

## Peremptory Challenges in Jury Selection in Louisiana

### When A “Gut Feeling” Is Not Enough



Presented By:  
Professor Bobby Marzine Harges  
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Bobby M. Harges, Peremptory  
Challenges in Jury Selection in  
Louisiana-When a “Gut Feeling” is  
Not Enough, 54 Loy. L. Rev. 95  
(2008).



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## Developing The Current Jury Selection Process

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|-----------------------------|---|
| ■ Federal Jurisprudence     | ■ Louisiana Jurisprudence                               |
| ■ <i>Batson v. Kentucky</i> | ■ <i>Alex v. Rayne</i>                                  |
| ■ Foundations of<br>Batson  | ■ <i>Concrete Services</i>                              |
| ■ Batson's Progeny          | ■ The current Louisiana<br>voir dire process            |
|                             | ■ Streamlining the<br>peremptory challenge<br>processes |

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## Batson v. Kentucky

- What is a Batson challenge?
- It allows any party to object to another party's peremptory challenge party based on
  - Race
  - Gender
  - Ethnic origin?



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## Batson v. Kentucky (1986)

Allows criminal defendants to object to peremptory challenges that are made on race



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## How did we get to Batson?



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## The Pillars of Batson

- The Fourteenth Amendment
- *Strauder v. West Virginia (1880)*
  - Established that a state could not exclude people from the jury pool based on race
  - Did not create a right to have a jury of your own race
- *Swain v. Alabama (1965)*
  - Peremptory challenges could not be used to systematically exclude potential jurors based on race

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## Problems In The Proof

- *Swain v. Alabama*
  - Required a showing that the entire system was being perverted through misuse of peremptory challenges over multiple cases
  - This high standard led to few successful challenges
- Eventually the Supreme Court reconsidered the test



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## *Batson v. Kentucky*

- Affirmed the ideals of Swain but rejects the method
- Allows criminal defendants to show discrimination only in the current case
- Criminal defendants are allowed to make a Batson challenge by establishing a prima facie case

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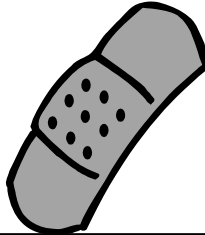
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## Batson v. Kentucky

- Litigants need to understand the Batson three part test.



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## The Batson Process

Step One:  
Prima Facie Case



Step Two:  
Neural Explanation



Step Three:  
Judge decides based on  
all relevant  
circumstances

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## Beyond Batson



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## Batson's Progeny

- The new test proved more workable
- The Court began to add to the Batson decision in other opinions
- Two basic types emerged
  - Cases that expanded the Batson test to other situations
  - Cases that explained how to apply the Batson test

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## Batson's Progeny

- Who can raise a Batson challenge?
  - Defendant
  - Prosecutor
  - Plaintiff (civil cases)
  - Defendant (civil cases)
- Based on exclusion of any potential juror of any race, gender, ethnic origin

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## Principles of Batson

- Equal protection clause of 14<sup>th</sup> Amendment based on a party's purposeful exclusion of potential juror because of race, gender, or ethnic origin.
- Third party standings allows any party to bring the case on behalf of the affected potential juror.

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## Expansion of Batson to other factual circumstances

- *Edmonson v. Leesville Concrete* (1991)
- *Powers v. Ohio* (1991)
- *Georgia v. McCollum* (1992)
- *J.E.B. v. Alabama* (1994)
- *United States v. Martinez-Salazar* (2000)



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## *Edmonson v. Leesville Concrete*

- Injured construction worker sued former employer
- D used 2 of its 3 peremptory challenges to strike black persons from prospective jury
- Peremptory challenges are considered state action
- Expands Batson to peremptory challenges made during civil trials



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## *Powers v. Ohio*

- White criminal defendant facing murder charges
- Prosecution used six of nine peremptory challenges to remove African American jurors
- Defendant has standing to object to jurors being excluded on race
- Allows Batson challenges even when the defendant is of a different race than the juror struck



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*Georgia v. MCollum*

- Defendant faced assault and battery charges
- State moved to prevent defendant from using peremptory challenges in a discriminatory manner
- Criminal defendants may not make racially discriminatory peremptory challenges



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*J.E.B. v. Alabama*

- Paternity and child support case
- State used 9 of 10 peremptory challenges to strike males
- A completely female jury was empanelled
- Peremptory challenges shall not be used to discriminate on gender



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*United States v. Martinez-Salazar*

