

## IN PRACTICE

## CONSTITUTIONAL LAW

# Age Discrimination in Jury Selection

Case law is weighted toward permitting the use of peremptory challenges

BY CAROLYN R. CONWAY

It is well-settled law in New Jersey that race, ethnicity, religion and gender cannot be bases for excluding potential jurors in either a criminal or civil trial. Less clear is whether the constitutional guarantee of a jury comprising a “representative cross-section” of a community forbids discrimination on other bases. Age discrimination is a current hot-button issue in civil litigation, but whether it is unconstitutional for a party to exercise peremptory challenges based on a juror’s age remains to be seen.

### Constitutional Considerations in Jury Selection

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the seminal case addressing the Equal Protection Clause’s application to juror challenges, the United States Supreme Court held that the federal Constitution prohibits the use of peremptory challenges on the basis of a potential juror’s race. Building upon *Batson*, the New Jersey Supreme Court in *State v. Gilmore*, 103 N.J. 508 (1986), sought to define the permissible boundaries for

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peremptory challenges under the New Jersey Constitution. The *Gilmore* Court found that the New Jersey Constitution affords greater protection than the federal Constitution. The Court held that the state Constitution guaranteed the right to “an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex.”

The *Gilmore* Court held that a jury must be “drawn from a representative cross-section of the community.” This rule does not guarantee an exact proportional representation of all groups, but instead seeks to achieve an impartial jury through the recognition that jurors come from a variety of backgrounds and are members of multiple, overlapping groups. The *Gilmore* Court also identified groups from which representation was desirable, such as those defined by age, occupation and political affiliation. However, the Court expressly left open the issue of whether one or some of these groups could constitute a cognizable group necessitating constitutional protection.

Since its decision in *Gilmore*, the New Jersey Supreme Court has continued to expand upon the concept of prohibited discrimination in jury selection. In *State v. Fuller*, 182 N.J. 174 (2004), the Court analyzed to what extent “religious principles,” which had been identified in

*Gilmore* as one of the cognizable group attributes protected by the New Jersey Constitution, protected a juror from discriminatory challenges. The *Fuller* Court reiterated that the New Jersey Constitution affords greater protection than the federal Constitution, and held that it prohibits discrimination on the basis of religious affiliation. The Court left room, however, for challenging jurors on the basis that a specific religious belief created a bias that would prevent a juror from serving impartially.

### Age Discrimination in Jury Selection in the Federal Courts

Although the United States Supreme Court has never ruled on the permissibility of striking a juror based on age, in *Cleburne v. Cleburne Living Centers*, 473 U.S. 432 (1985), the Court described the level of constitutional protection certain groups merit. The claim in *Cleburne* alleged discrimination based on mental handicap, which the Court afforded only rational basis review. In dictum, the Court noted that age discrimination was afforded rational basis review because historically, people have not been discriminated against based on age. Therefore, the Court would presumably refuse to recognize age discrimination as an unconstitutional basis for a peremptory challenge.

Relying on *Cleburne*, federal courts have been hostile to claims of age discrimination in jury selection. The Third Circuit Court of Appeals recently addressed the issue in the unpublished decision, *United States v. Edwards*, 264 Fed. Appx. 139, cert. denied, 129 S. Ct. 234 (2008), and held that a peremptory strike based on the age of a potential juror is generally permissible. The other Courts of Appeals that have addressed the issue have held that age is a permissible basis upon which to use a peremptory challenge.

### Age Discrimination in Jury Selection in New Jersey

Although the federal courts have refused to recognize age as an impermissible basis upon which to exercise a peremptory challenge, the New Jersey Supreme Court's holding in *Gilmore* leaves open the possibility of such a holding based on the noted divergence between federal and state constitutional guarantees. The *Gilmore* Court specifically relied on the New Jersey Constitution as a means to offer more protection than the federal Constitution guarantees. After the *Gilmore* decision, two New Jersey cases squarely addressed the use of peremptory challenges on the basis of age, each reaching a different result.

