An Asymmetrical Approach to the Problem of Peremptories?

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An Asymmetrical Approach to the Problem of Peremptories?

By Richard D. Friedman*

The Supreme Court's decision in Batson v. Kentucky, and the extension of Batson to parties other than prosecutors, may be expected to put pressure on the institution of peremptory challenges. After a brief review of the history of peremptories, this article contends that peremptories for criminal defendants serve important values of our criminal justice system. It then argues that peremptories for prosecutors are not as important, and that it may no longer be worthwhile to maintain them in light of the administrative complexities inevitable in a system of peremptories consistent with Batson. The article concludes that the asymmetry of allowing peremptories for the accused but not for the prosecution is not troublesome.

In 1986, in Batson v. Kentucky, the Supreme Court held that the Constitution forbids a criminal prosecutor to exercise peremptory challenges to potential jurors in a racially discriminatory manner. Batson raised a host of important issues. Most obvious, perhaps, was the question of whether the prohibition of Batson would be extended to litigating parties other than a criminal prosecutor. In its last two terms, the Court has answered that question resoundingly. Last year, in Edmonson v. Leesville Concrete Co., the Court extended Batson to civil litigants. And this year, the Court completed the circle, holding in Georgia v. McCollum that neither may criminal defendants exercise peremptories in a racially discriminatory manner.

* Professor of Law, University of Michigan Law School. Many thanks to Tom Ferries for excellent research assistance, and to my colleagues Tom Green, Jerry Israel, Yale Kamisar, Rick Lempert, and Debra Livingston for valuable advice and comments. Because of editorial policy, masculine pronouns are used throughout this article.

Thus, the question of who is bound by *Batson* has been resolved, or at least nearly so,\(^4\) in a couple of broad brushstrokes. But other problems and complexities remain, and they are sure to put pressure on the continued maintenance of the institution of peremptory challenges itself. Indeed, in *McCollum* Justice Thomas, concurring, predicted dolefully that the death of peremptories was inevitable.\(^5\) To many, though, that would be a welcome development. Concurring in *Batson*, Justice Thomas’s predecessor, Justice Marshall, advocated the abolition of peremptories.\(^6\) And recently, three judges of the New York Court of Appeals—one shy of a majority on the highest court in the state—endorsed the same idea.\(^7\)

This essay presents another, somewhat more moderate possibility, which may at first sound slightly odd, although in fact it has deep historical roots: retention of the accused’s peremptories but elimination of the prosecution’s.

### The Historical Perspective

Although peremptory challenges in civil cases appear to be a relatively recent creation,\(^8\) in criminal cases they are very old.

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\(^4\) The caveat reflects the suggestion made by the NAACP Legal Defense Fund, Inc., as amicus in *McCollum*, that different considerations apply when the peremptories are exercised by an accused who is a member of a racial minority. Justice Thomas referred somewhat sneeringly to this suggestion. 112 S. Ct. at 2360 n. 2. Although *McCollum* was based on the rights of the juror rather than on those of the accused, it seems unlikely that the Court would openly adopt different rules for defendants—or, for that matter jurors—of different races. Of course, application of *McCollum* will vary from one case to another, and it is impossible to be confident that the race of the accused will not be a significant factor.

\(^5\) 112 S. Ct. at 2360.

\(^6\) 476 U.S. at 103.


\(^8\) Blackstone speaks of peremptories only in criminal cases. 4 William Blackstone, *Commentaries on the Laws of England* 353.
The common law was generous in its provision of peremptories to criminal defendants, allowing them 35, later reduced (except in cases of high treason) to 20. The allowance of peremptory challenges was extolled by Blackstone in *Commentaries on the Laws of England* as "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." But by a statute of 1305, enacted to correct a bias toward the prosecution in the selection of jurors, peremptory challenges were denied to the king's attorneys. This prohibition was only marginally effective, because prosecutors were allowed to require a member of the venire to "stand aside," giving a reason only if a jury of twelve could not be selected. The "standing aside" procedure did not, however, find quick or universal acceptance in the United States. This resistance appears to be attributable to the same perception that led to the constitutionalization of the jury right—the perception of the jury as an essential bulwark against state oppression. Thus, New York did not allow prosecutors any form of peremptory challenge until 1881 and Virginia did not until 1919. In 1856, the U.S. Supreme Court held, pursuant to statute, that federal courts should follow the procedure of the state in which they sat with respect to prosecutors' peremptories. But through the nineteenth century, as the mistrust of government characteristic of the Revolutionary era gave way to increasing acceptance of state power, peremptories for the prosecution gradually became the rule rather than the exception.

