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Prosecutorial Misuse of the Peremptory Challenge to Exclude Discrete Groups from the Petit Jury: Commonwealth v. Soares

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Prosecutorial Misuse of the Peremptory Challenge to Exclude Discrete Groups From the Petit Jury: *Commonwealth v. Soares* [1]—Edward J. Soares, Richard S. Allen and Leon Easterling were indicted for first-degree murder [2] after the stabbing death of Andrew Puopolo, a Harvard University senior and varsity football player. The homicide occurred in the course of a late-night brawl in the notorious Combat Zone of Downtown Boston, Massachusetts.[3] All three defendants were black; the victim was white. Massachusetts state law permitted each defendant the opportunity to exercise sixteen peremptory challenges. The prosecution was entitled to exercise forty-eight peremptory challenges.[4] Exercising forty-four of its challenges,[5] the prosecution eliminated twelve of the thirteen black jurors drawn from the jury venire.[6] The defendants raised timely objections [7] and alleged that the systematic use of peremptory challenges to exclude all but one black juror from the jury panel had deprived them of a fair and impartial jury. The trial judge, citing Massachusetts precedent,[8] denied each objection. Subsequently, the jury, composed of eleven

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[1] 1979 Mass. Adv. Sh. 593, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

[2] Easterling was indicted and convicted of assault and battery by means of a dangerous weapon, receiving a sentence of eight to ten years. Soares was convicted of two counts of simple assault and battery; those convictions being placed on file. Allen was acquitted of assault and battery by means of a dangerous weapon. 1979 Mass. Adv. Sh. at 593-94, 387 N.E.2d at 502-03.

[3] The entire incident is fully described by the court in the first segment of its opinion. *Id.* at 594-98, 387 N.E.2d at 503-04. Before reaching the issue of peremptory challenges, the court found that the convictions were warranted by the evidence introduced at trial. *Id.* at 602-07, 387 N.E.2d at 506-08. But see note 11 *supra* (second trial concluded in one conviction for manslaughter and two acquittals). The homicide, with its obvious racial overtones, received excessive media attention for several weeks. The victim, Andrew Puopolo, remained hospitalized in a coma for five weeks. He arrived at the Tufts-New England Medical Center without active brain function and was sustained by artificial means during the ensuing weeks. Boston Globe, Nov. 16, 1978, at 1, col. 3.

[4] MASS. GEN. LAWS ANN. ch. 234, § 29 (West 1968) (each defendant granted 16 challenges, prosecution allowed number equal to that of all defendants combined). *See generally* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 160-75 [hereinafter cited as VAN DYKE]; 1 BUSCH, LAW AND TACTICS IN JURY TRIALS 817 (1959); A.B.A. Standards Relating to Trial by Jury 70-78 (1968) [hereinafter cited as A.B.A. Standards].

[5] The court failed to comment on the fact that the prosecution did not exhaust all its available challenges and, yet, allowed one black juror to remain on the panel. Nevertheless, implicit in the court's theory of diffused impartiality is the notion that a large reduction in group representation is no less harmful than total exclusion. *See* 1979 Mass. Adv. Sh. at 627, 387 N.E.2d at 516.

[6] See note 169 *infra*. *See* Comment, 64 MASS. L. REV. 139, 140 (1979) (eight per cent representation of blacks on panel not greatly disproportionate compared to twelve per cent representation on jury venire); *cf.* Hayden, Henna & Seigel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Informational Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768, *passim* (1978) (statistical evidence yielding tentative conclusions regarding the use of peremptory challenges).

[7] See text and note at note 152 *infra*.

[8] See text and notes at notes 96-98 *infra*.

whites and one black,[9] convicted all three defendants of first-degree murder.[10]

The Massachusetts Supreme Judicial Court granted the defendants a new trial[11] and HELD: elimination of a discrete group from the petit jury through purposeful exercise of peremptory challenges, motivated solely by the assumption of shared, similar biases among members of a discrete group, violates a defendant's right to a jury drawn from a representative cross-section of the community guaranteed by Articles 12 and 15 of the Massachusetts Constitution.[12] Three justices concurred,[13] arguing that there was no occasion for a decision on constitutional grounds[14] but that a new trial should be granted in light of the extraordinary publicity and racial tension surrounding the original trial.[15]

The *Soares* decision is significant in several respects. The Supreme Judicial Court, faced with restrictive federal precedent, turned to the Massachusetts Constitution for independent state grounds[16] and radically departed from earlier state court decisions by opening the peremptory challenge to inquiry.[17] The court in *Soares* has significantly affected traditional use of

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[9] Sixteen jurors were sworn as the petit jury at the outset of the trial in order to prevent a mistrial if a juror were unable to continue at some time during the trial. MASS. GEN. LAWS ANN. ch. 234, § 26B (West 1968); MASS. R. CRIM. P. 20(d)(1). However, to ensure that all jurors remain attentive throughout the trial, alternates are not designated until immediately before the jury retires for deliberations. The only juror who is exempted from such designation is the jury foreman. The trial judge in *Soares* appointed the sole remaining black juror as the jury foreman. 1979 Mass. Adv. Sh. 607-08, 387 N.E.2d. at 508. This indicated that the trial judge was cognizant of the prosecution tactics and made sure that at least one black juror would reach the jury room. *See* Commonwealth v. Flowers, 1977 Mass. Adv. Sh. 950, 967, 365 N.E.2d 839, 847-48 (1977) (Brown, J., concurring).

[10] Conviction of first-degree murder carries a mandatory life sentence without parole. MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1968).

[11] The results of the second trial were striking. Jury selection took almost two weeks and exhausted a special venire of three hundred jurors. Eventually, the jury, consisting of ten whites and six blacks (eight men and eight women) returned verdicts of not guilty against defendants Allen and Soares and a verdict of guilty of manslaughter against defendant Easterling. Boston Globe, December 15, 1979, at 1, col. 4. Essentially, this jury found no evidence of premeditation or joint enterprise on the part of the three men. *Cf.* 1979 Mass. Adv. Sh. 604-07, 387 N.E.2d. at 506-07 (first-degree murder convictions warranted by the evidence). The manslaughter conviction indicates that Easterling used excessive force while defending himself during the brawl with the football players.

[12] 1979 Mass. Adv. Sh. at 594, 387 N.E.2d. at 503. During their appellate arguments the defendants stressed article 12 of the Massachusetts Constitution as the basis of their appeal. *Id.* at 613, 387 N.E.2d. at 510. Article 12 states in pertinent part: "and no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgement of his peers or the law of the land." MASS. CONST. art. 12.

[13] 1979 Mass. Adv. Sh. at 634, 387 N.E.2d at 519 (Braucher, J., concurring).

[14] *Id.* at 634-35, 387 N.E.2d at 519.

[15] *Id.* at 635, 387 N.E.2d at 519; see note 3 *supra.*

[16] See text and notes at notes 96-123 *infra.*

[17] See text and notes at notes 140-51 *infra.*

the peremptory challenge. Specifically, the court has placed an additional burden on the voir dire process,[18] has created procedural uncertainty,[19] and, ironically, may have hampered the efforts of counsel to obtain a fully disinterested jury.[20]

This casenote will discuss first the three earlier decisions that most influenced the Massachusetts Supreme Judicial Court in *Soares*. The important elements of the *Soares* opinion then will be analyzed in detail. Following this analysis, the likely procedural effect of the *Soares* decision in future cases at the trial level will be considered. Finally, as a suggestion to limit the scope of the decision, this casenote will offer an alternative to the methodology used by the court in *Soares*.

I. The Precedential Basis of *Soares*

A. *The False Promise of Equal Protection*

Prior to the United States Supreme Court decision in *Swain v. Alabama*,[21] black defendants had utilized the fourteenth amendment, with limited success, to challenge jury selection procedures which systematically excluded blacks from jury lists and jury venires.[22] These defendants claimed that purposeful elimination of their societal group from the jury selection process was a denial of equal protection.[23] In recognizing the validity of this equal protection challenge, the Supreme Court required a defendant to establish three elements. First, in order to have standing, the defendant must be a member of the group excluded.[24] Second, convincing evidence of a pattern of group exclusion must be presented.[25] Finally, the defendant must demonstrate that the

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[18] See text and notes at notes 152-63 *infra*.

[19] See text and notes at notes 164-80 *infra*.

[20] See text and notes at notes 181-97 *infra*.

[21] 380 U.S. 202 (1965).

[22] Norris v. Alabama, 294 U.S. 587 (1935); Hill v. Texas, 316 U.S. 400 (1942). These successful challenges were in situations where there had been total exclusion of black jurors from the jury lists and jury pools for an extended period. *See* Daughtry, *Cross-Sectionalism in Jury Selection Procedures After Taylor v. Louisiana*, 43 Tenn. L. Rev. 1, 17 n.68 (1975) [hereinafter cited as Daughtry].

[23] Until Hernandez v. Texas, 347 U.S. 475 (1954), the Supreme Court had refused to consider allegations of systematic exclusion in situations other than racial discrimination. Strauder v. West Virginia, 100 U.S. 303 (1879). *Hernandez* introduced the term "identifiable group" as a means of extending the systematic exclusion rationale. 347 U.S. at 478. However, courts interpreted the term narrowly and also found sufficiently rational reasons for excluding groups even if they were considered identifiable. *See, e.g.*, Hoyt v. Florida, 368 U.S. 571 (1961); Daughtry, *supra* note 22, at 13-14 nn.49-52.

