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Peremptory Challenges in Transition

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I. Introduction

A defendant's right to a trial by an impartial jury is recognized as fundamental to the American scheme of justice.[1] The role peremptory challenges can play in the jury selection process to undermine that right is less recognized. Peremptory challenges are used to eliminate potential jurors in the final stage of selection of a jury panel.[2] In *Swain v. Alabama*,[3] the United States Supreme Court characterized the nature of a peremptory challenge[4] as "one exercised without a reason stated, without inquiry and without being subject to the court's control."[5] In *Swain*, the Court held that under the equal protection clause of the fourteenth amendment there was no constitutional impediment to the use of peremptory challenges by a prosecutor to exclude all blacks from a jury in a particular case.[6] The Court indi-

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1. *See generally* Duncan v. Louisiana, 391 U.S. 145, 151-58 (1968) (historical development of the sixth amendment guarantees).

2. There are three main stages in jury selection. First a master list of eligible jurors is compiled. Second the venire panel or pool from which the jury is selected is created. At this stage jurors are excused or disqualified by the judge on grounds of incompetency or undue hardship. The third stage is the challenge stage in which jurors are eliminated both for cause and peremptorily. The first and second stages relate to jurors' qualifications to serve in any case. The third stage relates to jurors' qualifications to serve in a particular case.

3. 380 U.S. 202 (1965).

4. There are two systems of peremptory challenges. One is the common law system which simply allows counsel to eliminate undesired jurors. The second is the struck jury system. Under this system, the entire venire is assembled and questioned. Then each side alternately strikes jurors until the required number remains. *Id.* at 216.

5. *Id.* at 220. Citing earlier cases, Justice White emphasized the difference between peremptory challenges and challenges for cause. "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Id. See also* CAL. PENAL CODE § 1069 (defining "peremptory challenge" as an objection to a juror for which no reason need be given, but upon which the court must exclude him); *id.* § 1071 (defining "challenge for cause" as an objection to a particular juror that is either general when the juror is disqualified from serving in any case or particular when he is disqualified from serving in the action on trial because he will not be impartial).

6. *Swain*, 380 U.S. at 222.

cated that, regardless of the circumstances, peremptory challenges would be subject to judicial scrutiny only if systematic exclusion of blacks could be shown in case after case.[7]

Swain established an almost insurmountable burden for overcoming the presumption that in any particular case the prosecution is using its peremptory challenges to obtain a fair and impartial jury.[8] In fact, only two defendants have successfully challenged misuse of peremptory challenges under the *Swain* rule.[9] During the nineteen years since *Swain*, systematic exclusion of potential jurors on the basis of group bias has come under increasing attack by both commentators[10] and judges.[11]

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7. *Id.* at 222-23.

8. Specifically, the Court stated:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor is therefore not subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.

Id. at 222.

9. In United States v. Childress, 715 F.2d 1313 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 744 (1984), the dismal record under the *Swain* rule was reviewed. The court found that defendants had been successful in only two cases, and that both cases had used the same statistics regarding a particular prosecutor in a Louisiana parish. *Id.* at 1316. *See* State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 375 So. 2d 1162 (La. 1979).

10. *See, e.g.*, Brown, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978) (arguing that grant of peremptory challenges to prosecutors should be rescinded unless courts can prevent abuse); Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966) (comparing *Swain* to the more "realistic" approach adopted by the Fifth Circuit); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and A Constitutional Analysis*, 81 MICH. L. REV. (1982) (focusing on the consequences of *Swain* in creating juries significantly more prone to convict in captial cases); Note, *Peremptory Challenge — Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967) (arguing *Swain* set an insurmountable burden of proof for the defendant); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977) (favoring extension of *Taylor* representative cross-section requirement to peremptory challenge stage); 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) (case study showing difficulty of meeting *Swain* burden of proof); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966) (arguing *Swain* gives greater deference to peremptory challenges than to constitutional considerations); Recent Development, *Racial Discrimination in Jury Selection*, 41 ALB. L. REV. 623 (1977) (favoring extension of *Taylor* cross-sectional requirement).

11. *See, e.g.*, McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983) (Nickerson, J.);

These critics argue that *Swain* is in conflict with the sixth amendment[12] and must be modified or overruled. California, Massachusetts, and most recently Florida, have examined the *Swain* rule and have established different standards for the use of peremptory challenges.[13] These states now permit a defendant to question the prosecution's use of peremptory challenges in an individual case rather than requiring a showing of systematic exclusion in case after case. Even more significant, some justices of the United States Supreme Court are indicating a willingness to reexamine the *Swain* rule while other justices are encouraging more state experimentation before the issue is addressed by the Court.[14]

People v. Payne, 99 Ill. 2d 135, 155, 457 N.E.2d 1202, 1212 (1983) (Simon, J., dissenting); People v. Gosberry, 449 N.E.2d 815, 816 (Ill. 1983) (Simon, J., dissenting); State v. Eames, 365 So. 2d 1361, 1370-72 (La. 1978) (Dennis, J., concurring); People v. McCray, 57 N.Y.2d 542, 551, 443 N.E.2d 915, 920, 457 N.Y.S.2d 441, 446 (1982) (Meyer, J., dissenting); *id.* at 556, 443 N.E.2d at 923, 457 N.Y.S.2d at 449 (Fuchsberg, J., dissenting); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981); Commonwealth v. Martin, 461 Pa. 289, 336 A.2d 290, 295 (1975) (Nix, J., dissenting). *See also infra* notes 75-79 and accompanying text.

12. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an *impartial* jury." U.S. CONST. amend. VI (emphasis added).

13. Although basing their decisions on state constitutional grounds, California and Massachusetts have effectively rejected *Swain*. *See* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499 (1978), *cert. denied*, 444 U.S. 881 (1979). For further discussion, see *infra* notes 53-68 and accompanying text. In September, 1984 the Florida Supreme Court joined Massachusetts and California in ruling an alternative to *Swain* was needed to prevent peremptory challenges from being used solely as a scalpel to excise a distinct racial group. The court restricted its holding to racial bias, leaving consideration of other distinctive groups to be determined as those cases arise. State v. Neil, 53 U.S.L.W. 2200 (Fla. Sept. 27, 1984) (No. 63-899). The only other state that has endorsed any modification of *Swain* is New Mexico. In New Mexico, an appellate court applied both the *Swain* and the *Wheeler/Soares* test but did not find the defendant's burden satisfied under either standard. *See* State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1981). *See also* State v. Davis, 99 N.M. 522, 660 P.2d 612, *cert. denied*, 99 N.M. 578, 661 P.2d 478 (1983).

