# JURY SELECTION AFTER *JOHNSON VS. CALIFORNIA* & *MILLER-EL VS. DRETKE*: SHOULD I BE WORRIED? IT DEPENDS!

## A PERSPECTIVE

**September 10, 2005**

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Los Angeles County . Office of the District Attorney . Saturday Seminar 3

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*San Francisco Assistant District Attorney*
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*For the Generous Contribution of the Articles Used in this Presentation*

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**Scope of Proper Voir Dire**
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## SCOPE OF PROPER VOIR DIRE

- Compare Code of Civil Procedure section 222.5 (Civil) [voir dire to develop challenges for cause and the intelligent exercise of peremptory challenges] with Code of Civil Procedure section 223 (Criminal) [voir dire only to development of challenges for cause].

- **Probing Voir Dire Requires Knowledge of Current Events and Concerns of the Community**: Read National and Local Newspapers such as the Los Angeles Times, Daily News, New York Times, Long Beach Press Telegram, Pasadena Star News, Daily Breeze; know what's topical on television and radio news and talk shows.

- Probing Voir Dire Requires Knowledge of Your Case, Possible Defenses, and the Applicable Law; **Advance Thought and Preparation Essential; Don't Conduct Voir Dire "By the Seat of Your Pants!"**

- Probing Questions on Voir Dire are Both Appropriate and Necessary to Identify Possible Bias; **Originality Can Count!**

- "Why are there are so few blacks in professional golf and tennis?" *People v. Wells* (1983) 149 Cal.App.3d 721, 727.

- See *People v. Wells, supra,* 149 Cal.App.3d at 727,

> Because racial, religious, or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence – and sometimes even good faith efforts to be objective – trial judges must not foreclose counsel's right to ask prospective jurors relevant questions which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held.

- See also, *People v. Williams* (1981) 29 Cal.3d 392

> This defendant challenges the long-standing rule that prohibits voir dire from being conducted as a means to uncover bases for peremptory challenges. [Citation]. Like a moss-covered oak, the doctrine has seemed sturdy because of its venerable age, but we have only to examine its shallow roots and hollow substance to realize that it is precariously poised, ready to topple at the first challenged blow.

| Code of Civil Procedure section 222.5. Prospective jurors; examination | Code of Civil Procedure section 223. Criminal cases; voir dire examination by court and counsel |
|---|---|
| To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.<br><br>The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed.<br><br>The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning. For purposes of this section, an "improper question" is any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law. A court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel.<br><br>In civil cases, the court may, upon stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence. | In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.<br><br>The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution. |

## CASE LAW

A) The Basics

1) *People v. Wheeler* (1978) 22 Cal.3d 258

2) *Batson v. Kentucky* (1986) 476 U.S. 79

B) "What's Good for the Goose is Good for the Gander."

1) *Georgia v. McCollum* (1991) 505 U.S. 42

C) The Prima Facie Case

1) *Johnson v. California* (2005) 125 S.Ct. 2410

D) The Facial Neutrality of Proffered Explanation for Challenges.

1) *Purkett v. Elem* (1995) 514 U.S. 795

2) *Hernandez v. New York* (1991) 500 U.S. 352

E) Proving Purposeful Discrimination

1) *Miller-El v. Dretke* (2005) 125 S.Ct. 2317

F) Remedies

1) *People v. Willis* (2002) 27 Cal.4th 811

G) Post *Miller-El v. Dretke* Application

1) *People v. Ward* (2005) 36 Cal.4th 186

## THE PRIMA FACIE CASE

A) Cognizable Group

1. Race
2. Ethnicity
3. Gender
4. Sexual Orientation
5. Religion
6. The Hybrids; e.g., African American Woman. (*People v. Young* (2005) 34 Cal.4th 1149, 1173.)

B) "The Totality of the Relevant Facts Gives Rise to an Inference of Discriminatory Purpose" (*Johnson v. California* (2005) 125 S.Ct. 2410; *Batson v. Kentucky* (1986) 476 U.S. 79.)

1. Statistics:
   i. Number of cognizable group in the panel;
   ii. Number in the jury box;
   iii. Number and percentage of peremptory challenges used to exclude members of the cognizable group relative to the number of members of the group in the box or panel; is first challenge to a person from the cognizable group sufficient to warrant a finding that a prima facie case is established? It may. (Cf. *People v. Cornwell* (Aug. 18, 2005, S046176) __ Cal.4th __ [2005 Cal.LEXIS 9060 at pp. *19 to *39].)
2. Disparate Questioning: type and form of questions directed toward members of cognizable group (e.g., African American,

Hispanic, women, etc.) compared to questions directed toward members of a different cognizable group (e.g., Caucasian, men, etc.).

3. Comparative analysis of challenged jurors with jurors accepted. (See e.g., *People v. Cornwell, supra,* __ Cal.4th __ [2005 Cal.LEXIS 9060 at pp. *19 to *39].)
4. Historical evidence of invidious jury selection practice by the prosecutorial agency or the specific prosecutor. (*Miller-El v. Dretke* (2005) 125 S.Ct. 2317, and *People v. Young* (2005) 34 Cal.4th 1149, 1171, fn. 3 [judicial notice of relevant past court records]; *People v. Turner* (1994) 8 Cal.4th 152, 162-172, abrogated on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5, and *People v. Fuentes* (1991) 54 Cal.3d 707 [capital cases involving the same Los Angeles County Deputy District Attorney, reversed for *Wheeler/Batson* error].)
5. Local procedures (e.g., jury shuffling).

## PROVING PURPOSEFUL DISCRIMINATION

(*Miller-El v. Dretke* (2005) 125 S.Ct. 2317)

A) Statistics

B) Disparate Questions

C) Comparative Analysis (See *People v. Johnson*[*] (2003) 30 Cal.4th 1302; see also, *People v. Ward* (2005) 36 Cal.4th 186 for post *Miller-El, supra,* 125 S.Ct. 2317 comparative analysis application in California.)

D) Identifying prospective jurors by race

E) Historical evidence of discrimination by prosecutorial agency or the specific prosecutor

F) Local procedures (e.g., jury shuffling).

[*] Overruled on other grounds in *Johnson v. California* (2005) 125 S.Ct. 2410.

## THE REMEDIES

(*People v. Willis* (2002) 27 Cal.4th 811)

A) Dismiss the panel and start all over.

B) With consent or waiver of party objecting to challenged juror, reseat the challenged juror [bring challenges at sidebar to avoid alienating the unsuccessfully challenged juror].

C) With appropriate warning, contempt and/or money sanctions.

D) State bar reporting; *see* Bus. & Prof. Code section 6068, subdivision (o) [self-reporting]; Bus. & Prof. Code section 6086.7 [mandatory reporting].

# "Wheeler Federalized by 2 US Supreme Court Opinions: These Changes are Seismic!"

By
Jerry P. Coleman

| Sept-Oct. '05* CDAA Did You Know? | "*Wheeler* Federalized by 2 US Supreme Court Opinions: These Changes are Seismic!" | JURY SELECTION; ETHICS |
|---|---|---|

* [Editor: change Assault article sent in already for Sept. to Nov-Dec., as this piece more timely]

**Introduction:**

For years I've taught the standard jury selection dogma that California courts differ from their Ninth Circuit counterparts in key aspects of *Wheeler* procedure; specifically, that our standard for making a prima facie case is different (our standard being a strong likelihood of discrimination, versus the federal standard of merely raising a reasonable inference of discrimination). Also, California courts wouldn't utilize comparative analysis to test the reasonableness of a justification given, where the federal circuits often did. (Comparative analysis looks beyond the reason given for a challenge to see if that same reason could apply to a juror of a different suspect class who is kept on the panel; if so, the stated reason is judged as pretext and rejected.)

Then along came *People v. Johnson* (2003) 30 Cal.4th 1302, where the California Supreme Court faced these twin issues and the state/federal differences, and came to a new, compromise position. Our state high court decided first that both standards (strong likelihood and reasonable inference) were *equal*; but it then restated the standard as follows: "the objector must show that it is *more likely than not* the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (Id, at p.1318.) Next, the Cal. Supremes reluctantly allowed comparative analysis, *but only if a record is made at the trial court, not for the first time on appeal.* (Id, at pp. 1324-25.)

So much for water behind the dam, so to speak; the *Johnson* dam burst on June 13, 2005, when the United States Supreme Court issued its opinions in *Johnson v. California* (yes, the same Jay Shawn Johnson out of Contra Costa County) and *Miller-El v. Dretke* [editor: put in cites by press time, please]. The new, federal *Johnson* is actually the opinion with the lesser impact, although it may call some of our pending cases back into court for factual remand hearings. *Miller-El*, calling for a retrial of a ***1985*** Texas murder prosecution, with its huge arsenal of analytical tools to rebut prosecution justifications, is the biggie.

**In the sober, morning-after analysis of this War-of-the-Worlds confrontation between state *Wheeler* and federal *Batson* doctrine, one can come to only a single conclusion: the Golden State had been successfully invaded by the federal tripods, and much of our standard state jury selection doctrine is now wrong. It's too late to run, or hide; we can only submit, and learn to obey our new masters.**

**Discussion:**

***Johnson***

Jay Shawn Johnson was a black male convicted of second degree murder of a 19 month old child. The prosecution challenged all 3 black jurors on the panel, resulting in an all-white (including alternates) jury. Although the defense made a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, the trial court did not ask the prosecution to justify any of its challenges, finding no prima facie case had been made under the state's "strong likelihood" standard. Of note (ultimately to the U.S. Supreme Court) was that the trial judge commented, even in denying the *Wheeler* challenge, that "we are very close", and that the California Supreme Court, even in affirming the conviction, acknowledged that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury" (30 Cal.4th 1307, at p.1326). The U.S. Supreme Court's holding is narrow, but bright line: California's strong likelihood standard, and even its modified more likely than not standard, find no support in federal *Batson v. Kentucky* (1986) 476 U.S. 79 analysis, and are therefore inappropriate yardsticks with which to measure the first prong of a prima facie case. The High Court rationalized that "[w]e did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." [editor: cite, please]

Even though the opinion goes on to state how a *Batson* objector may make a prima facie case, its language is couched solely in unhelpful generalities. Time and again throughout the opinion, and its

footnotes, it hints at the practical effect of its ruling: it is designed to be so low a standard as to force actual answers by the prosecution to the suspicions raised by the defense, so long as those suspicions are based on facts and logic. The bottom line is simple: it takes very little to raise an inference; a second juror of the same protected class challenged is certainly likely to reach that mark. Even a first challenge of such a class member, if done on no voir dire, may be sufficient. From our side, then, the moral is equally clear: be prepared to question carefully so as to elicit, and once-elicited, be prepared to enunciate, neutrally-based justifications *for each and every juror challenged*; i.e., you can practically concede the first prima facie prong. (Hopefully, we can use this same analysis against the defense when they kick off protected class jurors, since *Wheeler-Batson* applies to both sides so as to remedy *society*'s rights to a fairly-selected jury.) Finally, state your justifications persuasively, and be sure they are supported by the record (and if based on subjective observations of juror conduct, have the trial judge support your observations on the record); only that way will you succeed in winning the third prong. So even though your opponent has the legal burden of proving purposeful discrimination, once you challenge jurors and the defense calls you on it, you really have all the verbal work of finding facts to justify your challenges.

So much for future advice. But what about our pending/past cases? There are three categories of problems. The first concerns the oldest cases: the whole body of California appellate case law discussing prima facie case making (see, e.g., *People v. Walker* (1998) 64 Cal.App. 4th 1062, 1068-9); or, any case where a trial court found no prima facie case, and the appellate court affirmed. Unfortunately, all such cases are probably overruled, sub silentio, by *Johnson*. The middle class of cases are those trial matters of your own, where you were *Wheelered*, you won, and you never had to justify, but whose appeals from your conviction are not yet final. Since it can hardly be said that *Johnson*'s conclusion is new law (based as it is on the 1986 *Batson*), it will probably apply retroactively. That means that your conviction will likely come back to haunt you; a suggested strategy is to seek a remand hearing that is two part: first, the trial judge redecides any *Wheeler* issue by the proper federal standard, and may still find the prima facie case not met; second, and more likely, the trial court would find a prima facie case, but still allow you to provide justifications of your challenges; if you persuade the trial court that your challenges are for neutral motives, the conviction should stand on appeal. Finally, there are cases you just tried and are awaiting sentencing, where you won a *Wheeler* challenge without having to provide justifications; here, don't wait for any appeal, but simply request the sentencing court to do *Wheeler* over, properly, before pronouncing sentence. (The analysis of these final two categories of cases leading to remand hearings is shared by Contra Costa County, when it issued a training alert to its deputies in light of its reversal in *Johnson*.)

***Miller-El***

Thomas Joe Miller-El was charged with murder in the course of a Dallas, Texas hotel robbery in 1985. The prosecution challenged 10 of 11 black jurors. *Batson v. Kentucky* wasn't even law yet, but it became so during Miller-El's appeal, so the Texas courts sent it back for a justification hearing. That was held in early 1989 and the stated justifications found credible. State and federal courts affirmed that decision continuously for fourteen more years, until the United States Supreme Court allowed Miller-El to pursue his habeas claim on this ground in *Miller-El v. Cockrell* (2003) 537 U.S. 322. Now, on June 13, 2005, in *Miller-El v. Dretke* [editor: cite, please], after at least 3 Texas Corrections Directors had lent their names to this litigation as defendants, the nation's highest court has ordered habeas relief, finding that any prior court conclusions of neutral bases for juror challenges to be wrong: the Dallas prosecutors were racially biased, as was their entire office, historically, in its jury selection procedures and training.

The opinion starts on an ominous tone: "Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, [citation], but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice,' [citation]. ... That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality' [citation] and undermines public confidence in adjudication." [cite, please, editor]

As I noted when I first wrote about this case (after the 2003 Supreme Court opinion), there are at least five levels of analysis used by the High Court to see through the prosecution tactics, as well as their justifications, as pretext for racial discrimination:

1. Statistical Evidence; 2. Comparative Analysis; 3. Disparate Questioning; 4. Local Procedures; and 5. Historical Evidence of the Prosecutor's Office. Without repeating that article here (See your Did You Knows, Vol.9, No.3, March 2003), suffice it to say that there are now 6 votes on the Supreme Court ready,

willing, and able to find many ways to skin a cat, any one of which will work to gain the mouse a new trial. (We are the cat.) Let me just supply the 'atmospherics' of this year's final opinion on defendant Miller-El. Strikes to exclude 91% of eligible African American jurors are unlikely to have been produced by happenstance. Side-by-side comparisons of jurors struck and jurors kept is acceptable evidence of purposeful discrimination. Limited questioning of jurors struck is suspect, as is a second justification, given after the first is challenged by the defense as unsupported by the record. (The new explanation "reeks of afterthought". [cite]) Reasons for a challenge will be judged on a credibility scale which runs from reasonable to improbable, and also by "whether the proffered rationale has some basis in accepted trial strategy." [cite.] Even leaving on a member of a protected class at the final stages of jury selection will not insulate an early-stage decision to challenge a similarly situated panel member. The plausibility of prosecution justifications must be viewed by the trial judge on their own, without help of a trial or appellate court imagining a valid reason for that challenge. ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." [cite])

Beyond such statistical and comparative analysis, there is ample room to examine broader patterns of practice; the most interesting of these is 'disparate questioning': the asking of different classes of jurors categories of questions in different ways, so as to elicit different responses as a basis to make a legitimate-sounding challenge. In *Miller-El*, 94% of white jurors were told a bland description of the death penalty, and then asked their views on the ultimate punishment; 53% of African American panelists were given a far more graphic script on the death penalty before being asked their feelings about it. The opinion gave a second example, as well; it called that example "trickery". [cite.]

As if the excoriation of individual prosecutors were not enough, the Court proceeded to cite evidence of systematic exclusion of blacks in Dallas County for decades. (Witnesses had been called by the defense back in 1986 to establish that an ADA from the early 1960's was warned by his superiors that he would be fired if he permitted any black jurors; a 1968 manual, which remained in circulation until 1976, was also unearthed that outlined the reasons for excluding all minorities: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter haw rich or how well educated." [Citation from 2003 opinion.] Finally, the court noted that the trial prosecutors in *Miller-El* "marked the race of each prospective juror on their juror cards." [cite.]

The opinion ends with a chilling summary: "In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny. [para.] The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. … [para] If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror." [cite.] (In a final dig, footnote 38 disdains the State's oral argument that trial prosecutors could have been tracking races to be sure to avoid *Batson* violations: *Batson*, the footnote notes, was decided the month *after* Miller-El was tried.) And if the majority opinion is not scary enough, Justice Breyer's concurrence suggests peremptory challenges be eliminated altogether.

