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Prosecutors' Peremptory Challenges - A Response and Reply

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RESPONSE

PROSECUTORS' PEREMPTORY CHALLENGES

Lynn A. Helland, Sheldon N. Light and William J. Richards, all experienced federal trial attorneys, wrote this detailed response to Professor Richard Friedman's LQN article proposing the elimination of peremptory challenges for the prosecution (Vol. 36 No. 2, 1993). Helland, J.D. '80, and Light have both been trial attorneys in the U.S. Attorney's Office in the Eastern District of Michigan for 11 years. Richards, J.D. '72, has been a trial attorney for the past 19 years, including eight as an assistant U.S. attorney and 10 in private practice. All are currently a part of the unit in the U.S. Attorney's Office that investigates and prosecutes public corruption and complex financial crimes. The views they express below are their own, and not necessarily those of the Department of Justice. Friedman's reply follows.

WE READ WITH INTEREST Professor Richard Friedman's article advocating the elimination of the prosecution's peremptory challenges. Based on our extensive practical familiarity with the topic, we do not think that Friedman's proposal is a desirable change in the law.

We believe that Friedman has seriously overestimated the litigative costs of *Batson v. Kentucky*, 476 U.S. 79 (1986), while he has seriously underestimated the litigative and other significant costs of abolishing the government's peremptories. He has misinterpreted the historical record, and as a result, he has proposed an idea that is radical and unjust, and that invites mischief.

As we understand Friedman's position, his justification for eliminating the prosecution's peremptories is that the mess created by *Batson* has made the retention of those peremptories expensive in terms of extra litigation. Indeed, Friedman claims that *Batson* has made prosecutors' peremptories a "frightfully expensive procedural nightmare" that very often threatens to append a mini-case of discrimination onto the criminal trial. We agree that *Batson* has made a conceptual mess of what was once a straightforward rule of procedure. However, based on our own practical experience, our knowledge of cases other than our own in the Eastern District of Michigan, and our contact with other federal prosecutors around the country, we strongly disagree with Friedman's assessment of the actual litigative cost of the decision.

In the vast majority of cases, the question of improperly exercised peremptories does not even arise, and accordingly, there is *no* litigative cost. When it does arise, most *Batson* claims are dismissed by the district court immediately, because the defense fails to establish a prima facie basis for believing that any improper challenge has been exercised. In these cases, the only litigative cost is the few seconds or minutes it takes for the court to hear and deny the defense motion.

This is not to say that *Batson* hearings are never held. In our experience, district courts are very sensitive to the issue of discrimination in jury selection. Because of this sensitivity, many Batson hearings take place even though one could not fairly say that a prima facie case of discrimination has been established, on the apparent theory that the district court is better off being safe with a hearing than being sorry with a reversal on the prima facie issue. The appropriate hearing is also held, of course, in any cases in which a prima facie violation is really established.

However, even in these cases and even with this degree of judicial caution, the actual litigative costs have proven to be minimal. Typically, *Batson* hearings are a five- to 15-minute interlude during the jury selection process. The government explains its reasons for excusing particular jurors, those reasons are almost always deemed to be neutral, and the most common result is that the *Batson* claim is denied. We have not checked court records so we cannot say categorically that a court in this district has never found a *Batson* concern to be substantiated, but if it has happened, it is extremely rare. Further, if such a case occurs, the remedy is to restart the jury selection process, *before* the tremendous

Continued on page 46

Reply

ASSYMETRICAL PEREMPTORIES DEFENDED

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. For that matter, I am equally unsurprised that defense counsel seem to think this is a great idea. And perhaps the biggest non-surprise is that I 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 — perhaps 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, the prosecutors can find an excellent example of how probing an investigation a careful judge may have to conduct to follow *Batson* conscientiously. In *Echlin v. LeCureux,* 800 F. Supp. 515 (E.D. Mich. 1992), 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, 995 F.2d 1344 (1993), but only by using a rather dubious avoidance mechanism — denying the petitioners standing on the ground that *Powers v. Ohio,* 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 by prosecutors, for exercising their peremptories. Some of these reasons — "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" — should not pass the "straight face" test.

And so 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 her 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.