14. *See* McCray v. New York, 103 S. Ct. 2438 (1983) (mem.), *denying cert. to* People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982); State v. Perry, 420 So. 2d 139 (La. 1982); People v. Miller, 104 Ill. App. 3d 1205, 437 N.E.2d 945 (1982). Justice Stevens, joined by Justices Blackmun and Powell, invited the states "to serve as laboratories in which the issue receives further study before it is addressed by this Court." *Id.* at 2439.

Justices Marshall and Brennan urged the Court to grant certiorari now to reexamine the *Swain* rule, or to determine whether the sixth and fourteenth amendments prohibit

The *Swain* rule should be modified because it insulates invidious discrimination from review and works to defeat the goal of providing an impartial jury. If individual states choose to experiment with peremptory challenges, however, they must face the procedural and substantive problems involved in any alteration of the *Swain* rule. These problems must be satisfactorily resolved if new standards are to work fairly and effectively.

This Comment examines the problems involved in modifying the *Swain* rule. Part II briefly examines the historical development of peremptory challenges, the developments under the sixth amendment, the California and Massachusetts tests, and the recent developments in the Supreme Court. Part III analyzes the emerging case law in California and Massachusetts, the two states that have been operating under the new test for several years. The Comment concludes that these state standards are flexible and workable, and most important, that they better ensure that discriminatory abuse does not go unchecked.

II. Background

A. *Evolution of Peremptory Challenges*

Peremptory challenges have their roots in English common law and thus have "very old credentials."[15] The use of peremptory challenges, however, has been neither consistent nor popular, particularly when challenges by prosecutors are involved. As a result, the system has been subject to debate and modification since 1305.[16]

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the states from excluding jurors on the basis of race. *Id.* at 2441-43 (Marshall, J., dissenting from denial of cert.). Justice Marshall reiterated his position in October 1983, and again in May and June of 1984. *See* Gilliard v. Mississippi, 104 S. Ct. 40, 41 (1983) (Marshall, J., dissenting from denial of cert.); Williams v. Illinois, 104 S.Ct. 2364, 2366 (1984) (Marshall, J., dissenting from denial of cert.); Harris v. Texas, 104 S. Ct. 3556, 3557 (1984) (Marshall, J., dissenting from denial of cert.). For a discussion of *McCray*, see *infra* notes 70-79 and accompanying text.

15. Swain v. Alabama, 380 U.S. 202, 212 (1965).

16. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 147-51 (1977). In the earliest jury trials for felonies, the Crown had an unlimited number of peremptory challenges while a defendant had 35. *See* L. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY 56 (1973). In 1305, the Crown's unlimited right was abolished under a statute requiring cause to be given for the exclusion of jurors. 33 Edw. 4 (1305). Parliament had decided that a jury biased toward the prosecution was not impartial and "was obnoxious to their idea of justice." J. VAN DYKE, *supra*, at 147. The statute was undermined, how-

At common law the peremptory challenge was recognized as a device to protect the defendant. In his Commentaries, Blackstone called the peremptory challenge "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[17] The colonists brought the English jury tradition, including the defendant's right to exercise peremptory challenges, with them when they came to America.[18] The use of peremptory challenges in England subsequently declined, and today it is rarely used by either the prosecution or the defense.[19]

In contrast to the development of peremptory challenges in England, peremptory challenges remain widely used in the United States.[20] Congress provided peremptory challenges for defendants in federal courts in the Act of 1790.[21] The use of peremptory challenges by the prosecution, however, remained "more controversial, and substantial popular protest was raised against it."[22] Until 1856, the federal courts allowed challenges by a prosecutor, but in that year the Supreme Court held that the Act of 1790, which afforded a defendant a right of challenge, did not include the government's right to request potential jurors to

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ever, by a judge-made rule that the Crown was permitted to ask potential jurors to "stand aside" until the panel was exhausted. There was an assumption that cause existed whenever a juror was asked to stand aside. *See* VAN DYKE, *supra*, at 147-48.

17. 4 W. BLACKSTONE, COMMENTARIES *353, *quoted with approval in* Lewis v. United States, 146 U.S. 370, 376 (1892). There were two reasons for the use of peremptory challenges. First, it was felt that a defendant on trial for his life should be able to have a "good opinion of his jury" unfettered by any lingering doubts about possible prejudice toward him, even if no concrete reason could be stated for this doubt. Second, there was a concern that, simply from the process of asking probing questions during the voir dire, some resentment might arise toward the defendant. *Id.*

18. Defendants in Virginia, for example, were allowed 20 peremptory challenges under a 1734 Virginia law, but the prosecutor was not permitted any challenges without showing good cause. Hyman & Tarrant, *Aspects of American Trial Jury History*, in THE JURY SYSTEM IN AMERICA 27 (R.J. Simon ed. 1975).

19. In England, if jurors are to be challenged, it must be before they are sworn. Challenges are infrequently used because barristers lack information on which to base a challenge, and because custom is strongly against challenge. L. MOORE, *supra* note 16, at 134. Moore also quotes an experienced barrister as saying, "In England, the trial begins when the jury is picked; in the United States, the trial is over when the jury is picked." *Id.*

20. *See Swain*, 380 U.S. at 218.

21. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119 (codified as amended at 28 U.S.C. § 1870 (1982)). *See Swain*, 380 U.S. at 214.

22. J. VAN DYKE, *supra* note 16, at 148.

"stand aside."[23] Nine years later, Congress granted federal prosecutors five peremptory challenges; defendants were permitted twenty challenges in capital and treason cases.[24] In other cases, the prosecution was allowed two challenges and the defense was allowed ten.[25]

Developments in the states paralleled the course in the federal system. The states enacted statutes that granted rights corresponding to the rights defendants had in England.[26] During the nineteenth century, the states also passed statutes allowing the prosecution to exercise peremptory challenges, although these statutes generally limited the prosecution's number of challenges to one-half the number permitted the defendant.[27] The fears of prosecutorial abuse, so prevalent during the Revolutionary period, gradually yielded to an acceptance of the idea that the states also had an interest in achieving an impartial jury.[28] Today, a majority of the states authorize an equal number of challenges for both prosecutors and defendants. Challenges are also typically allowed in civil cases.[29]

B. Swain v. Alabama — *Insulating the Misuse of Peremptory Challenges from Constitutional Attack*

Granting prosecutors an equal number of peremptory challenges created a problem for black defendants. Prosecutors could use peremptory challenges to systematically eliminate entire races or other distinct groups from the jury. This practice, which was widespread in the South, led to a major attack on

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23. United States v. Shackleford, 59 U.S. (18 How.) 588 (1856). For an explanation of the government's right to stand aside, see J. VAN DYKE, *supra* note 16, at 147-48.

