Limiting the Defense's Use of Peremptory Challenges

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I. INTRODUCTION

Since the inception of our nation, democratic ideals have governed our jury system. The right of a criminal defendant to a trial by jury is one of our most cherished and protected rights guaranteed by the Sixth Amendment. Ideally, a jury drawn from the community will provide the most impartial and fair decision possible. Thus, the jury’s power lies in the capacity of individuals with diverse viewpoints to reach a verdict that will reflect the community conscience. The selection system should thus ensure that a fair and impartial jury is impaneled and that bias is minimized.

However, racial discrimination has long pervaded the jury selection process. Even in modern times, jury discrimination still taints our system. Lately, the racially discriminatory use of peremptory challenges by the defense has gained a great deal of attention. The issue was recently raised in the highly publicized and racially volatile Howard Beach case where the defense used their peremptory challenges to eliminate blacks from the jury since the victim was black and the defendants were white. The prosecution claimed that the defense wrongfully used their peremptories to systematically exclude blacks. The trial judge ruled that the defense lawyers were seeking to exclude blacks from the

1 Most of the colonies specifically guaranteed trial by jury in their charters. See generally J. Van Dyke, Jury Selection Procedures- Our Uncertain Commitment to Representative Panels, at 6–9 for a historical discussion of the American jury.
2 U.S. Const. amend. VI., see infra note 13.
3 See Van Dyke, supra note 1, at xiv.
4 See id.
5 See id.
6 See e.g., Strauder v. W. Va., 100 U.S. 303 (1880) (State statute which in effect prohibited black persons from serving on juries was found to be unconstitutional.). See infra note 37 and accompanying text.
7 The victim, who was black, was struck and killed by a car after four white youths beat him with sticks and then proceeded to chase him on to a busy parkway. N.Y. Times, Sept. 17, 1987, at B3, col. 5–6.
8 Id. at col. 5.
jury and that he would curb the lawyers' remaining challenges against prospective black jurors.9

The Supreme Court has not ruled on the use of peremptory challenges by the defense in criminal cases. However, the Court recently has ruled that the Equal Protection Clause forbids prosecutors from using their peremptory challenges to exclude black jurors solely on account of their race, or on the assumption that black jurors as a group will be unable to impartially consider the case against blacks.10 The Court did not extend the ruling to cover the defendant's use of peremptory challenges.11 However, some state courts and lower federal courts have addressed this issue.12

This Note first reviews the jury selection procedure and the development of jury discrimination cases under the Equal Protection Clause by the Supreme Court. It then reviews how state courts and some federal circuits have progressed with regard to the issue of discriminatory uses of peremptory challenges using the impartial jury guarantee of the Sixth Amendment. Using the principles set forth in this line of cases, the Note then analyzes the use of peremptory challenges by the defense. Finally, the future of peremptory challenges in light of recent cases will be discussed.

II. THE JURY SELECTION PROCESS

Trial by an impartial jury is one of the basic fundamental rights guaranteed by the Sixth Amendment to every American citizen accused of a crime.13 This right has long been a part of our society and stems from English origins.14


In his ruling, Justice Thomas A. Demakos declared that "from the totality of the circumstances of the case, including the observations made by the court," he had determined that "a prima facie case has been made out" that the defense lawyers were "using their peremptory challenges to strike jurors on the ground of group bias alone." He said he was extending the Supreme Court ruling which prohibits prosecutors from doing that. Furthermore, he cited the California case, People v. Wheeler (see infra notes 77–91 & 120–122 and accompanying text), which prohibits both parties from systematically excluding blacks through the use of peremptory challenges. Id. at B4, col. 1.

If there were any further allegations that they were exercising their peremptory challenges against blacks on the ground of group bias alone, the judge said he would order the defense lawyers to give non-racial explanations. If he found the explanations unacceptable, the challenges would be disallowed. Id. at B4, col. 1–2.

Subsequently, the New York State Appeals Court let the ruling stand, stating that it was not the proper time for an Appeals Court to review such an action. Rather, the proper time would be during a normal appeal. N.Y. Times, Sept. 23, 1987, at B6, col. 6.

The final panel of jurors was composed of six non-Hispanic whites, one black, two people from Puerto Rican background, two Asian-Americans, and a man from Guyana whose roots go back to Asia. N.Y. Times, Oct. 2, 1987, at B2, col. 1.


11 Id. at 89 n.12.


13 The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend.VI.

14 See Van Dyke supra note 1, at 2.
The primary purpose of the jury is to provide the defendant with the "fairest instrument of justice."\textsuperscript{15} Assembling a group of twelve ordinary people for the sole purpose of deciding a given case ideally provides the best means of objectivity.\textsuperscript{16} Moreover, community participation in the decision making process promotes public confidence in and acceptance of the judicial system by reflecting the collective conscience of the community.\textsuperscript{17}

While each juror inevitably brings his or her own personal experiences and biases into the courtroom, the jury system strives for the impartiality guaranteed by the Constitution by balancing the diversity of viewpoints.\textsuperscript{18} The jury's power is thus based upon a common decision reached along a spectrum of perceptions.

