

# Case Note

## Arbitrary Rationality

*United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc).

### I

Since the Supreme Court's landmark decision in *Batson v. Kentucky*<sup>1</sup> limited the exercise of peremptory challenges on the basis of race, courts and commentators have struggled to reconcile what Blackstone called an "arbitrary and capricious" right<sup>2</sup> with the demands of the Equal Protection Clause.<sup>3</sup> That tension was most recently evident in *United States v. Annigoni*,<sup>4</sup> which upheld the traditional remedy of automatic reversal for convictions obtained following the erroneous denial of a peremptory despite the significant limitations that *Batson* and its progeny have placed upon the traditional right to challenge jurors without cause.<sup>5</sup> While this ironclad rule regarding peremptory remedies seems at odds with the introduction of scrutiny to the exercise of the peremptory right, this Case Note will argue that *Annigoni* can best be understood as part of a broader convergence between the jurisprudence of peremptory challenges and selective prosecutions.<sup>6</sup> This convergence raises the question of whether courts are approaching peremptory rights with an eye

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1. 476 U.S. 79 (1986).

2. 4 WILLIAM BLACKSTONE, COMMENTARIES \*346.

3. See *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994) (holding peremptory challenges based on gender unconstitutional); *Georgia v. McCollum*, 505 U.S. 42 (1992) (barring race-based peremptories exercised by criminal defendants); see also Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996).

4. 96 F.3d 1132 (9th Cir. 1996) (en banc).

5. See *id.* at 1134. Other courts have reached similar results. See *Kirk v. Raymark Indus.*, 61 F.3d 147 (3d Cir. 1995); *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363 (7th Cir. 1990). *But cf. Cudjoe v. Virginia*, 475 S.E.2d 821 (Va. Ct. App. 1996) (applying harmless error standard heavily deferential to peremptory right).

6. The seminal selective prosecution case is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which set aside a conviction, without regard to the actual guilt of the plaintiff in error, based on racially discriminatory enforcement.

toward protecting the Sixth Amendment right of criminal defendants to be tried by an impartial jury.<sup>7</sup>

## II

*Annigoni* arose out of a conviction for bank fraud, in which the defendant's peremptory challenge against an Asian-American juror was denied by the District Court as racially motivated.<sup>8</sup> On appeal, the panel determined that this denial had been erroneous because the prospective juror's experience with litigation over a limited partnership investment constituted ample justification to rebut a *Batson* challenge.<sup>9</sup> Nevertheless, the conviction was sustained on the ground that the denial constituted harmless error because there was no evidence that it had affected the eventual verdict.<sup>10</sup> An en banc panel of the Ninth Circuit reversed, holding that the application of harmless error analysis was incorrect and that only automatic reversal could remedy the erroneous denial of a peremptory.<sup>11</sup>

The en banc majority relied in large part on Chief Justice Rehnquist's opinion in *Arizona v. Fulminante*,<sup>12</sup> which distinguished between "trial errors" that can be assessed qualitatively by reviewing courts for harmless error and "structural errors" that compromise the trial mechanism itself and require automatic reversal.<sup>13</sup> After an expansive paean to the peremptory challenge, the majority explained that, "[t]o subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation."<sup>14</sup> Nevertheless, the court reserved judgment on the question of whether such a denial constitutes structural error, relying instead upon the importance traditionally accorded by the peremptory right to justify the continued application of the rule of automatic reversal.<sup>15</sup>

As the dissenters point out, however, the presumption that all errors resistant to appellate analysis are harmful is untenable.<sup>16</sup> Structural error has been understood to serve as a proxy for those defects that are conclusively

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7. See U.S. CONST. amend. VI. Recent case law on peremptory challenges has relied almost exclusively on equal protection analysis. See, e.g., *J.E.B.*, 114 S. Ct. at 1422; *Batson v. Kentucky*, 476 U.S. 79, 84-85 n.4 (1986). But see *Holland v. Illinois*, 493 U.S. 474 (1990) (upholding peremptory challenges against Sixth Amendment claim).

8. *Annigoni*, 96 F.3d at 1136 (quoting sidebar in trial record).

