



## Case Western Reserve Law Review

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Volume 36 | Issue 3

---

1986

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### Recommended Citation

Stephen I. Shaw, *Batson v. Kentucky: The Court's Response to the Problem of Discriminatory Use of Peremptory Challenges*, 36 Case W. Res. L. Rev. 581 (1986)  
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# BATSON v. KENTUCKY: THE COURT'S RESPONSE TO THE PROBLEM OF DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

*Peremptory challenges have long been a part of the American legal system. The use of the challenge to eliminate a discrete group of persons from a petit jury has been challenged in both state and federal courts. Some courts have followed Swain v. Alabama, holding that such use does not violate the equal protection clause of the fourteenth amendment. Other courts, however, have held that such use violates the sixth amendment. This Note discusses the Supreme Court's resolution of this conflict in Batson v. Kentucky.*

## INTRODUCTION

IN 1965, THE Supreme Court of the United States decided *Swain v. Alabama*.<sup>1</sup> *Swain* established a method for determining whether the use of peremptory challenges<sup>2</sup> to eliminate a specific group from a jury panel violates the equal protection clause of the fourteenth amendment.<sup>3</sup> Unfortunately, this method had proven virtually useless for most criminal defendants.<sup>4</sup> Prior to *Batson v. Kentucky*,<sup>5</sup> most jurisdictions followed *Swain*;<sup>6</sup> others, however, rejected it, reasoning in part that the discriminatory use of peremptory challenges violates the sixth amendment.<sup>7</sup>

In 1986, the Supreme Court resolved this conflict in *Batson*. Prior to *Batson*, the main deviations from *Swain* were through state constitutions or the post-*Swain* changes in sixth amendment doctrine.<sup>8</sup> The Court in *Batson*, however, directly addressed the equal protection rationale of *Swain*, and held the practice of striking black

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1. 380 U.S. 202 (1965).

2. A peremptory challenge is a statutory right to eliminate a party from sitting on a jury without having to state a reason for the elimination. *Id.* at 220; J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 140 (1977).

3. See *infra* notes 18-41 and accompanying text.

4. In only two cases has a defendant succeeded in passing the *Swain* test: *State v. Brown*, 371 So. 2d 751 (La. 1979) and *State v. Washington*, 375 So. 2d 1162 (La. 1979). See *infra* notes 38-41 and accompanying text.

5. 106 S. Ct. 1712 (1986).

6. *State v. Neil*, 457 So. 2d 481, 484 (Fla. 1984) ("Most [jurisdictions] have adhered to the *Swain* test . . .").

7. *Id.* The exceptions were California, Massachusetts, New Mexico, Florida, New York and the Second Circuit. See *infra* notes 51, 87, 93, 101, 112 and cases cited therein.

8. See *infra* notes 57-120 and accompanying text.

jurors for a discriminatory purpose in a single case to violate equal protection. Part I of this Note examines *Swain* and the criticisms that it has engendered.<sup>9</sup> Part II sets forth the state court decisions which have deviated from *Swain*.<sup>10</sup> Part III examines some of the reasons that changes in this area have not spread widely.<sup>11</sup> Part IV looks at the application of sixth amendment doctrine to peremptory challenges;<sup>12</sup> Part V compares this approach with the decision in *Batson*.<sup>13</sup>

In *Batson*, the prosecutor used his peremptory challenges to strike all the potential black jurors, empanelling an all-white jury. The petitioner objected at the time and after his conviction argued the issue on appeal to the state supreme court.<sup>14</sup> Petitioner did not attack the *Swain* holding directly under the equal protection clause; rather he argued in accordance with state and lower federal court reasoning that the discriminatory use of peremptory challenges violated his sixth amendment right to a jury drawn from a cross-section of the community, and also that the facts of his case indeed met the nearly impossible *Swain* standard.<sup>15</sup>

The Supreme Court chose to modify the equal protection analysis of *Swain* and to hold that under the equal protection clause a defendant could establish an unconstitutional use of peremptory challenges based on the facts of his case alone. The "defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."<sup>16</sup>

The defendant must then show that the peremptory challenge is inherently susceptible of abuse—which is virtually always assumed. Finally, the defendant must show, on the basis of the use of the challenges and "other relevant circumstances" that the use of the peremptories had a racial motivation. This established a *prima facie* case; the burden of rebuttal then falls on the state.<sup>17</sup>

In order to assess the impact of this recent holding, it is necessary to analyze the *Swain* case and the difficulties found in it by the state and lower federal courts.

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9. See *infra* notes 18-56 and accompanying text.

10. See *infra* notes 57-120 and accompanying text.

11. See *infra* notes 121-134 and accompanying text.

12. See *infra* notes 135-177 and accompanying text.

13. See *infra* notes 178-206 and accompanying text.

14. 106 S. Ct. at 1715.

15. *Id.*

16. *Id.* at 1723 (citation omitted).

17. *Id.*

I. *SWAIN V. ALABAMA* AND LOWER COURT DECISIONSA. *Swain v. Alabama*<sup>18</sup>

*Swain v. Alabama*<sup>19</sup> was the leading case for two decades concerning the rights of a minority defendant to challenge jury selection procedures. In *Swain*, a black defendant was convicted of rape and sentenced to death by an all-white jury.<sup>20</sup> The Alabama Supreme Court affirmed the conviction,<sup>21</sup> and the United States Supreme Court granted certiorari.<sup>22</sup>

Swain pressed three claims of error before the Supreme Court. First, he claimed that blacks were improperly underrepresented on jury panels throughout Talladega County, Alabama.<sup>23</sup> Second, he claimed that at his trial, blacks were improperly excluded from the jury, and that the state's system of jury panel selection facilitated this result by limiting the number of blacks on the jury panel.<sup>24</sup> Finally, he alleged that the state maintained a systematic practice of invidious discrimination, with the result that "there never has been a Negro on a petit jury in either a civil or a criminal case in Talladega County . . . ."<sup>25</sup>

On his first claim, concerning the lack of blacks on the trial jury,<sup>26</sup> the Court held that there is an initial presumption of proper use of peremptory challenges by a prosecutor.<sup>27</sup> Moreover, "[t]he presumption is not overcome . . . by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."<sup>28</sup> Therefore, Swain's motion to strike the trial jury had been properly denied below.<sup>29</sup>

As for Swain's second claim, based on the racial composition of the jury panel,<sup>30</sup> the Court held that a criminal defendant "is not constitutionally entitled to demand a proportionate number of his

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18. 380 U.S. 202 (1965).

19. *Id.*

20. *Id.* at 203.

21. *Swain v. State*, 275 Ala. 508, 156 So. 2d 368 (1963).

22. 377 U.S. 915 (1964).

23. 380 U.S. at 205.

24. *Id.* at 210-11 n.6.

25. *Id.* at 222-23.

26. *Id.* at 210.

27. "The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." *Id.* at 222.