24. *See Swain*, 380 U.S. at 214-15.

25. *Id.*

26. *Id.* at 215.

27. *Id.* at 216.

28. J. VAN DYKE, *supra* note 16, at 150. In New York, for example, defendants were allowed 20 peremptory challenges by statute in 1828, but the state had no challenges until 1858 when they were granted five. It was not until 1873 that the same number was allowed for each side. People v. Thompson, 79 A.D.2d 87, 98-99, 435 N.Y.S.2d 739, 748 (1981).

29. J. VAN DYKE, *supra* note 16, at 282-83 (chart showing breakdown of peremptory challenges by state for criminal and civil cases). Peremptory challenges, however, have never been constitutionally guaranteed. *See Swain*, 380 U.S. at 244.

peremptory challenges in *Swain v. Alabama*.[30] In *Swain*, the prosecution used six challenges to exclude all of the black veniremen.[31] Furthermore, the defendant argued that although an average of six or seven blacks appeared on jury lists, no black person had actually sat on a jury in a criminal case in Alabama for twenty-four years.[32] The Court held that no defendant may challenge the removal of Negroes from any particular panel.[33] In any given case, there is a presumption that the prosecutor is using his challenges to achieve a fair and impartial jury.[34] This presumption can be overcome only if, in case after case, it is demonstrated that the prosecution is eliminating venire members on the basis of race.[35]

Justices Goldberg and Douglas, and Chief Justice Warren dissented, arguing that this rule would reverse constitutional priorities by giving greater protection to the peremptory challenge than to the right to an impartial jury.[36] Justice Goldberg stated that the Court was, in effect, holding that "[t]here is nothing in the Constitution of the United States which requires the State to grant trial by an impartial jury so long as the inviolability of the peremptory challenge is secured."[37] Justice Goldberg's warning became a reality as defendants learned that the *Swain* rule presented an almost insurmountable burden.[38]

C. Taylor v. Louisiana — *Expanding Sixth Amendment Rights*

The petitioners in *Swain* claimed a denial of equal protection under the fourteenth amendment. In other cases, federal courts were developing the contours of the sixth amendment

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30. 380 U.S. 202 (1965). For almost a century after the Civil War, blacks were excluded from jury lists in the South. After years of litigation, they were included but then eliminated by the peremptory challenges. *See* J. VAN DYKE, *supra* note 16, at 150.

31. *Swain*, 380 U.S. at 205.

32. *Id.*

33. *Id.* at 222.

34. *Id.*

35. *Swain*, 380 U.S. at 222-23. The defendant's record in *Swain*, alleging that no Negro had sat on a jury from 1950 to 1964, was found inadequate because it did not prove whether the prosecutor alone was responsible. *Id.* at 224.

36. *Id.* at 244 (Goldberg, J., dissenting).

37. *Id.*

38. *See supra* note 9 and accompanying text.

guarantee of trial by an impartial jury. These cases held that an essential prerequisite to an impartial jury was that it be drawn from a "representative cross-section of the community."[39] Then, in 1968, the Supreme Court held in *Duncan v. Louisiana*[40] that the sixth amendment's provision for a jury trial was binding on the states through the fourteenth amendment.[41] This holding set the stage for the Supreme Court's opinion in *Taylor v. Louisiana*,[42] which applied the representative cross-section requirement to the states.[43]

Taylor dealt with the exclusion of women from the venire or panel from which a petit jury was chosen in Louisiana.[44] The Court found the representative cross-section requirement to be fundamental to the jury trial guaranteed by the sixth amendment.[45] In discussing the importance of a diffused impartiality on the jury, the Court noted that the effect of excluding "any large and identifiable segment of the community . . . is to re-

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39. *See, e.g.*, Fay v. New York, 332 U.S. 261 (1947); Thiel v. Southern Pac. R.R., 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1942); People v. Smith, 311 U.S. 128 (1940). For a discussion of these cases, see J. VAN DYKE, *supra* note 16, at 54-63. Judge Mosk, who wrote the California opinion in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1965), surveyed these decisions and found that

> [t]he rationale of these decisions, often unstated, is that in 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; that 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; and hence that 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.

Id. at 266-67, 583 P.2d at 754-55, 148 Cal. Rptr. at 896 (footnote omitted).

40. 391 U.S. 145 (1968).

41. *Id.* at 149. In *Duncan*, the Court stated that

> because we believe that a trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in federal court — would come within the Sixth Amendment's Guarantee.

Id.

42. 419 U.S. 522 (1975).

43. *Id.* at 530.

44. *Id.* at 523. The Louisiana Constitution and Code of Criminal Procedure both provided that a woman would not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. *Id.* (citing LA. CONST. art. VII, § 41; LA. CODE CRIM. PROC. ANN. art. 402 (West 1967)).

45. *Id.* at 530.

move from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[46]

Significantly, in *Taylor*, the Court confined its holding to the composition of the venire and it did not extend its holding to include the challenge stage of the jury selection process.[47] Furthermore, the Court repeated its determination that the actual jury selected need not represent all groups in the community.[48]

D. *The California and Massachusetts Tests — Peremptory Challenges on a Case by Case Basis*

In *Taylor*, the Supreme Court safeguarded the right to a representative jury during the selection of venire members. Nevertheless, these safeguards have been criticized as insufficient protection. As Justice Marshall has stated: "The right to a jury drawn from a fair cross-section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury."[49] Moreover, the desired interaction of diverse members of the community takes place in the jury room, not in the venire.[50] Thus, commentators and judges have advocated either expansion of the *Taylor* safeguards to cover the peremptory stage of jury selection or modification of *Swain*.[51] The state supreme courts of California and Massachusetts have chosen to reject the almost insurmountable *Swain* test, relying instead on the *Taylor* cross-sectional requirement and their own state constitutions to for-

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46. *Id.* at 532 n.12 (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)).

47. *Id.* at 538. For a discussion of the stages of jury selection, see *supra* note 2.

48. The Court asserted:

> We impose 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, . . . but the . . . venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Id. at 538.

49. McCray v. New York, 103 S. Ct. 2438, 2442 (1983) (Marshall, J., dissenting from denial of cert.).

50. *Id.*

51. *See* sources cited *supra* notes 10-11.

mulate a case by case approach.[52]

In *People v. Wheeler*,[53] the California Supreme Court announced a test that limits the unrestricted use of peremptory challenges. In *Wheeler*, the prosecutor had used his peremptory challenges to exclude all blacks from the jury.[54] This new test begins with a rebuttable presumption that peremptory challenges are being constitutionally exercised.[55] Writing for the court, Judge Mosk distinguished the many valid uses of peremptory challenges for specific bias[56] from the situation in which potential jurors are eliminated merely because they are members of an identifiable group distinguishable on the basis of racial, religious, ethnic, or other similar grounds.[57] Thus, under normal circumstances, there would be no change in the traditional procedure. If, however, a party believes the challenges are being used on the basis of group bias alone, he must then raise the

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52. *See* People v. Wheeler, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978); Commonwealth v. Soares, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979). Florida has also now rejected *Swain*. *See supra* note 13.

53. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

54. *Id.* at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893.

55. *Id.* at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904.

56. "Specific bias" was defined by Judge Mosk as a bias concerning the particular case on trial or the parties or witnesses involved. For example, a particular juror might be excused because he was exposed to pretrial publicity. *Id.* at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

57. *Id.* Judge Mosk also indicated that, although no reason need be given for a peremptory challenge, it does not follow that no reason need exist. On the contrary, he maintained that, given the limited number of peremptory challenges available, it is extremely unlikely that they would be exercised frivolously. *Id.* Therefore, the presumption exists that the challenge is used to remove a juror who may consciously or unconsciously be biased against a party. This presumed bias may be based on the fact that the juror has a record of prior arrests, or has complained of police harassment, or has clothes that suggest an unconventional lifestyle. The prosecutor may merely mistrust a juror's objectivity because of "bare looks." *Id.* at 275, 583 P.2d at 760-61, 148 Cal. Rptr. at 902 (quoting 4 W. BLACKSTONE, COMMENTARIES *353). These kinds of reasons cannot be established by normal methods of proof and may cause embarrassment to the challenged vernireman. Therefore, the law does not require that a reason be given. These uses of the peremptory challenge all share a common element: "[T]hey seek to eliminate a specific bias as we have defined that term herein — a bias relating to the particular case on trial or the parties or witnesses thereto." *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. Judge Mosk indicated that these reasons also are neutral with respect to the representation on the jury and do not, therefore, fundamentally alter the population mix on the jury. All members of society can have these biases whether black or white, rich or poor, young or old. *Id.*

point in a timely fashion and establish a prima facie case.[58] To establish a prima facie case, the court indicated that a party suspecting bias should do the following:

> First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.[59]

Judge Mosk rejected mathematical or statistical methods[60] to show systematic exclusion, because he felt such methods would be of little help during voir dire when the composition of the jury is constantly changing.[61] He did, however, indicate other factors that might be significant to prove discrimination because of group association. These factors include a showing that: (1) the party had struck most or all of the members of an identified group, or used a disproportionate number of his peremptory challenges against the group; (2) the struck jurors were in all other respects a heterogeneous group; (3) the voir dire was only desultory or no questions were asked at all; and (4) the defendant was a member of the excluded group although the victim was a member of the majority.[62]

In *Commonwealth v. Soares*,[63] the Supreme Judicial Court of Massachusetts followed *Wheeler* closely. The court's analysis also begins with the rebuttable presumption that peremptory challenges are being properly used.[64] The presumption is rebutted "on a showing that (1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership."[65]

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58. *Id.* at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905.
59. *Id.*
60. *Id.* at 279, 583 P.2d at 763, 148 Cal. Rptr. at 904.
61. *Id.* at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905.
62. *Id.*
63. 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).
64. *Id.* at 489, 387 N.E.2d at 516-17.
65. *Id.* at 489-90, 387 N.E.2d at 517.

At this point, both *Wheeler* and *Soares* require the trial judge to decide if a prima facie case has been established.[66] Once a prima facie case is established, the burden shifts to the other party to show that the peremptory challenges were not made on the basis of group bias alone.[67] Neither state requires that the reason for a peremptory challenge rise to the level of a challenge for cause, but the peremptory challenge must be based upon grounds reasonably relevant to the particular case at trial.[68]

E. *United States Supreme Court Invites Change*

The Supreme Court has thus far refused to review the *Swain* decision. For example, the Court denied certiorari to *McCray v. New York*,[69] a case alleging abuse of peremptory challenges. A majority of five justices, however, did agree that exclusion of minority jurors through peremptory challenges was an important constitutional issue.[70] In spite of this acknowledgement, Justice Stevens, joined by Justices Blackmun and Powell, chose to delay a decision and instead invited the state and federal courts to consider change on their own.[71] Justice Stevens maintained that this approach would enable the Supreme Court to address the issue more effectively at a later date.[72] He noted, without comment, the different standard adopted by California and Massachusetts, indicating only that those standards could not be reviewed by the Supreme Court because they were based upon state constitutional grounds.[73]

Justice Marshall, joined by Justice Brennan, strongly dissented in *McCray*.[74] In addition, Marshall has spoken out in

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66. *Wheeler*, 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 490, 387 N.E.2d at 517.

67. *Wheeler*, 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 517.

68. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 143 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 517.

69. 103 S. Ct. 2438 (1983) (mem.) *denying cert. to* People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982); State v. Perry, 420 So. 2d 139 (La. 1982); People v. Miller, 104 Ill. App. 3d 1205, 437 N.E.2d 945 (1982).

70. The five are Justices Brennan, Marshall, Blackman, Powell, and Stevens.

71. *Id.* at 2438-39 (Stevens, J.).

72. *Id.*

73. *Id.*

74. *Id.* at 2439-41 (Marshall, J., dissenting from denial of cert.).

three subsequent dissents in the past year.[75] He has termed the misuse of peremptory challenges "one of the gravest and most persistent problems facing the American judiciary today."[76] In *McCray*, Justice Marshall urged the Court to grant certiorari to reexamine *Swain* in light of *Taylor* and the expansion of sixth amendment principles.[77] Justice Marshall stated that

> [t]he systematic exclusion of prospective jurors because of their race is . . . unconstitutional at any stage of the jury selection process. There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so that they can be struck because of their race by a prosecutor's use of peremptory challenges.[78]

In sum, *McCray* indicates an increased willingness on the

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75. In Gilliard v. Mississippi, 104 S. Ct. 40, 40 (1983) (Marshall, J., dissenting from denial of cert.), for example, he argued that the other justices were shrinking from their constitutional duty, and observed that while the Supreme Court is awaiting developments in state courts, black defendants are facing death penalties from all-white juries. He also argued that the states have not and will not deviate from the *Swain* rule until the Supreme Court addresses the issue. *See also* Williams v. Illinois, 104 S. Ct. 2364, 2364-66 (Marshall, J., dissenting from denial of cert.), *reh'g denied*, 52 U.S.L.W. 3918 (1984); Harris v. Texas, 104 S. Ct. 3556, 3556-58 (1984) (Marshall, J., dissenting from denial of cert.).

76. *Williams*, 104 S. Ct. at 2366 (Marshall, J., dissenting from denial of cert.).

