Jury Discrimination and Stereotyping, aka *Voir Dire*

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I. JURY SERVICE

"Jury" means a body of persons temporarily selected from persons who live in a particular county or district and invested with power to present or indict in respect to a crime or to try a question of fact. ORS 10.010(3).

Unless there is a specific statutory exception, Oregon law makes it clear that the opportunity for jury service may not be denied or limited on the basis of:

Race;
Religion;
Sex;
Sexual orientation;
National origin;
Age;
Income (socioeconomic status);
Occupation; or,
Any other factor that discriminates against a cognizable group in the State of Oregon.

ORS 10.030(1).

A person cannot sit on a civil jury if that person:

1. Is not a citizen of the United States;
2. Does not live in the county in which summoned for jury service;
3. Is less than 18 years of age; or,
4. Has rights or privileges withdrawn and not restored under ORS 137.281 (Incarcerated at the time of summons for jury service, or under appeal in a criminal proceeding.)

ORS 10.030(2)

A person cannot sit on a criminal jury if:

5. They have any one or more of the above four (4) characteristics set out in ORS 10.030(2) above;
6. They are convicted of a felony or served a felony sentence within the past 15 years; or,

7. They are convicted of a misdemeanor involving violence or dishonesty within the past five (5) years prior to summons for jury service. ORS 10.030(3)

Thus, in the infinite wisdom of the Oregon Legislature, a convicted felon has every right to sit on a jury presiding over a civil case.

ORS 10.030(4) specifically states that a person who is:

Blind;
Hard of hearing;
Speech impaired; or,
Has a physical disability

is not ineligible to act as a juror and may not be excluded from service on the basis of blindness, hearing or speech impairment, or physical disability, alone.

ORS 10.115 requires the court to supply an interpreter for any juror who is hearing or speech impaired.

When in the court's opinion it is proper for a jury to have a view of the real property which is the subject of the litigation, or of the place in which any material fact occurred, the court may order a view of the involved premises for the jury pursuant to ORS 10.100.

The court does, however, have discretion on its own motion to excuse a juror whose presence on the jury would substantially impair the progress of trial or prejudice the parties. ORS 10.050(2).

ORS 10.050(1) gives the court additional discretion to excuse a person from jury duty upon a showing of "undue hardship":

To the person (*What about a booked Caribbean cruise?*);
To the person's family (*Sole caretaker.*);
To the person's employer (*Small shop booked orders.*); or,
To the public served by the person (*Any first responder or governmental employee.*)

Even though Oregon law expressly prohibits discrimination against a juror in the form of excluding a person from jury service, there are a number of State-sanctioned protected classes that can opt out of jury service simply by making a request of the court clerk. If a person is 70 years of age or older and requests exclusion from service, ORS 10.050(3) allows that person to be excused from jury service. Similarly, if a woman is breast feeding and requests exclusion, she can avoid jury service under ORS 10.050(4).

Unless the public need for an empaneled jury outweighs individual circumstances, the court shall excuse a person from jury service on their request, if they are the sole caregiver of a child or

other dependent during regular business hours, and they cannot afford day care or make other arrangements for such substitute care. ORS 10.050(5).

ORS 10.090 makes it an unlawful employment practice to discharge, threaten to discharge, intimidate or coerce any employee by reason of their jury service. Likewise, the employer cannot require an employee to use sick leave, vacation or other leave time for jury service. If the employer engages in such a prohibited practice, the employee has a civil action against the employer under ORS 659A.885, and the Bureau of Labor and Industries likewise may bring an enforcement action against the employer.

Prejudice

Let's face it, we are all prejudiced. Our prejudices make up our core values. Hopefully, those values are compatible with society as a whole. Also hopefully, we can repress and keep in check those prejudices which, although ingrained in our psyches by way of upbringing or past experience, are not compatible with civil social interaction. *Voir dire* offers the lawyer a main, if not exclusive, opportunity to mine the prejudices of the veniremen to determine whether they would bolster the winning of the case, or, if seated on the jury, may bring defeat.

We submit that picking a jury is a psychological balancing act. As Clarence Darrow stated in his paper *"How to Pick a Jury*" (1936):

> *Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of the human emotions, the better he is equipped for subtle selection of his so-called 'twelve men, good and true.' In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man; all of these qualities and experiences have left their effect on ideas, beliefs and fancies that inhabit his mind. Understanding of all this cannot be obtained too bluntly. It usually requires finesse, subtlety and guesswork. Involved in it all is the juror's method of speech, the kind of clothes he wears, the style of haircut, and, above all, his business associates, residence and origin."*

The peremptory challenge has been an essential element of common law for centuries and of the American jury system since the beginning of our nation. The peremptory challenge is not, however, a constitutional right and during the past thirty years the United States Supreme Court has limited its use in a series of decisions, beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986). As practitioners we must address the competing interests of litigators to zealously represent clients, using the peremptory challenge as a tool to select a jury that will favor one's client, versus the three-fold interests reflected in the make-up of the petit jury: of the party to a fair and impartial jury, the excluded juror, who may have been discriminated against, and public confidence in the fairness of our system of justice. *Id.* at 87.