28. *Id.*

29. *Id.*

30. *Id.* at 205.

race on the jury which tries him nor on the venire or jury roll from which petit juries are drawn."<sup>31</sup> A jury panel need not reflect the "proportionate strength" of every group in a community, and the alleged underrepresentation of blacks on the jury panel was not great enough to prove purposeful discrimination.<sup>32</sup>

In ruling on Swain's third claim, the Court distinguished between (1) a claim of discrimination based on the facts of a single case, and (2) a claim based on alleged discrimination in case after case. In the first situation, the Court held that the presumption of proper use could not be overcome based on the facts of any one case.<sup>33</sup> In the second situation, however, the Court stated that the presumption of proper use could possibly be overcome by evidence that the state had never allowed a black to sit on any trial jury.<sup>34</sup> The Court then turned to the facts of the case.

Swain alleged that no black had ever sat on a trial jury in Talladega County.<sup>35</sup> However, the evidence "[did] not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone ha[d] been responsible for striking those Negroes who ha[d] appeared on petit jury panels . . . ."<sup>36</sup> Since the striking of jurors involves both state officials and defense counsel, state participation needed to be shown before there would be an "inference of systematic discrimination on the part of the state."<sup>37</sup> Swain did not show the requisite amount of state participation,<sup>38</sup> so he failed to carry his burden of proof on that issue.<sup>39</sup>

This final portion of the *Swain* opinion appears to be important. It grants criminal defendants the right to challenge a discriminatory use of peremptory challenges. However, there is a heavy burden of proof on a defendant who seeks to vindicate that right—proof that a prosecutor, at least in a series of cases, was responsible for the striking of black panel members.<sup>40</sup> It is not surprising that the right announced in *Swain* has rarely been vindicated.<sup>41</sup>

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31. *Id.* at 208 (citations omitted).

32. *Id.* at 208-09.

33. *Id.* at 221-22. See *supra* notes 21-24 and accompanying text.

34. "If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome." 380 U.S. at 223-24.

35. *Id.* at 222-23.

36. *Id.* at 224-25.

37. *Id.* at 226-27.

38. *Id.*

39. *Id.* at 225-26.

40. *Id.* at 226-27.

41. Sullivan, *Detering the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L. REV. 477, 484 n.2 (1984); Comment, *Justice Ignored: The Discriminatory Use of Peremp-*

### B. Criticisms of Swain

Among the criticisms of *Swain*,<sup>42</sup> the most important for litigants was that which illustrated the difficulty that a criminal defendant had in winning.<sup>43</sup> In only two cases prior to *Batson* had a criminal defendant succeeded in obtaining relief by showing a systematic past practice. In one of those cases, the prosecutor admitted that "solely on the basis of race and without examination as to the individual's particular qualifications . . . he consistently excuse[d] black veniremen . . . when the defendant himself [was] black."<sup>44</sup> The second case involved the same prosecutor, and a great deal of evidence concerning discrimination was introduced against him.<sup>45</sup> Thus, *Swain* gave aggrieved defendants one avenue of relief, while blocking that same avenue to almost all traffic.<sup>46</sup>

A second criticism of *Swain* was that by requiring a defendant to prove a systematic past practice, only the later defendants in a series of cases will be able to get judicial relief.<sup>47</sup> Thus, the constitutional right granted in *Swain* was distributed unequally.<sup>48</sup>

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*tory Challenges*, 53 UMKC L. REV. 446, 451 (1985); see also *Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3546 (1984) ("Winning *Swain* claims are exceedingly rare.").

42. For a collection of some of the critical literature inspired by *Swain*, see Note, *Limiting the Peremptory Challenge: The Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977); *Commonwealth v. Soares*, 377 Mass. 461, 476-77 n.11, 387 N.E.2d 499, 510 n.11 (1979); *State v. Crespino*, 94 N.M. 486, 487, 612 P.2d 716 (1980).

43. See *supra* note 41; cf. *Batson*, 106 S. Ct. at 1720-21 ("Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." (footnote omitted)).

44. *State v. Washington*, 375 So. 2d 1162, 1164 (La. 1979).

45. *State v. Brown*, 371 So. 2d 751 (La. 1979). Testimony of two attorneys, one of whom was the defense attorney in *Washington*, 375 So. 2d 1162, indicated that the prosecutor constantly used peremptory challenges to exclude blacks from petit juries. 371 So. 2d at 752.

On the other hand, even where a systematic practice has been shown, dicta in *Swain*—indicating that prosecutors may use the peremptory strike based on a real or imagined partiality, 380 U.S. at 220—had been used to justify denying relief. See, e.g., *Ridley v. State*, 475 S.W.2d 769, 771 (Tex. Crim. App. 1972) (a number of witnesses testified it was a typical practice to strike black jurors whenever defendant was black; held, the burden of proof under *Swain* not met).

46. Cf. *Batson*, 106 S. Ct. at 1720-21 (citing the "crippling burden of proof"); see also *People v. Wheeler*, 22 Cal. 3d 258, 287, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909-10 (1978) ("It demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right.").

47. *Andrews v. State*, 438 So. 2d 480, 481 n.2 (Fla. Dist. Ct. App. 1983); *Wheeler*, 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908-09.

48. *Wheeler*, 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908-09; cf. *Batson*, 54 U.S.L.W. at 4429 ("For evidentiary requirements to dictate that 'several must suffer discrimination' before one could object . . . would be inconsistent with the promise of equal protection for all.").

Another criticism of *Swain* was based on the fact that defendants generally have great difficulty in obtaining sufficient evidence of past practices to prove their case under *Swain*. For instance, one court had observed that: (1) cost can deter indigent defendants from seeking necessary data; (2) a judge is unlikely to grant a continuance in the midst of jury selection to allow time for research; and (3) no convenient source of necessary information exists.<sup>49</sup>

Finally, it had been suggested that recent decisions concerning the sixth amendment have undermined *Swain*.<sup>50</sup> One such decision was *Duncan v. Louisiana*,<sup>51</sup> which incorporated the sixth amendment right to an impartial jury into the fourteenth amendment.<sup>52</sup> Another was *Taylor v. Louisiana*,<sup>53</sup> which held that under the sixth amendment, state jury panels must reflect "a fair cross section of the community," and entire "identifiable segments" of a community may not be deliberately underrepresented.<sup>54</sup> Thus, there appeared to be a conflict between *Swain* and *Taylor*.<sup>55</sup>

Indeed, the petitioner in *Batson* asserted as his basis the sixth amendment.<sup>56</sup> He had little alternative in the state supreme court, because an equal protection challenge would have certainly lost under *Swain*. However, the United States Supreme Court directly attacked the equal protection analysis of *Swain*. Thus, the *Batson* court accomplished directly what lower courts had sought to accomplish indirectly. It is worth comparing the goals for change perceived by the lower courts with the result in *Batson*.

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49. *Id.* at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 909.

