FIGHTING FOR TRUTH, JUSTICE, AND THE ASYMMETRICAL WAY

BARBARA FLAGG*
KATHERINE GOLDWASSER**

"What's sauce for the goose is sauce for the gander."

For many, symmetry in law enjoys nearly the same status as mom, baseball, and apple pie: it is of the essence of the American way of life. Law would not be law as we know it without the requirement of evenhandedness; justice as we envision her is blindfolded, so as not to see who stands before her. Nevertheless, in the course of our careers (such as they are) in legal academia, the two of us have from time to time proposed the adoption of asymmetrical legal doctrines. We are quite certain that asymmetry is not only tolerable in certain circumstances, but a necessity. Thus we're swimming against the cultural tide, and so have encountered more than a little resistance to our doctrinal proposals. We'd like to take this occasion to explore that resistance and to reflect on its possible sources. In the event that the reader is unfamiliar with the doctrinal recommendations of which we speak, we begin with synopses of them.

One of us—Barbara—has discussed the issue of symmetry in the course of criticizing existing race discrimination doctrine. One cornerstone of constitutional race discrimination law is the Supreme Court's ruling that there is a constitutional requirement of discriminatory intent: a facially race-neutral practice with racially disparate effects will not be deemed even presumptively inconsistent with the Equal Protection Clause unless it can be shown to have been adopted with discriminatory intent.[1] Barbara has proposed a revised doctrine that would impose a heightened burden of justification upon the government whenever a challenged facially neutral criterion of decision has racially disparate effects that disadvantage people of color; it emphasizes the concern that ostensibly race-neutral criteria of decision formulated and/or deployed by white decisionmakers are in fact white-specific.[2] The proposal is asymmetrical: it would not call for similarly

* Professor of Law, Washington University. A.B., University of California-Riverside, 1967; M.A., University of California-Riverside, 1971; J.D., University of California-Berkeley, 1987.

** Professor of Law, Washington University. B.A., University of Illinois, 1971; J.D., Temple University, 1978.

1. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

2. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the*

heightened scrutiny in the case of a facially neutral practice that disadvantages whites. The reason for the asymmetry can be found in the phenomenon that gives rise to the proposal: the fact that whiteness generally is transparent to whites.[3] The transparency of criteria of decision employed by white people impels further examination, which in constitutional doctrine takes the form of "heightened scrutiny." Because only whites have the social power that renders our point of view seemingly perspectiveless, there is no need for similar close examination of race-neutral criteria of decision that operate to the advantage of nonwhites (assuming there *are* instances of such).

Barbara also has proposed asymmetrical revisions of Title VII, which prohibits race discrimination in employment. Unlike the parallel constitutional doctrine, Title VII does recognize violations based on proof of racially disparate effects alone, without proof of discriminatory intent. Barbara has described two possible methods of establishing the existence of disparate effects that do not exhibit the weaknesses of current doctrine; each would be available only to persons of color.[4] The basis for asymmetry here is found in the statute itself. Title VII, Barbara argues, is best interpreted as calling for equal opportunity in employment (as opposed to strictly symmetrical treatment, or to a norm based on distributive effects).[5] Moreover, "equal opportunity" cannot be interpreted in an assimilationist manner. If "opportunity" is to be truly "equal," it must take into account social and cultural variations among employees. Thus Title VII's mandate must be read as one of cultural pluralism.[6] Implementing that mandate calls for asymmetrical rules because a policy of pluralism requires employment decisions to be made in ways that are sensitive to varying cultural norms and values.

The other one of us—Kathy—has proposed asymmetrical solutions to problems arising in the context of the criminal process. In one such proposal she argued that the United States Supreme Court's decision in *Batson v. Kentucky*,[7] which restricted prosecutors' use of peremptory challenges, should not be extended to criminal defendants.[8] *Batson* held (rightly, albeit

---

Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993).

3. The transparency phenomenon is described more fully *id.* at 969-79.

4. *See* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2038-51 (1995).

5. *See id.* at 2030-33.

6. *See id.* at 2033-37.

7. 476 U.S. 79 (1986).

8. *See* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989).

belatedly, in Kathy's view[9]) that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to exclude prospective jurors from a petit jury because of their race.[10] Kathy advanced three arguments against extending this prohibition to defendants. First, she contended, criminal defendants are not state actors, and so are not subject to the constraints of the constitutional guarantee of equal protection.[11] Second, she explained, fairness does not require symmetry in the criminal process.[12] Indeed, constitutional provisions designed to protect criminal defendants point in the opposite direction: fairness in criminal trials mandates asymmetry in an attempt to redress the enormous advantage enjoyed by the state. Third, she argued, unlike with prosecution peremptory challenges, there are sound reasons for preserving for criminal defendants the protections afforded by unrestricted peremptories when they select the juries that will decide their fate.[13]

More recently, Kathy has written about the application, in the criminal trial context, of evidence rules that call for the exclusion of evidence for reasons of supposed unreliability, again advocating an asymmetrical approach.[14] She contends that these rules should not be applied to exclude evidence offered by criminal defendants. Here too the Constitution provides the guiding principles: the requirement of proof beyond a reasonable doubt[15] and the right to trial by jury[16] both support the conclusion that defendants ought to be permitted to introduce exculpatory evidence even if it falls within the scope of ostensibly unreliability-based exclusionary rules. With respect to the former, to exclude possibly true (albeit unreliable) evidence of innocence in order to reduce the risk of an erroneous acquittal—which, Kathy argues, is precisely what unreliability-based rules of exclusion serve to do in this context—is flatly at odds with the reasonable doubt requirement's "fundamental value determination ... that it is far worse to convict an

---

9. *See id.* at 840.