The jury selection process strives to attain these ideals. The first stage of selection involves the compilation of a list of prospective jurors from voter registration lists.\textsuperscript{19} Random selection from the whole community is designed to produce a complete list most likely to impanel a representative jury.\textsuperscript{20} Moreover, in an effort to further ensure jury independence and impartiality, Congress passed the Jury Selection and Service Act in 1968 which outlawed special requirements for federal jurors and ordered random selection.\textsuperscript{21} The purpose of the Act is to provide improved judicial machinery without discrimination on federal grand and petit juries and to assure all litigants that potential jurors will be selected at random from a representative cross-section of the community.\textsuperscript{22} It is also designed to insure that all qualified citizens will have the opportunity to be considered for jury service.\textsuperscript{23}

In the second stage of selection, the number within the jury pool is reduced through the use of excuses. Excuses may be granted on different criteria: disqualification, automatic exemption, and discretionary uses and at three different times: when selected to the list, when summoned for jury duty, and when called at trial.\textsuperscript{24}

The third stage of the selection process, which will be focused on in this Note, involves challenges. The purpose of challenges is to eliminate jurors who may be biased in any way about the defendant, the prosecution, or the case and who might threaten the jury's impartiality.\textsuperscript{25} After questioning, each competing attorney can eliminate prospective jurors in two ways: using challenges for cause or exercising peremptory challenges during \textit{voir dire}. Challenges for cause are based on "narrowly, specified, provable and legally cognizable basis of partiality."\textsuperscript{26} For example, the court will accept challenges

\textsuperscript{15} Id. at xii.
\textsuperscript{16} Id.
\textsuperscript{17} See id. at xiii.
\textsuperscript{18} Id. at xii–xiv.
\textsuperscript{19} Id. at 85–86. When necessary, supplemental lists may be used. 28 U.S.C.§ 1863(b)(2) (West Supp. 1987); \textit{See generally} VAN DYKE, supra note 1, at 98–104.
\textsuperscript{20} VAN DYKE, supra note 1, at 98–104.
\textsuperscript{21} 28 U.S.C. §§ 1861–69 (West Supp. 1987). Section 1862 emphatically states that "No citizen shall be excluded from serving as a grand or petit juror in the district courts of the United States... on account of race, color, religion, sex, national origin, or economic status."
\textsuperscript{22} H.R. REP. No. 1076, 90th Cong., 2d Sess. 1792 (1968).
\textsuperscript{23} Id.
\textsuperscript{24} VAN DYKE, supra note 1, at 111.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 119.
\textsuperscript{27} Id.
for cause where the juror is related to a party involved, if the juror has a unique interest in the subject matter, or if the juror has a "state of mind" which will prejudice him.\(^{28}\)

Peremptory challenges are made without having to give reason, "without inquiry and without subject to the court's control."\(^{29}\) Thus attorneys can remove a limited number of prospective jurors\(^{30}\) who they believe are biased without having to defend their reasoning.\(^{31}\) Ideally, the purpose of the peremptory challenge is to eliminate the extremes of partiality on both sides and assure that the case will be decided fairly without regard to underlying prejudices.\(^{32}\) Peremptory challenges were instituted to eliminate extreme bias among prospective jurors which attorneys could most likely not prove but merely had "hunches" about.\(^{33}\)

In practice, peremptory challenges are inevitably used by attorneys to try to eliminate those jurors whom they believe unsympathetic to their cause, or sympathetic to the opposing party. For example, a prosecutor might excuse a juror because he or she has been in trouble with the police or seems to have bad feelings toward the courts.\(^{34}\) However, peremptory challenges are not always used in the way in which they were intended.\(^{35}\) The abuse of peremptory challenges in a racially discriminatory manner has been a widely used practice in criminal cases for many years. Prosecutors typically attempt to eliminate minority jurors in cases involving minority defendants. This practice tends to produce juries predominately composed of white, middle-aged, and middle-class people on the assumption that such jurors will identify with the government rather than the defendant, thereby increasing the likelihood of conviction.\(^{36}\) Such abuse of peremptory challenges can turn what was once a representative jury into a non-representative and possibly biased one. This practice violates the defendant's right to an impartial jury under the Constitution.

### III. Historical Perspective: Racial Discrimination in Jury Selection

Racial discrimination in the jury selection process has long been recognized as a problem in the American judicial system. In 1880, the Supreme Court first addressed

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\(^{28}\) Id. at 143.

\(^{29}\) Id. at 139–40 (citing Swain v. Ala., 380 U.S. 202, 220 (1965)).

\(^{30}\) Fed. R. Crim. P. 24(b). "If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

\(^{31}\) Van Dyke, supra note 1, at 140.


\(^{33}\) Van Dyke, supra note 1, at 146.

\(^{34}\) See generally 2 THE PROSECUTOR'S SOURCEBOOK 546 (1969).

\(^{35}\) In 1973, a Dallas County District Attorney’s Office training manual gave this “advice” to their prosecutors in selecting jurors:

1. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.

2. You are not looking for any member of a minority group which may subject him to oppression- they almost always empathize with the accused.

3. You are not looking for the free thinkers and flower children.

\(^{36}\) Id. at 152-53.

\(^{37}\) Id. at 152.
the issue in the landmark case of Strauder v. West Virginia, in which the Court struck down a state statute that denied black citizens the right to serve on juries. The exclusion of black people from jury panels on the basis of their race was held to be a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court reiterated that the importance of the jury lies in the fact that it is a representative body composed of peers and equals. Moreover, the court went on to acknowledge that the existence of prejudice in the jury selection was the type of discrimination the Fourteenth Amendment was designed to eradicate upon the emancipation of blacks from slavery.