[24] Alexander v. Louisiana, 405 U.S. 625, 633 (1972); see note 22 *supra; see generally* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235 (1968) [hereinafter cited as Kuhn]; Comment, *Fair Jury Selection Procedures*, 75 Yale L.J. 322 (1968) [hereinafter cited as *Fair Jury Selection Procedures*].

[25] Theoretically, a systematic exclusion can occur without total elimination of a group. However, under the influence of *Strauder*, courts were often reticent to infer discriminatory intent from mere disparity as opposed to complete exclusion. *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953); Daughtry, *supra* note 22, at 17-18 n.68 (cases collected therein).

jury selection procedures were intentionally carried out to produce the apparent exclusion.[26]

Defendants asserting a claim of systematic exclusion therefore faced a heavy burden of proof coupled with the pragmatic difficulty of assembling sufficient objective evidence to show an intentional pattern of exclusion.[27] Since the public officials responsible for the general selection of potential jurors and public records of jury lists were reasonably accessible, defendants prior to the *Swain* decision confined their efforts to prove systematic exclusion to the early stages of jury selection, namely jury lists and jury pools.[28] With the granting of certiorari by the United States Supreme Court, proponents of jury selection reform saw *Swain* as an opportunity to extend equal protection guarantees to methods of petit jury selection in an individual trial.[29]

Richard Swain, a black, was convicted of rape by an all-white jury. Under Alabama's struck-jury system,[30] all blacks had been eliminated from the jury venire by peremptory challenges. After the Alabama Supreme Court affirmed the conviction,[31] the United States Supreme Court granted certiorari.[32] Defendant Swain advanced two arguments, both alleging that the State's methods of petit jury selection systematically excluded blacks in violation of the equal protection clause. First, the defendant urged that the prosecution, through the purposeful exercise of peremptory challenges, had eliminated all black jurors from the petit jury that eventually convicted him of rape.[33] This argument focused specifically on the prosecutor's tactics during Swain's trial, alleging that the elimination of all blacks called to serve on the jury was sufficient demonstration of a systematic exclusion.

As a second argument, the defendant asserted that, in every criminal trial, the state prosecutors consistently and intentionally exercised peremptory challenges to remove all blacks from each petit jury with the result that no black had ever served on a petit jury in Talladega County, Alabama.[34] This

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[26] This aspect of the test required the defendant to establish the subjective intent of those responsible for jury selection. Ostensibly, if the defendant could establish substantial disparity over a period of time the court would be warranted in finding an intent to discriminate rather than the mere chance of the jury wheel. *Hernandez*, 347 U.S. at 482; *but see Swain*, 380 U.S. at 208. Nevertheless, anything short of total exclusion was usually insufficient. See note 22 *supra*.

[27] *See* Daughtry, *supra* note 22, at 26-28.

[28] See note 22 *supra*.

[29] See note 40 *infra*.

[30] The "struck-jury" varies from the more common systems of petit jury selection. A jury venire is assembled which, after all challenges for cause, equals the total number of peremptory challenges available to both sides and the total number of jurors (normally twelve) needed for the petit jury. Then counsel from both sides exercise all their challenges alternately. *Id.* at 210; ALA. CODE tit. 30, § 64 (1958). Those jurors who remain after all peremptory challenges have been exercised become the petit jury for the trial. Some feel this is the most equitable form of petit jury selection because it eliminates any uncertainty from the challenge process. A.B.A. Standards, *supra* note 4, at 76.

[31] 275 Ala. 508, 156 So. 2d 636 (1963).

[32] 377 U.S. 915 (1964).

[33] 380 U.S. at 203. *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (state statute qualifying only whites for jury duty held unconstitutional).

[34] 380 U.S. at 222-23.

second contention, which alleged a pattern of intentional exclusion over a period of time, resembled more closely the earlier decisions recognizing systematic exclusion arguments.[35] Unfortunately, however, this approach also placed an insurmountable burden of proof on Swain and on future defendants.[36]

In the *Swain* decision, the Supreme Court of the United States rejected the defendant's first argument[37] and, while recognizing the basic rationale of his second argument, framed a prohibitive standard to be satisfied by future defendants.[38] Addressing first the assertion that peremptory challenges were used systematically to exclude blacks during the defendant's trial, the Court held that the use of peremptory challenges in any one trial, even if all members of one race are excluded, will not constitute a violation of the fourteenth amendment.[39] When exercised by a single prosecutor to shape the composition of one petit jury, peremptory challenges are not subject to the demands of the equal protection clause even if motivated by race, religion, or nationality.[40] Categorizing the peremptory challenge as a fundamental element in a trial by jury,[41] the Court refused to make "a radical change in the nature and operation of the challenge" within the context of any individual trial.[42] In essence, the Court created an ironclad shield for the peremptory challenge, holding that in each trial such challenges are beyond the Court's control and may be used without inquiry.[43]

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[35] This argument focused on a series of trials rather than a single trial in its attempt to show a systematic exclusion.

[36] See note 41 *infra*.

[37] 380 U.S. at 222.

[38] *Id.* at 223.

[39] *Id.* at 222.

[40] *Id.* at 221-22. *Swain* immediately drew strong criticism from those who saw the case as the opportunity to extend equal protection standards to the petit jury. *See* Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966); Note, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 135-39 (1965); *Fair Jury Selection Procedures*, *supra* note 24; 1979 Mass. Adv. Sh. at 612 n.11, 387 N.E.2d at 510 (articles collected therein).

[41] 380 U.S. at 219. The Court in *Swain* gives the peremptory challenge a paramount role in a jury trial, concluding that ". . . the challenge 'is one of the most important rights secured to the accused.'" Pointer v. United States, 151 U.S. 396 (1894); *see* Lewis v. United States, 176 U.S. 379, 376 (1892) (denial of right to peremptory challenges reversable error). The peremptory challenge allows either side to remove a juror offended by probing voir dire or an unsuccessful challenge for cause. 1979 Mass. Adv. Sh. at 621 n.24, 384 N.E.2d at 513. VAN DYKE, *supra* note 4, at 147-51. The *Swain* majority is sharply criticized by Mr. Justice Goldberg for apparently making the peremptory challenge a fundamental right. *Swain*, 380 U.S. at 243 (Goldberg, J., dissenting); Stilson v. United States, 259 U.S. 593 (1919).

[42] 380 U.S. at 221-22.

[43] *Id.* at 220. *But see* 1979 Mass. Adv. Sh. at 622 n.26, 387 N.E.2d at 514. The *Soares* court points out the inconsistency of this language with later language in *Swain*. By conceding that proof or systematic exclusion would overcome "the presumption favoring the prosecutor," the Court in *Swain* admitted that improperly exercised peremptory challenges may be controlled by the court. 380 U.S. at 224. The court in *Soares*, unlike *Swain*, narrows its focus to the misuse of challenges during one particular trial.

Turning to the second element of the defendant's argument, the Court conceded that, if proven, the discriminatory use of peremptory challenges to exclude all blacks from petit jury service over an extended period would constitute an equal protection violation.[44] The Court's standard, however, placed a weighty burden of proof on the defendant by requiring a showing that peremptory challenges have been employed systematically over a period of time solely by the prosecution and for reasons totally unrelated to any individual trial.[45] This test produces the paradoxical result that a defendant must prove abuse of preremptory challenges in a series of trials without any right to question their use in any single trial.[46] The failure of any defendant ever to demonstrate systematic exclusion under this rule underscores the illusory protection offered by the Court in *Swain*.[47]

The conclusive presumption in *Swain*, which endorsed the use of peremptory challenges in any single trial, was the product of three considerations. First, the Court accepted the notion that racial factors were a legitimate

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[44] *Id.* at 223.

[45] 380 U.S. at 223-25.

[46] *Id.* at 222. *See* Comment, *The Prosecutor's Exercise of the Peremptory Challenge: A Valued Common Law Privilege In Conflict with the Equal Protection Clause* [hereinafter cited as *Prosecutor's Exercise*], 46 U. CIN. L. REV. 554, 560 (1977).

[47] 1979 Mass. Adv. Sh. at 611, 387 N.E.2d at 509. Massachusetts precedent has consistently adhered to the policy of *Swain* although the decision had never been specifically incorporated under the state constitution. 1979 Mass. Adv. Sh. at 609-10 n.9, 387 N.E.2d at 509. *Wheeler* also supplanted California precedent adhering to the *Swain* rule. *See* People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970); People v. Boyd, 16 Cal. App. 3d 901, 94 Cal. Rptr. 575 (1975). *See* Comment, 13 SUFFOLK U.L. REV. 1082, 1091 n.47 (1979).

United States v. McDaniels, 378 F. Supp. 1243 (E.D. La. 1974) is most often cited as an example of judicial dissatisfaction with the *Swain* rule. 1979 Mass. Adv. Sh. at 620, 387 N.E.2d at 513. In the interests of justice, the *McDaniels* court granted a new trial under FED. R. CRIM. P. 33 because peremptory challenges had eliminated six of seven blacks from the venire. 379 F. Supp. at 1244. Nevertheless, the decision has failed to affect significantly subsequent case law. *See Prosecutor's Exercise, supra* note 46, at 562. *See also* United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976), *vacated sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir. 1977) (lower court holding of systematic exclusion in the use of peremptory challenges reversed upon discovery of misapplied statistical evidence).

Of note is a recent Louisiana Supreme Court decision which apparently found sufficient evidence of systematic exclusion to warrant a new trial. State v. Brown, 371 So. 2d 751 (La. 1979). A series of eight appeals based on the alleged misuse of peremptory challenges had reached the Louisiana Supreme Court from the same county. *Id.* at 753. The court concluded that this number of cases coupled with testimony from a state prosecutor, constituted "more than a bare showing of prosecutorial use of a disproportionate number of challenges against blacks." *Id.* at 754. The decision is puzzling because the court neither rejected *Swain* nor used the state constitution as an analytical foundation. Instead the court, in effect, bifurcated the *Swain* rule. The state must now show that no intentional discrimination has taken place once the defendant has made a prima facie showing of systematic exclusion. *Id.* at 753.