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. Does *Batson* apply to these factors? If the answer is yes — the answer I expect the Court will give, with respect to gender, in the pending case of *J.E.B. v. T.B.* — the problem of incoherence will be extended and aggravated. But a negative answer — the answer given by the Alabama courts in *J.E.B.* and, with respect to religion, by several state courts — is even more troublesome: It is hard to look benignly on blatant sex or religious discrimination in a context 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. But relying on the prosecutor to address the problem, and on a peremptory basis no less, is the wrong

Continued on page 47

expenses of a trial have been incurred. We are not aware that any judges in this district have granted a new trial after conviction because of a *Batson* issue.

Because *Batson* claims are usually groundless, and because of the judicial caution summarized above, they are rarely a significant issue on appeal. Although the case law is confused, it is clear enough to permit the parties to address virtually all real-life *Batson* issues with a minimum of effort. Further, the judicial confusion that has occurred as the courts search for principles in the *Batson* area has not resulted in a significant number of reversals. In fact, in our collective recollection, not a single conviction has been reversed in this district because of *Batson*. For these reasons, while we find *Batson* to be a minor irritant and conceptually difficult, it has by no means created the expensive procedural nightmare Friedman suggests.

On the other hand, we think that Friedman has seriously understated the costs of abolishing the prosecution's peremptory. He notes, more or less in passing, that the inclusion of a few more biased jurors is more likely to cause a hung jury than to render a verdict inaccurate. In fact, we see this as an immense cost of his proposal.

In this district, it is not uncommon for trials to last several weeks or months. The financial costs associated with retrying such a case, including witness and juror expenses and court and attorney time, are tremendous. Other significant costs include serious inconvenience to witnesses and victims, who also have rights, after all. We have no doubt that the number of hung juries that would result from abolishing the prosecution's peremptories would be substantial — and substantially higher than the insignificant number of retrials that result from confusion surrounding *Batson*.

Most often, a hung jury is not the result of a close factual question. Criminal jury verdicts, whether for conviction or acquittal, must be unanimous. Hung juries most commonly are the result of one or two jurors refusing to deliberate or adopting an irrational view that is not supported by the evidence. A significant value of peremptories is that they permit us to act on our judgment that a particular juror is not up to the task of participating fully and rationally in deliberations.

This is not an idle concern. Many people who qualify for jury service are poor decision-makers — a fact that might not be obvious unless one has participated in a number of trials. However, there is rarely a basis for excusing such jurors for cause. Typically, each juror is in the selection "spotlight" for only seconds or a few minutes. Even if the parties had ample time to study each juror and could adequately articulate why a particular juror appears problematic, it is not apparent that our subjective evaluation that a juror is a poor decision maker, no matter how accurate, is a basis for a successful challenge for cause.

The defense has no motive to remove such "fringe" jurors. The defense often considers a hung jury to be a victory. A mistrial improves the defendant's bargaining position, particularly in a complex or lengthy case. Indeed, especially in some complex cases, a hung jury may result in a complete victory for the defense. In our experience it is not uncommon for the defense to try to hang a jury, simply because it improves the defendant's position so greatly. It is the rare prosecutor who has not witnessed the glee of a defense attorney who perceived that the government has permitted a "loose cannon" juror to remain on the jury.

The most useful purpose of the government's peremptory is therefore to remove those fringe jurors who do not appear to be able to deliberate meaningfully with fellow jurors, and it is the only means with which to accomplish this important goal. If the government lost that ability, there would be a large increase in hung juries, and this increase in litigative cost truly would be "frightfully expensive."

Aside from the costs involved, we also do not agree that the other considerations Friedman cites make the case for eliminating government peremptories. He is not persuasive when he argues that his proposed asymmetry is somehow permissible because other asymmetries already exist in the criminal justice system. The existence of some asymmetry in the system is hardly a justification for more. Furthermore, almost every existing asymmetry is the necessary result of some specific protection for defendants, or the logical result of the different positions in which government and defendant find themselves at trial.[1]

For example, Friedman's most prominent example of an existing asymmetry is the requirement that the government prove its case beyond a reasonable doubt. It is not clear to us that this even is an asymmetry. Rather, it reflects the standard practice that the burden of proof is placed on the moving party, while the level of proof in criminal cases is weighted to reflect society's view that we would rather wrongfully free ten guilty than wrongfully convict one innocent. Nothing in that burden of proof suggests that the procedure by which we determine whether it has been met should also be weighted against the government.[2]

Indeed, Justice Marshall's concurring opinion in *Batson* explicitly rejected of the notion that government peremptories should be eliminated, based on his

[1]The only exception is the current asymmetry in the federal system between prosecution and defense peremptories. Rule 24(b), Fed. R. Crim. P., permits the government six peremptories while the defense is permitted ten (except in capital cases and misdemeanors, where each side receives an equal number). The existence of this disparity does not justify any greater disparity. In fact, we have never found a satisfactory justification for the present asymmetry.

