same time, "tend to have more respect for authority and more prejudices than younger jurors," with particular contempt for "single persons and the young."26 In a commentary on complex litigation, F. Lee Bailey argues that "jurors who are between twenty-eight and fifty-five years of age . . . will tend to be most alert and receptive."27

Not surprisingly, based on the literature reviewed above, attorneys appear almost eager to offer age as a justification for strikes where assertions are made that improper racial or gender biases motivated the striking of a juror.28 In Smith v. State,29 the defense questioned the prosecution's use of peremptory strikes to eliminate four black members of the venire. The prosecution retorted that two black prospective jurors were eliminated not on the basis of their race, but because they were old. The fact that a white venireperson (almost ten years the senior of one of the struck black potential jurors) was not eliminated from the jury pool brings into question the veracity of that claim. In effect, then, a lawyer is covering an insidious and unconstitutional discriminatory practice based upon race, with an acceptable prejudice against the old. In addition to demonstrating the willingness of lawyers to acknowledge age-based discrimination, this and other similar cases reveal a judicial willingness "to accept age-based discrimination even while purporting to scrutinize motions for discrimination on other grounds."30

Misconceptions surround the legitimacy and accuracy of jury selection procedures that rely on hunches, intuition, or other popularly accepted methods. Empirical studies illustrate that trial lawyers who use assumptions or biases to predict the attitude of a particular class of jurors consistently fail to select individuals who would favor their side.31 In fact, a number of well-designed studies find a correlation between demographic characteristics and verdict preferences to be negligible at best, with information regarding jurors' attitudes revealing far more about the selector's preexisting biases than those of the selectee.32

Recently, three states have effected rules relating to discriminatory practices of attorneys against prospective jurors. Florida, Illinois, and Rhode Island now have regulations explicitly prohibiting discrimination on racial, gender, and other regularly cited grounds. However, only Florida added age to its list of protected classifications. This bar on discriminatory practices does not explicitly apply to peremptory challenges, except in the District of Columbia, which prohibits strikes based on "race, religion, national origin, background, or sex," but not age.33 Many judges, academics, and legal practitioners encourage the outright eradication of peremptory challenges.34 One judge argues that in a post-Batson era (discussed below, p.74) of manipu-
ative tactics and clever circumventions of the bar against racial and gender discrimination, the institutional costs of peremptory strikes “outweigh any of its most highly-touted benefits.”

The effect of peremptory challenges on dramatically reducing the number of older jurors being empanelled is unclear, although circumstantial evidence indicates that systematic and widespread discrimination against elders is occurring. Before conclusions about the effect of peremptory challenges on the right of elders to participate in judicial process by serving on a jury can be drawn, however, more research is required. The first step to a more comprehensive understanding of the problem is a review of the peremptory challenge and its place in American jurisprudence.

**Peremptory Challenges: A Historical Perspective**

The peremptory challenge has been a part of the American jury system for about two centuries. Though widely employed throughout the United States, “th[e] Court has repeatedly stated that the right of peremptory challenge is not of constitutional magnitude.” Peremptory challenges have no constitutional basis of protection, and the original framers of the Constitution contemplated no discussion of their use. The topic of juror challenges was not broached until 1791 when the Sixth Amendment to the U.S. Constitution was drafted. Even then, the debate was limited to discourse regarding challenges for cause. As American federal courts began effectuating peremptory challenges in the 1700s, states followed suit and, by 1790, most states enacted statutes giving defendants and prosecutors the right to peremptory strikes. Many state courts expressed the view that the prosecution was entitled to peremptory strikes based on English common law. Indeed, the Supreme Court has called it “one of the most important rights in our justice system.”

Some argue that the inherent tendency of peremptory challenges to compromise the integrity of the jury process by permitting exclusion based upon improper considerations of race ought to lead to their outright ban in the criminal justice system. Others praise the peremptory challenge as a device that lends itself to securing fairness and impartiality. Regardless of the view taken of the value of the peremptory challenge to the justice system, it is apparent that such challenges are chiefly based upon judgments made by prosecutors, plaintiffs’ attorneys, and defense attorneys who possess only very limited information about the individuals who are subject to the challenge. Additionally, it seems clear that a particular juror’s right to participate in the judicial system (sometimes viewed as a civic duty, or an opportunity to contribute to the democratic process, depending on one’s perspective) is not a chief consideration.