77. *McCray*, 103 S. Ct. at 2441 (Marshall, J., dissenting from denial of cert.).

78. *Id.* at 2442. The *McCray* facts may be reviewed again by the Supreme Court in the near future. After the denial of certiorari, McCray filed a petition for a writ of habeus corpus in federal district court. McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983). When Judge Nickerson heard the case, he sent "shock waves into the criminal justice system" with his decision to accept Justice Steven's invitation and to modify the *Swain* rule. *See* Cohn & Badillo, *The McCray Case — 2 Views On Peremptory Challenges*, N.Y.L.J., Jan. 20, 1984, at 1, col. 4.

Judge Nickerson admitted that he was taking a most unusual step in reexamining a Supreme Court case squarely on point. McCray v. Abrams, 576 F. Supp. 1244, 1246 (E.D.N.Y. 1983). He also admitted that the Court's invitation to reconsider *Swain* may not have been intended to encourage a collateral attack on the very same conviction. He noted, however, that Justice Stevens had pointed to the lack of conflict in the federal courts as a reason for denying certiorari. *Id.* Judge Nickerson's decision has created a conflict. Judge Nickerson concluded that *Swain* should be modified. *Id.* at 1249. He maintained that the validity of *Swain's* assumptions regarding federally guaranteed rights had been altered by the sixth amendment cases. *Id.* at 1247. Although agreeing that a defendant is not entitled to a jury of any particular composition, he argued that peremptory challenges should not be permitted "solely on the basis of an assumption of racial affinity in order to produce an all-white jury." *Id.* at 1248. He found this unconstitutional under the equal protection clause as well as under the sixth amendment because "no compelling governmental purpose justifies a prosecutor's use of peremptory challenges solely on the basis of race." *Id.*

part of the Supreme Court to reconsider the *Swain* ban on challenges to the misuse of peremptory challenges in individual cases. The Supreme Court will be closely watching developments at the state level for guidance. The success of state courts in addressing the substantive and procedural problems which arise will likely determine the law governing peremptory challenges.

III. Analysis

A majority of the United States Supreme Court has recognized that the arguments against *Swain* raise an important constitutional issue: whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from a jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group.[79] The Court should not postpone addressing this constitutional issue until the states provide further guidance because sufficient theoretical and practical information is available now. The theoretical arguments favoring extension of the representative cross-section rule to the peremptory challenge area have been analyzed by numerous commentators and judges and need no further discussion here.[80]

The practical considerations can be evaluated by examining the emerging case law in California and Massachusetts. A review of these cases rebuts the arguments of critics who believe that any deviation from *Swain* will mean, at worst, the end of all peremptory challenges, or at best, an ambiguous, impractical, and easily subverted test. Both California and Massachusetts begin with the presumption that peremptory challenges are being properly used.[81] To object successfully to the misuse of peremptory challenges in a single case, the objecting party must establish a prima facie case of peremptory abuse. If a prima facie case is established, an opportunity is then afforded the peremptory challenger to rebut the prima facie case.

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79. McCray v. New York, 103 S.Ct. 2438 (1983).

80. *See* sources cited *supra* notes 10-11.

81. *See supra* notes 55-58 and accompanying text.

A. *Establishing a Prima Facie Case*

The most common concern expressed by critics of change is that abandoning *Swain* will mean the end of peremptory challenges, that is, that all challenges will become challenges for cause.[82] In order to avoid this problem, trial judges must use explicit criteria at each step in the decision making process. These criteria must protect the valid exercise of peremptory challenges while guarding against discriminatory abuse. The first step in this process is to decide what is required to establish a prima facie case of abuse. California and Massachusetts have adopted workable requirements.

1. *Establishing a Complete and Accurate Record*

Wheeler requires that the defendant make a complete record of all significant information about the case.[83] If the record is insufficient, the court cannot draw an accurate conclusion, and any subsequent allegation of abuse will fail.[84] *Soares* does not explicitly set out this requirement, but Massachusetts courts have interpreted *Soares* to include a complete record requirement.[85] Thus, a defendant who hopes to successfully challenge

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82. *See, e.g.*, Younger, *Unlawful Peremptory Challenges*, 7 LITIGATION 22, 56 (1980); Cohn & Badillo, *supra* note 78. (Cohn arguing peremptories would require an oath of purity of commitment to furthering the quota system or affirmative action, at a minimum).

83. People v. Wheeler, 22 Cal. 3d 258, 280, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905 (1978).

84. The importance of this step was seen in People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1982), a California appellate level decision. Two challenges were exercised against the only two black members of the venire but the record failed to show any other information. The court found this bare showing insufficient to establish a prima facie case and so the challenges were not allowed. *Id.* at 536-37, 179 Cal. Rptr. at 897.

85. *See* Commonwealth v. Benbow, 16 Mass. App. Ct. 970, 970, 452 N.E.2d 1164, 1166, *appeal denied*, 390 Mass. 1103, 454 N.E.2d 1276 (1983). The court stated that a bare showing of 10 blacks on the venire, prosecutorial challenge of two with four blacks seated was an inadequate foundation. *Id.*, 452 N.E.2d at 1166. The recent Massachusetts Supreme Court ruling in Commonwealth v. Bourgeois, 391 Mass. 869, 465 N.E.2d 1180 (1984), reinforces this view. In *Bourgeois*, the defendants alleged abuse based solely on the surnames of the struck jurors and witnesses. The defendants did not object or create a record of prosecutorial abuse of peremptory challenges. Because there were no objections, the prosecution was denied an opportunity to explain the rationale for the challenges. Thus, the court ruled that "[a] record in which a party has not had an opportunity to explain the use of peremptory challenges is inadequate to raise a *Soares*

the prosecutor has an obligation to establish which cognizable group is allegedly being systematically struck and to note all other pertinent data. In this way, the trial judge can make an informed decision, and an appellate court will have an adequate record for appellate review.

The defendant must also object in a timely fashion.[86] A recent California decision has interpreted "in a timely fashion" to mean as early as possible so that all parties are put on notice regarding which subsequent challenges may give rise to a motion alleging systematic exclusion.[87] The requirements of a complete record and an early motion promote efficient and economic administration of justice by permitting the court, if it finds discrimination, to dismiss the panel and begin again at an early stage. This approach helps repudiate the concern that objection to peremptory challenges will drastically lengthen and complicate trials. Finally, early notice and, if necessary, dismissal of the panel, help the court to achieve the most fair and correct result at both the trial and the appellate levels.[88] California applied this approach successfully in the recent case of *People v. Walker*.[89] The defendant made his motion early, and the court and prosecution took careful notes. The result was an accurate record for an appellate court to review.[90]

2. *Limiting the Cognizable Groups*

The second step in establishing a prima facie case requires a showing that the persons excluded are members of a cognizable group within the meaning of the representative cross-sectional

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violation." *Id.*, 465 N.E.2d at 1186-87.