What can we expect, post *Miller-El*? At the least, know that the first prong of prima facie burden is easy to make, and that comparative analysis will be pointed out every time. Thus, don't just come up with good, non-biased justifications, but, if you fear that any one also applies to a kept juror (and thus would be susceptible to a defense attack on comparative analysis grounds), then ask more questions so as to articulate another good justification; alternatively, in that situation, you can inquire more of the juror you want to keep to develop other positive reasons to keep them that overshadows the reason in common with the juror you are challenging; or still again, you could simply decide to challenge that first juror you were otherwise prone to keep, which would moot the comparative analysis argument. Even the form of your questions will be scrutinized by counsel and court, and the number and order of your justifications tested for resonableness against some ever-changing generalized trial strategy standard. Should you personally, or your office, have any history of past *Wheeler/Batson* reversals, it will be brought up. Hell, my own lectures and writings on this subject may be cited. (You might want to present them yourself to rebut any historical evidence unearthed by the defense.) Your voir dire notes may even be subpoenaed into an appellate record, so don't make note of any protected categories. There is, of course, a simple antidote to all this convoluted

worry: don't be a racist in any of your challenges.

**Conclusion:**

Forget much of the procedural aspects of California jury selection precedent. Reread *Batson*. Take to court a list of acceptable justifications which have been affirmed on appeal, a thick pad of paper to take notes on, and a pocket calculator to figure percentages of challenges to panel populations. Listen to prospective jurors. Watch them. Question them. Ask categories of questions in similar ways to different classes of panelists. Note your justifications in advance of any potential challenge, and test them comparatively against other panel members previously challenged or about to be. Give them your own personal 'smell' test, and if they sound bogus or pretextual, bite your tongue. We are presumed to act honorably, and we always should; but the other side and some courts have a habit of making us eat some of our words, so we must be vigilant. Finally, your good justifications should be written down and preserved for any future appeal or habeas writ handed down from On High 20 years later.

The bottom line from here on out: jury selection – it IS rocket science. But it's also just basic instinct and good communication skills. If your heart is pure and your senses are alert, you can make a record that will outlast all challenges.

# Examples of Various Cases Concerning *Wheeler/Batson* Objections

By
Jerry P. Coleman

H: Reversed federal appellate overturning of state conviction (habeas corpus review) and remanded to see if the state trial court decision was supported by the record.
Convicted of second degree robbery in state court.
DA challenged two African American jurors.
Defense made a Batson motion against the peremptory challenges of two African American jurors that was denied by the trial court, overturned by the appellate court who only reviewed the reasonableness of the justifications, then the SC reversed the appellate ruling and remanded the matter for the appellate court to see if the record supported the judgment by the trial court.
B-1: The juror had long, curly, unkempt hair as well as a moustache/beard/goatee
B-2: The juror had a moustache and goatee as well. The prosecutor thought that they looked suspicious.
– These were considered racially neutral because they could be possessed by someone of any race.

> "I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee-type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." *Id.*, at A-41

**PROCEDURAL POSTURE:** Respondent sought review of a decision from the United States Court of Appeals for the Eighth Circuit, alleging that the prosecutor's use of peremptory challenges to strike two black men from the jury panel was racially motivated.

**OVERVIEW:** Respondent was convicted of second-degree robbery in a state court. During jury selection, he objected to the prosecutor's use of peremptory challenges to strike two black men from the jury panel. Respondent filed a petition for habeas corpus after the state courts found that respondent did not raise the necessary inference of racial discrimination. The federal district court held there was no purposeful discrimination. The federal court of appeals reversed and concluded that the prosecution's explanation for striking a juror was pretextual. The court held that the appellate court erred by not concluding or even attempting to conclude that the state court's finding of no racial motive was not fairly supported by the record. The appellate court improperly focused upon the reasonableness of the asserted nonracial motive.

**2. People v. Arias (1996) 13 Cal.4th 92. 137-139**

H: No Wheeler violation, conviction affirmed.
Convicted of First degree murder, with three counts of robbery
DA challenged two black jurors and three Hispanic jurors (on appeal one black juror and two Hispanic jurors were discussed)
Defense made a Wheeler motion challenging the removal of one black juror and two Hispanic jurors; trial court asked for justifications despite having questions as to whether a prima facie case had been made.
B-1: Juror's daughter was prosecuted by the DA's office and she testified at the trial. The DA did not consider the woman very bright. She also had negative views towards the use of the death penalty.
H-1: Ambivalence towards the use of the death penalty, the prosecutor suggested that he believed the death penalty discriminated against poor people and that he would be unreasonably susceptible to psychiatric and background defenses at the penalty stage.
H-2: Young (25 years old), single parent, never registered to vote, didn't believe in calling the police after her boyfriend was robbed. She admitted her prejudicial concerns about rendering a death penalty verdict.

**3. People v. Johnson (1989) 47 Cal.3d 1194, 1217-18**

H: No Wheeler Violation, conviction was affirmed.
Convicted of first degree murder with special circumstances
DA Challenged three African Americans, four Jews, and two Asians
The defense made a Wheeler motion, trial court asked for and got justifications.
B-1: Ex-husband was a cop, seemed prejudiced against cops; brother-in-law was arrested; defensive body position during DA questioning; pulse raced when death penalty was mentioned.
B-2: lower than average rating by DA; poor grooming/overweight, so "not in the mainstream of people's thinking"; nervous and covered mouth when talking about the death penalty; seemed not to trust the DA
B-3: arrested numerous times, in court and out of jail as defendant, believed that police officers treated blacks differently and abused people. Also, would require proof beyond a shadow of a doubt.
J-1: very nervous; noticeable smile to defendant; opposed death penalty
J-2: age 71, tired; relative was a lawyer; death penalty not a deterrent; rapport with defense attorney; friendlier to defendant than average juror
J-3: age 61, very tired look; one past dealing with the police and felt officer lied; sympathetic look to defendant
J-4: weird; wouldn't commit to promise to decide on evidence
A-1: cannot pass judgment
A-2: contested speeding ticket and lost, still had feelings about it
** Comparative Analysis Rejected **

4. People v. Gonzalez (1990) 218 Cal.App.3d 1186, 1201

H: Wheeler violation, conviction reversed
Convicted of heroin and cocaine possession with a sentencing enhancement for firearm
DA challenged two Hispanic jurors
Defense made a Wheeler motion that was denied at the trial court, appellate court ruled that asking for justifications consisted of finding an implied prima facie case and that the prosecutor did not meet his burden.
H-1: The prosecutor made a bald assertion that the naturalized citizen would have a hard time understanding the law.
H-2: Not considered because of the failure to justify striking H-1.
** "It is interesting to consider whether the prosecutor's blanket characterization of naturalized citizens and their inability to deal with the law would have resulted in the peremptory challenge of recently confirmed Supreme Court Justice Joyce Kennard, a naturalized citizen" **

**5. People v. Barber (1988), 200 Cal.App.3d 378, 389-99**

H: No Wheeler violation, conviction was affirmed
Convicted of selling cocaine and related offenses
DA Challenged four Hispanic jurors
The defense made a Wheeler motion, the court asked for justifications (implied prima facie case).
H-1: Prosecutor did not think that her surname was Spanish (no last names were used in the opinion to protect the juror's anonymity) and considered her to be white. She was a teacher, an occupation that the prosecutor considered to be more liberal than other occupations. Also, she had a cousin who had been in prison and was currently being tried for narcotics or armed robbery violations.
H-2: He wore a Coors jacket to court, was an assembly plant worker, his wife worked for a liberal attorney, had a hard time answering questions, was shy/withdrawn during questioning, and shook his head several times during the questioning. Also, his brother-in-law had pled guilty to a theft charge within the last one and a half years. The record did not support that he shook his head during questioning or had a hard time understanding the legal concepts.
H-3: He was an "unprofessional" person because he was a truck driver, his wife was a housewife, the prosecutor did not believe he would be able to understand the legal principles involved, and he had a significant financial hardship if he was to serve on the jury.
H-4: He seemed unable to comprehend the legal principles involved based on his confusion during questioning. He was unemployed and his previous job lasted only 15 months. He had an uncle who was involved in drugs and his answers to other questions implied that he was into drugs previously before he had embraced religion.

6. People v. Lopez (1994) 31 Cal.App.4th Supp. 10, 17

H: The trial court erred by not dismissing the entire venire after determining that the defense counsel challenged jurors for racial reasons.
Convicted of assault and drinking and driving.
The defense attorney challenged three Chinese jurors.
The DA made a Wheeler motion and the defense did not provide adequate reasons for striking the Chinese jurors.
C-1: The defense attorney claimed that the juror was challenged because she had problems with employment and would be distracted because she had to take care of her children (a non-Asian juror answered similarly and was not challenged, no Wheeler motion was made for the challenge of this juror).
C-2: The defense attorney claimed that the juror had a problem with the English language (the juror had to be asked questions multiple times) but this claim was not supported by the transcript of the voir dire questions.
C-3: Another Chinese person was challenged because the defense counsel had a personal bias against computer programmers on criminal juries.

**7. People v. Dunn (1995) 40 Cal.App.4th 1039, 1046-47**

H: No Wheeler violation, conviction was affirmed.
Convicted of First degree murder (used gun), but TC decreased to Second Degree murder
DA challenged four African American jurors.
Defense made two Wheeler motions, made a prima facie showing, and the trial court asked for and got justifications.
B-1/2: Challenged because they both had drug addicted (Aunt/Uncle) relatives and the defendant was a meth addict.
B-3: Challenged because he had friends who had contacts with law enforcement officials and he did not give detailed responses regarding those contacts (arrest details, etc...). He also admitted to discharging a firearm on the Fourth of July, which would violate local ordinances. The prosecutor claimed that this behavior would make him more likely to believe the gun related homicide was accidental.
B-4: She was challenged because she had an Uncle who had been convicted of murder in the Virgin Islands 15 years prior. Also, the prosecutor did not like the way she was sitting during questioning, her frowning, and apparent lack of interest in the proceedings.
** Comparative Analysis Rejected **

8. U.S. v. Biston (9th Cir. 1992) 959 F.2d 821, 825-26

H: The trial court erred in not finding a Batson violation for the prosecution's challenge of a black juror. The appellate court overturned the conviction.
Convicted of drug trafficking and assault on a federal officer.
The prosecutor challenged one African American juror.
The defense made a Batson motion challenging the use of the peremptory against the black juror, no prima facie ruling was explicitly stated but the prosecutor gave justifications anyway.
B-1: Challenged because she was a resident of a low-income neighborhood (Compton) and would be insensitive to violent crimes. The court held that stereotypical thinking is prohibited by the equal protection clause of the constitution.

9. People v. Johnson (1978) 22 Cal.3d 296, 298-299

H: The challenges against the African American jurors violated the California constitution so the conviction was overturned.
Convicted of robbery and rape.
The prosecutor challenged multiple African American jury members.
Justifications were given after the prosecutor stated that he intended to challenge all potential African American jury members.
B-1: The prosecutor stated that he intended to challenge all of the African American jury members because offensive racial epithets were used by witnesses in the police reports and because he believed it would be difficult for any African American jury member to be completely objective.

**10. People v. Perez (1994) 29 Cal.App.4th 1313, 1322-25**

H: No Wheeler violation, convictions affirmed
Convicted four defendants of various drug charges.
DA challenged four Hispanic jurors
The defense made a Wheeler motion, the trial court asked for and got justifications (prima facie case was made).
H-1: single, young, insufficient life experience
H-2: single, young, no jury experience, student, no life experience
H-3: party to a prior lawsuit, she had a hard time with basic jury selection questions, initially she only answered two of ten questions that were asked. The judge had to then ask the juror each question in order to receive a response. This led the prosecutor to believe she could not follow directions properly for a jury trial.
H-4: Former principal who was demoted to a teacher, fought the demotion with a lawsuit, inappropriate laugh during jury questioning (prosecutor observed), was in a prior jury trial and revealed that the defendant was not guilty.

**11. People v. Turner (1994) 8 Cal.4th 137, 168-72**

H: No Wheeler violation, convictions affirmed
Two counts of first degree murder, two counts of robbery, sentenced to death
DA challenged three African American jurors.
The defense made a Wheeler motion, the trial court denied the motion finding no prima facie case. The prosecution gave justifications that the appellate court reviewed (even though they did not necessarily have to).
B-1: he had trouble understanding and answering questions (he had a poor understanding of English). Also, he had sat on a hung jury previously. It was also possible that he was against the use of the death penalty. He also seemed to change his answers depending on who was asking the questions.
B-2: Juror was hostile during questioning, witnessed the shooting of the father of her child and did not feel justice was properly done. She also worked at the department of social services while the prosecutor was the head of the welfare division, who was personally being sued for unpopular decisions he made.
B-3: The juror was against the use of the death penalty.

12. Turner v. Marshall (9th Cir. 1997) 121 F.3d 1248 - comparative analysis in fed ct

H: The conviction was overturned because the federal court (habeas corpus motion) ruled that the prosecutor engaged in discrimination during jury selection.
Convicted of First degree felony murder, burglary, and robbery
The prosecutor challenged a black juror.
The defense attorney made a Batson motion and got justifications.
B-1: Challenged because he had a problem looking at the gruesome photos of the victim (but said he could do it as part of his job on the jury). This was a violation because a white juror who had problems looking at the photos was not challenged.
** Comparative Analysis used by 9th Circuit to find Batson violation on habeas corpus review **

**13. People v. England (2000) 83 Cal.App.4th 772**

H: The conviction was affirmed.
Convicted of two counts of battery on a non-confined person (defendant was a prison inmate)
The prosecution challenged an ex-prison guard for cause.
The defense claimed that striking the juror denied the defendant a trial by a jury of his peers.
J-1: The juror was not a member of a cognizable group just because he worked for the prison system (and was now retired). Also, the trial was to take place at a prison and his aversion against returning to prison (if only to be a juror) was fine.

**14. People v. Gutierrez (2002) 28 Cal.4th 1083, 1122-5**

H: The conviction was affirmed.

Convicted of first degree murder of two people, rape, attempted murder of a police officer, and first degree burglary. He was sentenced to death.

The prosecution challenged six Hispanic prospective jurors.

The defense made multiple Wheeler motions that were denied (no prima facie case for the first motion, an implied prima facie case for the second because the court immediately asked for justifications).

W-1: April – Juror had a Spanish surname but was not Hispanic, while a Spanish surname falls under a Wheeler challenge class, it only does when the race of the juror is unknown. Here the juror answered that she was white two different times.

H-1: Rudolph J – harbored views against the death penalty and had reservations against voting for that.

H-2: Arthur A. – Had three different racially neutral reasons that could be used to support his removal: father had been imprisoned on drug related charges, he admitted that he would rely too heavily on expert opinions, and he had a run in with the CHP where they tried to "rough him up."

H-3: Eva J. – appeared overly emotional during the proceedings and even cried twice during vior dire.

H-4: Sergio L. – As a teacher, he had never disagreed with a psychological evaluation of a student. Consequently, he would place too much emphasis on the expert opinion testimony of psychologists. Other reasons to support challenging this juror (that would be sufficient on their own): he gave hostile looks to the prosecutor, he felt transsexuals were "sick human beings" (given the victim's sexual orientation this was a valid concern for the prosecution, and the prosecution felt he was "in the defense camp" because he had served on another jury where he felt like the jurors had made up their minds before the defense had put on any evidence.

H-5: Ernestine C. – Felt that she had received an unfair parking ticket which she successfully fought. Also, her son had been convicted of drinking and driving and unfairly harassed for allegedly using drugs while at a treatment facility in connection with the charge.

H-6: Daniel A. – He gave answers strongly opposing the death penalty on the jury questionnaire and even though he suggested otherwise during vior dire the prosecutor was justified in removing him from the jury.

15. People v. Turner (2001) 91 Cal. App. 4th 413, 418-421

H: The conviction was reversed by the appellate court because the prosecutor could not show that the exclusion of the juror was not based on group bias.
Convicted of possession of cocaine and marijuana with intent to sell.
DA challenged two African Americans in the jury box.
The defense made a Wheeler motion, made a prima facie case, but the trial court denied the motions. The appellate court overturned because the prosecutor did not meet the burden of proof necessary to show that the juror was excused for a race-neutral reason.
B-1: The prosecutor stated that the juror was excused because she was a resident of Ingleside and was childless. However, other childless residents of Ingleside served on the jury.
B-2: The juror's brother had been convicted of conspiracy to sell drugs and she believed that the case had been handled poorly. This was a legitimate reason for striking the juror.

**16. People v. Ward 6/30/2005**

H: The conviction and sentence were affirmed by the California Supreme Court.
Convicted of two counts of first degree murder with special circumstances and sentenced to death.
DA challenged five African American jurors.
The defense made four Wheeler motions, all of which were denied (implied prima facie for the third and fourth challenges).
B-1: Juanita D. –
B-2: Charlotte B. – Said she would rather not impose the death penalty and that she was "not strongly" in favor of the death penalty.
B-3: Mary E. – stated that she "might" find it "difficult" to vote for the death penalty and that the person's environment may make them less responsible for their actions.
B-4: Harriette V. – unequivocal statements against the death penalty.
B-5: Carolyn P. – unequivocal statements against the death penalty.
B-6: Rose B. – the prosecutor justified this challenge by calling attention to her anti-death penalty responses on her jury questionnaire (this alone would be sufficient), "her unconventional appearance-i.e., wearing 30 silver chains around her neck and rings on every one of her fingers-which suggested that she might not fit in with the other jurors," and her "body language" suggested she was uptight during the jury questioning.