Even today, prosecutors are not always given the same number of peremptories as the accused. Under Federal Rule of Criminal Procedure 24(b), for example, in noncapital felony cases the accused is given ten peremptories and the government only six. And statutes in seventeen states provide more peremptories to the accused than to the prosecution in at least

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9 *Id.*

10 *Ordinance for Inquests, 33 Edw. I, st. 4 (1305).*


12 *Id.* at 148–149 & n. 46.

13 *United States v. Shackleford, 59 U.S. (18 How.) 588 (1856).*

14 *Van Dyke, note 11 supra at 150.*
Peremptories for the Accused: "Tenderness and Humanity," Efficiency, and the Perception of Fairness

The historical background suggests that, although peremptories now are provided to both sides in civil and criminal litigation, they exist principally for the benefit of criminal defendants. The value of the accused's peremptories may be assessed by comparing the status quo with the situation that would prevail if they did not exist. Presumably more liberal granting of challenges for cause would take up some of the slack caused by elimination of the accused's peremptories. Nevertheless, for several reasons it is far preferable to retain the accused's peremptories.

Perhaps most obviously, even if the standard for a cause challenge is lowered, a biased juror will very often escape it. Largely for this reason, Justice Thomas, although concurring in *McCollum*, purportedly on the ground of stare decisis, expressed grave misgivings:

I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes. . . . Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during voir dire, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. 16

Indeed, in some cases, an accused may reasonably conclude on the basis of one or more aspects of a potential juror's background or attitudes that he is less likely than the potential juror next in line to find in favor of the accused. Such a probabilistic judgment is an appropriate basis on which to exercise a peremptory challenge, and it will weed out some biased jurors. In most cases, though, it cannot support a challenge for cause, 17 unless the

16 112 S. Ct. at 2360.
17 See Lempert, "Jury Size and the Peremptory Challenge: Testimony on Jury Reform," 22 Law Quadrangle Notes No. 2, 8, 12 (Winter 1978) ("almost insoluble difficulties for a system which relies on the challenge for cause" posed "where a suspicion of bias is engendered not by some specific prejudice, but rather by a set of diffuse attitudes that characterize the juror's outlook on life.").
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standard for a cause challenge is eased so much as to sap it of virtually all meaning. 18

The point should not be overstated: It is probably relatively rare that the availability of peremptories actually prevents an inaccurate verdict. Empirical research suggests that attorneys, despite extensive efforts, and even aided by "scientific" selection methods, actually tend in most cases to have only modest success in identifying jurors inclined to find adversely. 19 And even where the attorney is able to identify hostile jurors, in most cases it is unlikely that the use of peremptories will prevent an inaccurate verdict. 20

But, even if peremptories are of only occasional importance in contributing to fairness itself, they are of consistent, although not as dramatic, importance in contributing to the perception of fairness. No system of challenges for cause can serve as well as peremptories the crucial function of giving the accused a strong sense that his jury is fair. 21 The accused may be suspicious of a juror "even without being able to assign a reason." 22 Or perhaps the accused knows the reason but is not able to persuade the

18 The author's colleague, Professor Richard Lempert, has suggested that trial judges may tend to be overly hostile, rather than overly receptive, to cause challenges made by an accused. To the extent this is so, it would be another important reason for not relying solely on a system of cause challenges to protect the accused in jury selection, even though the elimination of peremptories would naturally tend to cause some liberalization in the grant of cause challenges.