86. *See Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

87. People v. Ortega, 156 Cal. App. 3d 63, 66, 202 Cal. Rptr. 657, 661-62 (1984). Early notice facilitates the moving party in preparing the best prima facie case, helps the prosecution in making the best defense possible, and alerts the court so it can make an intelligent ruling. *Id.*, 202 Cal. Rptr. at 661.

88. *Id.*

89. No. AO 18763 (Cal. Ct. App. June 29, 1984) (available Aug. 15, 1984, on LEXIS, States library, Cal file).

90. *Id.* Because there was a complete record, the reviewing court was able to determine that the trial judge understood and discharged his obligation to evaluate the prosecutor's challenges and that substantial evidence supported the court's determination that the prosecutor sustained the burden of justification. *Id.*

rule.[91] A proper test must include groups that need protection without unduly expanding the list of cognizable groups. Although critics have argued that defendants will quickly seek to expand the list of cognizable groups,[92] there is no reason to assume that the definition of cognizable groups should be any broader in the peremptory challenge area than it is in other areas. In fact, neither California nor Massachusetts has shown any inclination to expand the groups in this area beyond those groups traditionally recognized.

The Massachusetts Supreme Court in *Soares* limited the definition to groups included in the Massachusetts Equal Rights Amendment.[93] Thus, the court held that group affiliation based on sex, race, color, creed, or national origin may not form the basis for jury exclusion.[94] Under this rule, age is not a cognizable group. Thus, in *Commonwealth v. Wood*,[95] when the Massachusetts Supreme Court recently determined that a trial court had disallowed peremptory challenges of elderly women based on age rather than sex, it was reversible error and the court ordered a new trial.[96]

The California Supreme Court found it necessary to set guidelines for the "cognizable groups" it had recognized in *Wheeler*. Because *Wheeler* involved the exclusion of black persons, the court did not define groups in that case.[97] In *Rubio v. Superior Court of San Joaquin City*,[98] the California court stated that two requirements must be met in order to qualify a group as "cognizable" for purposes of the cross-section rule. The requirements are:

> First, its members must share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group . . . . The party . . . must also show that no other members of the community are

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91. *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905 (1978); Commonwealth v. Soares, 377 Mass. 461, 490, 387 N.E.2d 499, 517, *cert. denied*, 444 U.S. 881 (1979). *See supra* text accompanying notes 39-48.

92. *See, e.g.*, Cohn, *supra* note 78.

93. *Soares*, 377 Mass. at 488-89, 387 N.E.2d at 516. *See* MASS. CONST. art. I, § 106.

94. *Soares*, 377 Mass. at 488-89, 387 N.E.2d at 516.

95. 389 Mass. 552, 451 N.E.2d 714 (1983).

96. *Id.*, 451 N.E.2d at 721.

97. *Wheeler*, 22 Cal. 3d at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893.

98. 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

capable of adequately representing the perspective of the group assertedly excluded.[99]

There has been no deviation from these general requirements regarding cognizable groups in the peremptory challenge cases. In fact, successful *Wheeler* challenges have all dealt with blacks.[100] Thus, the critics' concern that the list of cognizable groups would be improperly expanded has not materialized.

3. *Distinguishing Challenges for Group Association from Challenges for Specific Bias*

The third step in establishing a prima facie case is to show a likelihood that the jurors are being challenged because of group association rather than because of any specific bias. Specific bias was defined by the *Wheeler* court as "a bias relating to the particular case or trial or the parties or witnesses thereto."[101] A specific bias cuts across all segments of society and so does not significantly skew the population mix of the venire in any one direction.[102] Group bias, on the other hand, exists when a prose-

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99. *Id.* at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737. *Rubio* rejected the claim that resident aliens were a cognizable group within the meaning of the representative cross-section rule. In the recent plurality decision of People v. Harris, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984), the court questioned, without deciding, the validity of the second part of the *Rubio* test. The court commented:

> The validity of the second part of the *Rubio* test is questionable, since the constitutional rule requiring a representative jury bars not only the exclusion of a group, but disproportionate reduction in its members; if some persons with a particular life experience are barred from the jury, others cannot properly represent the perspective of those excluded because the number of persons with that perspective will be disproportionately small.

People v. Harris, 36 Cal. 3d 36, 679 P.2d at 441 n.51, 201 Cal. Rptr. at 790 n.51.

100. *See* People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983); People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978); People v. Holley, 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983); People v. Fuller, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982); People v. Allen, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979). In People v. Estrada, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (1979), for example, the defendant argued that the group excluded was comprised of less educated, young adults, blue collar workers, and households with family incomes less than $15,000. *Id.* at 95, 155 Cal. Rptr. at 743. In refusing to recognize this group, the court stated that "*Rubio* supports our view that *Wheeler* did not relax the definition of cognizability with respect to groups that are not delineated by either race, sex, ethnicity or religion in such a manner as to require a different result in the case at bar." *Id.*

101. *Wheeler*, 22 Cal. at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

102. As the *Wheeler* court stated:

> [B]oth blacks and whites may have prior arrests, both rich and poor may have

cutor decides to exclude all blacks or all Catholics, for example, because of stereotyped attitudes about how these groups will think and react.[103]

In distinguishing challenges for group association from challenges for specific bias, it is vital to set a standard that is not easily circumvented. California and Massachusetts have avoided this problem by suggesting several factors that the trial judge can consider to make a decision.[104] The first of these factors is whether "most or all the members of the identified group" have been struck from the venire.[105]

In analyzing this factor, the cases involving systematic exclusion at the venire stage provide a comparison. In these cases the defendant must show that the representation of a particular group is not fair and reasonable in relation to the number of such persons in the community. These cases rely on numbers to establish a prima facie case. In *Duren v. Missouri*,[106] for example, the petitioner established that fifty-four percent of the adults in the community were women while only fourteen and one-half percent of the persons on the weekly venires were women.[107] The Supreme Court held that such an imbalance violated the representative cross-section requirement of *Taylor*.[108] Applying this approach to the peremptory challenge area, composition of the venire and the jury actually chosen is compared.

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been crime victims, both young and old may have relatives on the police force, both men and women may believe strongly in law and order, and members of any group whatever may alienate a party by bare looks and gestures.

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

103. *Id.*

104. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1978), *cert. denied*, 444 U.S. 881 (1979).

105. *Id.* In *Soares*, the court noted:

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 with little resistance, and the representative cross section requirement is not fulfilled.