Oregon law also limits the use of peremptory challenges, via statute and court rule, but all Oregon court cases addressing discriminatory peremptory challenges have been decided on the basis of federal constitutional law.

> What does the limitation of peremptory challenges mean to us, as practitioners? How do we balance our duty to our clients with our commitment to professionalism?

The remainder of our discussion addresses discriminatory categories and characteristics of the potential juror that enter into the *voir dire* dance, as they interact with challenges for cause and peremptory challenges.

II. CHALLENGES FOR CAUSE

1. Physical Condition.

Litigants may have legitimate concerns about a potential juror's ability to competently serve as a juror, based on the prospective juror's disability. The Americans with Disabilities Act (ADA), however, is designed to protect people with disabilities from discrimination. The Act defines a person with a disability as *"A person with a physical or mental impairment that substantially limits one or more major life activities; a person with a record of such a physical or mental impairment; or, a person who is regarded as having such an impairment."* This forces us to carefully consider (and support any conclusion) whether or not a potential juror's disability does in fact affect his or her ability to competently serve.

The Marion County, Oregon, Juror Response form has a box in which a potential juror can state that they have a disability and request a reasonable accommodation under the ADA. This information is to be kept confidential. It would be an improper practice, and likely a violation of the ADA, to inquire of any prospective juror in *voir dire* as to the nature and extent of their disability.

A. The Blind Juror.

Many civil trials are document and image intensive. A juror in a business dispute trial is usually going to be required to sift through a great deal of written evidence. Likewise, a juror in a criminal matter will be exposed to crime scene pictures and hard evidence presentations. If the juror is unable to see, how then can that juror properly weigh such evidence? This was the question presented in one of the Assignments of Error in *Hutcheson v. City of Keizer*, 169 Or App. 510, 8 P.3d 1010 (2000). Although the Hutcheson court did not discuss its decision regarding the challenge for cause of a blind juror at trial, the Oregon Court of Appeals upheld such a challenge.

The appellant in the *Hutcheson* case argued that dismissal of a juror based on his blindness alone is in violation of both state and federal law entitling them to a new trial. The appellant also argued that dismissal of the juror on the basis of blindness alone violated the equal protection clauses of the United States and Oregon Constitutions, citing *J.E.B. v. Alabama*, 114 S. Ct. 1419, 511 U.S. 127 (1994) (Holding that "*Gender, like race, is an unconstitutional proxy for juror*

competence and impartiality.”); and *Batson v. Kentucky,* 106 S. Ct. 1712, 476 U.S. 79 (1986) (Holding that *“The equal protection clause forbids the prosecutor to challenge potential jurors solely on account of their race.”*). The appellant argued that while many exhibits were presented in the case and a jury view was had of the scene of the flooding, all that information could have been explained to the blind juror by some third party as a reasonable accommodation.

The *Hutcheson* respondent successfully argued that it was proper for the court to dismiss the blind juror for cause, based on its conclusion that the visual impairment in the case would cause prejudice to the parties, given the extent of the visual evidence to be presented.

The *Hutcheson,* case, *supra,* was tried in 1998. The result could well be different now, given the availability of software that can translate documents into braille from a computer, as well as computer-adapted technology that can scan documents and then read them out in high quality synthetic speech. *New South Wales Law Reform Commission, Blind or Deaf Jurors,* Report number 114 (2006) 49.

Furthermore, at the federal level, *Galloway v. Superior Court*, 816 F.Supp. 12 (D.C.C. 1993), held that denying an individual the right to jury service on the basis of blindness violates the Rehabilitation Act of 1974, 29 U.S.C. § 794, the Civil Rights Act of 1871, 42 U.S.C. § 1993, and Americans with Disabilities Act, 42 U.S.C. § 12132.

B. Mental Impairment.

There is no minimum IQ required for jury service. If the juror is capable of understanding the testimony of witnesses and the issues in the case, as well as the instructions from the court, then the juror is qualified to sit on the jury. The mere fact that a juror’s intellectual functioning, education or reading skill is subpar, does not disqualify a person from service. On the other hand, a juror who is incapable of understanding the nature of the proceedings or the questions propounded by counsel should be excused for cause. *Jury Selection: The Law, Art and Science*, pages 346 and 347.