9. See *United States v. Annigoni*, 68 F.3d 279, 283 (9th Cir. 1995), *rev'd en banc*, 96 F.3d 1132.

10. See *id.* at 285.

11. See *Annigoni*, 96 F.3d at 1134.

12. 499 U.S. 279, 309 (1991).

13. See *Annigoni*, 96 F.3d at 1143. In reaching its conclusion, the majority also distinguished *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988), which held that the erroneous denial of a challenge for cause was harmless error notwithstanding the defendant's eventual loss of a peremptory challenge to correct the error.

14. *Annigoni*, 96 F.3d at 1145.

15. See *id.* at 1144.

16. See *id.* at 1147 (Leavy, J., dissenting); *id.* at 1150 (Kozinski, J., dissenting).

harmful, and the inability of the majority to place peremptories within that category suggests that prejudice might not always follow from their denial.<sup>17</sup> This is a particularly important question because the harm of allowing discriminatory peremptories is clear after *Batson*, yet *Annigoni* equates the remedy for that wrong of constitutional dimension with the remedy for a violation of what has heretofore been considered a mere statutory right of uncertain significance.<sup>18</sup> Such asymmetry is not only unkempt as a matter of doctrine, but creates a disincentive for district courts to enforce *Batson* vigorously.

The dissenters also call into question the vitality of the tradition invoked by the majority to support automatic reversal. Although virtually unlimited in scope before *Batson*, within the last decade peremptories have been constrained by the Equal Protection Clause, and, as the dissenters in *Annigoni* emphasize, “[b]ecause the peremptory challenge has changed, our review of the trial court’s scrutiny of its exercise must change, too.”<sup>19</sup> Nevertheless, their response—applying harmless error review to an error that can never be adjudged harmful—rings hollow in light of the Supreme Court’s continuing support of the challenge as critical to a fair trial and the fundamental principle that for every right there must be a remedy.<sup>20</sup> The result, as Judge Kozinski complained, is that “we are forced to choose from two all-or-nothing rules: the error is *always* harmless or it is *never* harmless.”<sup>21</sup> What justifies choosing one over the other?

### III

This dilemma and its accompanying doctrinal confusion stem from the examination of a practice based on the arbitrary hunches of trial attorneys through the lens of a principle, embodied in the Equal Protection Clause, that demands a “rational basis” for drawing legal distinctions.<sup>22</sup> As the latter is of constitutional dimension, many have concluded that it must inevitably swallow

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17. See, e.g., *Scarpa v. Dubois*, 38 F.3d 1, 14 (1st Cir. 1994) (“In effect, then, the harmfulness of structural errors can be conclusively presumed.”), *cert. denied*, 115 S. Ct. 940 (1995); see also *Annigoni*, 96 F.3d at 1149–50 (Leavy, J., dissenting) (arguing that peremptory denial cannot be structural error).

18. See *Annigoni*, 96 F.3d at 1148 (Leavy, J., dissenting).

19. *Id.* (Leavy, J., dissenting); see, e.g., *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994)

20. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *Annigoni*, 96 F.3d at 1148 (Leavy, J., dissenting); *id.* at 1150 (Kozinski, J., dissenting); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (commenting on “role of litigants in determining the jury’s composition”); *Holland v. Illinois*, 493 U.S. 474, 482 (1990) (stating that requirement of jury impartiality “in no way could . . . be interpreted directly or indirectly to prohibit [peremptories]”).

21. *Annigoni*, 96 F.3d at 1150 (Kozinski, J., dissenting).

22. See *Batson v. Kentucky*, 476 U.S. 79, 123–24 (1986) (Burger, C.J., dissenting); cf. *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985) (voiding as irrational zoning regulation concerning mentally retarded).

the former and lead to the abolition of peremptories.<sup>23</sup> More pertinent to an analysis of *Annigoni* is the related contention that the peremptory's status as a right of subconstitutional importance demands, at a minimum, that Judge Kozinski's paradox be answered with a finding that peremptory error is *never* harmful.<sup>24</sup> Comparing peremptory strike case law with that of selective prosecutions, another legal niche that seeks to harmonize arbitrary discretion with equal protection principles, however, suggests exactly the opposite reading.<sup>25</sup>

