

Foster v. Chatman and the Failings of *Batson*

Patrick C. Brayer*

I.	INTRODUCTION.....	53
II.	THE FAILINGS OF <i>BATSON</i>	54
III.	RATIONALIZED RACIAL EXCLUSION.....	56
IV.	STRATEGIES OF RACIAL EXCLUSION IN THE POST- <i>FOSTER</i> ERA.....	57
V.	CONCLUSION	59

I. INTRODUCTION

In reflecting on the recent Supreme Court opinion in *Foster v. Chatman*,¹ I was struck by how the Court announced the correct ruling, but failed to capture and comprehend the true reality that racially motivated peremptory strikes still exist and flourish in our nation’s judicial system.² Condemning the 30-year-old actions of two Georgia prosecutors legitimizes our system of justice, as many will find comfort in the remedy,³ but does little to eliminate the tragic occurrence of a person of color being excluded from a jury. Thirty years of *Batson*-influenced jurisprudence has been ineffective in changing the reality that black citizens are barred from juries based on the color of their skin and black litigants, especially criminal defendants, are deprived of true due process and equal protection.⁴ This Essay is a reminder of how the

* Deputy District Defender of the St. Louis County Trial Office of the Missouri State Public Defender System and 28-year veteran of the trial division. This Essay represents my personal opinions and beliefs. Special thanks to Ann H. MacDonald for her substantial assistance in editing and researching this Essay.

1. See generally *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

2. See *Object Anyway, Radiolab Presents: More Perfect*, WNYC (July 16, 2016), www.wnyc.org/story/object-anyway; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 116–20 (2010). For this reason, some scholars have proposed eliminating peremptory challenges. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1607–10 (2012).

3. *Foster*, 136 S. Ct. at 1749 (“[T]he reasoning provided by Lanier has no grounding in fact.”).

4. See *Object Anyway*, *supra* note 2 (stating that no Tennessee appellate court has ever reversed a conviction on the basis of a *Batson* challenge); see also *State v. Saintcalle*, 309 P.3d 326,

evolution of rulings in *Batson*,⁵ *Miller-El*,⁶ and *Foster*⁷ raised awareness of open and intentional racial exclusion but failed to combat or even comprehend the modern face of judicially-sanctioned explicit and implicit racism.⁸

In *Foster*, the Supreme Court determined that the “prosecutors were motivated in substantial part by race” when they struck two potential jurors from hearing the capital murder case against Timothy Foster.⁹ In a 7 to 1 decision, written by Chief Justice Roberts, the Court reversed and remanded Foster’s conviction, citing numerous examples of how white jurors who were similarly situated to the excluded black jurors were not struck by prosecutors from the all-white jury.¹⁰ The opinion noted “shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution’s file” as evidence of how the peremptory strikes were improperly motivated.¹¹ It is truly unfortunate that this phenomenon of open and explicit racial intolerance is still in existence 30 years after *Batson* decision came down.¹² What is even more unfortunate, however, is that the Court did not acknowledge how attitudes of exclusion are less intentional today and more nuanced, implicit, and rationalized. Black defendants in 2016 face prosecutors who are less engaged in open discrimination but more likely impacted by their own implicit beliefs and comforted by false rationalizations of racial tolerance.¹³ The *Foster* ruling disregarded the new face of exclusion while it engaged in the relatively simple task (aided by a cache of records) of combating a detectable case of intentional racism in jury selection.

II. THE FAILINGS OF *BATSON*

The *Foster* ruling provided an opportunity for the Supreme Court to restructure the *Batson* standard by allowing a reviewing court to consider the impact of subconscious racial beliefs on both litigators and judges. I was optimistic that the Court would take the lead in validating a recent opinion by the Supreme Court of Washington, which called for the “replace[ment of] *Batson*’s ‘purposeful discrimination’ requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious

334–36 (Wash. 2013).

5. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

6. See generally *Miller-El v. Dretke*, 545 U.S. 231 (2005).

7. See generally *Foster*, 136 S. Ct. 1737. For a more detailed discussion of the evolution of case law post-*Batson*, see James J. Tomkovicz, *Twenty-Five Years of Batson: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393, 1406–23 (2012).

8. See generally Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229 (1993).

9. *Foster*, 136 S. Ct. at 1755.

10. See *id.* at 1750–51, 1752–54.

11. *Id.* at 1754.

12. See ALEXANDER, *supra* note 2, at 118.

13. See *Object Anyway*, *supra* note 2.

bias.”¹⁴ That court proposed for example that

it might make sense to require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant’s race, the peremptory would not have been exercised.¹⁵

The court suggested that such a standard “would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge.”¹⁶ Though such an approach is not the only way to address this issue,¹⁷ it would be a start and give judges a way to address discrimination without confronting the striking attorney. Unfortunately, in utilizing an archaic and outdated analysis, the Supreme Court ignored the significant role that implicit bias played in the prosecutors’ decisions in *Foster*¹⁸ and, ultimately, in our system of justice.

Both state and federal judges from across the nation are seeking clarity on this issue. For example, now-Senior Federal District Judge Mark Bennett, sitting in Sioux City, Iowa, has observed that “[b]ecause *Batson* is ineffectual in addressing bias in jury selection, it permits implicit bias—and probably even explicit bias—to have an impact on jury selection.”¹⁹ State appellate judges have recently written inspiring, well-researched, and eloquent opinions detailing how hidden racial beliefs on the part of prosecutors have directly impacted the composition of juries in cases before their courts.²⁰

Unfortunately, these opinions are imbedded with the tragic disappointment of judicial reality. As Judge Van Amberg writes: “I concur in result with the majority opinion because *Batson* requires a finding of purposeful discrimination and, deferring to the trial court as our standard of review requires, I cannot firmly conclude from this record that the trial court’s ruling is clearly erroneous.”²¹ These unfortunate affirmations of lower court verdicts have reduced appellate judges to merely “acknowledging the reality of unconscious bias in our courtrooms,” and hoping for a “national

14. *State v. Saintcalle*, 309 P.3d 326, 339 (Wash. 2013).

15. *Id.*

16. *Id.*

17. For example, Professor Henry L. Chambers, Jr. has suggested a test that assumes a state actor intended the “natural and probable consequences” of his or her action. Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 611, 625–27 (2004).

18. *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (stating that “[i]ndeed, at times the State has been downright indignant” when objecting that race was not a factor).

19. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 165 (2010).

20. *See, e.g., State v. Rashad*, 484 S.W.3d 849 (Mo. Ct. App. 2016).

21. *Id.* at 859 (Amburg, J., concurring).

conversation seeking alternatives to *Batson*.”²² Sadly, the United States Supreme Court commemorated the 30th anniversary of the *Batson* decision with an opinion that failed to advance this essential conversation.²³

III. RATIONALIZED RACIAL EXCLUSION

All human beings develop a unique racial identity status when their egos interpret interactions with individuals from another race.²⁴ This identity status helps protect our sense of “self-esteem” and “influences how [we] interact[] with individuals in different racial groups.”²⁵ Litigators today likely have matured past an identity status that is “oblivious[] to racism and one’s participation in it” to the relatively more mature status of “deceptive tolerance”²⁶ and a deceptive understanding of the plight of other races.²⁷ Tomorrow’s *Batson* violation will present at the intersection of implicit and explicit beliefs, masked by false rationalizations of racial acceptance.

In trial practice, deceptive tolerance is evidenced when opposing counsel makes a *Batson* challenge and litigators protest that they are not racist and object to the accusation that they are deliberately striking individuals based on race.²⁸ Today, black litigants are confronted with prosecutors who are unaware of their own implicit intolerance and who are oblivious to the impact of the years of cumulative cultural messaging that portrayed people of color as different.²⁹ The late Justice Scalia acknowledged the existence of this belief system when he dissented in *Powers v. Ohio* and wrote: “[A]ll groups tend to have particular sympathies . . . towards their own group members.”³⁰ When I first read Scalia’s dissent, I was alarmed by his characterization of how individual actions are based on membership in a racial group. But in the weeks following his death, I reflected on how his writings—when viewed in the context of modern research on race and bias—are a rare and honest admission of how he personally, and our system of justice generally, has yet to mature up the racial identity scale beyond deceptive tolerance.