- Criminal defendants used a peremptory challenge to strike a juror who should have been struck for cause
- Court finds no violation of due process
- Incidentally, the court notes the prohibition of strikes based on ethnic origin



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## Explanations – How to Apply Batson

Several cases are elaborations on how to apply the Batson Test



- *California v. Johnston*
- *Purkett v. Elem*
- *Miller-El v. Dretke*

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### *California v. Johnson*

- Criminal defendant makes Batson challenge after the State's second strike against a black juror
- California court denies the challenge because it does not show a strong likelihood of discrimination
- The prima facie case must only create an inference of discrimination in order for the judge to continue to step two

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### *Purkett v. Elem*

- Defendant facing robbery charges made a challenge after the state struck two African Americans on the panel
- The race natural reason was because of long hair and a beard
- The neutral reason tendered does not have to be persuasive or even pleasurable to satisfy step two

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### *Miller-El v. Dretke*

- At the criminal trial the state struck 10 of 11 black venire persons
- In considering how to rule the trial judge may consider all the relevant circumstances to determine whether the strike was discriminatory



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### *Snyder v. Louisiana (2008)*

- Court conducted a side-by-side comparison of how the prosecution treated jurors of other races in similar circumstances as the stricken African-American jurors.



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### *Snyder v. Louisiana (2008)*

- |   |   |
|---|---|
| ■ Jeffery Brooks (BM), struck by State of La. | ■ John Donnes (WM), accepted by State.            |
| ■ Hardship resolved after calling SUNO dean.  | ■ Had important work commitment later in week.    |
| ■ Was ready to serve                          | ■ To serve, "I'd have to cancel too many things." |
|   | ■ Presence essential at one appointment.          |



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### Snyder v. Louisiana (2008)

- Jeffrey Brooks (BM), struck by State of La.
- Hardship resolved after calling SUNO dean.
- Was ready to serve
- Ronald Laws (WM), accepted by State.
- Hardship – self-employed general contractor with 2 houses near completion; had daddy duty, wife had recent surgery; bad timing for him.



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### Louisiana Law



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### A Look at Batson Challenges in Louisiana

- *Alex v. Rayne Concrete Services*
  - Established appellate review of a Batson Challenge
  - Considers what constitutes a race neutral explanation
- The Procedure
  - Timeliness of challenge
  - The hearing
  - The inquiry
  - In the event of a violation
  - Appellate review of the decision



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## LA. C.C.R.P. ART. 795

- Prohibits peremptory challenges in criminal cases based on race or gender.



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## *Alex v. Rayne Concrete Services*

### Facts:

The case involves an Rayne Concrete employee injured while working on a swimming pool. Rayne Concrete used three peremptory challenges to remove three African-Americans from the jury panel.



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## ***Alex v. Rayne Concrete Services***

- Applies Batson/Edmondson to a Louisiana case
- The case looks at two questions
  - When can a Batson/Edmonson challenge be appealed in Louisiana?
  - What is the minimum standard for race natural reason for the strike?



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### Batson/Edmonson Ruling In Louisiana Civil Cases

- A Batson Challenge may be reviewed on appeal or by a supervisory writ
- The Court based the decision on
  - Criminal practice
  - Appellate review of civil challenges for cause
  - Federal practice allowing appellate review
  - The fact that the decision must be made on “all relevant circumstances”



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### When A Hunch Just Won't Suffice During Voir Dire

- Rayne Concrete used three peremptory challenges to remove three African-Americans from the jury panel
- Rayne Concrete claimed it struck one of the jurors because of a “gut feeling”
- The court found this was not a legitimate reason for a strike.



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### What is required for a race neutral explanation?

- An “articulable reason that enables the trial judge to assess the plausibility of the proffered reason”
- It must be “clear, reasonably specific, legitimate and related to the particular case at bar”



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## The Voir Dire Process



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## The Louisiana Voir Dire Process

- *Alex v. Rayne Concrete*, established the Batson test in Louisiana civil cases
- The United States Supreme Court left the voir dire procedure of the state courts
- To apply Batson in the civil context, the criminal procedure is informative

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## Purpose of Voir Dire

- Convey a favorable impression of the case to the jury
- To remove any unfavorable jurors from the panel

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## The Voir Dire Process

- The court begins with introductions
- In criminal cases defendants are allowed to conduct their own voir dire
- In civil cases the court may conduct more of the questioning



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## Peremptory Challenges

- Criminal**
- Death or imprisonment at hard labor
    - 12 peremptory challenges for defense and prosecution
  - All other criminal trials
    - 6 preematory challenges for defense and prosecution
- Civil**
- In juries of 6 each side is allowed 3 peremptory challenges
  - In juries of 12 each side is allowed 6 peremptory challenges