[2]If the burden of proof *is* an asymmetry, then it surely is important that it carries with it some significant pro-prosecution asymmetries. These include the right to speak first to the jury, the right to present evidence first and to rebut the defendant's evidence if any is offered, and the right to argue the case to the jury first and last, compared with only one argument for the defense.

Assuming that the burden of proof is an asymmetry, there is no evidence that additional asymmetry is necessary to attain the goal it serves. There is no reason to believe that the current system wrongfully convicts as many as one innocent person for every 10 or even 50 that are wrongfully acquitted. Nor is every incremental increase in the ratio of wrongful acquittals to wrongful convictions a good thing. There is, after all, a cost to letting the guilty go free. It is not clear that society would or should support changes that will increase that cost.

recognition that both the government and the defense are entitled to an equally fair trial: "Our criminal justice system 'requires not only freedom from bias against the accused, but also from any prejudice against the prosecution. Between him and the State the scales are to be evenly held'" (*Batson*, 476 U.S. at 107).

Several of Friedman's other examples of existing asymmetry result directly from constitutional requirements. For example, he points out that the government must disclose exculpatory evidence, yet the defense need not disclose inculpatory evidence. The government's duty to disclose arises from a desire for accurate trial results. The goal of accuracy calls for disclosure of inculpatory evidence as well, but for the defense, this goal is preempted by the Fifth Amendment's protection against self-incrimination. The same protection gives the defendant the sole choice of whether or not she will testify. Similarly, the defense right to confront witnesses arises directly from the Sixth Amendment. No similar constitutional imperative supports the one-sided right to peremptories.

The defense interest at issue in the peremptory debate is the right to an impartial jury of the defendant's peers. Friedman has not explained how his proposed new asymmetry is like the others he cites in that it is somehow necessary to protect the relevant defense interest. A defendant's right to an impartial jury is protected by the process of voir dire, by challenges for cause and by the defendant's peremptories. Elimination of the government's peremptories does not advance any of these defense interests. Rather, it permits the defense a greater opportunity to have jurors who might be biased in its favor. We cannot understand what the societal interest might be that is furthered by such an imbalance.

One benefit of peremptories to the government, and the main benefit to the defense, is to eliminate extremists who might favor the other side. So long as both sides have them, peremptories are useless for stacking the jury in one's favor. This is because each side uses roughly similar criteria in judging jurors, and each side uses peremptories to eliminate those jurors that the other side would most like to keep. If only one side had peremptories, it would be much more possible to stack a jury, instead of arriving at a jury of moderates.

Although Friedman's article describes his proposal as moderate, the historical record suggests otherwise. Prosecution peremptories were part of the common law we inherited from the English. Whether they were called peremptories or something else, the government's ability to disqualify jurors predates defense peremptories. As the Supreme Court noted in Swain v. Alabama, 380 U.S. at 219, "the persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Abolition of government peremptories would reverse the common law rule we inherited from the English, as well as the law in all 50 states plus the federal system. This is hardly a moderate proposal.

The government (read "people" or "society") is entitled to a fair trial by competent, rational, qualified jurors, just as the defense is. In the long run, public acceptance of not guilty verdicts requires that the public perceive that it has received a fair trial. A "fair" trial does not mean a trial that is biased in one's favor. There is no principled reason for adopting a rule that would decrease the government's ability to eliminate bias, or would increase the defendant's ability to benefit from bias. Society is not well served by changes that hamper the government's ability to receive a fair trial.

In our view, eliminating the government's peremptories would not only increase the cost of litigation, it would decrease the fairness to the government and society without providing the defendant with any justifiable benefit. Friedman's proposal would also reverse the well-considered rule of all 50 states, the federal courts, and the common law. We propose instead that the present rule, which balances the competing interests of society and the accused, be retained.