Some cases recognize that a nervous or emotional condition is a proper challenge for cause. In one such case, it was revealed to the trial judge that a juror suffered from claustrophobia. The juror indicated she could not tolerate being sequestered in a small room with other jurors, and a challenge for cause was allowed. *Jury Selection, supra,* at page 348.

III. PEREMPTORY CHALLENGES UNDER FEDERAL LAW

1. Religion.

An otherwise competent juror cannot justifiably be disqualified on the basis of religious belief or the lack of any such belief. Exclusion from jury service based on religion would certainly implicate constitutional rights. *Jury Selection: The Law, Art and Science*, page 328.

The converse of avoiding any inquiry into a person's religious convictions is a situation where a prospective juror volunteers religious beliefs. A common situation presents itself where a prospective juror states that their religious beliefs either prohibit them from resorting to litigation against anyone, and they find that activity improper, or that it is against their religion to sit in judgment upon any individual. It is suggested that when the careful practitioner is confronted with this type of situation, the line of questioning should be geared toward having the prospective juror admit that they could not fairly judge the case, so that a challenge for cause would be allowed.

Although unsolicited and direct questions about a prospective juror's religion are not proper, this did not stop Clarence Darrow from his observations of the human condition as follows:

> *If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians, you probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty.* Clarence Darrow, *"How to Pick a Jury"* 1936.

2. Race

The first U.S. Supreme Court case to limit peremptory challenges based on a juror's identification with a group was in the context of race, in *Batson v. Kentucky*. As noted above, the *Batson* court found that peremptory challenges used to eliminate African American jurors from the pool in criminal cases harmed not only the accused, whose life or liberty the jury is summoned to try, but also the excluded juror who has been discriminated against, and public confidence in the fairness of our system of justice. *Id.* at 87. (The U.S. Supreme Court previously held that the a prosecutor's use of the peremptory challenge against African Americans is impermissible as violating the Equal Protection Clause, but that such discrimination must be shown over a period of time, in multiple cases. *Swain v. Alabama*, 380 U.S. 202, 223-224 (1965))

To establish a prima facie case of purposeful discrimination in a specific case, "the defendant must first show that he is a member of a cognizable racial group…and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 96. A consistent pattern is not necessary, but a defendant may rely on the prosecutor's actions in his case alone. *Id.* at 95. Once a prima facie case is made, the burden shifts to the prosecutor to present a neutral explanation for challenging black jurors. *Id.* at 97. The explanation need not rise to the level to justify a challenge for cause. *Ibid.* The trial court must then determine if the defendant has established purposeful discrimination. *Id.* at 98.

The first part of the three-part *Batson* test required that the defendant show that the challenged venire members shared the defendant's race. Five years later the U.S. Supreme Court expanded this first step, holding that a defendant may challenge race-based peremptory strikes even if the stricken jurors do not share the defendant's race. *Powers v. Ohio*, 499 U.S. 400, 404 (1991) (The defendant was white and all seven black members of the venire were removed through the state's peremptory challenges.)

What *Batson* did for criminal jury trials, *Edmonson v. Leesville* did for civil jury trials. 500 U.S. 614 (1991). There was no direct state actor in *Edmonson*, but the court found that the equal protection component of the Fifth Amendment's Due Process Clause applied to civil jury trials because "without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist." *Id.* at 621.

Although the law in *Batson* is still valid, it can be difficult to prove purposeful discrimination, as highlighted in the most recent U.S. Supreme Court case to review a *Batson* claim, *Davis v. Ayala*, No. 13-1428, slip opinion (June 18, 2015). . In *Ayala*, a Hispanic man was on trial for three counts of murder and one count of attempted murder stemming from a failed robbery. At trial, the prosecutor exercised seven peremptory strikes to eliminate all Hispanic and African American jurors. The defendant challenged the prosecutor's use of these strikes, claiming racial discrimination. The trial court permitted the prosecution to give its reasons for exercising those strikes in chambers, *out of the presence of counsel for the defense*, and ruled that the reasons given were race-neutral. The defense did not receive a transcript of this hearing until after the trial concluded and the defendant was convicted. The California Supreme Court held that, although the trial court's exclusion of Ayala's counsel from the hearing was error, the error was harmless, and upheld Ayala's conviction. The 9th Circuit Court of Appeals reversed the California Supreme Court.