The connection between peremptory challenges and claims of selective prosecution, where laws are enforced "with an evil eye and an unequal hand,"<sup>26</sup> was made explicitly, albeit briefly, in *United States v. Armstrong*,<sup>27</sup> which established the discovery standards for selective prosecution.<sup>28</sup> This connection is more than rhetorical, for both share the anomaly of a rule of automatic reversal despite a failure to conform to the category of structural error.<sup>29</sup> Ever since *Yick Wo v. Hopkins*,<sup>30</sup> courts have stated that a successful claim of selective prosecution must lead to reversal.<sup>31</sup> This is particularly noteworthy because the Court has been reluctant in recent years to apply automatic reversal to errors that do not undermine confidence in the verdict's accuracy.<sup>32</sup> But selective prosecution claims do not affect a verdict's accuracy. As the Court noted in *Armstrong*: "A selective-prosecution claim is *not a defense on the merits* to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."<sup>33</sup> As such, it is neither structural error nor trial error, for

23. See, e.g., *Batson*, 476 U.S. at 102 (Marshall, J., concurring); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 157 (1989).

24. See Muller, *supra* note 3, at 143 n.294.

25. Two other commonalities between peremptory challenges and selective prosecutions are worth noting. First, prevailing on an equal protection claim in both areas is exceptionally difficult. Compare P.S. Kane, Student Commentary, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2303 (1993), with Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1106-13 (1994). Second, equal protection claims in both areas are given hardly any scrutiny under rational basis review. Compare *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (affirming broad prosecutorial discretion without need for disclosure of rationale), with *Purkett v. Elem*, 115 S. Ct. 1769, 1770 (per curiam) (sustaining challenge of juror who "had long curly hair" without examining rationality).

26. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

27. 116 S. Ct. 1480 (1996).

28. See *id.* at 1488 (establishing that defendants seeking discovery must show evidence of similarly situated persons not prosecuted).

29. Although the Court reserved judgment in *Armstrong* on the question of whether such a rule was to be applied without exception, see *id.* at 1484 n.2, reversal is the only remedy that has ever been applied once selective prosecution was established, see, e.g., *Yick Wo*, 118 U.S. at 374; *United States v. Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973).

30. 118 U.S. 356.

31. See, e.g., *id.* at 374; *Berrigan*, 482 F.2d at 174; *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972). Although written after the trial error/structural error dichotomy was introduced in *Fulminante*, the *Armstrong* opinion does not alter this view. See *infra* text accompanying notes 32-33.

32. See Muller, *supra* note 3, at 107-16.

33. *Armstrong*, 116 S. Ct. at 1486 (emphasis added).

it does not suggest that the defendant's guilt was established in an unfair trial or one whose outcome would have been changed if a malfeasant prosecutor had had more benign motives. Nevertheless, courts still apply automatic reversal for error, just as *Annigoni* does for peremptory challenges.<sup>34</sup>

The reason for the courts' approach in selective prosecution cases is simple: They are explicitly balancing settled constitutional norms of equal protection and separation of powers. Extraordinary judicial deference to prosecutorial choices ultimately "stems from a concern not to unnecessarily impair the performance of a *core executive function*."<sup>35</sup> The peremptory challenge cases share with selective prosecution doctrine an unusual remedial result borne out of a concern for synthesizing unbridled discretion with antidiscrimination norms. This suggests that courts evaluating the peremptory right are implicitly conducting a similar balancing act, but in this case between the demands of equal protection and the Sixth Amendment's guarantee that all criminal defendants have the right to trial "by an impartial jury."<sup>36</sup>

Beginning with *Batson*, the Court has based its analysis of peremptory challenges on the equal protection harm inflicted on jurors rather than on the Sixth Amendment right of defendants.<sup>37</sup> In part, this stems from the holding in *Stilson v. United States*<sup>38</sup> that peremptories are not a fundamental right.<sup>39</sup> The fact that peremptory challenges are not a constitutionally mandated *means*, however, need not be construed to block consideration of the impact the constitutional *end* of an impartial jury might have on the challenge once it has been selected by legislatures as the preferred procedural device. This insight may have animated the *Annigoni* majority's strained attempt to protect the remedy of automatic reversal. A brief survey of jury history will demonstrate just how crucial the Sixth Amendment's command should be for any judicial analysis of the peremptory challenge.

