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*¹ 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" right² with the demands of the Equal Protection Clause.³ That tension was most recently evident in *United States v. Annigoni*,⁴ 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.⁵ 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.⁶ This convergence raises the question of whether courts are approaching peremptory rights with an eye

2. 4 WILLIAM BLACKSTONE, COMMENTARIES *346.
4. 96 F.3d 1132 (9th Cir. 1996) (en banc).
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.\(^7\)

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.\(^8\) 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.\(^9\) 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.\(^10\) 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.\(^11\)

The en banc majority relied in large part on Chief Justice Rehnquist’s opinion in Arizona v. Fulminante,\(^12\) which distinguished between “trial errors” that can be assessed qualitatively by reviewing courts for harmlessness and “structural errors” that compromise the trial mechanism itself and require automatic reversal.\(^13\) 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.”\(^14\) 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.\(^15\)

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


\(^8\) 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.\textsuperscript{17} 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.\textsuperscript{18} 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."\textsuperscript{19} 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.\textsuperscript{20} 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.”\textsuperscript{21} What justifies choosing
one over the other?

\section*{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.\textsuperscript{22} As the latter is of
constitutional dimension, many have concluded that it must inevitably swallow

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\item\textsuperscript{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.”), \textit{cert. denied}, 115 S. Ct. 940 (1995); \textit{see also} Annigoni,
96 F.3d at 1149–50 (Leavy, J., dissenting) (arguing that peremptory denial cannot be structural error).
\item\textsuperscript{18} \textit{See} Annigoni, 96 F.3d at 1148 (Leavy, J., dissenting).
\item\textsuperscript{19} \textit{Id.} (Leavy, J., dissenting); \textit{see, e.g.,} J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).
\item\textsuperscript{20} \textit{See} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Annigoni, 96 F.3d at 1148 (Leavy, J.,
dissenting); \textit{id.} at 1150 (Kozinski, J., dissenting); \textit{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]”).
\item\textsuperscript{21} Annigoni, 96 F.3d at 1150 (Kozinski, J., dissenting).
\item\textsuperscript{22} \textit{See} Batson v. Kentucky, 476 U.S. 79, 123–24 (1986) (Burger, C.J., dissenting); \textit{cf.} City of
concerning mentally retarded).
\end{enumerate}
the former and lead to the abolition of peremptories. 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. 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.

The connection between peremptory challenges and claims of selective prosecution, where laws are enforced "with an evil eye and an unequal hand," was made explicitly, albeit briefly, in United States v. Armstrong, which established the discovery standards for selective prosecution. 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. Ever since Yick Wo v. Hopkins, courts have stated that a successful claim of selective prosecution must lead to reversal. 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. 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." As such, it is neither structural error nor trial error, for


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


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.  

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." 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."  

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. In part, this stems from the holding in Stilson v. United States that peremptories are not a fundamental right. 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, 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 anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by another..."
understanding or reasoning. 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. 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.

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. 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

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.