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The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges

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I. Introduction

For more than 600 years of Anglo-American jurisprudence the ability to peremptorily challenge prospective jurors has been a sacrosanct right of prosecutors and defendants.[1] One year ago in *Batson v. Kentucky*,[2] the Supreme Court devised a far-reaching test to prevent prosecutors from abusing peremptory challenges by excluding jurors solely on the basis of race. The decision was the Court's first deep inroad into the heretofore unquestioned use of the prosecutor's peremptory challenge.[3] Although the Court limited its holding to the defendant's right to object to a prosecutor's abuse of peremptory challenges, *Batson* begs the question of whether its limitation should be extended to a defendant's exercise of peremptory challenges.[4]

The defendant's use of peremptory challenges to exclude jurors on the basis of race, though left unaddressed by the Supreme Court, is a contemporary problem. In the greatly publicized Howard Beach murder trial in New York City, prosecutors objected when defense attorneys purportedly used peremptory challenges to exclude three prospective black jurors on the basis of their race.[5] The trial court, in what was the first decision of its kind in New York state, held that the defendants had improperly used their peremptories[6] and explic-

1. Swain v. Alabama, 380 U.S. 202, 212-13 (1965). The peremptory challenge has been the subject of abuse for an equally long time. *See* J. M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977) [hereinafter VAN DYKE].

2. 106 S. Ct. 1712 (1986).

3. Although the Supreme Court addressed the issue of peremptory abuse to exclude blacks in *Swain*, the *Swain* test placed an insurmountable burden of proof upon the defendant who attempted to make a prima facie equal protection case. Thus, *Swain* effectively insulated the peremptory challenge from judicial review. *See* Comment, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1770-71 (1979).

4. Recently, at least one state's lower courts have chosen to extend *Batson* to apply to a defendant's use of peremptories. *See Howard Beach: Selection of Jury is Found Biased*, N.Y. Times, Sept. 22, 1987, at A1, col. 1; People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (1988).

5. *Howard Beach: Selection of Jury is Found Biased*, N.Y. Times, Sept. 22 1987, at A1, col. 1. *See also Must a Jury of One's Peers Be a Panel of One's Race?* N.Y. Times, Sept. 20, 1987, § 4 (Week in Review), at 6, col. 4.

6. *Howard Beach: Selection of Jury is Found Biased, supra* note 4, at A1, col. 1.

itly expanded *Batson* to defendants as well as prosecutors.[7]

Only the high courts of California,[8] Massachusetts,[9] and Florida[10] have addressed the issue of whether a defendant may use peremptories to exclude venire members on the basis of race. These courts grounded their decisions on federal and state constitutional guarantees to a jury selected from a representative cross-section of the community.[11] In light of *Batson*, however, many courts are likely to face the issue of defendants' peremptory abuse.

In the aftermath of *Batson*, two pivotal questions emerge. First, does the United States Constitution grant a prosecutor the right to object to the defense attorney's use of peremptories to exclude a prospective juror on the basis of race? Second, if the Constitution does provide the prosecutor with such a right, is it found under the sixth and fourteenth amendments' guarantee of a fair and impartial jury or is the right based upon the fourteenth amendment's equal protection clause?

This comment addresses why application of the sixth amendment's "representative cross-section" requirement to petit jury selection is inappropriate for curbing a defendant's use of peremptories to exclude prospective black jurors. It proposes that, in the aftermath of *Batson*, courts should use an equal protection approach to limit a defendant's abuse of peremptories on the basis of race, despite the significant hurdles of the fourteenth amendment's "state action" and standing requirements.

II. The Role of the Peremptory Challenge in Criminal Trials

A. Jury Selection Procedure

Generally, the jury for a criminal trial is composed in three stages.[12] The first stage is the creation of a master list of prospective

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7. *Id.*

8. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

9. Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

10. State v. Neil, 457 So. 2d 481 (Fla. 1984).

11. *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903 (use of peremptory challenges by defendant or prosecutor to remove prospective jurors solely on the basis of group bias violates the right to trial by a jury drawn from a representative cross section of the community as guaranteed by article I, section 16 of the California Constitution); *Soares*, 377 Mass. at ____, 387 N.E.2d at 516 (peremptory abuse violates article I of the Declaration of Rights of the Massachusetts Constitution); *Neil*, 457 So. 2d at 486 (use of peremptory challenges to exclude black persons on the basis of race violates article I, section 16 of the Florida Constitution).

12. *See generally* VAN DYKE, *supra* note 1, at 85-175 (1977). A summary of California's jury selection procedures is found in *Wheeler*, 22 Cal. 3d at 272-74, 583 P.2d at 758-59,

jurors.[13] Typically, county jury commissioners prepare the list from existing juror lists, voter registration lists, tax assessor lists, city directories, and telephone books.[14] The sixth and fourteenth amendments mandate that selection for the master list have the goal of creating "a fair cross-section of the community."[15] In the second stage of jury selection, court personnel excuse from service those prospective jurors who are statutorily disqualified by reason of incompetence, recent prior jury service, employment in specific professions or hardship.[16]

Once the case is called to trial and the pool of prospective jurors, called the venire, is assembled, the final stage of jury selection occurs. This stage is the *voir dire*,[17] in which the parties may question jurors and then challenge them on the basis of individual or group bias.[18] The selection procedure exercised at this stage of the proceedings is different in kind from the creation of the master list, in that it involves a negative means of selection. Whereas the goal of the master list is to create a pool of eligible jurors representative of a "fair cross-section of the community,"[19] the purpose of the challenge stage is to eliminate prospective jurors who the parties believe may have bias against the defendant or the prosecution and who therefore threaten the impartiality of the jury.[20]

The challenges afforded to the prosecutor and defendant during

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148 Cal. Rptr. at 900-01.

13. VAN DYKE, *supra* note 1, at 85-109. In Pennsylvania, creation of the master list of prospective jurors is governed by 42 PA. CONS. STAT. ANN. § 4521 (Purdon & Supp. 1985).

14. VAN DYKE, *supra* note 1, at 87. In Pennsylvania, a jury selection committee annually compiles a master list of prospective jurors from the voter registration lists for the county or from some other list that will provide an equal number of prospective jurors. In addition, the commission may supplement the master list with names drawn from: telephone, city or municipal directories; tax assessment lists; lists of participants in any federal, state, county or local program; school census lists; and a list of other persons who apply to the commission to be included on the master list of prospective jurors. 42 PA. CONS. STAT. ANN. § 4521.

15. Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

16. *See, e.g.*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY Standard 2.1 (1968). In Pennsylvania, exemption from jury duty is governed by 42 PA. CONS. STAT. ANN. § 4503 (Purdon Supp. 1987), authorizing jury commissioners to excuse persons from jury duty for actively serving in the armed forces, serving on a jury within the previous three years, or demonstrating to the court that jury service will cause undue hardship or extreme inconvenience.

17. *Voir dire*, from the Law French, literally means "to speak the truth." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979). It is the preliminary examination of prospective jurors, conducted by the judge or by counsel, to determine a prospective juror's competency and absence of interest in the case. *Id. See also* Swain v. Alabama, 380 U.S. 202, 218-19 (1965) (describing American *voir dire* as "extensive and probing, operating as a predicate for the exercise of peremptories").