10. Actually, the *Batson* Court framed the prohibition somewhat more narrowly (specifically, as applying only to the use of peremptories by a prosecutor "to remove from the venire members of the defendant's race," *Batson*, 476 U.S. at 96); however, the Court subsequently made clear that it applies to all race-based prosecution challenges. *See* Powers v. Ohio, 499 U.S. 400 (1991).

11. Goldwasser, *supra* note 8, at 811-20.

12. *See id.* at 821-26.

13. *See id.* at 826-38.

14. *See* Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom about Excluding Defense Evidence*, __ GEO. L.J. __ (1998) (publication forthcoming).

15. *See In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

16. U.S. CONST. amend VI.

innocent [person] than to let a guilty [one] go free."[17] And as to the latter, if the defendant in a criminal trial has opted for a jury, to prevent the jury from making its own reliability/unreliability assessments of the defendant's evidence on an item-by-item basis deprives the defendant of the protection that the right to trial by jury is intended to provide.

Compelling as we find our proposals to be, they have not yet wrought significant changes in the law. Indeed, we are 0-for-1: the only one of these proposals to be considered by the United States Supreme Court—namely, Kathy's argument against extending *Batson*'s Equal Protection-based limitations to criminal defendants—has been soundly rejected.[18] Nevertheless, we remain convinced that asymmetry in law is at times—and certainly in the contexts we have examined—the only route to justice. Why does it meet with such resistance?

Some objections to asymmetrical legal doctrines focus on the notion of fairness. These arguments equate evenhandedness and fairness; only rules that treat everyone the same qualify as "fair." From this perspective, asymmetrical rules are unfair because they grant relative benefits or burdens; they treat some differently from others.[19] Thus Barbara's proposals are "unfair" insofar as they grant legal remedies to nonwhites that are not available to whites, and Kathy's are "unfair" in that they offer criminal defendants potential litigation strategies that are not available to the prosecution.

Our initial response to this line of argument is that fairness requires similar treatment only when the persons in question are similarly situated; when they are not, fairness often mandates different treatment. In this society, people of color are never in exactly the same position as whites, and criminal defendants are never in the same position as the prosecution. Thus asymmetrical treatment is at least potentially "fair" in these settings; there can be no plausible contention that different treatment is per se unfair in these instances.

However, we do not imagine that most proponents of "fairness" see it as universally interchangeable with evenhandedness. That is, we think that few—if any—of them would reject the point we have just made, or deny the existence of at least a limited number of instances in which fairness requires

17. *In re* Winship, 397 U.S. at 372 (Harlan, J., concurring).

18. *See* Georgia v. McCollum, 505 U.S. 42 (1992).

19. This line of argument is to be distinguished from strategic objections to "different treatment." *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-48 (1990).

different treatment. Thus the fairness objection is probably best understood in light of the legal context in which it is made. It is the proposition that the rule of law carries a special demand for evenhandedness; that a "law" that "knows the person" is not law at all, or at least not law deserving of respect.

Even given this limited interpretation, the "fairness" objection still falls short. First, our proposals are not the only examples of asymmetry in law. Kathy's rest on and reflect an underlying asymmetry in constitutional guarantees, which provide protection to the criminal defendant but not to the prosecution. Her suggestions—asymmetrical approaches to some rules of evidence and to the use of peremptory challenges in criminal trials—are no more "unfair" than the Constitution itself. Barbara's proposals also build upon a deeper, though perhaps less apparent, asymmetry in the law. Both the Equal Protection Clause and Title VII were intended to operate for the benefit of people of color, not whites.[20] At a minimum, each embodied the remedial purpose of redressing the effects of past discrimination,[21] a purpose that is not symmetrical. Thus Barbara's asymmetrical proposals also reflect a preexisting asymmetry in the law.

Second, the demand that law be symmetrical cannot be understood as a demand that no one ever be treated differently from another, because the law necessarily makes distinctions between persons. Someone who exceeds the speed limit ought to be cited, but another who drives within the posted speed limit ought not to be. It seems that it's not the *fact* of different treatment, but the *particular* different treatment, that gives rise to the "fairness" complaint. That is, the contention that our proposals are unfair, even though couched in terms of symmetry, must ultimately rest on some difficulty critics have with the particular distinctions we draw.

