CURBING PROSECUTORIAL ABUSE OF PEREMPTORY CHALLENGES—THE AVAILABLE ALTERNATIVES

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COMMENT
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I. INTRODUCTION

A peremptory challenge is a challenge exercised by an attorney to exclude a potential juror from the jury panel. There is no requirement that the attorney explain or justify a peremptory challenge, and no judicial determination is made as to its validity or sufficiency.\footnote{1} Due to the discretionary nature of the peremptory challenge, it has been the subject of much abuse by prosecutors desiring to secure a potentially “conviction-biased” jury panel.\footnote{2} Prosecutors have employed the peremptory challenge as a device to exclude members of a cognizable societal group\footnote{3} from a petit jury solely on the basis of that group membership. In particular, prosecutors have sought to eliminate those individuals with the

1. A challenge for cause, unlike a peremptory challenge, requires the attorney to give a specific reason, within statutory guidelines, for excluding a potential juror. The challenge is subject to judicial approval. Typically, statutes providing grounds for removal for cause permit exclusion of a juror who is related to a party to the litigation, who has special knowledge of or previous participation in the case, or whose state of mind would prevent impartial action. See, e.g., CAL. PENAL CODE §§ 1071-1076 (West 1970); N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1971). In contrast, a peremptory challenge, often referred to as a peremptory, requires no justification or judicial approval prior to its use. Except for statutory limitations on the number of peremptories, the exercise is essentially uncontrolled. In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court characterized peremptory challenges as those exercised “without a reason stated, without inquiry and without being subject to the court’s control.” Id. at 220.

2. People v. Wheeler, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978). For a discussion of some of the cases where prosecutors have purposefully excluded prospective jurors in hopes of securing “conviction-biased” juries, see J. VAN DYKE, JURY SELECTION PROCEDURES 152-59 (1977). Van Dyke notes that “[p]eremptories have been subject to abuse from the time juries were first introduced in England.” Id. at 147.

3. Essentially, a cognizable group is one readily identifiable and infused with a distinct set of attitudes and beliefs arising from a common perspective and life experience. For example, blacks are considered a cognizable group. See text accompanying notes 64-69 infra for a discussion of standards for identifying a cognizable group.
same group affiliation as the defendant.\textsuperscript{4} The motivation for such prosecutorial discrimination is the belief that jurors of the same group as the defendant will be biased in favor of acquittal.\textsuperscript{5} The result is a jury panel which is often decidedly more homogeneous than the community at large.\textsuperscript{6}

This comment will examine the scope of the peremptory challenge in criminal trials, the deliberate use of peremptory challenges in a discriminatory manner, and the existing and potential remedies for such abuse. The United States Supreme Court's longstanding approach, set forth in \textit{Swain v. Alabama},\textsuperscript{7} will be discussed. The emerging alternatives to \textit{Swain}, successfully utilized by defendants in state courts, then will be considered.\textsuperscript{8} Finally, the potential impact of these alternatives on future attempts to invalidate juries selected through the discretionary exercise of peremptory challenges will be explored.

It will be shown that defendants in most of the United States presently have little hope of establishing a prima facie case of discriminatory prosecutorial action in the exercise of peremptory challenges in any given case. This comment will suggest approaches which a defendant may successfully employ to assert a denial of his rights by a prosecutor who exercises the challenges granted to him against all, or almost all, members of a particular cognizable group. By following one of the approaches set forth in this comment, hopefully defendants will be able to better protect their rights to a fair trial by an impartial jury composed of a representative cross section of the community, unhampered by prosecutorial discrimination.

\textsuperscript{4} J. \textsc{Van Dyke}, \textit{supra} note 2, at 155-56. It is important to note that the defendant need not be of the same group affiliation as the jurors peremptorily challenged to assert a claim of violation of constitutional rights. In Peters v. Kiff, 407 U.S. 493 (1972), the Supreme Court held that a white defendant had standing to assert his claim where no blacks had served on the grand jury that indicted him or on the petit jury that convicted him. \textit{Id.} at 504-05. The Court stated: "[W]hen a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend upon the circumstances of the person making the claim." \textit{Id.} at 498.

\textsuperscript{5} United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979); J. \textsc{Van Dyke}, \textit{supra} note 2, at 152-54.


\textsuperscript{7} 380 U.S. 202 (1965).

II. HISTORICAL PERSPECTIVE

In England, prior to 1305, the peremptory challenge was available to both the Crown and the defendant.9 The Ordinance of Inquests, passed in that year, forbade the use of peremptories by the Crown because the previous grant of unlimited challenges had caused infinite delay.10 From this point on, criminal defendants were entitled to exercise a limited number of peremptory challenges whereas the government was allowed only challenges for cause.11 The rationale for providing the defendants with “an arbitrary and capricious species of challenge . . . without showing any cause at all”12 was to protect the defendant13 from jurors prejudiced either by the defense’s inciteful questioning on voir dire14 or by an unsuccessful attempt to challenge the juror for cause.15 No similar protection was available to the government because none was thought necessary.

It was not until the nineteenth century that the government’s interest in obtaining an impartial jury was recognized.16 A certain number of peremptory challenges were allocated to enable the government to strike jurors who were unfairly biased against conviction.17

The development of the peremptory challenge in the United States paralleled the common-law development of the challenge. The First Congress followed the common-law practice of providing defendants alone with the right to exercise peremptory challenges to potential jurors.18 It was not until 1865 that the government was

10. Id.
11. 4 W. BLACKSTONE, COMMENTARIES *353.
12. Id.
13. Blackstone refers to the peremptory challenge as “a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.” Id. at 346.
14. Id. at 353. Blackstone explained that sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another . . . [and] the law wills not that [the defendant] should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike.
15. Id.
16. J. VAN DYKE, supra note 2, at 150.
18. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119 (current version at Fed. R. CRIM. P. 24(b)).
granted the right to exercise peremptory challenges in federal courts. The practice in state courts varied. For example, New York did not allow the prosecutor to exercise any peremptory challenges until 1881. Virginia did not grant prosecutors the right to exercise peremptories until 1919. Today, however, the peremptory challenge is provided for by statute throughout the United States. It is available to both parties in the jury selection proceeding although the exact method of application varies by statute.