In *Strauder v. West Virginia*, a jury convicted a black man of murder. According to state law, only white males over the age of 21 were eligible to serve as jurors. The U.S. Supreme Court found that excluding African-Americans from the venire, which resulted systematically from their ineligibility to serve as jurors, violated the defendant’s rights as secured under the Equal Protection Clause of the Fourteenth Amendment. The Court also observed that “[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors... is practically a brand upon them... an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.” While the decision clearly focuses on the rights of the accused, this statement is an early and positive recognition that the prospective juror also possesses interests in the jury selection process.

The *Strauder* decision demonstrated that the Equal Protection Clause would not tolerate the exclusion of blacks from the jury venire. However, the Court emphasized that a defendant enjoys no right to a petit jury in which his race is represented. It also established a precedent which would be seized upon by later courts seeking to eradicate discrimination from the procedures used to select the venire from which jurors are drawn.

In *Swain v. Alabama*, a black man charged with and convicted of rape moved to quash the indictment, to strike the venire, and to declare the petit jury chosen in his case void on the basis that the jury process was compromised by invidious discrimination. Specifically, the defendant claimed that the process by which jurors were selected for participation on the grand jury and petit venire, as well as the manner in which peremptory challenges were employed by the state, discriminated against his race. The U.S. Supreme Court determined that a prosecutor’s use of peremptory challenges in a particular case could not establish a prima facie
case of purposeful discrimination. However, systematic discriminatory use of peremptory challenges over a period of time might establish an evidentiary burden upon the defendant to show purposeful discrimination in the selection of the grand jury or petit jury venire. This would change in the landmark case of *Batson v. Kentucky.*

In *Batson*, the U.S. Supreme Court revisited the procedural requirements for articulating a claim for violation of the Equal Protection Clause through use of peremptory challenges against potential members of the petit jury. The Court reaffirmed the principle that the Equal Protection Clause does not guarantee a defendant the right to a petit jury composed of members of his own race, but reiterated that it does guarantee a selection process free from purposeful discrimination on account of race. The Court observed that cases after *Swain* demonstrated that the burden upon a defendant of showing discrimination in the use of peremptory challenges over a series of cases had become a crippling one. Under the procedure articulated in *Batson*, a defendant’s prima facie case could be established by showing that:

1. the defendant is a member of a cognizable racial group;
2. the prosecutor used peremptory challenges to exclude members of that racial group; and
3. other facts and circumstances exist which give rise to the inference that the peremptory challenge was used for improper, racially motivated reasons.

To rebut a defendant’s prima facie case, the state must come forward with a racially neutral explanation for its conduct; and merely denying racial motivation will not suffice.

The majority’s decision in *Batson* was criticized as a total abandonment of the peremptory challenge, which by definition is not peremptory if it must be scrutinized and justified. Chief Justice Burger also found the majority Equal Protection analysis odd because it seemed to apply only when the specter of racial discrimination was raised, when, in his view, conventional Equal Protection principles should extend to challenges premised upon such factors as gender, religious affiliation, mental capacity, number of children, choice of living arrangements, or employment. The Chief Justice’s insight would prove keen.

Since *Batson*, the Court accepted opportunities to extend the application of its holding. These holdings suggest the full scope and breadth of the *Batson* decision have yet to be realized.

### The Peremptory Challenge and Elders

Elders are not viewed as a suspect class. That is, they are not considered a discrete and insular group in need of protection from a majoritarian political process. The question arises, then, whether one litigant may peremptorily challenge an older member of the petit jury venire based upon nothing except preconceived notions about elders and their biases. Put another way, if challenged by a criminal defendant, may a prosecutor answer: “I did not strike the juror because she is a woman; I struck her because she is an old woman.”

In *Strauder*, Justice Strong observed that “defendant[s] have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria.” Since *Strauder*, the Court has “repeatedly affirmed [its] commitment to jury selection procedures which are nondiscriminatory.” “Prospective jurors and litigants alike are entitled to a jury selection process untainted by stereotypes and historical prejudices.” If so, it would seem to follow that the condition of advanced age cannot constitutionally serve as a “proxy for juror competence and impartiality.”