Soares, 377 Mass. at 488 n.32, 387 N.E.2d at 516 n.32 (citing Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 281 n.213 (1968).

106. 439 U.S. 357 (1979).

107. *Id.* at 362.

108. *Id.* at 364-67.

In *Commonwealth v. Walker*,[109] the Supreme Court of Massachusetts seemed to take this approach in reviewing a case in which five out of seven blacks were eliminated from the venire. The court found that the exclusion of five out of seven blacks in *Walker* was a less compelling showing than the exclusion of twelve out of thirteen blacks in *Soares*.[110] Furthermore, the court noted that a higher percentage of blacks actually served on the jury than were in the original venire interviews.[111]

With peremptory challenges, however, reliance on numbers alone is not a sufficient basis upon which to make decisions. In case by case determinations, the courts cannot rely on the kind of statistical data that has been amassed in the venire composition area.[112] Recognizing this problem, *Wheeler* articulated additional factors that are relevant to an inquiry into peremptory misuse. These factors include: (1) whether the defendant is a member of the excluded group while the victim is a member of the minority; (2) whether the voir dire was desultory; and (3) whether the jurors in question share only one characteristic — their membership in the cognizable group — and that in all other respects they are as heterogeneous as the community as a whole.[113]

In the California case of *People v. Fuller*,[114] an appellate court examined these factors and held that the prosecution had misused its peremptory challenges.[115] The court emphasized, however, that no one factor was essential to this determination. Thus, it proceeded with its inquiry even though the defendant

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109. 379 Mass. 297, 397 N.E.2d 1105 (1979).

110. *Id.* at 301, 397 N.E.2d at 1108.

111. *Id.* In another case, a defendant claimed peremptory abuse when two blacks were challenged. The appellate court, however, found that three blacks did sit on the jury so the likelihood that the other two were kept off because of race was slight. *See* Commmonwealth v. Kelly, 10 Mass. App. Ct. 847, 406 N.E.2d 1327 (1980). *See also* Commonwealth v. Benbow, 16 Mass. App. Ct. 970, 452 N.E.2d 1164, *appeal denied*, 390 Mass. 1103, 454 N.E.2d 1276 (1983) (in which 10 blacks were on venire, the prosecutor challenged four, the defendant challenged two, and two, both women, were seated on the jury); Commonwealth v. Clark, 378 Mass. 392, 393 N.E.2d 296 (1979) (holding that excluding the only black did not constitute systematic exclusion).

112. *Wheeler*, 22 Cal. 3d at 278-80, 583 P.2d at 763, 148 Cal. Rptr. at 904-05. *See supra* text accompanying note 60.

113. *Id.* at 278-80, 583 P.2d at 764, 148 Cal. Rptr. at 905.

114. 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982).

115. *Id.* at 407-08, 186 Cal. Rptr. at 285.

and the victim were of the same race.[116] Nevertheless, the court found a significant racial overtone because the participants were all black, but the jury was all white.[117] The court also found that the voir dire was desultory, but emphasized that this factor was not essential.[118] The court indicated that the prosecutor should have asked more probing questions to elicit specific bias, because aside from race, the challenged jurors appeared as heterogeneous as the community as a whole.[119]

The dissenting judge argued that the majority was ignoring the rule that " 'when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.' "[120] Moreover, the dissent strongly disputed the majority's finding of group overtones and argued that the voir dire questioning of the three blacks was at least as extensive and probing as that of their white counterparts.[121] He maintained that this decision would lead to "a sort of inverse discrimination" in which a prosecutor would rarely exercise a peremptory challenge against a minority person, fearing that an appellate court would find an inference of group bias and declare a mistrial.[122]

Fuller was a difficult case to decide. The numbers were small and reasonable judges viewed the facts differently. The case illustrates that decisions under *Wheeler* and *Soares* are not always straightforward. Ambiguity alone, however, is an insufficient justification for retaining the "simpler" *Swain* test. *Fuller* also demonstrates the critical role of the trial judge, who must consider all of the factors, both tangible and intangible, in making a decision. The supreme courts of California and Massachusetts, however, have both expressed confidence in the trial judge's ability to make difficult determinations based on their experience and knowledge of local conditions and prosecutors.[123]

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116. Both the defendant and the victim were black.

117. 136 Cal. App. 3d at 419, 186 Cal. Rptr. at 293.

118. *Id.* at 419-20, 186 Cal. Rptr. at 293-94.

119. *Id.* at 420, 186 Cal. Rptr. at 294 (citing *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905).

120. *Id.* at 426, 186 Cal. Rptr. at 298 (Elkington, J., dissenting) (quoting Grainger v. Antoyan, 48 Cal. 2d 805, 807, 313 P.2d 848, 850 (1957)).

121. *Id.* at 428, 186 Cal. Rptr. at 299.

122. *Id.*

123. *Wheeler*, 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906; *Soares*, 377

The emerging case law in California and Massachusetts indicates that the *Wheeler/Soares* framework provides a workable approach for establishing a prima facie case of abuse on a case by case basis. The standard is high enough to prevent all peremptory challenges from becoming challenges for cause, while at the same time enabling an individual defendant to establish a prima facie case when the facts suggest peremptory abuse. The California and Massachusetts decisions permit defendants to allege abuse on a case by case basis — an approach that is preferable in light of the constitutional considerations.

B. *Rebutting the Prima Facie Case*

In addition to the difficult task of defining a prima facie case, there are problems that occur in setting guidelines for the successful rebuttal of a prima facie case. First, there is the problem of determining what constitutes a "sufficient" reason, because many reasons may actually disguise other motives based on group bias.[124] Second, there is the problem that judges may accept any explanation given, no matter how implausible. The California Supreme Court has shown its concern for these problems by stating that it "must be sensitive not only to the probability of disingenuousness on the part of the prosecution in its explanation of challenges, but also to the possibility of ingenuousness or alacrity on the part of the trial court in its acceptance of those explanations."[125] Both of these concerns address the issue of what explanations or other proof will rebut a prima facie case of discrimination.

Inevitably, a burden is once again placed upon the trial court judge, and it is essential that the judge reasonably and sincerely evaluate the explanations offered. *People v. Hall*[126] illus-

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Mass. at 490, 387 N.E.2d at 517.

124. Professor Younger states that prosecutors will quickly find their tongues and come up with sufficient explanations even though these explanations might disguise underlying purposes. *See* Younger, *supra* note 82, at 56.