III. Scope of the Peremptory Challenge

Although not constitutionally mandated, the peremptory challenge has long been recognized as an essential component of the right to a fair trial by jury. Peremptories provide a mechanism for assuring the existence of an impartial jury in a given trial. It is hoped that both sides will exercise their peremptory challenges judiciously to eliminate the extremes of partiality and potential prejudice. The result is a jury composed of "impartial" community members.

Despite the benefits to be derived from the exercise of per-

20. See J. VAN DYKE, supra note 2, at 171-72 n.57, for a compilation of the dates when each state authorized the prosecutor to exercise peremptory challenges.
21. Id. at 171 n.46. See also People v. Aichinson, 7 How. Pr. 241 (N.Y. 1852).
22. J. VAN DYKE, supra note 2, at 171 n.46.
24. There are basically two methods by which challenges are exercised. Under the system most commonly used, prospective jurors are chosen from the venire and are then subject to challenges. Once a juror is peremptorily challenged, he is replaced by another prospective juror. The replacement is then subject to peremptory challenge if the attorney has additional challenges remaining. The struck jury system is an alternative approach used in some states. Its exact method of application varies. Generally, the attorneys exercise their challenges for cause first to achieve a venire the size of the final jury plus the number of peremptory challenges available to both sides. At this point, each side exercises its peremptories until the panel is down to the final size. J. VAN DYKE, supra note 2, at 146-47. The struck system is recognized as more manipulative since the attorneys have more of an opportunity to control the composition of the final panel. It was the struck system that was utilized in Alabama and upheld as nondiscriminatory in Swain v. Alabama, 380 U.S. at 218.
emptyory challenges by both sides, peremptories also may be a tool for invidious discrimination by the prosecutor. By exercising his peremptory challenges to exclude all prospective jurors of a particular racial or ethnic group, the prosecutor can produce a jury panel that is not only demographically unbalanced, but is arguably more biased than the randomly selected jury panel. In doing so, the prosecutor may be infringing upon the defendant's constitutional protections of equal protection and fair trial by an impartial jury.

IV. THE SWAIN LEGACY

In Swain v. Alabama, the United States Supreme Court sanctioned the prosecutor's use of peremptory challenges to exclude from the jury those black jurors remaining after challenges for cause were exercised. The Court created a presumption that the prosecutor was using his peremptory challenges in a permissible manner to secure a fair and impartial jury in any given case. The Court went on to say, "The presumption is not overcome . . . by [defendant's] allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes."

29. Id.
30. 380 U.S. at 202. In Swain, the black defendant challenged the prosecutor's exercise of his peremptories against every black venireman as violative of the defendant's right to equal protection guaranteed by the fourteenth amendment: the exact number so challenged was unclear. It should be noted that the sixth amendment right to a fair trial by an impartial jury had not yet been applied to the states. Whether the United States Supreme Court would have decided Swain differently had the sixth amendment been applicable is open to debate. In People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the California Supreme Court suggested that the United States Supreme Court would have reached the same result. The California court perceived the underlying motivation for the Swain decision, preservation of the arbitrary nature of the peremptory system, to be equally applicable to the two constitutional provisions. Id. at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908. This notion may be supported by the language of Swain. The United States Supreme Court stated: "[T]o subject the prosecutor's challenge in any particular case to the demands of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge." 380 U.S. at 221-22. The same objection, the California court argued, would presumably arise if the sixth amendment were invoked. 22 Cal. 3d at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908.
31. 380 U.S. at 227.
32. Id. at 222. The Swain Court reviewed the history of peremptory challenges in England and the United States and then concluded that the use of peremptories in a given case must remain unquestionable. Id. at 212-22.
33. Id. at 222.
The Court proceeded to set forth the burden a defendant would have to meet in order to establish a prima facie case of discrimination. Essentially, the Swain standard gives presumptive propriety to the prosecutor's exercise of peremptory challenges in a given case. The defendant has the burden of establishing that the prosecutor has acted deliberately and systematically, in all types of cases, over an extended period of time, to exclude all members of a particular racial or ethnic group from all jury panels in the county so that no members of the group ever serve on petit juries. If the defendant meets this burden, then Swain suggests that the presumption would be overcome and that the defendant would be entitled to appropriate relief.

The Swain burden has proved insurmountable; no defendant has been able to comply. Nevertheless, Swain remains the rule.

34. Id.
35. Id. at 223-34. But see United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971). In Pearson, the court said that it did "not read Swain as meaning that the attack on the Government's use of its challenges must fail if the impermissible use is not exercised one hundred percent of the time." Id. at 1217. "The occasional service of a black as a petit juror . . . does not negate purposeful and systematic exclusion over an extended period of time." State v. Washington, 375 So. 2d 1162, 1164 n.1 (La. 1979).
36. 380 U.S. at 224. The Court recognized that the peremptory system was not intended to "facilitate or justify" the use of challenges to deny blacks the "same right and opportunity to participate in the administration of justice [as] . . . the white population." Id.
37. See Annot., 79 A.L.R.3d 14 (1977). The author states: "[N]o defendant has yet been successful in proving to the court's satisfaction an invidious discrimination by the use of the peremptory challenge against blacks over a period of time." Id. at 24. But see United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974), in which the court granted the defendant a new trial "in the interest of justice" after the government had peremptorily challenged six black jurors. Id. at 1250. See also United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971), in which the court ventured that the Swain burden, although never met, is not "insurmountable." Id. at 1218.