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## Timeliness In Making A Batson Challenge

- Objections must point out the problem in time for the court to correct it and to preserve the record for appellate review
- Objections should be raised before the swearing in of the jury panel
- The Batson challenge must be renewed with each new offending strike



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## Batson/Edmonson Hearings In Louisiana

- All challenges during voir dire are made on the record but at sidebar
- Challenges during voir dire in civil cases are required to be "out of the presence of the prospective jurors"
- Challenges in criminal cases are not required to be discussed in a separate location



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## The Batson Process



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## The Batson Process

Step One: Mover shows  
Prima Facie Case of discrimination in use of  
peremptory challenges.



Step Two: Opponent offers  
Neural Explanation.



Step Three: Judge decides  
based on all relevant  
circumstances- BOP  
remains on mover.

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## Three Step Inquiry: Mechanics of the Batson Test

1. Establishing A Prima Facie Case Of Discrimination
2. Providing A Neutral Explanation
3. Determining Whether The Moving Party Has Carried The Burden Of Proving Purposeful Discrimination

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## Establishing the Prima Facie Case - Step One

- The moving party must state a prima facie case that a juror was struck due to race, gender, or ethnic origin
- The prima facie case must show an inference of discrimination
- The burden is always with the moving party to win the challenge

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## Establishing the Prima Facie Case – Step One

- Comment on number of strikes used to strike member of protected class – e.g., D used 5/6 p.c. to strike females, whites, etc.
- Compare treatment of similarly situated prospective jurors. e.g., WM w/ hardship allowed to remain, while BM with hardship eliminated by p.c.

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## Establishing the Prima Facie Case – Step One

- Comment on inconsistent questioning of similarly situated persons; e.g. number and type of questions.
- Comment on different behavior between similarly situated individuals; e.g. different demeanor toward blacks and whites.
- Examine law firm's and lawyer's treatment in other cases. Firms have reputations.

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## Establishing the Prima Facie Case – Step One

- Examine the language and words used by lawyer.
- Examine the lawyer's behavior outside of the courtroom.

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## Establishing the Prima Facie Case – Step One

- The mover is allowed to rely on the fact that peremptory challenges are prone to discrimination
- Relevant circumstances must indicate exclusion based on race, gender, or ethnic origin

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## Establishing the Prima Facie Case – Step One

In considering how to rule on the Batson challenge, the trial judge may consider all the relevant circumstances to determine whether the strike was discriminatory.

Thus, it is important to be active, observant, and make sure that all comments are on the record.



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## Step Two:

- The defending party is required to present an articulable neutral explanation
- The explanation does not have to be persuasive or plausible
- A “gut feeling” alone is not a neutral explanation
- Remember this is not a burden shift, for the moving party must still carry the challenge



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## Step Two:

- Mover - if answer relies on race or gender, object.
- Mover – make the challenging party explain every questionable strike.



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### Step Three:

- The judge decides whether the moving party has carried the challenge
- The judge should consider “all relevant circumstances”
- Satisfactory natural explanations
  - Jurors had a criminal record
- Unsatisfactory explanations
  - Prospective black jurors were Baptist (other white Baptist jurors were not challenged)



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### The Total Process

Step One:  
Prima Facie Case



Step Two:  
Neural Explanation



Step Three:  
Judge decides based on  
all relevant  
circumstances



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### Batson Violations



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## What Happens If There Is A Batson Violation At Trial?

- The federal jurisprudence leaves the corrective measures up to the state courts
- Louisiana Criminal Procedure requires the juror be returned to the panel or the court may take other measures that are appropriate under the circumstances
- The judge may also dismiss the venire and select a new jury



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## Batson/Edmonson Violations On Appeal

- A party can appeal a Batson violation with a
  - A supervisory writ
  - On appeal after a trial on the merits
- The appellate court will give deference to the trial court's ruling



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## Changes to the system

- Several changes have been suggested
  - Abolish peremptory challenges
  - Legislation with comprehensive procedural rules for criminal and civil trials
- Legislation detailing the system for peremptory challenge
  - Produce more consistent results
  - Suggests that Louisiana is serious about eliminating discrimination in the court system



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## What do we learn?

- Peremptory challenges balance the defendant's right to a fair and impartial jury against harm to venire members
- Federal and State jurisprudence have made Batson challenges standard in criminal and civil settings
- The legislature should better define the process for Batson challenges

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The End.  
Have a nice day.

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