With the Strauder decision, the Supreme Court set the first precedent in the long struggle against racial discrimination in jury selection. Only one year later, the Court in Neal v. Delaware found that the conduct of state administrative officers could constitute evidence of discriminatory purpose where the law itself was neutral on its face. The Court thus found discriminatory state action where state officers had purposefully excluded blacks in composing jury lists.

Following Neal v. Delaware, the Court consistently found constitutional violations where blacks were denied their full rights to jury selection. Thus, constitutional violations were found not only where blacks were totally excluded from the jury, but also where the number of blacks were somehow limited. What developed was later to be called the “rule of exclusion” which protected defendants from the exclusion of minority jurors on Fourteenth Amendment equal protection grounds. However, the rule of

57 100 U.S. at 310. (The statute provided that “All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors. . . .”(quoting Acts of 1872-73) Id. at 305.)
58 Id. at 310.
59 Id. at 308.
60 Id. at 309.
61 Id. at 308. 103 U.S. 370, 397 (1880).
62 Id. (The Court stated, “The showing thus made, including as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State, -although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand- presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors of that equality of protection which has been secured by the Constitution and laws of the United States.”).
63 See Carter v. Tex., 177 U.S. 442 (1900) (Criminal defendant’s right to equal protection was violated whenever state excluded members of that defendant’s race from the jury no matter whether exclusion was accomplished by legislative, judiciary, or executive officers of the state.;) Smith v. Tex., 311 U.S. 128 (1940) (Blacks were excluded from juries where commissioners did not choose blacks because they “did not know the names of any who were qualified” or because they were “not personally acquainted with them.”). See also Cassell v. Tex., 339 U.S. 289 (1950) (Equal protection violation where only a limited number of blacks could be on a grand jury.;) Norris v. Ala., 294 U.S. 587 (1935) (Systematic and arbitrary exclusion of blacks from jury lists resulting in exclusion from grand and petit juries is a violation of the Fourteenth Amendment.).
64 See Neal v. Del., 103 U.S. at 397; Carter v. Tex., 177 U.S. at 448; Norris v. Ala., 294 U.S. at 598.
65 See Cassell v. Tex., 339 U.S. at 286-87; Avery v. Ga., 345 U.S. 559, 562 (1953) (Court found purposeful discrimination where the state drew jurors from slips of paper on which names of white persons were on white slips and those of black persons were on yellow slips.).
66 Hernandez v. Tex., 347 U.S. 475, 480 (1954) (Constitutional protection from intentional exclusion not limited to blacks but applies to any identifiable group in the community which may be subject to prejudice.). See also Casteneda v. Partida, 430 U.S. 482, 494 (1977) (The elements of the rule of exclusion were: (1) the defendant must show membership in a “recognizable, distinct class, singled out for different treatment under the laws, as written or as applied” and (2)the
exclusion was limited in its application to eligibility for jury service, that is, eligibility for
the jury venire. It did not prevent parties from utilizing subtle ways of keeping minorities
off the petit jury. Thus, blacks continued to be excluded through the exercise of per-
emptory challenges.

The Supreme Court first reviewed the discriminatory use of peremptory challenges
in Swain v. Alabama. During the jury selection process, the prosecutor struck the only six eligible
prospective black jurors from the venire resulting in an all-white jury. The defendant
alleged a violation of his right to equal protection under the Fourteenth Amendment.
The Court upheld the conviction despite the total exclusion of blacks from the jury
because it did not want to place restrictions on the traditional use of peremptories.
The Court concluded that to subject the prosecutor's challenge to scrutiny in the case at
hand would change the entire nature of the peremptory challenge, no longer making it
peremptory. Thus, by upholding the long standing tradition of peremptory challenges,
the prosecutor's judgment in exercising challenges in a particular case was insulated
from the court's interference. The Court stated that to show discriminatory use of
peremptory challenges the petitioner must show the systematic use of peremptories by
a specific prosecutor over a period of time. Thus, in Swain, the Court found that the
petitioner had failed to carry his burden of proof even though he had presented
convincing evidence of jury discrimination in the county. The petitioner had shown that
generally only ten to fifteen percent of the jury venires in criminal cases included an
average of six or seven blacks and that no blacks had actually served on a petit jury in
fifteen years in a county where black males over twenty-one constituted 26% of all
males. However, he had not shown that the opposing prosecutor had systematically
excluded black jurors over a period of time.

IV. THE CROSS-SECTION REQUIREMENT

The burden of proof set out in Swain to show discriminatory use of peremptory
challenges was later to prove insurmountable. For the next twenty years almost all
defendant must prove underrepresentation of the distinct class on juries by "comparing the
proportion of the group in the total population to the proportion called to serve as... jurors, over
a significant period of time." The Court explained the theory behind the "rule of exclusion" by
stating that significant underrepresentation of a particular group is more likely explained by
discriminatory selection procedures than by chance or by accident.