In Swain, evidence that no black had served on a jury in the Alabama county in question in at least 15 years, if ever, was deemed insufficient evidence of systematic exclusion, and the prosecutor's actions were held not to be in error. 380 U.S. at 225-26.
38. Although the federal and state courts have consistently followed Swain, the decision has not been without serious detractors. Commentators have assailed its effect upon jury composition and decisionmaking. See Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 NEW ENGL. L. REV. 192 (1978); Comment, A Case Study of the Peremptory Challenge: A Subtle Strike At Equal Protection and Due Process, 18 ST. LOUIS U. L.J. 662 (1974); Comment, The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause, 46 U. CIN. L. REV. 554 (1977); Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury,
Federal and state courts faced with the task of evaluating prosecutorial exercise of peremptory challenges consistently rely on the Court's standard of proof as controlling, and the Supreme Court has refused recent requests to reconsider the issue.\textsuperscript{39}

Defendants, however, have not been totally without remedy. Alternative methods of challenging a prosecutor's abusive exercise of peremptory challenges have emerged. Recently, in a series of decisions, judges have been sympathetic to defendants' pleas of discrimination in the use of peremptory challenges by prosecutors. Defendants have alleged and proved violations of state constitutional provisions protecting the right to trial by a jury representative of a cross section of the community\textsuperscript{40} and the right to equal protection and human dignity.\textsuperscript{41} The approaches adopted by the highest state courts of California,\textsuperscript{42} Massachusetts,\textsuperscript{43} and Louisiana\textsuperscript{44} are important both for their points of departure from the Swain approach and for their attempts to justify their decisions within the framework of the United States Constitution and recent Supreme Court holdings.\textsuperscript{45}

V. THE WHEELER ALTERNATIVE

In 1978, two black defendants in California successfully challenged the validity of guilty verdicts reached by an all-white jury that had been secured through the purposeful use of peremptory


\textsuperscript{40} See text accompanying notes 51, 62 & 63 infra.

\textsuperscript{41} See text accompanying notes 107 & 110 infra.


\textsuperscript{44} State v. Brown, 371 So. 2d 751 (La. 1979); State v. Eames, 365 So. 2d 1361 (La. 1978) (concurring opinion); State v. Kelly, 362 So. 2d 1071 (La. 1978) (concurring opinion).

\textsuperscript{45} See note 76 infra for a discussion of the Supreme Court cases.
challenges by the prosecution to eliminate all potential black jurors. In *People v. Wheeler*, the California Supreme Court held that the sixth amendment to the United States Constitution and article I, section 16 of the California Constitution independently and equally guaranteed the "right to trial by a jury drawn from a representative cross-section of the community." When the prosecution uses peremptory challenges to exclude individuals from a particular jury panel solely on the basis of group affiliation, and bias presumed to emanate from this affiliation, the California constitutional guarantee, at least, is offended. Any jury so impaneled, or any verdict reached by such a panel, cannot stand.

The *Wheeler* court set forth a method of evaluating prosecutorial action in light of a defendant's suspicion, in a particular case, of abuse. In accord with *Swain*, an initial presumption of

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48. The sixth amendment to the United States Constitution provides: "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI. The right to trial by an impartial jury was held applicable to the states in 1968. *Duncan v. Louisiana*, 391 U.S. 145 (1968).
49. Article I, § 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all. . . ." CAL. CONST. art. I, § 16.
51. 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The California Supreme Court acknowledged that "*Swain* provides less protection to California residents than the rule" adopted in *Wheeler*. *Id.* at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908. The court cited two major difficulties with *Swain*: First, the defendant is required to show systematic exclusion over time so that an individual defendant is afforded no protection; and second, the necessary data and records needed to establish the proper record of systematic exclusion are essentially unobtainable. *Id.* at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 908-09.
52. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. See text accompanying note 74 infra.
53. Prior to setting forth its method of evaluating prosecutorial exercise of peremptory challenges, the *Wheeler* court rejected proposed methods based upon statistical analysis of the voir dire. The approaches urged by the defendants and an amicus curiae would calculate the probability that the prosecutor intentionally exercised his peremptories to eliminate a particular group from the jury for discrimina-
prosecutorial propriety in the exercise of peremptory challenges exists. At this point the approaches diverge. While Swain asserted that the presumption could be rebutted only by evidence of systematic exclusion over an extended period of time, the court in Wheeler declared that the presumption could be rebutted within the framework of a single case.

The Wheeler court set forth a two-part test for defendants to apply in rebutting the presumption that the prosecutor exercised his peremptory challenges in a proper manner. The defendant must establish the two elements of this test to the satisfaction of the trial judge, by "as complete a record of the circumstances as is feasible. . . ." First, the defendant must show exclusion of members of a cognizable group within the meaning of the representative cross-section rule. Second, the defendant must demonstrate that there is a "strong likelihood" that the individuals were excluded on the basis of that group membership, rather than on the basis of a specific, individual bias. Once a defendant makes out a prima facie case of constitutionally impermissible action, the burden shifts to the prosecutor to justify his exercise of peremptory challenges on specific bias grounds.

The Wheeler court explained both the scope of the representative cross-section rule and the distinction between group and specific bias. The court viewed the representative cross-section requirement as an important prerequisite to obtaining an impartial jury. The interaction of diverse beliefs and inherent biases indica
Individual jurors necessarily bring with them to the decisionmaking process was cited as critical to achieving an impartial jury.61

[I]n our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; . . . it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; [therefore] . . . the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.62

When a juror is peremptorily challenged on the basis of group membership, and beliefs commonly associated with that membership, "such interaction [of diverse beliefs and values] becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority."63

The Wheeler court was vague as to what constituted a "cognizable group," stating only that blacks constituted such a group.64 The California Supreme Court, however, has since had occasion to explore the meaning of "cognizable groups." In Rubio v. Superior Court of San Joaquin County,65 a defendant challenged the exclusion of resident aliens from California's jury pools. The court set forth two requirements that must be met before a group will be considered cognizable within the meaning of the representative cross-section rule.66 "First, its members must share a common perspective arising from their life experience in the group . . . [including] a common social or psychological outlook on human events."67 Second, no other members of the community can be capable of adequately representing that common perspective so ex-

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61. Id. at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.
62. Id. The Massachusetts Supreme Judicial Court, in Commonwealth v. Soares, 1979 Mass. Adv. Sh. 617, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), pointed out that "[i]t is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case . . . ." Id. at 617-18, 387 N.E.2d at 512.
63. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
64. Id. at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26.
66. Id. at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737.
67. Id.
cluded from the jury. When these two requirements are met, then exclusion of group members effectively impedes the desired mixture of community attitudes and beliefs that is the essence of the representative cross-section rule.

