The Modern American

Volume 10 | Issue 1 Article 5

2017

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Reducing Racial Bias in Capital Jury Selection by Eliminating Peremptory Challenges

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On May 23, 2016, the Supreme Court addressed an area of capital trials continuously prone to racial discrimination in its *Foster v. Chatman*[1] decision. During *voir dire*, both parties are given peremptory challenges[2] and challenges for cause.[3] Challenging a juror for cause requires a specific reason for removing the juror, while peremptory challenges do not.[4] For example, prospective jurors who are morally opposed to the death penalty are often removed for cause from sitting on a murder trial in states where the prosecution is allowed to seek the death penalty. Before Timothy Foster's capital trial, the prosecution used four of its ten peremptory strikes to remove all of the prospective black jurors.[5] During the appeals process, Foster's counsel was able to obtain the prosecution's *voir dire* notes.[6] The copies of the jury venire list that Foster's counsel obtained had each black prospective jurors' name highlighted in bright green with an indication at the top that green "represent[ed] Blacks."[7] The prosecution also turned over a handwritten list of "definite NO's" that listed six potential jurors including all five qualified black prospective jurors.[8] Upon review, the Court found that the documentation clearly demonstrated racially motivated use of peremptory challenges that violated the Equal Protection Clause of the Constitution.[9]

After the Court released its ruling last May, critics opined that the facts of Mr. Foster's case were so egregious that the ruling would have little effect on racism in the criminal justice system as a whole.[10] However, based on the *Foster* decision, at least two murder convictions were vacated and remanded by the Supreme Court for further review.[11] Regardless of the magnitude of the decision's impact, the *Foster* case is a clear example of how the safeguards put in place by the Court to guarantee against racial bias in jury selection are failing.[12]

To remedy the repeated instances of bias, the courts should do away with peremptory strikes altogether.[13] Proponents of keeping peremptory strikes argue that the challenges have "very old credentials."[14] However, the potential for continued discrimination during jury selection outweighs any historical significance. Eliminating peremptory strikes also poses no risk to constitutional guarantee of a fair trial. In fact, requiring transparency early on in the trial process is essential to combat biases that the parties involved may not even be aware that they have.

Limiting *voir dire* challenges to strikes only for cause would require both the prosecution and defense to identify their reasons for striking the juror. Forcing the parties to state an actual reason to justify striking a potential juror is likely to ensure that racial bias is not the driving force behind the challenge.[15] Implicit and explicit racial discrimination is a hot topic in current events, but the influence that race may have in the fair administration of justice is a familiar foe. Following Justice Marshall's suggestions in his concurring opinion in *Batson v. Kentucky*[16] and eliminating peremptory challenges would be one critical step toward much overdue equality.

[1] 136 S. Ct. 1737 (2016).
[2] Peremptory challenges may be used by either the prosecution or defense to strike a potential juror without a reason during jury selection.
[3] Carol A. Chase & Colleen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L. REV. 507 (1997).
[4] *Id.* at 507–08.
[5] *Foster*, 136 S. Ct. at 1743.
[6] *Id.* at 1743–44 (noting that in 2006, Foster's counsel successfully used the Georgia Open Records Act to request the documents from the state).
[7] *Id.* at 1744.
[8] *Id.*
[9] *Id.* at 1755 (noting that prosecutors had clearly indicated on the notes which jurors were black and labeled them as "NO's").
[10] Adam Liptak, *Supreme Court Finds Racial Bias in Jury Selection for Death Penalty Case*, N.Y. TIMES, (May 23, 2016), http://www.nytimes.com/2016/05/24/us/supreme-court-black-jurors-death-penalty-georgia.html?_r=0.
[11] *See, e.g.*, Floyd v. Alabama, 136 S. Ct. 2482 (2016); Flowers v. Mississippi, 136 S. Ct. 2157 (2016).
[12] Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection,*15 MICH. J. RACE & L. 57, 104 (2009).
[13] *See* Price, *supra* note 9, at 104–05.
[14] Swain v. Alabama, 85 S. Ct. 824, 831 (1965).
[15] *Id.* at 106–07.
[16] 106 S. Ct. 1712, 1726 (1986) (Marshall, J., concurring).