47 380 U.S. at 212-28.
48 Id. at 203.
49 Id. at 205. (There were eight blacks on the petit jury venire but none actually served, two
being exempt and six being struck by the prosecutor).
50 Id. at 210.
51 Id. at 221-22.
52 Id.
53 Id. at 227.
54 Id. at 226. (Petitioner failed to show that the prosecutor was entirely responsible for the
absence of black persons on petit jurors in the county. Id. at 224).
55 Id. at 205.
56 Id. at 224.
57 There were only a handful of successful cases. See e.g., State v. Brown, 371 So. 2d 751 (La.
1979); State v. Washington, 375 So. 2d 1162 (La. 1979). For a list of unsuccessful cases, see 79
attempts in both state and federal courts were unsuccessful. 58 There were several reasons for this remarkable lack of success. First, the Supreme Court had not clearly explained what it meant by systematic exclusion over a long period of time and had never set forth the precise elements of a prima facie case. 59 Second, an individual defendant most likely did not have the time or the resources to compile and analyze data necessary for a statistical attack on a particular prosecutor’s use of peremptory challenges. 60 Lastly, there was usually no information recorded about the racial identity of prospective jurors or on the prosecutor’s use of strikes over a period of time. 61

Dissatisfied with the results, state courts eventually looked for an alternative test to show abuse of peremptory challenges to exclude minorities from juries. Instead of a Fourteenth Amendment analysis, the state courts relied upon the requirement that a jury be drawn from a cross-section of the community, an idea which had been developed by the Supreme Court based on the Sixth Amendment right to an impartial jury. In most cases the state courts overlooked the Swain precedent, based on the fact that at the time Swain was decided the Supreme Court had not yet ruled that the guarantee to an impartial jury in the Sixth Amendment was binding on the states by the incorporation into the Due Process Clause of the Fourteenth Amendment. 62

A. Supreme Court Development

Although the Supreme Court has yet to apply the cross-section requirement to the discriminatory use of peremptory challenges, the Court has used the concept in other jury discrimination cases since the 1940’s. 63 The line of Supreme Court cases on point began with Smith v. Texas, where blacks were found to have been intentionally and systematically excluded from grand jury service. 64 There, the Court first articulated the idea of cross-sectionalism.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified jurors not only violates our Constitution and the laws

58 See People v. Wheeler, 22 Cal. 3d at 286, 583 P.2d at 768, 148 Cal. Rptr. at 909 (“[I]n all of the cases involving this issue thus far, all of which have dealt with blacks as the group peremptorily challenged, no defendant has yet been successful in proving to the court’s satisfaction an invidious discrimination by the use of the peremptory challenges against blacks over a period of time.” (quoting Annot., Use of Peremptory Challenges to Exclude from Jury Persons Belonging to a Class of Race, 79 A.L.R.3d 14, 56-73 (1975)).


60 Id. at 1317.

61 Id.

62 See e.g., McCray v. Abrams, 750 F.2d 1113, 1122, (2d Cir. 1984), cert. granted —U.S. —, 106 S.Ct. 3289 (1986) (judgments vacated and cases remanded for further consideration in light of Allen v. Hardy, —U.S. —, 106 S.Ct. 2878 (1986), which held that Batson v. Kentucky, 476 U.S. 79 (1986), is not to be applied retroactively to convictions that were final before Batson was decided. See infra note 98.

63 For the history and theory behind the cross-section requirement, see Van Dyke, supra note 1, at 45–83.

64 311 U.S. at 132.
enacted under it but is at war with our basic concepts of a democratic society and a representative government.\(^65\)

The Supreme Court continued to expand on this principle in several cases to follow. In *Glasser v. United States*, it reiterated the idea of a representative jury, noting that the impartiality achieved through representativeness is essential to the constitutional right to a jury trial.\(^66\) It further condemned the selection of juries by any means which did not comport with such goals.\(^67\) In *Thiel v. Southern Pacific Co.*, the Court stated that the jury must be drawn from the community but it did not have to contain representatives of all the economic, social, racial, political, and geographical groups of the community since such complete representation would be impossible.\(^68\) Yet prospective jurors had to be selected by court officials without systematic and intentional exclusion of any of these groups.\(^69\)

Subsequently, the Court extended the cross-section principle to permit any defendant to challenge the arbitrary exclusion from the venire not only those of his own class but also those of different classes. In *Peters v. Kiff*, the Court reversed a state conviction of a white defendant upon a showing that blacks had been arbitrarily excluded from grand and petit jury service.\(^70\) The majority opinion rejected the State's argument that because the defendant was not himself black he was not harmed by the exclusion.\(^71\) The Court recognized that the exclusion of a discernible class from jury service not only harms defendants who belong to the excluded class but other defendants as well since it destroys the possibility that the jury will reflect a cross-section of the community.\(^72\) Moreover, it concluded that to allow exclusion of a class of jurors merely on the assumption that they will vote a certain way, may deprive the jury of perspectives which may have an unsuspected influence on the case.\(^73\)

Finally, in *Taylor v. Louisiana*, the Supreme Court imposed the cross-section rule on the states as a fundamental component of the Sixth Amendment right to an impartial jury incorporated in the Fourteenth Amendment.\(^74\) The Court stressed its ramifications on public policy grounds.

Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but it is also critical to public confidence in the fairness of the criminal system. Restricting jury service to only special groups or excluding identifiable segments playing

\(^{65}\) *Id.* at 130. (footnote omitted).
\(^{66}\) 315 U.S. 60, 85–86 (1942).
\(^{67}\) *Id.*
\(^{68}\) 328 U.S. 217, 220 (1946) (Federal court jury panel from which persons who worked for daily wages were intentionally and systematically excluded was held to be unlawfully constituted.).
\(^{69}\) *Id.*
\(^{70}\) 407 U.S. 493, 505 (1972).
\(^{71}\) *Id.* at 498.
\(^{72}\) *Id.* at 500.
\(^{73}\) *Id.* at 503–04.
\(^{74}\) 419 U.S. 522, 530, 538 (1975) (Requirement that a petit jury selected from a representative cross-section of the community as guaranteed by the Sixth Amendment was violated by the systematic exclusion of women from jury panels, which in the judicial district involved amounted to 53% of the citizens eligible for jury service.).
major roles in the community cannot be squared with the constitutional concept of jury trial. . . .

B. State Application to Peremptory Challenges

As an alternative to Swain, the states applied this newly developed principal under their state constitutions to prevent the use of peremptory challenges to systematically remove minority jurors.76 The California Supreme Court was the first to do so in People v. Wheeler in which two defendants, both black, were accused of murdering a white man during a robbery.77 At trial, a number of blacks were called to the jury box, were questioned on voir dire, and were passed for cause.78 The prosecutor proceeded to strike every black person from the jury panel using his peremptory challenges.79 In the end, an all-white jury convicted the defendants.80 The Court found that this use of peremptory challenges to remove prospective jurors on the sole ground of group bias violated the right to a trial by a jury drawn from a representative cross-section of the community.81 The Court explained that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.82

The Wheeler Court established a feasible burden of proof as compared to that set forth in Swain. Thus, if a party believes his opponent is using his peremptory challenges to strike jurors on the grounds of group bias alone, he must raise the point in a timely fashion while making as complete a record of the circumstances as possible.83 He must then establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule.84 Lastly, he must show a strong likelihood that such persons are being systematically excluded because of their group association rather than because of any specific bias.85 The court must then determine whether a reasonable inference arises that the peremptory challenges are being used on the ground of group bias alone.86 If the court finds that such is shown, the burden shifts to the other party to show, if he can, that the peremptory challenges in question were not

75 Id. at 530.
76 See generally Duncan v. L.A., 391 U.S. 145, 149 (1968) (Sixth and Fourteenth Amendments impose upon the states a duty to give a trial by jury in any criminal case.).
77 22 Cal. 3d at 262, 583 P.2d at 752, 148 Cal. Rptr. at 893.
78 Id. at 262–63, 583 P.2d at 752, 148 Cal. Rptr. at 893.
79 Id. at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893.
80 Id.
81 Id. at 277, 583 P.2d at 761–62, 148 Cal. Rptr. at 903. The court's decision was based on an interpretation of the California Constitution, Article I, Section 16 which states “Trial by jury is an inviolate right and shall be secured to all . . . .” Id. at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895.
82 Id. at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.
83 Id. at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.
84 Id.
85 Id. See also People v. Motton, 39 Cal. 3d 596, 606, 704 P.2d 176, 181–82, 217 Cal. Rptr. 416, 422 (1985) (In determining whether a cognizable group has been discriminatorily excluded from jury, the question is not one of merits of one group in contrast to another; the basis for prohibition from excluding cognizable groups is the diversity in beliefs and values that jurors bring from their group experiences which must be encouraged in order to achieve overall impartiality in decision making processes. (citing Wheeler, 22 Cal. 3d at 276, 583 P.2d at 748, 148 Cal. Rptr. at 583).
86 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906.
predicated on group bias alone. Moreover, the showing need not rise to the level of a challenge for cause but must merely show that his actions were reasonably relevant to the circumstances surrounding the case.

If the court finds that the burden of justification is not sustained, the presumption of validity in favor of the challenged party’s use of peremptory challenges is thereby rebutted. Accordingly, the court must find that the jury as constituted fails to comply with the cross-section requirement, a mistrial must be declared, and jury selection must begin anew.

Soon after Wheeler, the Supreme Judicial Court of Massachusetts ruled similarly in Commonwealth v. Soares. In Soares, three black defendants were convicted of murdering a white Harvard football player in Boston. At trial, the prosecutor peremptorily challenged twelve of the thirteen eligible black jurors. In all, he excluded 92% of the available black jurors and only 34% of the available white jurors. The Court concluded that the jury as constituted failed to comply with the representative cross-section requirement under article 12 of the Declaration of Rights of the Massachusetts Constitution and remanded the case for a new trial.

A line of state cases continued to recognize the Wheeler-Soares rationale. In addition two federal cases adopted the same view under the Sixth Amendment. The issue was again presented before the Supreme Court in McCray v. New York but the Court denied

87 Id. at 281–82, 583 P.2d at 764–65, 148 Cal. Rptr. at 906 (footnote omitted). The term “group bias” referred to a 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.” Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
88 Id. at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.
89 Id.
90 Id.
91 Id. For a list of cases in which defendants have successfully established a prima facie case under the Wheeler standard, see Note, Batson v. Kentucky: Jury Discrimination and the Peremptory Challenge for Cause, 20 CREIGHTON L. REV. 221, 232 n.103 (1986).
92 377 Mass at 488, 491, 387 N.E.2d at 516, 517–18.
93 Id. at 463–64, 387 N.E.2d at 502.
94 Id. at 473, 387 N.E.2d at 508.
95 Id.
96 Id. at 488, 387 N.E.2d at 516.
Art. 12 provides 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 law, exiled, or deprived of his life, liberty, or estate, but by the judgments of his peers or the law of the land.” MA. CONST. art. XII.
98 McCray v. Abrams, 750 F.2d at 1113. (Exclusion of all black and hispanic jurors from a criminal jury through prosecutor’s use of peremptory challenges was a violation of the Sixth Amendment.); Booker v. Jabe, 775 F.2d at 772 (All-white jury resulted when prosecutor used 22 of his 26 peremptory challenges to exclude black potential jurors, in several instances without addressing any questions to the excused jurors. On the other hand, the two black defendants used all forty of their combined peremptory challenges and excused 37 white potential jurors. Id. at 764.).
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certiorari.99 Although it recognized the importance of the problem,100 the Court did not reexamine the issue but instead wanted the state courts to refine it further.101

V. SUPREME COURT LIMITATIONS ON THE USE OF PEREMPTORY CHALLENGES

A. Batson v. Kentucky: Limiting the Prosecutor's Use of Peremptory Challenges

Finally in 1986, over two decades after Swain, the Supreme Court once again reviewed the discriminatory use of peremptory challenges in Batson v. Kentucky.102 In Batson, a black man was convicted of second-degree burglary and receipt of stolen goods.103 At trial, the prosecutor used his peremptory challenges to strike all four black persons resulting in an all-white jury.104 The defense counsel moved to discharge the jury on the grounds that prosecutor's removal of black venireman violated defendant's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community and to equal protection of the law.105 The trial judge denied the motion and the Supreme Court of Kentucky affirmed, declining to adopt a Wheeler-Soares rationale.106

However, the Supreme Court reversed and remanded.107 Although it did not recognize the defendant's Sixth Amendment claim,108 it held that Equal Protection Clause forbids the prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors will be unable to impartially consider the State's case against a black defendant.109 Moreover, the Court abandoned the Swain burden and adopted a more flexible rule which relied solely on the facts of the particular case rather than over a period of time.110 To establish a prima facie case of purposeful discrimination, the defendant must first show that he is a member of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.111 Once the defendant makes a prima facie showing, the burden shifts to the prosecutor who must then articulate a neutral explanation related to the particular case.112 The court must then make the final determination.113 The Supreme Court concluded that their decision did not undermine the tradition of per-

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100 Id. at 961–62.
101 Id. at 962–63.
102 476 U.S. at 79.
103 Id. at 82.
104 Id. at 83.
105 Id.
106 Id. at 83–84.
107 Id. at 100.
108 Id. at 89 n.12. ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by the defense counsel.").
109 Id. at 86.
110 Id. at 95.
111 Id. at 96.
112 Id. at 97.
113 Id. at 98.
emptory challenges but rather furthered the ends of justice by not allowing citizens to be excluded from jury service because of their race.114

B. Limiting the Defense’s Use of Peremptory Challenges

The importance of Batson lies in the fact that it recognized the abuse of peremptory challenges.115 Moreover, it set forth a more practical approach to prove a prima facie case of discrimination thereby overruling the insurmountable burden of proof as established in Swain.116 However, the holding was actually limited in its scope. Although it restricted the prosecution’s discriminatory use of peremptory challenges, it did not express a view on the Sixth Amendment argument117 nor did it extend protection to other cognizable groups other than racial groups.118 Moreover, it did not extend the ruling to include the defense’s use of peremptory challenges to exclude minorities from the jury.119

While the Supreme Court has remained silent on this last issue, some state courts and lower federal courts have addressed this issue under the cross-section analysis. Both the Wheeler and Soares courts, in prohibiting the discriminatory use of peremptory challenges by the prosecution under Sixth Amendment type analysis, extended their holdings, in dicta, to limit the exercise of peremptory challenges by the defense counsel.120 In Wheeler, the California Supreme Court, predicting a Howard Beach situation, noted that the government is also entitled to a trial by an impartial jury:

[T]he People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate cross-sectionalism. . . . For example, when a defendant is charged with a crime against a black victim the community as a whole has a legitimate interest in participating in the trial proceeding; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.121

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114 Id. at 98–99.


116 See id. at 96–98.

117 Id. at 84 n.4. For further discussion of the Sixth Amendment as applied to the prosecutor’s use of peremptory challenges, see Massaro, Peremptories or Peers?: Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C.L. REV. 501 (1986); Comment, Impartial Jury Guarantees of State May Forbid the Use of Peremptory Challenges Exercised to Exclude Jurors Solely Because of Race, 16 U. TOL. L. REV. 507 (1985); Doyel, In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges, 38 OKLA. L. REV. 385 (1985); Wilson, Prosectorial Misuse of Peremptory Challenges and the Sixth Amendment, 29 HOW. L.J. 481 (1986); Comment, Skin Color Doesn’t Reason: Closing the Door on the Discriminatory Use of Peremptory Challenge, 64 U. DET. L. REV. 171 (1986).

118 See 476 U.S. at 99.

119 See id. at 96–98; see supra note 108.

120 People v. Wheeler, 22 Cal. 3d. at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29; Commonwealth v. Soares, 377 Mass. at 489 n.35, 387 N.E.2d at 517 n.35.

121 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29.
Moreover, the Wheeler court's intentions were clearly reflected in the fact that its holding was written in neutral language which could be applied to either the defense or the prosecution.\(^\text{122}\)

Several California cases have subsequently upheld the Wheeler mandate. In People v. Pagel, the Superior Court explicitly ruled on this issue.\(^\text{123}\) The defendant, charged of a hit and run resulting in injury,\(^\text{124}\) was white and both the victim and the People's witnesses were all black.\(^\text{125}\) The defense counsel proceeded to exercise his first three peremptory challenges to remove prospective jurors each of whom were black.\(^\text{126}\) The trial court held that the People had made a prima facie case showing that the defendant had utilized peremptory challenges systematically on the basis of group bias and that the defense's explanations to overcome the burden were insufficient.\(^\text{127}\) Consequently, the Court dismissed the jury members already selected, quashed the remaining venire, and started jury selection anew.\(^\text{128}\) The appellate court affirmed the trial court's decision and outrightly rejected the defendant's argument that restrictions of peremptory challenges only applied to the prosecution.\(^\text{129}\) Furthermore, in Holley v. J & S Sweeping Co., the Court went even further and extended the Wheeler mandate to both parties in civil trials.\(^\text{130}\)