19 See Hastie, note 7 supra at 717–719 ("attorneys, relying on their experience and intuition, are not very acute judges of juror bias" but "do exercise a small influence on the outcome of a few cases"; "the party employing 'scientific' selection methods yields slightly better results than the side using conventional, intuition-based voir dire or random selection").

20 A peremptory does not prevent the inclusion of a biased juror unless the attorney identifies the juror as relatively hostile and a challenge for cause fails (or would fail if made). And even if in a given case the exercise of peremptories does prevent the inclusion of one or more biased jurors, it still may be unlikely that denial of peremptories would lead to an inaccurate result; at least where jury unanimity is required, the inclusion of one or a few biased jurors is probably more likely to cause a hung jury than to transform an accurate verdict into an inaccurate one.

21 See Hastie note 7 supra, at 725 ("social science research on procedural justice strongly implies that increased involvement of the defense attorney would be associated with a greater impression of fairness in the defendant's mind") (citation omitted); Barbara Allen Babcock, "Voir Dire: Preserving Its 'Wonderful Power'", 27 Stan. L. Rev. 545, 552 (1975) (peremptories serve a didactic function, teaching the litigant and thus the community that the jury is a good model for deciding "because in a real sense the jury belongs to the litigant: he chooses it. . . . The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue.").

22 Blackstone, note 8 supra, at 353.
judge that it amounts to good cause; it may be that the juror belongs to a group that the accused believes, as a statistical matter, is significantly less likely than the average run of jurors to find in his favor. The value of peremptory challenges lies precisely in their peremptoriness—that the accused can remove a potential juror whom he suspects would be biased against him (or merely less likely to vote for acquittal than the next potential juror) without having to persuade anyone. Peremptories thus help remove even grounds of suspicion that are weak or that would be difficult or embarrassing to articulate.

Given the nature of a criminal trial, in which the state attempts to deprive an individual of liberty (or even of life), increasing not only the actuality of fairness but also the accused’s perception of fairness is a crucial goal. Punishment by the state is more easily justifiable when that perception is a strong one. This consideration is especially important when the accused is particularly vulnerable to oppression by the state and prejudice by portions of the populace—and, as suggested by Justice Thomas in McCollum, that may be when peremptories serve their most important purpose.

The accused’s peremptories have other, subsidiary benefits as well. To develop a challenge for cause often requires extensive questioning of a juror, and as Blackstone pointed out, ‘‘the bare questioning his indifference may sometimes provoke a resentment.’’ The problem is inevitable, and making the

23 See Pizzi, ‘‘Batson v. Kentucky: Curing the Disease but Killing the Patient,’’ 1987 Sup. Ct. Rev. 97, 126 (‘‘What really happens at the peremptory challenges stage is comparison shopping.’’).

24 The embarrassment is not only to the accused. For pre-Batson views, see Spears, Note, ‘‘Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges,’’ 27 Stan. L. Rev. 1493, 1503 (‘‘the judicial system lets the parties handle under the guise of silence and caprice what the courts themselves should not and perhaps cannot handle rationally’’), and Babcock, note 21 supra, at 553–554 (peremptories avoid the ‘‘societally divisive’’ need for ‘‘trafficking in the core of truth in most common stereotypes’’).

25 Indeed, the Confrontation Clause of the Sixth Amendment, to the extent that it applies to hearsay statements, is based in substantial part on this consideration. See Coy v. Iowa, 487 U.S. 1012, 1018–1019 (1988); Lee v. Illinois, 476 U.S. 530, 540 (1986). The author of this article has described very briefly and roughly the principles that he believes should govern the hearsay aspect of the Confrontation Clause in ‘‘Toward a Partial Economic, Game-Theoretic Analysis of Hearsay,’’ 76 Minn. L. Rev. 723, 726 n. 10 (1992).

