Eliminated in All But Name:
Peremptory Challenges Continue to Plague Justice

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In 1986, Timothy Foster, an eighteen-year-old black teenager, was convicted of killing Queen Madge White, an elderly white woman, in Georgia.\(^1\) At trial, the prosecutor used four of his nine peremptory strikes to remove all prospective black jurors.\(^2\) Foster was subsequently sentenced to death by an all-white jury at the urging of the prosecutor, who insisted the jury needed to “deter other people out there in the projects.”\(^3\) Foster’s case has made its way to the Supreme Court almost thirty years later.\(^4\) Foster v. Chatmon highlights the untenable position peremptory challenges occupy in modern American jurisprudence and demonstrates, once again, why a change to the system is necessary.

Paul Smith, chair of the appellate and Supreme Court practice at Jenner & Block, filed an amici curia brief in Foster’s case on behalf of former prosecutors “who recognize, and refuse to condone, the blatant illegality of the prosecutorial misconduct at issue.”\(^5\) In his brief, Smith noted the numerous ways black jurors were singled out, including highlighting names with a green marker on the jury list, marking a “B” next to their names, circling the word “BLACK” in jurors’ questionnaires, referring to three prospective jurors as “B #1,” “B #2,” and B #3”, and ranking black prospective jurors against each other in case “it comes down to having to pick one . . .”\(^6\) Having singled out the prospective black jurors, the prosecution then systematically eliminated them from consideration using peremptory challenges. The Batson violations could hardly be more blatant:

The prosecution provided eight to ten “race-neutral” reasons for each of the four strikes. Some of those justifications were blatantly inaccurate (one thirty-four-year-old potential juror was struck in part due to her “age being so close to the [nineteen-year-old] defendant”); some were extreme exaggerations (that “theft by taking” arising from stealing hubcaps from a car is “basically the same thing that this defendant is charged with,” where the defendant was facing a capital indictment for murder, burglary, and theft by taking); and some directly contradicted others (one black juror “asked to be off the jury,” while another did not ask to be let off the jury). Many of the reasons applied equally to white jurors who were allowed to serve—for example, Marilyn Garrett’s occupation as a teacher’s aide counted against her even though the prosecutor claimed to want jurors who were “associated

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\(^1\) Foster v. State, 258 Ga. 736, 746 (Ga. 1988).
\(^2\) Id. at 737–38 (“The qualified panel from which the jury was selected included four blacks. The district attorney exercised peremptory challenges against each of the four black jurors.”).
\(^3\) Brief for Petitioner at 2, Foster v. Chatmon, No. 14-8349 (U.S. argued Nov. 2, 2015). The projects the prosecutor was referring to were ninety percent black. Id.
\(^5\) Brief of Joseph Digenova et al. as Amici Curiae Supporting Petitioner at 1, Foster, No. 14-8349.
\(^6\) Id. at 12 (citations omitted).
with teachers” and accepted every white teacher and teacher’s aide in the qualified pool. The prosecution even gave reasons that applied with greater force to white jurors who the prosecution kept on the jury. For example, the prosecutor voiced concern that Hood’s son was near the same age as the defendant. When jurors were asked whether the defendant’s age would be a factor in sentencing, Hood replied “none whatsoever,” while a white juror with teenage sons replied “probably so.” Hood was struck and the white juror was accepted.7

Smith additionally highlighted the substantial, contemporary issues with peremptory strikes. He noted that prosecutors have become adept at providing facially race-neutral justifications for strikes and that judges struggle to distinguish legitimate from pretextual strikes.8 Some prosecutors even attended trainings where racial discrimination was encouraged, going so far as giving advice on how to conceal discriminatory motivations from the court.9 Smith is not alone in his criticism of the Batson system for dealing with peremptory strikes.10

HOW WE GOT HERE

Trial by jury dates back to the Greeks, Romans, Gauls, Normans, and Saxons and was well established by the writing of the Magna Carta.11 The American legal system, built on the English model, incorporated jury trials into its structure. In doing so, a lesser-known stowaway made the journey to the new world as well: peremptory strikes. These strikes allow a party to exclude a potential jury member without justification. The Supreme Court has defined peremptory strikes as “exercised without a reason stated, without inquiry and without being subject to the court’s control.”12 Though these challenges take slightly different forms, some

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7 Id. at 12–13 (citations omitted).
8 Id. at 7.
9 Id. at 3. One such video is described in Smith’s brief:

In 1986, Jack McMahon, an assistant district attorney in Philadelphia, created a training film teaching prosecutors to exclude young blacks from juries. He explains in the video that “blacks from the low-income areas are less likely to convict”; “you don’t want those people on your jury”; “it may appear as if you’re being racist, but again, you’re just being realistic”; “young black women are very bad” because “they’re downtrodden in two respects,” namely “[t]hey are women and they’re black” and “they somehow want to take it out on somebody and you don’t want it to be you.”