In Massachusetts, the Soares court had also extended its ruling to include the use of peremptories by the defense.\(^\text{131}\) Similar to the Wheeler decision, it stated:

> While we have highlighted a defendant's right to be protected from the improper use of peremptory challenges, we recognize the Commonwealth's interest in prosecutions that are 'tried before the tribunal which the Constitution regards as most likely to produce a fair result.' Singer v. United States, 380 U.S. 24, 36 (1965). For this reason we deem the Commonwealth equally to be entitled to a representative jury unimpaired by improper exercise of peremptory challenges by the defense. Such a rule also serves to protect minority groups in the community . . . \(^\text{132}\)

The Soares mandate was later upheld in Commonwealth v. Reid, where the defendant was prohibited from using her peremptory challenges to exclude jurors solely on the basis of group association.\(^\text{133}\)

\(^{122}\) The Court used generic language such as "the party" and "the opposing party" rather than specifying "the prosecution" and "the defense." See id. at 280–82, 583 P.2d at 764–65, 148 Cal. Rptr. at 905–06.


\(^{124}\) Id. at 3, 232 Cal. Rptr. at 104.

\(^{125}\) Id. at 4, 232 Cal. Rptr. at 105.

\(^{126}\) Id. at 3, 232 Cal. Rptr. at 105.

\(^{127}\) Id at 4–5, 232 Cal. Rptr. at 105–06.

\(^{128}\) Id. at 5–6, 232 Cal. Rptr. at 106.

\(^{129}\) Id. at 6–7, 232 Cal. Rptr. at 107.

In Florida, the court in *State v. Neil* agreed with the *Wheeler-Soares* mandate. It too found that both the State and the defense may challenge the allegedly improper use of peremptories "since the State, no less than a defendant is entitled to an impartial jury." Among the federal courts, the Sixth Circuit Court of Appeals, in *Booker v. Jabe*, has been the first to recognize limitations on the use of the defense's peremptory challenges. Under a Sixth Amendment analysis, the court stated: Although the Sixth Amendment by its terms protects the right of "the accused" to trial by an impartial jury, it does not guarantee a criminal defendant the right to trial before a jury that is partial to his cause. The spectacle of a defense counsel systematically excusing potential jurors because of their race or other shared group identity while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury. Therefore, we hold that under the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury. If the Supreme Court is to place restrictions on the defense's use of peremptory challenges, it must do so under the cross-section requirement as state and lower federal courts have done. An equal protection analysis, which the court applied to the prosecution's discriminatory use of peremptory challenges in *Batson*, cannot simply be extended to protect the State. While the defendant is protected against discriminatory state action, the reverse is not true. Since the defense's conduct does not constitute state action, the State is not protected under the Fourteenth Amendment.
Thus, a Sixth Amendment analysis, whereby an "impartial" jury will be ensured, is essential. 142

The Supreme Court should adopt a Sixth Amendment analysis to limit the defense's use of peremptory challenges for several reasons. By not extending restrictions to the defense, the composition of the jury will be lopsided in favor of the defendant. 143 While the prosecution's use of peremptory challenges will be restricted, the defense's use will remain unchecked. This result will certainly contravene the goals of the Sixth Amendment, since the jury will no longer be "impartial." A long line of Supreme Court cases, beginning with Smith v. Texas, has upheld the principle that "the jury be a body truly representative of the community." 144 To continue to allow the racially discriminatory use of peremptory challenges by the defense would be contrary to this ideal and those of our democratic society. While a defendant is guaranteed an "impartial" jury by the Constitution, there is nothing that says a defendant is entitled to a jury that is biased in favor of him. 145 Moreover, if the defendant is acquitted as a result of a "partial" jury, the prosecution has no chance to appeal. 146

The State too is entitled to an "impartial" jury. 147 While the Constitution does not explicitly protect the State, the Supreme Court has recognized the Government's interest in criminal trials. It has noted:

[T]he Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. 148

Indeed, the Supreme Court in Hayes v. Missouri recognized the prosecution's interest in the exercise of peremptory challenges in order to secure "impartiality." 149 It stated, "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against the prosecution." 150

on the part of the state.). "Encouragement" of discrimination will however trigger a constitutional violation. See Reitman v. Mulkey, 387 U.S. 369, 375-76. See generally Note, The Death Knell, supra note 114, at 505-06 n.220.

142 See Note, Sixth and Fourteenth Amendments, supra note 114, at 839.

143 See infra note 155

144 See supra notes 64-75 and accompanying text.

145 See Booker v. Jabe, 775 F.2d at 772.

146 Provisions governing appeals by the prosecution vary among jurisdictions. In a few states, the prosecution is denied any right to appeal. Some states allow the prosecution to appeal an allegedly erroneous "ruling of law," including a trial ruling, even after the jury has returned a verdict. Most states, however limit prosecution appeals to (1) pretrial appeals from decisions dismissing an indictment or information (and in some states, a complaint), and (2) post verdict appeals from decisions granting a new trial or motion in arrest of judgment. Y. Kasimir, W. LaFave, J. Israel, Modern Criminal Procedure (4th ed. 1974).

147 See Spinkellink v. Wainwright, 578 F.2d 582, 596, (5th Cir. 1978), cert. denied 440 U.S. 976 (1979) (The right to a trial by a fair and impartial jury guaranteed a criminally accused under the Sixth and Fourteenth Amendments is also enjoyed by the State); Williams v. Wainwright, 427 F.2d 921, 923 (5th Cir. 1970) (The state also enjoys the right to any impartial jury.).


149 120 U.S. 68, 70-72 (1887).

150 Id. at 70.
Even the Swain Court stated that "[b]etween [the defendant] and the State the scales are to be evenly held."\textsuperscript{151} Since the State is entitled to no less than the defendant, it is only fair and rational that the adversary system should be an equally balanced process: what applies to one party, should apply to the other.

Moreover, the right to peremptory challenges is not guaranteed to a defendant by the Constitution. It is merely a statutory right.\textsuperscript{152} In addition, when a statutory procedure is found to conflict with a constitutional right, the constitutional right preempts it.\textsuperscript{153} Thus, if peremptory challenges are exercised by the defense in such a way that it contravenes the constitutional right to an impartial jury, the Court cannot allow it.

From a policy standpoint, the failure to restrict the defendant's use of peremptory challenges while the prosecution's use is so restricted will undermine public confidence in the judicial system. The jury, the backbone of our democratic system, will no longer be fair and impartial. The jury's decision will no longer be perceived as being credible and trustworthy or as a reflection of the community's conscience.

To continue to allow people to be excluded from juries solely on the basis of race affects the rights of those who are excluded for such reasons. As early as 1880, the Supreme Court in Strauder recognized the dangers inherent in this.\textsuperscript{154} The exclusion of otherwise qualified persons from the jury creates a feeling not only of unfairness and dissatisfaction but of inferiority.

VI. Conclusion

The Supreme Court should follow the lead of state and lower federal courts, as it did in limiting the prosecution's use of peremptory challenges, and limit the defendant's use of peremptory challenges to systematically exclude blacks from juries under a Sixth Amendment analysis. This abusive practice by the defense currently exists unchecked especially when the defendants are white and the victims black. In fact, the Carter Justice Department testified that manipulation of juries by the defense is a growing phenomenon.\textsuperscript{155} Today, after so many years of trying to eradicate racial discrimination in our society, such a practice should not be allowed to pervade our jury selection process.

\textsuperscript{151} 380 U.S. at 220 (quoting Hayes v. Mo., 120 U.S. at 70.)
\textsuperscript{152} See Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.").
\textsuperscript{153} See People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046, 1050 (1982) rev'd on other grounds, 457 N.E.2d 1202 (Ill. 1983) ("When a constitutional right conflicts with a statutory procedure, the constitutional right must prevail." (Citing Swain, 380 U.S. at 224, Goldberg, J., dissenting) ("Marbury v. Madison, 1 Cranch 137, settled beyond doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail.").)
\textsuperscript{154} See supra notes 6 & 37–40 and accompanying text.

Mr. Thornburgh testified in support of a proposed amendment to the Fed. R. of Crim. P. to reduce and equalize the number of peremptory challenges between the government and the defense. He pointed out the growing phenomenon among defendants involved with political corruption or white collar offenses to commission sociological studies and opinion polls to determine the attitudes of particular segments of the community in which their trial is being held. Such studies along with the judicious exercise of peremptory challenges have been permitted moneyed defendants to shape the jury and augment the chances of a favorable verdict.
Neither the defense nor the prosecution should be allowed to continue this abusive practice. The ramifications of this practice far outweigh any interest in upholding the use of peremptories merely on the basis of tradition. The use of peremptories seems to have outgrown its original intentions.

However, limiting the use of peremptory challenges by either party leaves the future of peremptories in question. Originally, peremptories were considered to be challenges for which no reason need be given. Ideally the purpose was to eliminate extreme bias on each side which might be difficult to explain. The original purpose has since become distorted, as it has become commonplace practice to exclude jurors simply on the basis of race on the assumption that black jurors will be sympathetic to black defendants or that they will be unsympathetic to white defendants. To eradicate this practice, the courts have thus had to subject peremptory challenges to scrutiny. Now, in order to overcome a *prima facie* case of discrimination against him, a party must offer a "neutral" explanation sufficient to the court. If the explanation is insufficient or if no explanation is given at all, the court will rule against him and order jury selection to begin anew. Hence, the peremptory challenge is no longer insulated from the court's discretion as it was originally intended to be. The principal on which it was has been based has certainly been greatly eroded.

Some commentators have suggested that peremptories be abolished altogether. Still others have suggested reducing the number of peremptories so as to lessen any possible discriminatory impact. Still others have suggested the use of "negative" peremptory challenges as a type of affirmative jury selection to ensure representation. Such peremptory "holds" would give counsel the privilege of selecting those most likely to favor their party as opposed to "striking" jurors least likely to sympathize with their cause.

In any case, the tradition of peremptories is no longer a sufficient justification for allowing them to continue to be used in a racially discriminatory manner. Our country has long strived to eradicate racial discrimination in any form. The last place it should pervade is in our judicial system. To fully resolve the issue of racially discriminatory use of peremptory challenges, the Supreme Court should extend restrictions to the defense. Perhaps, thereafter, the entire use of peremptory challenges should be reevaluated by our courts and Congress keeping in mind the goals of our jury system, that is, to provide a fair and impartial trial.

Beverly A. Chin

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159 Id.