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Asymmetrical Peremptories Defended: A Reply

By Richard D. Friedman*

Three years ago, with the publication of his article "An Asymmetrical Approach to the Problem of Peremptories" in this journal, Professor Friedman initiated a debate on the subject that was taken up in 1994 by three prosecutors who offered a rebuttal that was also printed in these pages. Professor Friedman continues the debate.

I am not surprised that three prosecutors—even such able and thoughtful advocates as Messrs. Helland, Light, and Richards—regard as distasteful to the point of abhorrence my proposal that peremptory challenges be eliminated for the prosecution but retained for the defense.¹ For that matter, I am equally unsurprised that defense counsel seem to think this is a great idea. And perhaps the biggest nonsurprise is that I continue to adhere to my view.

The prosecutors do not disagree with me that peremptories for the defense ought to be retained; our debate is whether they ought to be retained for the prosecution. I concede the prosecutors' point that *Batson* has not yet made the administrative burden of prosecutorial peremptories intolerable. I suspect, though, that the prosecutors would not belittle that burden if they practiced in other jurisdictions, such as in the Deep South, where (for a combination of reasons of history, demography, procedure, and personnel) the administrative burden has been far greater than in Michigan federal court, and where extensive *Batson* hearings and reversals have been far more common.

Even in their own court, however, the prosecutors can find an excellent example of how probing an investigation a careful judge may have to conduct to follow *Batson* conscientiously. In

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¹ Professor Friedman's original essay "An Asymmetrical Approach to the Problem of Peremptories," appeared at 28 Crim. L. Bull. 507 (Nov./Dec. 1992). The rebuttal appeared at 30 Crim. L. Bull. 242 (May/June 1994). This reply is based on one that first appeared as "Prosecutors' Peremptory Challenges—A Response and Reply," 37 Law Quadrangle Notes 44 (University of Michigan Law School Spring 1994).

Echlin v. LeCureux,² Judge Avern Cohn held six days of hearings before granting habeas corpus on the ground that a state prosecutor had discriminatorily exercised peremptories. The Sixth Circuit reversed,³ but only by using a rather dubious avoidance mechanism, denying the petitioners standing on the ground that *Powers v. Ohio*,⁴ one of the progeny of *Batson*, created a “new rule” and could not be applied retroactively.

Echlin is not atypical. Many courts have limited the burden imposed by *Batson* by doing their best to avoid the case. Some use the same approach as in *Echlin*. More commonly, courts avoid difficulty by according extremely hospitable treatment to the reasons proffered by counsel, particularly prosecutors, for exercising their peremptories. Some of these reasons—“That juror was scowling at me,”⁵ seem dubious and easy to manufacture. Others—“It wasn’t that the juror is Hispanic; it was that she speaks Spanish and so would listen to the actual testimony rather than to the transcript”⁶—should not pass the “straight face” test.

Thus, I have difficulty with the idea that the rule of *Batson* creates a “conceptual mess” but not a practical mess. There are doctrines on which this “tough in theory, easy in practice” type of argument might have some force—doctrines for which the difficult conceptual issues arise only occasionally, out on the fringes where law professors love to roam. *Batson* is different. Take, as a straightforward example, a criminal case with a black defendant. Any time the prosecutor peremptorily challenges a black juror, a potential *Batson* issue arises. How can we be satisfied that race did not enter into the decision? By offering peremptories, we invite prosecutors to indulge their hunches as to how a potential juror will likely behave. But then we tell them that they must put out of mind one of the most critical facts about that person, one that may critically affect the juror’s perspective on the world and the relationship of the state to the individual. This makes the exercise of peremptories, as well as the doctrine governing them, incoherent.

² *Echlin v. LeCureux*, 800 F. Supp. 515 (E.D. Mich. 1992).

³ *Echlin*, 995 F. 2d 1344 (6th Cir. 1993).

⁴ *Powers v. Ohio*, 499 U.S. 400 (1991).