For excellent critiques of *Swain*, see KUHN, *supra* note 24, at 288-92; VAN DYKE, *supra* note 4, at 56-58, 150-52; Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1430-33.

trial-related motivation for peremptory challenges.[48] Second, the Court feared that opening the peremptory challenge to attack even on narrow racial grounds would alter radically a fundamental element of a jury trial.[49] Finally, the Court's holding reflected the analytical inability of systematic exclusion arguments to deal effectively with small numbers of jurors. First developed during attacks on those early stages of jury selection that incorporated large numbers of jurors, the focus of this equal protection analysis was simply too broad to protect fully the individual defendant.

By the time *Swain* was decided, a change in the analysis of jury selection cases had begun. A divergent line of cases promised greater protection to the individual defendant by reducing his burden in demonstrating the exclusion of societal groups from jury service.[50] The single-most important steps in this change was the shift from the equal protection clause to the sixth amendment as the foundation for attacks on state jury-selection processes.[51]

B. *The Sixth Amendment's Guarantee of a Representative Cross Section*

In *Taylor v. Louisiana,*[52] the defendant challenged the validity of a state statute requiring women to file a written request before being included on jury lists.[53] The defendant alleged that this statute effectively eliminated an identifiable group from jury service and, consequently, denied him a full opportunity to obtain a jury drawn from a wide spectrum of society.[54] The facts in *Taylor,* a male protesting the underinclusion of women, squarely presented the United States Supreme Court with the opportunity to recognize explicitly a defendant's right to attack state methods of jury selection under the sixth amendment.[55]

In the *Taylor* decision, the Court held thet a jury drawn from a representative cross-section of the community is an essential component of a defendant's sixth amendment right to a fair and impartial jury.[56] Declaring the Louisiana state statute invalid, the Court removed analysis of jury selection procedures from the context of the equal protection clause and created an independent constitutional foundation for a defendant's right to a jury drawn from a representative cross-section of the community. Further, the Court's method of analysis significantly reduced a defendant's burden of proof by requiring the state, after proof of a pattern of apparent exclusion, to present "ample justification" for a system which operates to exclude a distinctive group in society.[57]

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[48] 380 U.S. at 220-21.

[49] *Id.* at 219; see note 41 *supra.*

[50] See text at note 27 *supra.*

[51] See text at note 56 *infra.*

[52] 419 U.S. 522 (1975).

[53] *Id.* at 525. The *Taylor* decision does not explicitly address the issue of peremptory challenges.

[54] *Id.* at 524.

[55] *Cf.* Alexander v. Louisiana, 406 U.S. 525 (1972) (Court failed to reach the issue of the exclusion of women).

[56] 419 U.S. at 528.

[57] *Id.* at 533-35. The defendant's burden of showing a pattern of apparent exclusion in *Taylor* was hardly difficult. The Court, without question, characterized the

As the first step in its decision, the *Taylor* Court declared that a defendant should have standing to challenge the representative character of his jury regardless of his relation to the group excluded.[58] This conclusion rested on a recognition of two important policies. First, the Court stated that the exclusion of identifiable segments of the community is not consonant with democratic principles of representative government.[59] Second, while refusing to assume that a particular group would vote consistently as a class, the Court perceived a subtle prejudice to the defendant's interests when jury selection removes from the courtroom the imponderable "interplay of influence" of one group against the other.[60]

Having found the right to a jury drawn from a representative cross-section of the community fundamental to the sixth amendment, the Court employed a two-part analysis, placing the initial burden on the defendant to prove a prima facie violation of his right to a representative cross-section of the community in his jury.[61] Recently the United States Supreme Court, in *Duren v. Missouri*,[62] clearly delineated the elements of this prima facie showing. According to *Duren*, a defendant must demonstrate that a "distinctive" group in the community has been systematically underrepresented in jury venires for reasons inherent to the jury selection process used by the State.[63] Once the defendant has established the elements of this prima facie showing, the state must justify the apparent imbalance of representation.[64] Because the defendant's rights are fundamental to the sixth amendment, a State's jury selection procedures will not be redeemed by reasons satisfying a minimum rationality test. Instead, as the Court emphasized in *Duren*, the State must show a significant state interest which prevents compliance with the goals embodied by the concept of the representative cross-section of the community.[65]

Consequently, a defendant's test of a state's jury selection procedures under *Taylor* serves the two-fold purpose of securing his individual rights

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Louisiana statute as eliminating 53% of the available persons capable of serving as jurors. *Id.* at 524, 531.

[58] *Id.* at 526. Peters v. Kiff, 407 U.S. 493 (1972). *Peters* granted standing to a white man to challenge the exclusion of blacks from his grand jury. *But cf.* Alexander v. Louisiana, 406 U.S. 525, 533 (1972) (dictum that the right of male to challenge exclusion of females finds no support in precedent).

[59] *Id.* at 530.

[60] *Id.* at 531-32 (quoting Ballard v. United States, 329 U.S. at 187, 193-94 (1946)). *See* Peters v. Kiff, 407 U.S. at 503-04, *cited in* 1979 Mass. Adv. Sh. at 617-18, 387 N.E.2d at 512.

[61] 419 U.S. at 533-35; see note 57 *supra*.

[62] 99 S. Ct. 664 (1979).

[63] *Id.* at 668. Although the Court in *Duren* continues to use the term "systematic" to describe the pattern of group exclusion, the term does not carry the same connotation as in earlier decisions under the equal protection clause. In *Duren* and similar decisions, an exclusion is systematic when a distinctive group fails to participate in the jury process over a period of time. Proof of an apparent pattern of exclusion will raise a presumption of intentional exclusion which must be rebutted by the state. In the earlier equal protection decisions, an exclusion would not be systematic until the defendant had also shown a discriminatory intent either in the selection process or the conduct of jury officers.

[64] *Id.* at 670.

[65] *Id.* See text at note 62 *supra*.

while guaranteeing "community participation in the administration of the criminal law."[66] For present purposes, however, it must be noted that the focus of the *Taylor* Court remained squarely on the pre-trial stages of jury selection.[67] With respect to the petit jury, the Court specifically cautioned that juries "actually chosen" are not required to mirror the community.[68] On the federal level, no decision has attempted to extend the rationale of *Taylor* to the petit jury stage of jury selection. On the state level, the California Supreme Court recognized that the *Taylor* rationale had the potential to extend greater protection to an individual defendant than had the earlier decision in *Swain*. In *People v. Wheeler*,[69] the California court fashioned a unique state remedy for defendants protesting prosecutorial use of peremptory challenges.

C. *State Extension of Federal Precedent*

In *Wheeler*, an all-white jury convicted two black defendants of first-degree murder in the death of a white store owner during the course of a robbery.[70] At trial, the prosecution, through the exercise of peremptory challenges, successfully excluded all potential black jurors from the jury venire.[71] On appeal, the defendants alleged a denial of their right to an impartial jury guaranteed by article one, section sixteen, of the California Constitution.[72]

In a question of first impression, the California Supreme Court held that its state constitution prohibits the use of peremptory challenges to eliminate a legally cognizable group from the petit jury.[73] Noting that the United States Supreme Court in *Taylor* had applied the constitutional guarantee of a jury drawn from a representative cross-section of the community to the states, the California court concluded that peremptory challenges which eliminate a legally cognizable group frustrate the "primary purpose" of a defendant's sixth amendment rights guaranteed by *Taylor*.[74]

A preliminary but nevertheless crucial aspect of the *Wheeler* decision was the court's careful delineation of an adequate and independent state ground. First, the court noted the arguable distinction between *Swain*, a decision based on the equal protection clause, and *Taylor*, a decision based on the sixth amendment.[75] The court believed, however, that the *Swain* holding with respect to peremptory challenges was undisturbed by the more recent *Taylor* decision and, consequently, refused to draw a specious distinction. Instead, the *Wheeler* court asserted that if the question were presented again, the Su-

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[66] 419 U.S. at 530.
[67] *Id.* at 538.
[68] *Id.*
[69] 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890. *See* Comment, 13 SUFFOLK U.L. REV. 1082 (1979); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1170 (1979) [hereinafter cited as *Prosecutorial Misuse*]; Comment, 48 U. CIN. L. REV. 599 (1979).
[70] 22 Cal. 3d at 262, 583 P.2d at 752, 148 Cal. Rptr. 893.
[71] *Id.* at 262-65, 583 P.2d at 753-54, 148 Cal. Rptr. 893-95.
[72] *Id.* at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893.
[73] *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 902.
[74] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
[75] *Id.* at 284, 583 P.2d at 767, 148 Cal. Rptr. at 908.

preme Court would "reaffirm *Swain* and reach the same result under the representative cross section rule as it did under the equal protection clause."[76]

While recognizing *Swain's* continued vitality, the court also noted the failure of *Swain* to provide even minimal protection to defendants and asserted that this sterile promise of protection justified an independent state ground for the *Wheeler* decision.[77] The *Swain* standard, observed the court, fails to safeguard the rights of defendants who are victimized before any discriminatory pattern in the use of peremptory challenges emerges. In addition, the standard places an onerous burden of proof on the defendant who, as party to but one criminal proceeding, must attempt to overcome the practical impossibility of assembling sufficient evidence.[78] Since a state court, when interpreting its constitution, may guarantee state citizens greater rights than those extended by "the divergent decisions of the United States Supreme Court,"[79] the court in *Wheeler* forcefully concluded that the *Swain* rule "is not to be followed in our courts" and that the California Constitution shall govern all claims of defendants alleging the misuse of peremptory challenges.[80]