50. *Swain* was decided in 1965, prior to the incorporation of the sixth amendment into the fourteenth amendment in *Taylor v. Louisiana*, 391 U.S. 145 (1968). Also, *Swain* was decided upon equal protection grounds. 380 U.S. at 203-04. A sixth amendment claim, it was thought, may require a different result. See *infra* notes 135-77 and accompanying text. See also Sullivan, *supra* note 41, at 489; cf. Comment, *supra* note 41, at 451 (noting that commentators have indicated that *Duncan v. Louisiana* and *Taylor v. Louisiana* had "rendered *Swain* constitutionally infirm"); accord *Booker v. Jabe*, 775 F.2d 762, 767 (6th Cir. 1985).

51. 391 U.S. 145 (1968).

52. *Id.* at 148-50.

53. 419 U.S. 522 (1975).

54. *Id.* at 530-31.

55. The apparent conflict is not in analysis; rather, it is in outcome. *Swain* was decided upon equal protection grounds, 380 U.S. at 203-04, and *Taylor* was decided upon sixth amendment grounds, 419 U.S. at 525.

56. 106 S. Ct. at 1717.

## II. APPROACHES TO CHANGE: STATE COURT DEVIATIONS FROM *SWAIN*

### A. Wheeler/Soares—*Shifting Presumptions*

California and Massachusetts were the first jurisdictions to depart from *Swain*, allowing criminal defendants to challenge the use of peremptory strikes without requiring a showing of systematic discrimination.<sup>57</sup> However, the decisions were based on state constitutions<sup>58</sup> rather than the equal protection clause of the federal constitution.<sup>59</sup>

In *People v. Wheeler*,<sup>60</sup> two black defendants were accused of murdering a white man during a robbery.<sup>61</sup> During voir dire, the prosecutor used his peremptory challenges to eliminate all of the potential black jurors.<sup>62</sup> Some of these he did not question at all on voir dire, and others had given answers indicating that they could make an impartial judgment.<sup>63</sup>

The court developed a test for analyzing a claim of improper use of a peremptory challenge. Initially, there exists a presumption of proper use of peremptory challenges.<sup>64</sup> However, that presumption is rebuttable by either party upon a showing that (1) several of the challenged jurors belong to a discrete group, and (2) there is a likelihood of their being challenged for no other reason than their group membership.<sup>65</sup> If this is shown, the burden shifts to the other party to show that the reason for the peremptory challenge relates to individual qualities of the challenged juror and not to group associa-

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57. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979).

58. In both cases, the state constitution provided for a right to a jury composed of a fair cross section of the community. *Wheeler*, 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900; *Soares*, 377 Mass. at 477-78, 387 N.E.2d at 510-11; cf. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (the sixth amendment provides a right to a jury panel composed of a fair cross section of the community).

59. *Wheeler*, 22 Cal. 3d at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893; *Soares*, 377 Mass. at 473, 387 N.E.2d at 508.

The *Wheeler* court did not try to distinguish *Swain* or claim that *Swain* should be overruled; rather, the court merely stated that the state constitution provided more protection than did the United States Constitution. 22 Cal. 3d at 285-86, 583 P.2d at 767, 148 Cal. Rptr. at 908-09. The court in *Soares*, on the other hand, took note of the criticisms of *Swain*, 377 Mass. at 476-77 n.11, 387 N.E.2d at 510 n.11, and consciously took the opportunity to fashion a new rule. *Id.* at 477 n.12, 387 N.E.2d at 510 n.12.

60. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

61. *Id.* at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893.

62. *Id.*

63. *Id.*

64. *Id.* at 278, 583 P.2d at 762-63, 148 Cal. Rptr. at 904.

65. *Id.* at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.



tion.<sup>66</sup> Should the trial judge find improper use, the judge must dismiss the jurors, quash the panel, and begin again with a new panel.<sup>67</sup>

In applying the test to the facts of the case, the court indicated that the proper use of a peremptory challenge is to remove a perceived juror bias which is specific to the case being tried.<sup>68</sup> The use of peremptory challenges to remove prospective jurors on the sole ground of a perceived group viewpoint violates a defendant's right to a jury drawn from a representative cross section of the community.<sup>69</sup> Since the evidence in the case showed that all of the prosecutor's peremptory challenges were used to eliminate blacks from the jury, the court ruled that the defendant had successfully rebutted the presumption of proper use.<sup>70</sup> Therefore, it was error for the trial court not to require the state prosecutor to show that the peremptory challenges were properly used.<sup>71</sup>

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66. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

67. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. For a concise description of the *Wheeler/Soares* system, see Comment, *supra* note 41, at 453.

68. *Wheeler*, 22 Cal. 3d at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

69. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

70. *Id.* at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907.

71. *Id.* One commentator, taking the view that a jury should be made up of individually bias-free jurors, has criticized *Wheeler's* reliance on the fair cross section requirement. Comment, *Is There a Place for the Challenge of Racially Based Peremptory Challenges?*, 1984 DET. C.L. REV. 703, 705-10. This commentator analyzes *Wheeler* as having two possible meanings: (1) allowing challenges based on group bias deprives a jury of those members best able to decide the case on the merits because group bias assists truth finding by providing jury members with "unique perspectives"; or (2) overall impartiality is achieved by including individuals with countervailing biases on a jury. *Id.* at 715-16. In either case, the result is "absurd." *Id.* at 717. Counsel should be able to remove jurors with any sort of bias; so long as twelve bias-free individuals sit on the jury, the defendant is not harmed. *Id.*

This criticism relies on the assumption that attitudes jurors may have as group members are "biases" of precisely the same type as those case-specific biases desirable to eliminate from the jury. *Wheeler* can be read to support such a view, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902 ("[The] purpose . . . is to achieve overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly, if jurors are struck simply because they hold these very beliefs, such interaction becomes impossible and the jury will be dominated by the . . . prejudices of the majority."). However, *Wheeler* views case-specific bias and group-related viewpoint as two different qualities. Case-specific bias refers to an actual disposition to decide the case in a certain manner; group-related viewpoint refers to the fact that jurors enter the jury box with different backgrounds and group experiences. *Id.* The *Wheeler* court speaks of group bias not in terms of a specific bias resulting from group membership, but rather in terms of a bias "presumed" by a party. As a result of their group memberships, the jurors actually possess "diverse beliefs and values." *Cf.* *Booker v. Jabe*, 775 F.2d 762, 767-68 (6th Cir. 1985) (the "model jury" contains disinterested individual jurors and a representative cross section). District of Columbia Survey, *Trial Court Discretion in Conducting the Voir Dire Subjected to More Stringent Scrutiny*: *Cordero v. U.S.*, 33 CATH. U.L. REV. 1121, 1123 (1984). Another commentator has noted that both case-specific bias and group viewpoint must be taken into account to conduct an

*Commonwealth v. Soares*<sup>72</sup> arose from a similar fact situation. Three blacks had been accused of first degree murder in the killing of a white man.<sup>73</sup> At voir dire, the state prosecutor peremptorily challenged twelve of the thirteen black men who were on the jury panel.<sup>74</sup> The thirteenth black was not peremptorily challenged, and he sat on the jury.<sup>75</sup> The defendants were found guilty, and an appeal followed.<sup>76</sup>