In *J.E.B. v. Alabama*, the state filed a complaint on behalf of a mother relating to paternity and child support. The state employed all of its peremptory strikes to exclude males. In holding that such gender-based uses of peremptory challenges may violate the Equal Protection Clause, the U.S. Supreme Court looked to its holding in *Taylor v. Louisiana* where it struck legislation preventing a woman from being drawn for jury service unless she filed a written expression of her desire to serve as a juror with the clerk of court. According to *Taylor*, the scheme violated a defendant’s Sixth Amendment right to have a jury drawn from a fair cross section of the community. The *Taylor* decision also mentioned that juries should maintain a representative character so as to allow individuals to share civic responsibility in the administration of justice. The *J.E.B.* Court found the statements of
Taylor consistent with "the heightened equal protection afforded gender-based classifications." The Court subjected the state's conduct to heightened scrutiny rather than strict scrutiny, and determined that gender-based peremptory challenges are not related to an important government objective. The state essentially argued that its justification was that men might be more sympathetic to another man under the circumstances, but the Court refused to "accept as a defense of gender-based peremptory challenges 'the very stereotype the law condemns."

Justice O'Connor's concurrence in J.E.B., which was intended to discuss some of "the costs" of the J.E.B. holding, is significant. According to O'Connor, J.E.B. should be limited to gender-based discrimination, and as Chief Judge Burger articulated in his Batson dissent, O'Connor acknowledges and lends support to the reality that peremptory challenges allow lawyers to act upon stereotypes without saying so. She states that, "discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." In essence, Justice O'Connor argues that race and gender-based discrimination in jury selection is to be avoided because this nation publicly stands against such discrimination, not because such discrimination is, wherever exercised, utterly without justification.

Using jurisprudential models discussed with regard to race and gender-based discrimination in the jury selection process, arguably age-based discrimination against elders is subject to at least three possible constitutional challenges:

1. when it systematically affects the composition of the petit jury venire, it is subject to scrutiny under the Sixth Amendment (at least where the challenge is raised by a criminal defendant);
2. under the Equal Protection Clause of the Fourteenth Amendment, when it purposefully impacts the composition of the petit jury through use of the peremptory challenge; and
3. under the Due Process Clause of the Fourteenth Amendment, to the extent the opportunity to serve on a jury may be viewed as a fundamental right.

Concerning a Sixth Amendment challenge, in Barber v. Ponte, there is a comprehensive review of the implications of a compression of the Sixth Amendment into the Equal Protection clause. "This they do in the face of the Supreme Court's long-standing and consistent position that the two are not congruent." Sixth Amendment claims are limited to defendants seeking relief from convictions by claiming that the jury, which is constitutionally mandated to reflect a cross section of the community, was in fact unrepresentative and partial. The U.S. Supreme Court has emphatically asserted that "enforcement of the Sixth Amendment cross-section requirement is not confined to enforcement of the Equal Protection Clause." For purposes of this discussion, the focus will remain on cases in which a defendant appealed a judgment, claiming that a specific age group was purposefully or systematically eliminated from the venire. As a result, the defendant asserts the jury was unable to render a fair and impartial verdict.

Recently, the U.S. Supreme Court has offered protection by allowing any defendant to challenge the arbitrary exclusion of his or her own (or any other) class, but this raises the rather complex question of what constitutes a class. In 1970, the Court explained that a cross section should mirror a community in such a way that "the peers or equals of the person whose rights it is selected or summoned to determine, that is, of his neighbors, associates, persons having the same legal status in society as that which he holds," are included and well-represented on the jury. However, as indicated in Barber, the defendant has several hurdles yet to clear before a Sixth Amendment violation will be considered.

Merely establishing that a "statistical disparity existed in the chosen age group" of jurors is insufficient evidence for a prima facie violation of the Sixth Amendment.
there be a community interest among the members of the group, such that the group’s interests cannot be adequately represented if the group is excluded from the jury process.3

Demonstrating that age was a distinctive class proved difficult not only for the defendant in Barber, but for countless defendants in every circuit in the country who similarly tried, and failed, to adequately argue the distinctiveness of certain age groups.