**17. U.S. v. Powers (9th Cir. 1989) 881 F.2d 733, 740**

H: No Batson violation, convictions affirmed
Sale of narcotics and other related offenses
DA challenged one African American juror
The defense made a Batson motion but there was no prima facie case. The appellate court, despite lack of a prima facie showing, reviewed the justifications given by the government.
B-1: juror had just served on another trial, was fidgeting and looking around while in the jury box. The prosecutor did not believe that he would be an attentive juror and could be hostile to the government for calling him so soon after his last jury service.

**18. People v. Crittenden (1994) 9 Cal.4th 83, 117-118 ***

H: No Wheeler violation occurred, the conviction was affirmed.
Convicted of two counts of First degree murder with special circumstances
DA challenged the only African American on the venire.
The defense made a Wheeler motion but did not state a prima facie case.
B-1: She was hesitant about imposing the death penalty, gave inconsistent responses regarding the death penalty, she was apprehensive about serving on a jury for the first time, and she had some transportation problems getting to court.
* no prima facie case, the appellate court reviewed the voir dire record *

**19. Hernandez v. New York (1991) 500 U.S. 352, 356-57**

H: No Batson violation occurred, the conviction was affirmed.
Convicted of attempted murder and possession of an illegal firearm.
DA challenged four Latino jury members.
The defense made a Batson motion, the prima facie requirement was waived, the justifications were determined to be race neutral.
L-1: Had a brother who had been criminally convicted
L-2: Had a brother who was on trial by the same DA.
L-3/4: The prosecutor did not believe that the jurors would be able to follow the interpreter for the duration of the trial (they were bilingual). The jurors said that they would merely try to follow them. Because the main witnesses for the trial would require an interpreter the prosecutor felt that these jurors would have an unfair impact on the deliberations.

**20. People v. Williams (1997) 16 Cal.4th 153, 191**

H: The conviction was affirmed.
Convicted of first degree murder and sentenced to death.
The prosecutor challenged two black jurors.
The defense attorney made a Wheeler motion, which was denied after the justifications (implied prima facie).
B-1: When asked for justifications the prosecutor responded that they made a mistake challenging that juror. A mistake made in good faith is a race neutral reason.
B-2: The prospective juror went to a high school that contained a large number of Blood gang members. The defendant was a Blood gang member so the prosecutor felt that the juror would sympathize with the defendant.

**21. Williams v. Rhoades (9th Cir. 2004) 354 F.3d 1101**

H: No Wheeler/Batson violation, conviction was affirmed.

Convicted of conspiracy to defraud, misappropriation of public funds, and grand theft via false pretenses.

DA challenged one African American juror.

The defense made a Batson motion (writ of habeas corpus). The trial court asked for and got justifications.

B-1: Challenged because the prosecutor feared she would identify with a prosecution hostile witness, she lacked forthrightness about prior trial experience, her demeanor or [*sic*] evinced bias in favor of the defense, and she had knowledge of the case through press coverage.

**22. People v. Farman (2002) 28 Cal.4th 107, 137-138**

H: No Wheeler violation, conviction was affirmed.

Convicted of first degree murder, rape, and sodomy with special circumstances. Sentenced to death.

DA challenged four African American jurors.

The defense made a Wheeler motion that was denied because there was no prima facie case, but justifications where given for the appellate review.

B-1: Sheila C – had negative views towards the death penalty and favored life without parole over imposing a death sentence.

B-2: Norman T – he was slightly against the death penalty favoring life without parole over a death sentence, worked at a juvenile hall, and believed that "lack of justice goes with lack of money"

B-3: John G – "On a couple of occasions" he visited his nephew who was incarcerated in Chino

B-4: Helena B – she had served on a hung jury previously

**23. People v. Robinson (2005) Cal. App. Unpub. LEXIS 7156, 140 Cal. App. 4th 1094**

H: The appellate court remanded the issue of two juror challenges to the trial court, if the reasons could not be stated (or passage of time made it impossible for the prosecution to provide justifications) then the conviction must be reversed.

Convicted of two counts of first degree murder with special circumstances. Sentenced to death.

DA challenged three African American jurors.

The defense made a Wheeler motion, the court provided justifications for the first two African American jurors (instead the prosecution should have provided the justifications because the burden shifted to them after the defense stated a prima facie case).

B-1/2: The trial court provided justifications for these jurors.

B-3: She was excused because she was a chaplain at the men's jail and regularly worked with gang members (the defendant was a gang member). There was no bias against religions [*sic*] workers.

24. People v. Allen (2011) 195 Cal.App.4th 542

H: The trial court denied the Wheeler motion, the appellate court reversed.
Convicted of theft, possession of stolen property, and possession of a firearm.
The prosecution challenged the only two African-American women on the panel.
The defense filed a Wheeler motion against the challenges, the court asked for and got justifications (a prima facie case was made).
B-1: The prosecutor misstated the record when giving his justifications for challenging the juror, claiming that she had questions as to what religious or moral convictions meant (when in reality she just didn't understand the question). The court said that this reasoning is problematic.
B-2: The prosecutor attempted to justify the challenge by basing it on the juror's "demeanor" without actually stating what specifically about her demeanor was bothersome.

***People v. Wheeler*** **(1978) 22 Cal.3d 528**

[Crim. No. 20233. Sept. 25, 1978.]

THE PEOPLE, Plaintiff and Respondent, v.
JAMES MICHAEL WHEELER et al., Defendants and Appellants.

## SUMMARY

Defendants, two black men, were convicted by an all-white jury of murdering a white grocery store owner in the course of a robbery. While a number of blacks were in the venire summoned to hear the case, were called to the jury box, questioned on voir dire, and were passed for cause, the prosecutor proceeded to strike each and every black from the jury by means of his peremptory challenges. Defendants' motions for a mistrial were denied. (Superior Court of Los Angeles County, No. A439988, William E. McGinley, Judge.)

The Supreme Court reversed. The court held the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under Cal. Const., art. I, § 16. The court held group bias exists when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds, and contrasted it with specific bias, which relates to the particular case on trial or the parties or witnesses thereto. The court held that while a party is not entitled to a petit jury that proportionately represents every group in the community, a party is constitutionally entitled to a jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. As to the remedy, the court held if a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the trial court. Thus, the court held that defendants made a prima facie showing that the prosecutor was exercising peremptory challenges against black jurors on the ground of group bias alone, and the trial court therefore erred in ruling that the prosecutor was not required





to respond to the allegation, and in denying defendants' motions for a mistrial without a rebuttal showing by the prosecutor that the challenges were each predicated on grounds of specific bias. The court further held the error was prejudicial per se. The court also held that all claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed by Cal. Const., art. I, § 16, and the procedure outlined by the court. (Opinion by Mosk, J., with Tobriner, Manuel and Newman, JJ., concurring. Separate concurring opinion by Bird, C. J. Separate dissenting opinion by Richardson, J., with Clark, J., concurring.)

## COUNSEL

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C. Stanley Trom, District Attorney (Ventura), Michael D. Bradbury, Assistant District Attorney, and Peter D. Kossoris, Deputy District Attorney, as Amici Curiae on behalf of Plaintiff and Respondent.

[Sept. 1978]

OPINION

MOSK, J.—Defendants James Michael Wheeler and Robert Willis appeal from judgments convicting them of murdering Amaury Cedeno, a grocery store owner, in the course of a robbery. (Pen. Code, §§ 187, 189.)

During the noon hour Cedeno withdrew $6,000 in cash from a bank and returned with the money to his store. As he entered he was seen to be grappling with another man; after a few moments four shots were fired and Cedeno was fatally wounded. The assailant ran from the store with the money, and entered the passenger door of a waiting car that was quickly driven away. A witness noted its license plate number, but did not see the driver.

At trial the principal issue was identification. Two witnesses to the events inside the store identified defendant Willis as the assailant from groups of photographs and from a lineup, and pointed him out in court. Willis sought to discredit this testimony by exploring various discrepancies between his appearance at trial and the descriptions furnished to the police by the witnesses. He also offered an alibi defense.

It was the People's theory that the unseen driver of the getaway car was defendant Wheeler. The sole direct evidence connecting him with that car, however, was two fingerprints found on the driver's door—one on the underside of the armrest and the other on the outside panel. A police expert identified the prints as belonging to Wheeler, but conceded on cross-examination that there is no way of determining when a fingerprint was actually placed on an object. The car in question had been stolen four days before the shooting.

To bolster their case, the People also introduced, over objection, evidence of several prior incidents of assertedly similar but uncharged robberies or apparent preparations for robbery in which these defendants and other persons were implicated in varying degrees. Because the convictions must be reversed on other grounds, we do not reach the serious conflict over the admissibility of this evidence.

I

We begin with a claim of error arising at the very outset of the trial and infecting the entire remainder of the proceedings. Defendants are both black; the man they were accused of murdering was white; a number of





blacks were in the venire summoned to hear the case, were called to the jury box, were questioned on voir dire, and were passed for cause; yet the prosecutor proceeded to strike each and every black from the jury by means of his peremptory challenges, and the jury that finally tried and convicted these defendants was all white. The issue is whether in such circumstances defendants were denied their right to trial by an impartial jury guaranteed by the California Constitution. The question is one of first impression in this court.

Not surprisingly, the record is unclear as to the exact number of blacks struck from the jury by the prosecutor: veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are—or should be—blind to all such distinctions among our citizens.

Nevertheless, when an issue of this nature does arise in any case it is incumbent upon counsel, however delicate the matter, to make a record sufficient to preserve the point for review. In the case at bar defense counsel discharged that burden: after the People had exercised eight peremptory challenges, defense counsel began eliciting from each successive black prospective juror an acknowledgment of his or her race. In a declaration filed in this court, Edward I. Gritz, attorney for defendant Wheeler, explained the reason for undertaking to make that record: "During the course of the voir dire proceedings, and only after two black jurors had been peremptorily excused by the prosecutor, I became aware that the prosecutor was utilizing his peremptory challenges in a systematic effort to exclude any and all otherwise qualified black jurors from serving on my client's petit jury."

Defense counsel thereafter established that prospective jurors Louise Jones, Odessa Bragg, and Napoleon Howard were black.[1] All three responded that racial considerations would not affect their impartiality and they would base their verdict solely on the facts; as Mr. Howard succinctly put it, "We are not trying color. We are trying a case." Both defense counsel passed these prospective jurors for cause, and the prosecutor did likewise after almost perfunctory questioning.[2] Neverthe-

[1]For example, counsel for defendant Willis, H. Russell Halpern, made the point as follows in his voir dire examination of Mrs. Jones: "Q. As I admonished the jury earlier, I asked questions that might seem to be personal and prying. My client is black, obviously you are black, too. A. Yes, I am."

[2]He asked four brief questions of Mrs. Bragg, two of Mr. Howard, and none of Mrs. Jones.

less the prosecutor exercised three of his next five peremptory challenges against these same three prospective jurors.

At this point Mr. Gritz expostulated that "It is obvious to me that there will be no blacks on this jury," and moved for a mistrial. He gave his count of the number of black prospective jurors struck by the prosecutor, and stated: "whatever the reason for that is, that's up to him to say. I am not impugning his integrity or anything like that. It is obvious to me that these defendants cannot get a jury of their peers or, how shall I say, a proper cross section of the community, if what is apparent to me is the policy of the district attorney's office. Maybe it is only in this case, I don't know, to excuse all blacks that are being called." His purpose in moving for the mistrial was, he said, "so we can try and get a fair cross section of the community." Mr. Halpern joined in the motion, stressing that from the manner in which the prosecutor was exercising his peremptory challenges "it is apparent that he is using a form of unauthorized procedure, and that is to exclude blacks rather than exclude people who hold prejudices one way or the other."

The trial court asked the prosecutor if he desired to respond, but advised him that "you don't have to respond if you don't wish to." The prosecutor declined to explain his conduct, and the court denied the motion for mistrial.

Voir dire then resumed. Defense counsel established that two more prospective jurors, Lloyd Hill and Evelyn Smith, were black. Both testified that racial considerations would not enter into their deliberations, and Mr. Hill specifically denied that he would be prejudiced in defendants' favor simply because he was black. Voir dire examination of these two prospective jurors by the court and defense counsel was brief and uneventful. Mr. Hill testified he was employed as a car man by the Santa Fe Railroad, his wife was a housewife, and his daughter a waitress; he had never served on a jury before, had never been the victim of or witness to a crime, and had no relatives or friends who were police officers or attorneys. In turn, Mrs. Smith testified she was employed as a cabin service planner by United Airlines and her husband was a presser at a cleaning business; she had previously served on a jury in two civil cases, one of which ended in a nonsuit; she had never been the victim of or witness to a crime, had never testified in court, and had no relatives or friends who were police officers or attorneys. Defense counsel passed both these prospective jurors for cause.





This time the prosecutor asked no questions whatever, quickly passed both Mr. Hill and Mrs. Smith for cause—and then used two of his next three peremptory challenges to strike them from the jury.

Once more Mr. Gritz vigorously objected, stating: "For the record, Your Honor, by my count, there are seven Negroes that have been kicked off the jury by [the prosecutor], I make a motion for mistrial. It is apparent that it is a policy of the district attorney's office not to permit any Negroes on this jury. Some of them have been kicked without him even questioning them. . . . I feel that these defendants cannot get a trial by their peers." Mr. Halpern joined in the motion, contending that because "there is evidence that the peremptory challenge is being used to excuse only blacks from the jury," there is "a prima facie case of abuse" of such challenges by the People.

Again the court offered the prosecutor the opportunity to respond, but made clear that it was "ready to rule on the matter" without the need of any explanations. The prosecutor replied, "I have no response, Your Honor, and I don't wish my silence to be construed as any tacit admission of the charges." The court agreed it was "not considering it as such," and ruled that "Attorneys have a right to select the jury and use all the peremptories available to them without stating the reason."

Impliedly denying the second motion for mistrial, the court directed voir dire to proceed. No more black prospective jurors were called to the box, and in due course 12 regular jurors and 2 alternates were sworn to try the case. They were all white.

(1) Article I, section 16, of the California Constitution declares in relevant part that "Trial by jury is an inviolate right and shall be secured to all . . . ." It is settled that in criminal cases the right so declared includes in this state the right to a unanimous verdict. (*People* v. *Feagley* (1975) 14 Cal.3d 338, 350 [121 Cal.Rptr. 509, 535 P.2d 373]; *People* v. *Superior Court* (1967) 67 Cal.2d 929, 932 [64 Cal.Rptr. 327, 434 P.2d 623, 25 A.L.R.3d 1143].) It is equally settled that the provision includes the right to have that verdict rendered by impartial and unprejudiced jurors. Section 16 of article I does not explicitly guarantee trial by an "impartial" jury, as does the Sixth Amendment to the federal Constitution; but that right is no less implicitly guaranteed by our charter, as the courts have long recognized.

The principle derives from "The common-law rule which demanded the strictest impartiality upon the part of each individual juror, [and] which declared that, one and all, should, as between the crown and the defendant, 'stand indifferent as they stand unsworn,' . . ." (*People* v. *Helm* (1907) 152 Cal. 532, 535 [93 P. 99], disapproved on other grounds in *People* v. *Edwards* (1912) 163 Cal. 752, 756 [127 P. 58].)[3] The common law rule was fully embodied in the constitutional jury trial provision: "The right of trial by jury is fundamental. It is a right which was transmitted to us by the common law and as such is expressly guaranteed by the constitution, and the distinctive quality of that right—its very essence—is that every person put upon trial upon an issue involving his life or his liberty is entitled to have such issue tried by a jury consisting of unbiased and unprejudiced persons." (*People* v. *Bennett* (1926) 79 Cal.App. 76, 91 [249 P. 20]; accord, *People* v. *Carmichael* (1926) 198 Cal. 534, 547 [246 P. 62]; *People* v. *Helm* (1907) *supra*, 152 Cal. 532, 536; *People* v. *Reyes* (1855) 5 Cal. 347, 349.)[4]

In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross-section of the community."[5] The 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

[3]The *Helm* court was apparently paraphrasing the following language of Lord Coke: "He that is of a jury, must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as he stands unsworne." (1 Coke upon Littleton 155a.)

[4]The Legislature has recognized this right in providing that "It shall be the duty of the trial court to examine the prospective jurors to select *a fair and impartial jury*. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel." (Italics added; Pen. Code, § 1078.)

[5]The history and theory of the representative cross-section rule are discussed in Van Dyke, Jury Selection Procedures (1977), chapter 3; Daughtrey, *Cross-Sectionalism in Jury-Selection Procedures After Taylor* v. *Louisiana* (1975) 43 Tenn.L.Rev. 1; and Kuhn, *Jury Discrimination: The Next Phase* (1968) 41 So.Cal.L.Rev. 235.





respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.[6]

The line of United States Supreme Court cases in point began with *Smith* v. *Texas* (1940) 311 U.S. 128 [85 L.Ed. 84, 61 S.Ct. 164]. There the high court reversed on equal protection grounds a state conviction of a black defendant upon a showing that blacks had been systematically excluded from grand jury service. In language that has proved to be seminal, Justice Black said for a unanimous court: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." (Fn. omitted; *id.*, at p. 130 [85 L.Ed. at p. 86].) We add that in such a war the courts cannot be pacifists.