26 Lempert, note 17 supra, at 12–13, also argues that challenges for cause may be ‘‘degrading or insulting’’ to the challenged juror, whereas a peremptory challenge has the ‘‘virtue of saving face.’’ To the extent this is a problem with challenges for
system more dependent on challenges for cause would aggravate it. 27

Finally, in some cases peremptories offer efficiency benefits. Occasionally, the exercise of a peremptory may keep off the jury an outlier, someone who would not persuade his colleagues but who might through sheer stubbornness or conviction cause a hung jury. Moreover, challenges for cause are more expensive to administer than are peremptory challenges. Not only must groundwork be laid in questioning, but an argument must be made to the judge, who must rule, and if the ruling is against the accused an appeal is possible. Peremptories, by contrast, to the extent they are allowed to be truly peremptory, are about as simple to administer as could be. The importance of this consideration is mitigated, but not altogether eliminated, by the fact that, so long as the accused does not have a surplus of them, he has a strong incentive to develop a challenge for cause against a juror whom he wishes to exclude, thus saving one of his peremptories.

**Peremptories for the Prosecutor: Is the Game Worth the Candle?**

Prosecutors’ peremptories stand on weaker ground than do the accused’s. Indeed, as the historical background has indicated, during much of the last 700 years or so, peremptories have not been as firmly established for prosecutors as for criminal defendants. There is good reason for this: The crucial function of increasing the accused’s perception of fairness is not served by prosecutors’ peremptories. Indeed, that function will be disserved to the extent that the prosecutor uses his peremptories to exclude jurors who, although apparently fair-minded, have backgrounds and attitudes suggesting that they are more likely than the average member of the community to find in favor of the accused.

*Batson* has mitigated, although hardly eliminated, one serious aspect of this problem, the tendency for prosecutors to use peremptories discriminatorily against potential jurors from mi-

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27 See Babcock, note 21 supra, at 552–553 (Because of potential alienation from questioning, “[w]ithout the insurance of the peremptory challenge, a party would be far less able to search for cause to eliminate jurors.”).
minority ethnic groups. At the same time, however, Batson has created a serious disadvantage of another type: It has made prosecutors' peremptories a frightfully expensive procedural nightmare. Batson has meant that very often—particularly where the accused is a member of a minority group, but even in some cases where he is not—the prosecutor's exercise of peremptories threatens to append a minicase of discrimination onto the criminal trial. And the discrimination case is not so easily resolved.

In some cases, the court must first determine whether the group assertedly excluded is cognizable under the Batson doctrine. If the prosecutor excludes blacks or Hispanics willy-nilly, that will run afoul of Batson, but presumably if he does the same to plumbers or pipefitters that will not. What if the prosecutor excludes people whose names sound Italian? The cases seem to be at odds. Conflicts such as this one may be resolved in time, but new ones are sure to arise as courts test the outer reaches of Batson. One court, for example, has applied Batson to disallow a peremptory challenge of a hearing-imparied juror.

If the court determines that the discrimination alleged is the type covered by Batson, it must then determine whether a prima

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28 See Brown, McGuire, & Winters, "The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse," 14 New Eng. L. Rev. 192, 234 (1978) (proposing, before Batson, that prosecutors' peremptories be eliminated "[u]nless and until courts are equipped with effective means for intervening against discriminatory uses of the peremptory challenge.").

29 See Powers v. Ohio, 111 S. Ct. 1364 (1991) (murder trial, white victim, white accused; held, 7–2, that accused has standing to object to prosecutor's use of peremptories to exclude black jurors).

30 See Note, Batson v. Kentucky: Two Years Later, 24 Tulsa L.J. 63, 80–81 (1988); United States v. Sgro, 816 F.2d 30 (1st Cir. 1987), cert. denied, 484 U.S. 1063 (1988) (not cognizable); United States v. Bucci, 839 F.2d 825, 833–834 (1st Cir. 1988), cert. denied, 488 U.S. 844 (1988) (defendants failed to show that Italians are a cognizable racial group and that veniremen whose names ended in vowels necessarily were Italian); United States v. Biaggi, 853 F.2d 89, 95–96 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (noting, without ruling on, trial court's characterization of Italian-Americans as a cognizable racial group, and finding no abuse of discretion in denial of new trial because the prosecutor offered reasonable neutral explanations, e.g., that panel members or their spouses held positions that might enable them to identify one of the defendants).