The *Soares* court began with a discussion of *Swain*,<sup>77</sup> but it decided to center its analysis on the state constitution's "right to trial before a jury of peers . . . ."<sup>78</sup> After analyzing that right,<sup>79</sup> the court developed a test for measuring whether peremptory challenges are being used properly.<sup>80</sup> First, there is a rebuttable presumption of proper use in favor of the party exercising a peremptory challenge.<sup>81</sup> If the attacking party can show "that (1) a pattern of conduct has developed whereby several [challenged veniremen] are members of a discrete group, and (2) there is a likelihood they are being excluded . . . solely by reason of their group membership,"<sup>82</sup> then the presumption is rebutted.<sup>83</sup> "[T]he burden shifts to the allegedly offending party" to show that group membership is not the reason for exclusion.<sup>84</sup>

In applying the test to the facts of the case, the court found that the defendant had successfully rebutted the initial presumption of proper use,<sup>85</sup> because twelve of the thirteen black veniremen had been peremptorily challenged.<sup>86</sup> Therefore, the burden of proof shifted to the state to "justify his challenges as predicated [on

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effective voir dire. *Id.* Individual bias should be rooted out as much as possible; but since voir dire cannot eliminate all varying viewpoints, the presence of a representative cross section will ensure a "balanced representation" of conflicting views. *Id.*

72. 377 Mass. 461, 387 N.E.2d 499 (1979).

73. *Id.* at 462-63, 387 N.E.2d at 502-03.

74. *Id.* at 473, 387 N.E.2d at 508. The thirteen blacks had been considered by the trial judge to be "indifferent." *Id.*

75. *Id.*

76. *Id.* at 462-63, 387 N.E.2d at 502-03.

77. *Id.* at 474-75, 387 N.E.2d at 509.

78. *Id.* at 476-77, 387 N.E.2d at 510.

79. *Id.* at 477-85, 387 N.E.2d at 510-14.

80. This test was adapted from and similar to the test in *Wheeler*. *Id.* at 489-91, 387 N.E.2d at 516-18.

81. *Id.* at 489-90, 387 N.E.2d at 516-17.

82. *Id.*

83. *Id.*

84. *Id.* at 491, 387 N.E.2d at 517.

85. *Id.* at 490, 387 N.E.2d at 517.

86. *Id.* at 492, 387 N.E.2d at 518.

proper grounds]."<sup>87</sup> Since the trial court did not require the state to show proper use of the peremptory challenges, there was reversible error.<sup>88</sup>

Although relying on state constitutions, the *Wheeler/Soares* courts took notice of the cases which developed the fair cross section requirement of jury panels.<sup>89</sup> Each court recognized that a defendant is not entitled to a jury of any particular composition.<sup>90</sup> However, both courts recognized the need to protect defendants from affirmative destruction of the representative nature of the jury panel through an improper use of peremptory challenges.<sup>91</sup>

### B. *The New Mexico Hybrid*

The New Mexico Court of Appeals announced an approach in which both *Swain* and *Wheeler/Soares* coexisted.<sup>92</sup> In *State v. Crespin*,<sup>93</sup> the defendant argued that it was error for the trial court to refuse to require a state prosecutor to give reasons for his peremptory challenge of a single black venireman.<sup>94</sup> In rejecting this argument,<sup>95</sup> the court indicated that *Swain* is the general rule, but that "certain fact situations [can] arise where the defendant can overcome the presumption of proper use based entirely on the facts of his own case."<sup>96</sup>

When the use of peremptory challenges is being attacked, a defendant must still present evidence which indicates a systematic exclusion of a group by improper use of peremptory challenges.<sup>97</sup> However, this may be done in either of two ways: (1) by presenting evidence of systematic exclusion from a series of cases, as *Swain* required; or (2) by showing that in his own case, persons from a cognizable group were excluded from the jury for their group asso-

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87. *Id.* at 489-90, 387 N.E.2d at 516-17.

88. *Id.*

89. See *Wheeler*, 22 Cal. 3d at 266-71, 583 P.2d at 755-58, 148 Cal. Rptr. at 896-99 (the cross section doctrine has been incorporated into the state constitution); *Soares*, 377 Mass. at 478-79, 387 N.E.2d at 510-11 (previous court decisions have made the cross section doctrine a part of Massachusetts law).

90. *Wheeler*, 22 Cal. 3d at 267-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903; *Soares*, 377 Mass. at 488, 387 N.E.2d at 516.

91. *Wheeler*, 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903; *Soares*, 377 Mass. at 486, 387 N.E.2d at 515.

92. *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *State v. Davis*, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983).

93. 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

94. *Id.* at 486, 612 P.2d at 716.

95. *Id.* at 488, 612 P.2d at 718.

96. *Id.* at 487, 612 P.2d at 717.

97. *Id.* at 488, 612 P.2d at 718.

ciation, as *Wheeler/Soares* allows.<sup>98</sup> Thus, both *Swain* and *Wheeler/Soares* were made to coexist.

In *State v. Crespin* only one black person had been peremptorily challenged.<sup>99</sup> Therefore, there was no "inference of improper use" under either approach, and "[t]he presumption of proper use was not rebutted."<sup>100</sup>

### C. Florida and New York: Limiting Wheeler

In *State v. Neil*,<sup>101</sup> the Florida Supreme Court rejected *Swain* on state constitutional grounds.<sup>102</sup> In *Neil*, a black defendant was charged with second degree murder in the shooting death of a black Haitian immigrant.<sup>103</sup> In the ensuing voir dire, the prosecutor used all of his peremptory challenges to eliminate three of the four blacks who were veniremen.<sup>104</sup> After the third black was excused, the defendant objected on the grounds that the prosecutor's use of the peremptory challenges "[was] discriminatory and violated [the defendant's] sixth amendment right to trial by an impartial jury."<sup>105</sup> The court denied a motion to strike the jury, but it granted each side five more peremptory challenges.<sup>106</sup> The prosecutor used those five in an effort to exclude the last black venireman, but he was unsuccessful.<sup>107</sup> The black venireman eventually sat as an alternate juror on the jury which convicted the defendant.<sup>108</sup>

On appeal, the court declined to apply the *Swain* test.<sup>109</sup> The court noted that *Swain* had been the subject of a great deal of criti-

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98. *Id.*

99. *Id.* at 486, 612 P.2d at 716.

100. *Id.* at 488, 612 P.2d at 718.

In *State v. Davis*, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983), the court reiterated the approach that it developed in *Crespin*. *Davis*, 99 N.M. at 523-24, 660 P.2d at 613-14. However, the court again found that the defendant failed to show systematic exclusion, *id.* at 524-25, 660 P.2d at 614-15, because only one black venireman had been challenged. *Id.* at 524, 660 P.2d at 614.

101. 457 So. 2d 481 (Fla. 1984).