To be considered impermissible, the prosecutor's peremptory challenges of members of a cognizable group must be based solely on the fact of group membership. The *Wheeler* court termed this "group bias." The elimination of an individual who is a member of a cognizable group, however, would be permissible if based upon "specific bias." A specific bias is "a bias relating to the particular case on trial or the parties or witnesses thereto."

Under the *Wheeler* rationale, once a prima facie case of exclusion is established, the burden shifts to the prosecutor to justify his

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68. *Id.*

69. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. This definition of cognizable groups is applicable only in the California state court system. Other approaches to the meaning of the term are likely. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the United States Supreme Court stated that, in the past, race and color have been readily identifiable characteristics of groups needing the Court’s protection.

But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. *Id.* at 478. Thus, in *Hernandez*, the Supreme Court held that systematic exclusion of Mexican-Americans from service on grand and petit juries was a denial of equal protection to a defendant of Mexican descent. *Id.* at 482.

In *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), the Court said that "economic, social, religious, racial, political, and geographical groups of the community" could not be excluded from jury service. *Id.* at 220. The *Thiel* court concluded that a system which resulted in exclusion of most wage earners from jury service was impermissible.

The Massachusetts Supreme Judicial Court has chosen to define such groups in relation to the equal rights amendment adopted by the state legislature in 1976. *Commonwealth v. Soares*, 1979 Mass. Adv. Sh. 593, 628, 387 N.E.2d 499, 516. Thus, peremptory challenges based solely upon "sex, race, color, creed, or national origin" would be impermissible. *MASS. CONST.* pt. I, art. 1. This is a broader definition than the one set forth by the California court in *Rubio v. Superior Court of San Joaquin County*, 24 Cal. 3d at 93, 593 P.2d at 595, 154 Cal. Rptr. at 734. In *Rubio*, exclusion of resident aliens from California's jury selection pools was upheld on the ground that, although the members might share common experiences, those experiences could be vicariously represented by other individuals eligible for jury service. *Id.* at 100, 593 P.2d at 599, 154 Cal. Rptr. at 738. Under the Massachusetts approach, exclusion on the basis of national origin would be unconstitutional.

70. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

71. *Id.*
use of peremptories by showing that they were used in a nondiscriminatory fashion. The prosecutor must demonstrate to the satisfaction of the judge\textsuperscript{72} that the peremptories were exercised against members of a cognizable group on the basis of specific bias.\textsuperscript{73} At this point, if the prosecutor is unable to make a showing of permissible use of the peremptory challenges, the jury already selected is dismissed, the entire jury pool is quashed, and jury selection must begin anew.\textsuperscript{74}

The uniqueness of the \textit{Wheeler} approach stems from the extension of the representative cross-section requirement, previously applied only to the jury venire, to the composition of the jury panel itself. The \textit{Wheeler} court based its extension of the rule to the jury panel upon a series of California\textsuperscript{75} and United States Supreme Court\textsuperscript{76} decisions which did not expressly apply the rule beyond the jury selection stage.

The extension of the right to a representative cross section to the composition of the actual jury panel is not illogical. The same concerns that give rise to the necessity for a variety of attitudes and beliefs on the jury venire are present in the final stage of selection of an impartial jury, the impanelling of the actual jury.\textsuperscript{77} The Supreme Court, however, has not yet chosen to extend the representative cross-section requirement to petit jury composition. In \textit{Taylor v. Louisiana},\textsuperscript{78} the Supreme Court, in the course of identifying and applying the representative cross-section rule to the

\textsuperscript{72} \textit{Id.} at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. The showing of permissible use of the peremptory challenge against a particular juror need not meet the level of justification necessary to support a challenge for cause. \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

\textsuperscript{75} \textit{Id.} at 270-72, 583 P.2d at 757-58, 148 Cal. Rptr. at 899-900. The court discusses \textit{People v. White}, 43 Cal. 2d 740, 278 P.2d 9 (1945), in detail. In \textit{White}, the California Supreme Court expressly recognized the requirement of "an impartial jury drawn from a cross-section of the entire community" as an essential component of the right to trial by an impartial jury. \textit{Id.} at 754, 278 P.2d at 17.

\textsuperscript{76} 22 Cal. 3d at 266-70, 583 P.2d at 754-57, 148 Cal. Rptr. at 896-98. The court traced a series of United States Supreme Court decisions from \textit{Smith v. Texas}, 311 U.S. 128 (1940) (systematic exclusion of blacks from grand jury service) to \textit{Taylor v. Louisiana}, 419 U.S. 522 (1975) (systematic exclusion of women from jury service). The \textit{Wheeler} court relied upon the Supreme Court's repeated emphasis that a petit jury should embody a representative cross section of the community, as proof of the importance of the representative cross-section rule in protecting the right to trial by impartial jury. 22 Cal. 3d at 270, 583 P.2d at 757, 148 Cal. Rptr. at 898.

\textsuperscript{77} \textit{Taylor v. Louisiana}, 419 U.S. 522, 530 (1975); \textit{People v. Wheeler}, 22 Cal. 3d at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.

\textsuperscript{78} 419 U.S. 522 (1975).
selection of the venire, specifically rejected any "requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." The Wheeler court recognized the impracticability of such a mirror-image requirement but refused to allow the final stage in the jury selection process, the challenges, to escape all representative requirements. It is this extension of the requirement that defendants in other state courts may seize upon in attempting to challenge prosecutorial abuse of challenges.

VI. POST-WHEELER: THE STATE CONSTITUTIONAL APPROACH

Challenging prosecutorial action by asserting a denial of a state constitutional right is a narrow approach to the problem. This method of attack cannot be used unless the state constitution provides appropriate protection. To date, the highest courts of

79. Id. at 538. Later, in Washington v. Davis, 426 U.S. 229 (1976), the Court again noted that "the fact that a particular jury ... does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause." Id. at 239. Congress expressly rejected the mirror-image rule. Discussing the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869, 1871 (1976), which was passed to ensure that potential jurors will be selected randomly from a representative cross section of the community, the House report states that the Act "does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup." H.R. REP. No. 1076, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1792, 1794.

