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PEREMPTORY CHALLENGES AND THE CLASH BETWEEN IMPARTIALITY AND GROUP REPRESENTATION*

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I. INTRODUCTION

When the Supreme Court decided Swain v. Alabama1 and held that a prosecutor's use of peremptory challenges to remove black jurors from an array was constitutionally permissible, the decision received more than a modest amount of criticism.2 Swain appeared to be out of step with other decisions of the Supreme Court of the 1960's, especially with those of the Warren Court.3 These other decisions strongly condemned actions on racial grounds by government officials and always found them impermissible.4

Although the criticism did not immediately prompt either the Supreme Court or state courts to reject the Swain analysis, more recently there has been a movement by some state courts to view Swain as representing undesirable law and to interpret differently the jury

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3. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (rejecting argument that anti-miscegenation law was valid as applying equally to everyone); Anderson v. Martin, 375 U.S. 399 (1964) (rejecting argument that state law requiring a candidate's race to be on the ballot was valid because it applied equally to all candidates).
trial provisions in their own constitutions. Some state decisions now bar the use of race and certain other classifications as a basis for striking jurors by means of peremptory challenges. They find that the Court’s decision in *Taylor v. Louisiana*, holding that a criminal defendant is entitled to a jury selected from a cross-section of the community, impels abandonment of *Swain*. Although the trend is far from overwhelming, it is significant, especially in view of many commentators’ favorable reactions to these decisions. This reaction plus the initial criticism of *Swain* may lead additional courts to reconsider whether counsel properly may use race, other “suspect” or “quasi-suspect” classifications, and additional distinctions delineating social groups in jury selection.

This discussion will suggest that the recent decisions prohibiting the use of certain traits as grounds for peremptorily challenging jurors are misconceived, that they miss the basic point of peremptory challenges, that they miscast the cross-section of the community requirement, and that in the long run they may do more harm to the litigation process than does the *Swain* rule. There are problems with peremptory challenges, but they are not those superficially identified in the recent


7. Thus far, the decisions do not maintain that *Swain* has effectively been overruled. Instead, they use state constitutions as the bases for their holdings. But the opinions strongly imply that *Swain* and *Taylor* are not consistent.


9. In jury selection cases courts look to exclusion of identifiable groups that might be thought of as having different values, attitudes or experiences from those included on juries. The groups identified thus far are those that receive some sort of heightened scrutiny in equal protection cases and others that might be said to be “distinctive.” See *Duren v. Missouri*, 439 U.S. 357, 364 (1978). See generally Luneberg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 Va. L. Rev. 887, 927-33 (1981).
cases that stand in opposition to Swain. In fact, the discussion will suggest that the focus on restricting the bases for peremptory challenges distracts attention from more important issues that should be considered in attempting to select fair juries. The recent decisions do point to a real need to increase minority participation on juries, but they do not provide an acceptable formula for doing so. This discussion, which concentrates on criminal rather than civil cases, will attempt to offer a better one.

II. THE ROLE OF THE CHALLENGE

A. Generally

The exercise of challenges is the last stage in the selection of a jury. After a venire has been drawn, usually at random, from a pool of qualified jurors, the prospective jurors are subject to voir dire, a face-to-face examination by the judge and by counsel to determine the impartiality of prospective jurors with respect to the particular case to be decided. At this stage, the attorney may use a peremptory chal-

10. Our discussion examines selection of juries in criminal rather than civil cases for two reasons: first, Swain and the recent cases challenging it are criminal cases; second, the sixth amendment right to a jury trial in criminal cases binds the states, Duncan v. Louisiana, 391 U.S. 145 (1968), whereas the seventh amendment right to a jury trial in civil cases does not, see Walker v. Sauvinet, 92 U.S. 90 (1875). Unless the Supreme Court were to say that no defendant can receive a fair trial under the Swain rule — something it is unlikely to say in light of a history in which Swain has been the traditional approach — states would not have to abandon Swain in civil litigation, even if they were forced to do so in criminal cases. The criminal case therefore presents a slightly more important context in which to consider the use of peremptory challenges.

11. There are several stages in the jury selection process. First, a list of eligible jurors is compiled by means of voter registration lists, directories, a key-man system, or similar methods. From that pool, a venire is randomly selected for service during a particular court term. After excuses for hardship, health, or similar reasons, the venire is examined and challenges are made. The petit jury is selected from those jurors who remain. For a discussion of the mechanics of jury selection, see Simon & Marshall, The Jury System, in THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 211, 214-17 (S. Nagel ed. 1972).


13. See Babcock, Voir Dire: Preserving “Its Wonderful Power,” 27 STAN. L. REV. 545 (1975). The method of conducting voir dire differs among jurisdictions in several important respects. First, in some jurisdictions, as well as in the federal courts, the judge may ask questions and may permit counsel to do so in lieu of or in addition to judicial questioning. More states give the primary role of questioning to counsel. The most common state rule provides for examination by the judge, followed by additional questions from counsel. STANDARDS RELATING TO TRIAL BY JURY § 15-2.4 commentary at 24 (1978); A. GINGER, JURY SELECTION IN CRIMINAL TRIALS § 7.11 (1980). Second, the permissible scope of examination varies. In some jurisdictions, voir dire is restricted to questions that will provide a basis for challenges for cause. See STANDARDS RELATING TO TRIAL BY JURY § 15-2.4 commentary at 25 (1978). In most states, questions are permitted if they relate to the exercise of
challenge to exclude a prospective juror from the panel or he may challenge a venireman for cause. Challenges for cause are unlimited, but subject to judicial control. A judicial finding of either implied or actual bias will support such a challenge. A court will infer bias from the existence of certain family or business relationships between the juror and parties to the action, or from other special interests in the outcome or the participants. A challenge for actual bias requires a finding that the juror is prejudiced with respect to the particular defendant on trial.

Challenges for cause have been criticized as too narrow to eliminate effectively any but the most blatant biases. The combination of restrictive voir dire procedures — for example limitations on the right of counsel to question jurors directly, and on the scope of inquiry — and narrow grounds for challenges for cause make it extremely difficult to discover, and even more difficult to prove, that a prospective juror has subconscious biases that will affect his ability to be impartial. Thus, both prosecutors and defense counsel have come to rely on the peremptory to remove jurors they suspect of prejudice. By definition, the peremptory challenge does not require an explanation. Although no reason need be given for exercising this challenge, statutes and rules limit the number available to each side ranging, for example, in a capital case from four in Virginia to twenty-six in California. Obviously,

either challenges for cause or peremptory challenges. Id. However, trial judges have considerable discretion to limit questioning which they consider to be irrelevant or insubstantial. See cases cited in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 61-63 (3d ed. 1977). Third, questions can be addressed either to individual jurors or to the panel as a whole, with significantly different results. Jurors will often fail to speak up in response to a question directed to the entire panel, because of a fear of speaking in front of others or of disclosing personal feelings. Babcock, supra, at 547-48.

These differences in the methods of conducting voir dire examinations have significant effects on the amount of knowledge available to counsel in exercising challenges. See generally id.; Note, Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges, 27 Stan. L. Rev. 1493 (1975).

For a discussion of the functions of voir dire, see A. Ginger, supra, §§ 7.12-24.

15. See Babcock, supra note 13, at 549.
16. See id. at 550.
19. J. Van Dyke, Jury Selection Procedures 282-83 (1977). Federal Rule of Criminal Procedure 24(b) provides that in a capital case the government and the defendant may exercise 20 peremptories apiece. In a prosecution where a prison sentence longer than one year is a possible penalty, the prosecutor gets six challenges and the defendant gets ten. If a fine or prison sentence of less than one year may be imposed, each side is entitled to three peremptories.

In 1976 the Supreme Court proposed an amendment to rule 24(b) that would have
the availability of peremptories has a substantial effect on the ability of parties to control the composition of the jury.\textsuperscript{20}

The peremptory challenge historically has enabled defendants to eliminate prospective jurors whom they suspect to be biased against them.\textsuperscript{21} Although the Court has held that the peremptory is not a constitutional requirement,\textsuperscript{22} it always has been considered one of the most effective means of securing an impartial jury and of satisfying the defendant of that impartiality.\textsuperscript{23} Since the late nineteenth century, the

reduced the number of challenges available in all criminal cases, and also equalized the number available to the two sides in noncapital felony prosecutions. 425 U.S. 1157, 1162 (1976). Congress rejected that proposal. Pub. L. No. 95-78 § 2(c), 91 Stat. 319 (1977).

The majority of states provide for equal numbers of challenges for both parties. In about 20 states, the defendant has more challenges than the government in prosecutions of more serious crimes. J. VAN DYKE, supra, at 282-84.

20. The procedure employed for exercising peremptories also affects their utility. Some states use a "struck jury" system in which a venire is seated that is equal in size to the desired number of petit jurors plus the number of peremptories available to both sides. The defense counsel and prosecutor alternately strike jurors until their challenges are exhausted and only the petit jury remains. This method of selection allows attorneys to exercise their challenges in a much more sophisticated manner because they can compare all the prospective jurors before making a judgment. J. VAN DYKE, supra note 19, at 146-47. Another common selection procedure is to draw a panel of the desired size from the venire and to sequester the remaining jurors. After voir dire, one attorney challenges jurors he considers undesirable. Each challenged juror is immediately replaced from among the remaining veniremen, and each replacement can, in turn, be removed. When one party is satisfied with the panel, he presents it to the opposing counsel, who follows the same procedure. The process continues until each side has exhausted its challenges or until both are satisfied with the panel. Under this system, the replacement for a struck juror is an unknown quantity; thus counsel is unlikely to strike a juror unless he is affirmatively dissatisfied. JOINT COMM. ON CONTINUING LEGAL EDUC., ALI-ABA, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 332 (3d ed. 1974).

United States v. Blovin, 666 F.2d 796 (2d Cir. 1981), describes some of the different systems for exercising peremptory challenges. The court upheld the following system: strikes are exercised in rounds with the sides alternating who goes first; after one side exercises its challenges to jurors seated in the box, the other side exercises its challenges before the box is refilled for the next round; and the defendant goes last and must exercise his final challenges without knowing who will replace challenged jurors.

21. Blackstone wrote that the challenge had two additional purposes: first, to allow a defendant to remove any jurors whom he intuitively dislikes, thus insuring that he has "a good opinion of the jury, the want of which might totally disconcert him"; and second, to permit the exclusion of jurors whom the defendant has alienated through his voir dire questioning. 4 W. BLACKSTONE, COMMENTARIES *353 (1783). The United States Supreme Court long has recognized the important role of the challenge in fulfilling these functions. See Swain v. Alabama, 380 U.S. 202, 220 (1965) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887) and Lewis v. United States, 146 U.S. 370, 376 (1892)).


prosecutor's right to exercise challenges also has been recognized.\textsuperscript{24} In theory, each side will be able to identify and exclude those jurors most strongly biased in favor of the opposition. The result will be a jury from which extremes of bias have been removed, and which should reasonably approximate the impartial jury envisioned by the sixth amendment.\textsuperscript{25}

In practice, however, attorneys have less than perfect information about the predispositions and hidden biases of prospective jurors. Thus, they naturally have tended to rely on stereotypes, common sense judgments, and even common prejudices in deciding whether a juror with a given age, race, sex, religion, ethnic background, and occupation will act impartially toward a particular defendant. It is not surprising, therefore, that in some cases attorneys have made race or sex or religion the dominant, sometimes the exclusive, criterion for deciding whom to challenge.

B. Swain v. Alabama

The Supreme Court affirmed the constitutionality of using stereotypes in \textit{Swain v. Alabama}.\textsuperscript{26} \textit{Swain} arose in Talladega County, Alabama, where twenty-six percent of those eligible for grand and petit juries were black. Yet, from 1953 until \textit{Swain}, only ten to fifteen percent of those who served on the grand jury had been black, and no black resident had ever been selected for petit jury duty. In the \textit{Swain} case, the state charged a black defendant with raping a white female. Two blacks served on the grand jury that indicted the defendant, but none was on the petit jury that convicted him and sentenced him to death. On appeal, the defendant claimed that the prosecutor's use of peremptory challenges to remove all six blacks from the venire violated the equal protection clause of the fourteenth amendment.\textsuperscript{27}

\textsuperscript{24} Hayes v. Missouri, 120 U.S. 68, 70 (1887). The prosecutor's and defendant's challenges derive from different historical events. While the history is inconclusive, it is often used to support the argument that the challenge was designed only to protect the accused. For differing perspectives on the history of the challenge, compare Swain v. Alabama, 380 U.S. 202, 212-19 (1965) with J. Van Dyke, \textit{supra} note 19, at 147-50. See also Babcock, \textit{supra} note 13, at 555 n.37. The discussion herein explains why both sides may need and want to exercise challenges.

\textsuperscript{25} For a discussion of “impartiality,” see infra text accompanying notes 76-86.

\textsuperscript{26} 380 U.S. 202 (1965). \textit{Swain} involved the “struck jury” system. See \textit{supra} note 20. Approximately 100 jurors were called. Excuses and challenges reduced the venire to approximately 75. The prosecutor struck two and the defendant one until a jury of 12 was chosen. Eight blacks were originally called. Two were exempt and the prosecutor struck six.

\textsuperscript{27} The defendant argued in the trial court that the “systematic and arbitrary method” of selecting jurors violated the Fourteenth Amendment. The Supreme Court treated this argument as an equal protection challenge, 380 U.S. at 221, because Duncan v. Louisiana,
The Supreme Court rejected the defendant’s claim, adopting Alabama’s argument that the essential nature of peremptory challenges requires that they be unaccompanied by stated reasons and unfettered by judicial scrutiny in order to secure juries that, in fact and in the opinion of the parties, are fair and impartial.28 Thus, the Court explicitly approved the exercise of challenges “on grounds normally thought irrelevant to legal proceedings.”29 According to the Court, the peremptory challenge by definition is exercised without a stated reason, without inquiry, so that veniremen may be struck “whether they be Negroes, Catholics, accountants or those with blue eyes.”30 Justice White wrote for the majority that “the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.”31 The Court recognized that veniremen cannot always be judged solely as individuals for the purpose of exercising peremptory challenges, because a counsel must base his challenges on only limited knowledge of the jurors, which may include their group affiliations or characteristics.32 This system, the Court suggested, would eliminate extremes of partiality by eliminating any jurors that the parties perceived as biased.33

Any attempt to subject the peremptory challenge to scrutiny for reasonableness would therefore destroy the essential nature of the challenge — a challenge that is “one of the most important of the rights secured to the accused.”34 Thus, the presumption in any given case must be that the prosecutor, like the defendant, is exercising his challenges to secure an impartial jury. The presumption was not overcome by allegations that the prosecutor removed all blacks from Swain’s jury simply because they were black.

The defendant in Swain also claimed that prosecutors in Talladega County had used their challenges to prevent blacks from serving on any petit jury for almost fifteen years. In dicta, Justice White suggested that the use of peremptories to exclude all blacks from juries in all criminal cases might violate the equal protection clause because it

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301 U.S. 145 (1968), had not yet been decided and the jury trial right of the sixth amendment was not yet binding on the states.

28. 380 U.S. at 212.
29. Id. at 220.
30. Id. at 212.
31. Id. at 220-21.
32. Id.
33. Id. at 219.
would deny blacks the same opportunity enjoyed by whites\textsuperscript{35} to participate in the judicial process. In such a case the presumption of the prosecutor's constitutional use of the peremptory would be sufficiently rebutted.\textsuperscript{36} In \textit{Swain} itself, the Court held that the defendant failed to prove that regular absence of blacks on the petit jury was due totally to the prosecutor's exercise of peremptories. He failed to show that the prosecutor was determined to strike all blacks, regardless of trial considerations.

Commentators sometimes ignore a third part of the \textit{Swain} challenge,\textsuperscript{37} the part that may be the most important today. The defendant contended that the low percentage of blacks called for jury service, compared to their percentage of the community, demonstrated discrimination in selecting the array from which the jury that decided the case was selected.\textsuperscript{38} The Supreme Court responded:

a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. . . . Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.\textsuperscript{39}

The defendant's contention that blacks were underrepresented on jury venires plus the historical evidence concerning the absence of blacks on county juries led the dissent to conclude that a prima facie case of exclusion had been made. A point often overlooked is that the dissent was narrowly written, urging only this limited holding:

where, as here, a Negro defendant proves that Negroes constitute a

\begin{itemize}
\item \textsuperscript{35} The Court said that the petitioner had "not laid the proper predicate" for raising this kind of claim. 380 U.S. at 226-27. Justice Harlan, in a one paragraph concurring opinion, observed that the Court did not decide the question whether continuous systematic exclusion of blacks through use of peremptory challenges would be unconstitutional. \textit{Id.} at 228.

\item \textsuperscript{36} Apparently, the Court was leaving open the possibility that exclusion of all blacks by the government might make the peremptory challenge system a cover for a state policy to disqualify blacks from serving on petit juries. The Supreme Court had outlawed early the exclusion of blacks. \textit{See} \textit{Strauder v. West Virginia}, 100 U.S. 303 (1880). Thus, under \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886), an administrative scheme designed to provide total exclusion might be unconstitutional.

If unconstitutional systematic discrimination were proved, fashioning a remedy would be difficult. Reversing one conviction would seem to be inadequate. Reversing all convictions during the period of discrimination would seem to be too costly. Perhaps an injunction against total exclusion in the future would be all that could reasonably be expected. This, together with a warning that if the pattern continues all future judgments of guilt might be overturned, would be a substantial deterrent.

\item \textsuperscript{37} \textit{See}, \textit{e.g.}, Harvard Note, \textit{supra} note 8; San Diego Comment, \textit{supra} note 8.

\item \textsuperscript{38} 380 U.S. at 205.

\item \textsuperscript{39} \textit{Id.} at 208.
\end{itemize}
substantial segment of the population, that Negroes are qualified
to serve as jurors, and that none or only a token number has
served on juries over an extended period of time, a prima facie
case of the exclusion of Negroes from juries is then made out; that
the State, under our settled decisions, is then called upon to show
that such exclusion has been brought about "for some reason other
than racial discrimination"...; and... the State wholly fails to
meet the prima facie case of systematic and purposeful racial dis-

The dissent explicitly stated that their holding would not "mean that
where systematic exclusion of Negroes from jury service has not been
shown a prosecutor's motives are subject to question or judicial inquiry
when he excludes Negroes or any other group from sitting on a jury in
a particular case."41

The Swain Court thus recognized two possible motives for exercis-
ing challenges against black jurors. The first — the use of race as a
proxy by which to identify probable prejudice in a particular case —
was explicitly approved by all the justices, except Justice Black who
concurred in the result without opinion. The Court emphasized the
importance of protecting the inviolability of the peremptory strike, con-
cluding that a court should not scrutinize a prosecutor's motive for
challenging blacks in a particular case. The second — the use of chal-
lenges to keep blacks off all juries — was not approved. If it is possible
to prove an unlawful exercise of challenges under Swain, a defendant
must show that the prosecution systematically and totally, or almost
totally, excluded blacks over a period of time.

Although courts interpreting Swain have maintained that this bur-
den of proof of systematic exclusion is not insurmountable, few, if any,
defendants have yet succeeded in meeting it.42 This may suggest that
Swain's test really is impossible to satisfy and that a concern about

40. *Id.* at 244-45 (Goldberg, J., dissenting).
41. *Id.* at 245 (Goldberg, J., dissenting).
42. For cases in which defendants have failed to meet the Swain test, see, e.g., United
States v. Durham, 587 F.2d 799 (5th Cir. 1979); United States v. McLaurin, 557 F.2d 1064
(5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); United States v. Nelson, 529 F.2d 40 (8th
Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Carter, 528 F.2d 844 (8th Cir. 1975),
cert. denied, 425 U.S. 961 (1976); United States v. Carlton, 456 F.2d 207 (5th Cir. 1972);
P.2d 166 (1979); King v. State Rds. Comm'n, 284 Md. 368, 396 A.2d 267 (1979); Common-
systematic exclusion of racial minorities should lead to adoption of a less demanding standard. Or it may suggest that while the test is demanding, it is not beyond satisfaction and the reason it has not been met is that prosecutors generally attempt to keep black jurors off some, but not all, juries. We conclude that the latter is likely, for reasons that we will discuss in Section IV.

III. THE PEREMPTORY CHALLENGE AFTER *TAYLOR V. LOUISIANA*

Ten years after *Swain*, in *Taylor v. Louisiana*, the Supreme Court for the first time interpreted the sixth amendment to require that the jury venire be selected from a representative cross-section of the community. The Court indicated that representation of diverse segments of the population in the jury pool would improve the chances of assuring impartiality in the jury. Further, the Court noted that community participation in the administration of justice would enhance the legiti-
macy of the outcome in the eyes of the community as a whole.\textsuperscript{45}

Taylor, a male, was convicted of aggravated kidnapping and was sentenced to death. Claiming unconstitutional systematic exclusion of women, he had moved unsuccessfully before trial to challenge the petit jury venire drawn for the term of court in which his trial was scheduled. The state stipulated that fifty-three percent of the persons eligible for jury service in the district were female, that no more than ten percent of the names in the jury wheel were women, and that their underrepresentation was the product of a state law barring women from jury service unless they filed a written declaration of a desire to serve.

While recognizing that women were not absolutely barred from service, the Court had little difficulty in finding systematic exclusion of most women. It said that

\begin{quote}
[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.\textsuperscript{46}

In the last substantive paragraph of the majority opinion, the Court said that it had imposed

no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition \ldots; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.\textsuperscript{47}
\end{quote}

\textsuperscript{45} 419 U.S. at 530.

\textsuperscript{46} \textit{id.} (emphasis added) (citations omitted).

\textsuperscript{47} \textit{id.} at 538. The Court's refusal to extend the cross-section rule to a petit jury can be explained by several factors. First, random selection often results in under- or overrepresentation of particular groups on a venire. In addition, the removal of jurors for cause may, in a given case, result in the absence of a particular group from the petit jury. Second, the requirement that specific groups be represented on a petit jury would create tremendous administrative problems and the opportunity for abuse. In each case a court would have to identify which groups of the population were relevant and, thus, must be included. To insure inclusion would require an affirmative selection of a jury, creating a much greater chance of manipulation and abuse than is possible under our current system of merely ex-
The language chosen by the Court could not be much clearer. The holding related to jury pools or venires, not to the composition of juries in particular cases. Yet, some commentators have argued that the decision's rationale compels its extension to the selection of particular petit juries. Specifically, they contend that the Court's reasoning in Swain is irreconcilable with that in Taylor because Swain sanctions the exclusion from the petit jury of those groups whose exclusion from the venire is condemned by Taylor. They conclude that, if it is the interplay of diverse groups that guarantees impartiality on the venire, then deliberate attempts to exclude certain groups from the petit jury will presumptively destroy that impartiality and violate the sixth amendment. In two important decisions, state supreme courts recently have adopted this reasoning.

In People v. Wheeler, the Supreme Court of California held that the exercise of peremptories on the basis of group bias violates the state constitutional guarantee of trial by an impartial jury. Wheeler and Willis were convicted of murdering a grocery store owner in the course of a robbery. The principal trial issue was identification. Both defendants were black, and the man they were accused of murdering was white. As the prosecution began to strike black jurors, defense counsel made a record of their race to lay the foundation for a claim that the prosecutor impermissibly struck jurors on racial grounds. The prosecutor declined to explain his conduct in striking jurors, and the trial judge indicated that the prosecutor had no obligation to offer an explanation. Whereas the trial judge ruled that attorneys could peremptorily strike whomever they wished, the California Supreme Court held otherwise.

The court reasoned that the right to an impartial jury entitled a defendant 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." It inferred that the purpose of the cross-section requirement is to "achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group exper-

cluding jurors from the randomly-selected venire. For a further discussion of these problems, see Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 YALE L.J. 1715, 1732 (1977).


49. See Comment, supra note 48, at 379-80.

50. See, e.g., id. at 379.

51. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). In a capital case in California, the prosecution and the defense each have 26 peremptory challenges. Jurors are called, questioned, and struck one at a time. See CAL. PENAL CODE § 1070 (West Supp. 1981).

52. 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.
Therefore, any attempt to exclude jurors simply because they belong to minority groups results in a jury dominated by the prejudices of the majority. The court concluded that the presumed group bias that triggers the challenge of blacks from the petit jury "is indistinguishable from the group perspective we seek to encourage by the cross-section rule." The court further held that the purpose of peremptory challenges is to remove only jurors who hold "specific biases" — i.e., biases concerning the particular case, or the parties or the participants at trial. Thus, under its analysis, only challenges intended to further this limited goal are constitutional.

The problem then is how to distinguish between lawful and unlawful exercises of the peremptory. The Supreme Court of California adopted a procedure proposed by commentators to identify and remedy unlawful uses of the challenge. Under this method, all parties are presumed to be exercising their challenges on legally permissible grounds. However, the opposing party may rebut that presumption by making a prima facie showing that the challenger is striking jurors on the ground of group bias alone. A showing that the challenge has been used to remove a disproportionate number of jurors in a particular group will suffice. The exercise of challenges by both prosecutors and defendants is subject to these limitations.

53. Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
54. Id.
55. As examples of specific bias the court listed the facts that a juror has an arrest record, has been a victim of crime, or has relatives in law enforcement. These factors "are essentially neutral with respect to the various groups represented on the venire: the characteristics on which they focus cut across many segments of our society." Id., 583 P.2d at 760-61, 148 Cal. Rptr. at 902.

In contrast, a peremptory is exercised on the basis of "group bias" when "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., 583 P.2d at 761, 148 Cal. Rptr. at 902. When group bias is the basis for a challenge, "the presumed group bias . . . is indistinguishable from the group perspectives we seek to encourage by the cross-section rule." Id.

56. The court borrowed from proposals made by J. VAN DYKE, supra note 19, at 166-67; Note, supra note 47, at 1733-41. It relied most heavily on the Note in creating its remedy. Although Article 1, § 16 of the California Constitution, part of a Declaration of Rights, could have been read as protecting only defendants and not the state, the court ignored this and boldly stated that all parties would receive protection from the Wheeler ruling.

In People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978), a companion case to Wheeler, the prosecutor used peremptory challenges to eliminate black veniremen, arguing that the testimony of several state witnesses could arouse hostility in black jurors. The court held such an assumption insufficient if not based on an individualized voir dire. In a similar decision, the court overruled a superior court's finding that defendants had failed to establish a prima facie case, holding that a pattern of eliminating black jurors after only a cursory voir dire violated Wheeler. People v. Allen, 23 Cal. 3d 286,
Unlike Swain, the California decision permits a party to claim abuse based solely on evidence about the opponent's challenges in the case at hand; he need not show a pattern of abuse over a period of time. If the trial court determines that a party has made a satisfactory showing of abuse, the burden shifts to the other party to show that the challenges were exercised on grounds of specific, rather than group, bias. The trial judge has complete discretion to determine whether a party has made a prima facie showing of abuse, and whether the asserted justifications are adequate. If the striking party fails to justify the questioned challenges, the court must dismiss the selected jurors and the remaining veniremen. In this situation, a new venire must be drawn and a new petit jury must be selected.\(^57\)

In reaching its conclusion the California Supreme Court relied upon the United States Supreme Court's decisions striking down exclusion of racial and other groups in the formulation of jury pools\(^58\) and on state cases holding that a fair jury trial requires a verdict by impartial and unprejudiced jurors.\(^59\) Although the California court assumed that the Supreme Court would reaffirm Swain,\(^60\) the court opted for what it viewed as more protection for California residents.\(^61\)

The Supreme Judicial Court of Massachusetts took a virtually identical approach to peremptories in Commonwealth v. Soares.\(^62\) The state charged three defendants with first degree murder in connection with an early morning street brawl. The incident arose after Harvard College football players "broke training" when they consumed alcoholic beverages at a dinner and went to a bar in Boston's "Combat Zone." As some of the players, apparently none of whom was black, were heading toward a van to go home, they encountered two black women and discussed "sexual favors." The two women departed. One

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57. 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. One author suggests that, as an additional deterrent against unlawful conduct, an offending party should forfeit some or all of its challenges in the selection of the new jury. Note, supra note 47, at 1740.

58. See cases cited supra notes 43-45.


60. 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908.

61. Id.

of the players then found that his wallet was missing and unsuccess-
fully chased them. Later, the players saw one of the women, pursued,
and held her as she screamed and attempted to flee. The defendants,
all black, interceded at some point. A fight ensued and one of the play-
ers was killed.

The prosecutor challenged twelve of thirteen black jurors. The
thirteenth was seated and designated the jury foreman. The prosecutor
challenged thirty-two of ninety-four white jurors. As in Wheeler, the
defendants carefully laid a foundation for appeal, noting each time the
prosecution challenged a prospective black juror. The prosecutor indi-
cated no desire to explain the theory behind his strikes and the trial
judge took the position that no explanation was required.

Relying on the state Declaration of Rights, the Massachusetts
court condemned the use of peremptories to exclude discrete groups of
jurors, "solely on the basis of bias presumed to derive from that indi-
vidual’s membership in the group." Unlike the Wheeler decision,
Soares specified the group affiliations that were impermissible grounds
for exclusion: sex, race, color, creed, or national origin. The court
adopted the Wheeler procedure for challenging a party's use of per-
emptories as well as the remedy to be applied upon a finding of
abuse. Soares, like Wheeler, also held that both prosecutor and de-
fendant were entitled to protest the improper exercise of challenges by
the opposing side.

The court refrained from deciding whether Taylor undermined
Swain and relied on the state constitution as its ultimate authority.
However, the court quoted from a dissenting United States Supreme
Court opinion in a civil case, borrowing language about the "assurance
of a diffused impartiality," and concluded that the cross-section of the
community requirement could not be limited to selection of jury pools
but must also serve to limit peremptory challenges in order to assure

63. Id. at 488, 387 N.E.2d at 516.

64. Id. The Wheeler court had declined to define the "cognizable groups" whose exclusion would be unlawful because the blacks who were challenged in that case clearly fit within the category of a "cognizable group." 22 Cal. 3d at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26.

65. Soares relied very heavily on Wheeler, observing at one point that the California decision "has broken much of the ground for us." 377 Mass. at 477 n.12, 387 N.E.2d at 510 n.12.

66. As in Wheeler, the state constitution appeared to protect only the defendant, but the court found that both sides were entitled to a cross-section of the jury. Id. at 489 n.35, 387 N.E.2d at 517 n.35.

“diffused impartiality” in trial juries.\(^6\)

Like the *Wheeler* court, the *Soares* court rejected the argument that peremptories could be exercised on the basis of group characteristics, simply because “members of specific identified groups in the community are statistically more likely than the population at large to hold a given view which might bear on their deliberations in the case.”\(^6\) It responded that

> [i]t is this very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations, which is envisioned when we refer to “diffused impartiality.” No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room.\(^7\)

*Soares* makes it clear that no individual defendant is entitled to a petit jury proportionally representing every group in the community, but it restricts the use of designated group affiliations or identifications as grounds for striking jurors.\(^7\)

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\(^{68}\) In the process the Massachusetts court misstated the holding in one important precedent, referring to Peters v. Kiff, 407 U.S. 493 (1972), as reversing a conviction on constitutional grounds. 377 Mass. at 480, 387 N.E.2d at 512. In fact, there was only a plurality for the constitutional holding.

The court also suggested, probably mistakenly, that *Swain* was internally inconsistent: “clearly... the *Swain* decision recognized that the improper use of peremptory challenges could be controlled by the judge.” *Id.* (emphasis in original). The court actually said that it was leaving open the question whether systematic and total exclusion of blacks might be held unconstitutional. Even an affirmative answer would not have resulted in control of the exercise of peremptories in particular cases.

\(^{69}\) 377 Mass. at 486, 387 N.E.2d at 515.

\(^{70}\) *Id.* at 486-87, 387 N.E.2d at 515.

\(^{71}\) Although most cases after *Soares* involved exclusion of black jurors, Commonwealth v. Whitehead, 400 N.E.2d 821 (Mass. 1980), involved allegations that women were improperly struck, not by the prosecution, but by a codefendant. Two female defendants were charged with the rape of another woman. One used eight of ten challenges to strike women, leaving only males to comprise the jury. The Massachusetts Supreme Judicial Court rejected the other woman’s challenge because she had not complained at trial about a strategy that would have given her “the same supposed advantage” as her codefendant. *Id.* at 828. *Soares* had not been decided at the time of trial, however, and thus the failure to complain might have been understandable. Moreover, it is unclear how the court that decided *Soares* could be satisfied by saying that there was a “supposed advantage” in using group classifications, because *Soares* rejects the idea that sexual stereotypes are accurate predictors of bias. 377 Mass. at 485 n.28, 387 N.E.2d at 514 n.28.

Commonwealth v. Reid, 424 N.E.2d 495 (Mass. 1981), held that the trial judge has authority to prohibit the use of peremptory challenges to exclude a group of males from a jury. The court rejected the claim that because the defendant had insufficient challenges to exclude all males, *Soares* did not apply. The court said that as long as the purpose for
It is too early to tell exactly how many state courts will abandon Swain in favor of the approach developed in California and Massachusetts. Some courts have rejected the approach, some have reserved judgment, and some have indicated movement toward adopting it. For the most part commentators have reacted favorably. Wheeler and Soares certainly provide an impetus for change, and for significant change at that.

These decisions differ from Swain in several important respects. First, they assume that the peremptory challenge is intended to be used only to eliminate specific bias from the jury. This assumption signals a significant departure from the traditional understanding of the challenge as one exercised for any reason or for no reason. Second, they assume that a jury from which some ranges of presumed bias have been excluded is no longer impartial, while Swain assumed that permitting unrestricted peremptory challenges furthered impartiality. Third, they presume that the peremptory challenge can be subject to judicial control without compromising its essential purpose — a proposition that Swain rejected.

IV. IMPARTIAL POOLS AND IMPARTIAL JURIES

A. Impartiality

The sixth amendment guarantees “an impartial jury.” Most of the Supreme Court’s opportunities to analyze the meaning of “impartial” have involved pretrial publicity cases. In Irvin v. Dowd, for example, the Court observed that “[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by an impartial, challenging males was impermissible, it did not matter that 100% could not be eliminated. Id. at 500 n.14.


75. See supra note 8.

76. U.S. CONST. amend. VI. Cases like Adams v. Texas, 448 U.S. 38 (1980), and Witherspoon v. Illinois, 391 U.S. 510 (1968), which bar a state from excluding for cause jurors who have scruples against the death penalty, indicate that the government may not stack the deck against a defendant by using cause challenges to systematically exclude persons whose views are less favorable to the government than to the defense.

maryland law review [vol. 41

'indifferent' jurors." It quoted the following from an earlier opinion: "[t]he theory of the law is that a juror who has formed an opinion cannot be impartial," but went on to distinguish between jurors who have some preconceived notion or information about a case that they can set aside and jurors who would remain partial after they are impaneled. A juror with "a positive and decided opinion" should be disqualified even if the opinion has not been expressed to another. In a more recent case, Murphy v. Florida, the Court referred to an impermissible juror attitude as "a partiality that could not be laid aside." The question raised by Wheeler and Soares is whether the rules articulated in those cases are necessary to guarantee impartiality or whether they actually detract from it.

The Supreme Court has used the word "indifferent" as a synonym for "impartial." Thus, a criminal defendant should be assured that no juror prefers a judgment for the state to one for the defendant; a juror must stand indifferent between the parties. Although the sixth amendment protects only the defendant, there is nothing in its language, and certainly nothing in its history, to suggest that the state may not protect itself from jurors who are partial to the defense. The amendment assures that even if the state is willing to tolerate biased jurors, the defendant need not. Historically, biased jurors could be excused for cause by either side. The peremptory challenge permits both sides to strike at hidden, subtle, or subconscious biases that may be just as threatening as overt prejudice to the concept of an indifferent, and therefore impartial, jury.

The peremptory also permits parties to strike jurors who seem incapable of working together in the collegial process of returning a verdict. Unlike a political process in which participants vote and the side with the most votes wins, jury deliberations may have to produce unanimous or nearly unanimous verdicts. This is not to say that juries must always agree, only that they must try to reach a consensus. Some

78. Id. at 722. The word "indifferent" had roots in English law. Id. at 721-22.
79. 366 U.S. at 722 (quoting Reynolds v. United States, 98 U.S. 145, 155 (1878)).
80. 366 U.S. at 722-23.
81. Id. at 723.
82. 421 U.S. 794 (1975).
83. Id. at 800.
85. The "beyond a reasonable doubt" standard of proof imposed on prosecutors signifies that risks of error will be borne predominantly by the state, but the risks are to be borne in a system in which the jurors are fair to both sides.
86. After Johnson v. Louisiana, 406 U.S. 356 (1972), Apodaca v. Oregon, 406 U.S. 404 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979), it appears that the jury must be unanimous in federal court, splits of as much as 9-3 will be allowed in state courts, and a
prospective jurors may have great difficulty in working with others. They may be impartial as far as the parties are concerned, but quite partial towards other jurors. The peremptory permits the parties to select juries keeping in mind that a jury eventually will function as a group.

B. Guarantees of Impartiality

Aside from the peremptory challenge there are two guarantees of impartiality in the jury selection process: random selection and challenges for cause. Random selection cannot insure an impartial jury in any particular case because it cannot screen out those jurors who have some relationship with or bias toward the particular case on trial or its participants. Jurors who have already made up their minds are as likely to be swept into the pool as those who are indifferent. Furthermore, random selection may produce particular venires that are comprised of only a narrow section of the community. Although random selection may be a necessary condition for an impartial jury, it is not a sufficient one.

The challenge for cause also is inadequate to protect against the bias that may exist in a randomly selected jury venire. The statutory grounds for challenge are usually drafted and applied quite narrowly, and a juror will seldom be removed for cause unless prejudice is admitted or clearly implied. Denials of bias are not reliable for several reasons: first, jurors are embarrassed to admit their prejudices when questioned before a large group; second, it is common for certain veniremen to decide that they want to be on the jury and then to evade questions — often unconsciously — in order to avoid being struck; third, jurors often are unaware of the existence or extent of their biases.

Even when bias can be inferred from a juror's answers on voir
dire, a judge may be reluctant to remove the juror if he asserts his ability to be fair. One commentator has argued that judicial restraint may be proper in this context. The detection of subconscious bias is too intuitive and subjective to justify a judicial pronouncement that a juror is unable to render an impartial judgment. Thus, peremptories serve an essential function because they permit the parties to exercise judgments on the basis of characteristics which would be "societally divisive" for judges to recognize as valid challenges for cause:

Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise.

Peremptory challenges serve to remove those jurors whose neutrality parties suspect, when the parties cannot prove partiality with enough certainty to justify a challenge for cause. In addition, they protect the exercise of the challenge for cause by allowing a party to remove a juror whom he has alienated through extensive voir dire aimed at identifying possible biases. The peremptory also seeks to ensure that a party has a good opinion of the jury by allowing him to remove anyone he intuitively dislikes. Thus, not only impartiality, but also the appearance of impartiality, is an important goal of the ex-

though the holder may be unaware of their influence." Note, supra note 13, at 1496 (footnotes omitted).

Other jurors . . . underestimate the impact of their biases on their ability to weigh the evidence. This phenomenon is especially likely to occur in cases of group bias where the individual juror may have no inkling that his views are not shared by others outside his own group or that his attitudes so profoundly color his perceptions that he may be incapable of accepting testimony with an open mind.

Babcock, supra note 13, at 554.

Justice Black noted that "[t]he test of bias sufficient to exclude a juror for cause is not what the particular juror believes he could do." Dennis v. United States, 339 U.S. 162, 176 (1950) (Black, J., dissenting).

92. Note, supra note 13, at 1500.

93. Id.

94. Babcock, supra note 13, at 553 (footnote omitted).

95. Professor Babcock writes that the peremptory "avoids trafficking in the core truth in most common stereotypes." Id. Through the peremptory, "the judicial system lets the parties handle under the guise of silence and caprice what the courts themselves should not and perhaps cannot handle rationally and explicitly." Note, supra note 13, at 1503.

96. See supra note 20.
exercise of peremptories.\textsuperscript{97} And the peremptory may serve to reduce the extent of the bias that imperfect selection schemes may produce.\textsuperscript{98} For example, the few studies that have been conducted indicate that juries "selected" by the parties are less likely to convict than those that are randomly selected after challenges for cause.\textsuperscript{99}

In conclusion, it appears that the peremptory challenge is more than just a traditional statutory right that may be helpful in obtaining a fair jury. The inadequacies of random selection and challenges for cause strongly suggest that the peremptory challenge is essential to the impartial jury right.

\section*{C. Impartiality v. Cross-Section}

Striking jurors removes some community voices from juries, thereby raising doubts whether juries adequately represent the full spectrum of community opinion. There is a problem, however, with any argument that the sixth amendment requires that the full spectrum of opinion be available on all juries. Such an argument would allow veniremen with strong and obvious biases toward or against a party to be seated on a jury merely because they represent a part of the community. It is these jurors, of course, that are removed for cause; by definition they are partial. Although the present system permits peremptory strikes of additional community voices, it does so because the challenge for cause cannot adequately eliminate all partiality. There is a danger in permitting peremptories, however. Parties may strike truly impartial

\footnotesize{\textsuperscript{97} Obviously, this argument can cut both ways: Just as the use of peremptories to obtain a partial jury would defeat its purpose, so too its use to create an \textit{apparently} partial jury might also be considered "abuse." The argument has been made that the use of challenges to remove all the minorities from a jury, particularly when the defendant is a member of that minority, deprives the jury of its legitimacy in the eyes of both the defendant and his community — whether or not the body could be considered impartial in the abstract. \textit{See} Kuhn, \textit{supra} note 17, at 246-47.

\textsuperscript{98} Clearly, peremptory challenges will not always assure the appearance of fairness. If, for example, a randomly selected venire represents only a narrow section of the community, peremptory challenges may further limit community representation on the jury. In some instances we would urge that additional jurors be summoned or that a particular draw be set aside and a new selection of jurors be attempted.

\textsuperscript{99} Zeisel & Diamond, \textit{supra} note 23, at 518-19. Professors Zeisel and Diamond used shadow juries composed of challenged jurors to conduct a comparative study of the verdicts of randomly selected and actual juries in twelve criminal cases. In all five cases in which the use of the peremptory challenge caused significant shifts in voting, the defendant was the beneficiary. The authors suggested that the defense attorneys out-performed the prosecutors in challenging the "right" people — i.e., jurors who actually voted against them, and that the defendant often had more challenges. Although the study was too small to render conclusive results, it does suggest that the peremptory, in practice, can provide the defendant with special protection. \textit{See also} Diamond \& Zeisel, \textit{A Courtroom Experiment on Juror Selection and Decision-Making}, 1 \textit{Personality \& Soc. Psychology Bull.} 276 (1974).}
jurors because they are somehow different from the parties or from most other jurors. Certain segments of the population thus may not participate on a jury. It may be difficult to distinguish bias, which the jury system wishes to eliminate, from cultural diversity which the cross-section requirement seeks to preserve.

Several different proposals for promoting impartiality have been prompted by the recognition that jurors with different backgrounds may have different values. The first is that the jury be composed solely of the defendant's peers. This system would insure that the jurors would interpret the evidence within the context in which the crime occurred. Also, jurors would apply the values of the defendant's community in ascertaining guilt or innocence. This proposal has gained little acceptance for several reasons. The community of the victim — and the people at large — have a strong interest in seeing that justice is done. Also, it is often difficult to isolate the relevant socioeconomic factors that must be matched in order to produce a jury of one's "peers." Furthermore, the democratic ethic in this country maintains that all citizens are peers, thus denying the existence of class distinctions. Finally, in some cases, the defendant's community members may not be neutral when the government opposes their "peer."

A second proposal is the "mixed jury," combining peers of both the victim with those of the defendant. While having some historical basis, this model also has been rejected for many of the same reasons as the first. The administrative problems of identifying applicable groups are too great. There is reluctance to recognize officially that the inclusion of certain groups on a jury may affect the verdict. Also, once again the identification of jurors with participants may suggest partiality or favoritism, not neutrality or indifference. Finally, the extremes such a jury would present threaten the prospects of the jury's reaching a verdict.

The third proposal is that the jury consist of a representative cross-section of the community. The assumption underlying this model is that the interplay of diverse views and experiences yields a verdict that represents the conscience of the community as a whole, which is less likely to be based on any one set of prejudices. Although the Supreme

102. In England, the jury de meditaten linguae, or jury of the half tongue, was used until 1870 to insure aliens a fair trial. It was composed half of local residents and half of aliens. In Canada, an alien is entitled to a jury at least half of which is skilled in his own language. Id. at 93.
Court has recognized the importance of selecting a jury from a cross-section of the population,\textsuperscript{103} it has refused to hold that the petit jury itself must reflect such a representation.\textsuperscript{104} A few commentators have proposed mandatory representation of certain distinct groups on the petit jury,\textsuperscript{105} but the majority have argued merely that the jury should be as representative of the community as the process of random draw will permit after challenges for cause.\textsuperscript{106}

In contrast to these recent proposals, the traditional model for jury selection assumes that impartiality is best realized by first choosing a pool of jurors from the community at large, excusing those clearly biased, and then permitting the parties to excuse additional jurors who, in their view, are less likely than others to provide a fair trial. This is not a perfect system for eliminating bias. Jurors still may have some residual sympathy for one side or the other. This system of selection eliminates those jurors each side distrusts most and leaves a remaining group that is preferred by each side, at least when compared with the jurors each party struck.

Neither \textit{Wheeler} nor \textit{Soares} rejects the last model of jury selection. Both decisions recognize the need for peremptory challenges as an additional protection against partiality. Both decisions accept that the process of removing partial jurors may cut down on the number of different community voices that will be heard on a jury, but both apparently conclude that impartiality is the principal concern of the sixth amendment in selecting a particular jury in a particular case. In other words, both cases accept the proposition that a jurisdiction must choose a jury that is in fact impartial. If the exclusion of biased jurors eliminates some portions of the community, that is acceptable because the cross-section that should serve on a jury is a cross-section of fair — i.e., impartial — jurors. \textit{Wheeler} and \textit{Soares} maintain, however, that the exercise of challenges on the grounds of group bias is improper because these challenges are insufficiently attuned to eliminating bias and thus eliminate too many of the community’s different voices.

\textbf{D. The Importance of Groups}

The Supreme Court’s jury cases have made the point that excluding groups from the pool may result in a skewing of community sentiment.\textsuperscript{107} But this point is different from that made in \textit{Wheeler} and

\begin{itemize}
\item \textsuperscript{103} Taylor v. Louisiana, 419 U.S. 522, 526-28 (1975). \textit{See also supra} note 44.
\item \textsuperscript{104} \textit{See supra} note 47.
\item \textsuperscript{105} Potash, \textit{supra} note 101, at 94.
\item \textsuperscript{106} \textit{See, e.g.,} J. \textsc{Van Dyke}, \textit{supra} note 19, at 167-69; \textit{Note, supra} note 47, at 1732.
\item \textsuperscript{107} \textit{See supra} text accompanying note 46.
\end{itemize}
If the state were free to exclude various groups that it views as more likely to be favorable to defendants when the jury pool is being selected, these groups might not have any opportunity to be part of the jury process. This exclusion would create suspicion that the state was trying to exclude absolutely those groups that might view the world differently than the group responsible for enacting and implementing jury selection schemes.

An example can illustrate this point. If a prosecutor or a court clerk acting at the prosecutor’s request summons a jury venire of persons known to be friendly to the prosecutor, no system of peremptory challenges is likely to produce an impartial jury. If, however, selection is random, there is no reason to think that the jury pool is not as impartial to begin with as is the community at large.

Wheeler and Soares leap from the jury pool selection requirements to the conclusion that parties should not select a particular jury using race and other group classifications as the basis for peremptory challenges. In making the leap they ignore the different interests at stake when the criminal justice system summons jurors to form a pool and when parties select individual jurors for a particular case. Those summoning jurors want a pool that can provide fair jurors for all cases and all parties. Parties, on the other hand, are faced with a particular case, specific evidence, and a designated group of jurors from which to pick. They want individual jurors who will be fair to them and thus they seek a proxy, whether race or something else, that relates to the specifics of their case. The proxy must be helpful in identifying partiality, not generally, but in a very specific context.

Wheeler and Soares seem to say that some group classifications never are acceptable proxies but they fail to explain why. Whatever it is about group associations that suggests that members of one group are somehow different from non-members also suggests that any differences might include a greater likelihood of certain shared feelings, which might imply partiality in some instances. If so, a challenge would be made to all members of the group precisely because they share special feelings.

E. The Identification of Bias

In an ideal world, all jurors would be aware of their biases and would admit to them readily on voir dire. In reality, some of the
strongest prejudices are subconscious, and even if jurors are aware of their existence, they might be reluctant to admit them. Thus, parties must find some other way to discover hidden predispositions. Suggested methods include extensive voir dire examination, hypnoanalysis, investigation of jurors, scientific jury selection, and the traditional method — reliance on stereotypes that experience indicates are accurate.

Voir dire questioning educates counsel about prospective jurors and allows him to challenge jurors without relying solely on stereotypes. Obviously, both the content and delivery of responses produce valuable information on which to base a judgment that a juror is or is not impartial. However, the method is far from ideal. Extensive voir dire questioning is time-consuming and costly. Given the backlog of cases in many courts, judges often are reluctant to allow the type of examination necessary to elicit helpful information. Furthermore, the trend toward giving judges discretion to control the length and nature of voir dire questioning reflects the prevalent judicial and legislative judgment that the costs of extensive voir dire outweigh the benefits. Thus, as a practical matter, this option is not available in many cases. Also, as a matter of policy, it may be undesirable to subject prospective jurors to interrogation in a public forum about their political or personal views. Forcing jurors to disclose embarrassing information or unpopular views — often in open court, with both fellow veniremen and the press in attendance — may create hostility both toward the parties involved and the system in general. The importance of identifying juror biases and the availability of other methods for doing so must be balanced against serious invasions of privacy and the danger of alienating the public from the judicial system.

A second technique for identifying bias is called hypnoanalysis. It involves the use of a psychologist to study the background of jurors, the content of their responses on voir dire, their intonations, body movements, and interaction with counsel to determine subconscious

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109. See generally Babcock, supra note 13; Note, supra note 13.
111. See A. GINGER, supra note 13, §§ 8.1-14.
113. See, e.g., STANDARDS RELATING TO TRIAL BY JURY § 15-2.4 commentary at 24 (1978).
114. The jury foreperson for the Angela Davis trial has argued that jurors have a right to be free from investigation into their private lives, including freedom from public voir dire questioning and from advance investigations of friends and neighbors of prospective jurors. M. TIMOTHY, JURY WOMAN 306 (1974).
prejudices. While this method has been used with apparent success in a few highly publicized murder trials, it is too expensive for the vast majority of defendants even to consider. Further, its success depends on the availability of extensive voir dire — something a judge is more likely to grant in a highly publicized case than in the average criminal prosecution. Finally, the technique seeks not only to identify and remove biased jurors but also to condition neutral or friendly prospective jurors so as to make them more responsive to one party's evidence at trial. This conditioning raises important policy questions about the difference between jury selection and "jury-tampering." Whatever the propriety of this method, it is clearly not a helpful means of discovering bias in the vast majority of cases.

A third technique for identifying prejudice is pretrial investigation of all prospective jurors — often a few hundred in number. Although personal contact with jurors is impermissible, a litigant can uncover a great deal of information by talking to neighbors or fellow employees, by checking voter registration forms, recent referendum petitions, the location and general characteristics of a juror's neighborhood and place of employment, and records of previous jury duty. In some large cities, private agencies keep files on all jurors currently on duty. The information available from these sources ideally is used to formulate the "right" questions for discovering bias on voir dire. In addition, it provides a composite picture of a particular juror from which to make an educated guess as to his probable predispositions.

When used in the second manner, this technique is very similar to scientific jury selection, the fourth method of discovering juror bias. That method involves a two-step process. Initially, an attempt is made to correlate the relationship between attitudes and various demographic characteristics such as race, sex, religion, age, and occupation.

115. See generally W. Bryan, supra note 110, at 153-69. Hypnoanalysis should not be confused with hypnosis as that term is commonly understood.

116. Hypnoanalysis was used to choose the juries in the second Sam Sheppard trial and in the first Coppolino trial in New Jersey, among others. Both of these defendants were acquitted. See W. Bryan, supra note 110, at 399-404. See also McConahay, Mullin & Frederick, The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little, 41 Law & Contemp. Probs. 205 (Wint. 1977).

Experts in the area of jury selection generally separate "hypnoanalysis" into 3 areas: evaluation of personality characteristics and general attitudes, evaluation of nonverbal behavior, and persuasion. The division reflects the potentially independent contributions made by each of these components to careful jury selection. The combination of techniques is evident in the Joan Little case. See McConahay, Mullin & Frederick, supra. Hypnoanalysis is used in this discussion as a general description of the more sophisticated technique.


A survey is sent to a random sample of potential jurors, e.g., registered voters, asking questions about both the case in question and general feelings about the administration of justice. The responses can be quantified to indicate the probability that a juror with particular characteristics will be favorable to one side. In the second step, veniremen are questioned on voir dire to elicit the same type of demographic information. A composite score for each juror is obtained by combining the ratings for each relevant characteristic. The result is specific both to the community and the case involved. Ideally, this model permits the accurate prediction of racial or other bias or predispositions about guilt or innocence without the necessity of intrusive questioning on voir dire.

Both juror investigation and scientific selection can be extremely expensive and time-consuming. Thus they are most helpful in “big” cases or highly political trials where either many volunteers or substantial funds are available.

The last alternative for identifying bias is the age-old technique used by trial lawyers — reliance on experience, intuition, and common sense to predict which jurors are likely to be most biased. The use of intuitive “hunches” differs from juror investigation and scientific jury selection more in degree than in kind. All three techniques attempt, with various degrees of precision, to gauge the probability that a juror with particular socioeconomic characteristics will be more biased in a given case than another juror. All three deal in generalizations and stereotypes. Even hypnoanalysis, which attempts more directly to discover a juror’s attitudes, in the end relies on generalizations about the meanings of particular body movements, the choice of words, or the intonation of the voice.

Swain recognized the necessity of relying on stereotypes to identify probable bias. Wheeler and Soares, on the other hand, condemned the practice, holding that the challenge is properly used only to eliminate “specific bias.” However, the distinction between the two is elusive. For instance, Wheeler cited as examples of lawful exercises of the peremptory a prosecutor’s removal of a juror who has an arrest record, who has complained of police harassment, or whose clothes or hair length indicate an unconventional lifestyle. Wheeler would also allow defense counsel to challenge a juror who has been a victim of crime or who has relatives in law enforcement. These are specific biases because they are “neutral with respect to the various groups represented on the venire: the characteristics on which they focus cut across

119. Wheeler, 22 Cal. 3d at 275-76, 583 P.2d at 760-61, 148 Cal. Rptr. at 902.
120. Id.
many segments of our society." However, in all these examples, as in the use of conventional stereotypes, bias is being presumed from a juror's membership in a group. When a prosecutor challenges a juror with an arrest record or long hair, he does so because he considers persons with those characteristics more likely to be biased against law enforcement — not because he knows for a fact that this particular juror is biased. Thus the major difference between the two practices is merely the definition of the relevant group. It seems unimportant that one group is defined by demographic characteristics and another by the choice of lifestyle or the occurrence of some event. In both cases, a party is trying to eliminate a predisposition in favor of the opposing side, which he infers from a juror's group membership. Thus, Wheeler condemned neither the elimination of the attitude itself nor the use of group membership as a proxy for identifying bias.

It is irrelevant that some of the impermissible groups in Wheeler are "suspect classifications." The equal protection clause does not invalidate challenges on the grounds of group bias. Under the law, all defendants, no matter what race or religion, may challenge jurors they dislike. Similarly, all jurors are equally subject to challenge by the government. If the government always strikes all jurors of one race, sex, or other group, it probably violates Swain. But as long as no group is systematically excluded in all cases, all groups and all members thereof are treated alike — i.e., all are subject to strikes. While one side strikes jurors with certain characteristics, the opposite side is likely to strike jurors with different characteristics. Thus, peremptory challenges do not demean any single group or deny any person any guaranteed right to serve, nor do they distribute any benefits to one race, sex, or other suspect group that are not conferred upon a competing group.

Wheeler does not make the closeness of the fit between a group and the presumed bias dispositive on the propriety of the presumption. The assumption that a young black male who lives in a ghetto neighborhood is hostile to the police is probably as statistically supportable as the assumption that long-haired jurors would favor the defendant — but Wheeler would permit only the latter. If the Wheeler court had been concerned primarily with accuracy, then it would not have implicitly condemned the use of scientific jury selection — which correlates

121. Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

122. The Wheeler court suggested that economic distinctions were impermissible grounds for the exercise of the challenge. Id. at 267, 583 P.2d at 754-55, 148 Cal. Rptr. at 896. Economic distinctions constitute a classification that is not "suspect" under the equal protection clause. Dandridge v. Williams, 397 U.S. 471, 485 (1970).
the attitudes toward a particular case with the demographic groups in a specific community with a high degree of success.

Furthermore, the accuracy of the stereotype should not determine the validity of the challenge. Any attempt to make the constitutionality of a challenge depend on the accuracy of the underlying assumptions would penalize lower-income defendants who are unable to afford sophisticated techniques or expensive expert assistance. Moreover, if courts were to try to ensure accuracy they would have to inquire into racial and other prejudices — an inquiry that they now prefer to avoid.

F. The Internal Check on Misuse of Peremptory Challenges

If one assumes a wide range of types and degrees of bias on a jury venire, judicial control may be unnecessary to insure that counsel exercise the peremptory as accurately as possible within the limits of available information. In one sense, the challenge system contains an internal sanction against abuse: a party who insists on challenging jurors on the basis of questionable stereotypes increases his chances of removing friendly jurors and decreases his opportunities for excluding more biased veniremen, thus reducing the possibility of success at trial. If the assessment of a juror's prejudices based on group affiliation is accurate, however, then counsel has exercised the challenge as it was intended — to remove the most partial jurors.

There are real opportunity costs, then, in exercising peremptory challenges for the wrong reasons. Those who strike jurors on grounds of race or sex or some other classification that is not a very good proxy for bias miss opportunities for more selective strikes and thus risk having a jury that is not as impartial as it might be. This internal control may explain why litigants have failed to meet the Swain test. It may be that, in the real world, prosecutors understand the need to exercise challenges in light of specific facts, know that they cannot afford to waste their challenges, and conclude that in most cases race is simply not a very good predictor of bias.

123. Babcock, supra note 13, at 559-63.
124. There is evidence that stereotypes may be accurate in some cases. See generally Hepburn, The Objective Reality of Evidence and the Utility of Systematic Jury Selection, 4 J.L. & HUM. BEHAV. 89 (1980).
125. For an example of opportunity costs, see People v. Allen, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979) (prosecutor struck black relatives of sheriffs in a prison guard murder case).
V. THE IMPACT OF WHEELER and SOARES

A. Protection of Minority Interests

The assumption of the cases that bar challenges on the basis of certain group affiliations is that increased representation of minority interests will promote fairer trials irrespective of the issues involved in specific cases. Several examples should show that the resultant trials are not necessarily fairer and may, in fact, be considerably less fair when the parties are prevented from striking the jurors they regard as most likely to be biased.

During the school desegregation troubles in Boston, there was fighting between whites and blacks. White youths in particular sections allegedly were involved in several attacks on black youths. Assume they were Irish-American Catholics. If the state charged one of the attackers with aggravated assault, should a prosecutor be permitted to strike white Irish-American Catholics from the jury? Soares, and probably Wheeler, would say "no," unless the prosecutor could prove that specific jurors were biased in the particular case — i.e., some showing of individual bias would be necessary. But is there any reason to doubt that other Irish-American Catholics in the district might tend to be more partial to a defendant from the same ethnic group than to a prosecutor seeking to vindicate a black victim, especially if the prospective jurors share a sense of frustration growing out of the desegregation process? The example illustrates that a peremptory strike is useful because it allows a prosecutor to rely on the relationship between a prospective juror's background and the kind of case being tried. Were the case a simple bank robbery, a prosecutor might not even think of striking on this ethnic basis. In the assault case, it might make sense to do so. If the prosecutor does strike members of this group, the court still should be able to impanel a broadly based jury. Mormons, Protestants, Jews, atheists, and black Catholics all would be free of prosecutorial strikes, as would numerous other groups. Thus, quite a cross-section of the community would remain.

The facts are changed easily. Other reports out of Boston related that black youths also were attacking whites. If the state charged a black defendant with aggravated assault, would a prosecutor who


For an illustration of a case in which religion of jurors was thought to be important, see Schulman, Shaver, Colman, Emrich & Christie, Recipe for a Jury, PSYCHOLOGY TODAY, May 1973, at 37.

127. This is an assumption only, although there was some resentment against blacks by Irish- and Italian-Americans reported at the time. See NEWSWEEK, Oct. 29, 1979, at 59.

struck black jurors be exercising good judgment with respect to possible partiality? Again, the answer probably is “yes.” If the prosecutor did not strike the jurors that he thought might be partial, would the Irish-American Catholic community believe that a fair trial was being conducted? Probably not. If the prosecutor did strike blacks, the court still could impanel a broadly based jury that would almost certainly include people whose religious beliefs were antithetical to the Catholic community as well as numerous ethnic groups that may be almost as distant from the Irish-American community as from the black community.

For a more general example, consider an interracial rape case, one in which a black woman accuses a white defendant of rape. Could the prosecutor justify striking jurors who were members of the Ku Klux Klan? Members of the American Nazi Party? If so, it must be because the strike makes sense in terms of general beliefs about the kinds of prejudices and preferences certain people may have. Would the prosecutor strike black jurors? Almost certainly not. There would be no reason for him to do so. Would the defense strike black jurors? It might, but the defense might be more concerned with striking jurors from the same neighborhood, women, or young jurors who might be especially sympathetic to the victim and thus more likely to be partial.

Now reverse the facts. A white woman accuses a black defendant. Would a prosecutor be likely to challenge black jurors? It is more likely that he would in this case than in the previous one, but it is not at all certain he would do so. The choice to strike blacks might result in the presence of young people, liberals, or members of the defendant's community on the jury. The prosecutor pays a price for striking only one group. And when he focuses on only one group, he permits all other groups in the community to be represented on the jury, assuring that a broad cross-section remains.

Actually, in all of these cases there is insufficient information to support any reliable judgment as to who should be struck and who passed. The first step in deciding whom to strike would be to examine

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129. One court has taken judicial notice that the United Klans of America is a “white hate” organization. United Klans of Am. v. McGovern, 453 F. Supp. 836, 839 (N.D. Ala. 1978), aff'd, 621 F.2d 152 (5th Cir. 1980).

130. There is some evidence that the races of the victim, the defendant, and the jurors may be significant to the outcome of a case. See Ugwuegbu, Racial and Evidential Factors in Juror Attribution of Legal Responsibility, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133 (1979). A recent example can be found in the series of murders of black children in Atlanta. A black man was charged in two killings. Atlanta Constitution, June 22, 1981, at 1-A. If, however, the defendant were white, would defense counsel be unreasonable in striking black jurors?
the jury array to see what choices are available. Then a judgment would have to be made by comparing the jurors in the pool to one another. In some jurisdictions a strike seats a successor juror whose identity is not known in advance, and any strike involves an extra element of risk that may inhibit the use of peremptory strikes.  

This system may make any strike risky and may dictate a cautious strategy for exercising strikes.

According to Wheeler and Soares, challenges on racial and certain other group lines are always impermissible, whether or not the use of group identification is the best predictor of bias under the circumstances. Such a rule will not uniformly protect the interests of minorities. It is unclear which groups may suffer in particular cases, because a single case may involve more than one minority or group—e.g., Irish-American Catholics and blacks; or blacks and women.

**B. Establishing Individual Bias**

One of the unfortunate outgrowths of the two recent decisions is that they may produce voir dire tactics that are inflammatory or deceptive. If one party believes that race, sex, or another group characteristic is a good proxy in a particular case, he may suggest that in voir dire of the jury. He may then challenge for cause any prospective jurors from the groups about which he is concerned who agree with his suggestion. Jurors who disagree might reasonably feel insulted by the

131. See supra note 20.

132. It is difficult to know exactly how important race is in any particular case. See Frederick, supra note 112, at 574. Race may be a good predictor of attitudes, but it may not always predict outcomes accurately. See Hepburn, supra note 124, at 95.

133. As minority populations increase in some places, see generally Feinberg, *Four Large Cities Pass District in Black-Population Percentage*, Wash. Post, Aug. 20, 1979, at C-1, it may be white defendants who express concern about exclusion of whites from juries. Supposedly, two Supreme Court Justices already are concerned. See B. Woodward & S. Armstrong, *The Brethren* 324 (1979). In Doepel v. United States, 434 A.2d 449 (D.C. 1981), the court said that where 70% of the population is black and the jury pool was fairly chosen, there was no constitutional infirmity in the prosecution's striking white males from the jury panel in a case in which a white defendant was charged with the rape and murder of a black woman.

134. Commonwealth v. DiMatteo, 427 N.E.2d 754, 757 (Mass. App. Ct. 1981), indicates that counsel will have to learn to hide their reasons for strikes and to be quick to suggest "legitimate" reasons to satisfy some trial judges. In that case defendants were charged with a series of offenses involving theft and illegal use of firearms. They tried to strike the only black juror on the venire, but the prosecution objected. When the trial judge asked counsel to explain the strike, counsel first said that he was striking the juror because she was a widow and later added that he did not like the way the juror "looks at the defendant." Although the trial judge found that the reasons were "credible" ones, he found them "insufficient." Even without a pattern of strikes, the appellate tribunal found that the trial judge acted properly.
suggestion and respond in a way that would cause them to be excluded peremptorily as hostile on an individualized basis. The result may be increased hostility between prospective jurors and litigants.

The decisions also may lead to greater scrutiny of juror attitudes and values. If a court is going to bar all strikes of members of certain groups without a showing of individualized cause, it will be natural for parties who believe that the group characteristic is a good proxy to ask for an opportunity to prove that it works well. Aside from infringing on the privacy of prospective jurors, the inquiry itself is likely to become hostile and to justify the use of a peremptory challenge.

It is doubtful then that Wheeler and Soares will provide increased minority representation on juries. As noted above, it is even possible that the decisions will increase tensions along racial and other lines by encouraging a detailed inquiry into the hidden thoughts of prospective jurors and by forcing parties to challenge jurors more directly than they must at present. Or, it may result in attempts to use voir dire to create alternative theories for striking jurors of a particular group without revealing that group membership is the real reason for strikes. Should this occur, voir dire is likely to become more time-consuming, more deceptive, and no more protective of minority interests than the Swain system.

C. Minority Impact on Verdicts

Several arguments may establish that representation of minorities on juries is desirable, particularly when the defendant is also a member of a minority group, but none supports a constitutional rule that challenges cannot be used to remove those jurors.

Minority jurors may be helpful in interpreting events in the context in which they occurred. They may understand, for instance, that a black youth might run from the police without his action being probative of guilt of any crime. However, other methods are available for conveying this information to the jury, such as the use of a "streetperson" as an expert witness. Or, the trial judge may exclude the evidence of a defendant's flight from the police on the ground that it is

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135. See Babcock, supra note 13, at 558.
136. For a discussion of the importance of jurors' experience with police, see generally MINIMIZING RACISM IN JURY TRIALS (A. Ginger ed. 1969). Of course, this is also stereotyping. Would a wealthy black doctor be as useful here as a white inner city youth?
137. Such a person would qualify as an expert under rules like Fed. R. Evid. 702. See, e.g., United States v. Johnson, 575 F.2d 1347, 1360-61 (5th Cir. 1978) (experience with marijuana).
more prejudicial than probative.\footnote{138} Thus, while such jurors are helpful, they are not necessary. If counsel suspects them of bias, he should be permitted to strike them.

Minority participation in the administration of justice also creates respect for the system and contributes to the legitimacy of the result. Although this consideration justifies the constitutional requirement that blacks not be systematically excluded from juries, it cannot take precedence over the need for impartiality in any particular case.

A final argument against using peremptories to exclude identifiable groups from a jury is that the practice affects verdicts. Studies have shown that increasing the number of blacks or women in the jury pool can have a significant impact on conviction rates.\footnote{139} These studies hardly are surprising, because they deal with systems in which large segments of the community never were allowed to serve on juries. We have already noted that wholesale exclusion of groups may indicate that a pool is stacked in favor of the government. It is possible to infer that the representation of identifiable groups on a petit jury also would affect the outcome and thus should be constitutionally required. However, there are problems with relying on legal and psychological studies about jury behavior in particular cases as a basis for constitutional decisionmaking.

First, the results reached by these studies are inconclusive and contradictory. For instance, studies have shown that blacks and women sometimes favor defendants;\footnote{140} that a defendant’s race has no effect on verdicts;\footnote{141} that women are more punitive than men;\footnote{142} that white jurors are more lenient toward black defendants accused of crimes against black victims;\footnote{143} that jurors of higher economic status or educational level are more likely to convict;\footnote{144} that the greater the socioeconomic disparity between the defendant and the jury, the more likely it is to convict;\footnote{145} that authoritarian personalities convict more often than egalitarian — except in rape cases;\footnote{146} and that Irish, Italians, Catholics, and Jews are more sympathetic to the defense than

\footnote{138} Some courts are clearly suspicious of evidence of flight from authority. \textit{See}, e.g., United States v. Myers, 550 F.2d 1036, 1048-50 (5th Cir. 1977).
\footnote{139} J. Van Dyke, \textit{supra} note 19, at 24-42.
\footnote{142} Kuhn, \textit{supra} note 17, at 248 n.57. \textit{See also} A. Ginger, \textit{supra} note 13, \S\ 7.39.
\footnote{143} Frederick, \textit{supra} note 112, at 574-75.
\footnote{146} Frederick, \textit{supra} note 112, at 582.
Germans, Englishmen, Scandinavians, and Baptists.\textsuperscript{147}

Second, reliance on such studies necessarily affects the operative assumptions of our legal system. At present, the law presumes that in finding facts, individual jurors will make like inferences and reach like conclusions in like situations, no matter who the parties are.\textsuperscript{148} Commentators have argued that when one group in the population is prejudiced against another and the latter is in the minority, any attempt to remove a minority juror increases the bias of the jury rather than making it more impartial.\textsuperscript{149} The controlling presumption here is that the system is divided into a majority and a minority that are in complete conflict with each other, and that there can be no overlap between the attitudes and biases of either group. Thus the removal of a black juror may eliminate one biased juror, but it also results in replacement with a white — and thus reciprocally biased — individual.

Although it is unquestionably true that this substitution may occur on occasion, it is not clear that the presumption of majority-minority conflict is a desirable basis for a constitutional standard for jury selection. If this presumption were adopted, the working hypothesis would be that majority and minority interests are so hostile to one another that replacement of a minority juror with a majority juror is unfair. Under this hypothesis, however, it is difficult to see how any jury panel could be established that would be composed of jurors indifferent to the parties. By definition each juror would favor one party, and there could be no jury that would qualify as impartial. This hypothesis also ignores the existence of numerous overlapping minority groups. A young, Catholic, black woman whose political beliefs are liberal, whose income is high and who works in a professional occupation could be classified in many ways. It may be a mistake to treat her as black, as a woman, as a professional, or as a member of any one group to the exclusion of others.

Another presumption about the operation of the system that is at least equally tenable is that there is a wide spectrum of attitudes and biases that cuts across racial or economic groups. Some considerable overlap may be due to such other relevant factors as religion, occupation, sex, and education level. As a result, a young, liberal, white juror may be more friendly to a young, aggressive, black, male defendant than would an older, black, male juror who has worked continuously for white employers.

\begin{thebibliography}{9}
\bibitem{Busch} F. Busch, Law and Tactics in Jury Trials 198 (1959) (quoting Clarence Darrow); I. Goldstein, Trial Technique 156 (1935); Frederick, supra note 112, at 574.
\bibitem{Goldstein} Minimizing Racism in Jury Trials, supra note 136, at 222.
\bibitem{Kuhn} See, e.g., Kuhn, supra note 17, at 249.
\end{thebibliography}
This second presumption is more consistent with the key assumptions now made by almost all courts about jurors and their ability to be fair. It is noteworthy that *Swain*, *Wheeler*, and *Soares* all have a common thread: all three decisions assume that the jury pool that remains after a fair draw and the exercise of challenges for cause is a jury of persons all of whom are fairly eligible for service in the particular case for which they are called. Furthermore, under either the *Swain* test or that proposed in *Wheeler* and *Soares*, there is no requirement that members of any group be represented on any particular jury. Thus, when no members of a particular group happen to be called, or when they are called and are stricken on the basis of individual bias, courts deem the jury composed of members of the remaining groups to be fair. We believe that if such juries are fair, they are not made less so when jurors are removed by a party who believes that members of some groups are more hostile to him than are members of other groups. Once peremptories are exercised on the basis of group affiliations, the parties are in the same position as they would be if no juror of the stricken group had been randomly called or if some were called and removed either for cause or peremptorily for individual bias.

Our view then is that the use of challenges should always be for one purpose — to screen the jurors perceived by the parties as most likely to be at the extreme ends of community sentiment and, therefore, as less likely than others to be fair. We know of no way to justify the rule articulated in *Wheeler* and *Soares* that permits exclusion of some, but not all, groups if a court truly believes in a cross-section requirement. If courts conclude, as *Swain* did and we do, that the spectrum approach to a jury pool is a valid one, parties can use the proxies in which they have the most faith when deciding whom to strike. If the contrary assumption is made, then *Wheeler* and *Soares* are hardly an adequate remedy for an enormous problem.150

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150. Although we reject the presumption that there are majority and minority interests so opposed to one another that replacing a juror who belongs to the minority with one from the majority substitutes a readily identifiable majority view for a readily identifiable opposing minority view, we do not pretend that no case will ever divide a community into hostile camps. Such cases may arise. See, e.g., Harris, *Pickens County Flare-Up: The Story of Two Blacks Found Guilty*, Wash. Post, Feb. 6, 1982, at A6, col. 1 (reporting a conviction of two black voting rights advocates under questionable circumstances). To deal with them we would invoke other safeguards. First, we would be much more willing than are most courts to grant a change of venue whenever a reasonable likelihood of community prejudice is established. A change of venue can avoid community hostility. See generally McConahay, *Mullin & Frederick*, supra note 116. Second, we would permit more extensive voir dire of jurors in cases in which some atypical community interest is evident. Third, we would urge trial judges and appellate courts to review the record for sufficiency of the evidence more carefully in highly emotional cases and to be willing to grant new trials where the evidence is
D. Overall Assessment

Wheeler and Soares appear to view the cross-section requirement as posing a conflict with the use of peremptory challenges on the basis of group affiliations. But it seems that Swain is more consistent with the theory underlying the cross-section decision in Taylor than are the recent state court decisions. The rationale for requiring that a jury pool be drawn from a cross-section of the community is that wholesale exclusion of groups may well produce a partial jury. In other words, the inclusion of select groups combined with the exclusion of others may produce a pool that is more favorable to one side, usually the government that decides whom to include and exclude, than a pool chosen from the entire community. By assuring that the pool is chosen indifferently, the Supreme Court has attempted to guarantee that the selection process does not intentionally favor either side when prospective jurors are summoned. Challenges for cause and peremptory strikes then work to assure that the jury actually chosen does not include persons who appear to be partial to either side. What should remain after all challenges and strikes are exhausted is a jury that has been fairly drawn from the community and that contains a broad core of various segments of the community. The prospective jurors regarded as reflecting extremes of community values or feelings may have been removed, but a representative and neutral body should remain.

In a case in which a party believes that a group is likely to be very partial against him or for the other side, Wheeler and Soares may compel the party to accept members of that group as jurors. Swain would not. Impartiality is the key to both the cross-section requirement and the provision of peremptory challenges. If someone develops a better calculus of bias, there is every reason to believe that litigants will use it. Until then, judging people on the basis of stereotypes is probably a necessary part of any peremptory challenge system. In California and Massachusetts, the stereotypes change, but litigants still use group affiliations to make peremptory challenges. They simply are denied the use barely sufficient but the verdict nevertheless is questionable. Fourth, we would suggest that jurisdictions that are concerned about disparate outcomes might consider sentencing guidelines to control disparities among defendants. See generally Perlman & Stebbins, Implementing an Equitable Sentencing System: The Uniform Law Commissioners’ Model Sentencing and Corrections Act, 65 Va. L. Rev. 1175 (1979). Fifth, we would remind courts of the possibility of breathing life into selective prosecution cases — e.g., Oyler v. Boles, 368 U.S. 448 (1962) — when racial minorities appear to be prosecuted for improper reasons. Finally, we would suggest that it may be wise to require prosecutors to formulate general guidelines to promote evenhanded treatment of potential defendants. See generally Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521 (1981). In the rare case that divides the community, Wheeler and Soares afford inadequate protection.
of the stereotypes that they believe are most valid. *Swain* assumes that the litigants will choose to strike the jurors that are most likely to disfavor them. This appears to be just what the peremptory challenge system should entitle them to do, unless judges can demonstrate that they indeed know better than litigants which jurors are likely to be partial.

E. Wheeler and Soares

*Wheeler* and *Soares* fail to recognize that all peremptory challenges are likely to be made because of the parties' feelings about the class, group, or niche into which prospective jurors seem to fit. They fail to explain why group characteristics that are the most obvious and that in the courts' own eyes most clearly differentiate among people in a community are not better than others for screening out partiality. And they do not realize that litigants who choose bad proxies pay the price in terms of bad results at trial. Thus, *Wheeler* and *Soares* are not steps forward and should not replace *Swain* as part of federal constitutional law.

VI. ALTERNATIVES TO WHEELER AND SOARES

Although the argument has now been made that no restrictions such as those created in the recent state cases should be placed on the use of peremptory challenges as a matter of constitutional law, surely no one would suggest that the existing system of challenges is perfect. The exclusion of certain groups from juries is troublesome because it does limit minority participation in the legal process and it does threaten to remove different voices from juries unnecessarily. Changes in the jury selection process would tend to lessen the diffusion of minority input on juries.

A. Random Selection

The aspect of *Swain* that remains disturbing is the Court's failure to find a prima facie case of discrimination on the facts presented. Today, with voting lists, driver's license lists, telephone books and other samples of community membership available, there is no excuse for the continuation of a system that relies on officials to select jurors from people known to them or their associates when such a system produces underrepresentation of identifiable groups in the community. At a

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151. Thus, *Swain* itself should be decided differently if similar facts are again presented. Although the Court seems to be more sensitive to discrimination claims today when random selection is not employed, see J. Van Dyke, supra note 19, at 58, it does not flatly condemn all disparities produced by such systems. See Castaneda v. Partida, 430 U.S. 482, 499-501
minimum, any disparity\textsuperscript{152} between the percentage of various identifiable groups in the community\textsuperscript{153} and the percentage of these groups within jury pools should be impermissible if a jurisdiction does not use a random selection system based on some list compiled for a purpose that would not suggest favoritism along race, sex or other unacceptable lines.\textsuperscript{154} The disparity in Swain should never be tolerable today. If groups are fully represented in the pool, there is a greater chance of minority representation on particular juries.

Courts might even consider going further, requiring random selection even if no identifiable groups are excluded.\textsuperscript{155} This would be some recognition that even within a single group, such as a racial or religious group, there may be identifiable subgroups that are thought to be less favorable to the government and that would be intentionally kept from the jury pool. Defendants in criminal cases cannot go out and formulate their own lists and compel the prosecution to select jurors from it. Why should the state be allowed to do so? There is no way of knowing whether a jury pool is "loaded" by the officials who handpick the members. And there is no reason to rely on handpicking in this modern era of technology and information gathering. The point was made earlier

\textsuperscript{152} One case suggested that a standard deviation test might be adopted to determine whether statistical evidence qualifies as prima facie proof of discrimination. Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977).

\textsuperscript{153} If this suggestion is adopted, additional groups can receive the protection of the rule, because the remedy of random selection is so readily available.

\textsuperscript{154} Using lists not compiled for jury purposes provides some guarantee that the government is not stacking the jury pool. If a list is thought to be underrepresentative of minority groups, it should not be used. The type of additional list that would be least helpful is one in which those called as jurors are asked to list the names of other potential jurors. Whatever defects are present in the initial selection are likely to be carried over on such additional lists.

\textsuperscript{155} Cf. State v. Nims, 180 Conn. 589, 430 A.2d 1306 (1980) (holding jury selection system was bad when clerk kept names of men and women separate, even if juries ended up balanced).
that peremptories are not very useful if the initial pool is stacked. Random selection is the best guarantee against stacking.

It is possible to require the use of more than one source of names, at least where officials learn that a single source produces underrepresentation of an identifiable group. A voter registration list thus may be valid when it is first used, but invalid standing alone if underrepresentation of a group on juries becomes obvious. The decision whether to require supplementary lists involves a judgment as to how far the selection process should go in ferreting out people who would give up benefits like voting or driving to avoid jury service. If forced to serve despite their commitment not to do so, they might be hostile to the government. It is arguable that the legal system is justified in attempting to identify as jurors only the pool of persons who show at least some willingness to bear civic responsibilities. Voter registration lists are a useful place to start, for no one need have property to be qualified to vote. There are many reasons why people do not register, however. If there is any history of discrimination in voting, requiring at least one supplementary list would be justifiable.

We can eliminate disparities between representation of groups in the general population and on juries immediately. No additional data is needed to justify appropriate steps. 156 While they are taken, we can decide whether to go even further to assure neutral selection of the pool.

B. The Number of Peremptories

Previously we suggested that there is an internal check on the exercise of peremptory challenges: the opportunity costs associated with challenging one juror rather than another. This internal control mechanism is frustrated, however, when either the prosecution or the defense has too many challenges. The incentive to use one's challenges responsibly — i.e., to identify partiality rather than to indulge a personal taste for discrimination — diminishes when a party has so many peremptories that mistakes are not very costly. The solution may be to reduce the number of challenges available to each side. This reduction

156. For suggested approaches to increase jury pools, see J. VAN DYKE, supra note 19, at 98-104; Kairys, Kadane & Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 CALIF. L. REV. 776, 819-826 (1977). Some proposals also contemplate cutting back on the number of excuses now recognized. This may be desirable, but it is unclear whether such a step would increase minority participation. Some of the excused groups involve occupations that may themselves suffer from too few minority members.

For an innovative argument that exclusive use of voter lists infringes voting rights, see Note, The Constitutionality of Calling Jurors from Voter Registration Lists, 55 N.Y.U. L. REV. 1266 (1980).
is best handled as a legislative or supervisory, not a constitutional, matter. Just as the line between prejudices and values is difficult to draw, so too is it impossible to know how many challenges are enough to remove the one without eliminating the other. Such a line might depend on the facts of a particular case, the nature of the crime, the identities of the victim and the defendant, and the existence of strong community sentiment in favor of or against one party. For instance, in a case with significant racial and political overtones, such as the Huey Newton trial, it is reasonable to assume that the community as a whole was strongly biased in favor of the prosecution. It therefore might be necessary to provide the defendant with additional challenges, or to reduce those of the prosecutor to insure selection of the most impartial jury available. Such a case illustrates the need for flexibility in granting challenges, and thus the inadequacy of constitutional decisionmaking to deal with the problem.

Another related option would be to reduce generally the prosecutor's challenges even more than those of the defendant. There are at least two reasons for choosing this option. First, a few studies have shown that sixty percent of prospective jurors do not accept the notion that a criminal defendant is presumed innocent. If this is true, then the prosecution has a built-in advantage in every trial, and the defendant may need more challenges to remove the jurors most strongly predisposed toward the prosecution. Second, it is the unusual case where there is strong public opinion running against the government when it prosecutes crime. Although an unpopular or other extraordinary event may produce an exceptional amount of hostility toward the government, ordinarily the government appears to be acting for the people. More typically, any strong bias is against a defendant. Thus, the prosecutor needs fewer strikes to eliminate the jurors biased against the state, while the defendant may need more to compensate for the prejudice against him. Some commentators maintain that this situation exists every time the defendant is black, citing the conclusion of the


One reason why it might be reasonable to assume that juries are not likely to disfavor the prosecution in criminal cases is that an acquitted defendant may well be released in the community. Thus, jurors have an incentive to protect themselves against acquittals of persons they believe to be guilty. In some cases — e.g., where the crime involves gambling or some other offense not thought to be dangerous — jurors might be more sympathetic to defendants.

Arguably, peremptory challenges for the prosecution ought to be greatly restricted or eliminated except in cases in which there is some reason to suspect that jurors might view the government as oppressing ordinary citizens.

158. NAT'L JURY PROJECT, supra note 112, at 2.
Kerner Commission in 1967 that two-thirds of all whites were prejudiced against blacks. Although reliance on this statistic may be wholly inappropriate for determining a violation of the sixth amendment, it could support a legislative decision to give minority defendants — or all defendants — more challenges than the prosecutor.

A few commentators have proposed the elimination of all prosecutorial challenges. That proposal, however, ignores both the state's interest in a jury that is not biased against the prosecution and the potential danger posed to the defendant's right of challenge. The abolition of the prosecutor's challenge suggests that representativeness is the primary goal of petit jury selection, regardless of the bias that thereby finds its way onto the jury. The acceptance of this theory could eventually result in the elimination of the defendant's challenge because it, too, destroys the cross-section secured by random draw. Arguably, we are not yet ready to take such a drastic step.

Another, related way to insure increased representation of minorities on venires, and thus to increase their chance of ultimate selection on juries, is to reduce or expand the size of the districts from which a jury is drawn with an eye to providing a better balanced jury pool. If a district's size were reduced, this might result in a jury that is more representative of the defendant's actual "community" than a jury chosen from a larger area. If the district's size were expanded, there might be some loss of a sense of community, but this loss might be offset by an increase in the number of minority jurors available for jury service.

None of these possibilities ought to be constitutionally required.

159. See A. Ginger, supra note 13, § 4.17.

It is possible, but not very likely, that a political check exists that prevents the unreasonable exercise of peremptory challenges by prosecutors. If a group believes that an elected official is improperly removing its members from juries, it may express dissatisfaction through the ballot box. However, to have much influence the group must be sufficiently large. The larger the group the less likely it is that the prosecutor would have attempted to eliminate its members in the first place, since the larger group is more likely to be viewed as part of the mainstream of a jurisdiction. Often, excluded groups will be those that have little influence in the election of a prosecutor. Also, because most prosecutors' offices are staffed by more than one person (even though only one may be elected), it may be difficult to pin down responsibility for exclusion of jurors, especially when individual prosecutors do not have to explain their reasons for exercising strikes. Finally, the political check may be ineffective because the majority of the voters will not be members of groups targeted for exclusion, and they may share the prosecutors' view that excluded groups would be less fair to the state than are included groups. In jurisdictions where prosecutors are appointed, any political check is likely to be even weaker. The official who appoints the prosecutor is unlikely to be held responsible for abuse of challenges. Even if he were, his duties are likely to involve issues of more immediate concern to voters.
However, all are worthy of consideration by legislatures and courts with rulemaking power. Before they are implemented, more information is needed.

We need data on the relationship between the size of the area from which the jury is drawn and the number of peremptory challenges that should be available. The number of peremptories may require adjustment in accordance with population. If so, it is not clear in what direction the adjustment should be made. On the one hand, the smaller the community, arguably the more likely it is that the inhabitants share bias. Thus more challenges could be made available in districts with small populations. On the other hand, a greater number and variety of biases may appear in larger communities, creating a need for additional challenges when population increases. More information is needed before we can decide whether the size of the community should determine the number of peremptories and, if so, how to allocate them.

Another question for study is whether community sentiment tends to run higher in certain classes of cases and whether it tends to run against one or both parties. It may be possible to provide parties who are likely to be adversely affected by any such sentiment with additional challenges — either by statute or rule, or in the discretion of the trial judge. If sentiment appears to favor one party, a reduction of his challenges might be warranted.

Too little attention has been paid to the number of peremptory challenges that are necessary to make the parties and the community believe that the system has produced a fair jury in the typical case. We need information.

We already have sufficient information to conclude that jurisdictions concerned about effective minority representation should keep, or reestablish if necessary, twelve as the appropriate number of trial jurors. As the number decreases so do the chances for effective minority participation.

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C. Providing Information About Jurors

We can also improve the way we select jurors from a venire. First, all jurisdictions should ask jurors to fill out a questionnaire that provides basic background data before calling any jurors in a particular case. The questionnaire should cover race, sex, religion, current occupation, past occupations, marital status, military experience, criminal record, education, registered political status, past experience as a juror, current address, past addresses, and some information about wealth.\(^{163}\) The parties in any case should receive this information about each juror.

Although some jurors might prefer to provide no data about themselves, it is now well recognized that courts have discretion to require information as part of voir dire. Voir dire is time consuming, however, and can tend to be offensive when counsel single out some people for questions. A simple questionnaire would be preferable.

The more lawyers know about jurors, the more refined their use of peremptories can be. Race and sex are usually data that are obvious to the parties and their lawyers. Because other information may be neither obvious nor available, lawyers may use race, sex, or other observable characteristics to challenge jurors. Providing the parties with more facts about jurors should make the internal check on the selection process more significant. It should underscore the true costs of exercising a peremptory challenge.

Second, lawyers for the parties should have an opportunity to put voir dire questions about the particular case to the jurors. Currently, there is a debate over whether the judge or the lawyers should control voir dire.\(^{164}\) Many federal courts permit only the judge to ask ques-

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163. This questionnaire would be more comprehensive than some that have been proposed. See, e.g., Standards Relating to Trial by Jury § 15-2.4 (1978). Some jurisdictions require that a questionnaire be used, although its contents may not be specified. See, e.g., Me. Rev. Stat. Ann. tit. 14, § 1254 (1980), discussed in State v. Thomas, 432 A.2d 757, 759-60 (Me. 1981).

An advantage of a questionnaire is that if many questions are asked and answered in writing without much expenditure of scarce judicial resources, judges may find that they have time for more careful questioning of individual jurors outside the hearing of other jurors. Some jurisdictions require an individual voir dire in some circumstances — Mass. Gen. Laws Ann. ch. 234, § 28 (West 1959 & 1981 Supp.), discussed in Commonwealth v. Shelley, 409 N.E.2d 732 (Mass. 1980) — but the requirement usually applies only in exceptional circumstances.

Individual voir dire should be encouraged in any case in which there is a reasonable chance that jurors may be prejudiced against certain classes or groups with which parties or witnesses will be associated or in which inflammatory issues are present.

164. See supra note 13.
tions while more states allow lawyers to question jurors.\textsuperscript{165} Once the initial questionnaire is provided to the lawyers, many of their questions should be unnecessary. But a need to focus on the specific case will remain.

It should be perfectly acceptable for the judge to approve all questions asked. The advantage of having the lawyers actually ask them is that each lawyer has an opportunity to see how a juror reacts to him and his side of the case.\textsuperscript{166} Every juror’s reactions should be observable. This should not slow down the process, even minimally.

As for the number of questions, courts must of course be concerned with the time that voir dire takes. But they also should recognize that the more information generated on voir dire, the less likely the lawyers are to use stereotypes like race, sex, and religion in selecting jurors.

In every case in which a party reasonably believes that something in the facts might cause a particularly negative reaction among some jurors, the court should permit questions to the jurors on that subject.\textsuperscript{167} This does not mean that extended voir dire should be necessary, only that one or possibly a few questions relating to reasonable fears of prejudice or bias are always proper.

Are any of these procedures constitutionally required? At the moment there would be little support for arguing that they are.\textsuperscript{168} The Supreme Court has reiterated that the Constitution does not require peremptory challenges.\textsuperscript{169} Thus the Court is unlikely to view any procedures surrounding them as constitutional imperatives. One should

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\item \textsuperscript{165} See Standards Relating to Trial by Jury § 15-2.4 commentary at 24 (1978).
\item \textsuperscript{166} The appearance of counsel and jurors’ reaction to counsel may be important to the outcome of a case. See H. Kalven & H. Zeisel, The American Jury 367-68 (1966); See generally Costopoulos, Persuasion in the Courtroom, 10 Duq. L. Rev. 384 (1972).
\item \textsuperscript{167} The Supreme Court has not gone far enough in requiring that basic questions be put to prospective jurors concerning their possible bias. See Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981) (plurality opinion); Ristaino v. Ross, 424 U.S. 589 (1976); Ham v. South Carolina, 409 U.S. 524 (1973). Because post-trial challenges are undesirable and greatly restricted, see, e.g., Fed. R. Evid. 606(b), there is even more reason before trial begins to make some brief inquiry about jurors’ views. Massachusetts has taken a step in the right direction in Commonwealth v. Sanders, 421 N.E.2d 436, 438 (Mass. 1981) (requiring jurors to be individually examined regarding racial bias in cases involving interracial rape, if the defendant requests such questioning).
\item \textsuperscript{168} California has now gone further than we would require. In People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981), the court held that counsel could ask about a juror’s willingness to apply a specific doctrine of law as an aid to the exercise of peremptory challenges. California has now gone further than we would require. In People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981), the court held that counsel could ask about a juror’s willingness to apply a specific doctrine of law as an aid to the exercise of peremptory challenges.
\item \textsuperscript{169} Rosales-Lopez v. United States, 101 S. Ct. 1629, 1634 n.6 (1981) (plurality opinion), (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)).
\end{itemize}
remember, however, that the Supreme Court plainly requires an impartial jury.\textsuperscript{170} The Court has never assessed the legitimacy of a system of jury selection that bans peremptory challenges and also treats challenges for cause as narrowly as most jurisdictions now treat them. Without a radical change in voir dire and in the use of challenges for cause, peremptory challenges may be essential to assure the constitutionally mandated impartial jury. If so, the Constitution may require that a lawyer be permitted to ask questions about bias relating to the evidence, so that he can evaluate both the substantive responses and the jurors' reactions to him. The more general information provided on a questionnaire probably would not be constitutionally necessary.

\textbf{VII. CONCLUSION}

Peremptory challenges are essential to the selection of an impartial jury. Neither random selection nor challenges for cause are adequate to detect and eliminate the subconscious biases that destroy impartiality. Although the peremptory is better able to perform this function, it cannot do so effectively if the motives for its exercise are subject to judicial control in any particular case.

While claiming to preserve the essence of the peremptory, recent state decisions like \textit{Wheeler} and \textit{Soares} effectively reduce its usefulness. They fail to recognize that while race, religion, ethnic background, occupation, and age may be only rough proxies for predispositions that detract from impartiality, given the limitations on and problems with voir dire of prospective jurors, reliance on stereotypes is the most reasonable and least expensive way for parties to identify probable juror bias. The attempt to distinguish between the use of group and specific bias is unsatisfactory; both rely on the use of generalizations and stereotypes to discover which jurors are likely to be most prejudiced toward one side or another.

Although courts should hold peremptories on the basis of group bias constitutional, there remain strong arguments that the presence of minorities on petit juries is nonetheless desirable and that currently we do too little to promote minority representation. These arguments make a persuasive case that we should strive to improve the system for selecting neutral jury pools, placing special emphasis on random selection. We also need to gather information concerning the number of peremptories needed by both sides and the relationship between this number and the population of a district in order to decide whether we

\textsuperscript{170} Rosales-Lopez v. United States, 101 S. Ct. at 1634; \textit{supra} text accompanying notes 76-86.
should decrease challenges in some cases, especially for the prosecution.

In addition, we should attempt to provide lawyers with more information about prospective jurors. Increased information will reduce reliance on stereotypes that may lead to striking jurors according to unsatisfactory criteria, unnecessarily depriving minority members of opportunities for jury service.

The ideal is that juries will be both representative of the community and impartial. No single solution like the one suggested in Wheeler and Soares will help much in achieving that ideal. A broader program for reform may be more successful. This discussion is an effort to generate some interest in developing that program.