The possibilities are seemingly endless. Suppose the prosecution in a rape trial challenges young men. Is that covered? There appear to be no published cases as yet, but no doubt there will be. Cf. Commonwealth v. Hyatt, 409 Mass. 689, 568 N.E.2d 1158 (1991) (trial judge committed reversible error in not allowing rape defendant, who had not challenged older women, to exercise peremptories against three young women).
facie case of discrimination is made out. According to the New York Court of Appeals, "[t]here are no fixed rules" for answering this question; the statistics of whom the prosecutor challenges and whom he accepts are helpful, but not conclusive, especially when the accused's objection is to a single peremptory challenge. Such factors as "objective facts indicating that the prosecutor has challenged members of a particular racial group who might be expected to favor the prosecution because of their backgrounds" must also be taken into account.32

If the court does find a prima facie case of discrimination, the sideshow is not over, because the prosecutor has the opportunity to demonstrate that the exercise of peremptories was done of a permissible basis. Suppose that the accused is Hispanic, and that much of the testimony will be in Spanish. Can the prosecutor defend peremptory challenges of Spanish-speaking jurors by expressing fear that they will follow their own understanding of the testimony rather than the official translation? The Supreme Court has said yes.33 It is difficult to know which this puts in the most unfavorable light—the judicial exaltation of the translation over the actual testimony, the Batson rule, or peremptories themselves.34

32 People v. Bolling, 79 N.Y.2d 317, 323–324, 591 N.E.2d 1136, 1141 (1992). There is a slightly bizarre aspect to this consideration, although it may be inevitable given Batson. In exercising peremptories, the prosecutor is not only allowed, but expected, to adhere to generalizations based on the background of a potential juror, but the prosecutor must disregard one crucial facet of the potential juror's background, his race, that may have affected that juror's life and perspective more strongly than any, or nearly any, other. Cf. Peters v. Kiff, 407 U.S. 493, 503–504 (1972) (pre-Batson case, upholding standing of white man to challenge jury selection system that effectively excluded blacks; "[W]hen any large and identifiable segment of the community is excluded from jury service, [the] exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").


though petitioner did not suggest the alternative to the trial court here, Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial. A prosecutor's persistence in the desire to exclude Spanish-speaking jurors despite this measure could be taken into account in determining whether to accept a race-neutral explanation for the challenge.

111 S. Ct. at 1868. Justices Stevens, Marshall, and Blackmun disagreed in part on the basis that this remedy could have been adopted by the trial judge in Hernandez's case.

34 See generally Alschuler, note 7 supra, at 173–176 (noting the flimsy explanations that have been held sufficient rebuttal of prima facie discrimination).
If the court does find a Batson violation, it must grant an appropriate remedy; sometimes it may be feasible for the court to order the seating of jurors who had previously been excused, but sometimes it is necessary to dismiss the entire panel and start anew.

Finally, if in the end the trial court decides there is no Batson violation, the accused may appeal on that issue. Unless the appeal is interlocutory—which requires a postponement of trial—the only effective remedy, if the appellate court determines that there has been a violation, is a retrial.

Small wonder that, as Professor William Pizzi has said: "If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than Batson."