Further, the report notes that the Act "leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons." Id. at 1795 (emphasis added).

80. 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

81. Although the New York Court of Appeals has not decided the issue, one New York supreme court has considered whether the New York Constitution affords defendants the same protections that the California and Massachusetts courts delineate in Wheeler and Soares. In People v. Kagan, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. 1979), a New York supreme court held that the use of peremptory challenges to exclude jurors "solely by reason of their sex, race, color, creed, or national origin," where that affiliation is the same as that of the defendant, is a deprivation of the right to trial by a jury of peers guaranteed by art. 1, § 1 of the New York Constitution. Id. at 277, 420 N.Y.S.2d at 989. The court went on to find that there had been no violation of the rights of two Jewish defendants when a prosecutor used five of his six peremptory challenges to exclude from the jury individuals with surnames that the defendants claimed indicated affiliation with the Jewish faith. A subsequent judicial inquiry determined that in fact four of the five were Jewish. Id. at 277, 420 N.Y.S.2d at 990.

For an explanation of the California court's approach in Wheeler, see text accompanying notes 49-54, 56-59 & 72-74 supra.
California,\textsuperscript{82} Massachusetts,\textsuperscript{83} Louisiana,\textsuperscript{84} and Delaware\textsuperscript{85} have shown at least some interest in affording defendants protection beyond \textit{Swain}'s limits. Other state courts, however, continue to adhere to \textit{Swain}; the rights of defendants in these states to a fair trial unhampered by prosecutorial discrimination in the use of peremptories remains essentially unprotected.\textsuperscript{86}

A. Massachusetts: Adopting the Wheeler Approach

\textit{Commonwealth v. Soares}\textsuperscript{87} was the first post-\textit{Wheeler} case to adopt the \textit{Wheeler} approach. The Massachusetts Supreme Judicial Court found that the state constitutional guarantee of a fair trial by an impartial jury, embodied in article XII of the Declaration of Rights of the Massachusetts Constitution,\textsuperscript{88} was violated by the prosecutor's use of peremptory challenges to remove twelve of the thirteen blacks on the venire.\textsuperscript{89} Like the California Supreme Court

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\item[82.] 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903. See notes 47-59 & 70-74 \textit{supra} and accompanying text.
\item[84.] State v. Brown, 371 So. 2d 751 (La. 1979); State v. Eames, 365 So. 2d 1361 (La. 1978); State v. Kelly, 362 So. 2d 1071 (La. 1978).
\item[85.] Saunders v. State, 401 A.2d 629 (Del. 1979). The Delaware Supreme Court discussed the \textit{Wheeler} mode of inquiry into the prosecutor's use of peremptory challenges, but rejected its application where only one black was called to the jury box and peremptorily challenged. The court stated that there was no indication of impropriety in this single instance. \textit{Id.} at 632. The mention of \textit{Wheeler}, however, may indicate a willingness to follow its standard in future cases in the Delaware courts where a pattern of abuse arises within a single jury selection proceeding.
\item[88.] Article XII of the Declaration of Rights of the Massachusetts Constitution provides for trial "by the judgment of [the defendant's] . . . peers." MASS. CONST. pt. 1, art. XII.
\item[89.] 1979 Mass. Adv. Sh. at 626-27, 387 N.E.2d at 515-16. Although one black juror remained on the jury panel that tried and convicted the defendants in \textit{Soares}, the court stated that this did not affect the holding.
\end{itemize}
\end{footnotesize}
in *Wheeler*, the court in *Soares* reviewed the representative cross-section rule as applied by Massachusetts\(^90\) and the United States Supreme Court\(^91\) and concluded that "the right to be tried by a jury drawn fairly from a representative cross-section of the community is critical."\(^92\) The exclusion of cognizable groups from a jury panel "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."\(^93\) Thus, the Massachusetts court stated that peremptories may be used only to challenge "prospective jurors whose unique relationship to the particular case raises the spectre of individual bias."\(^94\)

The approach adopted by the *Soares* court for evaluating the actions of a prosecutor in a given case clearly is modeled after *Wheeler*.\(^95\) The defendant must make a prima facie showing that the prosecutor used his peremptory challenges to exclude individuals from the jury solely on the basis of group bias. The prosecutor must then come forward and justify the challenges on the basis of specific bias.\(^96\) The *Soares* court specifically rejected the *Swain* approach, noting that the defendants were not predicing their claims of error upon a violation of the fourteenth amendment guarantee of equal protection and would have been unsuccessful before the court had they done so. The defendants would have had insufficient evidence of past practices to meet the extensive burden imposed by *Swain*.\(^97\)

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One need not eliminate 100% of minority jurors to achieve an impermissible purpose. If the minority's representation is reduced to 'impotence,' as for example, by the challenge of a disproportionate number of group members, and the failure to challenge only a minority member who can reasonably be relied on as 'safe,' the majority identified biases are likely to meet little resistance, and the representative cross-section requirement is not fulfilled.

\(^{96}\) 1979 Mass. Adv. Sh. at 631-32, 387 N.E.2d at 517-18. See notes 72-74 supra and accompanying text for the remedy the *Wheeler* court applied once a prima facie case of discrimination had been established and not rebutted by the prosecutor.
\(^{97}\) 1979 Mass. Adv. Sh. at 611 n.10, 387 N.E.2d at 509 n.10. The court remarked that the defendants "declined to take up the Sisyphean burdens imposed on persons asserting a violation of equal protection under *Swain*." *Id.*
The Soares court's comments about the unavailability of an equal protection claim, combined with the Wheeler court's similar pessimism, raises serious questions about the status of an equal protection argument. At least one state supreme court, the Louisiana Supreme Court, has begun to consider the equal protection guarantee of its constitution as affording possible protection and may serve as a guide to defendants in other states.

B. Louisiana—The Possibility of Utilizing Equal Protection

While a majority of the Louisiana Supreme Court has yet to depart fully from the Swain standard, a series of recent concurring opinions has suggested a possible mode of departure. In State v. Brown,98 the court acknowledged the persistent plea of colleagues to adopt a new approach, but a majority of the court still refused to do so.99 Due to the present concern with developing alternatives to Swain, and the possibility that the proffered alternative may soon be followed by courts dissatisfied with Swain, the analysis Brown refers to is worth evaluating. Specifically, the concurring opinions in State v. Eames100 and State v. Kelly101 will be explored.