10 See e.g., Maureen A. Howard, Taking The High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges, 23 GEO. J. LEGAL ETHICS 369, 370–371 (2010). Many scholars and commentators have criticized the peremptory challenge system as discriminatory and unconstitutional, referring to challenges as “weapon[s] of prejudice” and “probably the single most significant means by which … prejudice and bias [are] injected into the jury selection system.” Id. Even some federal judges have voiced their concerns about abuse of peremptory challenges with one judge banning them in her courtroom as a violation of equal protection. “Id.
version of the peremptory challenge has existed in almost every jury trial system throughout history.\textsuperscript{13}

In the United States, juries are assembled during \textit{voir dire}, the jury selection phase preceding a trial where the qualifications of prospective jury members are examined. During \textit{voir dire} proceedings the parties have the opportunity to question prospective jurors and are provided two methods for removing jurors: for-cause removal and peremptory challenges.\textsuperscript{14} For-cause challenges require narrowly-specified, provable, and legally cognizable partiality often based on familial or social relationships to the parties, failure to meet statutory qualifications for jury duty, or other specific evidence of bias.\textsuperscript{15} These challenges are unlimited but apply only to those jurors demonstrating objective bias.\textsuperscript{16} In contrast, peremptory strikes require no justification,\textsuperscript{17} are limited in number,\textsuperscript{18} and are generally used to handle jurors demonstrating subjective or presumed bias.\textsuperscript{19}

Though peremptory challenges are designed to require no explanation, that changed in 1986 with \textit{Batson v. Kentucky}.\textsuperscript{20} Since this seminal case, peremptory challenges in their classical meaning have been effectively eliminated—no longer can a party strike a juror without providing a reason. In \textit{Batson}, the defendant claimed his rights had been violated when peremptory strikes removed all four potential black jury members during \textit{voir dire}, resulting in an all-white jury.\textsuperscript{21} The Court overruled precedent in finding peremptory strikes based on race unconstitutional.\textsuperscript{22} It also set up a three-part system to test future peremptory challenges for impermissible motives.\textsuperscript{23} First, a defendant must show that the circumstances surrounding the challenge in question create a \textit{prima facie} case that the prosecutor impermissibly relied on race.\textsuperscript{24} Second, the burden shifts to

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\item[13] Carlson, \textit{supra} note 11, at 953 (“Some type of peremptory challenge has been allowed in almost every system of jury trial, from the Romans to today.”).
\item[16] Carlson, \textit{supra} note 11, at 953.
\item[17] Prior to \textit{Batson v. Kentucky}, 476 U.S. 79 (1986), the Court explained the nature of peremptory challenges as essentially unqualified: 
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The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.
\end{center}
Swain, 380 U.S. at 220.
\item[18] The number of peremptory challenges varies based on specific statutes in each jurisdiction. Beck, \textit{supra} note 15, at 964. Federal courts grant three challenges for each side in civil cases and misdemeanor cases while the government gets six challenges and the defendant gets ten in felony criminal cases. \textit{Id.} Most states provide similar rules. \textit{Id.}
\item[19] Carlson, \textit{supra} note 11, at 953.
\item[21] \textit{Id.} at 86 (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.”).
\item[22] \textit{Id.} at 100.
\item[23] Beck, \textit{supra} note 15, at 967–68.
\item[24] \textit{Id.}
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the proponent of the challenge to provide a legitimate, race-neutral reason.\textsuperscript{25} Third, the trial court makes a determination regarding whether purposeful discrimination has been proven.\textsuperscript{26} Thus, post-\textit{Batson}, traditional peremptory challenges that require no reason or explanation no longer exist. However, slightly modified peremptory challenges remain and continue to create questions about the racial composition of juries.