Thus though evenhandedness is a value of genuine importance, it does not fully account for the resistance with which our proposals often have been met. There are four considerations that we think shed additional light on this phenomenon of resistance. One is that symmetry in law tends to reinforce the societal status quo. Preexisting inequalities in power and resources can only be reproduced, not redressed, in a legal arena that treats all participants identically. For example, many of the Bill of Rights guarantees are designed to limit the power of government on the premise that the individual—the "little guy"—stands in need of some protection against the potential excesses of an unrestrained "big guy" state. Without some such limitations, in a world in which the government and the individual were treated identically under the

---

20. Both also prohibit discrimination on the basis of sex. Title VII does so explicitly, *see* 42 U.S.C. § 2000e-2(a) (1988); the Equal Protection Clause by virtue of judicial interpretation. *See* United States v. Virginia, 518 U.S. 515 (1996).

21. *See* Flagg, *supra* note 2, at 1006-07; Flagg, *supra* note 4, at 2030-37.

law, the individual would stand little chance in any legal clash with the state.

The same argument applies to power imbalances between individuals. For example, we now recognize that "freedom of contract" doctrines that prevented the state from intervening on behalf of workers operated in practice to entrench employers' power over them.[22] Insisting upon a symmetrical playing field would serve only to assure that employers would reap the benefits of their superior bargaining position. An analogous, though less direct, argument can be made with respect to race. People of color lack the social privilege that attaches to whiteness. A legal system that is perfectly symmetrical with respect to race leaves those relative advantages and disadvantages untouched; it does nothing to counteract the effects of a racist social structure.

A second consideration that may shed light on resistance to asymmetrical legal proposals is that symmetry in fact serves to legitimate the existing distribution of power and resources. Given a legal regime that does contemplate intervention in the interest of justice, areas of law in which symmetry is the rule send the message that in those instances there is no maldistribution or imbalance needing to be redressed. Any seeming inequality in those areas is thus presented as the product of benign social forces—or as illusory.

Third, calls for symmetry themselves tend to appear asymmetrically. That is, they arise with greater frequency and greater force when the asymmetry at issue operates to the benefit of the less privileged than they do when asymmetry benefits the already-advantaged. Legal doctrines that asymmetrically benefit the latter seem not to evoke the same degree of discomfort as do those that threaten an erosion of advantage. For a good example of this, consider first the following response to a (less privileged) defendant's contention that he should have a means of securing grants of immunity for his witnesses because the prosecution could do so:

> Th[is] contention, based on equalizing the powers of the prosecution and the defense, is entirely unpersuasive. A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. . . . Viewed in isolation, there is a surface appeal to the equal availability of use immunity for prosecution and defense witnesses. But in the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle on which to

22. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880 (1987).

extend any particular procedural device.[23]

Now compare with this asymmetry-is-fine argument Chief Justice Burger's different view in his *Batson* dissent, expressed in the course of denouncing the new peremptory challenge limitation imposed on the (more privileged) prosecution:

> Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not? "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."[24]

Finally, advantage generally is not experienced as advantage, but as neutrality. Whites do not see ourselves as occupying a privileged position vis-á-vis people of color; men do not experience themselves as advantaged vis-á-vis women. This feature of privilege renders symmetry its logical expression: because advantage is experienced as if one were playing on a level field, evenhandedness appears the appropriate mechanism to preserve that levelness. Moreover, even when advantage is acknowledged, its preservation seems necessary and thus is experienced too as neutrality. For example, maintaining a degree of advantage over criminal defendants unconsciously seems "fair," because our desire to feel safe in relation to them renders advantage a felt necessity.

The conjunction of these four considerations reveals a deep connection between legal symmetry and advantage. Because symmetry reinforces existing systems of privilege, it is inherently attractive, though perhaps unconsciously so, to those who occupy the uppermost position in those systems. A threatened erosion of advantage, as embodied in the kinds of doctrinal proposals we have set forth, elicits an almost visceral response in favor of symmetry. Moreover, symmetry seems "fair," at least in part, because it reflects the social experience of the advantaged. The fact that advantage is often not apparent to those who enjoy it, masks the symbiotic relationship between symmetry and the status quo.

These considerations expose calls for symmetry as "What about me?" complaints, which must be reevaluated in light of the interests most often served by them—the interests of the already-advantaged in society. The doctrines we have proposed are designed to alter the existing balance of

---

23. United States v. Turkish, 623 F.2d 769, 774-75 (2d Cir. 1980).

24. Batson v. Kentucky, 476 U.S. 79, 126 (1986) (Burger, C.J., dissenting) (quoting *id.* at 107 (Marshall, J., concurring in part) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887))).

power and privilege. The "What about me?" response, though at times quite understandable in view of the difficulty we all experience in giving up advantage, may finally amount to little more than a rejection of the fundamental premise that justice demands the use of legal doctrines (along with other means) in the effort to dismantle existing systems of privilege and/or redress advantage. We ought not to let the superficial appeal of symmetry obscure that fact, or eviscerate the redistributive potential of asymmetrical legal rules.