In State v. Kelly,102 the defendant raised the issue of prejudicial error due to the prosecutor's use of peremptory challenges against ten black jurors, thereby achieving an all-white jury.103 The Louisiana Supreme Court rejected the defendant's argument that his right to an impartial jury representing a cross section of the community was infringed.104 Instead, the court followed Swain, and finding no evidence of systematic exclusion over time, dismissed the defendant's claim of error as without merit.105

98. 371 So. 2d 751 (La. 1979).
99. Id. at 754 n.4. Following Brown, the Louisiana Supreme Court reiterated its adherence to the principles articulated in Swain. See State v. Albert, 381 So. 2d 424 (La. 1980); State v. Allen, 380 So. 2d 28 (La. 1980). Judge Dennis concurred in both cases, on the ground that prosecutorial discrimination could occur in a single case. State v. Albert, 381 So. 2d at 432; State v. Allen, 380 So. 2d at 32.
100. 365 So. 2d 1361 (La. 1978).
101. 362 So. 2d 1071 (La. 1978).
102. Id.
103. Id. at 1076.
104. Id. at 1077. Subsequently, defendants successfully relied upon this approach in California and Massachusetts. The highest courts of both states found violations of the defendant's state constitutional right to a jury composed of a representative cross section of the community. See notes 47-52 & 87-89 supra and accompanying text for a discussion of the approach.
105. 362 So. 2d at 1077.
Judge Dennis concurred in the Kelly result but felt that the defendant might have been successful had he made a timely objection at trial to the prosecutor's discriminatory use of peremptories. Judge Dennis suggested that such action on the part of the prosecutor was in violation of article I, section 3 of the Louisiana Constitution. Subsequently, in State v. Eames, the defendant made timely objections to the prosecutor's exercise of peremptories to exclude all but one of the black veniremen. Judge Dennis, joined by two of his colleagues, renewed his discussion of the rights he felt were violated when the prosecutor used his peremptories in such a manner.

The Eames concurrence asserted that the Louisiana Constitution, in guaranteeing the right to equal protection and human dignity, absolutely forbids prosecutorial action that discriminates against a person on the basis of race or religion. This absolute prohibition under the Louisiana Constitution contrasts sharply with the Swain analysis of the equal protection clause of the United States Constitution, which would find no violation of equal protection by the exercise of peremptories in a single case to exclude members of a racial group. The concurring judges in Eames argued that the presumption of prosecutorial propriety set forth in Swain is unjustified if there is "substantial evidence [of] ... exclusion of jurors because of race." Thus, once it is shown that the prosecution has exercised "a disproportionate number of challenges against members of one race[,] ... a prima facie case of discrimination because of race has been established. . . ." At this point, as in the Wheeler and Soares analysis, the burden shifts to the prosecution to show that the challenges were exercised on the basis of individual characteristics apart from the group affiliation.

106. Id. at 1082.
107. Id. Article I, § 3 of the Louisiana Constitution sets forth the right to individual human dignity: "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. . . ." LA. CONST. art. I, § 3. See also Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 LA. L. REV. 1, 8 (1974).
108. 365 So. 2d at 1361.
109. Id. at 1365.
110. Id. at 1368-69.
111. See notes 33 & 34-36 supra and accompanying text.
112. 365 So. 2d at 1369.
113. Id. at 1370. See also text accompanying notes 132-35 infra.
114. See notes 72, 73 & 96 supra and accompanying text.
115. 365 So. 2d at 1370.
The essential distinction between the Louisiana standard advocated by Judge Dennis and that adopted in Massachusetts and California is in the scope of the protection afforded the defendant. The *Wheeler* and *Soares* courts expressed concern about, and fashioned a remedy to eliminate, the use of peremptory challenges by prosecutors on the basis of any cognizable group membership. The method advocated in the *Eames* concurrence extends only to the use of peremptories by prosecutors to eliminate members of racial groups from the jury.\(^\text{116}\) Nevertheless, the approach articulated in *Kelly* and *Eames* provides an important starting point for defendants interested in attacking prosecutorial abuse of peremptories. Although the right to equal protection discussed in these cases appears to extend "beyond the decisional law construing the Fourteenth Amendment to the United States Constitution,"\(^\text{117}\) it serves to highlight the importance of the right to equal protection and the need for federal protection of that right in the context of the jury challenge stage of trial proceedings.

VII. BEYOND STATE CONSTITUTIONS—
FASHIONING A FEDERAL REMEDY

Individual defendants in California, Louisiana, and Massachusetts may have an available state-created remedy for prosecutorial misuse of peremptory challenges; however, the broad prospect of continued abuse of peremptory challenges invites speculation as to how defendants may be provided with a constitutional avenue of protection that will surmount the obstacles created by *Swain*. In the *Eames* concurrence, Judge Dennis suggests an alternative.\(^\text{118}\) He argues that the *Swain* standard should become inapplicable when the prosecutor admits to using his peremptory challenges to exclude members of a racial or ethnic group without a legitimate specific bias justification.\(^\text{119}\) Once the prosecutor makes this admission, a prima facie case of violation of equal pro-

116. *Id.*
117. *Id.* at 1369.
118. *Id.* at 1372.
119. *Id.* But see State v. Washington, 375 So. 2d 1162 (La. 1979). The Louisiana Supreme Court found *Swain* applicable and its burden met where a single prosecutor testified at an evidentiary hearing that he had consistently excluded blacks from juries by the use of peremptory challenges "solely on the basis of race and without examination as to the individual's particular qualifications or predilections." *Id.* at 1164. Similarly, in United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), the district court stated that the prosecutor's motive is irrelevant unless there is a showing of systematic exclusion over time. *Id.* at 1067.
tection under the fourteenth amendment is established. Additionally, the prosecutor’s admission need not be a bold statement of purpose. When the prosecutor fails to provide a good faith justification for the challenged exercise of his peremptories against members of a racial group, an admission may be found. The burden would then shift to the government to show that the exercise of each peremptory challenge by the prosecutor was based upon permissible specific bias grounds.