18. VAN DYKE, *supra* note 1, at 139-40.

19. *Taylor*, 419 U.S. at 527.

20. VAN DYKE, *supra* note 1, at 139-40.

the third stage of jury selection are of two types: challenges for cause and peremptory challenges.[21] Their scope is typically defined by statute.[22] A party may exercise an unlimited number of challenges for cause, but the judge must approve of the exclusion.[23] Generally, a court will sustain a challenge for cause in two situations. First, a court will sustain a challenge for cause when the prospective juror has shown by his answers during *voir dire* that he is incapable of being an impartial juror.[24] Second, it will do so when, regardless of the venire member's answers, the court presumes a likelihood of bias on the part of the juror because of a familial, social or financial relationship with a party to the case.[25]

A party may exercise the second type of challenge, the peremptory, "without a reason stated, without inquiry and without being subject to the court's control."[26] Typically, the number of peremptories afforded each party is limited by jurisdictional rules of civil procedure.[27]

B. Historical Importance of the Peremptory Challenge

The historical roots of the peremptory challenge demonstrate the importance of this right to defendants.[28] Blackstone viewed the

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21. *Id.* at 139.

22. *Cf.* People v. Wheeler, 22 Cal. 3d at 273-74, 583 P.2d at 759, 148 Cal. Rptr. at 900-01. In Pennsylvania, however, the statute merely incorporates the common law grounds for challenges for cause and peremptory challenges. 42 PA. CONS. STAT. ANN. § 4503 (Purdon & Supp. 1987). Section 4503 states, "This subchapter shall not affect the existing practice with respect to peremptory challenges and challenges for cause." *Id. See also* 42 PA. CONS. STAT. ANN. § 4526(f) (Purdon 1981); PA. R. CRIM. P. 1126.

23. VAN DYKE, *supra* note 1, at 140.

24. Commonwealth v. Stamm, 286 Pa. Super. 409, 415, 429 A.2d 4, 7 (1981).

25. *Id.* at 416, 429 A.2d at 7.

26. Swain v. Alabama, 380 U.S. 202, 220 (1965). While this definition remains true in most circumstances, the Supreme Court has given the trial court some control over the prosecutor's abuse of peremptory challenges when black prospective jurors are excluded because of their race. *See* Batson v. Kentucky, 106 S. Ct. 1712 (1986).

27. For example, Pennsylvania affords both sides five peremptory challenges in misdemeanor trials, seven in noncapital felony trials, and twenty in capital trials. PA. R. CRIM. P. 1126. In the federal courts, each side is entitled to twenty peremptory challenges in capital cases. If the offense is punishable by more than a year in prison, the government is allowed six peremptories and the defendant ten. For crimes punishable by less than one year, each side receives three peremptory challenges. FED. R. CRIM. P. 24(b). When there is more than one defendant, the number of peremptories for both sides may be adjusted. *See* PA. R. CRIM. P. 1126(b) and FED. R. CRIM. P. 24(b).

28. Blackstone set forth two reasons the peremptory was essential to the defendant. First, the necessity that a defendant, especially in the capital trials, have confidence in his jury requires that the defendant have the power to exclude a prospective juror based "upon sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." 4 W. BLACKSTONE, COMMENTARIES 346-47 (1769). Second, the defendant may provoke resentment in a juror by vigorous questioning during the *voir dire*. While such an objection to a juror may not rise to the level of a challenge for cause, Blackstone

peremptory as a right granted essentially to benefit the defendant.[29] He called it "a provision full of the tenderness and humanity to prisoners, for which our English laws are famous."[30] At common law, the defendant received 35 peremptory challenges.[31] The Crown, however, by means of a procedure known as "standing aside," could exclude an unlimited number of jurors.[32]

In colonial and early United States history, citizens' distrust of a powerful central government manifested opposition to the prosecutor's right to "stand aside" jurors.[33] In *United States v. Shackelford*,[34] the Supreme Court held that the English practice of "standing aside" was not required practice in the federal courts. Unless the state granted the prosecutor the right to peremptory challenges, the prosecutor in federal court had none.[35]

With regard to the defendant, however, Congress recognized the importance of peremptories. In 1790, it granted thirty-five challenges without cause to persons on trial for treason and twenty to those charged with other specified capital crimes.[36] Although this law made no provision for the prosecutor to exercise peremptories,[37] most states had statutorily granted peremptories for the prosecution by the mid-nineteenth century.[38]

C. *The Practical Importance of the Peremptory in Criminal Trials*

The purpose of the peremptory challenge is "not only to elimi-

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believed the exclusion of such jurors necessary to ensure impartiality of the jury. *Id.*

29. *Id.*

30. *Id.* at 346.

31. *Id.* at 347. In England, the number of peremptories allowed to the defendant was reduced to 20 in 1530 and now is set at seven. VAN DYKE, *supra* note 1, at 147-48.

32. At early common law, the Crown could exercise an unlimited number of peremptory challenges. Recognizing the potential of such a practice for prosecutorial abuse, the English Parliament passed a law in 1305 that limited the prosecutor to challenges for cause. English judges, however, essentially preserved an unlimited number of peremptories for the Crown by creating a procedure known as "standing aside." Under this procedure, the Crown could make a challenge for "cause," but the court did not require the prosecutor to state the reasons for the challenge at the time it was made. Only in unusual circumstances in which the jury selection process failed to yield twelve jurors was the prosecutor asked to state the reasons for the challenges against prospective jurors who had been stood aside. *See Ordin. de Inquis.*, 33 Edw. I, ch. 4 (1305) (repealed 1825); 4 W. BLACKSTONE, *supra* note 28, at 347; VAN DYKE, *supra* note 1, at 146-48.

33. VAN DYKE, *supra* note 1, at 148-49. New York did not allow the prosecution any peremptory challenges until 1881. Virginia finally granted peremptory challenges to the prosecution in 1919. *Id.* at 149 n.46.

34. 59 U.S. 588 (1856).

35. *Id.* at 590.

36. 1 Stat. 119, ch. IX § 30 (1790).

37. *Id.*

38. VAN DYKE, *supra* note 1, at 150.

nate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[39] Many attorneys believe that trials may be won or lost by strategic use of peremptories.[40] One study has concluded that jury verdicts are seriously affected by the exercise of peremptories and that indeed lawyers sometimes win their cases in the *voir dire* stage of proceedings.[41]

Lawyers, recognizing the peremptory's influence on the outcome of trials, have employed various means in deciding when to exercise the exclusion. While some lawyers rely on instinct, others have employed persons of various skills, ranging from pollsters to psychics, to advise them during the *voir dire*,[42] with varying results.[43] Besides the premise of individual bias, the decisions to exercise peremptories have been based on the belief that certain groups will view one side of the case unfavorably. The groups have been defined in various ways: by education,[44] by the magazines they read,[45] and by political opinion.[46]

Prosecutors and defendants also have employed the peremptory to exclude persons on the basis of race. Prior to *Batson*, the Supreme

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39. Swain v. Alabama, 380 U.S. 202, 219 (1965).