102. *Id.* at 486. The Florida State Constitution "guarantees the right to an impartial jury . . . . *Swain* . . . impedes, rather than furthers, . . . that guarantee . . . . [T]herefore . . . *Swain* is no longer to be used . . . when [a state court is] confronted with the allegedly discriminatory use of peremptory challenges." *Id.*

103. *Id.* at 482-83.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 486.

cal literature,<sup>110</sup> and that some jurisdictions were deviating from its test.<sup>111</sup> The *Wheeler* and *Soares* decisions were discussed, but the court opted to adopt a test that was developed in the New York case of *State v. Thompson*.<sup>112</sup>

The *Neil* test is similar to the *Wheeler/Soares* test:

The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a substantial likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories . . . . [I]f the court decides that such a likelihood has been shown . . . the burden shifts to the [other side] to show that the questioned challenges were not exercised solely because of the prospective juror's race . . . . If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry ends . . . . On the other hand, if the party has been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.<sup>113</sup>

However, *Neil* limits the *Wheeler/Soares* test in two important respects. First, it expressly denies that a party can compel an inquiry into the use of peremptory challenges merely by showing that a certain number of minority veniremen have been excluded.<sup>114</sup> The ob-

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110. *Id.* at 483-84.

111. *Id.* at 484.

112. *Id.* at 484-87.

In *Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (App. Div. 1981), a black defendant was accused of grand larceny and possession of stolen goods. *Id.* at 88, 435 N.Y.S.2d at 742. At voir dire, the prosecutor used all of his peremptory challenges to exclude blacks from the trial jury. *Id.* Thereafter the defendant moved for a mistrial. *Id.* The trial judge indicated that some of the excused veniremen looked to be fair and impartial, but because "the law [was] clear," the motion was denied. *Id.* at 89, 435 N.Y.S.2d at 742-43. The defendant was found guilty after a trial, and a second motion for mistrial was denied. *Id.* at 89-90, 435 N.Y.S.2d at 743.

On appeal, the court looked beyond *Swain*, *id.* at 94, 435 N.Y.S.2d at 745, and it developed the test discussed in *Neil*. When the new test was applied to the facts of *Thompson*, the court found that the trial court had erred in not requiring the prosecution to explain his peremptory challenges after the defendant had complained. *Thompson*, 79 A.D.2d at 111, 435 N.Y.S.2d at 755. Therefore, the trial court was reversed and a new trial granted. *Id.*

113. *Neil*, 457 So. 2d at 486-87 (footnotes omitted). The *Thompson* case was cited in *Neil*, *id.* at 485-86.

114. *Id.* at 487, n.10. See also *Thompson*, 79 A.D.2d at 111, 435 N.Y.S.2d at 755.

jecting party must show that "there is a strong likelihood that they have been challenged solely because of their race."<sup>115</sup> Second, while *Wheeler/Soares* holds that members of any identifiable group may avail themselves of this right,<sup>116</sup> *Neil* applies only when the peremptory challenges being attacked have been used against blacks.<sup>117</sup>

Turning to the facts of the case, the court determined that Neil had to be granted a new trial.<sup>118</sup> The court noted that the trial court had relied on *Swain* and did not have the benefit of the new test.<sup>119</sup> Since the court could not tell how the trial court would have decided had the new test been available, the court found that a new trial was necessary.<sup>120</sup>

### III. REJECTION OF CHANGE IN THE PEREMPTORY SYSTEM

Despite the criticisms, deviations from *Swain* prior to *Batson* had been rare.<sup>121</sup> One possible reason for the sluggish acceptance of change in this area is attributable to the criticism which had been leveled against the courts which have deviated from *Swain*. The dissent in *Wheeler* argues that the majority unreasonably extended to the petit jury rules which were intended to apply only to the jury panel.<sup>122</sup> This is sometimes regarded as mandating a certain jury composition,<sup>123</sup> an anomaly since the function of jury selection is not primarily to produce a representative jury, but rather an impartial one.<sup>124</sup> The express language of *Taylor v. Louisiana*, limiting its holding to jury panels,<sup>125</sup> gives this criticism force. *Batson*, however, shows that whatever protections the fourteenth amendment provides persist through the entire criminal proceeding.<sup>126</sup>

Critics have also argued that scrutiny of the use of peremptory challenges will destroy the peremptory challenge system.<sup>127</sup> This is

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115. *Neil*, 457 So. 2d at 487.

116. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 764, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 489-90, 387 N.E.2d at 516-17.

117. *Neil*, 457 So. 2d at 487.

118. *Id.*

119. *Id.*

120. *Id.* Although a new trial was granted in *Neil*, the court indicated that the test would not otherwise be applied retroactively. *Id.* at 488.

121. See *supra* note 41 and accompanying text.

122. *Wheeler*, 22 Cal. 3d at 292, 583 P.2d at 771, 148 Cal. Rptr. at 913 (Richardson, J., dissenting).

123. *Id.*, 148 Cal. Rptr. at 912.

124. *Id.*

125. 419 U.S. at 538.

126. *Batson*, 106 S. Ct. at 1717 n.8.

127. *King v. Nassau County*, 581 F. Supp. 493, 501 (E.D.N.Y. 1984); Note, *People v.*

more than a mere reactionary impulse to cling to tradition. Rather, it is a fear grounded in the fact that two types of challenge exist: for cause and peremptory.<sup>128</sup> Each type of challenge has a specific function, and the function of a peremptory challenge is to eliminate bias not reached by the for cause challenge.<sup>129</sup> In addition, the peremptory challenge also supplements the for cause challenge. Probing questions designed to demonstrate a "for cause" bias may have the effect of antagonizing a juror.<sup>130</sup> If an antagonized juror is not removed by the court for cause, an attorney can use a peremptory challenge.<sup>131</sup> These functions are valuable ones, and if attorneys are scrutinized when a peremptory is used, then the critics argued that peremptory challenges will become nothing more than for cause challenges.<sup>132</sup>

While the *Batson* court does not specifically refer to this theory of the peremptory challenge, it does note the state's argument that "our holding will eviscerate the fair trial values served by the peremptory challenge."<sup>133</sup> The Court rejects this argument, restating the supremacy of the equal protection clause and asserting that the holding will strengthen public respect for the criminal justice system.<sup>134</sup>

#### IV. *MCCRAY V. ABRAMS*: APPLICATION OF SIXTH AMENDMENT DOCTRINE TO PEREMPTORY CHALLENGES

When the Second Circuit became the first federal circuit to deviate from *Swain*,<sup>135</sup> it relied upon the fair cross section requirement of the sixth amendment.<sup>136</sup>

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*Wheeler: Has California Really Assured Impartial Juries by Revision of Peremptory Challenges?*, 1979 DET. C.L. REV. 529, 539-40 (1979).

128. *Wheeler*, 22 Cal. 3d at 273, 583 P.2d at 759, 148 Cal. Rptr. at 900-01; J. VAN DYKE, *supra* note 2, at 140-41.

129. Note, *supra* note 127, at 540.

130. *Thompson*, 79 A.D.2d at 106, 435 N.Y.S.2d at 752.

131. *Id.*

132. See Note, *supra* note 127, at 539-40.

133. 106 S. Ct. at 1724.

134. *Id.*

135. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *reh'g denied*, 756 F.2d 277 (1985).

136. 750 F.2d at 1131. More recently, the sixth circuit found *McCray* persuasive and held that the use of peremptories in a particular case violated the sixth amendment. Counsel virtually admired the discrimination. *Booker v. Jabe*, 775 F.2d 762, 770 (6th Cir. 1985) ("The sixth amendment guarantees that a criminal charge will not be tried before a jury that fails to represent a cross-section of the community as a consequence of a method of jury

*McCray v. Abrams*<sup>137</sup> was an appeal by the state from a successful habeas corpus action in federal court which overturned a guilty verdict against McCray in state court.<sup>138</sup> McCray's first criminal trial ended in a hung jury.<sup>139</sup> In preparation for a second trial, the state prosecutor peremptorily struck seven black veniremen and one Hispanic venireman, thus eliminating all minority representation from the jury.<sup>140</sup> McCray moved for a mistrial, arguing that "the prosecutor appeared to be systematically using . . . peremptory challenges to exclude blacks and Hispanics from the jury."<sup>141</sup> The trial court denied the motion, and McCray went to trial in front of an all-white jury.<sup>142</sup> McCray was convicted,<sup>143</sup> and the conviction was upheld by the Court of Appeals of New York, which relied on *Swain*.<sup>144</sup> A petition for certiorari was denied by the United States Supreme Court.<sup>145</sup>

Thereafter, McCray petitioned for habeas relief in federal district court, alleging that the state had violated his sixth amendment right to a trial jury by improperly using peremptory challenges.<sup>146</sup> The federal district judge ruled that the sixth amendment required "judicial scrutiny of discriminatory prosecutorial peremptory challenges."<sup>147</sup> The district judge then decided that the trial judge should have inquired into the reasons for the peremptory challenges that were being attacked, and the trial judge's failure to do so was grounds for a new trial.<sup>148</sup>

The appeals court began with a review of both *Swain*<sup>149</sup> and the state court cases which had rejected *Swain*.<sup>150</sup> Although noting that the arguments for rejecting *Swain* were strong, the court recognized that *Swain* was controlling as far as an equal protection claim

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selection that systematically excludes a cognizable group from jury service."'). Both these cases were decided prior to *Batson*.

137. 750 F.2d 113 (2d Cir. 1984).

138. *Id.* at 1114.

139. *Id.* at 1115. At the first trial, three blacks sat on the jury, and two of them were among the three votes for acquittal. *Id.* at 1115, 1118.

140. *Id.* at 1115.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 1115-16.

145. *Id.* at 1116. See *McCray v. New York*, 461 U.S. 961 (1983).

146. 750 F.2d at 1116.

147. *Id.* at 1117.

148. *Id.*

149. *Id.* at 1118-20.

150. *Id.* at 1122-23.



was concerned.<sup>151</sup> On the other hand, the court realized that *Swain* did not control the outcome of a sixth amendment claim, because *Swain* was decided upon equal protection grounds rather than sixth amendment grounds.<sup>152</sup>

Turning to sixth amendment analysis, the court noted that the "Sixth Amendment provides in pertinent part that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .'"<sup>153</sup> The Supreme Court had interpreted that provision on many occasions, and "the touchstone of each analysis has been whether the practice in question deprived the defendant of the possibility of a jury [panel] that represent[s] a cross section of the community."<sup>154</sup> Admittedly, this does not mean that a defendant is entitled to a jury of any particular composition;<sup>155</sup> however, the court did not believe that such a fact necessarily implied that the sixth amendment does not apply to petit juries.<sup>156</sup>

A jury panel serves an important function by providing a pool from which a petit jury can be drawn.<sup>157</sup> However, the venire itself "takes no action and makes no decisions."<sup>158</sup> Therefore, "[i]f there is a sixth amendment requirement that the venire represent a fair cross section of the community, it must logically be because it is important that the defendant have the *chance* that the petit jury will be similarly constituted."<sup>159</sup> This "chance" is the "fair and undistorted" possibility that cross-sectional representation may survive onto a petit jury,<sup>160</sup> and it is guaranteed by the sixth amendment.<sup>161</sup>

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151. *Id.* at 1123-24.

152. *Id.* at 1124. *Cf.* *Taylor v. Louisiana*, 419 U.S. 522, 533-34 (1975) (a decision based on due process or equal protection grounds does not control the outcome of a sixth amendment claim). It is interesting to note that both *McCray* and the state were claiming that *Swain* was no longer good law. *Id.* at 1123-24.

153. 750 F.2d at 1124 (quoting the sixth amendment). The sixth amendment was made applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

154. 750 F.2d at 1124-25. The court discussed the following cases: *Williams v. Florida*, 399 U.S. 78 (1970) (six-person juries in noncapital cases upheld as sufficient in size to "provide a fair possibility for obtaining a representative cross-section of the community"); *Ballew v. Georgia*, 435 U.S. 223 (1978) (five-person jury struck down as not able to fairly represent the community); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (statute exempting women from jury service unless a woman specifically requests to be included struck down as unreasonably restricting opportunity for jury drawn from fair cross section of community). 750 F.2d at 1124-28.

155. 750 F.2d at 1128 (citing *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)).

156. 750 F.2d at 1128.

157. *Id.* at 1128-29.

158. *Id.*

159. *Id.* (emphasis added).

160. *Id.*

On the other hand, peremptory challenges are not constitutionally based.<sup>162</sup> Therefore, when there is a conflict between the two, “. . . the peremptory challenge . . . must yield . . . .”<sup>163</sup>

From this point, the court turned to the scope of analysis which a court should use in examining a challenged use of peremptory challenges. The sixth amendment protects criminal defendants in “‘all criminal prosecutions.’”<sup>164</sup> Thus, courts are required under the sixth amendment “to decide each case on the basis of the acts or practices complained of in that very case, and not require the defendant to show, as [in] *Swain* . . . that those acts or practices have had undesirable effects in case after case.”<sup>165</sup>

After defining the scope of analysis, the court looked at various guiding principles behind the sixth amendment. First, the court indicated that “the goal of jury selection is to assure that each juror is free from bias.”<sup>166</sup> Next, the court stated that the notion “that all persons who share an attribute . . . will *ipso facto* view matters in the same way . . . [is] fallacious and pernicious.”<sup>167</sup> Finally, the court noted that the responsibility of a state prosecutor is to “see that justice is done, and justice is best served by a jury that represents a cross section of the community . . . .”<sup>168</sup> Combining these three principles, the court determined that the sixth amendment “allows the prosecution to exercise its peremptory challenges to excuse jurors [who have a bias specific to the case]; but it forbids the exercise of such challenges . . . solely on the basis of their racial

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161. “[T]he state is not permitted by the Sixth Amendment to restrict unreasonably the possibility that the petit jury will comprise a fair cross section of the community.” *Id.* at 1129. In support of this proposition, the court cited *Ballew v. Georgia*, 435 U.S. 223 (1978) (five-person jury violates sixth amendment not because of an improper venire, but because of unreasonably low likelihood of such jury comprising cross section of community); and *Whitherspoon v. Illinois*, 391 U.S. 510 (1968) (statute allowing for cause challenge of persons opposed to death penalty invalidated). 750 F.2d at 1129.

162. *Id.* at 1130.

163. *Id.*

164. *Id.* (emphasis supplied by the court).

165. *Id.* The court did not understand why the equal protection clause protects only the later defendants in a series of cases, as *Swain* provides. *Id.* However, the court was certain that the sixth amendment did not require a defendant to look for evidence beyond the facts of his own case. *Id.* The *Batson* decision arrived at the same result, relying on *Washington v. Davis*, 492 U.S. 252 (1977), and *Arlington Heights v. Metropolitan Housing Corp.*, 426 U.S. 229 (1976), for the proposition that discriminatory impact alone can demonstrate an unconstitutional purpose; and that discrimination can be shown on the facts of the plaintiff's case alone. 106 S. Ct. at 1722.

166. 750 F.2d at 1131. “By this we mean that he or she is likely to be able to decide the case solely on the basis of the evidence before the jury.” *Id.* (citing *Swain*, 380 U.S. at 219).

167. 750 F.2d at 1131.

168. *Id.*

affiliation.”<sup>169</sup>

Once the court determined that *Swain* did not control the outcome of a sixth amendment claim, a new test had to be developed for judging an attack on the use of peremptory challenges. To do so, the court “adapt[ed] the Supreme Court’s test for the establishment of a prima facie case of a Sixth Amendment violation with respect to the venire . . . .”<sup>170</sup> Thus, “to establish a prima facie violation of his right to the possibility of a fair cross section in the petit jury, the defendant must show that in his case, (1) the [excluded] group . . . is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of . . . group affiliation rather than [a bias specific to the case].”<sup>171</sup> If the defendant makes such a showing, the burden shifts to the prosecutor to show that the challenges were exercised for a proper reason.<sup>172</sup> If the prosecutor’s reasons “appear to be genuine,” then the court should accept those reasons, and voir dire will continue.<sup>173</sup> However, if the court determines that the prosecutor’s reasons are pretextual, or are inadequate to rebut the prima facie case, then “the court should declare a mistrial and a new jury should be selected from a new panel.”<sup>174</sup>

In applying this test to the facts of the case, the court concluded that McCray had established a prima facie case of improper use of the peremptory challenge.<sup>175</sup> Therefore, the burden was on the prosecutor to show that the peremptory challenges were properly used.<sup>176</sup> Since the district court did not give the prosecutor the opportunity to rebut the prima facie showing, the court remanded the case to give the prosecutor that opportunity.<sup>177</sup>

## V. TOWARD A BETTER PROCEDURE FOR INQUIRY INTO THE CHALLENGE

### A. *Substantive Goals*

The preceding analysis of lower court cases points out the short-

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169. *Id.*

170. *Id.* (citing *Duren v. Missouri*, 439 U.S. 357 (1979)).

171. *Id.* at 1131-32.

172. *Id.* at 1132. However, “the prosecutor need not show a reason rising to the level of cause.” *Id.*

173. *Id.* The trial judge has “the responsibility of assessing the genuineness of the prosecutor’s [reasons].” *Id.*

174. *Id.*

175. *Id.* at 1133.

176. *Id.*

177. *Id.* at 1134-35.

comings of the law in this area prior to *Batson*. The experience of these lower courts suggests desirable goals for change. The remainder of this Note will describe these goals and analyze the success of the *Batson* court in meeting them.

Above all, the experience of the lower courts demanded that a new rule should, unlike the rule in *Swain*, provide a navigable avenue of relief for all aggrieved parties, and it should not require them to gather facts from outside their own case.<sup>178</sup> The *Batson* court unequivocally met this goal and instructed courts that proof of discriminatory use of the challenge can be made based solely on the criminal defendant's own case.<sup>179</sup> This derives from the equal protection standard articulated in *Washington v. Davis*.<sup>180</sup> A law does not violate equal protection merely because it has a disparate impact; a discriminatory purpose must also appear.<sup>181</sup> Discriminatory purpose can appear from the application of a facially neutral law in one case alone; for instance, the combination of a disproportionate racial impact and a racially non-neutral selection procedure would suffice to show a violation.<sup>182</sup>

When examining a challenged use of peremptory challenges, a court should scrutinize the attorney's good faith in making the challenge. In that way, the court can avoid transforming the peremptory challenge into a type of "for cause" challenge.<sup>183</sup> *Batson* sets forth the following standard: while "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause," the prosecutor must articulate a "neutral explanation" for the challenge "related to the particular case to be tried."<sup>184</sup> Thus, once the criminal defendant has established an inference of improper use, the prosecutor must affirmatively show a good reason for the challenge; mere generalized assertions of good faith will not suffice. This represents a fairly substantial curtailment of the peremptory challenge in favor of the individual's rights.

### B. Court Procedures for Scrutinizing Peremptories

Prior to making any inquiry, a court must define a protected

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178. See *supra* notes 41-48 and accompanying text.

179. *Batson*, 106 S. Ct. at 1722-23.

180. 426 U.S. 229 (1976).

181. *Id.* at 239.

182. *Id.*

183. See, e.g., *People v. Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) (proffered reason for excluding minorities equally applicable to nonminorities who were not excluded).

184. *Batson*, 106 S. Ct. at 1723.

group. However, the lower courts' struggles with the issue suggest that care must be taken when doing so. The protected group should not be defined so broadly that actual bias cannot properly be excluded, nor so narrowly as to derogate from the protection of minority jurors. Courts before *Batson* fell into three general categories in defining the protected group.

### 1. *The Broad Rule*

*Wheeler* defines the protected group as one cognizable within the meaning of the fair cross section rule.<sup>185</sup> Thus, *Wheeler* adopts the rule for the jury pool and the panel cases. Similarly, the Massachusetts and New Mexico courts follow *Wheeler* in widely defining the protected group.<sup>186</sup>

### 2. *Limiting the Protected Group*

The Florida court in *State v. Neil*,<sup>187</sup> following the restrictive rule of the *Thompson* case,<sup>188</sup> places the most severe limitation on the protected group. The rule as announced in *Neil* applies only on behalf of blacks;<sup>189</sup> furthermore, a showing of a large number of challenges alone does not suffice to rebut the presumption of proper use.<sup>190</sup>

These cases permit a wide-ranging exclusion of jurors because of their group affiliation so long as they are not blacks. Thus, these cases might not impede the exclusion of specific bias; however, they may derogate from the preservation of groups other than blacks on the jury. Other groups besides blacks can fall victim to discriminatory exclusions.