It is rare, however, that a prosecutor will be called upon to admit in a judicial proceeding that his exercise of peremptory challenges against potential jurors was motivated by a discriminatory purpose. Rather, the prosecutor normally exercises his peremptories without comment as to the basis for the exclusion and without subsequent judicial inquiry. The prosecutor’s use of peremptory challenges should be presumed to be proper. Nevertheless, when a prosecutor’s exercise of peremptory challenges results in the exclusion of a disproportionate number of individuals of a single discrete group affiliation from service on a particular jury, a defendant may wish to challenge the prosecutor’s actions as discriminatory. Swain and its progeny indicate that a defendant must prove systematic exclusion of the group by prosecutors in the particular trial court system, over an extended period of time, in order to prevail. An alternative analysis, however, seems to be suggested by the United States Supreme Court’s discussions of invidious discrimination violative of the equal protection components of the fourteenth and fifth amendments.

In Washington v. Davis, the United States Supreme Court identified the central purpose of the equal protection clause as “the prevention of official conduct discriminating on the basis of race.” When a defendant believes that the prosecutor in his case

120. 365 So. 2d at 1372. At least one federal court has expressed concern that if a prosecutor were required to testify as to his motive for exercising his peremptories in a particular case against individuals of a particular racial group, the prosecutor might then be criminally liable under 18 U.S.C. § 243 (1976) for excluding a qualified citizen from jury service on account of race. United States v. Pearson, 448 F.2d 1207, 1216 (5th Cir. 1971).
121. 365 So. 2d at 1372.
122. See note 1 supra for a discussion of the characteristics of peremptory challenges, as well as a discussion of challenges for cause.
123. See text accompanying note 32 supra.
124. See text accompanying notes 34-39 supra.
126. Id. at 239.
has exercised peremptory challenges in a discriminatory manner, thereby excluding members of a particular racial group, the equal protection clause, consonant with its essential purpose, ought to be available to vindicate the defendant’s rights. The Supreme Court has stated that “the fact that a particular jury . . . does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause.” Rather, the Court has required a showing of purposeful discrimination.

Systematic exclusion should be but one method of proving purposeful discrimination. Additionally, when a defendant proves that the prosecutor’s actions had a disproportionate impact on jury composition, and he can point to additional factors concerning the selection of the jury that give rise to an inference of intentional discrimination, a violation of the equal protection clause should be established. In Davis, the Court pointed out that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts” including the fact that the official act had a disproportionate impact on one race. The Davis Court discussed juror selection cases at length and acknowledged that discriminatory impact “may, for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.” Although the Court was relying on cases concerning the exclusion of jurors from grand and petit juries by operation of jury selection systems, it is

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127. Id. See also text accompanying notes 79 & 80 supra.
128. Id. See also Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). In Arlington Heights, the Supreme Court stated that “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action . . . . But such cases are rare. Absent [such] a pattern, . . . impact alone is not determinative, and the Court must look to other evidence." Id. at 266. In a footnote, the Court noted that a “single invidiously discriminatory act . . . would not necessarily be immunized [from a challenge of discrimination] by the absence of such discrimination in the making of other comparable decisions.” Id. at n.14.
129. 426 U.S. at 242.
130. Id.
132. 426 U.S. at 242.
arguable that the same rationale should apply to the exclusion of jurors from the petit jury by the prosecutor's exercise of peremptory challenges. Thus, when the prosecutor's exercise of his peremptories results in the exclusion of all or nearly all individuals of a particular racial or ethnic group from the jury panel and the discriminatory impact is very difficult to explain on grounds unrelated to the discrete group affiliation, an unconstitutional exercise of the challenges might be found.

In its discussion of the jury selection cases, the Davis Court also indicated that a prima facie case of discriminatory purpose might be proven by the absence, or the severely disproportionate exclusion, of blacks from a particular jury, combined with nonneutral selection criteria or procedures. One such nonneutral factor, a defendant might argue, is the use of peremptory challenges to exclude all, or nearly all, individuals of a particular discrete group affiliation on general, rather than specific, bias grounds. The number of peremptory challenges the prosecutor used, the group affiliations of those excused, the proportionate exercise of challenges against group and nongroup members, the composition of the resultant panel, as well as the proportionate representation of group and nongroup members in the community at large might be relevant factors demonstrating the nonneutral character of a prosecutor's exercise of peremptory challenges in a particular case.

Once a defendant established a prima facie case of discriminatory purpose, the burden of proof would shift to the prosecutor to rebut the presumption of discriminatory action. The Supreme Court has suggested that the government might refute a presumption of discrimination "by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." The prosecutor might meet this burden by coming forward and identifying the specific bias reasons for excluding each of the group members, thereby demonstrating that it was not the common group affiliation that led to the exclusions and that the resulting jury panel was not purposefully disproportionate in its composition. If the prosecutor is unwilling or unable to identify specific

133. *Id.* at 241.
134. *Id.* For example, the Court pointed out that a prima facie case of discriminatory purpose was presented when the jury commissioners were not informed of eligible black jurors in *Hill v. Texas*, 316 U.S. 400 (1942), and blacks were absent from the particular jury. 426 U.S. at 241.
135. 426 U.S. at 241.
bias reasons for the exclusion of each of the individuals peremptorially challenged, then a violation of the equal protection clause may be established. Since the jury panel so selected would be the result of invidious discrimination by the prosecutor, it would appear proper to follow the suggestion of People v. Wheeler\textsuperscript{136} by beginning jury selection again.\textsuperscript{137}

