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The Supreme Court's Gap on Race and Juries

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There are so many troubling issues surrounding race and the criminal justice system these days that it is easy to forget a longstanding problem: the exclusion of African-Americans from juries. After all, it was nearly three decades ago that the Supreme Court took what was seen then as a major step toward solving that problem. In *Batson v. Kentucky*, decided in April 1986, the court ruled that prosecutors could be required to provide a race neutral explanation when their use of peremptory challenges to strike black potential jurors raised an inference of discrimination.

That decision, applying on a trial-by-trial basis the 14th Amendment's guarantee of equal protection, repudiated a precedent that had given defendants the near-impossible task of proving that blacks were systematically excluded from juries in a particular jurisdiction in many trials over a long period of time. In short order, the court expanded the *Batson* rule to cover civil as well as criminal trials, to apply to defense lawyers as well as prosecutors, and to the exclusion of jurors on the basis of ethnicity and gender as well as race.

But the open secret is this: *Batson* hasn't really worked. Despite efforts by the American Bar Association, the National District Attorneys Association, and well-intentioned prosecutors' offices, and despite the alarms raised by serious inquiries, including one five years ago by the Equal Justice Initiative in Montgomery, Ala., blacks are still being excluded from juries at disproportionate rates, especially when

the defendant is black and the crime victim is white. Prosecutors have learned to game the system by providing explanations that are accepted as persuasive to judges who appear all too eager to be persuaded.

Examples abound, and they are eyebrow-raising. In a criminal case in Floyd County, Ga., the prosecution struck all four black potential jurors. Responding to the judge's questions at the "Batson hearing" that followed the defense lawyer's objection, the prosecutor claimed to have struck one woman because of her "age being so close to the defendant." She was 34 and the defendant was 19. Another black potential juror was struck for having a son who was once convicted of stealing hubcaps from a car — "basically the same thing that this defendant is charged with," the prosecutor explained to the judge. The charge against the defendant was capital murder.

The judge accepted the explanations and permitted the trial to proceed with an all-white jury. The black teenage defendant, Timothy Tyrone Foster, was sentenced to death for the murder of an elderly white woman, Queen Madge White. The Georgia courts upheld the verdict and sentence; the state Supreme Court held that the prosecutors' reasons for striking the black jurors were "sufficiently neutral and legitimate." In its term that begins in October, the Supreme Court will hear Mr. Foster's appeal, *Foster v. Chatman*.

The case is unusually compelling because the prosecution's notes from the jury selection are part of the record on appeal. Although the state courts had upheld the prosecution's refusal to turn the notes over to the defense, Mr. Foster's lawyers in a subsequent state habeas corpus proceeding got them through the Georgia Open Records Act. The notes proved to be a road map of discrimination.

The prosecution had identified each black prospective juror with the letter "B" and highlighted the names in green ink. Each was given a number: "B#1," "B#2" and so on. On a list of "definite NO's," the first five names were the names of the black potential jurors then on the panel. They were then evaluated against one another, with such notations as: "If it comes down to having to pick one of the black jurors, Ms. Garrett might be O.K." The state courts remained unmoved, with the state Supreme Court refusing to hear Mr. Foster's appeal from the lower court's denial of

his habeas corpus petition. (Although the trial took place in 1987, the Georgia Supreme Court's final order denying the habeas corpus appeal didn't come until last November; many years in between were spent in determining whether Mr. Foster was sufficiently intellectually disabled as to be ineligible for the death penalty. The state courts ruled him eligible.)

In his appeal to the United States Supreme Court, Mr. Foster is represented by Stephen B. Bright, president and senior counsel of the Southern Center for Human Rights in Atlanta and also a visiting lecturer at Yale Law School. The justices didn't easily decide whether to hear the case, scheduling it for their closed-door conference five times before finally granting it in May. Any of several scenarios might explain the prolonged review. Perhaps the Batson violation was so obvious that at least several justices might have tried for a majority willing to decide the case in Mr. Foster's favor summarily, skipping oral argument; the current court typically uses this technique to decide criminal cases in favor of the state. Or perhaps the court initially lacked the necessary four votes to grant the case, and some justice or justices circulated an opinion dissenting from the denial of review that was powerful enough to pick up sufficient votes.

The brief that Mr. Bright filed with the court last month argues that the case, with its "extraordinary circumstances," represents a straightforward violation of the Batson rule. "The evidence of race discrimination in this case is overwhelming," the brief states. It sticks largely to the facts without veering into policy arguments. The broader national picture is captured by a friend-of-the-court brief filed by eight prominent former state and federal prosecutors. (The state's brief isn't due until Sept. 8.)

The prosecutors, including Larry D. Thompson, deputy attorney general in the administration of President George W. Bush, and Gil Garcetti, the former Los Angeles district attorney, offer statistics showing persistent discrimination in jury selection. It is clear that although the Foster case dates from shortly after the Batson decision, not much has changed since those early days. "Some prosecutorial misconduct is shockingly blatant," the former prosecutors tell the court, "but most discrimination occurs under the guise of purportedly 'race-neutral' justifications prepared by prosecutors with the specific objective of defeating Batson challenges."

The prosecutors warn the justices: “If this court does not find purposeful discrimination on the facts of this case, then it will render Batson meaningless.”

But suppose Mr. Foster does win his case. What then? If the justices treat what happened in this case as an extreme outlier — a fact-bound path of least resistance — it's possible they will avoid rather than confront the systemic problem that the post-Batson experience demonstrates. The problem is deeper than prosecutors gaming the system. It lies with the system itself.

Peremptory challenges — for which, typically, no reason need be given — are anchored deeply in the English common law tradition, which invites lawyers to shape a jury based on strategy and instinct. The problem, as Mark W. Bennett, a senior federal district judge in Iowa, pointed out in an article in the *Harvard Law & Policy Review*, is that relying on instinct almost inevitably means acting on the basis of implicit bias, about which researchers have learned a great deal in recent years.

“The Batson challenge process may allow the implicit biases of the judges and attorneys to go unchecked,” Judge Bennett wrote, adding: “The promise of Batson remains illusory for two reasons in particular: trial judges are reluctant to doubt prosecutors' proffered reasons for their challenged strikes, and appellate courts are highly deferential to the trial court's decisions.”

To reject the prosecutor's explanation of his or her actual motive, the judge has basically to find that the prosecutor is lying, hardly a welcome task for a judge who is most likely elected, and who will be seeing the same prosecutor in case after case.

So here's a thought experiment: What if we abolished peremptory challenges? There is nothing in the Constitution that requires them. In a concurring opinion in the Batson case, Justice Thurgood Marshall warned that the decision was not sufficient to eliminate discrimination in jury selection. “Only by banning peremptories entirely can such discrimination be ended,” he wrote. Justice Stephen G. Breyer subsequently took up the call. Justice John Paul Stevens, before his retirement, came close.

There clearly aren't five votes on the Supreme Court to abolish peremptory challenges. But just as clearly, their continued existence threatens to erode even

further the public's confidence in the fairness of the criminal justice system, already stretched to near the breaking point. It only takes a Supreme Court justice or two to jump-start a public conversation, as Justice Anthony M. Kennedy's recent remarks about solitary confinement demonstrate. Might this case provide such an occasion? That would be a fitting way to start a new Supreme Court term.

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