These complexities are probably inevitable in a system that gives the prosecution peremptory challenges subject to the qualification that a limited set of grounds for their exercise is impermissible. The qualification could be removed only if Batson

38 Pizzi, note 23 supra, at 155.
39 Given McCollum, some of these complexities may arise as well with respect to the accused's peremptories, but less frequently. A quick scan of reported decisions at the trial level indicates that the vast majority of Batson-type motions are made against prosecutors' peremptories. This may be in part because the prosecutor is less likely than the accused to be motivated to complicate the case by making the objection. It is also possible that the accused is less likely than the prosecutor to exercise peremptories on racially discriminatory grounds. Experiments show that in-group favoritism tends to be stronger when a group sees itself as a minority. Pizzi, note 23 supra, at 13. This suggests that a prosecutor trying a case against an accused who is a member of a minority group has a great deal to gain by exercising peremptories in a discriminatory manner against members of that group, and that (except in a racially charged case) a white accused has relatively little to gain by discriminatory peremptories. As for a minority-member accused, the exercise of peremptories on racially discriminatory grounds against whites is likely to be futile; in most communities, a substantial number of jurors next in line are likely to be white.

Furthermore, it is probable that most often when a trial court denies a McCollum objection, the prosecutor will not emulate the prosecutor in McCollum itself by seeking an interlocutory appeal, and that will mean that the matter will end at the trial court level.

In short, it is doubtful whether McCollum will create the administrative snarl that Batson itself did. And, although only time will tell, the complications caused by the extension of Batson to civil cases will probably not be intolerable.
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were overruled. That prospect, however, is both unappealing and extremely unlikely. The question then becomes whether the supposed benefits of prosecutors' peremptories are great enough to make the considerable costs worthwhile; Batson has so fundamentally altered the nature of prosecutors' peremptories that inertia alone should not justify their retention.

Prosecutors' peremptories do presumably occasionally prevent inaccurate verdicts, but for reasons discussed previously this is probably a relatively rare occurrence. Prosecutors' peremptories also offer some benefits comparable to the subsidiary benefits of the accused's peremptories. But these do not seem weighty enough to warrant retaining them. And neither is any concern about altering the balance of litigation.

Putting It Together: The Nonproblem of Asymmetry

So far this article has argued that it is important to preserve peremptories for the accused and suggested that it may be wise to eliminate them for the prosecutor. Putting these ideas together is sure to raise objections of asymmetry, but these objections should not be troublesome.

For one thing, the allocation of peremptories is already asymmetrical in federal courts and in a substantial number of states. Eliminating peremptories for the prosecution altogether would expand and accentuate an already existing asymmetry, not create a new one.

40 See notes 19–20 supra and accompanying text.

41 One of the subsidiary benefits of peremptories discussed supra notes 26–27 and accompanying and following text, is that they minimize the adverse consequences of questioning a potential juror aggressively. Juror resentment is far less worrisome when the target is the prosecution rather than the accused.

Another subsidiary benefit of peremptories is avoidance of hung juries. Elimination of prosecutors' peremptories may produce more hung juries in cases that otherwise would, and should, yield convictions. That would be unfortunate. But at least the case could be retried. It is hard to believe that the inefficiencies caused by additional hung juries would approach in magnitude those caused by prosecutors' peremptories under Batson. And most criminal defendants would gladly accept an increased chance of having to be tried twice in exchange for elimination of prosecutors' peremptories.

Finally, while peremptories for the accused may be somewhat more efficient to administer than challenges for cause, this consideration, which is marginal only (see text following note 27 supra) applies only if peremptories are kept simple—and that, of course, Batson does not allow.

42 See, e.g., Pizzi, note 23 supra, at 147 ("The immediate result of abolishing peremptory challenges for prosecutors only would be to remove the adversary balance that presently exists in the jury selection process.").
More fundamentally, it is important to bear in mind that criminal trials are not about even-handedness. In various ways, the judicial system creates asymmetries to protect important rights of the accused. Most obviously, the accused is presumed innocent and only proof beyond a reasonable doubt will suffice to convict; if, after all the evidence is in, the jury is in equipoise, or even thinks that guilt is substantially, but not overwhelmingly, probable, it must return a verdict of not guilty. Other asymmetries can also be crucial. The prosecution is obligated to disclose potentially exculpatory evidence to the accused, but the accused has no obligation to disclose inculpatory evidence to the prosecution. The accused can decide to testify, but the prosecution cannot compel him to. The accused can put his character into issue, to show that he was not a person likely to commit the crime charged, but unless he does so the prosecution cannot attempt to show that he was such a person. Similarly, in certain cases, only the accused can decide whether to raise questions about the character of the purported victim, such as by bolstering a contention of self-defense by showing that the supposed victim is a violent person. And in some circumstances the accused’s right to confront witnesses against him under the Sixth Amendment to the Constitution gives him the right to override an evidentiary objection of the type that would bind the prosecution.