In *Glasser* v. *United States* (1942) 315 U.S. 60 [86 L.Ed. 680, 62 S.Ct. 457], the defendants in a federal trial complained of the alleged exclusion from petit jury service of all women not members of the state League of Women Voters. Although rejecting the contention on the ground of insufficient proof, the high court strongly reaffirmed the requirement of a representative jury. It observed at the outset that impartiality achieved through representativeness is essential to preserving the constitutional right to jury trial: "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial." (*Id.*, at p. 85 [86 L.Ed. at p. 707].) Quoting from *Smith* v. *Texas*, the court stated (at p. 86 [86 L.Ed. at p. 707]) that "the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." Finally, the court warned (*ibid.*, [86 L.Ed. at p. 707]) that the officials charged with choosing jurors "must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be

[6]As appears from the decisions that follow, the representative cross-section rule also serves other essential functions in our society, such as legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups.

of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right."

In *Thiel* v. *Southern Pacific Co.* (1946) 328 U.S. 217 [90 L.Ed. 1181, 66 S.Ct. 984, 166 A.L.R. 1412], the court reversed a tort judgment in a diversity case tried in California on the ground that daily wage earners had been regularly excluded from petit jury service. In language thereafter often repeated, the court said: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [Citations.] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." (*Id.*, at p. 220 [90 L.Ed. at p. 1185].) The court further explained (*ibid* [90 L.Ed. at p. 1185]) that "Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

In *Ballard* v. *United States* (1946) 329 U.S. 187 [91 L.Ed. 181, 67 S.Ct. 261], the court reversed a federal conviction on the ground that women had been deliberately excluded from both grand and petit jury service. The court began by reiterating the above-quoted passage from *Thiel* (*id.*, at pp. 192-193 [91 L.Ed. at p. 185]), then addressed the government's contention that an all-male panel drawn from diverse groups would be equally representative because women jurors do not "act as a class." Rejecting this argument, the court reasoned that "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." (Fn. omitted; *id.*, at pp. 193-194 [91 L.Ed. at p. 186].) And the court concluded (at p. 195 [91 L.Ed. at p. 187]) that "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at





large, and to the democratic ideal reflected in the processes of our courts."

In *Peters* v. *Kiff* (1972) 407 U.S. 493 [33 L.Ed.2d 83, 92 S.Ct. 2163], the court reversed on equal protection grounds a state conviction of a white defendant upon a showing that blacks had been arbitrarily excluded from grand and petit jury service. The state contended that because the defendant was not himself black he was not harmed by the exclusion. The plurality opinion of Justice Marshall rejected the argument, stating (at p. 503 [33 L.Ed.2d at p. 94]) that "the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases." The court warned that "the opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society," and concluded, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (Fn. omitted; *id.*, at pp. 503-504 [33 L.Ed.2d at p. 94].)

The most recent case of this type was *Taylor* v. *Louisiana* (1975) 419 U.S. 522 [42 L.Ed.2d 690, 95 S.Ct. 692]. There the court reversed a state conviction of a male defendant on the ground that women had in effect been totally excluded from jury service. The court reviewed the foregoing precedents and concluded (at p. 528 [42 L.Ed.2d at p. 697]) that "The unmistakable import of this Court's opinions, at least since 1940, *Smith* v. *Texas, supra,* and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." In justifying that conclusion the court stressed (at p. 530 [42 L.Ed.2d at p. 698]) several of the functions served by the representative cross-section requirement: "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." (See also *Ballew* v. *Georgia* (1978) 435 U.S. 223, 235-238 [55 L.Ed.2d 234, 244-245, 98 S.Ct. 1029].)

We have reviewed this line of United States Supreme Court opinions in some detail because we fully agree with the views there expressed as to the importance of the representative cross-section rule, particularly in protecting the constitutional right to an impartial jury.[7] We rely equally, however, on the law of California. It was not until its 1975 decision in *Taylor* that the high federal court imposed the representative cross-section rule on the states as a fundamental component of the Sixth Amendment right to an impartial jury incorporated in the Fourteenth Amendment.[8] In California we had long since adopted that rule.

Thus in *People* v. *White* (1954) 43 Cal.2d 740 [278 P.2d 9], the defendant contended he was denied "his constitutional right to a trial by an impartial jury" because the method used in selecting the jury panel produced a "systematic inclusion of limited classes of persons who did not represent a cross-section of the community," i.e., businessmen and club women, with a resulting exclusion of working class people. (*Id.*, at p. 748.) The jury commissioner testified he drew his list largely from the membership rosters of such organizations as the Rotary, Kiwanis, and Lions Clubs, the Chamber of Commerce, and certain women's clubs, and that he attempted to "get as many businessmen on the panel as possible" (*ibid.*).

Although we found the error nonprejudicial in the circumstances of the case because the panel actually selected did in fact include a reasonable representation of working class people, we unanimously condemned the selection system itself for its tendency to produce venires that were not representative cross-sections of the community. We began, as we do here, by quoting well-known passages from *Thiel* and related federal cases. We then turned to the particular issue at hand, i.e., whether the source list used by the jury commissioner was "improperly weighted so as to prevent having a good cross-section of the community for prospective jurors." (*Id.*, at p. 750.) The question was answered in a vigorous affirmative: "Those persons who would be denied the opportunity for jury service under this system would not be excluded because of any lack of ability, intelligence or qualifications but merely because they did not belong to the social and economic strata of the community which compris[e] the membership of certain private clubs and organizations. A system which tends to permit this form of wholesale exclusion of a large segment of our citizens from jury duty would normally prevent the selection of juries from a cross-section of the community. Such a system is highly discriminatory and should not be condoned." (*Id.*, at p. 753.)

Summing up, we repeatedly emphasized (at p. 754) the need for compliance with the representative cross-section rule as a precondition to trial by an impartial jury: "The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society. In selecting a truly representative jury panel, the membership lists of various clubs and organizations may properly be used, but they should not be relied on as the principal source of prospective jurors nor should they be used to the complete exclusion of other general sources more likely to represent a cross-section of the population, such as telephone directories, voting lists, and city directories. Any system or method of jury selection which fails to adhere to these democratic fundamentals, which is not designed to encompass a cross-section of the community or which seeks to favor limited social or economic classes, is not in keeping with the American tradition and will

[7]The rule has also been embodied in federal legislation: in 1968 Congress declared, at the outset of the Jury Selection and Service Act (28 U.S.C. §§ 1861-1869), that "It is the policy of the United States that all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from *a fair cross section of the community* in the district or division wherein the court convenes. . . ." (Italics added; 28 U.S.C. § 1861.)

[8]The path of incorporation was not smooth. As noted above, *Smith* first articulated the rule as a requirement of equal protection. *Glasser*, *Thiel*, and *Ballard* applied it pursuant to the supervisory power over federal courts. When the high court first declared the Sixth Amendment's guarantee of trial by jury applicable to the states through the Fourteenth Amendment, it was silent on the present question. (*Duncan* v. *Louisiana* (1968) 391 U.S. 145 [20 L.Ed.2d 491, 88 S.Ct. 1444].) Yet when it held two years later that the federal guarantee of a jury trial does *not* require that the jury be composed of 12 persons, the court almost incidentally read the representative cross-section requirement into the *Duncan* rule. (*Williams* v. *Florida* (1970) 399 U.S. 78, 100 [26 L.Ed.2d 446, 460, 90 S.Ct. 1893].) Because *Duncan* did not apply to state trials preceding its rendition (*De Stefano* v. *Woods* (1968) 392 U.S. 631 [20 L.Ed.2d 1308, 88 S.Ct. 2093]), however, the court could not invoke it in *Peters*; instead, the plurality opinion held that conviction by a deliberately unrepresentative jury violated the due process clause of the Fourteenth Amendment, while the concurring opinion rested on federal statutory grounds. Finally, in *Taylor* the court came to grips with the issue and held the representative cross-section rule applicable to the states through the Sixth Amendment right to an impartial jury.

not be condoned by this court." (See also *People* v. *Carter* (1961) 56 Cal.2d 549, 568-570 [15 Cal.Rptr. 645, 364 P.2d 477].)

The *White* opinion did not specify which Constitution—state or federal—it was relying on as the source of its declared requirement of cross-sectionalism, but simply spoke in broad terms of the "American system" and the "American tradition." California, of course, is an integral part of that system and tradition; and as we noted above, our courts have long recognized that the right to an impartial jury is an inseparable element of the jury trial guarantee of article I, section 16, of the California Constitution. (2) Accordingly, we now make explicit what was implicit in *White*, and hold that in this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution.[9]

It therefore becomes the responsibility of our courts to insure that this guarantee not be reduced to a hollow form of words, but remain a vital and effective safeguard of the liberties of California citizens. There are three stages in the jury selection process at which the ideal of a representative cross-section can be seriously compromised. The first is the initial compilation of the "roll of eligible juror candidates" (Code Civ. Proc., § 204e) or master list from which, by various steps, the venires are drawn. (*Id.*, §§ 203-220.) Obviously if that list is not representative of a cross-section of the community, the process is constitutionally defective *ab initio*. The issue has been extensively litigated[10] and has received the close attention of legal commentators.[11] In the case at bar, however, no claim is made that the master list, or indeed the venire drawn therefrom, was unrepresentative.

Secondly, a number of prospective jurors thus selected are disqualified or excused by judges or various court personnel on grounds of competency (Code Civ. Proc., §§ 198, 199), suitability (*id.*, §§ 204d, 205, subd. (a)), undue hardship (*id.*, § 200), or, until recently, occupation (*id.*, former § 200, repealed by Stats. 1975, ch. 593, § 2, p. 1310). The almost total elimination in 1975 of automatic exemptions for occupational reasons was a commendable step towards preserving the representative character of the jury.[12] But the continuing power to excuse prospective jurors on the grounds of "suitability" and "undue" hardship is highly discretionary in nature, and courts must be alert to prevent its abuse. In particular, excessive excuses on such grounds as sex, age, job obligations, or inadequate jury fees, can upset the demographic balance of the venire in essential respects.[13] Again, defendants herein do not complain of such abuse.

Thirdly, when the case is called for trial the clerk draws the names of veniremen at random from the "trial jury box" (Code Civ. Proc., § 600), and the parties may exercise their statutory challenges to the jurors thus chosen. (Pen. Code, §§ 1055-1089.) Challenges to an individual juror are of two kinds, peremptory and for cause. (*Id.*, § 1067.) A peremptory challenge is "an objection to a juror for which no reason need be given, but upon which the Court must exclude him." (*Id.*, § 1069.) A challenge for cause is either "general"—the juror is legally incompetent to serve in any case—or "particular"—the juror is actually or impliedly biased in the specific matter on trial. (*Id.*, §§ 1071-1073.) Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire

[9]In an earlier decision this court reversed a conviction of a black defendant upon a showing that blacks had been systematically excluded from venires and petit juries in Merced County, a practice we condemned as a denial of an impartial jury, of due process, and of equal protection. Quoting both the Sixth and Fourteenth Amendments, we said: " 'Clearly the preceding mandates imply that one who is on trial for an alleged crime is entitled to a jury from which individuals of his own race who are otherwise qualified as jurors in the particular case, have not been arbitrarily excluded merely because of their nationality, race or color.' " (*People* v. *Hines* (1939) 12 Cal.2d 535, 539 [86 P.2d 92].)

In two more recent decisions—still prior to *Taylor*—we again recognized the Sixth Amendment basis of the right to a representative cross-section of the community, but did not consider whether it might also be founded on article I, section 16, of the California Constitution. (*Adams* v. *Superior Court* (1974) 12 Cal.3d 55, 59-60 [115 Cal.Rptr. 247, 524 P.2d 375]; *People* v. *Jones* (1973) 9 Cal.3d 546, 556 [108 Cal.Rptr. 510 P.2d 705].)

[10]Numerous federal cases have addressed the question, including the Supreme Court decisions cited hereinabove. (See generally Gewin, An Analysis of Jury Selection Decisions, appen. to *Foster* v. *Sparks* (5th Cir. 1975) 506 F.2d 805, 811.) For additional California cases, see, e.g., *People* v. *Spears* (1975) 48 Cal.App.3d 397 [122 Cal.Rptr. 93] (petit jury venire); *People* v. *Powell* (1974) 40 Cal.App.3d 107, 124-133 [115 Cal.Rptr. 109] (same); *Adams* v. *Superior Court* (1972) 27 Cal.App.3d 719 [104 Cal.Rptr. 144] (same); *People* v. *Pinell* (1974) 43 Cal.App.3d 627 [117 Cal.Rptr. 913] (grand jury venire); *People* v. *Goodspeed* (1972) 22 Cal.App.3d 690, 699-703 [99 Cal.Rptr. 696] (same); *In re Wells* (1971) 20 Cal.App.3d 640, 649-650 [98 Cal.Rptr. 17] (same); *People* v. *Newton* (1970) 8 Cal.App.3d 359, 388-391 [87 Cal.Rptr. 394] (both).

[11]See, e.g., Van Dyke, *op. cit. supra*, footnote 5, at chapter 4; Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 65 Cal.L.Rev. 776; Note, *The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966* (1966) 52 Va.L.Rev. 1069.

[12]In 1977 the Legislature restored the former exemption of peace officers. (Stats. 1977, ch. 748, § 1, p. —.)

[13]The dangers are discussed in Van Dyke, *op. cit. supra*, footnote 5, at chapter 5.

impartiality and without prejudice to the substantial rights of either party" (*id.*, § 1073). Implied bias arises when the juror stands in one of several relationships to a party, such as consanguinity, trust, or employment, or has been involved in prior legal proceedings relating to the parties or the case (*id.*, § 1074); in such circumstances no proof of prejudice is required—it is inferred as a matter of law.

The purpose of the challenge stage of jury selection is apparent from these statutory provisions and the constitutional considerations discussed above. Until this point in the process the goal of an impartial jury is pursued by insuring that the master list be a representative cross-section of the community and that the venire and the proposed trial jury be drawn therefrom by wholly random means. But precisely because it is both all-inclusive and random, the process cannot consistently screen out those prospective jurors who bring to the courtroom a bias concerning the particular case on trial or the parties or witnesses thereto—we may call this "specific bias"—derived, for example, from personal experience or from general exposure to pretrial publicity. Yet such persons must evidently be excused from the jury insofar as possible if the goal of impartiality is to be achieved. The law therefore presumes that each party will use his challenges to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire.

(3) The purpose of the challenges also dictates their scope: they are to be used to remove jurors who are believed to entertain a specific bias, and no others. In the case of challenges for cause the matter is clear: the above-quoted statutory definition of actual bias is a literal description of this state of mind, i.e., a prejudice "in reference to the case, or to either of the parties" (Pen. Code, § 1073).

The issue is somewhat more complex with respect to peremptory challenges, but the answer remains the same. It is true that the statute defines such a challenge as one for which "no reason need be given" (*id.*, § 1069); but it does not follow therefrom that it is an objection for which no reason need *exist*. On the contrary, in view of the limited number of such challenges allowed by statute[14] we may confidently disregard the possibility that a party will squander his peremptories by removing jurors, simply because he has the right to do so, for frivolous reasons. In

[14]If the offense charged is punishable by imprisonment for 90 days or less, each side has six peremptory challenges. (Pen. Code, § 1070, subd. (b).) In the case of all other offenses not punishable by death or life imprisonment—including therefore the vast majority of felonies and all serious misdemeanors—each side has 10 peremptory challenges. (*Id.*, subd. (a), as amended by Stats. 1978, ch. 98, § 2, p. —.) In the case of the few offenses punishable by death or life imprisonment, each side has 26 peremptory challenges. (*Ibid.*) (See also *id.*, § 1070.5 (multiple defendants).)





practice, a party will use a peremptory challenge only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased.[15]

To say that peremptories will ordinarily be exercised only in cases of bias, however, does not clarify the kinds of bias upon which the challenge may permissibly be based. In contrast to the limited list of events authorizing a challenge for cause on the ground of implied bias (Pen. Code, § 1074), the law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative.

For example, a prosecutor may fear bias on the part of one juror because he has a record of prior arrests or has complained of police harassment, and on the part of another simply because his clothes or hair length suggest an unconventional lifestyle. In turn, a defendant may suspect prejudice on the part of one juror because he has been the victim of crime or has relatives in law enforcement, and on the part of another merely because his answers on voir dire evince an excessive respect for authority. Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" (4 Blackstone, Commentaries *353)—upon entering the box the juror may have smiled at the defendant, for instance, or glared at him. Responsive to this reality, the law allows removal of a biased juror by a challenge for which no reason "need be given," i.e., publicly stated: in many instances the party either cannot establish his reason by normal methods of proof or cannot do so without causing embarrassment to the challenged venireman and resentment among the remaining jurors.[16]

[15]The hyperbole of certain earlier opinions—e.g., that peremptory challenges may be invoked "upon the mere whim or caprice" of the parties (*People* v. *Helm* (1907) *supra*, 152 Cal. 532, 535)—should be reconsidered in the light of these pragmatic imperatives.

