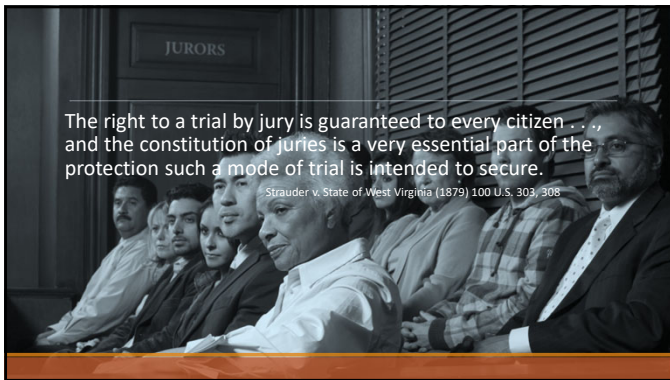


Jury Selection: Invisible Barriers

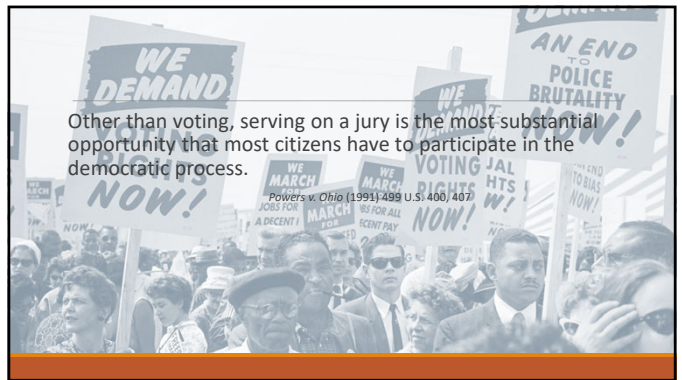
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Unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors

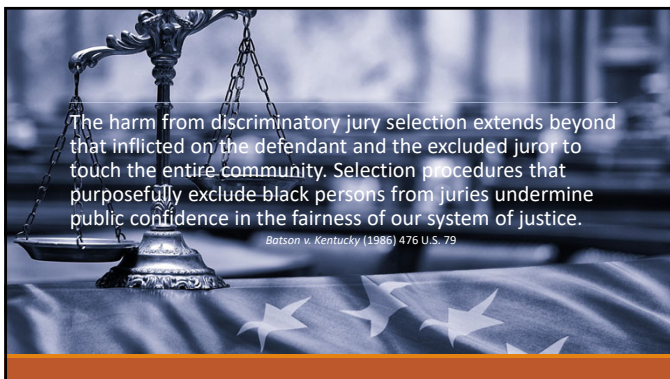
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6

CONSTITUTION
(Sept. 17, 1787)
"We, the People of the United States, in order to form a more perfect Union, establish Justice . . . Article III
"The trial of all crimes . . . shall be by jury;"

BILL OF RIGHTS
(December 30, 1791)
Sixth Amendment
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

7

Emmet Till

- In 1955, Emmett Till, a 14-year-old boy, was alleged to have said, "Bye Baby," to Carolyn Bryant in a Mississippi store
- Carolyn's husband heard about it, lynched, tortured, and brutally murdered the boy
- The man was tried by an all-white jury who acquitted him
- In 2017, the woman admitted that Mr. Till never made the statement

8



9

DOGS
NEGROES
AMERICANS

Hernandez v. Texas (1954) 347 U.S. 475

- The systematic exclusion of persons of Mexican descent from service as a juror
- In a Texas county where Defendant was tried for murder
- There were a substantial number of jurors qualified to serve
- Deprived Defendant of Equal Protection of the laws guaranteed by the 14th Amendment

LONESTAR RESTAURANT ASSN.
Dallas, Texas

10

Batson v. Kentucky (1986) 476 U.S. 79

The equal protection clause forbids the challenge of a potential juror on account of their race.

Set forth a three-step procedure:

- Step 1 – Objection
- Step 2 – Prima Facie Showing?
- Step 3 – Purposeful Discrimination?

11

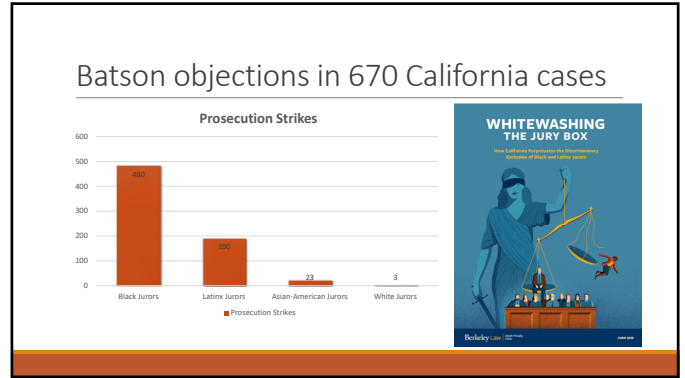
From Marshall's concurring opinion in *Batson*:

"Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."

12

“Even though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions employed various discriminatory tools to prevent black persons from being called for jury service. And when those tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors.” *Flowers v. Mississippi* (June 21, 2019) 204 L.Ed.2d 638

13



14

Flowers v. Mississippi

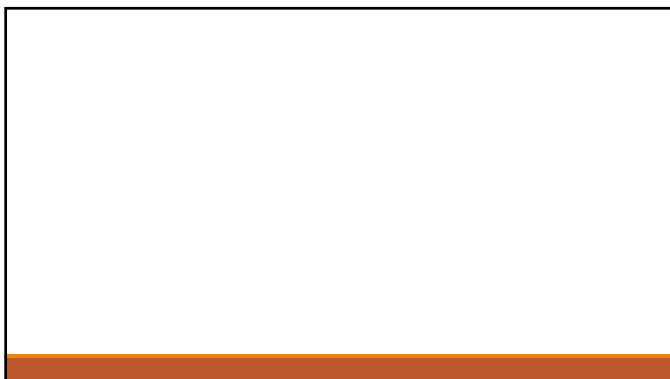
(2019) 204 L.Ed.2d 638
 TRIED FOR MURDER SIX TIMES IN MISSISSIPPI

15

Jury Selection: Invisible Barriers

- Recent changes in state laws with respect to the exercise of peremptory challenges;
- Judicial efforts to overcome barriers in court; and
- Best practices.

