

Batson & Bias—Problem Solved?

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The American judicial system has a long history of being plagued by bias and discrimination. Laws were enacted with the specific intent of excluding certain people from participating in the judicial process based solely on certain characteristics, often focused on race or ethnicity. Over time many of these laws have been challenged based on constitutional principles.

In 1880, the United States Supreme Court considered one such West Virginia law that only allowed white men to be qualified for jury service. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Relying on the Fourteenth Amendment, the Court invalidated the law and determined that it violated the Constitution for a defendant to be tried by a jury from which members of the defendants' race had been purposefully excluded. Specifically it was held that deliberate exclusion of people from jury service based on race denies a defendant equal protection under the law. The Court later applied the same principles announced in *Strauder* to a Texas law and determined that purposeful exclusion of jurors based on national origin or ethnicity also violates the Constitution.

Based on the reasoning of *Strauder*, in 1965 a criminal defendant challenged the procedures of selecting jurors under an Alabama law. *Swain v. Alabama*, 380 U.S. 202 (1965). Robert Swain, a black man, had been convicted of rape in the Circuit Court of Talladega County, Alabama and was sentenced to death. He sought to have the conviction overturned based on “alleged invidious discrimination in the selection of jurors.” Because such laws had been previously ruled unconstitutional, Alabama did not have a system in place excluding all black men from serving on a jury. Instead, the Alabama law at issue established that jury commissioners in the County would put on the jury roll only those men who were intelligent and who were of good character and sound judgment. Swain argued that the method of selecting the jury venire in Talladega County, which resulted in few black men being “qualified,” coupled with the prosecutor’s use of peremptory challenges, established a *prima facie* case of discrimination. But the *Swain* Court refused to invalidate the Alabama law and rejected Mr. Swain’s arguments. The Court held that deliberate discrimination in the jury selection process is not established by a mere showing that a particular group has been underrepresented and that Mr. Swain failed meet his burden of proving purposeful exclusion of black jurors from the venire. Further, the Court refused to change the historical deference given to a prosecutor to exercise peremptory challenges without judicial control. In doing so,

the Court held that peremptory challenges made without a stated reason are presumed to have been exercised properly and do not deny someone of their equal protection rights under the Constitution.

It was the principles articulated by the *Swain* Court that were ultimately challenged in *Batson v. Kentucky*. 476 U.S. 79 (1986). The prosecutor in Mr. Batson's trial had used peremptory challenges to exclude all black people from the jury. When Mr. Batson's attorney objected to the peremptory challenges, the trial court overruled the objection and determined that the parties could use their peremptory challenges to "strike anybody they want to." In considering the issue on appeal, the Supreme Court recognized that lower courts' application of the *Swain* decision had "placed on defendants a crippling burden of proof" and that, consequently, peremptory challenges made by prosecutors were "largely immune" from claims of being violative of the Constitution. Despite refusing to overturn conviction, the Supreme Court did however remand the case for further consideration of whether the prosecutor could "come forward with a neutral explanation" for striking black people from the jury. As guidance to the lower court, *Batson* created a three-step analysis to consider in determining whether the jury was unconstitutionally seated: (1) a party challenging the peremptory strikes must establish a *prima facie* case of discriminatory intent by showing that she/he is part

of a “cognizable racial group” and that the prosecutor used peremptory strikes against members of that group; (2) if the requisite showing is made, the party arguing in support of the strikes must next offer justification for the strike(s) that is race neutral; and (3) the trial court then makes a determination of whether purposeful discrimination has been proven.

Batson was heralded as a dynamic new tool to eliminate bias in jury selection. In addition to race, various courts would later apply the *Batson* test to other cognizable classes such as gender, national origin, sexual orientation, religious affiliation, and skin color. Ultimately, the test would be extended to apply in civil cases. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

So was the problem of bias in our jury system solved by *Batson* and its progeny? The *Batson* test itself only addresses purposeful discrimination. Further, myriad explanations in support of claims of race-neutrality in jury selection have been proffered and accepted by courts despite the fact those explanations are questionable at best. Further, *Batson* in no way addresses implicit bias in the jury selection process. Legal scholars have deemed this failure to address implicit bias as a blind spot or loophole. Justice Thurgood Marshall in his *Batson* concurrence seemed to foreshadow these issues when he noted that challenges to peremptory

strikes would be rarely successful and that the Court's decision would not end discrimination in the courtroom. Clearly bias remains, not only in the process of selecting jurors, but also in all phases of the jury system, including deliberations. Recognizing the shortcomings of the 1986 Batson framework, some jurisdictions have begun to examine the continuing problem of bias in the jury system. Data gathered by scholars and statistics submitted in support of Batson challenges demonstrate that much work is left to be done.