[16]The latter point touches on an additional purpose served by the peremptory challenge: it allows a party to remove a juror whom he has offended by a probing voir dire or by an unsuccessful challenge for cause, and thereby safeguards the vigorous exercise of both those rights. (See, e.g., *People* v. *Durrant* (1897) 116 Cal. 179, 198-199 [48 P. 75].) Blackstone agrees, and adds another function of the peremptory: to preserve the appearance as well as the substance of impartiality by guaranteeing the defendant he will not be tried by anyone whom he intuitively dislikes. (4 Blackstone, Commentaries *353;

All of these reasons, nevertheless, share a common element: they 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. By the same token, they are essentially neutral with respect to the various groups represented on the venire: the characteristics on which they focus cut across many segments of our society. Thus both blacks and whites may have prior arrests, both rich and poor may have 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." It follows that peremptory challenges predicated on such reasons do not significantly skew the population mix of the venire in one direction or another; rather, they promote the impartiality of the jury without destroying its representativeness.

(4) By contrast, when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—we may call this "group bias"—and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen, is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority. Seen in this light, the presumed group bias that triggered the peremptory challenges against its members is indistinguishable from the group perspective we seek to encourage by the cross-section rule.[17]

(5a) We conclude that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to

see generally Babcock, *Voir Dire: Preserving "Its Wonderful Power"* (1975) 27 Stan.L.Rev. 545, 552-555.)

[17]As a recent commentator aptly put the point in the context of the case at bar, "It may be argued that the exclusion of jurors on the basis of group membership would be acceptable where it is believed that, for example, blacks are consistently more biased in favor of acquittal than whites. The argument misses the point of the right to an impartial jury under *Taylor*. Blacks may, in fact, be more inclined to acquit than whites. The tendency might stem from many factors, including sympathy for the economic or social circumstances of the defendant, a feeling that criminal sanctions are frequently too





trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. This does not mean that the members of such a group are immune from peremptory challenges: individual members thereof may still be struck on grounds of specific bias, as defined herein.[18] Nor does it mean that a party will be entitled to a petit jury that proportionately represents every group in the community: we adhere to the long-settled rule that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals. (See, e.g., *People* v. *White* (1954) *supra,* 43 Cal.2d 740, 749; *People* v. *Hines* (1939) *supra,* 12 Cal.2d 535, 539; *People* v. *Durrant* (1897) *supra,* 116 Cal. 179, 199; *People* v. *Breckenridge* (1975) 52 Cal.App.3d 913, 920 [125 Cal.Rptr. 425]; *People* v. *Spears* (1975) *supra,* 48 Cal.App.3d 397, 401-402; *People* v. *Superior Court (Dean)* (1974) 38 Cal.App.3d 966, 973 [113 Cal.Rptr. 732]; *People* v. *Gonzales* (1972) 28 Cal.App.3d 1091, 1097 [104 Cal.Rptr. 530].)

What it does mean, however, is that a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. Obviously he cannot avoid the effect of that process: the master list must be reduced to a manageable venire, and that venire must in turn be reduced to a 12-person jury. The best the law can do to accomplish those steps with the least risk to the representative nature of the jury pool is to take them by random means, i.e., by drawing lots. We recognize that in a predictable percentage of cases the result will be a wholly unbalanced jury, usually composed exclusively of members of the majority group. This is inevitable, the price we must pay for juries of a workable size. It is no less inevitable, however, that in all other instances—as in the case at bar—the representative nature of the pool or venire will be reflected at least in

harshly applied, or simply an understandable suspicion of the operations of government. Whites may also be more inclined to convict, particularly of crimes against a white victim. But these tendencies do not stem from individual biases related to the peculiar facts or the particular party at trial, but from differing attitudes toward the administration of justice and the nature of criminal offenses. The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard elaborated in *Taylor* is designed to foster." (Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* (1977) 86 Yale L.J. 1715, 1733, fn. 77.)

[18]For example, in the case at bar the black prospective juror Napoleon Howard disclosed on voir dire that he had a stepson who had been convicted of crime and was currently incarcerated. A personal experience of this nature, suffered either by the juror or a close relative, has often been deemed to give rise to a significant potential for bias against the prosecution.

some degree in the 12 persons called at random to the jury box. It is that degree of representativeness—whatever it may prove to be—that we can and must preserve as essential to trial by an impartial jury. Certainly the prospective jurors are then subject to challenges for cause and peremptory challenges on grounds of specific bias; but for the reasons stated above we cannot countenance the decimation of the surviving jurors by peremptory challenges on the ground of group bias alone.

## II

The question of remedy remains, and we do not underestimate its difficulty.[19] (6) We begin with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. We adopt this presumption for several reasons: in deference to the legislative intent underlying such challenges, in order to encourage their use in all proper cases, and out of respect for counsel as officers of the court.

Yet it is only a presumption, and must be rebuttable if the foregoing constitutional right is not to be nullified even by honest zeal. The issue is what showing is necessary to rebut it. We must define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system.

In their briefs on appeal defendants propose a mathematical method of analyzing numerical data derived from voir dire to determine the statistical probability, expressed as a percentage, that the prosecutor exercised his peremptory challenges against black prospective jurors on a purely random basis. They calculate that chance as 2.8 percent, conclude there was a 97.2 percent probability that the elimination of all black

[19]In recent years a variety of solutions have been proposed in the literature that do not seem entirely satisfactory. (See, e.g., Note, *Racial Discrimination in Jury Selection* (1977) 41 Albany L.Rev. 623; 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* (1977) 46 U.Cin.L.Rev. 554; Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process* (1974) 18 St. Louis U.L.J. 662; Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race* (1967) 39 Miss. L.J. 157; Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury* (1966) 52 Va.L.Rev. 1157, 1173-1175; cf. LaRue, *A Jury of One's Peers* (1976) 33 Wash. & Lee L.Rev. 841; Note, *The Case for Black Juries* (1970) 79 Yale L.J. 531.)





jurors was intentional, and infer that intent was racially motivated.[20] An amicus curiae for defendants begins with the same data, but uses a different mathematical method of analyzing it and produces a slightly different figure.[21]

We decline to accept either proposal, not because of the discrepancy between their results but because of their inappropriateness to the need at hand. The method suggested by amicus, commonly called statistical decision theory, has impressive credentials: the United States Supreme Court has given it increasing weight in the past decade,[22] and it has been enthusiastically espoused by scholars.[23] But its use thus far has been limited to reviewing an earlier stage in the jury selection process, i.e., whether the master list or the grand or petit jury venire constitutes a representative cross-section of the community. Even for that purpose the technique has been criticized on the ground that it "involves complicated calculations resulting in answers that are difficult to visualize and evaluate," and that "the result is significantly affected by the choice of sample size." (Fn. omitted.) (Kairys et al., *op. cit. supra*, fn. 11, at p. 794.) More disturbing for our purpose is the declaration by a leading writer in the field that because of the discretionary nature of peremptory challenges it is "virtually impossible" for statistical decision theory to demonstrate racial motivation in the striking of blacks from a petit jury.[24]

[20]Defendants assume, as their counsel asserted at trial, that the total number of blacks excused by peremptory challenge was seven. The prosecutor never conceded that figure was correct, but in the view we take of the matter the conflict is immaterial.

[21]By amicus' calculation there was a 98.3 percent probability that the total exclusion of blacks herein was intentional. In their petitions for hearing in this court defendants apparently adopt this figure and the method used to reach it.

[22]Compare *Whitus* v. *Georgia* (1967) 385 U.S. 545, 552, footnote 2 [17 L.Ed.2d 599, 605, 87 S.Ct. 643], with *Alexander* v. *Louisiana* (1972) 405 U.S. 625, 630, footnote 9 [31 L.Ed.2d 536, 541, 92 S.Ct. 1221], and *Castaneda* v. *Partida* (1977) 430 U.S. 482, 496-497, footnote 17 [51 L.Ed.2d 498, 511-512, 97 S.Ct. 1272]; see also *id.*, at page 489, footnote 8 [51 L.Ed.2d 506].

[23]Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases* (1966) 80 Harv.L.Rev. 338; Kairys, *Juror Selection: The Law, a Mathematical Method of Analysis, and a Case Study* (1972) 10 Am.Crim.L.Rev. 771, 785-789; Sperlich & Jaspovice, *Statistical Decision Theory and the Selection of Grand Jurors: Testing for Discrimination in a Single Panel* (1975) 2 Hastings Const.L.Q. 75; Comment, *The Civil Petitioner's Right to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases Generally* (1973) 20 UCLA L.Rev. 581, 620-631.

[24]Finkelstein, *op. cit. supra*, footnote 23, at page 352 ("there remains a broad area of discretion in the use of such strikes or challenges which makes it virtually impossible to determine from population statistics, however carefully refined, the probability that a Negro will appear on a petit jury").

We need not undertake in this proceeding to mediate any such dispute among experts, nor to decide which computational method is preferable for resolving attacks on the master list or the venire. Such cases are clearly distinguishable, as the final demographic composition of those lists is known when the issue arises: at that time, when all the figures are in, mathematical techniques may well be of assistance to the courts. (See, e.g., cases cited in fn. 10, *ante*.) But they are of little help during voir dire, when the composition of the jury is constantly changing under the influence of challenges—and when counsel may be trying to expose an emerging pattern of discrimination in time to forestall an unfair trial.

In that setting, rather, we rely on more traditional procedures.[25] (7) If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, as in the case at bar, 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.[26] 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.

We shall not attempt a compendium of all the ways in which a party may seek to make such a showing. For illustration, however, we mention certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole.[27] Next, the showing may be

[25]The solution that follows is supported, with variations, by a substantial body of scholarly opinion. (See, e.g., Van Dyke, *op. cit. supra*, fn. 5, at pp. 166-167; Kuhn, *op. cit. supra*, fn. 5, at pp. 293-295; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* (1977) 86 Yale L.J. 1715, 1738-1741; Note, *The Jury: A Reflection of the Prejudices of the Community* (1969) 20 Hastings L.J. 1417, 1430-1433.)

[26]Because there can be no doubt that the blacks in the present case constitute a cognizable group for such purpose, we have no occasion to explore the point further at this time. For a useful discussion of the subject, see Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* (1977) 86 Yale L.J. 1715, 1735-1738.

[27]For example, in a case of alleged exclusion on the ground of race it may be significant if the persons challenged, although all black, include both men and women and are of a variety of ages, occupations, and social or economic conditions.





supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, under *Peters* and *Taylor* the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.

Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. We recognize that such a ruling "requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." (Kuhn, *op. cit. supra*, fn. 5, at p. 295.) They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay.

If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone.[28] The showing need

[28]At this point the statutory provision that "no reason need be given" for a peremptory challenge (Pen. Code, § 1069) must give way to the constitutional imperative: the statute is not invalid on its face, but in these limited circumstances it would be invalid as applied if it were to insulate from inquiry a presumptive denial of the right to an impartial jury.

That right is paramount because the peremptory challenge is not a constitutional necessity but a statutory privilege. The point was made with characteristic clarity by Justice (then Presiding Justice) Sullivan, writing for the court in *People* v. *King* (1966) 240 Cal.App.2d 389 [49 Cal.Rptr. 562, 21 A.L.R.3d 706]. After reviewing numerous statements in federal and state decisions on the origins and importance of the peremptory challenge, Justice Sullivan concluded: "Notwithstanding such distinguished ancestry and respected career, neither the United States Constitution nor the Constitution of California in their respective provisions securing to the accused his right to trial by jury (U.S. Const., 6th Amend.; Cal. Const., art. I, § 7 [now § 16]), or elsewhere, requires that Congress or the California Legislature grant peremptory challenges to the accused [or prosecutor] or prescribes any particular method of securing to an accused [or prosecutor] the right to exercise the peremptory challenges granted by the appropriate legislative body. [Citations.] The matter of peremptory challenges rests with the Legislature, limited only by the necessity of having an impartial jury." (*Id.*, at pp. 399-400.)

not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein. He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.

If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges. Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew.[29]

[29]Additional sanctions are proposed in the literature (fn. 25, *ante*), but we have no present grounds to believe that the above procedure will be ineffective to deter such abuses of the peremptory challenge. If experience should prove otherwise, it will be time enough then to consider alternative penalties.

Although in the present appeal the Attorney General for obvious reasons does not claim the right to object to the same misuse of peremptory challenges on the part of defense counsel, we observe for the guidance of the bench and bar that he has that right under the constitutional theory we adopt herein: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism. (See fn. 6, *ante*.) For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

We do not reach, however, the question of the applicability of this decision to civil cases. Although article I, section 16, of the California Constitution governs such cases as well, most of the state and federal authorities relied on herein invoke the requirement of cross-sectionalism in the context of a criminal trial only. Whether the requirement also applies in a civil setting turns on such considerations as the function of a jury in that setting. Because the issue is not presented in the case at bar, we leave it to another day.





**(5b)** Applying these rules to the record before us, we hold that defendants made a prima facie showing that the prosecutor was exercising peremptory challenges against black jurors on the ground of group bias alone. The trial court therefore erred in ruling that the prosecutor was not required to respond to the allegation, and in denying defendants' motions without a rebuttal showing by the prosecutor that the challenges were each predicated on grounds of specific bias.[30]

The error is prejudicial per se: "The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside." (*People* v. *Riggins* (1910) 159 Cal. 113, 120 [112 P. 862]; accord, *People* v. *Carmichael* (1926) *supra*, 198 Cal. 534, 547; *People* v. *Diaz* (1951) 105 Cal.App.2d 690, 696-700 [234 P.2d 300]; *People* v. *O'Connor* (1927) 81 Cal.App. 506, 519-521 [254 P.2d 630]; *People* v. *Wismer* (1922) 58 Cal.App. 679, 687 [209 P. 259]; cf. *Ballard* v. *United States* (1946) *supra*, 329 U.S. 187, 195 [91 L.Ed. 181, 186-187] (federal rule).) The judgments must therefore be reversed and the cause remanded for a new trial.[31]

## III

The People nevertheless contend that we are compelled to allow this pernicious practice to continue in our courts by the case of *Swain* v. *Alabama* (1965) 380 U.S. 202 [13 L.Ed.2d 759, 85 S.Ct. 824]. There a black defendant was convicted of rape and sentenced to death by an all-white jury after the prosecutor had struck each of the six blacks on the venire by the equivalent of peremptory challenges. In an opinion concurred in by only five justices (*id.*, at pp. 209-222 [13 L.Ed.2d at pp. 766-774]) the court rejected the defendant's claim of a violation of the equal protection

[30]Because the prosecutor declined to give any such reason, we shall not speculate on whether he could have done so. (Cf. fn. 18, *ante*.) Instead of justifying his own conduct, the prosecutor simply retorted that defense counsel seemed in their turn to be striking from the jury "all elderly business people" and most of those with Spanish surnames. A party does not sustain his burden of justification by attempting to cast a different burden on his opponent.

[31]The rule we adopt herein applies to the defendants in the case at bar and in the companion matter of *People* v. *Johnson* (1978) *post*, page 296 [148 Cal.Rptr. 915, 583 P.2d 774], and to any defendant now or hereafter under sentence of death. (Cf. *In re Jackson* (1964) 61 Cal.2d 500 [39 Cal.Rptr. 220, 393 P.2d 420].) In all other cases the rule will be limited to voir dire proceedings conducted after the present decision becomes final. (See *People* v. *Cook* (1978) *ante*, pp. 67, 99, fn. 18 [148 Cal.Rptr. 605, 583 P.2d 130], and cases cited.)

clause of the Fourteenth Amendment. Reviewing the grounds of peremptory challenges, the court noted—with no expression of disapproval—that such a challenge is "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation, or affiliations of people summoned for jury duty." (Fn. omitted; *id.*, at p. 220 [13 L.Ed.2d at pp. 772-773].) The court reaffirmed the point by observing (at p. 221 [13 L.Ed.2d at p. 773]) that "veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges," but rather may be excluded on the ground of their "group affiliations." The court then held that the presumption of validity of the prosecutor's use of peremptories in any given trial "is not overcome and the prosecutor therefore 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 p. 222 [13 L.Ed.2d at p. 773].)

The high court reached this conclusion because of its concern (*ibid.*) that under a contrary rule the challenge "would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity."[32] Finally, in a dictum concurred in by only four justices (cf. opn. of Harlan, J., 380 U.S. 228 [13 L.Ed.2d 777]), the opinion implied that a meritorious equal protection claim might be stated "when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," removed every black from every petit jury. (*Id.*, at p. 223 [13 L.Ed.2d at p. 774].)

It is true that *Swain* adjudicated the issue in terms of the equal protection clause of the Fourteenth Amendment rather than the impartial jury guarantee of the Sixth Amendment, presumably because the case predated both *Duncan* and *Taylor*. (See fn. 8, *ante*.) But we shall not attempt to distinguish it on that ground. The court's motivation in *Swain* seems to have been its desire to avoid what it believed would be "a radical change in the nature and operation of the [peremptory] challenge" (380 U.S. at pp. 221-222 [13 L.Ed.2d at p. 773]), and we strongly suspect that desire has survived the advent of the *Taylor* rule.[33] We therefore assume that if the present question were before the high court it would reaffirm *Swain* and reach the same result under the representative cross-section rule as it did under the equal protection clause.

