

Editor's Note: It's been a busy month for juries in the news and Doug Keene (President of ASTC) has spent hours on the phone with reporters attempting to clarify the issues and to communicate the position of the American Society of Trial Consultants (ASTC) on issues related to [jurors and the internet](#) as well as the [Wall Street Journal article on peremptory strikes](#) published barely two weeks earlier. Following is Doug's response to the WSJ:

Fairness, Justice and True Understanding: The Benefits of Peremptory Strikes

**by Douglas L. Keene, Ph.D.
President, American Society of Trial Consultants**

Your article of March 5, 2009, "Three Strikes and You're Out? Critics Seek Juror-Dismissal Cap", by Nathan Koppel, raises important questions about fairness and justice in the court system, but it ignores many dimensions of voir dire and the use of peremptory strikes that are crucial for true understanding.

As a psychologist and litigation consultant (and current President of the American Society of Trial Consultants), I am intimately aware of the complexity of discerning bias, and the affect that such bias might have on jury decision-making. Prof. Baldus makes some assumptions in his paper that are superficially tempting but not factual.

First, demographic differences, including race, are not normally the best predictors of juror attitudes. Our senior membership is asked to teach scores of education programs at law schools and legal seminars every year, and this is one of the consistent messages. If all you look at is the race of jurors, you are likely to over-simplify their attitudes, which are not usually driven by race at all.

What drives juror decision-making are core values, life experiences, and the way the juror views the world. There can be an intersection of these factors with the experience of living in a crime-ridden neighborhood, or having a friend who was assaulted, or not feeling that the police have the right amount of authority, for instance, but those attitudes transcend race. The same worries can exist equally in a white suburban homemaker as in an African-American urban retiree, and they could be the cause of a peremptory strike by the same trial lawyer.

One of the unfortunate trends in recent years is that courts have reduced the amount of time allowed for questioning jurors, and this raises the tendency to rely on demographics to 'guess' where to find bias, instead of actual information. Beyond that, in a world where people are struggling to keep up with mortgages, we lose far more jurors to the crisis of economic hardship than we do to peremptory strikes. The poor and those in vulnerable jobs (often under-represented in the venire under any circumstance) are thus least likely able to afford jury service.

Racism does exist, and racial stereotypes are out there, among the public and among some trial lawyers. What is far more important in jury selection is to understand whether those attitudes and biases are going to affect juror decision-making, and what the effect will be.

I am reminded of a research group I conducted on a personal injury case in which members of a Mexican-American family were severely injured in a motor vehicle accident. When considering damage awards, two mock jurors demurred that the medical, rehabilitation and lost wages damages should be very low, because the family (who had lived in the US for decades) might just go back to Mexico. Should we have been limited in our peremptory strikes? These people were not subject to a strike for cause, and in their hearts they did not feel themselves to be biased.

In an Alabama court, an entire community of African-Americans was suing for damages related to a massive chemical spill. One of the peremptory strikes was used for a white woman who sat at an angle in her chair for 3 hours during jury selection, never once even acknowledging the presence of the African-American juror to her left, while talking freely with all of the white jurors sitting around her. She denied any bias related to the race of the Plaintiffs, yet she could not even acknowledge the woman sitting 8 inches to her side.

Without peremptory strikes, fairness is what is lost. Americans are the beneficiaries of a system that is under a dynamic tension, with the considerations of the trial court under the scrutiny of an appellate system that keeps its eye on global ramifications, as well as those specific to a particular case. However imperfectly this legal system works, it does generally work very well. The unintended consequence of changes that Prof. Baldus proposes, and which Mr. Koppel appears to embrace, are that far more racial bias, as well as prejudice of other kinds, will overwhelm justice. Peremptory strikes are not merely a favored anachronism, they are an essential part of the justice process.

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Welcome to our March issue of *The Jury Expert*!

As spring moves in and brings new life to the world around us, so this issue of *TJE* is packed with new ideas and energy. Some ideas you may find to be things of beauty, others may make you go ‘hmmmm’, and still others may make you wrinkle your face with disgust. Our hope is that every article in *The Jury Expert* elicits some response in you--agreement, disagreement, aha moments, and yes, even disgust!

This issue is filled with contributions from ASTC member trial consultants and from the academics who actually perform the research upon which much of what we, as trial consultants, do is based. Flip through the pages of this pdf file or travel about on-line at our website and view all of *TJE* on the [web](#).

Either way you choose to read our publication (on your computer via pdf, from a hard-copy print version of the pdf, or on our website) please come back to the website and comment on what you see, think, feel, sense, or wonder about as you peruse the ideas reflected in the hard work of each of our authors. Your comments and feedback help us know what you like, what you want more of, what makes you think, and how we at *The Jury Expert* and the American Society of Trial Consultants can address issues to improve your own litigation advocacy. Comment on the web or drop me an email--we welcome your feedback.

-- [Rita R. Handrich, PhD](#)
Editor, *The Jury Expert*



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