In a 5-4 majority written by Justice Alito, the U.S. Supreme Court held that habeas petitioners are not entitled to relief unless they establish that the claimed error resulted in actual prejudice, the standard established in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The court also held that the California Supreme court had properly adjudicated the case on the merits, based on the highly deferential requirements of the Antiterrorism and Effective Death Penalty Act of 1996, 28 USC Sec 2254. In other words, a federal court cannot overturn a state court's determination unless the decision was contrary to clearly established law or based on an unreasonable view of the facts. *Ayala* at _____. The U.S. Supreme Court further held that, assuming that the trial court's exclusion of defense counsel from the *Batson* hearing was error, the state supreme court's finding that the error was harmless was supported by the record and the conviction would stand. *Ayala* at _____.

3. Sex

A few years after it decided *Batson*, the U.S. Supreme Court expanded its protection against discriminatory peremptory challenges to include sex. In *JEB v. Alabama*, the State had used 9 of its 10 peremptory challenges to remove men from the jury panel in a paternity and child support trial. 511 U.S. 127 (1994). The court held, "Gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* at 129. "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* at 140.

4. Sexual Orientation

The U.S. Supreme Court has not addressed whether peremptory challenges based on sexual orientation violate the Equal Protection Clause of the Fifth Amendment, but the 9th Circuit Court

of Appeals has, in *SmithKline Beecham Corp., dba GlaxoSmithKline v. Abbott Laboratories*, 740 F.3d 471 (2014) (referred to as SKB). In *SKB*, GlaxoSmithKline sued Abbott over a licensing dispute and the pricing of HIV medications. Abbott used a peremptory strike to exclude the only juror who self-identified as gay. The court held that classifications based on sexual orientation are subject to heightened scrutiny and that the Equal Protection Clause prohibits peremptory strikes based on sexual orientation. *Id.* at 474.

5. Beards and Goatees

It is, in fact, permissible to discriminate against jurors who have facial hair. In *Purkett v. Elem*, 514 U.S. 765 (1995), two men were stricken from the jury panel by the prosecutor. The defendant made a *Batson* challenge. The prosecutor explained his strikes:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far…hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty four also has a mustache and goatee type beard….I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.

Purkett at 766. *Jurors twenty-two and twenty-four were African American* and the *Batson* challenge was made on the basis of racial discrimination. The state trial court over-ruled the defendant's *Batson* challenge without explanation.

The 8th Circuit Court of Appeals reversed and remanded, with instructions to grant the writ of habeas corpus, concluding that the prosecution's explanation was pretextual and the trial court erred25 F.3d 679, 683-4 (1984). The U.S. Supreme Court reversed the Court of Appeals, stating,

> [I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious.

514 U.S. at 768. Furthermore, "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id* at 769.

IV. PEREMPTORY CHALLENGES UNDER OREGON LAW

As noted at the beginning of this paper, Oregon law employs broad language to prevent discrimination in jury service. ORS 10.030(1). This statute, however, specifically applies to the *jury pool*. Statutory prohibitions against discriminatory peremptory challenges are much narrower: "A party may not exercise a peremptory challenge on the basis of race, ethnicity, or sex." ORCP 57 D(4). Criminal peremptory challenges are subject to this same rule under ORS 136.230(4).

Appellate cases addressing peremptory challenges in Oregon have not been decided based on Oregon's statutory scheme, but on Federal Constitutional precepts, and only on the basis of race. (ORCP 57D(4)(c), which outlines a three-step process for deciding objections to peremptory challenges based on race, ethnicity, or sex, matches the three-step process prescribed by the U.S. Supreme Court.)

The first Oregon case to address race-based peremptory challenges was *State v. Henderson*, 315 Or. 1, 843 P.2d 859 (1992). *Henderson* involved the criminal conviction of an African American defendant. The prosecutor exercised a peremptory challenge to the only African-American prospective juror. The defendant objected to the strike based on *Batson* and the trial court over-ruled the defendant's objection.

The Oregon Supreme Court used the *Batson* 3-part test and accepted the prosecutor's explanation that his challenge was based on the challenged juror's demeanor, reinforced by information and observations that had been gathered by his office about the juror in other trials. The court also found that demeanor is a legitimate and reasonable race-neutral basis for a peremptory challenge. *Henderson* at 7.

The second Oregon case to address race-based peremptories was *State v. Clay*, 175 Or. App. 409, 27 P.3d 1110 (2001). In *Clay*, the state used peremptories to challenge all three black members of a 27-person jury pool.