To interpret the requirement of jury impartiality, one must begin with the concept that jury decisionmaking is fundamentally subjective. As early as *Bushell's Case*,<sup>40</sup> the first major decision on jury authority in Anglo-American law, Lord Chief Justice Vaughan rejected attempts to reexamine jury factfinding and punish jurors for "incorrect" verdicts with the famous observation that, "[a] man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolv'd by another's

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34. See *supra* notes 4–5 and accompanying text.

35. *Armstrong*, 116 S. Ct. at 1486 (emphasis added). In response to the argument that a criminal defendant's peremptory right cannot be construed as equivalent to a "core executive function," the Sixth Amendment's guarantees can be read as collectively supporting a defendant's core right to receive a fair trial. See U.S. CONST. amend. VI.

36. See U.S. CONST. amend. VI; *supra* note 35.

37. See *supra* note 7.

38. 250 U.S. 583 (1919).

39. This holding is somewhat shaky precedent given its factual context: the Court's effort to enforce the Espionage Act against publishers of "subversive" Lithuanian literature. See *id.* at 584.

40. 124 Eng. Rep. 1006 (C.P. 1670).

understanding or reasoning."<sup>41</sup> In deferring to jury factfinding, our judicial system has acknowledged that the search for objective criteria to frame factual inquiries is generally fruitless, because human perceptions will and do differ.<sup>42</sup> Just as we are skeptical about the objective assessment of jury factfinding by courts, so too should we be skeptical that the constitutionally mandated impartiality of the jurors who judge those facts can be assessed objectively by courts. Peremptory challenges capture this skepticism by circumventing "objective" judicial control over voir dire. Moreover, the command of jury impartiality in the Sixth Amendment cannot escape reference to the criminal defendant whose rights that Amendment protects. In this sense, one person's impartial jury can be another's stacked deck due to differing perceptions about the venire. Hence, both history and the Sixth Amendment lend support to an understanding of the peremptory as crucial to a fair trial.<sup>43</sup>

While no case has explicitly recognized the constitutional dimension of the peremptory, that may have less to do with the merits than with the peculiar procedural status of the right before *Batson*. Prior to that decision, there was no need to constitutionalize the peremptory because it hovered, *sui generis*, outside judicial constraints as an inheritance of the common law. Indeed, to have brought constitutional analysis to bear upon the peremptory arguably would have served to diminish rather than to enhance its efficacy. Instead of tarnishing the peremptory's legitimacy, recent cases are better understood as an effort to strip the right of its natural law gloss by bringing it within the positive law landscape of the twentieth century.<sup>44</sup> That effort has implicitly balanced the relevant positive law of the Sixth and Fourteenth Amendments to create a new peremptory right post-*Batson* while maintaining a robust remedy for its erroneous denial in cases such as *Annigoni*.

In an era when feelings of disempowerment often cloud the legitimacy of the judicial system, the peremptory challenge retains a preeminent role in giving litigants control of their destiny. The time has come for the Court to acknowledge the legitimacy of what lower courts have been doing silently in cases like *Annigoni*: adapting the peremptory challenge for the modern age.

—Gerard N. Magliocca

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41. *Id.* at 1013.

42. The essence of *Bushell's Case* is codified in our Constitution. See U.S. CONST. amend. V (prohibiting review of criminal jury acquittal); *cf. id.* amend. VII (prohibiting review of facts found by juries in civil cases).

43. One might ask why the same argument does not apply to judges. Aside from an appeal to tradition, the answer lies in the ultimate decisionmaking authority of the criminal jury, along with the asymmetry in the manner of decisionmaking between judge and jury. For example, judges are constrained to justify their acts according to neutral principles established by law, whereas juries can exercise wide discretion through a general verdict, even to the point of nullifying the applicable law. See generally JEFFREY ABRAMSON, *WE THE JURY* ch. 2 (1994) (outlining history of nullification).

44. See *supra* note 3.