125. People v. Clay, 153 Cal. App. 3d 433, 200 Cal. Rptr. 269, 279 (1984).

126. 139 Cal. App. 3d 829, 189 Cal. Rptr. 231 (1983). The appellant in this case argued that race was the only common characteristic shared by the struck jurors and that the struck jurors had never been directly questioned. He also pointed out that the defendant was black while the victim was white, and that the first trial had ended in a mistrial because one black juror caused a hung jury. *Id.*, 189 Cal. Rptr. at 234.

trates this need. The appellant contended that the prosecutor had excluded four black jurors solely on racial grounds to produce an all-white jury. The prosecutor offered several reasons for his peremptory challenges. For one juror, the explanation included the fact that the juror was from Texas, where the defendant had some contact, and that the juror had a son the same age as the defendant. The prosecutor explained that another juror was struck because he kept himself distant from the others and never smiled during light moments. The trial judge found that these reasons successfully rebutted the prima facie case. The appellant argued that the judge erred in not going "behind the reasons the prosecutor gave," and in effect, accepting any reason that was offered.[127]

The appellate court held that the trial judge had adequately distinguished bona fide reasons from sham excuses and concluded that there was no error.[128] Judge Poche dissented, arguing that the trial judge could never accurately assess the reasons in this case because his premises were incorrect.[129] In examining the trial court record, Judge Poche found the trial judge believed he should disallow challenges only if the prosecutor announced his intent to exercise them on racial grounds. Furthermore, the trial judge had stated that he would accept any reason, even if he thought it was fallacious.[130]

Judge Poche's position regarding the nature and extent of the trial court's duty of inquiry was ultimately upheld by the California Supreme Court.[131] The court held that the exclusion of five out of eight blacks clearly established a prima facie case and that the trial court did not understand its *Wheeler* obligation to inquire into the reasons offered by a prosecutor for his challenges.[132]

Hall indicates that the trial judge must understand the new

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127. *Id.*, 189 Cal. Rptr. at 235.

128. *Id.*

129. *Id.*, 189 Cal. Rptr. at 237-38 (Poche, J., dissenting).

130. *Id.*, 189 Cal. Rptr. at 237. In *Wheeler*, the Supreme Court had stated that the offending party must satisfy the court that the challenges were exercised on grounds "reasonably relevant to the particular case on trial." *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

131. *See* People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983).

132. *Id.* at 168, 672 P.2d at 858, 197 Cal. Rptr. at 75.

standard before it can be used to eliminate peremptory abuse. But even if this first stage is reached, both the judge and the prosecutor have additional responsibilities. To sustain his burden of justification, the prosecutor "must satisfy the court that he exercised his peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses."[133] The prosecutor also has a legal and ethical responsibility to seek justice and to offer only truthful reasons for exercising peremptory challenges.[134] The trial judge must then determine whether the prosecutor has met his burden. The judge's role is not a passive one. He should take notes during the voir dire so that he can compare the prosecutor's explanations with his own evaluations. When this approach is taken, the final decision is based on a factual record rather than vague recollections. It also provides a clear record for appellate review.

The benefits of this factual approach were seen in the recent case of *People v. Walker*.[135] In *Walker*, defense counsel made a *Wheeler* motion noting that four out of five of the prosecutor's challenges had been against blacks. The judge denied the motion as premature but began taking notes. Later, when seven blacks had been removed and when the prosecutor was called upon to provide explanations, the judge was able to declare himself satisfied that there had been no systematic exclusion of blacks.[136] When the appellate court reviewed the case, it was able to examine a complete record to determine whether the trial judge understood his obligation. Unlike *Hall*, in *Walker* the appellate court found that the trial judge had made a "sincere and reasoned attempt to evaluate the prosecutor's

133. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

134. *Hall*, 35 Cal. 3d at 169 n.11, 672 P.2d at 859 n.11, 197 Cal. Rptr. at 76 n.11. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979), which states that "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice not merely to convict."

135. No. AO 18763 (Cal. Ct. App. June 29, 1984) (available Aug. 15, 1984, on LEXIS, States library, Cal file).

136. *Id.* The trial judge stated his understanding of several of the challenges, while asking the prosecutor to justify those he questioned. The prosecutor indicated that one of these questioned jurors stood out as a "comic," and the trial judge agreed. Another juror had been convicted of bribery, another had been seen standing among friends of the defendant, and another was excluded out of fear of empathy between her and a potential alibi witness. *Id.*

explanations."[137]

The appellate court affirmed, holding that the prosecutor had successfully rebutted the prima facie case. The court emphasized that: (1) the prosecutor had passed the jury twice while there were blacks; (2) four jurors were excused on grounds reasonably related to the case on trial; (3) the judge apparently agreed with the dismissal of two jurors; and (4) the lack of recollection by the prosecutor, regarding one juror who was eliminated before the prosecutor was placed on notice, was acceptable.[138]

Walker demonstrates that strict formulas cannot be applied under the *Wheeler/Soares* test. A common sense approach, however, coupled with the guidelines set out in *Wheeler* and *Soares* leads to just results. *Walker* also demonstrates that a prima facie case can be successfully rebutted by a prosecutor with reasons relevant to the case. As judges become more familiar with the new tests and better understand their own responsibilities, they can provide an essential and positive influence in making this approach successful.

IV. Conclusion

Swain v. Alabama[139] established an almost insurmountable burden for overcoming the presumption that in any particular case the prosecution is using its peremptory challenges to obtain a fair and impartial jury. A majority of the Supreme Court has recognized that the approach adopted in *Swain* raises compelling constitutional issues.[140] The Court should not wait for the states to provide guidance before requiring a case by case approach. The experience of the California and Massachusetts courts provides practical insight into the effects of a case by case approach. The cases in those states show that, although their systems are not perfect, instances of glaring abuse have clearly

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137. *Id.* (quoting People v. Hall, 135 Cal. 3d at 167, 672 P.2d at 858, 197 Cal. Rptr. at 75). The appellate court quoted, with approval, the trial judge's statement regarding *Wheeler*: "I look at *Wheeler* as really not setting up very technical criterion (sic) but rather what they look for, and that's the exclusion of groups and that I should use my common sense in whether or not I think that's been done." *Id.*

138. *Id.*

139. 380 U.S. 202 (1964).

140. *See supra* note 8 and accompanying text.

been eliminated. These states are operating under a workable alternative to *Swain*. There has been no deluge of frivolous cases; most of the time peremptory challenges are exercised in their normal manner. Furthermore, each step in the process provides protection for the valid exercise of peremptory challenges with reasonable tests for both establishing and rebutting a prima facie case of discrimination while protecting constitutional interests. Difficult decisions must, of course, be made by the trial judges, but this is true in many procedural and substantive areas of the law. Use of peremptory challenges should not continue to take precedence over the right to an impartial jury drawn from a representative cross-section of the community. It is time to place peremptory challenges in perspective and limit their potential for abuse.

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