During voir dire, the prosecutor asked the jury pool if any had been charged with drug offenses. Two jurors, both white, responded that they had. The prosecutor then asked about their experiences with and attitudes about police. Two of the three black jurors testified that they had unpleasant experiences in traffic-stop police encounters. The third testified that she witnessed a police beating of a man outside her residence. But she said generally that she believed in police officers, that they try to do their job to help take care of the people. One of the other jurors said that her experiences would not make it hard for her to listen to an officer telling the jury what happened on a separate occasion. One of the white jurors testified that he had a police encounter in which the police officers had "made more of it than it was": He had been pulled over in Seaside, an unfamiliar town, and the police found a marijuana pipe. Then they charged him with having had it within 1,000 feet of a school, even though he hadn't known the school was there. The prosecutor *did not challenge this juror*.

Faced with the defendant's objection to the challenge of all three black jurors, the trial judge stated:

> I must say the view of this court is if the only reason to excuse a racial minority juror is that they've had bad experiences with the police, that is the equivalent of a race-based challenge by definition….but my own observation, as I indicated, is that this is now a race-based jury and it is inappropriate and if I thought I had the authority I would have not allowed at least two of those challenges. I would have allowed the challenges to [juror 1]. But in the current state of the law, frankly … I think the State can state just

> about any reason and trial judges are stuck until we have further decisions from appellate courts.

Id. at 413-14.

The Oregon Court of Appeals disagreed:

> [D]efendant made a prima facie showing here. All of the African American jurors were challenged, and a Caucasian who had had a more serious encounter with the police—the essential reason proffered for the challenge to the African Americans--was not.

Id. at 414. The court further held, "The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 415, citing *Hernandez v. New York*, 500 U.S. 352 at 360 (1991). Moving to the third step, the court found:

> The decisive question will be whether or not counsel's race-neutral explanation for a peremptory challenge should be believed….[T]he best evidence often will be the demeanor of the attorney who exercises the challenge. This analysis is 'peculiarly within a trial judge's province.'

Clay at 415. The court continued, "What is…more clearly wrong, was the later statement in the ruling that the prosecution 'can state just about any reason and trial judges are stuck until we have further decisions from the appellate courts.'" *Ibid*. Because the trial court failed to make the necessary finding, the Court of Appeals vacated the judgment and remanded the case to the trial court.

V. PROFESSIONALISM, ETHICS, AND THE PEREMPTORY CHALLENGE

The concurring and dissenting opinions written in the *Batson* case highlight the debate over the role peremptories can play in excluding entire categories of potential jurors: "When is a peremptory challenge *peremptory*…A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force the peremptory challenge [to] collapse into the challenge for cause." *Batson* at 127 (Burger, C.J., dissenting). Not surprisingly, Justice Marshall stood at the opposite end of the spectrum and proposed the elimination of peremptories, "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Batson* at 103 (Marshall, J., concurring). Chief Justice Burger saw the *Batson* decision as the top of a slippery slope that would spell the end of the peremptory challenge and predicted the limits to expand, to include: sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry. *Batson* at 124 (Burger, C.J., dissenting).

As members of the bar and of the American Inns of Court, what role do we play in this area of the law? At the American Inns of Court, we endorse a Professional Creed that states, in part: "I will represent the interests of my client with vigor and will seek the most expeditious and least costly solutions to problems…" and "I will work to make the legal system more accessible, responsive and effective." The Oregon State Bar Statement of Professionalism reads, "I will work to ensure access to justice for all segments of society. I will avoid all forms of unlawful or unethical discrimination….I will work to achieve my client's goals, while at the same time maintain my professional ability to give independent legal advice to my client."

Where do you draw the line as a litigator in challenging a potential juror who is African American, Hispanic, Russian, male, female, transgender, self-identified as gay or lesbian, someone whom you believe to be gay or lesbian, low income, elderly, young (older than 18, but lacking in life experience), impoverished, not a high school graduate? Recall that two of the harms identified by the U.S. Supreme Court include harm to the excluded juror who has been discriminated against and public confidence in the fairness of our system of justice. *Batson* at 87.

Were the prosecutors in *Batson* and *Powers* acting in a way that would be consistent with our Inns Professional Creed and the Oregon State Bar Statement of Professionalism? What about the prosecutors in *Purkett* or *Clay*? The civil litigator in *SKB*? Why or why not?

It has been said that one must be either unapologetically bigoted or painfully unimaginative to lose a *Batson* challenge (from the perspective of the one making the peremptory strikes). *See* Bellin and Semitsu, "Widening Batson's Net," 96 Cornell L. Rev. 1075 (2011). There may be truth in this. However, it is apparent from reading the collective cases that address *Batson* challenges that the trial court judge plays a significant role in the final determination and his or her decision is given great deference. *See Purkett Clay,*, and *Ayala*