\textbf{WHERE TO NEXT?}

On November 2, 2015, the Court heard argument in \textit{Foster v. Chatman} to determine the fate of Timothy Foster, the black teenager convicted of murder by an all-white jury.\textsuperscript{27} While it may be somewhat surprising that the court granted certiorari for a case primarily raising factual issues, it is even more surprising that the respondent did not contend that there were race-neutral explanations for the peremptory strikes. Rather, the respondent claimed the prosecutor in the case was in fact explicitly considering race in attempting to place a single black person onto the jury.\textsuperscript{28} It seems unlikely that considering race in an effort to ensure a black jury member (and thereby, theoretically defeating a \textit{Batson} challenge) is a strategy the conservative Justices would condone.\textsuperscript{29} It seems equally unlikely to win favor with the liberal members of the court.\textsuperscript{30} Thus,

\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} \textit{Foster v. Chatmon}, No. 14-8349 (U.S. argued Nov. 2, 2015).
\textsuperscript{28} The respondent claimed the prosecutor was attempting to avoid the appearance of a “white lynch mob” and defeat a presumed \textit{Batson} challenge:

Also undermined by the notes is Foster’s suggestion that the State was attempting to select an all-white jury. The notes from the prosecution’s file support the district attorney’s testimony at the motion-for-new-trial hearing that the State was attempting to place a black person on the jury for the State’s benefit. The State’s main witness against Foster was black and the State wanted to avoid an argument from the defense in closing that the jury was a “white lynch mob.” Notes from the district attorney’s investigator, expressing his opinion as to which black prospective jurors may be acceptable even in light of their voir dire, corroborate the testimony that the State was actively seeking a black juror.

\textsuperscript{29} See, \textit{e.g.}, \textit{Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1}, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). There was some indication during oral argument that the conservative Justices might look to procedural issues and avoid ruling on the merits. This would be a disappointing outcome for anyone hoping for clarification on the permissible use of peremptory strikes.
\textsuperscript{30} The questions asked by the liberal justices suggested they may have serious qualms with the facts of the case:

\textbf{JUSTICE KAGAN:} Look. You have a lot of new information here from these files that suggests that what the prosecutors were doing was looking at the African-American prospective jurors as a group, that they had basically said, we don't want any of these people. Here is the one we want if we really have to take one. But that there—all the evidence suggests a kind of singling out, which is the very antithesis of the Batson rule. So, you know, I mean—well, isn't this as—I'm just going to ask you: Isn't this as clear a \textit{Batson} violation as a court is ever going to see?

\textbf{JUSTICE BREYER:} Well, wait. The point is he gave 40 different reasons. And the very fact that he gives 40 different reasons—and many of them are self-contradictory, obviously not applicable, totally different... I think any reasonable person looking at this would say no, his reason was a purpose to discriminate on the basis of race. Now, tell me why I'm wrong.

\textbf{JUSTICE GINSBURG:} What do you do with other—I mean, it just—it seems an out-and-out false
it appears the most likely outcome is a reversal of the Georgia Supreme Court’s ruling. But is that really the only reason the Court took this case?

In many ways, the violations in Foster’s case are egregious. Of equal concern, however, is the fact that there are likely many cases in which race was impermissibly used but in more subtle ways. The system established by *Batson* seems almost designed to fail:

The current framework makes it exceedingly difficult for judges to reject even the most spurious of peremptory strikes—a reality that is not lost on trial attorneys. Specifically, the Supreme Court has decreed that before a trial court can find a *Batson* violation it must determine that an attorney has (1) exercised a racially motivated peremptory challenge and (2) lied to the court in an effort to justify the strike. The trial court must find all of this based almost solely on the attorney's demeanor. Accordingly, trial courts rightly hesitate to make the damning findings *Batson* requires on such paltry evidence.\(^{31}\)

Trial court judges are unlikely to be eager to make a formal decision that the attorney in front of him or her is a racist liar. The system is inherently flawed. Perhaps *Foster v. Chatman* is the case where the Supreme Court will finally put an end to this experiment, or at least come up with a new structure for peremptory challenges.

Abolishing peremptory challenges is not a new idea,\(^{32}\) nor are alternative approaches designed to fix some of the problems posed by peremptory challenges.\(^{33}\) Yet, the *Batson* test has been around for almost thirty years, and peremptory challenges have continued largely

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\(^{32}\) E.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 810 (1997) (“I am a late convert. It has taken a shift of reference frame from bar to bench, and then from civil bench to criminal bench, for me to reach the point where I now believe that the benefits of the peremptory challenge system are outweighed by the damage which that system causes to the most basic principles of an impartial jury.”).