[32]We emphasize that under the rule we adopt herein (part II, *ante*) peremptories are not "open to examination" unless and until on a timely motion the trial court is satisfied there is a prima facie showing that jurors are being challenged on the sole ground of group bias; that even then the prosecutor is not required to defend "each and every challenge" but only those he has exercised against members of the identified group; and that the issue in such event is not his "judgment" or "sincerity" but simply whether his ground of challenge was a specific bias on the part of the individual juror.





**(8a)** Because a fundamental safeguard of the California Declaration of Rights is at issue, however, "our first referent is California Law" and divergent decisions of the United States Supreme Court "are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." (*People* v. *Pettingill* (1978) 21 Cal.3d 231, 248 [145 Cal.Rptr. 861, 578 P.2d 108]; accord, *People* v. *Hannon* (1977) 19 Cal.3d 588, 606 [138 Cal.Rptr. 885, 564 P.2d 1203]; *Serrano* v. *Priest* (1976) 18 Cal.3d 728, 764 [141 Cal.Rptr. 315, 569 P.2d 1303]; *People* v. *Longwill* (1975) 14 Cal.3d 943, 951, fn. 4 [123 Cal.Rptr. 297, 538 P.2d 753].) It is apparent that *Swain* provides less protection to California residents than the rule we now adopt. Under *Swain* a defendant is barred from vindicating his right to an impartial jury unless he can prove that over a long period of time the same prosecutor has struck every black from every petit jury "whatever the circumstances, whatever the crime and whoever the defendant or the victim may be."

To begin with, *Swain* obviously furnishes no protection whatever to the first defendant who suffers such discrimination in any given court—or indeed to all his successors, until "enough" such instances have accumulated to show a pattern of prosecutorial abuse. Yet in California each and every defendant—not merely the last in this artificial sequence—is constitutionally entitled to trial by a jury drawn from a representative cross-section of the community.

Moreover, even if we consider only the defendant who believes himself in a position to invoke the exception suggested in *Swain*, we see that his attempt to comply with the federal standard of proof is bound to fail. The defendant is party to only one criminal proceeding, and has no personal experience of racial discrimination in the other trials held in that court. Nor can he easily obtain such information, for several reasons. First, those defendants who are indigent or of limited means cannot afford to pay investigators to develop the necessary data. Second, even if the funds were available—or the public defender's office were willing and able to

[33]We note that the author of the majority opinion in *Swain*, Justice White, also authored the majority opinion in *Taylor*.

do the research—the time is not: by definition, abuse of peremptory challenges does not appear until the jury selection process is well under way—as in the case at bar—and few if any trial judges would be willing to interrupt the proceedings at that point by a continuance of unpredictable length to permit the necessary investigation. Third, even if the funds and time were available, the data is not: we know of no central register conveniently listing the names and races of all jurors peremptorily challenged by the prosecution in a given court.[34]

Rather, the defendant would be required to somehow obtain and analyze the records of an undetermined number of individual trials in the hope of finding a pattern of abuse among the many peremptory challenges there exercised by the People. But he would have no practical way of discovering which of the excused jurors were black, or of proving their race even if he could learn of it; nor, for the same reasons, could he discover and prove the race of each of the previous defendants and their victims. And even if he could somehow show such a pattern at the hands of certain prosecutors, what of other prosecutors who had more recently joined the local district attorney's office? Would they be immunized from any inquiry until they had made a "record" of such discrimination? If so, how many "free" unrepresentative juries would each be entitled to?

That these are not fanciful concerns is dramatically demonstrated by the history of attempts by black defendants to meet the *Swain* burden of proof. Those attempts, in both federal and state courts, were recently reviewed in some detail (Annot., Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race (1975) 79 A.L.R.3d 14, 56-73), and the author concluded (at p. 24) that in the 10 years since *Swain* "in all of the cases involving this issue thus far, all of which have dealt with blacks as the group peremptorily challenged, *no defendant has yet been successful* in proving to the court's satisfaction an invidious discrimination by the use of the peremptory challenge against blacks over a period of time." (Italics added; fn. omitted.) The California experience has been identical: numerous decisions of the Court of Appeal have adopted the *Swain* burden of proof; numerous black defendants have attempted to comply with it, but none has succeeded.[35]

[34]In a related context it was noted, "In California one of the problems faced by blacks who seek to prove a prima facie case of discrimination from the composition of the venire that results from whatever selection process is employed appears to be that our officials are very properly colorblind and do not keep records based on race." (*People* v. *Jones* (1972) 25 Cal.App.3d 776, 782, fn. 5 [102 Cal.Rptr. 277].)

[35]See, e.g., *People* v. *Wiley* (1976) 57 Cal.App.3d 149, 166 [129 Cal.Rptr. 13]; *People* v. *Allums* (1975) 47 Cal.App.3d 654, 663-664 [121 Cal.Rptr. 62]; *People* v. *Anderson* (1975) 44 Cal.App.3d 723, 726-727 [118 Cal.Rptr. 918]; *In re Wells* (1971) *supra*, 20 Cal.App.3d 640, 647-648; see also *People* v. *Gardner* (1975) 52 Cal.App.3d 559, 562 [125 Cal.Rptr. 186]; *People* v. *Wheeler* (1971) 23 Cal.App.3d 290, 309-310 [100 Cal.Rptr. 198].





It demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right. (5c) For the reasons stated, the rule of *Swain* v. *Alabama* is not to be followed in our courts and the cases applying it are disapproved to that extent. (See fn. 35, *ante*.)[36] (8b) Rather, all claims in California courts that peremptory challenges are being used to strike jurors solely on the ground of group bias are to be governed by article I, section 16, of the California Constitution and the procedure outlined above.

In view of our disposition herein it is unnecessary to reach defendants' additional contentions.

The judgments are reversed.

Tobriner, J., Manuel, J., and Newman, J., concurred.

**BIRD, C. J.**, Concurring.—I agree with the result reached by the majority that the state's use of peremptory challenges to remove prospective jurors on the sole ground of race violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. I do not believe that the state can systematically exclude blacks from serving on a jury by the selective use of the peremptory challenge by the state's representative, i.e., the prosecutor. However, I do not concur in the dicta in the majority opinion which suggest other restrictions on the use of peremptory challenges. The peremptory challenge is not a challenge for cause. The distinction between the two should not be blurred in our attempt to stop an unconstitutional practice.

[36]The Attorney General also invokes language in *People* v. *Floyd* (1970) 1 Cal.3d 694, 727-728 [83 Cal.Rptr. 608, 464 P.2d 64], a capital case in which a majority of this court quoted from *Swain* in rejecting a complaint that the prosecutor peremptorily challenged certain jurors solely because of their scruples against the death penalty. The reference to *Swain* was essentially dictum, however, because the opinion concluded (at p. 728) that "In any event, the *voir dire* examination of the jurors fails to establish" that any juror had in fact been challenged on that ground. Any implication of *Floyd* contrary to our decision in the case at bar is disapproved.

**RICHARDSON, J.**—I respectfully dissent.

In my opinion when a lawyer during the course of a civil or criminal trial exercises a peremptory challenge he is not accountable for his decision to anyone. This has been axiomatic for many years both in the United States generally and in California. As to criminal cases the rule is cemented in Penal Code section 1069 which provides: "A peremptory challenge can be taken by either party and may be oral. It is an objection to a juror *for which no reason need be given,* but upon which the court *must* exclude him." (Italics added.) The majority now changes this rule and, for the first time, requires a justification, excuse, or explanation for use of a *peremptory* challenge.

The majority accepting, as it must, the statutory definition of a peremptory challenge contained in section 1069 nonetheless holds: "It is true that the statute defines such a challenge as one for which 'no reason need be given' (*id.,* § 1069) but it does not follow therefrom that it is an objection for which no reason need exist." (*Ante,* p. 274.) This suggests that a reason must exist but need not be "publicly stated." (*Ante,* p. 275.) This rather startling conclusion requires considerable reflection.

Ostensibly, the new principles which the majority adopts are necessary to "vindicate" a defendant's right to an impartial jury. I believe the concepts advanced by the majority are wholly antithetic to procedural rules which governed civil and criminal trials for many years. Further, rather than guaranteeing an impartial trial, I think the only guarantee is that the present lengthy process of voir dire will be rendered lengthier still. In my opinion, the majority position is wrong in concept and will prove illusory and unworkable in application.

Preliminarily, two important features of the majority's holding should be stressed and their implications fully understood in evaluating both its wisdom and its reach. First, it applies in criminal cases to both prosecution and defense. (*Ante,* p. 276.) Second, although the majority limits application of the new principles to criminal cases and leaves "to another day" a determination of whether the new rules apply to civil cases, the "functions" of a jury, which the majority treats as controlling, seem remarkably similar in civil and criminal cases, leading me to conclude that, given the issue in a civil context, the majority will reach the same result. This probability underscores the seriousness of the sweeping procedural changes today worked by the majority.





In my opinion, any analysis of the issue should begin, not end, with a consideration of the single most persuasive, if not controlling, case on the point, namely, *Swain* v. *Alabama* (1964) 380 U.S. 202 [13 L.Ed.2d 759, 85 S.Ct. 824]. In *Swain* the United States Supreme Court dealt squarely with the use of peremptory challenges to eliminate black jurors from a petit jury which was to try a black defendant. In its affirmance of the underlying conviction the high court stressed the importance of the use of the peremptory challenge in impanelling impartial jurors while describing the practical considerations which affect its exercise.

Referring to the peremptory challenge, the *Swain* court said: "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice." ' [Citation omitted.]" (P. 219 [13 L.Ed.2d p. 772].) . . . "The essential nature of the peremptory challenge is that it is one exercised *without a reason stated, without inquiry and without being subject to the court's control.* [Citations omitted.] 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. [Citation omitted.] . . . [A peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. *For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.* . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations, in the context of the case to be tried.*" (Pp. 220-221 [13 L.Ed.2d pp. 772-773], italics added.)

By its decision in *Swain* the United States Supreme Court recognized that in the appropriate circumstances the race as well as religion, sex, nationality, occupation, or affiliation of prospective jurors are trial-related considerations which may constitute proper reasons for the exercise of the peremptory challenge.

The importance of *Swain* as authority cannot be disputed. It has been said that "In all of the cases in which the courts have considered the constitutionality of the prosecution's use of the peremptory challenge in a single case against blacks, the courts have reached the same conclusion as the Supreme Court in the Swain decision, . . ." (Annot. (1977) 79 A.L.R.3d 17 at p. 19.) So far as I can learn, the majority's new rules find no judicial acceptance anywhere.

We ourselves have consistently followed *Swain* and have denied hearing in several recent cases raising the precise present contention. (See *People* v. *Allums* (1975) 47 Cal.App.3d 654, 663-664 [121 Cal.Rptr. 62], hg. den., cert. den., 423 U.S. 934 [46 L.Ed.2d 266, 96 S.Ct. 291] [defendant must show systematic exclusion of blacks "over a period of time"]; *In re Wells* (1971) 20 Cal.App.3d 640, 647-648 [98 Cal.Rptr. 1], hg. den. [same].) Moreover, the majority errs in suggesting that the issue is one of first impression. Indeed, we have quoted from *Swain* with approval in rejecting a similar contention regarding the prosecutor's use of peremptory challenges to exclude jurors with negative views concerning the death penalty. (*People* v. *Floyd* (1970) 1 Cal.3d 694, 727 [83 Cal.Rptr. 608, 464 P.2d 64].)

In *Floyd*, we carefully explained that "we cannot engage in conjecture regarding the prosecutor's reasons for exercising some of his peremptory challenges . . . . Instead, we must assume 'that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged.' [Citing *Swain.*] *Swain* held that the prosecutor could properly exclude all Negroes from a particular jury, regardless of the factual basis for his belief that such jurors, either as individuals or as a class, might be biased in the particular case to be tried. As the court stated, *'In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case.'* [Citing *Swain.*]" (*People* v. *Floyd, supra,* at pp. 727-728, italics added.)

The majority now insists that the petit jury exhibit the same "representative" characteristics which heretofore have been required exclusively of the *jury pool* or jury venire. This is a totally novel proposition and makes for unwieldy, unworkable results. *Without exception* all of the authorities relied upon by the majority involve the compositions of grand juries or jury venires. The salutary principles





expressed in these cases are unhelpful in the consideration of *petit* juries. Nonetheless, the majority mandates that the representation required of the jury venire from which the trial jury is chosen also be applied to those persons actually seated. The majority reasoning relies for support on cases such as *Taylor* v. *Louisiana* (1975) 419 U.S. 522 [42 L.Ed.2d 690, 95 S.Ct. 692]. The express language of *Taylor* repudiates such an equation. "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community 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, [citations omitted] but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." (P. 538 [42 L.Ed.2d pp. 702-703].)

I suggest that the foregoing *Taylor* rule is the only feasible rule, given the element of chance which necessarily, and properly, is injected in the process through use of the jury wheel. For although the jury *panel* sitting in the courtroom may reflect to perfection the economic, social, occupational, sexual, religious, and cultural community from which it is drawn, once the jury wheel is turned and the first names are drawn the situation is changed. Fate takes a hand. The first 12 names drawn may be all men, or all women, all black or all white, all from the poor, or from the wealthy class. The exercise of the peremptory challenge by both sides is directed to 12 persons who may not be, at any given time, "representative" of either the community or the venire. It is not the true function of peremptories to "restore" any balance, but rather, to the extent humanly possible to attain *impartiality*. Thus the true rule and goal should be that while the jury venire, or pool, or reservoir must be "representative" the trial jurors must be "impartial."

Henceforward, under the majority's holding any peremptory challenge "on the ground of group bias" will be deemed to violate the right to a jury trial under the California Constitution because it does not permit "a jury drawn from a representative cross-section of the community." (*Ante,* p. 277.) I find no legal precedent for such a proposition. In any event, the majority now insists "that a party is constitutionally entitled to a *petit jury* that is *as near an approximation of the ideal cross-section of the community as the process of random draw permits.*" (*Ante,* p. 277, italics added.)

The majority repeatedly refuses to recognize the established distinction between the jury venire and the petit jury. It attempts to render synonymous the terms "representative" and "impartial" insisting that the true guarantor of impartiality is a mixing of representative groups "so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." (*Ante,* pp. 266-267.) I totally, and fundamentally, disagree that this is either the function or the goal of the jury selection process.

Dissension, to the extent that it reflects only a clash of the "respective biases" of individual jurors, is no guarantee whatever of impartiality. Impartiality is not assured by balancing "biases." Quite the opposite. Such disagreement may indicate that individual prejudices so control the jurors that they are incapable of viewing the issues before them dispassionately. Such disharmony may make a unanimous verdict an impossibility from the outset thus rendering the criminal trial a futile exercise. Surely, one of the specific purposes of voir dire is to allow counsel to identify those in the venire whose biases hold such sway over their thinking and to eliminate them from the jury.

In Ginger, Jury Selection in Criminal Trials (1975), one informed source is noted at page 281: "The real and realistic aim of our jury selection method is not to achieve the impossible complete impartiality but rather to minimize the range of predispositions that may influence the jury's verdict. Conceptually, we can rank the members of a jury venire in a spectrum that ranges from those most predisposed toward the plaintiff to those most predisposed toward the defendant. The purpose of the voir dire proceedings is to eliminate from the jury that will sit on the case the extreme positions on both sides of the spectrum."

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A heavy responsibility rests upon a trial lawyer in a criminal case, whether prosecution or defense. The factors which prompt counsel to exercise a peremptory challenge may be very subtle. The lawyer's antenna is alert for signals. The prospective juror's hesitancy in answer, the tone of the voice, the nature of the response, whether warm or metallic, a stare, a set of the jaw, a partial smile or frown, may be revealing to a seasoned lawyer. These physical signs will not appear in a cold record.

Counsel, knowing the issues and witnesses, the probable evidentiary flow and interplay of emotion, and the strength and weaknesses of his case and that of his opponent, may believe that his client may get more or





less fair and impartial treatment from members of a particular economic class, social group or age classification. His judgment may, for example, tell him that those of a particular religious persuasion will be attracted to or offended by a witness or particular piece of evidence. He may not be able to justify or explain his own strong instincts. His opponent objects on the ground that the challenge stems from "group bias." The judge, as directed by the majority, must question counsel and ask him to explain, at the cost of a wasted jury venire if he is unsuccessful, with attendant expense and delay for litigants, witnesses, and court personnel.

The majority, commendably, recognizes that the real difficulty with its formulation is reached when it considers the matter of the "remedy." These difficulties inhere in requiring judges at the voir dire phase of trial to examine the validity of the subjective motives of counsel in exercising peremptory challenges. With due respect, I suggest that what the majority proposes as a simple straightforward test will, in fact, become all too frequently a time consuming inquiry leading the court, counsel, and litigants into procedural quicksand and a quagmire of questionable efficacy. The majority requires that the challenger's opponent "show a strong likelihood" that group associations alone are the basis of the complained of challenge. The court must then determine whether a "reasonable inference" arises that the challenges are improperly motivated. If a "prima facie" case has been made, the "burden" shifts to the other side to show that the challenges were exercised on grounds "reasonably relevant" to the particular case.