The Massachusetts Supreme Judicial Court's opinion in Commonwealth v. Soares\textsuperscript{138} contains sufficient information about the composition of the jury venire, the exercise of peremptory challenges by the prosecutor, and the resulting jury panel\textsuperscript{139} to enable application of the equal protection analysis just suggested. In Soares two black defendants were charged with the murder of a white victim. The jury that tried and convicted the defendants included only one black member.\textsuperscript{140} The prosecutor had exercised forty-four peremptory challenges, excluding twelve of the thirteen blacks on the venire and thirty-two of the ninety-four whites on the venire.\textsuperscript{141} The court pointed out that "Through his use of these [peremptory] challenges, . . . [the prosecutor] excluded ninety-two percent of the available black jurors, and only thirty-four per cent of the available white jurors."\textsuperscript{142} The defendants in Soares might have argued that the prosecutor had used his peremptory challenges in order to purposefully exclude blacks from the jury. Further, the combination of the exclusion of almost all blacks from the jury and the use of the peremptory challenges in a nonneutral manner would constitute a violation of the equal protection clause. Once the defendants had set forth a prima facie case of discriminatory action by the prosecutor, the government would have the burden of proving that the prosecutor's exercise of his peremptories was based on permissible neutral criteria, rather than on the fact of group affiliation.\textsuperscript{143}

The utility of such an equal protection approach is unclear at present. Neither the United States Supreme Court nor state supreme courts have used this mode of analysis in determining the

\begin{itemize}
\item \textsuperscript{136} People v. Wheeler, 22 Cal. 3d at 258, 583 P.2d at 748, 148 Cal. Rptr. at 890.
\item \textsuperscript{137} See text accompanying note 74 supra.
\item \textsuperscript{138} 1979 Mass. Adv. Sh. at 593, 387 N.E.2d at 499.
\item \textsuperscript{139} See generally text accompanying notes 87-97 supra.
\item \textsuperscript{140} 1979 Mass. Adv. Sh. at 607-08, 387 N.E.2d at 508. See also note 89 supra.
\item \textsuperscript{141} 1979 Mass. Adv. Sh. at 608, 387 N.E.2d at 508.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 630, 387 N.E.2d at 517.
\end{itemize}
constitutionality of a prosecutor’s exercise of peremptory challenges. Nonetheless, this alternative may prove valuable in the future.

Another alternative for defendants is to continue to press for a reevaluation of the representative cross-section rule and its applicability to the actual jury panel. Although it is clear that the Court in Taylor rejected the mirror-image concept of petit jury composition,\footnote{144} the representative cross-section rule still may extend to the jury panel. The Supreme Court has never indicated that Duncan v. Louisiana\footnote{145} and Taylor cannot be so extended. If more state courts recognize the importance of the representative cross-section rule to jury composition at the final stage of jury selection, the Supreme Court might be willing to reevaluate and expand its holding in Taylor.

In addition to suggesting possible constitutional routes of challenge for defendants, it is important to recognize that legislative change may in fact be the only way to protect defendants nationwide from prosecutorial abuse of peremptory challenges. Two alternatives are worthy of consideration.

Some commentators have argued that the peremptory challenge should be abolished.\footnote{146} It is felt that the potential and actual discriminatory application and abuse is too great to permit the continued exercise of peremptories. This belief is supported by the current failure of the courts to provide sufficient protection for defendants in the criminal process from prosecutorial manipulation of jury panels. The desire and necessity for a fair trial by an impartial jury still could be insured through the random selection of the jury venire and the continued use of statutory excuses and challenges for cause. Nevertheless, given the underlying purposes of the peremptory challenge,\footnote{147} and its continued approval by the courts,\footnote{148} abolition seems unlikely at present.

A second legislative solution would be to eliminate the statutory grant of peremptory challenges to the prosecution while retaining the right for the defense.\footnote{149} Considering the historical de-

\footnote{144} See notes 78-80 supra and accompanying text.
\footnote{145} 391 U.S. 145 (1968).
\footnote{146} J. VAN DYKE, supra note 2, at 167-68. Brown, McGuire, & Winters, supra note 38, at 234-35.
\footnote{147} See notes 3 & 4 supra and accompanying text for Blackstone’s explanation of the underlying purposes.
\footnote{148} See notes 25-27 supra and accompanying text.
\footnote{149} J. VAN DYKE, supra note 2, at 167.
development of peremptory challenges,\textsuperscript{150} this approach may seem attractive. The prosecution was without the right during much of the time that our common law and statutory law were developing. The rationale for extending the right to the prosecution, to allow the elimination of potential jurors unfairly biased against acquittal, while valid, may not stand up to the increasing need for protection of the defendant's constitutionally protected right to a fair trial by an impartial jury.

VIII. Conclusion

The peremptory challenge has been recognized as an essential mechanism for assuring an impartial jury in a particular trial. The challenges also have been the subject of abuse by prosecutors who exercise their peremptories to exclude members of discrete groups from petit juries solely on the basis of that membership. This discriminatory use of peremptory challenges may produce a jury biased in favor of conviction. The prosecutor's actions arguably impinge on the defendant's rights to a fair trial by an impartial jury and to equal protection under the laws. Yet the future of the peremptory challenge and of the protection of the criminal defendant's rights remains uncertain.

In\textit{ Swain}, the United States Supreme Court established the presumption that prosecutors' peremptory challenges were exercised fairly so as to secure an impartial jury. To overcome this presumption, defendants are faced with an insurmountable burden of proof: defendants must show extensive, systematic, and complete exclusion of a particular racial or ethnic group from juries over an extended period of time. Inroads are being made into the\textit{ Swain} barrier, as evidenced by the opinions of a few state courts, yet the United States Supreme Court has essentially remained silent on this issue for fifteen years. It is unknown at present whether the United States Supreme Court or additional state courts will follow the examples of\textit{ Wheeler} and\textit{ Soares}. These two cases prohibit peremptory challenges on general bias grounds and place a limitation on their use, thus ending prosecutors' exclusion of discrete groups from particular jury panels in contravention of the right to a fair trial by an impartial jury. Further, the suggestion of an equal protection analysis has not been adopted by the courts in their evaluations of prosecutorial use of peremptory challenges.

\textsuperscript{150} See notes 9-24\textit{ supra} and accompanying text.
The potential for, and reality of, prosecutorial abuse of peremptory challenges makes it essential that the courts reevaluate their approaches to defendants' claims of prosecutorial abuse of peremptory challenges. Defendants in criminal trials should be afforded the protection effectively denied them under Swain.

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