16



17

California

CHANGES IN LAWS RELATED TO JURY SELECTION

18

Voir Dire Rules

- The parties may submit questions to the trial judge
- Counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors
- The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire.
- The trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court
- The fact that a topic has been included in the trial judge's examination shall not preclude appropriate followup questioning in the same area by counsel
- The trial judge shall permit counsel to conduct voir dire examination without requiring prior submission of the questions

19

California Protected Cognizable Groups

- Sex (Gender)
- Race
- Religious Affiliation
- National Origin
- Ethnic group identification
- Sexual orientation
- Gender Identity
- Color
- Age
- Mental disability
- Physical disability
- Medical condition
- Genetic information
- Marital status
- Ancestry

20

AB 3070/CCP 231.7

WASHINGTON'S GENERAL RULE 37 USED AS A MODEL

21

CCP 231.7 PROCEDURES

- Party or Trial Court objects to peremptory challenge.
- Objecting party identifies the juror(s) they believe were improperly excused and their perceived group.
- Party exercising the peremptory challenge states the reasons for the peremptory challenge.
- Objecting party may be heard and each side may make their record

22

FACTORS COURT MAY CONSIDER

STANDARD:

If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained.

The court need not find purposeful discrimination to sustain the objection.

A "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

An "objectively reasonable person" is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

23

FACTORS COURT MAY CONSIDER

Is the objecting party of the same perceived cognizable group as the excused juror?

Is the victim a member of the same cognizable group as the excused juror(s)?

Are witnesses of the same perceived cognizable group as the excused juror(s)?

Does the [cognizable group classification] bear on the facts of the case to be tried?

Jurors from other cognizable groups who provided similar answers have not been challenged.

Reasons justifying challenge were contrary or not supported by the record.

Counsel/counsel's office has a history of prior violations against same cognizable group as excused juror.

24

FACTORS COURT MAY CONSIDER

Reasons justifying challenge are disproportionately associated with membership in the cognizable group.

Voir dire questioning:

- Excused juror was asked about reason for the challenge.
- Excused juror was asked cursory questions.
- Excused juror was asked questions in contrast to those asked of other jurors from different cognizable groups about the same topic.

Reason provided is presumptively invalid.

Reason provided is historically associated with improper discrimination.

25

PRESUMPTIVELY INVALID REASONS

- Distrust/negative experience with law enforcement/criminal legal system
- Belief that law enforcement engages in racial profiling/enforced in discriminatory manner
- Close relationship with people who have been stopped/arrested/convicted of crime
- Neighborhood
- Receiving state benefits
- Child outside of marriage
- Not being native English speaker
- Employment disproportionately occupied by members of cognizable group
- Justification used against this juror(s) not used against other jurors who are not subject to challenge for the reasons given
- Dress, attire, or personal appearance
- Lack of employment/underemployment
- Friendliness with other jurors of same cognizable group
- Ability to speak another language

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REASONS HISTORICALLY ASSOCIATED WITH IMPROPER DISCRIMINATION

- Prospective juror was inattentive, staring, or failed to make eye contact
- Prospective juror exhibited lack of rapport or problematic attitude, body language, or demeanor
- Prospective juror provided unintelligent or confused answers

These reasons are presumptively invalid unless observed by the court or opposing counsel. In addition, counsel offering this fact as a reason must explain why it matters to the case to be tried.

27

STANDARD FOR OVERCOMING “PRESUMPTIVELY INVALID” REASONS

Though the reasons given are presumptively invalid the court finds by clear and convincing evidence that they are unrelated to the juror’s cognizable group membership. The court finds that it is highly probable that the reasons given are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror’s ability to be fair and impartial in the case.

28

REMEDIES

- Quash the jury venire and start jury selection anew (shall be provided if unequivocally requested by the objecting party)
- Seat challenged juror
- Provide objecting party more challenges
- Another remedy court deems appropriate

If jury already impaneled when objection is sustained:

- Declare a mistrial, only if requested by the defendant

29

People v. Jaime (2023) 91 Cal.App.5th 941

During voir dire the juror had disclosed that her cousin was convicted of murder in the same court. And when she was a child the elected district attorney, not the district attorney in court, spoke to her class and ended up bringing up her cousin’s trial in class before it had gone to trial. She further disclosed that she spoke with a lawyer about the district attorney’s conduct.

The prosecutor exercised a peremptory challenge against the juror and defense counsel objected.

In response to the objection the prosecutor explains that she was concerned because the juror disclosed that her cousin was prosecuted by our office for murder. That he was sent to prison and that she had an experience with the elected official from our office that in her words prompted her to seek out an attorney because she was upset by, I guess, what she had experienced.

Defense counsel replied that the juror said she would follow the law and evidence and would do so as an impartial member of the jury despite the unusual circumstances from her youth.

30

People v. Jaime (2023) 91 Cal.App.5th 941

Prosecutor's use of peremptory challenge based on prospective juror's previous negative experience with law enforcement and close relationship with people who had been convicted of a crime was presumptively invalid.