Several courts note that if age groups were held to have distinct characteristics, then the floodgates would open, thus permitting groups like “blue collar workers, Rotarians, Eagle Scouts, and an endless variety of other classifications [to be treated as “distinct groups”] . . . [t]hese are not the groups the Court has traditionally sought to protect from under-representation on jury venires.”8 However, for purposes of exempting or challenging jurors on the basis of age, legislators, attorneys, and judges often treat older people as a homogeneous group. Nevertheless, “in the context of challenges to the under representation of older people (or, in the case of Barber, younger people) on jury panels, courts tend to emphasize the diversity of the elder population and the arbitrariness of age-based categories.”9

In Taylor, the U.S. Supreme Court rejected the notion that women’s “distinctive role in society,” which ostensibly formed the basis of a Louisiana law excluding them from compulsory jury service, superseded the defendant’s Sixth Amendment right to a jury drawn from a fair cross section of the community.4 The Court accepted that women are a distinct enough group to be part of the cross section of the community the participation of which in the jury system is owed a defendant under the Sixth Amendment, but disagreed with the Louisiana legislature as to the characteristics that render women a distinct group.5 In reality, the Court recognized women as an identifiable segment of the community without much discussion as to what makes them identifiable. Nevertheless, it is clear that women’s perceived role as “the center of home and family life” did not set the Court’s line of demarcation.6 It can be argued that the Taylor line of demarcation rests on an unstated premise, articulated in J.E.B. That is, women share in common the experience of being subjects of “invidious, archaic, and over broad stereotypes.”7 Then again, according to J.E.B., so do men, as the prejudices are about gender. So, at bottom, the line of demarcation is where one should expect to find it—with the difference that makes a difference.

Similarly, it cannot seriously be questioned that elders are usually viewed as a distinct and identifiable segment of the community because they are recognized upon sight and prone to differential treatment. And yet it cannot be denied that in contemporary American culture, older people are often viewed not merely as old but, furthermore, as feeble, forgetful, close-minded, and bigoted (raised apart as they were from modern views about race, gender, religious affiliation, etc.). In short, elders are stereotyped, and these stereotypes form the basis of laws that can exclude them from petit jury venire. Protection under the Sixth Amendment is intended to offer criminal defendants the opportunity to be judged by the full spectrum of human experience, requiring all age groups to be reflected on the jury panel.

The difficulties of challenging age-based or elder-based discrimination with regard to the use of peremptory challenges under the Equal Protection Clause of the Fourteenth Amendment is somewhat more problematic because elders have (rightly or wrongly) not been defined as a protected class.8 Thus, challenging age-based discrimination in jury selection under this clause most likely would require determining that older adults are an insular group, as blacks and women have been.

Under the equal protection clause, defendants (in criminal cases) and opposing litigants (in civil cases) have standing to object to unconstitutional exclusions of jurors through peremptory challenges. A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party’s ability to protect his or her own interests.9 So far, there has not been a case of an excluded juror claiming that their equal protection rights were violated because they were stricken from a jury panel. Although there is no bar to such an action, the U.S. Supreme Court notes that “[t]he
barriers to a suit by an excluded juror are daunting." Thus, a Court decision on the constitutionality of age-based peremptory challenges likely will be in the hands of third parties, not the older jurors themselves.

Finally, the right to participate in the justice system and to serve on a jury may be viewed as a fundamental right under the Due Process clause of the 14th Amendment. Thus, the stricken juror potentially would have standing to challenge the peremptory strike on that basis. Compare the right to serve on a jury with the right to vote, which is an established fundamental right. If participating in the justice system through service in the jury system is a fundamental right, then only government in the presence of a compelling interest requiring review using strict scrutiny can interfere with this right. Since it is widely acknowledged that the interest in preserving the peremptory challenge is not of constitutional magnitude and that using such challenges may be based on nothing more than intuition and hunches at best, and biases or prejudice at worst, arguably the peremptory challenge cannot survive a strict scrutiny analysis. Therefore, an older juror may have standing to challenge age-based removal from the venire, claiming a violation of a fundamental right, thus requiring the attorney (the state actor) to demonstrate that the strike served a compelling state interest. Review of peremptory challenges using a strict scrutiny analysis would effectuate perhaps the strongest basis for arguing their unconstitutionality.

Conclusion

Many aspects of an older person's interaction with the jury system require further critical assessment. In particular, greater attention should be directed to the use of exemptions and exclusions for older citizens summoned for jury service; the practice of peremptorily striking older potential jurors based solely upon their age; the perceptions older people have about the judicial process; and the perceptions held by actors in the justice system about older people. The fact that, in the peremptory challenge phase, courts accept lawyers' justifications for striking a juror based solely on that individual's age is cause for serious concern. Older people may become tentative, ambivalent, and untrusting of the process if they perceive that they are being stereotyped and discarded.

Further, the implications of age-based discrimination for the rights of the accused in Sixth Amendment situations and, perhaps more interestingly, the fundamental rights of older citizens being excluded from jury panels under Due Process, merit closer examination by the courts. As the population of older people increases, there should be more systematic analysis of their needs and rights in the judicial branch. Very little assessment has been done to identify factors that discourage elders' participation, but anecdotal evidence indicates that entrenched stereotypes about older people actually may work to drive discriminatory laws, policies, and practices that keep older people from ever reaching a jury panel.

Endnotes


3. Id.


10. See Bleyer et al., supra note 7, at 274.
12. See Bleyer et al., supra note 7, at 273; see also 47 AM. JUR. 2d Jury § 163 (1995).
14. 342 So. 2d at 1327.
18. See generally Entzel et al., supra note 1.
20. See id.
22. See generally, supra note 6 for cases that discuss these arguments.
24. AMERICAN BAR ASS’N, supra note 5, at 45.
30. Entzel et al., supra note 1.
31. See Olczak et al., supra note 23, at 432–434.
32. See generally Entzel et al., supra note 1; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986).
35. Id. at 845.
37. Id. at 108 (Marshall, J., concurring).
38. See Hoffman, supra note 33, at 823–24.
40. See WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 175 (London, John W. Parker & Son 1852).
41. Id.
42. See id. at 304.
43. See id. at 310.
44. Id.
45. See id. at 305.
46. See id.
47. See Batson, 476 U.S. at 85.
48. Swain, 380 U.S. at 203.
49. See id. at 205–10.
50. See id. at 227.
52. Batson, 476 U.S. at 82.
53. See id. at 86.
54. See id. at 92.
55. Id. at 96.
56. See id.
57. Id. at 112 (Burger, C.J., dissenting).
58. See id. at 124.
59. See, e.g., J.E.B. v. Alabama, 511 U.S. 127 (1994) (applying Batson to gender-motivated use of the peremptory challenge); Georgia v. McCollum, 505 U.S. 42 (1992) (establishing that criminal defendants may not use peremptory strikes in a discriminatory manner); Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991) (applying Batson to private civil cases between private litigants); Powers v. Ohio, 499 U.S. 400 (1991) (holding that a defendant may object to race-based peremptory challenges even though he is not of the same race as the excluded juror).
61. Strauder v. West Virginia, 100 U.S. 303, 303 (1879).
63. Id.
64. Id. at 129.
65. Id.
66. 419 U.S. 522 (1975)
68. Id.
69. J.E.B., 511 U.S. at 135.
70. See id.
71. Id. at 137–138.
72. Id. at 149.
73. See id. at 149.
74. Id.
75. See id.
76. 772 F.2d 982 (1985).
77. Id. at 984. In this quote, the Court's reference to "they" applies to the Supreme Court members who decided the case, Peters v. Kiff, 407 U.S. 493 (1972). The Barber decision also remarks that the 1972 Court was experiencing a "bright-line fever to confine cognizability" which contributed to the meshing of the Sixth Amendment and equal protection.
78. Id.
80. Barber, 772 F.2d at 986.
82. Barber, 772 F.2d at 999; see, e.g., Hill v. Texas, 316 U.S. 400 (1942); Duren v. Missouri, 439 U.S. 357 (1979).
83. See Entzel, et al. supra note 1, at 176.
84. Taylor, 419 U.S. at 534.
85. See id. at 533–537.
86. Id.
87. J.E.B., 511 U.S. at 129.
88. See Murgia, 427 U.S. at 307.
89. Edmonson, 500 U.S. at 629.
91. See id. at 407.

92. See generally Amar, supra note 21.