As compared to a symmetrical rule, each of these asymmetries alters the results of the factfinding process in favor of the accused. To a large extent, though, that is desirable. Blackstone’s statement that it is better to let ten guilty defendants go free than to convict one innocent person may be a cliche, but it only became a cliché because it expresses a fundamental value. The principal expression of that value in our criminal law system is

43 But note Justice Marshall’s dissent in Batson, 476 U.S. at 79: “Our criminal justice system ‘requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.’ Hayes v. Missouri, 120 U.S. 68, 70 (1887).” Justice Marshall’s reliance on Hayes is criticized in Goldwasser, Note, “Limiting a Criminal Defendant’s Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial,” 102 Harv. L. Rev. 808. 821-826 (1989), which makes an argument similar to the one presented in this paragraph of the text.

45 Fed. R. Evid. 404(a)(1).
46 Fed. R. Evid. 404(a)(2).
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the standard of proof beyond a reasonable doubt, which, as compared to a more-likely-than-not standard, prevents some fact-finding errors against the accused at the price of creating far more fact-finding errors in favor of the accused—a trade-off that is easily worthwhile.

Thus, even if an asymmetrical rule on peremptories led to a substantially greater number of errors in favor of the accused as compared to those that would be yielded by a symmetrical rule (either both sides or neither side having peremptories), that would not be enough to condemn the asymmetrical rule. We would first have to ask whether the corresponding reduction in errors against the accused is great enough to make the change a net improvement in the truth-determining process, given that errors against the accused are far more important that errors in favor of the accused. There is no way of knowing for sure, but it seems unlikely that the increase in errors in favor of the accused would be so many times greater than the increase in errors against the accused to make the trade-off a bad one. 48

Moreover, even if the ratio of these two effects does work to the disadvantage of the asymmetrical rule, it is unlikely that the magnitude of the increase in errors in favor of the accused would be so great as to be not only a significant concern, but to outweigh in importance the efficiency of denying peremptories to the prosecution or the perceived value of maintaining them for the accused. 49

A Rumination

There is a strong case for maintaining peremptories for the accused. Perhaps the case can be made for retaining prosecutors’

48 Actually, two comparisons are necessary, because there are two basic symmetrical rules. As compared to a rule allowing neither side peremptories, the reduction in errors against the accused caused by the asymmetrical rule would probably be greater than the increase in errors in favor of the accused; this is because, as compared to the no-peremptory rule, the asymmetrical rule essentially results in the replacement of some jurors who may have a bias against the accused with jurors who are presumably fair. For corresponding reasons, as compared to the results under the usual practice allowing either side peremptories, the increase in errors in favor of the accused under the asymmetrical rule would probably be greater than the decrease in errors against the accused, but one could not say with any confidence that the ratio of these two effects works to the disadvantage of the asymmetrical rule.

49 See supra notes 19–20 supra and accompanying text for reasons suggesting that the magnitude of the increase in errors attributable to the elimination of peremptories would not be great.
peremptories, but this is doubtful, and it does not seem that the case can be made on the ground of symmetry. So this presents the possibility of an asymmetrical solution, in which the accused but not the prosecutor may challenge potential jurors peremptorily. That leads one to wonder whether McCollum would have come out the way it had if there were no prosecutors' peremptories. Would the Court have been tempted to limit the accused's exercise of his peremptories? The best guess—and it can only be that—is that the Court would have let the accused's peremptories remain truly peremptory.