In *State v. Zavala*, 259 N.J. Super. 235 (Law Div. 1992), a trial court was faced with the issue of whether peremptory challenges based on the youth of potential jurors was constitutionally permissible. The prosecution admitted to excluding jurors based solely on their age because of an assumption that young individuals would not make good jurors because they lacked "life experiences." Although the trial court stated that young people did not form a cognizable group under *Gilmore*, the prosecution's purposeful removal of young people from the jury was based on group bias and therefore impermissible.

Soon after *Zavala* was decided, the Appellate Division addressed the same issue but reached a different result. In *State v. Bellamy*, 260 N.J. Super. 449 (App. Div. 1992), certif. denied, 133 N.J.

436 (1993), the prosecution admitted to excluding jurors solely based upon their age. Defendant argued that young people were a cognizable group under *Gilmore* and therefore the prosecution's actions were constitutionally impermissible. The appellate court disagreed with the defendant, and stated that *Gilmore* was not intended to "encourage an endless proliferation of 'cognizable groups.'" Drawing upon *Cleburne*, the *Bellamy* court held a group is only cognizable within the meaning of *Gilmore* if it "has been historically excluded, on the basis of stereotypical prejudices, from full participation in the significant duties and privileges of American citizenship." Although the *Bellamy* court found there was no showing of historical bias in that case, the court left open the possibility that an age-defined group may satisfy this standard in the future.

### The Future of Age Discrimination in Jury Selection

Society is increasingly defining groups against whom discrimination will not be tolerated. The New Jersey Law Against Discrimination ("LAD"), for example, prohibits discrimination on a wider range of bases than does the New Jersey Constitution, including age, sexual orientation and physical disability. On the one hand, momentum is on the side of a broader definition of unconstitutional bases for peremptory challenges. Yet on the other hand, peremptory challenges themselves may become ineffective if every struck juror creates the opportunity to argue the juror's exclusion was impermissible.

The first challenge for any party attempting to make a claim of age discrimination in jury selection is to define the particular age group. This would seem easiest at each end of the age spectrum, but becomes increasingly difficult toward the middle. If a party challenges everyone within a small group at one end of the spectrum, it may be easy to classify that as age discrimination. But how big of a range is too big? Would excluding everyone over the age of 50 or under 30 constitute age discrimination? At what

point would age discrimination dilute the effectiveness of peremptory challenges by forcing an explanation for every dismissed juror?

Another challenge would be to prove that any cognizable age group has suffered historical discrimination. This is especially difficult because any asserted age group is constantly in flux, with people moving from one age group into another throughout their lives. Thus, age differs substantively from classifications based on immutable characteristics, such as race. However, the argument for different treatment based on changing characteristics is undermined by the New Jersey Supreme Court's holding in *Fuller*, which found discrimination based on religious affiliation in jury selection unconstitutional. Just as a juror's age classification will change during his or her life, the juror may belong to multiple religious groups throughout his or her lifetime.

A final consideration would be predicting the effect of prohibiting peremptory challenges on the basis of age on peremptory challenges generally. As the LAD makes clear, there are many groups that are worthy of legal protection from discrimination; however, courts may be reluctant to further impinge upon the practice of peremptory challenges. At what point would the desire for a representative cross-section dilute the peremptory challenge process by making every potential juror a member of one or more cognizable groups? One could envision claims being made over improper peremptory challenges on nearly any basis, such as occupation, socioeconomic status, education, etc. However worthy an identifiable group may be of legal protection, courts may fear a deluge of similar claims to protected status.

It appears that for now, case law is heavily weighted toward permitting the use of peremptory challenges on the basis of age. Yet as attitudes shift more toward greater recognition of groups deserving constitutional protection, age may ultimately be viewed alongside race or gender, as characteristics for which there is no basis to justify discriminatory treatment. ■