LQN

Reply

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. Federal prosecutors ordinarily get six peremptories; in picking a jury of twelve, there can't even be that many 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 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?

So I conclude that, while defense peremptories are important for reasons discussed in my earlier essay, 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 soft-headed 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.

LQN

Friedman's original essay was adapted for Law Quadrangle Notes *from* 28 Criminal Law Bulletin 507 *(Nov.-Dec. 1992).*

Continued from page 35

U.S. Attorney's Office and private practice in Manhattan, and Deborah Malamud came to us from a Washington law firm. Even the AC/DCs are respectful of lawyers and are deeply interested in how the law works. I certainly see none of this distain from our young people."

James Boyd White, the L. Hart Wright Professor of Law, wrote that this sense of disdain, not theoretical content, makes some scholarship irrelevant. "It is often the most theoretical work that will prove to be of surprising practical value. For me, the relevant line is not between the 'theoretical' and the 'practical' as Judge Edwards defines these terms, but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not.

"Often associated with calls for more 'practical' education and writing is an image of the law as a series of tasks to be performed more or less correctly, an image that I think is deeply debilitating. Learning to 'read a judicial opinion' is not a 'skill' to be 'mastered' in the first weeks of law school, before one gets to the really important matter of deciding what kind of society we should have. Learning to read a judicial opinion well and criticize it intelligently . . . is a task for a lifetime," wrote White, who is also a professor of English and adjunct professor of classical studies.

How do we legal academics learn to value and respect work that is different from our own? How do we instill in students and in faculty a sense of appreciation for what others do, be it writing about doctrine or practicing law? How do we get the academy to practice what it preaches — that diversity (of opinion, of style, of thought, of ethnicity and gender and age, of scholarship, of work) is inherently important?

Lawyers seldom simply do what's right or wrong, but make choices in uncertain circumstances, so their judgment is their most basic resource. That's why law should be linked to other disciplines, he argued. "By its nature, the law is a discourse that calls upon others. It creates a space in which other languages can be heard, their findings and judgments employed. The education of the lawyer should therefore involve training in the process of translation, the art by which the lawyer can learn from other fields and disciplines, yet at the same time criticize them."

Clinical professor Paul Reingold echoed those thoughts in his response. "Central to (legal practice) is an idea that is antithetical to academic thinking: that what matters is not who is right, but what works. All first-rate practice will share certain features, but the issue of 'rightness' is literally an academic question. Success outside of the university is measured not in terms of theoretical rightness, but in cases or convictions won, or profits made or policies changed to favor a client's interest. The successful practitioner must be open to all sources of help, from all disciplines. The question is never who has the more elegant theory, but which discipline or argument will work best."

Reingold, director of the U-M's General Law Clinic, said that to clinical faculty, the disjunction between legal education and practice has always been apparent. He agreed with Edwards that much legal scholarship today has become so theoretical that it has little to offer practicing lawyers, judges or legislators. Like Edwards, he points out that the interdisciplinary movement that has broadened the scope of legal education has paradoxically made it less diverse in some ways.

Faculties of theorists are replicating themselves, hiring like-minded scholars and granting tenure to those who demonstrate prowess with legal theory. Theorists are the academic meritocracy; traditional doctrinal scholars are the equivalent of "solid B students," and practitioners not inclined toward theory are viewed as "a rung down the intellectual ladder." Reingold called for tolerance, diversity and increased emphasis on clinical legal education to balance the trend. He wrote:

"How do we legal academics learn to value and respect work that is different from our own? How do we instill in students and in faculty a sense of appreciation for what others do, be it writing about doctrine or practicing law? How do we get the academy to practice what it preaches — that diversity (of opinion, of style, of thought, of ethnicity and gender and age, of scholarship, of work) is inherently important?

"In my view, clinical legal education may well provide an answer. When clinical legal education is integrated fully into the law school curriculum, then theory and practice have a chance to merge. This is not to say that theory should play a lesser role than it does now, but theory would be regarded differently for having to compete daily with the issues of doctrine, procedure, policy, strategy, ethics, and business and personal skills that are more important to lawyers.

"Theory may have overtaken doctrine at the 'elite' schools, but Judge Edwards is still right that the best legal education will have to include doctrine, theory, clinical instruction and probably something from a range of other disciplines as well, in order to cover all the bases."

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