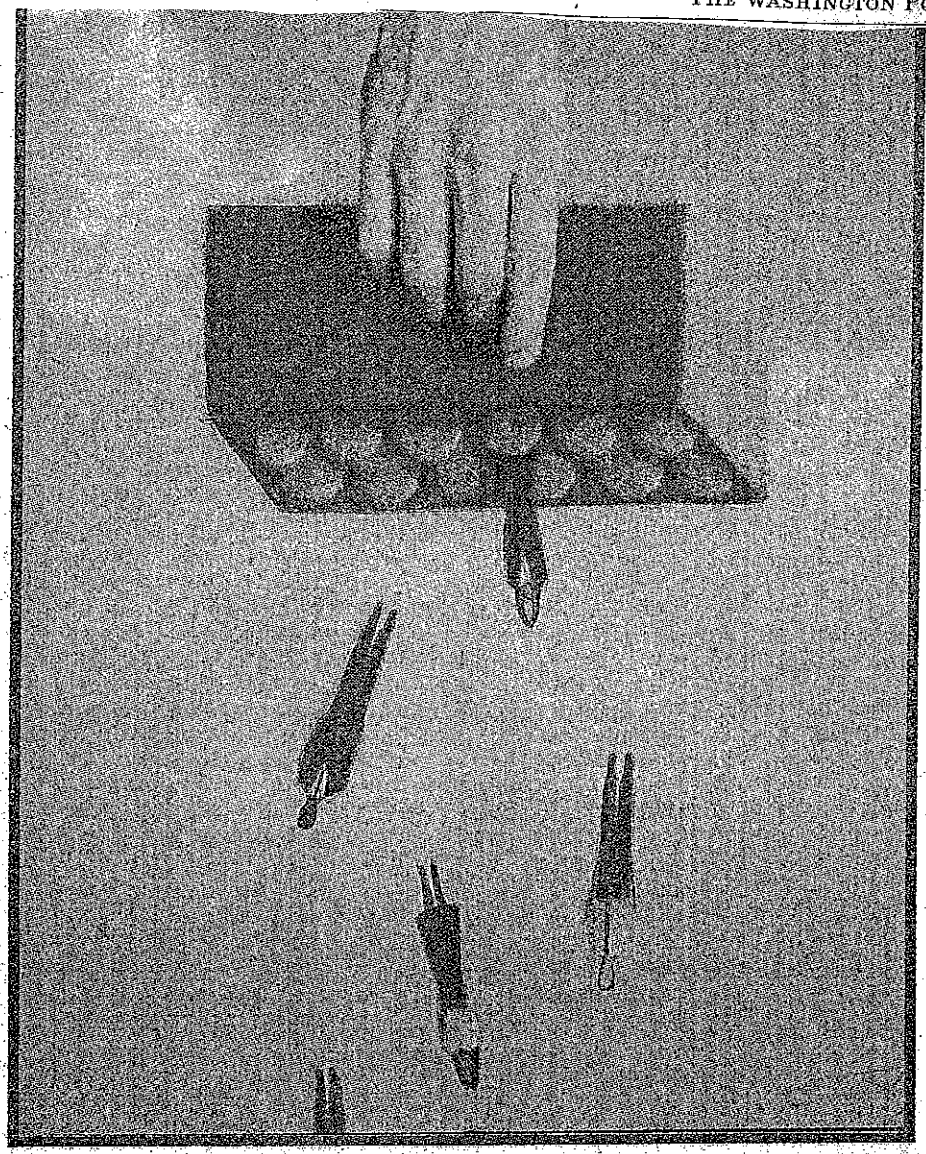
Juries aren't supposed to be picked on the basis of race and sex, but it happens all the time.

A Legal Discrimination



BY JON C. KRAUSE

On a typical Monday morning, a group of D.C. residents—beautifully reflective of our community in terms of gender, race and ethnicity—came to my courtroom for jury selection in a personal injury case.

They listened to my pep talk about the virtues of jury service and about the importance of their oath to tell the truth during the selection interviews. I told them that the purpose of the questioning was to learn if anything in their experience would stand in the way of their being fair in the case.

It took about 45 minutes for the group to be questioned, collectively and then individually, by the lawyers and by myself, to ferret out any grounds to excuse someone "for cause"—legalese meaning a juror likely would not be impartial.

After I ruled on motions by the lawyers to strike a citizen for cause, there came the centuries-old legal procedure called peremptory challenge, during which a party can strike a citizen from service based on hunch, instinct, social "science" or whatever.

Accordingly, each side exercised the three peremptories provided it by law. The plaintiff (an African American man) struck three white men, and the defendant (a corporation) struck two white males and one African American female. Relying on doctrine from the Supreme Court, I called upon the plaintiff's attorney to provide the reasons for his apparent gender- and race-oriented use of peremptory strikes. The counsel gave various non-gender and non-race-based rationales for his actions. By law, I had to honor his strikes. As a result, an all-female jury of five African Americans and two whites was seated.

Before the trial began, one of those rejected, a middle-aged white man, returned to the courtroom and asked to speak to me. The court reporter recorded his words.

"With all due respect to everyone involved in the proceedings, he said, "I have a concern based upon what I understood was your guidance and your telling us the criteria that are used for jury selection. 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 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] 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."

He then quietly left the courtroom. The trial proceeded smoothly to conclusion thereafter, but his words still resonate. He experienced a process in which he and his peers were asked many personal questions with the assurance that they were geared toward obtaining a truly fair and impartial jury. They were informed that the U.S. Supreme Court had outlawed anyone's being struck from jury duty merely because of race, gender or ethnicity. He and others were not challenged "for cause" by any of the parties. And yet, with the dash of a lawyer's pen, they were dismissed.

Many of us on the bench have seen this legal chess game during jury selection. Everyone is saying gender and race should not matter, but gender and racial profiling are being undertaken in the exercise of these largely hidden strikes. Litigants are being permitted to eliminate competent individuals from juries for reasons that need not rise to the level of a strike for good cause.

In felony criminal cases in federal and many state courts, this litigation weapon power is increased more than threefold, the government and the defendant each having—and almost always using—10 peremptories.

Are peremptory strikes a reasonable means to produce impartial juries, which is what the Constitution mandates? Or are they really suited to creating the opposite? What if in the November elections candidates and their campaign teams similarly could sweep any of us out of the voting booth merely on the basis of complexion, grooming, facial expression or who knows what?

What kind of message do these attorney-client tools of intuition and suspicion send to our community? Should we not rely on strikes for good cause as the more relied upon means to eliminate citizens from trial service?

For the numerous citizens whose right to vote in the jury deliberation room is nullified by the veiled exercise of peremptory strikes, answers to those questions likely would encourage a policy change. Perhaps change will occur if policymakers show up for jury duty soon.

—Gregory E. Mize

is an associate judge of the D.C. Superior Court; the views here are his own.