⁵ See *United States v. Jenkins*, 1995 U.S. App. LEXIS 7937 (Apr. 11, 1995).

⁶ See *Hernandez v. New York*, 500 U.S. 352 (1991).

ASYMMETRICAL PEREMPTORIES DEFENDED

Aside from race, gender and religion are also crucial facts that a party predicting a juror's attitudes in a given case may well want to know. Last year, in *J.E.B. v. Alabama ex rel. T.B.*,⁷ the Supreme court held that *Batson* applies to peremptories based on gender; thus, the problem of incoherence has been extended and aggravated. But several state courts have said that *Batson* does not apply to peremptories based on religion, and in *Davis v. Minnesota*,⁸ the Court apparently signaled that it agreed with them. The Minnesota Supreme Court, deciding before *J.E.B.*, had based its refusal to apply *Batson* to religiously based peremptories, in part on its belief that *Batson* would not be extended beyond race; over a dissent by Justice Thomas, joined by Justice Scalia, the Supreme Court denied certiorari without even remanding for reconsideration in light of *J.E.B.*⁹ The implication of this line of cases is particularly troublesome: It is hard to look benignly on blatant sex or religious discrimination in a context, jury selection, that the Court has actively sought to rid of racial discrimination.

Perhaps the courts will continue in large part to avoid the consequences of this incoherence by turning their eyes away from violations of *Batson* principles. We ought to be suspicious of a rule when one argument for it is that it is widely ignored.

These difficulties would all be tolerable if there were any compelling need to allow prosecutors to exercise peremptory challenges. I do not believe there is. Wisely, my prosecutorial critics do not appear to argue strongly that prosecutorial peremptories are necessary to prevent inaccurate pro-defendant verdicts. Rather, they emphasize the harm that an outlier, perhaps an irrational juror, might do by causing a hung jury.

I agree that this is a problem that must be addressed. Most often, though, one outlier will not be enough to hang a jury.¹⁰

⁷ *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

⁸ *Davis v. Minnesota*, 114 S. Ct. 2120 (1994).

⁹ Justice Ginsburg took the unusual step of writing an opinion concurring in the denial of certiorari, pointing to reasons cited by the Minnesota court supporting its decision.

¹⁰ My understanding is that usually—though of course not inevitably—one or two holdouts on a jury of twelve do not cause the jury to hang; the pressure to go along becomes intense. Note also that unanimity among twelve-member juries is not constitutionally required even in criminal trials. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Perhaps more significantly, relying on the prosecutor to address the problem, and on a peremptory basis no less, is the wrong way to go. It gives an advocate a blunderbuss, when what is needed is judicial use of a scalpel. For one thing, most often, prosecutors do not use their peremptories to remove outliers, and it is not at all clear that they would be particularly good at it anyway. Federal prosecutors ordinarily get six peremptories; in picking a jury of twelve, there cannot, by definition, even be that many outliers—because if there were that many, they would not be outliers. Prosecutors, I believe, use most of their peremptories the way defense lawyers do—for comparison shopping.

Furthermore, if a venire member exhibits characteristics making him or her unlikely to be an adequate juror, the trial judge should be persuadable of that fact. If the judge—taking into account the interest that the court and the prosecutor share in preventing a hung jury—is not persuaded, why should an advocate's peremptory contrary desire carry the day?

Thus, I conclude that, while defense peremptories are important, prosecutorial peremptories are not worthwhile. This leads me to advocate an asymmetrical solution. Asymmetries in our rules of criminal justice should not be adopted out of softheaded sympathy for the defendant. Rather, they should be adopted only when justified by the fact that the defendant and the prosecution that seeks to punish him are in asymmetrical positions with respect to the adjudication. Current law in the federal courts and in many state systems usually gives more peremptories to defendants than to prosecutors. Thus I do not even suggest creating a new asymmetry; I would merely extend one that already exists.