The greater protection which the *Wheeler* decision offers defendants is found in the court's interpretation of the sixth amendment guarantee of a jury drawn from a fair and impartial pool. Attempting to prevent those uses of the peremptory challenge which frustrate this constitutional guarantee, the court created a duty to preserve "that degree of representativeness" which the random draw from the jury venire produces in the petit jury.[81] A representative jury contains a diversity of perspective and opinion.[82] Within the petit jury, the court reasoned, each individual possesses "opinions, preconceptions, or even deep-rooted biases" which are often the result of their association with a particular element of society.[83] Since an individual's personal outlook may be similar to that of other persons within the same societal group, the court acknowledged the existence of shared group perspective and termed this notion "group bias."[84]

Equating the preservation of group bias with the rationale of the sixth amendment guarantees,[85] the *Wheeler* court found that the overall impartiality of petit juries is secured by the "interaction of diverse beliefs and values" among the jurors.[86] Thus, group bias must be protected in order to ensure that the "representative biases . . . to the extent that they are antagonistic, will tend to cancel each other out."[87] If potential jurors could be challenged for holding those general perspectives which the sixth amendment guarantees are

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[76] *Id.* at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908.
[77] *Id.* at 286-87, 583 P.2d at 767-68, 148 Cal. Rptr. at 909-10.
[78] *Id.* at 285-86, 583 P.2d at 767, 148 Cal. Rptr. at 908-09.
[79] *Id.* at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908.
[80] *Id.* at 287, 583 P.2d at 768, 148 Cal. Rptr. at 909-10.
[81] *Id.* at 278, 583 P.2d at 762, 148 Cal. Rptr. at 903.
[82] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902-03.
[83] *Id.* at 266, 583 P.2d at 755, 148 Cal. Rptr. at 896.
[84] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
[85] *Id.* at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.
[86] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
[87] *Id.* at 276-77, 583 P.2d at 761, 148 Cal. Rptr. at 902.

designed to foster, then those biases associated with a majority group would dominate a jury after the minority group biases were purposefully eliminated by the use of peremptory challenges.[88] Therefore, the court concluded that the random composition of a petit jury may be altered only by challenges for cause and peremptory challenges motivated by specific reasons associated with the trial at hand.[89]

Peremptory challenges which are based on group bias, however, cannot be allowed to undermine the broad diversity of opinion represented in the petit jury.[90] Extending a co-equal right of objection to the prosecution,[91] the *Wheeler* court framed a proof and remedy procedure aimed at eliminating those uses of the peremptory challenge which eliminate legally cognizable groups. Beginning with a presumption in favor of the party utilizing peremptory challenges, the court required a showing by the objecting party that a "cognizable group"[92] has been excluded and a "strong likelihood" that group affiliation is the reason for such an exclusion.[93] If both elements are established, an inference of improper group exclusion arises and the allegedly offending party must then justify its use of peremptory challenges.[94] If such a justification does not satisfy the trial judge, he must quash the venire and select an entirely new jury panel, thereby restoring representational balance to the jury selection procedures.[95]

Wheeler represents a novel state appraisal of the peremptory challenge. The rationale used by the California Supreme Court to justify a limited inquiry into the traditionally unassailable right to exercise peremptory challenges was accepted and applied again by the Massachusetts Supreme Judicial Court in *Commonwealth v. Soares.*

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[88] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902; *see* 1979 Mass. Adv. Sh. 626-27, 387 N.E.2d at 516.

[89] 22 Cal. 3d at 274, 583 P.2d 760, 148 Cal. Rptr. at 900.

[90] *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902-03.

[91] *Id.* at 282 n.29, 583 P.2d at 765, 148 Cal. Rptr. at 907.

[92] *Id.* at 280 n.26, 583 P.2d at 764, 148 Cal. Rptr. at 905. Since blacks were clearly a cognizable group, the court declined to enumerate other cognizable groups; preferring instead to define other such groups on a case-by-case basis. *Id.* Recently, in Rubio v. Superior Court, ____ Cal. 3d ____, 593 P.2d 595, 154 Cal. Rptr. 734 (1979), the California Supreme Court was faced with the question of whether resident aliens and ex-felons constitute a cognizable group. The court framed a two-part test for the determination of cognizable group status. First, persons within a group must share a common perspective "precisely *because* they are members of that group." *Id.*, 593 P.2d at 598, 153 Cal. Rptr. 439 (emphasis in original). Fearful, however, that cognizable groups would be narrowly defined, the court added a second element. In order to establish a legally cognizable group, the aggrieved party must also demonstrate that no group in the community is "capable of adequately representing the perspective of the group assertedly excluded." *Id.*, 593 P.2d at 598, 153 Cal. Rptr. at 729. Looking to the instant case, the court found that persons convicted of misdemeanors and naturalized citizens share similar attitudes with ex-felons and resident aliens. A vigorous dissent argued that the court had created a "vicarious representation" standard. *Id.*, 593 P.2d at 604, 153 Cal. Rptr. at 745.

[93] 22 Cal. 3d at 280, 583 P.2d at 765, 148 Cal. Rptr. at 905.

[94] *Id.* at 282-83, 583 P.2d at 766, 148 Cal. Rptr. at 906.

[95] *Id.*

II. *COMMONWEALTH V. SOARES*: REJECTION OF FEDERAL PRECEDENT AND ACCEPTANCE OF THE *WHEELER* RATIONALE

Prior to the *Soares* decision, several Massachusetts defendants had raised the abuse of peremptory challenges as an issue on appeal.[96] Various defendants chose, unsuccessfully, to tackle the burdensome task of satisfying the *Swain* burden of proof;[97] others searched, also unsuccessfully, for an alternative argument by which to circumvent the restrictive precedent of *Swain*.[98] The argument presented by the defendants in *Soares*, however, was a question of first impression in Massachusetts.[99] The defendants asserted that article twelve of the Declaration of Rights of the Massachusetts Constitution, which guaranteed a defendant's right to a trial before a jury of his peers, offered an alternative state ground permitting the court at least to consider the alleged abuse of peremptory challenges by the prosecution.[100]

The Supreme Judicial Court accepted the defendant's "invitation to reexamine the issue" of prosecutorial practices in the use of peremptory challenges, and noted the similar route chosen by the California Supreme Court in *Wheeler*. Echoing the reasoning of the *Wheeler* court, citing the negligible protection offered by *Swain*, and noting *Swain's* history of uniformly unfavorable criticism, the court in *Soares* refused to follow *Swain* and "perfunctorily" reject the defendants' claims.[101] Instead, the court turned to the Massachusetts Constitution and delineated the qualities of a jury guaranteed by article twelve.[102]

Several Massachusetts decisions previously had concluded that a fair and impartial jury embodies a cross-section of the community.[103] While not specifically incorporating this concept under article twelve,[104] these decisions demonstrated, nevertheless, that a defendant's right to a jury drawn from a representative cross-section of the community is a guarantee accepted by Massachusetts courts.[105] Similar to the jury-selection decisions on the federal level, however, these state decisions had considered this concept only with respect to the preliminary stages of jury selection, namely, jury lists and jury pools.[106] Consequently, the court in *Soares* faced the task of extending to the

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[96] *See, e.g.*, Commonwealth v. Mitchell, 367 Mass. 419, 326 N.E.2d 6 (1975); Commonwealth v. Talbert, 357 Mass. 146, 256 N.E.2d 748 (1970).

[97] 367 Mass. at 420, 326 N.E.2d at 7 (court refused to "transmute peremptory challenges into challenges for cause"); 357 Mass. at 147, 256 N.E.2d at 749.

[98] Commonwealth v. King, 366 Mass. 6, 313 N.E.2d 869 (1974) (court refused to formulate a new rule for the exercise of peremptory challenges under general supervisory jurisdiction).

[99] 1979 Mass. Adv. Sh. at 609-10 n.9, 387 N.E.2d at 509 n.9.

[100] *Id.* at 612-13, 387 N.E.2d at 510.

[101] *Id.* at 613 n.12, 387 N.E.2d at 510 n.12.

[102] See note 12 *supra*.

[103] *Id.* at 614, 387 N.E.2d at 510-11; Commonwealth v. Rodriguez, 364 Mass. 87, 300 N.E.2d 192 (1973); Commonwealth v. Ricard, 355 Mass. 509, 246 N.E.2d 433 (1969).

[104] See note 103 *supra*.

[105] 1979 Mass. Adv. Sh. at 614, 387 N.E.2d at 510-11.

[106] See note 103 *supra*.

final stage of jury selection—the petit jury—a defendant's right to trial by a jury representing a cross-section of the community.