\(^{33}\) See, e.g., Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL’Y 323, 323 (2003) (suggesting introducing jury selection by blind questionnaires and restricting peremptory challenges to questionnaire responses before the parties view the jurors thereby eliminating the *Batson* test); Bellin & Semitsu, *supra* note 31, at 1078 (proposing “decoupl[ing] *Batson* violations from any finding regarding the striking attorney's subjective intent and foster[ing] a procedural mechanism that permits the immediate reseating of an improperly stricken juror without the juror ever knowing that she was the subject of a strike.”); Collin P. Wedel, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J.C.R. & C.L. 293, 295 (2011) (recommending “courts gather a moderate amount of information about potential jurors and then disseminate that information to litigants. Attorneys could then apply scientific jury selection methods to this data to excuse jurors for actual bias, eliminating the need to fall back on discriminatory and useless stereotypes.”).
uninterrupted in the United States. Proponents of maintaining the current system contend that these challenges safeguard a criminal defendant’s Sixth Amendment right to an impartial jury, protect jurors and promote efficiency and integrity in voir dire proceedings, and allow litigants to choose their own jury in a way that fosters a belief that the jury has been fairly chosen. Those who argue for the abolishment of peremptory strikes would contest all three points.

A bright line rule that would be easily administrable and would also maintain valuable aspects of peremptory challenges is a rule that eliminates only those challenges issued by prosecutors. If the main value in peremptory challenges lies with the potential to promote impartial juries, then it follows that peremptory challenges are most necessary for defendants. While legislators concerned about appearing tough on crime are unlikely to enact such reform, the Court likely does not have similar concerns. The Court’s concern is much simpler: the protection of Constitutional rights. Eliminating prosecutorial peremptory challenges is a straightforward bright-line rule that does just that by protecting the Sixth Amendment rights of the defendant and the Fourteenth Amendment rights of the potential jurors and the community at large.

At the time of Batson, Justice Marshall called for an end to peremptory strikes

34 Chiapetta, supra note 14, at 2003.  
35 U.S. CONST. art. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).  
36 Chiapetta, supra note 14, at 2003–04.  
37 Wedel, supra note 33, at 295 (“From an institutional perspective, however, the peremptory challenge is a crucial procedural mechanism that confers upon the judicial system the appearance of legitimacy—‘perhaps the most important political capital courts possess’ to effectuate their judgments.”).  
38 There isn’t much evidence that a jury is any less biased after peremptory challenges are exerted during voir dire. See Wedel, supra note 33, at 296 (“Worse, after wasting considerable time purifying the jury of bad auras and crooked smiles, attorneys often fail to improve a jury’s composition at all. Attorneys could often construct a less biased jury simply by keeping the first twelve people seated in the jury box.”).  
40 Certainly arguments might arise that such a system would unfairly benefit defendants and make prosecution too difficult. However, any perceived trial advantage conferred on defendants by peremptory challenges would pale in comparison to the standard of proof ‘beyond a reasonable doubt.’ Our system has never attempted to ensure complete fairness between prosecution and defense in criminal trials, the scales have strategically been tipped in favor of defendants as a matter of policy. This purposeful design is a response, in part, to prosecutorial discretion and the awesome responsibility of the state to fairly wield its power to restrict freedoms. See Note, Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion, 119 HARV. L. REV. 2121, 2130 (2006) (“Prohibiting prosecutors from manipulating the racial composition of juries, and thus the likelihood of conviction, would appropriately restrict the range of options available to prosecutors at the charging stage in ways that other mechanisms would not.”).  
41 The Supreme Court has held that discrimination in the courtroom does not only harm the litigants:

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

J.E.B., 511 U.S. at 140.
altogether.\textsuperscript{42} In the intervening thirty years, not much progress has been made. Peremptory challenges are still being used to unconstitutionally manipulate juries based on race.\textsuperscript{43} The Supreme Court should not only reverse the Georgia Supreme Court in \textit{Foster},\textsuperscript{44} but should go further to eliminate racially motivated peremptory challenges altogether. At this point it is clear there is only one way to ensure that end—prosecutorial peremptory challenges should be held unconstitutional.

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\textsuperscript{42} Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., dissenting) (“The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”).

\textsuperscript{43} Brief of Joseph Digenova et al. as Amici Curiae Supporting Petitioner at 4–11, \textit{Foster}, No. 14-8349.

\textsuperscript{44} Indeed, “[i]f this Court does not find purposeful discrimination on the facts of this case, then it will render \textit{Batson} meaningless.” \textit{Id.} at 3.