Today’s *Batson* violation is shrouded in a cloak of rationalization, with trial attorneys consciously believing their actions are not motivated by bias but

22. *Id.* at 862.

23. *See generally Foster*, 136 S. Ct. 1737.

24. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL’Y 133, 166–69 (2004).

25. *Id.* at 167.

26. *Id.* Deceptive tolerance is an ego status that represents how an individual remains intellectually committed to one’s own racial group while demonstrating a “deceptive tolerance” of non-white groups. *Id.*

27. *Id.*; *see also* Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1476–83 (2012).

28. *See, e.g., Foster*, 136 S. Ct. at 1755.

29. SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 72–73 (2010).

30. *Powers v. Ohio*, 499 U.S. 400, 424 (1990) (Scalia, J., dissenting).

by the advancement of a greater good.³¹ This rationalization is evidenced when prosecutors ask questions in voir dire targeting the heart of the black experience in this country. For example, prosecutors may ask potential black jurors if they have had negative experiences with law enforcement because of their race.³² Many rationalize this questioning as comparable to asking if a potential black juror has been a victim of a crime, but in reality, exclusions based on such questions mark the continued victimization of a black juror simply because they were victimized by their government in the past.³³ This government-sanctioned victimization is exacerbated when prosecutors in black communities, unbeknownst to potential jurors, use their extensive resources to run arrest records of said jurors, who were never convicted, and troll for answers that can be portrayed as dishonest or ambiguous in a strike for cause.³⁴

Allowing attorneys to ask jurors if they have a friend or family member in jail or the penitentiary is another way our system masks prosecutors' implicit or rationalized bias because a disproportionate number of incarcerated individuals are African American.³⁵ *Foster* never asked this crucial question: is striking a person from a jury because they have experiences based on their race the same as striking an individual because of their race? I fail to see the distinction. Unfortunately, the *Batson* standard is an inadequate tool in preventing this tactic, and the tactics of bias to be utilized post-*Foster*.

IV. STRATEGIES OF RACIAL EXCLUSION IN THE POST-*FOSTER* ERA

Tomorrow's tools of exclusion will be more complex, subtle and, at times, more undetectable. I have observed the following trial tactics evolve in the past few years and I anticipate courts will confront these methods of circumventing *Batson* in the future.

First, in the post-*Foster* era, courts will confront the issue of trial attorneys opting not to utilize their allowed peremptory strikes as a way to exclude people of color.³⁶ For example, a prosecutor who is implicitly or intentionally attempting to strike individuals based on race, gender, or ethnicity will notice a targeted group is less represented in the first section of the assembled voir dire panel. Thus, if he or she uses all allowed strikes, they will have some or more of this group present on the final jury. Currently, an attorney may opt

31. See *Object Anyway*, *supra* note 2.

32. *Id.*

33. *Id.*

34. See, e.g., Keith L. Alexander, *Questions Arise Over Criminal Background Searches of Jurors in D.C. Superior Court*, WASH. POST (Dec. 8, 2013), https://www.washingtonpost.com/local/crime/questions-arise-over-criminal-background-searches-of-jurors-in-dc-superior-court/2013/12/08/fa612fec-4e13-11e3-be6b-d3d28122e6d4_story.html.

35. See ALEXANDER, *supra* note 2, at 188–89.

36. See, e.g., *State v. Paleo*, 5 P.3d 276, 279 (Ariz. Ct. App. 2000), *vacated*, 22 P.3d 35 (Ariz. 2001).

not to use all of his or her preemptory strikes.³⁷ Unfortunately, this tactic serves a racially-motivated prosecutor's interests by excluding people of color from the panel and, at the same time, avoiding a *Batson* challenge.