For its rationale, the court in *Soares* turned to that line of United States Supreme Court decisions which eventually led to the recognition of a defendant's sixth amendment right to a jury drawn from a representative cross-section of the community.[107] The court noted that in these decisions, the growing concern for an individual defendant's right to a properly constituted jury was based on a number of convergent policy considerations.[108] The court focused particularly on the policy, most clearly articulated in *Taylor,* that broad group participation assures that the "commonsense judgment of the community" will be reflected in a jury verdict.[109] Thus, the court concluded that a key objective of a jury selection process which draws jurors from all identifiable segments of the community is the assurance that a "diffused impartiality"—a diverse range of opinions, perspectives and qualities of human nature—will appear in any individual jury.[110]

The phrase "diffused impartiality" appeared originally in a dissenting opinion by Justice Frankfurter in *Theil v. Southern Pacific Co.*[111] In *Soares,* however, the Supreme Judicial Court infused the term with a special significance in making it the goal of petit jury selection. Portraying juror interaction as "dynamic commingling of the ideas and biases" of each juror, the court stated that every person is influenced by the "interests and preferences which are the product of his cultural, family and community experience."[112] Further, the court reasoned that particular elements of society, "discrete groups,"[113] may share a common perspective and the positive contribution which an individual group member makes to the jury debate is the assertion of his opinion, even if it is derived from group affiliation.[114] Consequently, the diffused impartiality of a properly constituted petit jury represents the diverse community attitudes and beliefs that are essential to impartial jury deliberations and, therefore, a fair trial.[115]

The court then scrutinized the state's method of selecting jury panels to determine if such procedures unreasonably threatened a defendant's newly-created right to diffused impartiality in a petit jury.[116] Deferring to administrative concerns and simple impracticality, the *Soares* court refused to require that a petit jury mirror the community.[117] The court recognized that challenges for cause and the vagaries of the random draw unavoidably alter the composition of a petit jury.[118] The court required, however, that peremptory

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[107] *Id.* at 614-21, 387 N.E.2d at 511-13.
[108] *Id.* at 615-16 n.17, 387 N.E.2d at 511.
[109] *Id.* at 616, 387 N.E.2d at 511 (quoting 419 U.S. at 530).
[110] 1979 Mass. Adv. Sh. at 617, 387 N.E.2d at 512.
[111] 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).
[112] 1979 Mass. Adv. Sh. at 625-26, 387 N.E.2d at 515.
[113] *Id.* at 627-28, 387 N.E.2d at 516.
[114] *Id.* at 624-26, 387 N.E.2d at 515.
[115] *Id.* at 619-24, 387 N.E.2d at 512-14.
[116] *Id.* at 627, 387 N.E.2d at 516 (citing 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903).
[117] 1979 Mass. Adv. Sh. at 619-21, 387 N.E.2d at 512-13.
[118] *Id.* at 620-21, 387 N.E.2d at 513.

challenges satisfy a more rigorous analysis in the interest of preserving diffused impartiality within the petit jury.[119]

The court in *Soares* held that the guarantee of diffused impartiality requires that the peremptory challenge be restricted in certain circumstances.[120] If the right to a petit jury that reflects a cross-section of the community is "to signify more than hollow words," the systematic use of peremptory challenges to exclude potential jurors solely because of membership in a discrete group must be prohibited.[121] The court maintained that its holding does not radically affect the peremptory challenge. Instead, such challenges retain a significant role in eliminating "those jurors whose unique relationship to the particular case raises the spectre of individual bias."[122] Peremptory challenges which eliminate those elements of the broad community conscience that are incorporated in a petit jury by the preservation of diffused impartiality frustrate the competitive interplay of diverse opinion guaranteed by article twelve of the Declaration of Rights.[123]

The court in *Soares* did not limit the right to question the use of peremptory challenges solely to defendants. The court acknowledged the right of the prosecution to a jury which is likely to reach a fair decision.[124] Defendants are no less likely than the prosecution to challenge jurors based on association with discrete groups. If a question were properly presented on appeal, the court asserted that "the Commonwealth is equally entitled to a representative jury."[125] Thus, while possessing only limited appeal rights, the State may object at trial to defense tactics designed to eliminate particular groups from the petit jury.[126] The right to diffused impartiality is extended equally to prosecution and defense in order to safeguard the process of jury deliberations by assuring the influence of diverse viewpoints upon the ultimate decision.

The Supreme Judicial Court, having defined the purpose and scope of diffused impartiality, set forth a two-part method of proof. This method was designed to preclude the use of peremptory challenges which are based on a juror's group affiliation without inhibiting their legitimate function in

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[119] *Id.* at 622-23, 387 N.E.2d at 514. See, contra, text and note at note 47 *supra* (decisions therein which adhere to *Swain* rule of unregulated peremptory challenges); United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1980), *aff'd without opin.*, 620 F.2d 286 (2d Cir. 1980) (*Swain* remains binding precedent on federal courts). In contrast, the *Soares* and *Wheeler* decisions required trial courts to discern the motives behind peremptory challenges in order to distinguish between specific and group-related reasons for peremptory challenges. 1979 Mass. Adv. Sh. at 623-24, 387 N.E.2d at 514; *Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902; *cf.* People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978) (pretrial knowledge that witnesses will relate racial slurs during testimony insufficient reason to justify challenges aimed at black jurors).

[120] 1979 Mass. Adv. Sh. at 624-26, 387 N.E.2d at 515.

[121] *Id.* at 622-23, 387 N.E.2d at 514.

[122] *Id.* at 623, 387 N.E.2d at 514.

[123] *Id.* at 624-26, 387 N.E.2d at 515.

[124] *Id.* at 629-30 n.35, 387 N.E.2d at 517 n.35.

[125] *Id.*

[126] See text at note 178 *infra*.

eliminating individual bias.[127] The court placed an initial burden on the party alleging group exclusion. Such parties must overcome a rebuttable presumption that peremptory challenges are being properly exercised. Following an objection, the complaining party must establish both a pattern of challenges against a discrete group and a reasonable inference that such challenges are based solely on group affiliation.[128] In demonstrating a reasonable inference, it is essential that the complaining party show a disproportionate exclusion of a discrete grup as compared to the remaining discrete groups on the jury panel.[129] The court also noted other significant, but not essential, elements to be considered by the trial judge in ruling on the objection, such as group affiliation between the defendant and the excluded group, and common group membership between the victim and a significant number of the remaining jurors.[130]

If the complaining party has demonstrated prima facie evidence raising an inference that a discrete group has been excluded, the burden of proof then shifts to the allegedly offending party to rebut the apparent misuse of peremptory challenges. While the reasons offered in rebuttal need not meet the requirements for a challenge for cause, the burden of justifying peremptory challenges is, nevertheless, a difficult one.[131] The *Soares* court indicated that specific grounds showing individual bias must be offered for "*each* member excluded."[132] Quoting *Wheeler*, the court expressed confidence in the ability of trial judges to distinguish "bona fide reasons" from "sham excuses belatedly contrived" to obfuscate the improper use of peremptory challenges.[133] The Supreme Judicial Court concluded that if insufficient justification is offered to sustain contested peremptory challenges,[134] a trial court would be warranted in finding an improper group exclusion and in utilizing the appropriate remedy.[135]

Again referring to the *Wheeler* decision, the court in *Soares* defined a remedy which restores diffused impartiality to the petit jury.[136] If the trial judge finds that the exercise of peremptory challenges has eliminated a discrete group improperly, he has necessarily concluded that the representational qualities of diffused impartiality also have been stripped from the jury panel.[137] The court held, therefore, that a trial judge must excuse not only the jurors already seated, but any jurors remaining in the venire as well and begin juror selection anew.[138] This procedure assures the presence of dif-

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[127] 1979 Mass. Adv. Sh. at 629-30 n.35, 387 N.E.2d at 517 n.35.

[128] *Id.* at 628-32, 387 N.E.2d at 516-18.

[129] *Id.* at 629, 387 N.E.2d at 517.

[130] *Id.* at 630, 387 N.E.2d at 517.

[131] *Id.* at 629-30, 387 N.E.2d at 517.

[132] *Id.* at 630-31, 387 N.E.2d at 517 (emphasis added).

[133] *Id.*

[134] *Id.* at 632, 387 N.E.2d at 518 (quoting 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906).

[135] 1979 Mass. Adv. Sh. at 630, 387 N.E.2d at 518; *see* KUHN, *supra* note 24, at 295 (trial judge capable of making decisions as to use of challenges even if close judgments).

[136] 1979 Mass. Adv. Sh. at 631-32, 387 N.E.2d at 517-18.

[137] *Id.*

[138] *Id.*

fused impartiality and guarantees both parties a petit jury which represents the community sense of justice as nearly as "the process of random draw permits."[139]

III. Evaluation

A. *The Rationale of* Soares *and* Wheeler

The fundamental element of the rationale advanced by the Supreme Judicial Court in *Soares,* and by the California Supreme Court in *Wheeler,* is the assumption that individual jurors hold opinions and beliefs, derived from their membership in societal groups, which they will assert in the course of jury deliberations.[140] Both courts arrived at this novel proposition after lengthy analyses of those United States Supreme Court decisions, culminating in *Taylor,* which established the sixth amendment right to a jury that is drawn from a representative cross-section of the community.[141] These federal decisions, however, were concerned exclusively with the problems related to the early stages of jury selection and do not readily support the interpretation offered by the two state courts.

The rationale underlying the Supreme Judicial Court's decision in *Soares* and the California Supreme Court's decision in *Wheeler* consists of two distinct aspects. First, both state courts assume a correlation between group membership and the beliefs and opinions of individual group members. The court in *Wheeler,* for example, asserted that one consideration supporting a defendant's sixth amendment right to an impartial jury is the recognition that every person possesses "deep rooted biases derived from their life experiences."[142] Nevertheless, the California Supreme Court admitted that this rationale is "often unstated."[143] In similar fashion, the Massachusetts Supreme Judicial Court concluded that diffused impartiality—a diversity of individual opinion derived from group affiliation—is a "key objective" secured by the guarantee of representative cross-section of the community.[144]

Yet, the United States Supreme Court has never explicitly linked individual beliefs with group membership.[145] The Court has looked, instead, to groups present in society to measure objectively the validity of state jury selection procedures. In *Peters v. Kiff,*[146] for example, the Court minimized the importance of internal identification and similarity of values among members of a particular group.[147] Group affiliation appears to be merely a means to identify the extent of community participation in the administration of justice. By suggesting a link between individual beliefs and group membership, the

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[139] *Id.* at 627, 387 N.E.2d at 516 (citing 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903).