I believe the foregoing proposed test is so vague as to constitute no standard at all. Could not a prosecutor, for example, carry his burden in this regard merely by declaring that his challenges were based upon such considerations as the economic or social (as opposed to racial) backgrounds of those challenged, or some subjective, unprovable suspicion of sympathy for the defendant?

Furthermore, the majority suggests that the foregoing tests may be met by a showing that "most or all of the members of the identified group" (*ante,* p. 280) have been challenged or that a "disproportionate number" of peremptory challenges have been directed at the group, or that counsel's voir dire of the challenged group has been "desultory." The mere recitation of the following three examples illustrates the difficult burdens which the majority has imposed. If the victim in a robbery case is elderly and the contention is that the young have been systematically challenged, a statistical age profile of the venire would have to be compiled and

preserved to determine whether "most" of the number had been excused. Furthermore, this will have to be done "after the event," for previously challenged prospective jurors will have been excused and long since will have left the courtroom. This will require a continued monitoring and recording of the "group" composition of the panel present and prospective, all before the group in question has been even identified. If the group allegedly being excluded in a white-collar crime prosecution is the poor, would not an income or wealth comparison presumably have to be available to the judge in order to determine if other venire members of that group had been subjected to more vigorous or extended voir dire questioning. Similarly, in a sex case if the contention is that women or members of particular religious bodies have been subject to peremptory challenge, would not the sexual or religious composition of the venire have to be recorded or developed for the judge to decide the issue?

The majority's rules place the court in a difficult, indeed precarious, position. It is a fundamental principle of our trial system that it is the litigants who pick, and must be satisfied with, the jury. The court can rarely have the intimate knowledge of the case possessed by the parties and a jury with which the court is happy may not be a jury with which either the district attorney or the defense can reasonably be comfortable or satisfied.

In the event either prosecutor or defense counsel has improperly exercised a peremptory challenge, the jurors theretofore chosen are to be dismissed along with the entire remaining venire. The majority deems the foregoing a sufficient deterrent to "the abuses of the peremptory challenge," adding, "if experience should prove otherwise it will be time enough then to consider alternative penalties." (*Ante,* p. 282.) The ominous overtones of this warning will not be lost on counsel, both prosecution and defense.

Unlike almost every other area of the criminal justice system in the matter of jury selection there is no inherent or gross disparity between the power and the resources of the People and those of the defense. Each side has an equal opportunity to challenge and the end result is the most satisfactory jury that can be drawn from the venire, for it is not only the fact but the appearance of prejudice which may disqualify a juror. It is the probable rather than the provable fact of prejudice which impairs the legitimacy of the jury. In the matter before us there is no suggestion that the jury was not impartial. On the contrary, the record indicates that defendants did not exhaust their peremptory challenges. Although the





defense exercise of peremptory challenges could not replace any jurors theretofore challenged by the prosecution, failure to exhaust their own peremptories suggests to me defense satisfaction with the jury as then comprised. There remained unused several opportunities by which the composition of the jury could have been altered by the defense.

There is a clear salutary effect which peremptory challenges have in assuring an impartial petit jury. The challenge is an important tool for trial lawyers who, bearing heavy responsibilities to their clients, should remain free and unfettered to do their essential job. The legal precedents, notably *Swain,* are compelling. The practical difficulties in administering the majority's scheme are complex.

I would affirm the judgment.

Clark, J., concurred.

The petitions of all the parties for a rehearing were denied October 25, 1978. Clark, J., and Richardson, J., were of the opinion that the respondent's petition should be granted.

***Batson v. Kentucky* (1986) 476 U.S. 79**

# BATSON *v.* KENTUCKY

## CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 84-6263. Argued December 12, 1985—Decided April 30, 1986

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain* v. *Alabama*, 380 U. S. 202, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

*Held:*

1. The principle announced in *Strauder* v. *West Virginia*, 100 U. S. 303, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 84–89.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder* v. *West Virginia*, 100 U. S. 303, 305. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 85–88.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise

peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Pp. 88–89.

2. The portion of *Swain* v. *Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 89–96.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 96–98.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 98–99.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. P. 100.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 100, and MARSHALL, J., *post*, p. 102, filed concurring opinions. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 108. O'CONNOR, J., filed a concurring opinion, *post*, p. 111. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 112. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 134.

*J. David Niehaus* argued the cause for petitioner. With him on the briefs were *Frank W. Heft, Jr.*, and *Daniel T. Goyette*.

*Rickie L. Pearson*, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *David L. Armstrong*, Attorney General, and *Carl T. Miller, Jr.*, Assistant Attorney General.

*Deputy Solicitor General Wallace* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Fried, Assistant Attorney General Trott*, and *Sidney M. Glazer*.*

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*Briefs of *amici curiae* urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, Anthony G. Amsterdam*, and *Samuel Rabinove*; for the Lawyers' Committee for Civil Rights Under Law by *Barry Sullivan, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson*, and *Norman J. Chachkin*; and for Michael McCray et al. by *Steven R. Shapiro*.

*Robert E. Weiss, Donald A. Kuebler, Robert J. Miller*, and *Jack E. Yelverton* filed a brief for the National District Attorneys Association, Inc., as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Legal Aid and Defender Association by *Patricia Unsinn*; and for Elizabeth Holtzman by *Elizabeth Holtzman, pro se*, and *Barbara D. Underwood*.

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.[1]

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to

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[1] Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker* v. *Jabe*, 775 F. 2d 762 (CA6 1985), cert. pending, No. 85-1028; *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84-1426. See *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Riley* v. *State*, 496 A. 2d 997, 1009-1013 (Del. 1985); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979). See also *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States* v. *Childress*, 715 F. 2d 1313 (CA8 1983) (en banc), cert. denied, 464 U. S. 1063 (1984); *United States* v. *Whitfield*, 715 F. 2d 145, 147 (CA4 1983). See *Beed* v. *State*, 271 Ark. 526, 530-531, 609 S. W. 2d 898, 903 (1980); *Blackwell* v. *State*, 248 Ga. 138, 281 S. E. 2d 599, 599-600 (1981); *Gilliard* v. *State*, 428 So. 2d 576, 579 (Miss.), cert. denied, 464 U. S. 867 (1983); *People* v. *McCray*, 57 N. Y. 2d 542, 546-549, 443 N. E. 2d 915, 916-919 (1982), cert. denied, 461 U. S. 961 (1983); *State* v. *Lynch*, 300 N. C. 534, 546-547, 268 S. E. 2d 161, 168-169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. Compare *United States* v. *Leslie*, 783 F. 2d 541 (CA5 1986) (en banc), with *United States* v. *Jackson*, 696 F. 2d 578, 592-593 (CA8 1982), cert. denied, 460 U. S. 1073 (1983). See also *United States* v. *McDaniels*, 379 F. Supp. 1243 (ED La. 1974).

exercise peremptory challenges.[2] The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain* v. *Alabama*, *supra*, apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross section of the community. Petitioner also contended

[2] The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky. Rule Crim. Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain*.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People* v. *Wheeler*, *supra*, and *Commonwealth* v. *Soares*, *supra*. The court observed that it recently had reaffirmed its reliance on *Swain*, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. See *Commonwealth* v. *McFerron*, 680 S. W. 2d 924 (1984). We granted certiorari, 471 U. S. 1052 (1985), and now reverse.

II

In *Swain* v. *Alabama*, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U. S., at 203–204. This principle has been "consistently and repeatedly" reaffirmed, *id.*, at 204, in numerous decisions of this Court both preceding and following *Swain*.[3] We reaffirm the principle today.[4]

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[3] See, *e. g.*, *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Neal* v. *Delaware*, 103 U. S. 370 (1881); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935) *(per curiam)*; *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967) *(per curiam)*; *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970); *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Vasquez* v. *Hillery*, 474 U. S. 254 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." *Alexander* v. *Louisiana*, 405 U. S. 625, 626, n. 3 (1972); see *Norris* v. *Alabama*, *supra*, at 589. These principles are reinforced by the criminal laws of the United States. 18 U. S. C. § 243.

[4] In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Peti-

A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.*, at 306–307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.*, at 305.[5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins* v. *Texas*, 325 U. S. 398, 403 (1945).[6] But the defendant does have the right to be

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tioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

[5] See *Hernandez* v. *Texas*, *supra*, at 482; *Cassell* v. *Texas*, 339 U. S. 282, 286–287 (1950) (plurality opinion); *Akins* v. *Texas*, 325 U. S. 398, 403 (1945); *Martin* v. *Texas*, 200 U. S. 316, 321 (1906); *Neal* v. *Delaware*, *supra*, at 394.

[6] Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), we have never held

tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin* v. *Texas*, 200 U. S. 316, 321 (1906); *Ex parte Virginia*, 100 U. S. 339, 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder*, *supra*, at 305,[7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris* v. *Alabama*, 294 U. S. 587, 599 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder*, *supra*, at 308; see *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 330 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968).[8] Those on the ve-

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that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.*, at 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams* v. *Florida*, 399 U. S. 78, 102–103 (1970).

[7] See *Hernandez* v. *Texas*, *supra*, at 482; *Cassell* v. *Texas*, *supra*, at 287; *Akins* v. *Texas*, *supra*, at 403; *Neal* v. *Delaware*, *supra*, at 394.

[8] See *Taylor* v. *Louisiana*, *supra*, at 530; *Williams* v. *Florida*, *supra*, at 100. See also Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1 (1966).

In *Duncan* v. *Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action

nire must be "indifferently chosen,"[9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder*, *supra*, at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 223–224 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.*, at 227 (Frankfurter, J., dissenting). As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U. S., at 308; see *Carter* v. *Jury Comm'n of Greene County*, *supra*, at 329–330; *Neal* v. *Delaware*, *supra*, at 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. See *Ballard* v. *United States*, 329 U. S. 187, 195 (1946); *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the

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by the Due Process Clause of the Fourteenth Amendment. 391 U. S., at 147–158. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.*, at 155, 156–157. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.*, at 156; *Glasser* v. *United States*, 315 U. S. 60, 86–88 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Akins* v. *Texas*, *supra*, at 408 (Murphy, J., dissenting).

[9] 4 W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan* v. *Louisiana*, 391 U. S., at 152).

judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder*, 100 U. S., at 308.

B

In *Strauder*, the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.*, at 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris* v. *Alabama*, *supra*, at 589; see *Hernandez* v. *Texas*, 347 U. S. 475, 478–479 (1954); *Ex parte Virginia*, *supra*, at 346–347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds,[10] and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.[11] While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, *Hill* v. *Texas*, 316 U. S. 400, 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953); see *McCray* v. *New York*, *supra*, at 965, 968

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[10] *E. g.*, *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967) *(per curiam)*; *Whitus* v. *Georgia*, 385 U. S., at 548–549; *Avery* v. *Georgia*, 345 U. S., at 561.

[11] See *Norris* v. *Alabama*, 294 U. S., at 589; *Martin* v. *Texas*, 200 U. S., at 319; *Neal* v. *Delaware*, 103 U. S., at 394, 397.

(MARSHALL, J., dissenting from denial of certiorari); see also *Alexander* v. *Louisiana*, 405 U. S. 625, 632 (1972).

Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.[12] Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States* v. *Robinson*, 421 F. Supp. 467, 473 (Conn. 1976), mandamus granted *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

## III

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court.

[12] We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183–189 (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see *id.*, at 116–118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts.[13] A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967); *Hernandez* v. *Texas*, *supra*, at 478–481; *Akins* v. *Texas*, 325 U. S., at 403–404; *Martin* v. *Texas*, 200 U. S. 316 (1906). That question also was at the heart of the portion of *Swain* v. *Alabama* we reexamine today.[14]

A

*Swain* required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U. S., at 209–210. The record in *Swain* showed that the prosecutor

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[13] See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Alexander* v. *Louisiana*, 405 U. S., at 628–629; *Whitus* v. *Georgia*, *supra*, at 549–550; *Swain* v. *Alabama*, 380 U. S. 202, 205 (1965); *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Norris* v. *Alabama*, *supra*, at 589; *Neal* v. *Delaware*, *supra*, at 394.

[14] The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. *E. g.*, Van Dyke, *supra*, at 166–167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L. Rev. 247, 268–270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235, 283–303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum. L. Rev. 1357 (1985); Note, Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss. L. J. 157 (1967); Comment, *Swain v. Alabama:* A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va. L. Rev. 1157 (1966). See also Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain*. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337 (1982).

had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.*, at 210. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.*, at 222–224.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.*, at 214–220, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.*, at 222–224. While the Constitution does not confer a right to peremptory challenges, *id.*, at 219 (citing *Stilson* v. *United States*, 250 U. S. 583, 586 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U. S., at 219.[15] To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.*, at 221–222.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the

[15] In *Swain*, the Court reviewed the "very old credentials" of the peremptory challenge system and noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." 380 U. S., at 219; see *id.*, at 212–219.

circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.*, at 224–228.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause.[16] Since this interpretation of *Swain* has placed on defendants a crippling burden of proof,[17] prosecutors' peremptory challenges are now largely immune

[16] *E. g.*, *United States* v. *Jenkins*, 701 F. 2d 850, 859–860 (CA10 1983); *United States* v. *Boykin*, 679 F. 2d 1240, 1245 (CA8 1982); *United States* v. *Pearson*, 448 F. 2d 1207, 1213–1218 (CA5 1971); *Thigpen* v. *State*, 49 Ala. App. 233, 241, 270 So. 2d 666, 673 (1972); *Jackson* v. *State*, 245 Ark. 331, 336, 432 S. W. 2d 876, 878 (1968); *Johnson* v. *State*, 9 Md. App. 143, 148–150, 262 A. 2d 792, 796–797 (1970); *State* v. *Johnson*, 125 N. J. Super. 438, 311 A. 2d 389 (1973) *(per curiam)*; *State* v. *Shaw*, 284 N. C. 366, 200 S. E. 2d 585 (1973).

[17] See *McCray* v. *Abrams*, 750 F. 2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States* v. *Pearson*, 448 F. 2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. See *People* v. *Wheeler*, 22 Cal. 3d, at 285–286, 583 P. 2d, at 767–768.

from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

B

Since the decision in *Swain*, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis*, 426 U. S. 229, 240 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus* v. *Georgia*, 385 U. S., at 550 (citing *Tarrance* v. *Florida*, 188 U. S. 519 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington* v. *Davis*, 426 U. S., at 242. We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Ibid.* For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.*, "is itself such an 'unequal application of the law . . . as to show intentional discrimination,'" *id.*, at 241 (quoting *Akins* v. *Texas*, 325 U. S., at 404).

Moreover, since *Swain*, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima

facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington* v. *Davis*, *supra*, at 239–242. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander* v. *Louisiana*, 405 U. S., at 632. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See *Alexander* v. *Louisiana*, *supra*, at 632; *Jones* v. *Georgia*, 389 U. S. 24, 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander* v. *Louisiana*, *supra*, at 632; see *Washington* v. *Davis*, *supra*, at 241.[18]

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. *E. g.*, *Castaneda* v. *Partida*, 430 U. S. 482, 494–495 (1977); *Alexander* v. *Louisiana*, *supra*, at 631–632. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. *Castaneda* v. *Partida*, *supra*, at 494. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. *Id.*, at 494. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the "result bespeaks discrimination." *Hernandez* v. *Texas*, 347

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[18] Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *United States Postal Service Board of Governors* v. *Aikens*, 460 U. S. 711 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, at 252–256.

U. S., at 482; see *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, at 266.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell* v. *Texas*, 339 U. S. 282, 290 (1950) (plurality opinion). In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus* v. *Georgia*, *supra*, at 552; see *Castaneda* v. *Partida*, *supra*, at 494; *Washington* v. *Davis*, *supra*, at 241; *Alexander* v. *Louisiana*, *supra*, at 629–631. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. *Alexander* v. *Louisiana*, *supra*, at 630.

Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U. S., at 266, n. 14. For evidentiary require-

ments to dictate that "several must suffer discrimination" before one could object, *McCray* v. *New York*, 461 U. S., at 965 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all.[19]

C

The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. See *Castaneda* v. *Partida*, *supra*, at 494–495; *Washington* v. *Davis*, 426 U. S., at 241–242; *Alexander* v. *Louisiana*, *supra*, at 629–631. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda* v. *Partida*, *supra*, at 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery* v. *Georgia*, 345 U. S., at 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circum-

[19] Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him. See cases in n. 18, *supra*.

stances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See *McCray* v. *Abrams*, 750 F. 2d, at 1132; *Booker* v. *Jabe*, 775 F. 2d 762, 773 (CA6 1985), cert. pending, No. 85–1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. *Norris* v. *Alabama*, 294 U. S., at 598–599; see *Thompson* v. *United States*, 469 U. S. 1024, 1026 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra*, at 86, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of

such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander* v. *Louisiana*, 405 U. S., at 632. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris* v. *Alabama*, *supra*, at 598. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.[20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination.[21]

## IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the

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[20] The Court of Appeals for the Second Circuit observed in *McCray* v. *Abrams*, 750 F. 2d, at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S., at 258.