40. VAN DYKE, *supra* note 1, at 139.

41. H. Zeisel and S.S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L .REV. 491, 518-19 (1978). The authors of this article studied twelve federal criminal trials in order to determine whether the parties' exclusion of jurors by peremptory challenges had an impact on the verdict. The study also concluded that attorneys' "correctness" in exercising peremptories varied greatly, but that the *voir dire* was occasionally decisive. *Id.* at 528-29.

42. In the 1975 Joan Little murder trial in North Carolina, the defense team employed, for jury-selection purposes, sociologist Jay Schulman, an expert on social science jury selection techniques, and Richard Christy, a social psychologist then at Columbia University. The team also employed a "body language" expert and an astrologer-psychic. The astrologer received $3,000 for his contribution to jury selection. Little was a young black woman accused of fatally stabbing her jailer eleven times with an ice pick. Her plea was self-defense — that she had killed the jailer when he tried to force her to have oral sex. The jury acquitted her after deliberating only seventy-eight minutes. E. Tivnan, *Jury By Trial*, N.Y. Times, Nov. 16, 1975, § 6 (Magazine) at 30 [hereinafter Tivnan].

43. One surprisingly unsuccessful result occurred in the 1971 Harrisburg Seven trial in which a group of Vietnam Conflict protestors faced federal conspiracy charges. Defense lawyers did not exclude one woman because she had four sons who were conscientious objectors. Ironically, the woman was one of two members of the jury who held out for conviction and hung the jury. Tivnan, *supra* note 42, at 30.

44. During the trial of former United States Attorney General John Mitchell, defense attorneys employed peremptories to exclude all persons with a college education from the jury. VAN DYKE, *supra* note 1, at 155.

45. In the Joan Little trial, the defense team's research indicated that prospective jurors' choice of magazine subscriptions was the strongest indicator of whether the juror would favor the defendant's case. *See* Tivnan, *supra* note 42, at 30. *See supra* note 42.

46. *See* Tivnan, *supra* note 42, at 30.

Court had found no constitutional limitation on such use.[47] In fact, the Court's opinion in *Swain v. Alabama*[48] effectively precluded any attack on peremptory abuse based on the equal protection clause of the United States Constitution.

Swain marked the first time the Supreme Court addressed the issue of whether the Constitution precluded the use of peremptories to exclude blacks from a jury. An all-white jury had convicted the black defendant in *Swain* of raping a white woman, and the defendant was sentenced to death.[49] During jury selection the prosecutor had used peremptory challenges to strike all six blacks from the jury pool.[50] Furthermore, the defendant showed that no black had served on a jury in the county where the case was tried for at least 15 years, although the average jury pool included approximately six blacks.[51] The Supreme Court held that a defendant could not overcome the presumption that the prosecutor had used his peremptories properly based on evidence from a single case.[52] In dicta, it recognized that if a defendant could show that under every circumstance the prosecutor had consistently excluded blacks from juries in case after case, the defendant could meet the burden of proof.[53] The Court found, however, that the defendant's evidence over 15 years was insufficient to meet this extremely high burden.[54]

III. State Approaches to the Defendant's Abuse of Peremptories

The burden of proof that *Swain* placed upon defendants virtually precluded an equal protection-based challenge to peremptory abuse. State courts, recognizing the obvious injustice to a black defendant when he was tried by a jury from which blacks had been excluded, sought other means of correcting peremptory abuse. These state courts found a potential basis for limiting such abuse in *Taylor v. Louisiana*.[55]

The Supreme Court in *Taylor* held that the fourteenth amendment due process clause incorporates the sixth amendment guarantee that an accused has the right to a jury drawn from a fair cross sec-

47. *See* Swain v. Alabama, 380 U.S. 202 (1965).
48. *Id.*
49. *Id.* at 203.
50. *Id.* at 205, 210.
51. *Id.* at 205.
52. *Id.* at 221-22.
53. *Id.* at 223-24.
54. *Id.* at 226.
55. 419 U.S. 522 (1975).

tion of the community.[56] California,[57] Massachusetts,[58] and Florida[59] have adopted the representative cross section requirement as a rationale to allow the prosecutor to object to a defendant's abuse of peremptories.

Basically, these states have extended a reciprocal right to the prosecutor to object to peremptory misuse, with justification of the right arising in part out of the limitation these courts have imposed on prosecutorial abuse of peremptories. These courts apparently derive this right out of a concept of fair play. For example, in *Commonwealth v. Soares*[60] the Supreme Judicial Court of Massachusetts held that the Commonwealth, by peremptorily excluding twelve of thirteen eligible black jurors because of their race, violated the black defendants' right to "a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits."[61] In a footnote, the court made note of the "Commonwealth's interest in prosecutions that are 'tried before the tribunal which the Constitution regards as most likely to produce a fair result.' "[62] Similarly, the Florida Supreme Court in *State v. Neil*[63] briefly summarized its rationale for extending to prosecutors the right to object: "The state, no less than the defendant, is entitled to an impartial jury."[64] California, in *People v. Wheeler*,[65] provided a

56. *Id.* at 538. In *Taylor*, the defendant had been convicted by a jury in Louisiana state court of aggravated kidnapping and sentenced to death. The Louisiana jury selection system provided that women were not eligible for jury service unless they had filed a written declaration of their desire to serve. The Supreme Court held that the defendant's constitutional guarantee of "the selection of a petit jury from a representative cross section of the community," *id.* at 528, mandated that "women cannot be systematically excluded from jury panels from which petit juries are drawn." *Id.* at 533.

57. *See* People v. Wheeler, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 906 (1978) (stating that the government has no less a right than the defendant "to a trial by an impartial jury drawn from a representative cross-section of the community"). The *Wheeler* dicta has not yet been tested in the California appellate courts. *Cf.* People v. Trevino, 39 Cal. 3d 667, 683 n.10, 704 P.2d 719, 726, 217 Cal. Rptr. 652, 649 (1985).

58. *See* Commonwealth v. Soares, 377 Mass. 461, ___ n.35, 387 N.E.2d 499, 517 (1979), in which the court stated, "We deem the Commonwealth equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense." The court also noted that if the black defendant, as contended by the Commonwealth, had attempted to exclude peremptorily all prospective jurors of Italian descent from the jury, such a practice would have been prohibited under their new rule. *Id.*

59. *See* State v. Neil, 457 So. 2d 481, 487 (Fla. 1984) ("The state, no less than the defendant, is entitled to an impartial jury.") *Cf. Wheeler*, 22 Cal. 3d at 282 n.29, 583 P.2d at 765, 148 Cal. Rptr. at 906.

60. 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

61. *Id.* at ___, 387 N.E.2d at 516 (quoting *Wheeler*, 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903).

62. *Id.* at ___, 387 N.E.2d at 517 n.35 (quoting Singer v. United States, 380 U.S. 24, 36 (1965)).

63. 457 So. 2d 481 (Fla. 1984).

64. *Id.* at 487.

65. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

similar abbreviated justification for the prosecutor's reciprocal right of objection.[66]

Massachusetts' appellate courts have applied the prohibition against defendants' abuse of peremptory challenges on at least two occasions.[67] In *Commonwealth v. Reed*,[68] the defendant, a woman charged with murdering a man, raised peremptory challenges to exclude from the jury the first six male prospective jurors who were summoned.[69] The prosecutor asked the judge to require the defendant to explain her use of the challenges.[70] The judge, expressly relying on *Soares*, found that the defendant had used her peremptories to exclude prospective jurors on the basis of their sex and asked the defense counsel to explain the challenges.[71] When counsel refused to offer an explanation, the judge disallowed the challenges and the six men were installed on the jury.[72] On appeal, the Supreme Judicial Court of Massachusetts held that the trial court had acted properly.[73] The court stated that the defendant's right to exercise peremptories was only a statutory right, and that the trial court, by disallowing the challenges, had not infringed on the defendant's constitutional rights.[74]

White defendants in *Commonwealth v. DiMatteo*[75] attempted to peremptorily exclude from the jury the sole black member of the jury venire.[76] The prosecutor, who was black,[77] objected, noting that with the exception of her race, the prospective juror's background

66. *Id.* at 282 n.29, 583 P.2d at 765, 148 Cal. Rptr. at 906.

67. For a third and unique case discussing peremptory abuse by defendants, *see* Commonwealth v. Whitehead, 379 Mass. 640, 400 N.E.2d 821 (1980). In *Whitehead*, one female co-defendant complained that her female co-defendant had unconstitutionally excluded female prospective jurors by means of peremptory challenges in a trial for female-to-female rape. The court held that "it would be a perverse misuse of the doctrine" barring peremptory challenges to exclude jurors on the basis of sex to overturn the appellant's conviction when the appellant had failed to object at trial to her co-defendant's acts and when the peremptory abuse provided the appellant with the same supposed advantage as the purported violator. *Id.* at ____, 400 N.E.2d at 828.

68. 384 Mass. 247, 424 N.E.2d 495 (1981).

69. *Id.* at ____, 424 N.E.2d at 498.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at ____, 424 N.E.2d at 500. The deferential standard used by the Supreme Judicial Court indicates that the scope of review it applied to the trial court's decision was "abuse of discretion."

74. *Id.* at ____, 424 N.E.2d at 499. Further authority that the peremptory challenge is not a constitutional right is found in Swain v. Alabama, 380 U.S. 202, 219 (1965) (citing Stilson v. United States, 250 U.S. 583, 586 (1919)).

75. 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981).

76. *Id.* at ____, 427 N.E.2d at 757.

77. *Id.* at ____, 427 N.E.2d at 758.

was similar to that of the other jurors against whom the defendant's counsel had raised no objections.[78] The trial court rejected as mere pretexts the reasons proffered by defense counsel, who claimed that he had excluded the juror because she was a widow and because of the way she looked at the defendant.[79] The appellate court found that given the circumstances of the *voir dire* — white defendants, a black prosecutor, and a single black venireman — the judge could have concluded that the defendant had improperly exercised a peremptory challenge, even though there was no "pattern of conduct."[80]

The Massachusetts, California, and Florida courts derived the prosecutor's right to challenge a defendant's use of peremptories from their initial holdings allowing a defendant to object to the prosecutor's abuse of peremptory strikes.[81] Beyond the obvious inequality of permitting only a defendant to exercise peremptories without supervision, however, the courts' analysis of the legal and policy issues raised by granting the same right to the prosecutor was minimal.[82]

The reasoning applied by the Massachusetts, California and Florida courts assumes that unless the prosecutor receives a right to object equal to the defendant's right, a purported constitutional guarantee to the prosecutor of an "impartial jury" is abridged. Traditionally, however, the Supreme Court has let the legislature, rather than the courts, protect the prosecutor's interest in a fair trial.[83] The Supreme Court has held that the peremptory challenge is neither a common law nor a constitutional right, but is rather a purely statutory one.[84] Furthermore, the Court has read the sixth amendment's "impartial jury" guarantee as primarily protecting the defendant:

> The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by

78. *Id.* at ____, 427 N.E.2d at 757.

79. *Id.*

80. *Id.* at ____, 427 N.E.2d at 758.

81. Two states, Massachusetts and California, demoted their original decisions concerning prosecutorial rights to footnotes. People v. Wheeler, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906; Commonwealth v. Soares, 377 Mass. 461, ____, 387 N.E.2d 449, 517 n.35.

82. A more provident approach was taken by the Supreme Court in Batson v. Kentucky, 106 S. Ct. 1712, 1718 n.12 (1986), wherein the court limited its holding to prosecutorial misuse of peremptories and saved the issue of the defendant's abuse of peremptories for another day.

83. The sixth amendment's text itself supports the concept that it protects defendants, but not prosecutors. It states that, "In all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI, § 1 (emphasis added). *See* Hayes v. Missouri, 120 U.S. 68, 70 (1887).

84. United States v. Shackelford, 59 U.S. 588, 590 (1856).

> jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused.
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> . . .
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> In the light of the foregoing, it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.[85]

Courts should therefore recognize that any prosecutorial right to object to peremptory abuse may not arise out of a constitutional guarantee to an impartial jury because this constitutional guarantee protects only the defendant. It is rather the duty of the legislature to protect the state interest in a fair trial. Indeed, except for the rights of the *defendant* protected by the Constitution, the duty "to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties . . . . With regard to peremptories, the whole matter is under [legislative] control."[86]

Such a view does not mean that the Constitution provides no guarantee to the prosecutor of a fair trial, but rather that a court, in deciding whether the prosecutor had a fair trial, should defer greatly to the intent of the legislature.[87] Thus, when the legislative body has granted the defendant an unfettered peremptory challenge, courts should be reluctant to review this statutory right under the auspices of guaranteeing the prosecutor a fair trial.[88]

Another fundamental difficulty with extension of the sixth amendment's representative cross section guarantee to prosecutors is the broad definition of what "identifiable groups" cannot be systematically excluded from the jury panel.[89] Courts have held that jury panel selection procedures shall not systematically exclude groups

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85. Patton v. United States, 281 U.S. 276, 296-97 (1929). *See also* Commonwealth v. Wharton, 495 Pa. 581, 594, 435 A.2d 158, 164 (1981) (noting that although the defendant has a constitutional right to trial by jury, the prosecution does not have a commensurate constitutional right to demand a jury.)

86. *Hayes*, 120 U.S. at 70.

87. This view is consistent with the explanation of heightened judicial scrutiny set forth by Justice Stone in United States v. Carolene Products Co., 304 U.S. 144 (1938). Although prejudice against a criminal defendant may require the court to engage in heightened scrutiny in order to ensure the impartiality of the jury, the "political processes" may be relied upon to protect the prosecutor's interest in an impartial jury. *Id.* at 153 n.4.

88. Of course, state courts interpreting their state constitutions are free to afford greater protections than those afforded by the United States Constitution. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978).

89. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

defined by language,[90] race,[91] economic status,[92] sex,[93] and occupation.[94] These cases, however, provide only a loose framework as to what constitutes an identifiable group.[95]

A peremptory challenge, by definition, is based on some unarticulated suspicion of bias, often predicated on the juror's "group" affiliation.[96] When, for instance, a defense attorney may exclude prospective jurors because they come from the crime victim's neighborhood or from a different economic stratum than the defendant, application of the sixth amendment fair cross-section analysis may undo these challenges. Such broad-based definitions of what comprises a cognizable group may eviscerate peremptory practice and mark its demise as an effective device for the defendant to use in securing an impartial jury.[97]

The Massachusetts *Soares* decision, in order to avoid making too great an inroad into peremptories, limited the identifiable groups against which a party may show peremptory misuse to those defined by sex, race, color, creed or national origin.[98] The Florida court in *Neil* spoke only of the exclusion of a "distinct racial group."[99] Only California couched its holding in broad terms of the representative cross section requirement. It recognized peremptory exclusion of any "cognizable group" as unconstitutional but declined to explain what constitutes a cognizable group.[100]

The Massachusetts holding in *Soares* and the Florida holding in

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90. *See* United States v. Ramos Colon, 415 F. Supp. 459 (D.C. Puerto Rico 1976).

91. *See* United States v. Gometz, 730 F.2d 475, 478 (7th Cir. 1984).

92. *See* United States *ex rel.* Barksdale v. Blackburn, 610 F.2d 253, 272 (5th Cir. 1972) (exclusion of "wage earners").

93. *See Taylor*, 419 U.S. 522 (1975).

94. *See* Simmons v. State, 182 So. 2d 442 (Fla. 1966).

95. *See* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

96. A defendant may, however, object to the exclusion of a group, even though he or she is not a member of the group. *Taylor*, 419 U.S. at 526. Such broad standing to object distinguishes a sixth amendment "representative cross section" from most equal protection cases. *Cf.* Batson v. Kentucky, 106 S. Ct. 1712, 1723 (1986), in which the Court required that the defendant show that the excluded jurors and defendant were members of the same racial group.

97. The challenges based on nonracial group biases are not nearly as invidious a form of discrimination as discrimination based on race. Thus, balancing the importance of the peremptory challenge to the defendant against a limitation barring the peremptory from being used to exclude on any group bias, the importance of the peremptory may prevail. When, however, the importance of the peremptory is weighed against the detriments of racial discrimination, a different conclusion may be reached. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

98. Commonwealth v. Soares, 377 Mass. 461, ____, 387 N.E.2d 499, 516 (1978).

99. State v. Neil, 457 So. 2d 481, 486 (Fla. 1984).

100. People v. Wheeler, 22 Cal. 3d 38, 280 n.26, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905.

Neil have been criticized as equal protection cases in the guise of the sixth amendment.[101] Unless these two state courts reevaluate the application of the representative cross section guarantee to the challenge stage of jury selection, these holdings are subject to extension to other cognizable groups and to erosion of the artificial limitations these courts have placed on the grounds for objection. Eventually, such decisions, if their analysis is permitted to stand, may erode effective peremptory practice.[102]

IV. Equal Protection: The Proper Approach to Limiting the Defendant's Abuse of Peremptories

For over a century, the Supreme Court has invoked the equal protection clause to protect against racial discrimination in jury selection procedures.[103] In *Strauder v. West Virginia*,[104] the Court invalidated a state statute that limited grand and petit jury service to "all white men who are 20 years of age and who are citizens of this state."[105] Similarly, the Court in *Swain v. Alabama* recognized that use of peremptory challenges was subject to equal protection analysis, yet placed an insurmountable burden of proof upon the defendant who attempted to show peremptory abuse.[106] It was left to *Batson v. Kentucky* to allow proof of purposeful discrimination to be inferred from a single case.

The defendant in *Batson*, a black man, was charged with burglary and receipt of stolen goods.[107] During jury selection the state prosecutor used his peremptory challenges to strike all four blacks from the venire, leaving an all-white jury.[108] The defense counsel moved to discharge the jury on the grounds that the prosecutor's use of peremptories had violated the defendant's sixth and fourteenth

101. *See* Note, *Sixth and Fourteenth Amendments — The Swain Song of the Racially Discriminatory Use of Peremptory Challenges*, 77 J. CRIM. L. & CRIMINOLOGY 821, 840 (1986) [hereinafter *Swain Song*].

102. A premise of this comment is that only peremptories used for the purposeful discrimination against prospective jurors on the basis of race, color or national origin are so pernicious that they should be the subject of judicial review.

103. Strauder v. West Virginia, 100 U.S. 303 (1880) was the Supreme Court's first jury discrimination case. Typically, in an equal protection case, the complaining party must show a "class," and must show discrimination against the "class." Racial classes always have been afforded the greatest protection. *See* McLaughlin v. Florida, 379 U.S. 184, 196 (1964). *See also* Hernandez v. Texas, 347 U.S. 475 (1954) (persons of Mexican descent are a class protected by fourteenth amendment).

104. 100 U.S. 303 (1880).

105. *Id.* at 305.

106. *See* Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

107. Batson v. Kentucky, 106 S. Ct. 1712, 1715 (1986).

108. *Id.*

amendment right to a jury selected from a representative cross-section of the community and his fourteenth amendment right to equal protection of the laws.[109] The Kentucky Supreme Court, relying on *Swain*, affirmed.[110]

In a 7-2 decision, the Supreme Court reversed the conviction and expressly overruled the "crippling burden" placed on defendants by *Swain*.[111] Under the new *Batson* standards, a defendant could establish a prima facie case of purposeful discrimination in petit jury selection by proving two elements. First, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptories to remove venire members of the defendant's race.[112] Second, the defendant can rely on circumstantial evidence to demonstrate an inference of discriminatory purpose by the prosecutor.[113] Such evidence may take the form of a "pattern" of strikes against members of the defendant's race or be inferred from questions and statements during the *voir dire*.[114] After the defendant has presented a prima facie case, the burden falls on the state to present a neutral explanation of the challenges.[115]

Although *Batson* expressly refused to address whether the United States Constitution limits a defendant's abuse of peremptories, the concurrence of Justice Marshall accepts such a possibility. In support of his proposal that peremptories should be abolished altogether, Marshall stated that the

> potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.[116]

A curb on the defendant's abuse of peremptories, however, need not take the drastic form of abolition of the time-honored practice. A limitation on abuse should still preserve the protections that the peremptory affords. By extension of the *Batson* test to situations in

109. *Id.*
110. *Id.*
111. *Id.* at 1720.
112. *Id.* at 1723.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 1729. During oral argument, several questions of the Court discussed the possible application of the equal protection clause to a defendant's abuse of peremptories. *See* Batson v. Kentucky, Transcript of Oral Argument, at 8-9, 20, 26 (1986) [hereinafter *Transcript*].

which a defendant of one race seeks to exclude members of another race, color, or national origin, the test would place defendants on notice that courts will not tolerate abuse of peremptory challenges. Furthermore, if circumstances indicate that a defendant has exercised peremptory challenges on racial grounds, a trial judge will be empowered to take corrective action.[117]