[140] *See Prosecutorial Misuse, supra* note 46, at 1178.

[141] See text and note at note 52 *supra.*

[142] 22 Cal. 3d at 266, 583 P.2d at 754-55, 148 Cal. Rptr. at 895-96.

[143] *Id.* at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.

[144] 1979 Mass. Adv. Sh. at 617, 387 N.E.2d at 512.

[145] *Prosecutorial Misuse, supra* note 69, at 1178-79; Comment, 13 Suffolk U.L. Rev. at 1091.

[146] 407 U.S. 493 (1972).

[147] *Id.* at 503-04.

Massachusetts and California courts have asserted a strained, albeit novel, interpretation of the right to a jury drawn from a representative cross-section of the community.

As the second distinct aspect of their similar rationales, the courts in both *Wheeler* and *Soares* assumed that individual jurors vigorously assert their respective group-related biases during jury deliberations. The California Supreme Court in *Wheeler* suggested that diverse biases should be present in order to assure that antagonistic biases "will tend to cancel each other out." [148] Similarly, in *Soares,* the Supreme Judicial Court feared that if minority group biases were eliminated from the jury, majority group biases would dominate the debate.[149] Neither court addressed the implications of this conclusion.[150] Nevertheless, this portrayal of the jury debate would appear to conflict with the more traditional view of the jury as an impartial finder of facts. In the view of both the *Wheeler* and *Soares* courts, interaction between partial jurors, jurors swayed by "deep-rooted biases," will produce an impartial verdict. Even if jurors do, in fact, assert their respective biases, it is anomalous that both courts, in their effort to foster impartial juror selection, would conclude that passion rather than dispassion, conflict rather than consideration, will produce a fair decision.[151]

Adopting identical rationales, the California Supreme Court in *Wheeler* and the Supreme Judicial Court in *Soares* first stated a tenuous interpretation of the right to a fair and impartial jury and then characterized the decision-making process as an adversarial encounter among a group of opponents. Each demonstrates the problems with the courts' conceptual analysis. Of more significance, however, is the effect of the *Soares* decision on the process of voir dire.

B. *Additional Burden on Voir Dire*

By opening the peremptory challenge to inquiry, the Supreme Judicial Court in *Soares* created a corresponding need for objective evidence in order to prove whether peremptory challenges, in fact, are being exercised in light of individual characteristics. The court emphasized the necessity of creating a complete record against the possibility of appeal.[152] While the court explicitly referred to the duty incumbent on the party alleging the misuse of peremptory challenges to create a clear record, the party exercising those challenges also will seek to establish evidence of specific, individual biases in anticipation of a possible objection. To accomplish their respective needs, both parties will turn to the voir dire process. In practice, however, the necessity of

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[148] 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

[149] 1979 Mass. Adv. Sh. at 626-27, 387 N.E.2d at 515-16.

[150] *But see* 22 Cal. 3d at 288, 583 P.2d at 770, 148 Cal. Rptr. at 910 (Richardson J., dissenting).

[151] *Id.* at 292, 583 P.2d at 773, 148 Cal. Rptr. at 913 (Richardson, J., dissenting) ("Dissension, to the extent that it reflects only a clash of 'respective biasies' of individual jurors, is no guarantee whatever of impartiality.").

[152] 1979 Mass. Adv. Sh. at 608-10 n.8, 387 N.E.2d at 508-09; *see* 22 Cal. 3d at 263-65, 583 P.2d at 753-54, 148 Cal. Rptr. at 894-95 (defense counsel's problems in creating an adequate record for appeal).

justifying peremptory challenges places an excessive burden on the voir dire process, a burden which that process is not designed to handle.

While voir dire is the only means available for establishing the grounds necessary to support or to attack the exercise of peremptory challenges, procedures for conducting voir dire vary widely.[153] Some jurisdictions, believing that properly supervised exchange between attorney and juror will successfully weed out biased individuals, allow both sides to question the panel directly.[154] Other jurisdictions, fearing that voir dire often is abused to create predispositions in jurors, grant the trial judge discretionary power to determine voir dire procedures.[155] Massachusetts judges, although given the option to allow attorney inquiries, invariably assume jury questioning themselves.[156]

Because voir dire is designed to reveal the narrow statutory elements of a challenge for cause, it is seldom pursued with the purpose of uncovering more general bias or prejudice.[157] Even if the questioning is extensive and probing, some doubt its effectiveness. These critics point out that potential jurors often do not recognize the subtle traits or slanted perspectives which may govern their personalities.[158] Other potential jurors, well aware of a pre-

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[153] *See* FED. P. CIV. P. 47; FED R. CRIM. P. 24(a); ABA Standards, *supra* note 4, at § 2.4; *cf.* Babcock, *Voir Dire: Preserving Its Wonderful Power,* 27 STAN. L. REV. 545 (1975); VAN DYKE, *supra* note 4, at 165-66.

[154] *See* Cal. Rules of Court, r. 516 (judges *shall* allow counsel to question jurors (emphasis added)).

[155] *See* ABA Standards, *supra* note 4, at § 2.4 (judge should initiate questioning, then allow parties questions as he deems proper).

[156] MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1968); MASS. R. CIV. P. 47; MASS. R. CRIM. P. 20(b)(1). Ostensibly these statutes permit questioning of jurors by counsel. The consistent policy of the Superior Court has been for the trial judge to retain control of all questioning while incorporating questions submitted by counsel.

This narrowly circumscribed procedure contrasts sharply with the methods used in California courts. See note 154 *supra.* The court in *Wheeler* emphasizes the relevance of an attorney's conduct during voir dire as evidence that peremptory challenges are based on group bias. *Wheeler,* 22 Cal. 3d at 280, 583 P.2d at 765, 148 Cal. Rptr. at 906 (failure to ask challenged jurors more than desultory questions is additional evidence of group exclusion). The court in *Soares* failed to discuss this significant difference in trial procedures. It will be far more difficult to establish evidence on the record of "specific bias" in Massachusetts courts which do not permit exchange between counsel and jurors.

[157] The scope of voir dire remains almost completely within the discretion of the trial judge; subject to review only in the most blatant instances of abuse. One area of inquiry which has been recently expanded is that of racial prejudice. Ham v. South Carolina, 409 U.S. 524 (1973); Ristaino v. Ross 424 U.S. 589 (1976); Commonwealth v. Lumley, 367 Mass. 213, 327 N.E.2d 683 (1975). A 1975 amendment to the Massachusetts voir dire statute made mandatory questioning with respect to "considerations, attitudes, exposure, opinions" which might influence a potential juror when race is an issue in the trial. MASS. GEN. LAWS ANN. ch. 234, § 28 (West Supp. 1979). Nevertheless, the trial judge still retains control over the manner, form and extent of questioning. VAN DYKE, *supra* note 4, at 144-45, 160-66; People v. Crowe, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973).

[158] Broeder, *Voir Dire: An Empirical Study,* 88 S. CAL. L. REV. 503, 505-21 (1965) [hereinafter cited as Broeder] (voir dire grossly ineffective even in eliciting data which

disposition, may refuse to answer truthfully in the public forum of a courtroom.[159] As the judge conducts the voir dire, counsel must look for personal mannerisms or attitudes which, in light of common experience, may indicate a juror's attitude or predisposition. Such subtle hints, perhaps evident only to the alert attorney, certainly will not appear in the record. If an objection is raised later by opposing counsel alleging group-based peremptory challenges, little or no discernable evidence will be available to support possibly legitimate assertions that a juror holds a specific bias.[160]

The formidable task of creating a record sufficient to substantiate each peremptory challenge places counsel in a dilemma. Concerned that his challenge may be questioned, he may request further inquiry in the hope of highlighting a suspected bias. This tactic, even if successful, risks alienating the remaining jurors who will not fail to perceive the source of the additional questions.[161] If counsel simply exercises his challenges instead, he risks an adverse finding by the trial judge and the dismissal of the venire.[162] Too often counsel may accept a questionable juror out of fear that his inchoate, but nevertheless legitimate, suspicions will not be sufficient to justify his peremptory challenges. As a result, the voir dire process is ill-equipped to shoulder the new evidentiary burden created by the *Soares* decision. To the extent that the voir dire ineffectively reveals juror bias, vigorous use of the peremptory challenge is hampered. Consequently, *Soares,* while purporting to eliminate peremptory challenges which improperly disrupt diffused impartiality, also may inhibit those challenges motivated by the "spectre of individual bias"—a result contrary to the intent of the decision.[163]

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may suggest bias). The system is further handicapped by counsel who do not use their questions effectively. For a humorous, fictional account of voir dire and a subsequent trial, see Starrett, *The Eleventh Juror,* in MASTERPIECES OF LEGAL FICTION 719 (1964) (wrongly-accused defendant acquitted of murder by jury of which actual perpetrator of the crime is a member).

[159] Broeder, *supra* note 158, at 515-16.

[160] *Wheeler,* 22 Cal. 3d at 294, 583 P.2d at 774, 148 Cal. Rptr. at 915. (Richardson, J., dissenting) (subtle signals which prompt peremptory challenges do not appear in the cold record). Recognizing the possibility that his peremptory challenges may be questioned, alert counsel may wish to make an offer of proof concerning the reasons for particular challenges. Placing counsel in this position may significantly deter the use of peremptory challenges. See text and notes at notes 106-08 & 145.

