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To Save Our Justice System, End Racial Bias in Jury Selection

By JON O. NEWMAN MAY 27, 2016

THE Supreme Court ruled correctly on Monday when it found that Georgia prosecutors in Foster v. Chatman had illegally barred African-Americans from serving as jurors in a death penalty trial. But the decision does not end racial discrimination in jury selection. The best way to do that is to limit the number of jurors that lawyers can strike for no reason at all to just one or two per side.

Both prosecutors and defense lawyers can exclude any number of prospective jurors for legitimate reasons — if a juror knows the defendant, has formed an opinion about the case or is unlikely to be impartial. But lawyers can also dismiss several more potential jurors simply because they do not want them — without explaining why. In federal felony trials, the prosecutor has six peremptory challenges and the defense usually has 10. In federal death penalty cases, each side has 20. State numbers vary.

In the Foster case, which dates from the 1980s, the prosecutors eliminated people simply because of race. Timothy Foster, a black man,

stood accused of killing an elderly white woman when he was a teenager. The prosecutors worked conscientiously to exclude the potential black jurors; they marked their names with a “B” and highlighted each black juror’s name in green on four different copies of the juror list. Those jurors were ranked against one another in case, one member of the prosecutorial team said, “it comes down to having to pick one of the black jurors.” The plan worked, and an all-white jury sentenced Mr. Foster to death.

This was an egregious case, but not a unique one. Far too often in criminal or death penalty cases that involve a black defendant, prosecutors try to exclude black jurors because they believe it will increase the chances of a conviction. In Houston County, Ala., prosecutors struck 80 percent of qualified black jurors from death penalty cases from 2005 to 2009.

If these strikes are challenged, prosecutors can claim race-neutral reasons. In Mr. Foster’s case, prosecutors said one prospective juror who was excluded didn’t make enough eye contact. Another seemed nervous. Moreover, some of the reasons prosecutors gave for striking black jurors were inaccurate. Other excuses applied to white jurors who were selected.

Not only is this practice unconstitutional, but all-white juries risk undermining the perception of justice in minority communities, even if a mixed-race jury would have reached the same verdict or imposed the same sentence.

The Advisory Committee on Rules of Criminal Procedure, which is part of the Judicial Conference, the federal court system’s principal policy-making body, should propose sharply reducing the number of jury strikes allowed in federal trials.

Several Supreme Court justices have suggested as much. Justice Thurgood Marshall endorsed such a reform in his concurring opinion in the 1986 case Batson v. Kentucky: “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." In 2005, Justice Stephen G. Breyer also urged reconsideration of the peremptory challenge system.

Total abolition of peremptory challenges would most likely face vigorous opposition from prosecutors and some defense attorneys. And it's unlikely to be achieved, either for federal or state criminal trials. But reducing the number will do significant good.

In 1879, the Supreme Court declared that to single out African-Americans for removal from jury service "is practically a brand upon them affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing individuals of the race that equal justice which the law aims to secure all others." All-white juries will continue to be a blight on the American system of criminal justice until federal and state rule makers significantly reduce the number of peremptory challenges.

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