An essential element of an equal protection violation is that the discrimination be "purposeful."[118] A defendant thus can still lawfully challenge a minority juror, or several minority jurors, on grounds other than race.[119] In such cases, however, a defendant should be prepared to explain the nonracial reasons for the challenges. It is this requirement of purposeful discrimination that distinguishes an equal protection case from one under the "representative cross section" requirement of the sixth amendment. Violations of the sixth amendment are based not only on intentional exclusion but also on the "systematic exclusion" of a group.[120] The requirement of "systematic exclusion" does not properly address the individualized use of peremptories. It is difficult, for example, to find systematic exclusion of black jurors when a white defendant asserts a peremptory to exclude the sole black member of the venire.[121] Such a flaw does not exist in a challenge to peremptory abuse based on equal protection grounds. The Supreme Court has recognized that a single

117. The form of remedy may depend upon the jury selection procedure used by the particular court. A venire member who previously has been advised of his dismissal from the jury panel by the defendant may carry a grudge against the defendant. In such instances, the trial judge should not reinstate the prospective juror but should instead dismiss jury members already selected and the remaining venire and begin jury selection anew. If, however, the prosecutor raises an objection while the prospective juror is ignorant of his dismissal by the defendant, the juror should be reinstated on the jury.

118. *See, e.g., Batson*, 106 S. Ct. at 1717.

119. Such exclusion of jurors on grounds other than race is not "purposeful discrimination" but merely is incidental to the party's goal of excluding jurors the defendant suspects of bias, either on individual grounds or for non-racial group bias. The Florida Supreme Court recognized the potential divergence of concepts between "systematic exclusion" of prospective jurors and the wrong of peremptory abuse that the court sought to remedy. In situations where a party peremptorily excludes black jurors on grounds other than race, "it is possible that the cross-section requirement might have to give way before [the Florida Constitution's] guarantee of an impartial jury." State v. Neil, 457 So.2d 481, 487 (Fla. 1984).

120. Taylor v. Louisiana, 419 U.S. 522, 527 (1975). Of course, in some instances, the exclusion may be both "systematic" and "purposeful." *See* Peters v. Kiff, 407 U.S. 493, 503 (1972). Yet, in many situations, the peremptory challenge, given its individualized exercise, lends itself only to the "purposeful discrimination" analysis. *Cf., Transcript, supra* note 116, at 26 (members of the *Batson* court recognized during the argument that the representative cross section requirement may not curb a single discriminatory act). Furthermore, the Supreme Court has sidestepped at least one opportunity to extend the sixth amendment "cross section" requirement to selection procedures for individual jurors. *See Batson*, 106 S. Ct. at 1729-31 (Stevens, J., concurring); *Id.* at 1731-33 (Burger, C.J., dissenting).

121. *But see* Commonwealth v. DiMatteo, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981).

act may violate the equal protection clause:

> A consistent pattern of official racial discrimination is [not] a necessary predicate to a violation of the Equal Protection Clause. A single invidious discriminatory government act would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.[122]

Furthermore, when a party exercises a series of peremptories against a racial group for reasons other than race, the exclusion may be "systematic," even though it is not "purposeful" discrimination. Thus, the equal protection clause provides a more appropriate basis by which to address the problem of peremptories executed individually to exclude a person on the basis of race.[123]

V. Finding State Action

Whether one scrutinizes a defendant's abuse of peremptory challenges under the representative cross section requirement of the sixth amendment or under the equal protection clause of the fourteenth amendment, the United States Constitution demands that the challenged practice be "state action."[124] When the objection is to the acts of a state prosecutor, as in *Batson*, the state action is obvious. When, however, defense counsel excludes jurors through peremptory challenges on the basis of race, the state has only authorized the private actor.[125] The question of state action is therefore a close one.

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122. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977).

123. It should be noted that those states applying the "representative cross section" requirement to peremptory abuse read *Swain* as precluding an equal protection attack on peremptories. Forced to innovate, these states chose the wrong tool for the problem. Since *Batson* has overruled *Swain*, those courts in Massachusetts, Florida, and California that had rejected the equal protection argument should re-evaluate their decisions.

124. The fourteenth amendment to the United States Constitution states that, "No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme Court held that the fourteenth amendment due process clause incorporates the sixth amendment "fair cross section" requirement. Some commentators, however, have inexplicably ignored the state action component of the "fair cross section" requirement.

125. Generally, courts must address the state action issue when a challenger seeks to call a private actor's conduct "state action" based on the relationship of the conduct with government. Clearly, if the private actor's conduct is prohibited by state law, the conduct is not state action. In contrast, when the state compels the private actor to perform the challenged conduct, courts will find state action. The close issue arises when the state permits private conduct which may be discriminatory. *See* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (1977) [hereinafter Glennon & Nowak]. The defense counsel's exercise of peremptory challenges to exclude blacks is an example of this third scenario.

If the conduct is deemed state action, it becomes subject to more stringent constitutional

The law of state action under the fourteenth amendment remains unclear. The Supreme Court has previously recognized that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'this Court has never attempted.' "[126] Rather, in determining whether the "nonobvious involvement of the state" is state action under the fourteenth amendment, a court reaches its conclusion "by sifting facts and weighing circumstances."[127]

Courts, while sifting and weighing, typically direct their inquiry toward three possible scenarios for state action.[128] The first scenario is the "state nexus" approach, under which a court may find that the number and pervasiveness of the contacts between the conduct of the private actor and the state are such that the conduct may be called state action.[129] Under the second scenario, known as the "state function" approach, the conduct of a private actor is state action when the state has delegated to the private actor a responsibility traditionally belonging to the government.[130]

Some commentators have proposed that the Supreme Court has also directed inquiry toward a third approach. This approach, referred to as "state authorization," is applied when the private actor's conduct has been supported by the state to such a degree and is so outweighed by the importance of the right it infringes upon that the

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limitations than private action. "Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals." United States v. Guest, 383 U.S. 745, 771 (1966) (Harlan, J. concurring). *See also* The Civil Rights Cases, 109 U.S. 3 (1883).

126. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (quoting Kotch v. Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

127. *Id.*

128. *See* Buchanan, *Challenging State Acts of Authorization Under the Fourteenth Amendment: Suggested Answers to an Uncertain Quest*, 57 WASH. L. REV. 245 (1982) [hereinafter *Suggested Answers*]; Buchanan, *State Authorization, Class Discrimination, and the Fourteenth Amendment*, 21 HOUS. L. REV. 1 (1984); Glennon & Nowak, *supra* note 125, at 221.

129. *See, e.g.*, *Burton*, 365 U.S. 715 (1961) (discrimination against blacks by the owner of a restaurant located in a publicly owned building was held to be state action). *See also Suggested Answers*, *supra* note 128, at 246-49.