[161] Counsel may approach the bench and explain the questions he wishes asked. See note 102 *supra.* Assuming the trial judge agrees to ask the questions, the jurors, observing the side-bar conference, cannot help but realize that counsel requested the additional inquiry. If, then, the same attorney uses peremptory challenges against some of the jurors, those remaining may react unfavorably.

[162] 1979 Mass. Adv. Sh. at 631-32, 387 N.E.2d at 518 (venire must be quashed in order to restore representative cross-sectional balance to the new panel). In many instances, if jury selection has already taken some time, most of the available jurors will have been called for the trial already. If the venire is then quashed, the trial may have to be suspended for several weeks until a new group of jurors is assembled. If, however, jurors are available so that new selection can begin, the same trial judge will preside over the trial. No judge will be pleased at having spent valuable trial time only to have the panel rendered unfair by the conduct of counsel.

[163] *Id.* at 623-24, 387 N.E.2d at 514.

C. *Procedural Ramifications of* Soares

The court in *Soares* defined a two-part test which objections to the use of peremptory challenges must satisfy. The first element of this test requires a party to demonstrate a pattern of peremptory challenges.[164] This aspect of the test appears to be objective and should present few difficulties. When immutable characteristics link the challenges, and counsel is careful to preserve the trial record, proof of an apparent pattern should be fairly simple.[165] Nevertheless, practical considerations may hinder efforts to prove the existence of a discrete group based on creed or national origin. More information than the name, address, and occupation of the jurors and their spouses is rarely available.[166] Trial judges, during the course of voir dire, will demand strong justification before questioning jurors concerning their religious beliefs or national heritage.[167] Consequently, this informational gap could handicap the complaining party in showing a series of challenges which constitute a discrete group of challenged jurors.

In addition to objective evidence of a discernable pattern, the two-part test also requires subjective evidence which reveals the purpose behind the pattern of challenges. The *Soares* court carefully noted that a party need not show any direct relationship between a pattern of challenges and the issues at trial.[168] Therefore, in theory, the complaining party may simply point to the exclusion of a discrete group and thereby also prove the subjective fact that the exclusion was predicated on membership in the discrete group. The test formulated by the Supreme Judicial Court in *Soares* does not appear to require a more stringent degree of proof.[169]

Once prima facie exclusion of a discrete group has been shown, the allegedly offending party seeking to justify an apparent pattern of peremptory challenges against a discrete group, is confronted with a difficult task. The court in *Soares* created a strong presumption against the validity of challenges which limit representation of societal groups on the petit jury.[170] The al-

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[164] *Id.* at 628-29, 387 N.E.2d at 516-17.

[165] See text and note at note 152 *supra.*

[166] The typical jury list in the Commonwealth of Massachusetts is a computer print-out compiled primarily from voter registration lists. It is composed as follows:

Juror name	Juror home address	Ward
Juror employer	Employment address	Juror occupation
Spouse's employer	Spouse's employment address	Spouse's occupation

(line two and three deleted if unavailable)

[167] Trial judges are fearful of arousing racial or ethnic issues unless they are inextricably bound up in the issues at trial. *See, e.g.*, 1979 Mass. Adv. Sh. at 608-09 n.6, 387 N.E.2d at 508 n.6.

[168] *Id.* at 629, 387 N.E.2d at 517.

[169] *But see id.* at 629-30, 387 N.E.2d at 517 (court discusses evidence which is persuasive on the issue of systematic exclusion). The court noted that 92% of the available black jurors were excluded as compared to only 34% of the white jurors. *Id.* The California Supreme Court in *Wheeler* refused to use any statistical evidence in evaluating the purpose behind a series of challenges. 22 Cal. 3d at 278-80, 583 P.2d at 763-64, 148 Cal. Rptr. at 904-05.

[170] 1979 Mass. Adv. Sh. at 625-26, 387 N.E.2d at 515 (cultural, family and community experience essential elements of diffused impartiality).

legedly offending party has two choices in suggesting reasons other than the assumption of group affiliation as the basis for a pattern of challenges. First, counsel may show that, while the excluded jurors share a common group membership, they also share a common specific trait which is significant in the trial. For example, those jurors eliminated all may be black, but they also may live in the same general neighborhood as the defendant. Thus, counsel may fear that these persons could be aware of extraneous information about the defendant or the facts of the case which would affect their judgment. If this argument is not a sham, counsel will have available geographical information and, quite probably, will have excluded potential white jurors for the same reason.[171]

A second choice available to counsel is to support each exclusion individually within the discrete group.[172] The court in *Soares* noted several examples of sufficiently specific and particular reasons which would justify a peremptory challenge. The court suggested that a potential juror with a prior arrest record, or one who had been the victim of a crime or whose manner of dress suggests "unconventional lifestyle" could be excluded legitimately by use of a peremptory challenge.[173] The court also indicated, however, that specific grounds must be offered for "*each* group member excluded."[174] The burden of justifying a pattern of challenges by showing a unique bias in each excluded juror is, therefore, a formidable task, especially when the limitations of voir dire are considered.[175] If a trial judge refuses to accept the specific grounds offered to support even one of a pattern of challenges, he would be warranted in exercising the remedy delineated by the court.[176]

The remedy defined by the court in *Soares* requires the trial judge, upon finding a systematic use of peremptory challenges, to dismiss the remaining seated jurors and quash the entire venire.[177] This remedy is expressly designed to restore diffused impartiality by reconvening a jury which satisfies the cross-sectional balance contemplated by article twelve of the Massachusetts Declaration of Rights. Although other, less drastic solutions may come to mind, the court suggests no alternatives. Further, because the remedy secures a defendant's right to a fair and impartial jury, the requirement that the venire must be quashed in favor of an entirely new venire appears to be the exclusive remedy contemplated by the court.

In a footnote the court promised, however, to "study the experience which develops" including "judicial reactions" to the procedures and remedy outlined in *Soares*. Apparently, the Supreme Judicial Court expected different reactions at the trial court level to the procedural aspects of *Soares*. An example of one trial judge's reaction to *Soares* is the recent trial in *Commonwealth v.*

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[171] *Id.* at 631, 387 N.E.2d at 517 (quoting 22 Cal. 3d at 282, 583 P.2d at 764, 148 Cal. Rptr. at 905).

[172] 1979 Mass. Adv. Sh. at 623, 387 N.E.2d at 514.

[173] *Id.* at 623-24 n.27, 387 N.E.2d at 514 n.27.

[174] *Id.* at 632, 387 N.E.2d at 518 (emphasis added).

[175] See text and notes at note 131 *supra*.

[176] *Id.* at 631-32, 387 N.E.2d at 517-18.

[177] *Id.*

Sanders.[178] In *Sanders,* a jury trial of a black man for the rape of a white woman, the trial judge required counsel from both sides to disclose, before the exercise of a peremptory challenge, the reasons prompting each challenge. After eleven jurors were seated, the Commonwealth attempted to challenge a black man. The trial judge, rejecting the reasons offered by the prosecution in support of its challenge, refused to exclude the juror and ordered that he be seated on the panel.[179] The Commonwealth petitioned the Supreme Judicial Court for extraordinary interlocutory review and requested the court to invalidate the unique procedure used by the trial judge. The Commonwealth, as the basis for its petition, asserted that the exclusive remedy available to the trial judge was to quash the jury venire and begin selection anew.

In a memorandum opinion, Justice Abrams declined to invoke the court's supervisory powers and stated that the "cutting edge" of the *Soares* decision is the procedural discretion of the trial judge to resolve problems as they arise at trial.[180] While not expressing the position of the full court, this memorandum opinion indicates a willingness to accommodate the efforts of trial judges to enforce the mandates of *Soares.* In effect, the trial judge in *Sanders* refused to wait for a pattern of challenges to emerge and dispensed with the elaborate proof and remedy procedures of *Soares.* The result was a streamlined procedure which, nevertheless, prevented the use of peremptory challenges to eliminate a discrete group.

Whether the procedures outlined in *Soares* are exclusive is a question to be answered definitively in the future. At present, *Sanders* may exemplify merely the dissatisfaction of trial judges with that aspect of *Soares* which requires the dismissal of the jury venire after improper use of peremptory challenges. Persuasive in theory, this remedy appears ponderous and excessive in practice. The approach taken by the trial judge in *Sanders* is an effective alternative.

In sum, the California Supreme Court in *Wheeler* and the Massachusetts Supreme Judicial Court in *Soares* stated a novel interpretation of a defendant's right to a fair and impartial jury. While both courts advanced a strained interpretation of federal precedent, both courts also were faced with a factual situation that clearly required redress. Nevertheless, the two state court decisions do present several drawbacks. First, the threat that either party may be forced to justify its use of peremptory challenges places a heavy burden on the voir dire stage of jury selection. Second, the threat of objection to a pattern of challenges unintentionally may hamper the valuable role of the peremptory challenge in obtaining an impartial jury. Finally, the remedy defined by both courts is certainly unwieldy and, in light of recent experience at the trial court level, may be unnecessary.

In large part, these difficulties are most visible in fact situations where the discrete group allegedly excluded is based on some group other than race. Ironically, if the court in *Soares* had employed an alternative rationale to jus-

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[178] Commonwealth v. Sanders, No. 79-476, slip op. (Mass. Nov. 13, 1979) (Abrams, J., single justice).

[179] *Id.* at 1.

[180] See note 178 *supra.*

tify its decision, the broad holding which included sex, religion and national origin as well as race, may have been unnecessary.

III. Alternative Analysis: Equal Access to the Peremptory Challenge

Framing its decision within the context of Articles 12 and 15 of the Massachusetts Constitution,[181] the Supreme Judicial Court defined the term "discrete group" to include several distinct societal groups which traditionally have been afforded protection under the state constitution.[182] Refusing to limit the term solely to groups based on race,[183] the court looked beyond the facts of *Soares* and offered a broad definition of discrete groups which included race, sex, religion and national origin.[184] A party able to prove intentional elimination of any such discrete group is entitled to a new jury venire from which to draw a new jury panel.[185] With respect to the facts of *Soares*—peremptory challenges purposefully employed to exclude black jurors—the decision is beyond reproach. Faced with a situation which demanded a remedy, the court, to its lasting credit, fashioned a commendable solution.

Nevertheless, in extending the scope of its holding to incorporate groups other than race, the court in *Soares* may have offered protection where none was required. Focusing on the subjective intent of counsel in the use of peremptory challenges,[186] the court implicitly assumed that the same inequity occurs whether a pattern of challenges is related to race or to sex, religion or national origin.[187] Yet, if one considers the use of peremptory challenges in light of their effect upon the composition of the jury panel, the court was apparently mistaken in assuming that challenges based on group association are uniformly improper. If both parties in a particular trial have an equal opportunity to challenge prospective jurors for whatever reason, then no substantial harm occurs. Conversely, if for reasons related solely to the issues in a given trial, one party has a significant advantage in its ability to challenge arguably biased jurors, then a material inequity results and steps should be taken to neutralize the advantage. As will be demonstrated, only when peremptory challenges are employed to eliminate black jurors in the context of a trial influenced by racial issues[188] is there sufficient reason to require counsel to disclose his reasons for challenging prospective jurors.

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[181] See text at note 12 *supra*.

[182] 1979 Mass. Adv. Sh. at 627-28, 387 N.E.2d at 516.

[183] *See* 22 Cal. 3d at 280 n.26, 583 P.2d at 561 n.26, 148 Cal. Rptr. at 905 n.26; see note 92 *supra*.

[184] 1979 Mass. Adv. Sh. at 627-28, 387 N.E.2d at 516.

[185] *Id.* at 631-32, 387 N.E.2d at 517-18.

[186] See text at note 168 *supra*.

[187] *See* 1979 Mass. Adv. Sh. at 627-28, 387 N.E.2d at 516.

[188] There is no better example of a trial dominated by racial issues than the *Soares* trial. The homicide occurred during a gang fight—white college students against black inner-city residents. In effect, the trial simply pitted the two sides against each other again.

In *Soares*, the Supreme Judicial Court recognized that the peremptory challenge retains a valuable role in the selection of an impartial jury. It is helpful, therefore, to examine the theoretical basis which justifies the arbitrary elimination of randomly-selected jurors. Ideally, the peremptory challenge aids parties in obtaining a jury devoid of predisposition with respect to the issues and participants in the trial at hand.[189] Viewing the potential jurors as a spectrum of conscious and unconscious biases, each side seeks to eliminate those persons who arguably may hold views at the extremes of that spectrum.[190] The attorney exercising a challenge quite understandably hopes to obtain a new juror more favorable to his client along this spectrum of biases. If the system operates correctly, however, the opposing side will exercise its peremptory challenges in the same manner and exclude a replacement juror who seems unfavorable to its position. The entire system is predicated upon the assumption that there are available jurors who will fall somewhere near the middle of the spectrum of biases.[191] These persons, with no discernable interest in the outcome of the particular trial, should be able to set aside those biases inherent in every person and objectively consider the evidence fairly presented at trial. The competitive exercise of peremptory challenges improves the composition of the jury panel by narrowing the spectrum of juror biases.

This portrayal of jury selection during a routine trial contrasts vividly with a trial where race is inextricably bound up in the proceedings.[192] When race becomes an integral element at trial there can be no routine jury selection. There is no spectrum of juror biases because every potential juror arguably will be identified with one side in the trial. This is not to assume that each juror will somehow be swayed by biases derived from group association.[193] Nevertheless, the particular situation forces counsel to recognize a juror's race in evaluating his potential reactions during the trial. Yet, traditional use of the peremptory challenge is futile because prosecution and defense do not begin on an even footing, hoping to reach some middle ground of impartiality. In the racially-charged atmosphere of a trial such as the *Soares* trial, each peremptory challenge replaced bias with bias rather than exchanging bias for impartiality.

In the example of the *Soares* trial, the black defendant does not have equal access to the peremptory challenge. Unable to eliminate all white jurors, the defendant must attempt to discover, at his peril, those white jurors who may feel sympathy for the victim or prejudice toward the defense. The prosecution need not engage in guesswork. Believing that black jurors will favor a black defendant and possessing sufficient number of challenges,[194] the district

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[189] 1979 Mass. Adv. Sh. at 623, 387 N.E.2d at 513-14; *see* 22 Cal. 3d at 274, 583 P.2d at 759-60, 148 Cal. Rptr. at 910-11 (extremes of potential prejudice eliminated, leaving jury impartial).

[190] *See* GINGER, JURY SELECTION IN CRIMINAL TRIALS 281 (1975).

[191] *Cf.* 1979 Mass. Adv. Sh. at 626, 387 N.E.2d at 513-14 (peremptory challenges designed to eliminate subtle juror prejudice).

[192] See note 188 *supra*.

[193] *See* 1979 Mass. Adv. Sh. at 617-18, 387 N.E.2d at 512.

[194] See note 4 *supra*.

attorney is able to exclude all black jurors who are called from the venire. Further, having challenged a black juror, the replacement juror will not be any less partial. Without a wide spectrum of juror biases, every replacement arguably will be equally biased. It is in this situation, where the defendant is inevitably handicapped in his effort to obtain an impartial jury, that the court should step in to regulate the use of peremptory challenges. Only here is the inequity sufficient to warrant a rule requiring counsel to disclose his reasons for challenges directed at black jurors.

In comparison, the situation is distinctly different if, instead of a series of challenges based on race, counsel employs peremptory challenges to eliminate a group of jurors sharing the same religion or national origin. In this instance, the jury is composed of a full spectrum of religious affiliations or national heritage. For example, an attorney may decide, based on various trial-related reasons, that jurors with a Roman Catholic background are less beneficial to his client's interests than jurors of other religious backgrounds. Yet, in challenging Catholic jurors, counsel does not automatically gain a favorable juror. Rather, he eliminates a juror arguably biased against his client's interests and, in all likelihood, gains a new juror closer to the middle along the spectrum of biases.

The same reasoning applies to peremptory challenges aimed at a group of jurors of the same national origin. In the *Soares* trial, defense counsel attempted to exclude jurors of Italian descent, fearing that such jurors would be swayed by sympathy for the victim or the victim's family.[195] While the *Soares* court would have held such use of peremptory challenges to be improper,[196] if one looks again to the spectrum of biases within the jury panel it appears that peremptory challenges are exerting a positive influence on the jury panel. Defense counsel, wishing to employ his challenges in his client's best interest, quite reasonably concluded that jurors of the same national origin as the victim should be regarded as one extreme in the spectrum of juror biases. Since this use of peremptory challenges aids in securing an impartial jury, there is no reason why it should not be permitted.

The concern of the court in *Soares* over the use of peremptory challenges based on the sex of prospective jurors also is misplaced, although for a different reason than in the case of religion or national origin. In no other situation could there be a more equal opportunity for either party to direct peremptory challenges at one sex or the other. Yet, while the opportunity may be equal, any attempt would be futile. If the state's jury selection procedure is reasonably competent,[197] then the percentage of both sexes in the jury venire will be roughly equal. To employ a series of peremptory challenges against one sex would be a futile gesture and, clearly, not in the best interests of one's client.

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[195] 1979 Mass. Adv. Sh. 629-30 n.35, 387 N.E.2d at 517.

[196] *Id.*

[197] Should there be a marked disproportion between the number of petit jurors of either sex, the state's jury selection procedures which take place before trial would be open to attack. The court's decision in *Soares* protects a defendant's right to an impartial *petit* jury. The court assumed that the procedures which went into composing a particular petit jury satisfied constitutional standards.

In conclusion, the court in *Soares* recognized that there are proper and improper uses for the peremptory challenge. Unfortunately, by expanding its holding to include groups other than race, the court has inhibited legitimate uses of the peremptory challenge. Only in the context of a trial in which racial issues have effectively eliminated impartiality within the jury panel should the court take the extreme step of opening the peremptory challenge to inquiry. In all other cases, either party has equal access in the exercise of peremptory challenges and their use should continue unfettered.

Conclusion

With its decision in *Soares,* the Supreme Judicial Court became only the second state court to hold that a defendant's right to a fair and impartial jury is violated when the prosecution purposefully exercises peremptory challenges to eliminate black jurors. Rejecting federal precedent which had offered no more than illusory protection to earlier defendants, the Massachusetts court followed the California Supreme Court decision in *Wheeler* and concluded that the "diffused impartiality" of a randomly-selected jury cannot be disturbed by peremptory challenges motivated solely by an assumption of bias derived from group association. While the decision has produced some procedural uncertainties at the trial level and the holding may have been unnecessarily broad, nevertheless, the *Soares* decision represents a state court's refusal to follow blindly federal precedent which is perceived to be unnecessarily restrictive. The influence of *Soares* and *Wheeler* in other states and at the federal level remains to be seen. Beyond doubt is the strong, independent stand taken by the Supreme Judicial Court of Massachusetts.

Thomas J. Lynch