

Ethics and Batson Excluding Jurors Based on Race with Professor Peter Joy

- Overview of problem of racial discrimination in jury selection
 - Long history of racial discrimination in jury selection in the U.S.
 - 1875 Civil Rights Act provision prohibited racial discrimination in juries.
 - Discrimination in jury venires continued until 1960s via other ways, e.g., by selecting for the jury pool from names submitted by prominent community members who were white.
 - Shift from discriminatory exclusion from jury venires to jury selection via peremptory strikes in recent decades.
 - Why does the racial makeup of the jury matter
 Research shows all-white juries convict Black defendants more often than white defendants and that diverse juries deliberate longer.
 Jury should be representative of the community, undermines public perception of fairness

- *Batson* standard
 - *Batson v. Kentucky*¹
 - Held that jurors cannot be excluded on the basis of race through prosecutor's use of peremptory challenges. Later cases extended prohibition to include strikes on the basis of gender or economic status.
 - Set out process for *Batson* challenge:
 - Defense must make prima facie case of discrimination. May rely on evidence such as pattern of peremptory strikes or questions or statements from the prosecutor.
 - If defense makes a threshold showing, prosecutor must rebut with race-neutral reasons for striking the juror. Reasons need not be "persuasive, or even plausible" and need only to establish facial validity. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).
 - Court determines whether defendant established that prosecutor purposefully discriminated against potential jurors.
 - Same requirements for defense under *Georgia v. McCollum*, 505 U.S. 42 (1992).
 - Discussion of the low bar in *Batson* and the difficulty in enforcement
 - *Foster v. Chatman*²

¹ 476 U.S. 79 (1986). <https://tile.loc.gov/storage-services/service/ll/usrep/usrep476/usrep476079/usrep476079.pdf>

² 136 S. Ct. 1737 (2016). https://www.supremecourt.gov/opinions/15pdf/14-8349_6k47.pdf.

- Prosecution used four peremptory challenges to remove Black jurors, resulting in an all-white jury. Foster challenged the strikes, and the prosecution gave race-neutral reasons. Post-conviction after subsequent denials of appeals and writ of habeas corpus, Foster obtained access to prosecution notes through the Georgia Open Records Act. The notes showed that prosecutor had highlighted the names of each prospective Black juror and wrote “B” and circled the word “black” on the jury questionnaire race question.
 - Court held that Foster established prosecutor’s purposeful discrimination against two Black prospective jurors. The notes contradicted the prosecution’s trial justifications for the peremptory challenges, and the reasons proffered for striking a Black prospective juror that applied equally to an otherwise similar juror suggested purposeful discrimination.
- Legal ethics
 - ABA Model Rule 8.4(d).
 - Misconduct to “engage in conduct that is prejudicial to the administration of justice.”
 - ABA Model Rule 8.4(g)
 - Misconduct to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race... in conduct related to the practice of law.”
 - Comment 5 to Rule 8.4
 - “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).”
 - ABA Model Rule 3.8 Special Responsibilities of a Prosecutor Comment 1
 - “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”
 - Despite explicit *Batson* carveout re. Rule. 8.5 (g), 8.4(d) broadly suggests it would be an ethical violation for lawyer to strike jurors on the basis of race. But the difficulty in enforcing *Batson* and the ineffectiveness of the ethics rules contribute to continued racial discrimination in jury selection.
 - Despite explicit *Batson* carveout re. Rule. 8.5 (g), 8.4(d) broadly suggests it would be an ethical violation for lawyer to strike jurors on the basis of race. Difficulty in enforcing *Batson*

- When race matters in jury selection
 - Research suggests that in cases when the only racial component is the race of the defendant, probing jurors about potential biases can be important. Race-relevant voir dire may make jurors consider the possibility of their implicit biases. When the racial component is obvious in a case, race-relevant voir dire is less important because race is already top of mind for jurors.
- Addressing the problem of racial discrimination in jury selection
 - Washington General Rule 37³
 - Purpose of rule is to eliminate unfair exclusion of jurors based on race or ethnicity.
 - Court uses an objective observer standard in determining whether race or ethnicity was a factor in the use of the peremptory challenge.
 - Subsection (f) provides that “an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”
 - Subsection (h) outlines reasons that are presumptively invalid, including having prior contact with law enforcement, expressing distrust of police, and living in a high-crime neighborhood.
 - Proposals
 - Jury venire be representative of the community
 - Combine peremptory strikes and peremptory inclusion, i.e., allow a party to insulate a juror from peremptory strike
 - Collect data on composition of jury venires and use of peremptory strikes

³ https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf.