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Peremptory Challenges and the Systematic Exclusion of Minorities: State Courts Lead the Way

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PEREMPTORY CHALLENGES AND THE SYSTEMATIC EXCLUSION OF MINORITIES: STATE COURTS LEAD THE WAY

I. INTRODUCTION

The sixth amendment to the U.S. Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." In applying the sixth amendment's guarantee of an impartial jury, the Supreme Court has frequently affirmed the concept that a jury must be drawn from a fair and representative cross section of the community.[1]

The circumstances in which the question of what constitutes a representative jury have varied greatly over the years. For example, in a long sequence of cases, the Supreme Court has faced such questions as whether the sixth amendment permits the exclusion of blacks,[2] women,[3] and conscientious objectors[4] from jury panels; whether jury verdicts of guilty could be less than unanimous;[5] and whether juries could consist of groups smaller than the traditional twelve.[6] Although the answers to these questions have varied, the focal point of each analysis has been whether the practice in question deprived the defendant of the possibility of a jury that represented a cross section of the community.

The concept of a representative jury does not mean that petit juries actually chosen must mirror the community or reflect the various distinctive groups in the population. The Supreme Court in *Taylor v. Louisiana*[7] did not hold that the defendant was guaranteed a jury of a particular composition, but rather that he was entitled to a venire from which distinctive groups had not been systematically excluded.[8] What is clear from the Supreme Court cases, however, is that whatever the nature of the state statute or practice may be,[9] the state is not permitted by the sixth amendment to unreasonably restrict the

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[1] *See infra* note 66.

[2] *See, e.g.*, Peters v. Kiff, 407 U.S. 493 (1972).

[3] *See, e.g.*, Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Ballard v. United States, 329 U.S. 187 (1946).

[4] *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968).

[5] *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972).

[6] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970).

[7] 419 U.S. 522, 538 (1974).

[8] *Id.* at 538.

[9] That is, state statutes concerning jury selection (*e.g.*, granting exemptions from jury service, adjusting the size of the petit jury, or defining "cause" to challenge) or departing from the traditional requirement of unanimity.

possibility that the petit jury will comprise a fair cross section of the community.[10]

This constitutional principle is the backbone of our jury system. The importance of a jury which represents a cross section of the community has been addressed by the Supreme Court in *Taylor*:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power — to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.[11]

This article will discuss how the absence of such a principle would undermine the very foundation of the jury system by subjecting juries to the prejudices and abuses of officials who wish to oppress unpopular or inarticulate minorities. The completely discretionary use of peremptory challenges[12] comes dangerously close to achieving this undesireable end. Thus, this article will discuss how the state courts have maneuvered to rectify the problems resulting from the use of peremptory challenge as allowed by the Supreme Court.

II. Peremptory Challenges: Historical Purpose and the Current Constitutional Standard

There is nothing in the Constitution of the United States which requires Congress or the states to grant peremptory challenges.[13] A peremptory challenge is a right conferred solely by statute in all states and by rule in the federal courts.[14]

At one point in the development of the common law,[15] only defendants were entitled to peremptory challenges as protection against jurors who might be prejudiced against them.[16] Later, in recognition of the government's interest in trial by a jury not unfairly

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[10] Illinois v. Payne, 106 Ill. App. 3d 1034, 1036-37 (1982).

[11] *Taylor*, 419 U.S. at 530.

[12] A peremptory challenge is "[t]he right to challenge a juror without assigning a reason for the challenge. In most jurisdictions each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges." Black's Law Dictionary 1023 (5th ed. 1979).

[13] Stilson v. United States, 250 U.S. 583, 586 (1919).

[14] Fed. R. Crim. P. 24(b)(c).

[15] Peremptory challenges have been traced as far back as *The Ordinance for Inquests*, 33 Edw. 1, Stat. 4 (1305).

[16] *See* 4 W. Blackstone, Commentaries 353 (1807), in which it is noted that use of the peremptory challenge also allowed the defendant to remove a juror whom he had offended by an incisive voir dire or by an unsuccessful challenge for cause. Use of peremptory challenges in such cases, therefore, safeguards the vigorous exercise of these rights.

biased in favor of acquittal, the right of the prosecution to exercise peremptory challenges was established.[17]

Traditionally, the scope of the peremptory challenge has exceeded that of the challenge for cause.[18] Great latitude is allowed in the use of peremptory challenges: "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[19] The legitimate and significant role of the peremptory challenge lies "[i]n fashioning a balance between the goal of diffused impartiality in the petit jury and the limitations inherent in a feasible and fair process of jury selection . . . ."[20] Toward the end of "eliminate[ing] extremes of partiality on both sides," and of assuring 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," peremptory challenges may be used to eliminate prospective jurors whose unique relationship to the particular case raises the spectre of individual bias but who cannot be removed by a valid challenge for cause.[21] Both parties retain wide discretion to exercise peremptory challenges in this manner.[22] By definition, no reason need be given when exercising a peremptory challenge and there is no supervision by court or judge.

Properly utilized, peremptory challenges should seek to eliminate an identified bias relating to the particular case on trial or the parties or witnesses thereto. The goal is to promote the impartiality of the jury without destroying its representativeness.[23]

In contrast, when a party peremptorily strikes all persons belonging to one group solely because they are members of an identifiable group, he not only disrupts the demographic balance of the venire but also frustrates the primary purpose of the representative cross section requirement. The purpose of such a requirement is to achieve overall impartiality by encouraging the interaction of the diverse beliefs, values, and experiences of the jurors.[24]

Under ideal conditions,[25] the prosecution and defense would be able to voir dire a final panel of jurors containing a significant number of nonwhite citizens. Assuming all challenges for cause are racially neutral, either party may destroy the possibility of a representative jury by the exercise of peremptory challenges.[26] Prosecutorial exercise of the government's peremptory challenges against nonwhite potential jurors often results in the empanelment of an all-white jury to determine the guilt or innocence of criminal defendants who are black or of another racial minority.[27] Unchecked, this practice

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[17] *See* Swain v. Alabama, 380 U.S. 202 (1965); Hayes v. Missouri, 120 U.S. 68 (1887).

[18] A challenge for cause is "[a] request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." BLACK'S LAW DICTIONARY 209 (5th ed. 1979).

[19] *Swain*, 380 U.S. at 220.

[20] Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).

[21] *Id.* at 514 (citing *Swain*, 380 U.S. at 219).

[22] In practice, a party will also use a peremptory challenge when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased.

[23] *Soares*, 387 N.E.2d at 514.

[24] People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978).

[25] *Id.* at 761.

[26] Realistically, the American jury selection process is far from racially neutral, as indicated by the massive amount of litigation by black defendants who have been indicted or convicted by all-white grand or petit juries.

[27] *See* Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A*

effectively erodes decades of legislation and Supreme Court decisions requiring representative juries.

The use of peremptory challenges, however, has been upheld as above suspicion and beyond the control of the court. In the landmark case of *Swain v. Alabama*,[28] the Supreme Court established that purposeful discrimination must be proven, not assumed or merely asserted. *Swain* is the only United States Supreme Court decision thus far to directly address the constitutional validity of the use of peremptory challenges to discriminate on the basis of race. Although intensely criticized,[29] *Swain* has led most courts to reject all constitutional challenges to the prosecutor's alleged discriminatory use of peremptory challenges.

Swain was a black defendant convicted by an all-white jury of the rape of a white woman. Of eight blacks on the venire, two were exempt and six were peremptorily struck by the prosecutor. Swain contended that the prosecution's use of its peremptory challenges constituted invidious discrimination in the selection of jurors.[30] The Supreme Court disagreed. The basis of the Supreme Court's holding was that the petitioner had failed to carry the burden of proof that there had been systematic exclusion of blacks on the petit jury.[31] The court reached this conclusion despite the fact that it had been established that no black had served on a petit jury in the county since 1950.[32]

Based on the *Swain* decision, the burden is especially heavy on the appellant since the reviewing court examines the records on the assumption that the trier of fact, who heard the witnesses and observed their demeanor on the stand, had a better opportunity than the reviewing court to reach a correct conclusion as to the existence of discrimination.[33] Therefore, the court, in a particular case, will accept the conclusion of the trier on disputed issues unless the evidence is overwhelming enough to be fundamentally unfair, i.e., in violation of due process or equal protection. It is essential, therefore, to prove that a review of peremptory challenges is necessary before the harm is done[34] and before the defendant's chance to prove that he was tried by a jury which is not representative of the community of which he is a member is extinguished.

III. Overcoming the *Swain* Burden

One logical route to tackling the *Swain* standard is to concentrate on the defendant's burden of proof that the prosecutor's peremptory challenge of every nonwhite on the defendant's final panel is part of a past pattern of systematic exclusion of nonwhites from juries. Since *Swain*, defendants have objected frequently to prosecutorial employment of peremptory challenges to obtain all-white petit juries, but the Supreme Court's "system-

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Valued Common Law Privilege in Conflict with the Equal Protection Clause, 46 U. Cin. L. Rev. 554, 557 (1977).

[28] 380 U.S. 202 (1965).

[29] Although this article addresses this issue from the minority defendants' perspective, particularly the black defendants, standing to sue rests with all criminal defendants who challenge that they were denied a jury fairly representative of the community. *See* Peters v. Kiff, 407 U.S. 493 (1972).

[30] *See infra* note 32.

[31] *Swain*, 380 U.S. at 203-04.

[32] *Id.* at 231-32.

[33] For example, the *Soares* court relied on the fact that trial judges have extensive experience with jury empanelment, have knowledge of local conditions, and are familiar with attorneys on both sides. 387 N.E.2d at 517.

[34] That is, before the minority defendant is tried by a jury which is not composed of a fair cross section of the community.

atic exclusion" test has remained insurmountable in all cases.[35] While racial prejudice has been attacked at each step in the jury selection process, the final step — the exercise of peremptory challenges — has traditionally been unassailable.[36]

The systematic exclusion standard has been a formidable hurdle for three principal reasons. First, the Supreme Court in *Swain* held that the "mere absence of blacks on juries over an extended period of time does not establish systematic exclusion" if the defendant cannot show that the state was solely responsible for that result. Second, there is a rebuttable presumption that peremptory challenges are used only to obtain a fair and impartial jury. Finally, the *Swain* decision never fully delineated the elements necessary to show a pattern of systematic exclusion.[37]

The Supreme Court in *Swain* did, however, indicate that a pattern may exist when "no Negroes ever sit on petit juries" as a result of the prosecution's peremptory challenges.[38] Such a standard means that if one or two token jurors have been seated on a jury, then systematic exclusion cannot be proven.

A defendant who is the victim of a consistent prosecutorial policy of total exclusion of blacks through the use of peremptory challenges would find it extremely difficult to prove his case under the standard set forth in *Swain*. Not the least of the impediments to establish such a claim is the nature of the proof required to establish systematic exclusion by the prosecutor. The defendant is placed in a difficult position if he is tried before an extended pattern of abuse becomes apparent.[39] Most defendants, especially blacks and other minorities, are either indigent or have limited financial means and thus are unable to afford investigators to gather the necessary data.[40] Furthermore, many jurisdictions do not maintain comprehensive records of peremptory challenges, let alone information regarding the race of those individuals challenged.[41]

It has only been since *Swain* that some attempt at record-keeping has been instituted, although doubt still remains as to how prevalent and accurate such records are. For example, in *People v. Wheeler*,[42] the court found the record unclear as to the exact number of blacks struck from the jury by the prosecutor; veniremen[43] are not required to announce for the record their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire.[44]

Fortunately, in instances where records of such challenges and exclusions began to be

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[35] Comment, *supra* note 27, at 554.

[36] *Id.*

[37] The *Swain* court merely implied that it would entertain an equal protection challenge in instances where, for example, the prosecutor, in case after case, whatever the circumstances and whatever the crime, and whoever the defendant or the victim may be, removes blacks who have been selected as qualified jurors and who have survived challenges for cause, and where the result is that no blacks ever serve on petit juries. 380 U.S. at 223.

[38] *Swain*, 380 U.S. at 223. In so stating, the *Swain* court ignored the Supreme Court's former holding in *Patton v. Michigan*, 332 U.S. 463, 466 (1948), requiring a state to justify why no blacks actually had served on juries for an extended period of time.

[39] *Soares*, 387 N.E.2d at 511 n.17; *Wheeler*, 583 P.2d at 767.

[40] *Wheeler*, 583 P.2d at 768.

[41] *Id.* at 768.

[42] 583 P.2d at 748.

[43] A venireman refers to "[a] member of a panel of jurors . . . ." BLACK'S LAW DICTIONARY 1395 (5th ed. 1979).

[44] The reason given, of course, is that the courts are, or should be, blind to all such distinctions among its citizens. *Wheeler*, 583 P.2d at 752.

kept after *Swain*, courts have become alert to possible discriminatory practices and began warning prosecutors that they were approaching systematic exclusion of nonwhites.[45]

IV. The State Court's Rejection of *Swain* and the Implementation of New Standards

In light of the near impossibility experienced by defendants in attempting to meet the requirements set by *Swain*, a small number of state courts[46] have fashioned standards based on their state constitutions to guarantee the defendant a trial before a jury that has not had cognizable groups eliminated by the discriminatory acts of the prosecutor.[47] As a result, these courts have fashioned new approaches to the peremptory challenge issue. These approaches can provide the Supreme Court the means with which to reevaluate the present status of fair representation in light of the current use of the peremptory challenge.

A. *The Application of State Constitutions to Peremptory Challenges*

In *Commonwealth v. Soares*,[48] the Supreme Judicial Court of Massachusetts followed an alternative basis for examination of the prosecutor's use of peremptory challenges to exclude twelve of thirteen black jurors. The court looked to its own state constitution and noted that the protections offered by the right to trial before a jury of one's peers is guaranteed by Article 12 of the Declaration of Rights of the Massachusetts Constitution. 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 judgment of his peers, or the law of the land."[49]

Citing the extensive criticism of *Swain*,[50] and recognizing that *Swain* offers negligible protection to a defendant asserting the right to trial by a jury of his peers,[51] the court took the opportunity to depart from applying its rule perfunctorily. The court was therefore giving serious attention to the defendant's suggestion that consideration of the discriminatory use of peremptory challenges should not begin and end with *Swain*.

Beginning with the mandate that a jury be drawn from a fair and representative cross

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[45] United States v. Nelson, 529 F.2d 40, 43 (8th Cir. 1976); United States v. Pearson, 448 F.2d 1207, 1216-17 (5th Cir. 1971).

[46] For example, Massachusetts, California, Illinois.

[47] In most instances, the state court was influenced by the fact that at the time *Swain* was decided, the Supreme Court had not yet ruled that the guarantee of the sixth amendment of a trial by an impartial jury was binding on the states through incorporation into the due process clause of the fourteenth amendment. It was in Duncan v. Louisiana, 391 U.S. 145, 149 (1968), decided three years after *Swain*, that the Supreme Court stated that, "[b]ecause we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee."

[48] 387 N.E.2d at 499.

[49] *Id.* at 510.

[50] *See, e.g.*, Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 Hous. L. Rev. 448 (1966); Soja, *Recent Development, Racial Discrimination in Jury Selection*, 41 Alb. L. Rev. 623 (1977); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662 (1974).

[51] *Soares*, 387 N.E.2d at 510 n.12.

section of the community,[52] the *Soares* court held that the exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group, contravenes the requirement inherent in Article 12 of the Declaration of Rights and cannot be tolerated.[53] In effectuating the guarantee, the court recognized the presumption that peremptory challenges would be used properly. That presumption, however, was held rebuttable by either party on a showing that: (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group; and (2) there is a likelihood that they are being excluded from the jury solely by reason of their group membership.[54]

In *Soares*, the court found a clear pattern of conduct in which twelve of thirteen eligible blacks were challenged by the prosecutor. The disproportionate exclusion by the prosecution of ninety-two percent of the prospective black jurors, as contrasted with thirty-four percent of the available whites, was sufficient indication of the likelihood that blacks were being challenged because they were black.[55] The court also recognized other factors to be considered by the trial judge when assessing whether the presumption of propriety has been rebutted; e.g., common group membership of a defendant and those jurors excluded, and the lack of common group membership of the victim and the majority of remaining jurors.[56] In *Soares*, the defendants and the disproportionately excluded jurors were black; the victim and the seated jurors, with the exception of one, were white.

Presented with such evidence, the trial judge must determine whether it is reasonable to draw the inference that peremptory challenges have been exercised so as to deliberately exclude individuals on account of their group affiliation. Allowing for the difficulty of making such a judgment, the *Soares* court was nevertheless convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with the attorneys on both sides, will address these questions with the requisite sensitivity.[57]

Once the judge determines that the presumption has been rebutted, the burden shifts to the alleged offender to demonstrate, if possible, that members of the disproportionately excluded group were not struck on account of their group affiliation. It is in this respect that the *Soares* court most markedly departs from the *Swain* standard. While the *Swain* court placed the burden exclusively on the complaining defendant to prove systematic exclusion, a burden that has often proved to be of Herculean proportions, the *Soares* court allocates part of the burden to the prosecuting attorney. If a reasonable inference can be drawn that peremptory challenges have been exercised to exclude individuals on the basis of group affiliation — a much more reasonable and demonstrable standard — the burden shifts to the allegedly offending party to justify his use of peremptory challenges. While it need not approximate the grounds required by a challenge for cause, the prosecutor's reason must pertain to the individual qualities of the prospective juror

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[52] *Id.* at 511. The United States Supreme Court has frequently affirmed the concept that a jury must be drawn from a fair and representative cross section of the community. *See infra* notes 66 & 67.

[53] *Soares*, 387 N.E.2d at 516.

[54] *Id.* at 517.

[55] *Id.*

[56] Although the *Soares* court noted that these factors are not a prerequisite to an assertion of the right herein defined, they are nevertheless significant. *Id.*

[57] *See also Payne*, 106 Ill. App. 3d 1034 (1982) and *infra* note 79.

and not to that juror's race or group affiliation.[58] Again, reliance is placed on the good judgment of the trial courts to distinguish bona fide reasons for such peremptory challenges from "sham excuses belatedly contrived to avoid admitting facts of group discrimination."[59]

The presumption of validity is rebutted if the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges. In that event, the court must conclude that the jury as constituted fails to comply with the representative cross section requirement,[60] and it must dismiss the jurors thus far selected and draw a different venire for the jury selection process to begin afresh. As the *Soares* court points out, some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. Article 12 of the Declaration of Rights of the Massachusetts Constitution calls for a probing scrutiny of trials conducted in the Commonwealth.[61]

In following this alternative route to relief, the Supreme Judicial Court of Massachusetts gave much credit to the California Supreme Court for their recent decision in *People v. Wheeler*[62] which broke away from the traditional *Swain* standard and laid the groundwork for other courts to use. In *Wheeler*, two black men were convicted of murdering a white store owner in the course of a robbery. Several blacks had been summoned to the jury box and had been found unimpeachable. However, the prosecutor eliminated each of them through his use of peremptory challenges, and was thereby able to obtain an all-white jury. The California high court reversed the convictions on the basis that the prosecution's actions violated the right to an impartial jury representative of a cross section of the community, as guaranteed by the California Constitution.

Article I, section 16, of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all . . . ."[63] It is well settled that in criminal cases, this provision includes the right to have a unanimous verdict rendered by impartial and unprejudiced jurors.[64] Although section 16 of Article I does not explicitly guarantee trial by an "impartial" jury, as does the sixth amendment to the U.S. Constitution, the California court emphasized that the "right is no less implicitly guaranteed by our charter, as the courts have long recognized."[65]

The California Supreme Court began its analysis by noting that in a series of decisions beginning almost four decades ago,[66] the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross section of the community."[67] Especially relevant to the court's analysis was the

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[58] *Soares*, 387 N.E.2d at 517.

[59] *Id.* at 517-18 (citing *Wheeler*, 583 P.2d at 765).

[60] Of course, the right to trial by a jury drawn from a representative cross section of the community does not mean that members of a group must be immune from peremptory challenges. Individual members may still be struck on grounds of specific bias. Nor does it mean that a party is entitled to a petit jury that proportionately represents every group in the community. All that a party is constitutionally entitled to is 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] *Soares*, 387 N.E.2d at 511 n.17.

[62] 583 P.2d at 754.

[63] *Id.* at 754.

[64] *Id.*

[65] *Id.*

[66] The series of decisions is: Smith v. Texas, 311 U.S. 128 (1940); Glasser v. United States, 315 U.S. 60 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217 (1945); Ballard v. United States, 329 U.S. 187 (1946); Peters v. Kiff, 407 U.S. 493 (1972); Taylor v. Louisiana, 419 U.S. 522 (1975).

[67] *Wheeler*, 583 P.2d at 755. For the history and theory of the representative cross section rule,

warning in *Glasser v. United States*[68] that "tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."[69]

The California Supreme Court in *Wheeler* stressed, however, that it was relying as much on the law of California as on federal case law. The court points out that it was not until the 1975 decision in *Taylor v. Louisiana*[70] that the United States Supreme Court imposed the representative cross section rule on the states as a fundamental component of the sixth amendment right to an impartial jury incorporated in the fourteenth amendment.[71] California, on the other hand, had long since adopted that rule: "The court has repeatedly emphasized the need for compliance with the representative cross section rule as a precondition to trial by an impartial jury."[72]

The *Wheeler* court also held that in California the right to trial by a jury drawn from a representative cross section of the community is guaranteed equally and independently by the sixth amendment to the federal Constitution. In this respect, the California court diverges from the *Swain* court whose rationale was based on the fourteenth amendment. The *Swain* court held that peremptory challenge was an absolute right which did not violate the fourteenth amendment in the absence of a strong showing of systematic, continual exclusion.[73] The California court also diverged from *Swain*'s holding that a peremptory challenge is an absolute right. While conceding that the statute[74] defines such a challenge as one for which "no reason need be given,"[75] the California court pointed out that "it does not follow therefrom that it is an objection for which no reason need *exist*."[76]

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see Jon M. Van Dyke, *Jury Selection Procedures* (1977), ch. 3; Daughtrey, *Cross-Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1; and Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968).

[68] 315 U.S. 60 (1942). In this case, the defendants in a federal trial complained of the alleged exclusion of all women who were not members of the state League of Women Voters from petit jury service. Although the Court rejected the contention on the ground of insufficient proof, it did strongly reaffirm the requirements of a representative jury. It observed at the outset that impartiality achieved through representativeness is essential to preserving the constitutional right to jury trial.

[69] *Wheeler*, 583 P.2d at 756 (citing Glasser v. United States, 315 U.S. 60, 85 (1942)).

[70] 419 U.S. 522, 525 (1975). In *Taylor*, the Supreme Court considered a statute which provided that women must file with the clerk of the court a written declaration of their desire to serve in order to be selected for jury service. The result was that in the parish in which the petitioner was tried, although fifty three percent of those eligible for jurys ervice were women, no more than ten percent of the venire persons were women. The Court concluded that the provision violated the sixth amendment since it operated to exclude women from jury service and thus unduly restricted the possibility of a defendant's having a petit jury that represented a fair cross section of the community.

[71] When the high court first declared the sixth amendment's guarantee of trial by jury applicable to the states through the fourteenth amendment, in Duncan v. Louisiana, 391 U.S. 145 (1968), it was silent on the present question.

[72] *Wheeler*, 583 P.2d at 758.

[73] *Swain*, 380 U.S. at 220.

[74] CAL. PENAL CODE § 1069.

[75] *Id.*

[76] *Wheeler*, 583 P.2d at 760. The court, however, was careful to limit the extent of such inquiry by emphasizing that peremptories are not open to examination unless and until a timely motion is made, the trial court is satisfied that there is a prima facie showing that jurors are being challenged on the sole ground of group bias, and even then, the prosecutor is not required to defend each and every challenge but only those he has exercised against members of the identifiable group. Finally, the court stressed that the issue in such an event is not his "judgment" or "sincerity" but simply whether his ground of challenge was a specific bias on the part of the individual juror. 583 P.2d at 767 n.32.

In fashioning a remedy, the *Wheeler* court's solution was to delineate a burden of proof which a party may reasonably be expected to sustain in meritorious cases,[77] but which cannot be abused to the detriment of the peremptory challenge system. Therefore, the *Wheeler* court relied on more traditional procedures which were supported by a substantial body of scholarly opinion.[78]

The *Wheeler* court requires a party to make timely objections if he believes his opponent is using his peremptory challenges to strike jurors on the basis of race alone.[79] He must make a prima facie case of such discrimination to the satisfaction of the court.[80] The latter can be accomplished by making as complete a record of the circumstances as is feasible, by establishing that the excluded persons are members of a cognizable group within the meaning of the representative cross section rule,[81] and by showing a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.[82]

The trial court must determine upon presentation of evidence whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone.[83] If the court finds this to be the case, the burden shifts to the other party to show that the peremptory challenges in question were not predicated on group bias alone. At this point, the statutory provision that "no reason need be given" for a peremptory challenge[84] must give way to the constitutional imperative. Although the statute is not invalid on its face, it would be impermissible to allow it to insulate from inquiry a presumptive denial of the right to an impartial jury.[85] This right is paramount because the peremptory challenge is not a constitutional necessity but a statutory privilege.[86] If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, then the presumption of their validity is rebutted. A new jury selection process would therefore be granted to the defendant.

The California court in *Wheeler* soundly rejected the prosecution's contention that the court is "compelled to allow this pernicious practice to continue"[87] because of *Swain*. The court's rationale in rejecting this contention was that "[b]ecause a fundamental safeguard of the California Declaration of Rights is at issue, 'our first reference is California Law' and divergent decisions of the United States Supreme Court are to be followed by

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[77] The California court thus rejected the *Swain* requirement as too burdensome where a legitimate claim arises.

[78] The body of scholarly opinion includes Van Dyke, *supra* note 67, at 166-67; Kuhn, *supra* note 67, at 293-95; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L. J. 1715, 1738-41 (1977); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1414, 1430-33 (1969).

[79] *Wheeler*, 583 P.2d at 764.

[80] *Id.*

[81] Blacks, of course, constitute one such group.

[82] For example, the party may show that the jurors in question share only the characteristic of membership in the group and that in all other respects, they are as heterogeneous as the community as a whole.

[83] The term "group bias" was used by the *Wheeler* court to refer to that condition where "a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." 583 P.2d at 761.

[84] CAL. PENAL CODE § 1069.

[85] *Wheeler*, 583 P.2d at 765 n.28.

[86] *Id.* at 765 n.28 (citing People v. King, 240 Cal. App. 2d 389 (1966)).

[87] *Id.* at 766.

California courts only when they provide no less protection than is guaranteed by California law."[88]

Deciding that *Swain* afforded less protection to California residents than the rule it adopted, the California Supreme Court criticized *Swain* for its "impossible-to-meet standard."[89] Noting that "it demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right,"[90] the *Wheeler* court ordered that *Swain* was not to be followed in the California courts and refused to follow the cases applying it. Rather, in California, all claims that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed by Article I, section 16 of the California Constitution and the procedure outlined in *Wheeler*.

B. *Constitutional Limitations of the Use of Peremptory Challenges*

Another approach to the problem of the discriminatory use of peremptory challenges focuses on the fact that a peremptory challenge is a procedural right whereas a right to an impartial jury which represents a fair cross section of the community is a constitutional right. Commentators and several state courts have taken the position that the former must yield to fifth and fourteenth amendment rights.[91]

Recently, in *Illinois v. Payne*,[92] the Illinois Appellate Court held that the right to peremptory challenges is not absolute when jurors are excluded merely because of race. The prosecutor's statutory right to exercise peremptory challenges without giving a reason, therefore, must yield to the paramount constitutional right of the accused to a jury drawn from a fair cross section of the community.[93] In this case, the prosecutor, over the accused's objections on voir dire, used six of eight peremptory challenges to exclude from the jury six of seven available blacks who were factually heterogeneous and shared no common characteristics other than race. The Illinois Appellate Court held that the trial court's failure to require the prosecutor to demonstrate that blacks were not being systematically excluded solely because of their race was reversible error.[94]

Initially, the *Payne* court addressed the often ignored fact that every criminal trial "involves the proper roles of the State, the prosecuting attorney and the court itself."[95] It is usually overlooked that, in a criminal trial, it is the state that is the plaintiff throughout the entire proceeding. The *Payne* court took the position that if a state's attorney effectively practices racial discrimination, the state itself is racially discriminating against the accused. The *Payne* court therefore defined the problem as whether the state itself can exclude blacks from serving as jurors solely because of their immutable characteristics. In answer the court found that such acts by the State are repugnant to the sixth amendment

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[88] *Id.* at 767.

[89] *Id.* at 768.

[90] *Id.*

[91] *See* Kuhn, *supra* note 67, at 288; Geeslin, *Peremptory Challenge — Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 159 (1967). *See also* People v. Wheeler, 583 P.2d 748 (Cal. 1978); Illinois v. Payne, 106 Ill. App. 3d 1034 (1982).

[92] 106 Ill. App. 3d 1034 (1982).

[93] U.S. CONST. amend. VI; ILL. REV. STAT. ch. 38, para. 115-4(e) (1979).

[94] This was based on the court's finding that under these circumstances, the trial court should have realized that such exclusion was occurring. Therefore, the resulting conviction was reversed and a new trial ordered in which the accused would be accorded the constitutional right to be tried by a jury drawn from a fair cross section of the community.

[95] *Payne*, 106 Ill. App. 3d at 1035.

of the Constitution of the United States. The court further declared that the systematic exclusion of prospective jurors solely on the basis of their race is equally invidious and unconstitutional at any stage of the jury selection process.[96] To hold otherwise would be to render a nullity the constitutional right to a jury drawn from a fair cross section of the community through the use of peremptory challenges.

The court also looked to the role of the prosecuting attorney in a criminal case. The duty of the prosecutor is to seek justice and not merely to convict.[97] Thus, a prosecutor is not primarily seeking justice when he excludes blacks from the jury solely because they are blacks. He is merely seeking to convict. This action is a clear violation of professional duty which must be discouraged.

In recognizing that the process of criminal trial involves the whole society, the court points out that when, by affirmative means, blacks are systematically excluded from serving on a petit jury, the harm is not restricted to the defendant. There is harm to the jury system, to the law as an institution, and to the democratic ideal reflected in the processes of our courts.[98] Clearly, justice is not fulfilled if the trial court acquiesces in, condones, or fails to preclude attempts by the prosecuting attorney to exclude blacks from the jury solely because they are blacks.

Therefore, the Illinois Appellate Court in *Payne* ordered that "when it reasonably appears to the trial court that the prosecuting attorney is systematically excluding blacks from the jury solely because they are blacks, any trial procedure which allows such racial discrimination must yield to the paramount constitutional demand of the sixth amendment."[99] In other words, the rule that no reason is needed for a peremptory challenge must give way to the constitutional imperative. The *Payne* court followed the *Wheeler* court's reasoning that the statute allowing peremptory challenges would be invalid if it were applied "to insulate from inquiry a presumptive denial of the right to an impartial jury."[100]

The rationale for the requirement that the constitutional demand must control lies in the indisputable fact that the State's peremptory challenge is a statutory procedure and not a constitutional necessity,[101] nor even a common law imperative. Even the *Swain* court had held that when a constitutional right conflicts with a statutory procedure, the constitutional right must prevail.[102] Accordingly, if a reasonable inference of systematic exclusion is drawn, the prosecutor is required to demonstrate, by whatever facts and circumstances exist, that blacks were not being excluded from the jury solely because they were blacks. To the *Payne* court, the presumption that the Constitution was not being violated was no longer applicable once it reasonably appeared to the trial court that the accused was being affirmatively denied an impartial jury as required by the sixth amendment.

The *Payne* court put the burden squarely on the shoulders of the prosecution to demonstrate that the Constitution was not being violated. Unless the State could sustain its burden of demonstrating that it was not excluding blacks from the jury solely because

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[96] That is, from the time the general jury list is prepared by the jury commissioner until the jury is actually selected and sworn.

[97] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979).

[98] *Payne*, 106 Ill. App. 3d at 1038 (citing Ballard v. United States, 329 U.S. at 187).

[99] *Payne*, 106 Ill. App. 3d at 1039.

[100] See People v. Wheeler, 583 P.2d at 765 n.28.

[101] *Payne*, 106 Ill. App. 3d at 1039 (citing Stilson v. United States, 250 U.S. at 586).

[102] *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting).

they were black,[103] the jurors who had been already selected at the time the inference was drawn were to be dismissed as failing to comply with the fair cross section requirement of the Constitution. As in *Soares* and *Wheeler*, the defendant in *Payne* was granted a new venire for a new jury selection process.

The state relied upon *Swain* to permit the use of peremptory challenges to exclude blacks. The *Payne* court rejected the state's defense of "this pernicious practice."[104] Instead, it relied on the *Swain* court's own language which stated that "[i]f it would appear that the purposes of the peremptory challenge are being perverted . . . the presumption protecting the prosecutor may well be overcome."[105] The *Swain* court, indeed, had recognized that peremptory challenges could be controlled by the trial court if it appeared to the court that they were being used to violate the constitutional rights of the accused.

The *Payne* court further relied on *Duncan v. Louisiana*[106] and *Taylor* [107] which were decided after *Swain*. In *Duncan*, the sixth amendment of the Constitution as it related to jury trials was applied to state criminal trials. Seven years later, the *Taylor* court held that the fair cross section requirement was fundamental to the jury trial guaranteed by the sixth amendment.[108]

Deciding that *Duncan* and *Taylor* had significantly changed the law from the time *Swain* was decided that an accused therefore has the right not to have the state affirmatively frustrate his sixth amendment right, the *Payne* court applied the rationale of the *Taylor* court.[109] The *Payne* court recognized that systematic and affirmative racial exclusion of available black jurors by the state which results in only one black being seated as a juror is no less evil and no less constitutionally prohibited than the same procedure which results in the total exclusion of blacks. The practice of seating a token black, after being assured that there are no more blacks available to be seated, does not lessen the unconstitutionality of the State's initial exclusion of blacks from the jury solely on the basis of race.

A recent Supreme Court decision has reaffirmed the superiority of the due process right to a fair trial over procedural considerations. In *Peters v. Kiff*,[110] the Supreme Court held that a white criminal defendant had standing to challenge the method used to select his grand or petit jury on the ground that it arbitrarily or discriminatorily excluded blacks from jury service. Even though such a holding was limited to the issue of standing, the court expressed considerable concern about the arbitrariness of modern jury selection procedures. While discussing the "potential impact" of such practices, the Supreme Court

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[103] Again, it is noted that decisions of this nature are difficult, and faith is placed on the trial judges who, "given their presence in the courtroom during the entire proceeding and their ability to observe all facets of the voir dire selection, their experience with voir dire examinations, and the benefit of their judicial trial experience, should be able to distinguish bona fide reasons for exclusion from contrived declarations of motives. Moreover, if errors are made in this regard, they are subject to review as are other errors that occur during trial." *Payne*, 106 Ill. App. 3d at 1040 n.5.

[104] *Id.* at 1041.

[105] *Swain*, 380 U.S. 202, 224 (1965).

[106] 391 U.S. 145 (1968).

[107] 419 U.S. 522 (1975).

[108] The *Taylor* court itself relied on cases that arose after *Swain*. For example, the court discussed *Carter v. Jury Commissioner*, 396 U.S. 320 (1970), and noted that in *Carter*, "the Court observed that the exclusion of Negroes from jury service because of their race 'contravenes the very idea of a jury — "a body truly representative of the community." ' "[Citation]." *Payne*, 106 Ill. App. 3d at 1042.

[109] *Id.* at 1042, 1043.

[110] 407 U.S. 493 (1972).

implied in dictum a preference for preserving constitutional rights rather than procedural devices, such as the peremptory challenge.[111] The Court cited *Strauder v. West Virginia*[112] as authority for the fundamental principle that a jury must represent a fair cross section of the community in order to be consistent with due process of law. Quoting *Hill v. Texas*,[113] the Court also stressed that no state is at liberty to impose upon one charged with a crime, discrimination in its trial procedure which the Constitution forbids.[114]

V. Conclusion

In May of 1983, the Supreme Court refused to hear three cases concerning peremptory challenges.[115] Denying certiorari, Justices Stevens, Blackmun, and Powell noted that some states have restricted the use of these challenges and that other state courts are studying the matter. The Justices suggested that states be used as "laboratories" before the Supreme Court addresses the question again.[116]

The fact that the Supreme Court has decided to defer its decision on this issue to a later time bodes well for minority defendants. There is still time to prepare a convincing argument to the Court that peremptory challenges are easily subject to abuse by prosecutors for discriminatory purposes and that requiring proof of "systematic exclusion" of a minority group from the jury venire is an unreasonable standard.

New approaches have been applied by state courts to lessen the discretionary aspect of peremptory challenges in order to meet the Constitutional requirement of a jury composed of a fair cross section of the community. The highest courts of Massachusetts and California have relied upon their own state constitutions by rationalizing that they afford greater protection than *Swain*. In all cases, the state courts have emphasized that the seating of one or two token minority jurors does not preclude the possibility of systematic exclusion. They also realize that the *Swain* standard imposes an intolerable burden, resting exclusively on the accused, without clearly stating the guidelines necessary to carry this burden sufficiently. Some courts have also acted under the rationale that procedural rights must yield to constitutional rights when a right of such magnitude — the right to an impartial jury representative of a fair cross section of the community — is involved.

Without the ability to impose restrictions on the exercise of peremptory challenges, there is no effective remedy for a continuing practice of systematic exclusion.[117] Therefore, peremptory challenge, a nonconstitutional procedural tool, should be sacrificed where its exercise infringes upon rights found in both the sixth and fourteenth amendments, especially since it is not a right guaranteed by the Constitution.

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[111] *Id.* at 502-03.

[112] 100 U.S. 303 (1880).

[113] 316 U.S. 400, 406 (1942).

[114] *Peters*, 407 U.S. at 506.

[115] McCray v. New York, 57 N.Y.2d 542, 443 N.E.2d 915 (1982); Miller v. Illinois, 104 Ill. App. 3d 1205, 437 N.E.2d 945 (1982); and Perry v. Louisiana, 420 So.2d 139 (La. 1982), *cert. denied*, 461 U.S. 961 (1983). Justice Stevens, with whom Justice Blackmun and Justice Powell joined, stated that he "believe[d] that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." 461 U.S. at 962.

[116] Silas, *A Jury of One's Peers*, A.B.A.J., November, 1983, at 1607, 1608.

[117] Comment, *supra* note 27, at 568.