130. *See* Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 157 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). In *Jackson*, the Court reviewed both the public function and state nexus approaches to the state action issue yet found no state action. Jackson had challenged the termination procedure for nonpayment of bills used by a privately owned electric utility in York, Pennsylvania. She claimed that the procedure was state action and did not provide adequate notice consistent with constitutional due process requirements. *Id.* at 348. The court rejected the claim that the electric utility was performing public functions, stating that such duties were not "powers traditionally exclusively reserved to the state." *Id.* at 354. It also found that the extensive state regulation and monopoly status granted by the state did not create a nexus, because the state had not authorized the termination procedure. *Id.* at 358.

conduct violates the Constitution.[131] Essentially, the court engages in a balancing test and weighs the value of the infringed individual right against the importance of the challenged practice.[132] In its review on the merits, the court may also consider those facts relevant to "state nexus" and "public function" in weighing the invidiousness of the infringement resulting from the challenged act.[133] Thus, when certain "closely scrutinized" rights are infringed, a lesser threshold of state action may be required of the conduct in order to violate the fourteenth amendment.[134]

When defense counsel selects a jury, his conduct is inextricably entangled with government. Furthermore, the Constitution traditionally has afforded its greatest protections in areas involving racial discrimination.[135]

The jury selection process in the courtroom is a combined effort of the judge, prosecutor, and defense attorney. The proceeding takes place in the government courtroom and selects a body whose members are employed by the state to undertake the important governmental function of adjudicating the defendant's guilt or innocence. In addition, the state has statutorily authorized the number of peremptories given to the defendant. Thus, the entanglement is so great that the defense counsel's acts in selecting the jury cannot be partitioned from the state criminal justice system of which they are an essential part.[136] The conduct of defense counsel in exercising peremptories, therefore, should be deemed state action.

Perhaps the strongest evidence of the nexus between the state and defense counsel during jury selection is the public's strong reaction when a defendant excludes prospective jurors on the basis of

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131. *See supra* note 128.

132. The balancing test has been articulated as follows: "If the value of the right clearly outweighs the value of the challenged practice, the [fourteenth a]mendment proscribes the practice. If the importance of the right is not clearly greater than that of the challenged practice the effect of the practice of the right does not violate the Amendment." Glennon & Nowak, *supra* note 125, at 231.

133. *Suggested Answers, supra* note 128, at 249-50.

134. *Compare* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state action found where restaurant discriminating against blacks was located in publicly owned building) *with* Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) (no state action where state statutorily authorizes self-help method of collateral sale).

135. Classes of disadvantaged racial groups are "immediately suspect" and in such instances, the courts will engage in "the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). *See also* Loving v. Virginia, 388 U.S. 1 (1967); Palmore v. Sidoti, 466 U.S. 429 (1984).

136. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980), in which the Court found that actions of a privately retained defense counsel, motivated by a conflict of interest, violated the sixth and fourteenth amendments right to counsel. In addressing the state action issue, the court noted that the "[s]tate's conduct of a criminal trial itself implicates the State." *Id.* at 344-45.

race.[137] The Court has noted that "the harm from discriminatory jury selection extends . . . to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[138] Indeed, this public concern in part led California and Massachusetts to apply to defendants the limitation on abuse of peremptory challenges.[139]

In weighing the value of a jury selection system free of invidious race discrimination against the defendant's right to exercise peremptories, the constitutionally guaranteed freedom of equal protection must prevail.[140] Although history indicates that the peremptory is primarily a right granted to protect defendants[141] who may need the challenges more than a prosecutor in order to overcome the prejudice created by criminal accusation and relatively limited resources[142] and the defendant's stake in the trial is so great that it is

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137. *Cf.* Note, *State v. Neil, Approaching the Desired Balance Between Peremptory Challenges and Racial Equality in Jury Selection*, 39 U. MIAMI L. REV. 777, 796 n.125 (1985), in which the author notes that in the Miami, Florida area, white defendants' abuse of peremptory challenges had raised the ire of the general public. The public concern centered on three cases in which white police officers charged with beating or shooting blacks to death were acquitted by all-white juries. *Id.*

138. Batson v. Kentucky, 106 S. Ct. 1712, 1718 (1986).

139. The California Supreme Court presented the following example as support for granting the prosecutor the right of objection:

> [W]hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

People v. Wheeler, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 907 n.29 (1978).

The Massachusetts Supreme Judicial Court also cited the above excerpt from *Wheeler* to support its contention that the prosecutor should have the right to object to a defendant's abuse of peremptories. Commonwealth v. Soares, 377 Mass. 461, ___ n.35, 387 N.E.2d 499, 517 n.35 (1979). The court also noted that the government's complaint that the defendants attempted to strike all veniremen of Italian descent from the jury would, if proven, be a legitimate ground for objection. *Id.*

140. In *Batson*, the Supreme Court applied a similar balancing test to weigh the prosecutor's right to the peremptory challenge against the defendant's right to equal protection of the laws. In part, the public interest in the criminal justice system tipped the scales for the defendant's equal protection rights. The Court explained that:

> While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice . . . . In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."

Batson, 106 S. Ct. at 1724.

141. *See supra* notes 28-38 and accompanying text.

142. According to one study, 25 to 30% of the members of jury pools believe that a defendant is guilty once he or she is indicted, while only 5% of the jury pool hold animosity

of great importance that he or she have confidence that the jury will decide the case impartially,[143] to bar the defendant from exercising peremptories on the basis of racial bias represents only a limited intrusion on the defendant's strong interest in the challenge.

The opportunity to exercise this peremptory in many other circumstances remains. This limitation protects the rights of the state from racial abuse via the state-authorized action of the defense counsel. More importantly, the limitation protects the interests of the general public and of venire members of different races to be considered for the jury without regard to race. These individuals have a constitutional right to serve as jurors and to be considered for such duty without regard to race.[144] Limiting the defendant's misuse of peremptories plugs the last loophole in which racial discrimination is permitted in judicial procedure, thereby protecting the public interest in a criminal justice system free from racial considerations.

VI. Prosecutorial Standing to Raise the Objection

Peremptory abuse by a defendant injures three distinct parties. First, there is the injury to the interests of the prosecutor, as the representative of the state, in a fair jury selection from which minorities have not been purposefully excluded.[145] Second, the general public, particularly members of the excluded minority, suffer from the injection by the defendant of racially discriminatory practices into the jury selection process.[146] Third, the excluded juror suffers

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toward the government. Comment, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1786-87 (1979).

143. *Id.* at 1787.

144. *Batson*, 106 S. Ct. at 1718.

145. FED. R. CRIM. P. 23(a) recognizes the prosecutor's legitimate interest in a jury trial. Rule 23 conditions a defendant's waiver of a jury trial upon the "consent of the government." FED. R. CRIM. P. 23(a). *See* Singer v. United States, 380 U.S. 24 (1965). In *Singer*, the Court notes, "[T]he government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before a tribunal which the Constitution regards as most likely to produce a fair result." *Id.* at 36. Rules similar to FED. R. CRIM. P. 23(a) are in effect in many states. *See Singer*, 380 U.S. at 36. The government's legitimate interest, however, is not protected under the sixth amendment. *See supra* notes 83-102 and accompanying text.

See also United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984), in which Judge Posner, in a pre-*Batson* opinion, noted:

> As it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant and not when it harms the law-abiding community represented by the prosecutor, the prosecutor would be allowed to object to the defendant's making racial peremptory challenges if the defendant could object to the prosecutor doing so.

146. The Supreme Court, in *Batson*, noted the public interest in non-racial jury selection:

> The harm from discriminatory jury selection [by the prosecutor] extends

from his or her exclusion.[147]

Although the prosecutor, as representative of the sovereign, may find scant protection under the sixth amendment representative cross section requirement,[148] he may be dutybound[149] on behalf of the excluded juror and the law-abiding citizens he represents to raise objections to state-authorized discrimination carried out by the defendant. These interests of individuals are afforded greater protection under the Constitution than the interests of the state sovereign.[150] A successful assertion of the tertiary rights of the unlawfully excluded juror, however, may be subjected to the requirements of third party standing.

The general rule of standing is that a party may raise only his own rights in mounting a constitutional challenge to official action.[151] The rule has been broken down by the Court into both a constitutional requirement and a judicially invented "prudential" limitation.[152] The constitutional aspect stems from the article III jurisdictional "case or controversy" requirement.[153] It requires that the

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> beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Batson, 106 S. Ct. at 1718.

147. *Id. See also* Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970); Thiel v. Southern Pac. Co., 328 U.S. 217, 224 (1946); Strauder v. West Virginia, 100 U.S. 303, 308 (1880). All of these cases note the injury to a wrongfully excluded juror.

148. *See supra* notes 83-102 and accompanying text.

149. In Berger v. United States, 295 U.S. 78, 88 (1935), the Court described the government prosecutor's duty as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is . . . that justice shall be done."

150. *See generally* D. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985) (sovereign is "trustee" rather than beneficiary of the Constitution).

151. *See* Gilmore v. Utah, 429 U.S. 1012 (1976), in which the mother of a death row inmate was denied standing to challenge her son's sentence, because the son could represent adequately his own interest if he so chose. The standing inquiry has been articulated as whether "a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of the controversy." Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

For a general discussion of third party standing, *see* M. Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981).

152. *See* Singleton v. Wulff, 428 U.S. 106, 112 (1976); Warth v. Seldin, 422 U.S. 490, 498 (1975).

153. In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), the Court stated that

> Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Id. at 472 (footnotes and citations omitted).

party suffer "injury in fact."[154] The court-created aspect of the rule asks "whether, as a prudential matter, the [complaining parties] are the proper proponents of the particular legal rights on which they base their suit."[155] While the article III "case or controversy" requirement does not bar third party assertion of constitutional rights, the Court often invokes its prudential standing doctrine in cases of third party standing.[156]

The Supreme Court has explained its rule against third party standing as a "salutary rule," but subject to exceptions.[157] Thus, when a majority of the Court believes that the merits of the petition should be addressed, the hurdle of standing is overcome. In *Singleton v. Wulff*,[158] Justice Blackmun explained two factors the court may consider in deciding whether to grant third party standing. The first consideration is

> the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the rights as the

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154. *Wulff*, 428 U.S. at 112.

155. *Id.* The Court occasionally treats the two aspects of the rule as a unitary test for standing. *See e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962), in which standing is described as having "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the prosecution of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.*

156. *See Wulff*, 428 U.S. at 113-14. *See also* Carey v. Population Services Int'l, 431 U.S. 678 (1977); Craig v. Boren, 429 U.S. 190 (1976); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249, 255 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

157. Barrows v. Jackson, 346 U.S. 249, 257 (1953). In *Barrows*, the Court was asked to decide the issue of whether a white landowner who had sold property to a black in violation of a deed covenant could raise the constitutional rights of the buyer as a defense in a damages action by the beneficiaries of the covenant. Speaking for the Court, Justice Minton described by rationale for the relaxation of the rule against third party standing as

> a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

Id.

158. 428 U.S. 106 (1976).

latter.[159]

Second, the court examines

> the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.[160]

Some commentators suggest that the Court actually considers four factors when presented with a third party standing issue: the interest of the litigant; the nature of the right asserted; the relationship of the litigant and the third party whose rights the litigant asserts; and finally, the ability of those third parties to assert independently their rights.[161] The third and fourth elements of this test mirror those set forth in *Singleton.*

The prosecutor as sovereign and as participant in the trial has a dependent relationship with the prospective jury members, some of whom will serve as arbiters of his presentation of the case. By the defendant's exclusion of prospective jurors because of race, the defendant interferes with that relationship by exercising an unconstitutional selection process.[162] Additionally, it is highly unlikely that a venire member, peremptorily excluded by a defendant, would assert his or her own right to be considered for the jury without regard to race. Since the grounds for peremptory challenges are not explicitly revealed, a prospective juror may be entirely unaware of the discrimination, either because the juror was not present for the " 'pattern' of strikes"[163] evidencing purposeful discrimination, or because the ju-

159. *Id.* at 114-15.

160. *Id.* at 115-16.

161. R. Sedler, *Standing To Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 627 (1962).

162. In Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court was faced with the issue of whether a trial court could consider the probable public prejudice against an interracial marriage in deciding a child custody case. After noting the "reality" of prejudice where a child lives with a stepparent of another race, the Court stated that

> the question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. at 433 (footnote omitted).

163. Batson v. Kentucky, 106 S. Ct. 1712, 1723 (1986).

ror's attention to the issue was not as great as the watchful eyes of the adversarial prosecutor. Unless the right of objection is granted to the prosecutor, a defendant's exercise of peremptories will perpetuate "discrimination within the judicial system [which] is most pernicious."[164]

VII. Conclusion

The peremptory challenge plays an important role in protecting the rights of defendants in the American criminal justice system. When, however, defendants exercise peremptories to exclude prospective jurors on the basis of race, color, or national origin, the action taints the entire justice system with invidious discrimination. Courts, therefore, must find a logical means of addressing the defendant's abuse of peremptory challenges. Whereas Massachusetts, California and Florida have invoked the representative cross section requirement of the sixth and fourteenth amendments to limit peremptory abuse by both prosecutors and defendants, a more logical answer to the problem is found under the equal protection clause of the fourteenth amendment. An equal protection limitation upon defendants is especially desirable now that the Supreme Court has invoked the clause to limit a prosecutor's abuse of peremptories. Certain problems still will remain.[165] Nevertheless this solution provides the best balance between preservation of the peremptory as a means of achieving a fair trial, and this nation's strong interest in preventing racial discrimination from invading the courtroom.

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164. *Id.* at 1718.

165. In one foreseeable scenario, a black defendant may exercise peremptory challenges against white prospective jurors in order to reach the few black members of a jury venire. *See, e.g.*, People v. Gary M., 138 Misc.2d 1081, 526 N.Y.S.2d 986 (1988) (counsel for black defendant excluded white prospective jurors). Arguably, this is not the type of discrimination which the fourteenth amendment was designed to remedy, nor is it as invidious as other types of discrimination. *Compare* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (heightened judicial scrutiny is applied when "discrete and insular minorities" are involved) *with* University of California Regents v. Bakke, 438 U.S. 265, 289-94, 361-62 (1978) (amendment requires heightened scrutiny of all forms of racial classifications).