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185. *Wheeler*, 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.

186. *Soares*, 377 Mass. at 438 n.33, 387 N.E.2d at 516 n.33. The New Mexico cases do not define the nature of the protected group, but they adopt the *Wheeler* "cognizable group" standard. *State v. Davis*, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

187. 457 So. 2d 481 (Fla. 1984).

188. *People v. Thompson*, 79 A.D.2d 205, 435 N.Y.S.2d 739 (1981).

189. *Neil*, 457 So. 2d at 487. *Accord Thompson*, 79 A.D.2d at 106, 435 N.Y.S.2d at 752 ("[O]ur Constitution requires that petit juries be selected in a manner that permits the exclusion of blacks only by means of either random selection or the challenging of prospective jurors, on the basis of actual or perceived partiality, which relates not to race alone . . .").

190. *Neil*, 457 So. 2d at 487 n.10; *Thompson*, 79 A.D.2d at 110, 435 N.Y.S.2d at 755 ("[A] black juror may have been peremptorily challenged, and properly so, because of some idiosyncrasy which does not appear on the cold record, but which was apparent to anyone who was intently observing the conduct of the *voir dire*"). *But cf. Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905 (a party may overcome the presumption of proper use of the challenge by showing that his opponent has struck all the members of a group or has used his peremptories disproportionately against group members).

### 3. *A Middle Approach*

A New York state trial court, ruling on an interlocutory motion for a mistrial, has suggested a middle approach.<sup>191</sup> This rule would trigger scrutiny whenever the challenged jurors are of the same group as the criminal defendant.<sup>192</sup>

The Court in *Batson*, in accordance with equal protection principles, extended protection to defendants who are members of "cognizable racial groups" protected under the equal protection clause. Members of these groups undoubtedly form the vast majority of potential jurors who are excluded for discriminatory reasons. Yet in the special setting of a trial, the prosecution might similarly exclude jurors who, for instance, are of the same religion as the defendant.<sup>193</sup> Arguably, defendants in such a situation should receive protection as well. Further development in this area is possible.

#### C. *Circumstances Triggering the Inquiry*

Once a party shows that peremptory challenges have been used to eliminate a specific group from the jury, a second question arises: What other trigger facts, if any, must be shown before a court can find a *prima facie* case of improper use of peremptories? The *Wheeler* shifting presumption rule and the New Mexico hybrid rule advocated scrutiny based solely on the number of challenges directed at group members alone;<sup>194</sup> the more limited rule set forth in *Neil* required more.<sup>195</sup>

*Batson* requires simply a showing that members of the defendant's race have been excluded from the jury, plus undefined additional circumstances showing an improper motive.<sup>196</sup> These may be a pattern of challenges, or statements made during voir dire. The Court leaves the trial judge discretion to establish the motive underlying the use of the challenge.

#### D. *Review by Shifting Presumptions*

*Wheeler* had established a system of shifting rebuttable presumptions which has been followed in subsequent cases in other

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191. *People v. Kagan*, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. 1979).

192. *Id.* at 276, 420 N.Y.S.2d at 989.

193. *Cf. Kagan*, *supra* note 191.

194. *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *See also Crespin*, 94 N.M. 486, 612 P.2d 716.

195. *Neil*, 457 So. 2d at 485-86.

196. *Batson*, 106 S. Ct. at 1723.

states.<sup>197</sup> There is an initial presumption of proper use.<sup>198</sup> Upon rebuttal of this presumption,<sup>199</sup> a presumption of improper use then shifts to favor the party objecting to the use of the peremptory challenge.<sup>200</sup> The striking party then has the burden of showing proper use.<sup>201</sup> *Batson* adopts the same procedure.<sup>202</sup>

The initial presumption of propriety should discourage the interposition of weak motions filed for purposes of delay. If the evidence is strong, however, the initial presumptions can be rebutted. Rebuttal of the initial presumptions then raises a presumption in favor of the objecting party. This shift in presumptions in turn guarantees the party using the challenge an opportunity to be heard.

### E. Remedies

In *Batson*, the trial court had simply rejected the defendant's objection to the use of challenges, without any sort of hearing.<sup>203</sup> The Court remanded to the trial court for a determination of whether there was purposeful discrimination and, if so, a reversal of the conviction.<sup>204</sup> Thus, the Court did not have occasion to consider possible alternative remedies at the time of empanelling the jury. Some suggestions derived from commentators and the experience of the lower courts follow.

Courts that have rejected *Swain* have all ruled that the applicable remedy is the one developed in *Wheeler*: dismissal of the jurors already selected, and the calling of a new panel.<sup>205</sup> However, this ignores the fact that the judge attending or directing voir dire may be able to prevent improper use without having to resort to the most drastic remedy. For example, in order to effectively exclude a group, a party must have a sufficient number of challenges to do so. Thus, one commentator has suggested the possibility of limiting the number of challenges available to a party making improper

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197. *Wheeler*, 22 Cal. 3d at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906; see *supra* notes 57-100 and accompanying text.

198. *Wheeler*, 22 Cal. 3d at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

199. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

200. *Id.*

201. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

202. 106 S. Ct. at 1723.

203. *Id.* at 1725.

204. *Id.*

205. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906; accord *Soares*, 377 Mass. at 491, 387 N.E.2d at 517; *McCray*, 750 F.2d at 1133 (Because McCray was making a collateral attack on a state verdict, he could not get this relief; however, "a mistrial should have been ordered and the jury selection process begun afresh.").

strikes.<sup>206</sup> Similarly, some jurisdictions may allow a very limited number of challenges, making it difficult for a party effectively to exclude a group. In these states, perhaps adding to the objecting party's challenges may suffice.<sup>207</sup> Of course, in some cases, beginning again with a new jury panel may be the only effective remedy. All such options should be available.

## VI. CONCLUSION

For over 20 years, *Swain v. Alabama*<sup>208</sup> dominated the law regarding the use of peremptory challenges. However, as critical literature<sup>209</sup> and lower court decisions recognized, the *Swain* rule led to injustice and the denial of equal protection. *Batson* responded to the need for change by overturning *Swain* on equal protection grounds.

The *Batson* court has met most of the goals for change demanded by the experience of the lower courts, particularly by allowing the criminal defendant a chance to prove improper use based on the facts of his case alone. The *Swain* requirement that an aggrieved defendant adduce facts from outside his own case had led to the most glaring injustices.<sup>210</sup> Other areas, such as the scope of protection and remedial measures available to trial judges at the time of voir dire, remain open for further development. Such development in the constitutional law of peremptory challenges had been stifled by *Swain*, but it now seems assured by the decision in *Batson*.

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206. Note, *supra* note 42, at 1740.

207. See Sullivan, *supra* note 41, at 500.

208. 380 U.S. 202 (1965). See *supra* notes 18-41 and accompanying text.

209. See *supra* note 42 and accompanying text.

210. See *supra* note 43.