Second, rationalized racism in jury selection in the post-*Foster* era will no longer present with all white juries. Some litigators practice a more nuanced form of exclusion by targeting individuals with certain intersectionalized traits.³⁸ For instance, some prosecutors will rationalize that black women will be tired of crime in their communities but black males will be sympathetic to the defendant or hate the police.³⁹ In addition, strikes based on youth will, in reality, be strikes based on youth, gender, and race, with prosecutors harboring the false fear of black men relating to one another and sympathizing with the plight of the accused.⁴⁰ Compounding this problem is that when questions of exclusion are raised, the presence of one or a few black members of the jury will be trumpeted as proof of race-neutral actions.⁴¹

Third, other litigators will engage in the practice of citing the involvement of black professionals as evidence of proper conduct when defending an act of exclusion. For example, in denying relief for Timothy Foster, the Georgia habeas court noted that the prosecutor's investigator, "Mr. Lundy, [was] himself African American,"⁴² when it outlined facts demonstrating no bias existed in the State's strikes. Black litigators are not immune from the institutional pressures and cultural messaging that promotes an irrational fear of a case being lost if people of color are allowed on the jury.⁴³ The stereotyping of black professionals as being unconditionally protective of black jurors is evidence of the racially rationalized and implicit beliefs that permeate our system.⁴⁴

The current framework for addressing discrimination in jury selection, with its focus on proving intentional conduct by the striking attorney, does little to address how these tactics, formed by implicit bias, cause the improper

37. *State v. Paleo*, 22 P.3d 35 (Ariz. 2001).

38. See *Object Anyway*, *supra* note 2, for an interview with ACLU Deputy Legal Director Jeffery Robinson describing his perception of the belief system his parents would bring to jury service. This generalization of attitudes, based on race and gender, is arguably shared by a number of prosecutors.

39. *Id.*

40. *Id.*

41. See, e.g., *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) ("The district court erred in ruling that a *Batson* violation did not occur since members of the defendants' racial group were seated on the jury.").

42. See Brief of Respondent in Opposition to Petition for Writ of Certiorari at 9, *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (No. 14-8348).

43. See VEDANTAM, *supra* note 29, at 72-73.

44. See *State v. Rashad*, 484 S.W.3d 849, 859 (Mo. Ct. App. 2016) (finding "[t]he facts of this case do not even hint at a motive to discriminate" in part because "the victim and [the defendant] were African-American[,] . . . [t]he investigating police detective was African-American[,] . . . [t]he family witnesses were African-American[, and] . . . "[t]he case did not present any issues of cross-racial identification.").

removal of minority jurors from juries.

V. CONCLUSION

As the 30th anniversary of the *Batson* decision approached (April 30, 2016), I spent the prior week reflecting on the Supreme Court's anticipated *Foster v. Chatman* ruling. I contemplated if the Court would adopt the more logical and impactful standard of denying a peremptory strike when "more likely than not that, but for the defendant's race, the peremptory would not have been exercised."⁴⁵ It did not. For decades I have witnessed open bigotry and racial biases plague our system of justice in both my community and throughout the nation. But my experience with racial attitudes inside the walls of the courthouse has been more nuanced and less explicit. In a majority of my trials, I have witnessed people of color struck from jury panels due to the color of their skin. I have also seen prosecutors who I considered to be progressive and enlightened individuals offer questionable race-neutral reasons as they rationalized striking African Americans from my black client's jury. In defending their strikes, many protested that they are "not racist" and objected to being questioned about their actions. After hearing this objection on several occasions, I soon understood that many of the prosecutors genuinely believed their actions were not racially motivated. My black clients—who were facing all-white juries—knew, however, that race had played a significant role in the selection processes. Given the circumstances of Mr. Foster's case, the Supreme Court should have recognized that *Batson* is not actually addressing explicit or implicit discrimination in jury selection and offered a new approach to addressing this form of pervasive discrimination.

45. *State v. Saintcalle*, 309 P.3d 326, 339 (Wash. 2013).