[21] In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575–576.

contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.[22] In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens,[23] and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.[24]

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[22] While we respect the views expressed in JUSTICE MARSHALL'S concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

[23] For example, in *People* v. *Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

[24] In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how

V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *E. g., Whitus* v. *Georgia*, 385 U. S., at 549–550; *Hernandez* v. *Texas*, 347 U. S., at 482; *Patton* v. *Mississippi*, 332 U. S., at 469.[25]

*It is so ordered.*

JUSTICE WHITE, concurring.

The Court overturns the principal holding in *Swain* v. *Alabama*, 380 U. S. 202 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting,

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best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see *Booker* v. *Jabe*, 775 F. 2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see *United States* v. *Robinson*, 421 F. Supp. 467, 474 (Conn. 1976), mandamus granted *sub nom. United States* v. *Newman*, 549 F. 2d 240 (CA2 1977).

[25] To the extent that anything in *Swain* v. *Alabama*, 380 U. S. 202 (1965), is contrary to the principles we articulate today, that decision is overruled.

that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries.* This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes—

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*Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), that *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom* v. *Illinois*, 391 U. S. 194 (1968), as it was in *Daniel* v. *Louisiana*, 420 U. S. 31 (1975) *(per curiam)*, with respect to the decision in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.[1] I nonetheless write separately to express my views. The decision today will not end the racial discrimina-

[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

tion that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. See *Swain* v. *Alabama*, 380 U. S. 202, 231–238 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235 (1968); see also J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155–157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. See *United States* v. *Carter*, 528 F. 2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U. S. 961 (1976); *United States* v. *McDaniels*, 379 F. Supp. 1243 (ED La. 1974) (in 53 criminal cases in 1972–1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney* v. *Walker*, 394 F. Supp. 1015, 1017–1018 (SC 1974) (in 13 criminal trials in 1970–1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F. 2d 516 (CA4 1975).[2] Pros-

[2] See also *Harris* v. *Texas*, 467 U. S. 1261 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams* v. *Illinois*, 466 U. S. 981 (1984) (MARSHALL, J., dissenting from denial of certiorari).

ecutors have explained to courts that they routinely strike black jurors, see *State* v. *Washington*, 375 So. 2d 1162, 1163–1164 (La. 1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "'any member of a minority group.'"[3] In 100 felony trials in Dallas County in 1983–1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.[4]

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'" *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881), quoting *Virginia* v. *Rives*, 100 U. S. 313, 323 (1880). JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. *Post*, at 138. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes—even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks

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[3] Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury-selection treatise circulated in the same county instructed prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

[4] *Id.*, at 1, col. 1; see also 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).

lack the "intelligence, experience, or moral integrity," *Neal*, *supra*, at 397, to be entrusted with that role.

## II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, *ante*, at 97–98, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See *Commonwealth* v. *Robinson*, 382 Mass. 189, 195, 415 N. E. 2d 805, 809–810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People* v. *Rousseau*, 129 Cal. App. 3d 526, 536–537, 179 Cal. Rptr. 892, 897–898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors' motives. See *King* v. *County of Nassau*, 581 F. Supp. 493,

501–502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People* v. *Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983), or seemed "uncommunicative," *King*, *supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall*, *supra*, at 165, 672 P. 2d, at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King*, *supra*, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post*, at 138; see also THE CHIEF JUSTICE's dissenting opinion, *post*, at 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that "114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in

our society as a whole." *Rose* v. *Mitchell*, 443 U. S. 545, 558–559 (1979), quoted in *Vasquez* v. *Hillery*, 474 U. S. 254, 264 (1986).

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167–169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L. Rev. 247, 269–270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that "[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." 380 U. S., at 244. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis* v. *United States*, 146 U. S. 370, 376 (1892), and "one of the most important of the rights secured to the accused," *Pointer* v. *United States*, 151 U. S. 396, 408 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L. Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of

peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U. S., at 212, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, at 219. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. *Frazier* v. *United States*, 335 U. S. 497, 505, n. 11 (1948); *United States* v. *Wood*, 299 U. S. 123, 145 (1936); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); see also *Swain*, 380 U. S., at 219. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado* v. *Connelly*, 474 U. S. 1050 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition

for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 115–116, nn. 1 and 2. In this case, however—unlike *Connelly* and *T. L. O.*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

> ". . . Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed. . . .
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> . . . . .
>
> ". . . We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.
>
> "Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.
>
> . . . . .
>
> "In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama."[1]

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae*

[1] Tr. of Oral Arg. 27–28, 43.

also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

> "PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS
>
> "A. Under *Swain* v. *Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case"[2]

Several other *amici* similarly emphasized this issue.[3]

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years,[4] I believe the Court acts wisely in

[2] Brief for United States as *Amicus Curiae* 7.

[3] The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain* v. *Alabama*." *Id.*, at 5.

*Amici* supporting petitioner also emphasized the importance of the equal protection issue. See, *e. g.*, Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24–36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11–17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

[4] See *McCray* v. *New York*, 461 U. S. 961 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.*, at 963 (MARSHALL, J., dissenting from denial of certiorari).

The eventual federal habeas corpus disposition of *McCray*, of course, proved to be one of the landmark cases that made the issues in this case

resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court.[5]

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and JUSTICE WHITE that today's decision does not apply retroactively.

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ripe for review. *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84–1426. See also Pet. for Cert. 5–7 (relying heavily on *McCray* as a reason for review). In *McCray*, as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain*. 750 F. 2d, at 1118–1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84–1426 (Question 2). Indeed, shortly after agreeing to hear *Batson*, the Court was presented with a motion to consolidate *McCray* and *Batson*, and consider the cases together. Presumably because the Court believed that *Batson* adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. See *Abrams* v. *McCray*, 471 U. S. 1097 (1985). Cf. *ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

[5] Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, *e. g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 551 (1986) (BURGER, C. J., dissenting) (addressing merits even though majority of the Court found a lack of standing); *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (concurring opinion, joined by BURGER, C. J.) (expressing view on merits even though writ was dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); *Florida* v. *Casal*, 462 U. S. 637, 639 (1983) (BURGER, C. J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that "the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement"). See also *Colorado* v. *Connelly*, 474 U. S. 1050 (1986) (ordering parties to address issue that neither party raised); *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (same).

CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain* v. *Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84–SC–733–MR (Ky.). As petitioner explained at oral argument here: "We have not made an equal protection claim. . . . We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such." Tr. of Oral Arg. 6–7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is im-

proper in this Court: "'The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . .'" *Illinois* v. *Gates*, 459 U. S. 1028, 1029, n. 2 (1982) (STEVENS, J., dissenting) (quoting *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969)). Neither the Court nor JUSTICE STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings* v. *Norwood's Lessee*, 5 Cranch 344 (1809), and *Crowell* v. *Randell*, 10 Pet. 368 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the "constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case," Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). During oral argument, counsel for petitioner was pointedly asked:

> "QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?
>
> "MR. NIEHAUS: Yes.
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> "QUESTION: Your claim here is based solely on the Sixth Amendment?
>
> "MR. NIEHAUS: Yes.
>
> "QUESTION: Is that correct?
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> "MR. NIEHAUS: That is what we are arguing, yes.

"QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

"MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

. . . . . .

"MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such. . . ." Tr. of Oral Arg. 5–7.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

"QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.

"MR. NIEHAUS: Simply overrule Swain without adopting the remedy?

"QUESTION: Yes.

"MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

"QUESTION: That is a concession." *Id.*, at 10.

Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

"MR. NIEHAUS: . . . [T]here is no state action involved where the defendant is exercising his peremptory challenge.

"QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

"MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question. . . ." *Id.*, at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have—as we sometimes do—directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 408 U. S. 921 (1972); *Colorado* v. *Connelly*, 474 U. S. 1050 (1986).[1] Even following oral argument, we could have—as we sometimes do—directed reargument on this particular question. See, *e. g.*, *Brown* v. *Board of Education*, 345 U. S. 972 (1953); *Illinois* v. *Gates*, *supra*; *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984).[2] This step is particularly appropriate where re-

[1] In *Colorado* v. *Connelly*, JUSTICE BRENNAN, joined by JUSTICE STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that "it is hardly for this Court to 'second chair' the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim." 474 U. S., at 1052. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

[2] JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, dissented from the order directing reargument in *New Jersey* v. *T. L. O.* They explained:

"The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented

examination of a prior decision is under consideration. See, *e. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 468 U. S. 1213 (1984) (directing reargument and briefing on issue of whether *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 422 U. S. 1005 (1975) (directing reargument and briefing on issue of whether the holding in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in JUSTICE STEVENS' concurrence. JUSTICE STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante*, at 109. Cf. *Illinois* v. *Gates*, 459 U. S., at 1029, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for *affirming* the decision below") (emphasis in original). To be sure, respondent and supporting *amici* did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to ex-

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by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here. . . . Volunteering unwanted advice is rarely a wise course of action.

. . . . . .

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." 468 U. S., at 1215–1216.

JUSTICE STEVENS' proffered explanation notwithstanding, see *ante*, at 109 (concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

plaining that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." JUSTICE STEVENS does not cite, and I am not aware of, *any* case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

JUSTICE STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante*, at 109–110, and n. 3. But I thought it well settled that, even if a "point is made in an *amicus curiae* brief," if the claim "has never been advanced by petitioners . . . we have no reason to pass upon it." *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

When objections to peremptory challenges were brought to this Court three years ago, JUSTICE STEVENS agreed with JUSTICE MARSHALL that the challenge involved "a significant and recurring question of constitutional law." *McCray* v. *New York*, 461 U. S. 961, 963 (1983) (MARSHALL, J., dissenting from denial of certiorari), referred to with approval, *id.*, at 961 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, JUSTICE STEVENS wrote that the issue could be dealt with "more wisely at a later date." *Id.*, at 962. The same conditions exist here today. JUSTICE STEVENS concedes that reargument of this case "might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years." *Ante*, at 110. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral

argument on this claim might convince us to do otherwise.[3] I believe that "[d]ecisions made in this manner are unlikely to withstand the test of time." *United States* v. *Leon*, 468 U. S. 897, 962 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the "'very old credentials'" of the peremptory challenge and the "'widely held belief that peremptory challenge is a necessary part of trial by jury.'" *Ante*, at 91, n. 15 (quoting *Swain*, 380 U. S., at 219). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was

[3] This fact alone distinguishes the cases cited by JUSTICE STEVENS as support for today's unprecedented action. See *ante*, at 111, n. 5. In *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 551 (1986) (BURGER, C. J., dissenting), *Colorado* v. *Nunez*, 465 U. S. 324 (1984) (WHITE, J., concurring), and *Florida* v. *Casal*, 462 U. S. 637, 639 (1983) (BURGER, C. J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[un]necessary to the disposition of the case or petition." *Ante*, at 111, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado* v. *Connelly*, 474 U. S. 1050 (1986), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

recognized that "[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. "It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices*, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime." *Ibid.*; see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

In *Swain* JUSTICE WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

> "In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if 'they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies." 380 U. S., at 212–213 (footnotes omitted).

Peremptory challenges have a venerable tradition in this country as well:

> "In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . .
>
> "The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant." *Id.*, at 214–216 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way, "justice must satisfy the appearance of justice."'" *Id.*, at 219 (quoting *In re Murchison*, 349 U. S. 133, 136 (1955)).

Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

> "The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 553–554 (1975).

For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is 'one of the most important of the rights'" in our justice system. *Swain*, 380 U. S., at 219 (quoting *Pointer* v. *United States*, 151 U. S. 396, 408 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain*, *supra*, at 219 (citing *Lewis* v. *United States*, 146 U. S. 370 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a

violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder*," as the Court maintains, *ante*, at 89–90, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge. See *post*, at 135–137 (REHNQUIST, J., dissenting). More recently we held that "[d]efendants are not entitled to a jury of any particular composition . . . ." *Taylor* v. *Louisiana*, 419 U. S., at 538.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.
>
> "Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular

isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *United States* v. *Leslie*, 783 F. 2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder*, the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Swain, supra*, at 220. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante*, at 97. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "'an arbitrary and capricious right,'" *Swain, supra*, at 219 (quoting *Lewis* v. *United States, supra*, at 378); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 725 (1982), does not explain the breadth of a procedure exercised on the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" *Lewis, supra*, at 376 (quoting 4 W. Blackstone, Commentaries *353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race;* the

Court's opinion clearly contains such a limitation. See *ante*, at 96 (to establish a prima facie case, "the defendant first must show that he is a member of a cognizable *racial group*") (emphasis added); *ibid.* ("[F]inally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race*") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig* v. *Boren*, 429 U. S. 190 (1976); age, *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307 (1976); religious or political affiliation, *Karcher* v. *Daggett*, 462 U. S. 725, 748 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); number of children, *Dandridge* v. *Williams*, 397 U. S. 471 (1970); living arrangements, *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); and employment in a particular industry, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456 (1981), or profession, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955).[4]

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. See *McCray* v. *Abrams*, 750 F. 2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84–1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest," *Cleburne*, 473

[4] While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972).

U. S., at 440; others would be reviewed to determine if they were "substantially related to a sufficiently important government interest," *id.*, at 441; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.* at 442.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." *Lewis* v. *United States*, 146 U. S., at 376. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today . . . ." *Ante*, at 102 (WHITE, J., concurring).[5]

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Ante*, at 89, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valu-

[5]The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante*, at 97, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, . . . then counsel has exercised the challenge as it was intended—to remove the most partial jurors." *Id.*, at 365.

able tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?[6] "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Ante*, at 107 (MARSHALL, J., concurring) (quoting *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887)).

Rather than applying straightforward equal protection analysis, the Court substitutes for the holding in *Swain* a curious hybrid. The defendant must first establish a "prima facie case," *ante*, at 93–94, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante*, at 97. The Court explains that "the operation of prima facie burden of proof rules" is established in "[o]ur decisions concerning 'disparate treatment' . . . ." *Ante*, at 94, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Ante*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)).[7]

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress,[8] they seem curiously out

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[6] "[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *United States* v. *Leslie*, 783 F. 2d 541, 565 (CA5 1986) (en banc).

[7] One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." *United States* v. *Clark*, 737 F. 2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

[8] It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a re-

of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. "It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*" H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." *United States* v. *Clark*, 737 F. 2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted, "[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards." *Swain*, 380 U. S., at 222.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level justifying exercise of a challenge for cause." *Ante*, at 97. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Any-

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jection of the Sixth Amendment issue presented by this petition and an affirmance of the decision below, "[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U. S. C. 1861 *et seq.* . . . [T]he House Report makes clear that . . . 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.'" Brief for United States as *Amicus Curiae* 20, n. 11 (quoting H. R. Rep. No. 1076, 90th Cong., 2d Sess., 5–6 (1968)).

thing short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, Commentaries *353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary—but not too much. While our trial judges are "experienced in supervising *voir dire*," *ante*, at 97, they have no experience in administering rules like this.

An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante*, at 99, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See *Turner* v. *Murray*, *ante*, at 36–37. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . . ." *Ante*, at 35.[9] Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante*, at 97, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis* v. *United States:*

> "[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom

[9] This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

> he has conceived a prejudice even without being able to assign a reason for such his dislike." 146 U. S., at 376.

The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante*, at 98, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." In *Avery* v. *Georgia*, 345 U. S. 559 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part*, such as the slips here, *that differentiates between white and colored* . . . ." *Id.*, at 564 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire." *People* v. *Motton*, 39 Cal. 3d 596, 604, 704 P. 2d

176, 180, modified, 40 Cal. 3d 4b (1985) (advance sheet).[10] This process is sure to tax even the most capable counsel and judges since determining whether a prima facie case has been established will "require a continued monitoring and recording of the 'group' composition of the panel present and prospective . . . ." *People* v. *Wheeler*, 22 Cal. 3d 258, 294, 583 P. 2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People* v. *Motton, supra.* However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A. B. A. J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition.[11]

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement

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[10] The California Supreme Court has attempted to finesse this problem by asserting that "discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case" of racial discrimination. *People* v. *Motton*, 39 Cal. 3d, at 604, 704 P. 2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

[11] Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante*, at 83. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "prima facie case" entitling him to any form of relief. *Ante*, at 100.

our holding today." *Ante*, at 99–100, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

> "from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions." *Holley* v. *J & S Sweeping Co.*, 143 Cal. App. 3d 588, 595–596, 192 Cal. Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to "furthe[r] the ends of justice," *ante*, at 99, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.*, at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

III

I also add my assent to JUSTICE WHITE's conclusion that today's decision does not apply retroactively. *Ante*, at 102 (concurring); see also *ante*, at 111 (O'CONNOR, J., concurring). We held in *Solem* v. *Stumes*, 465 U. S. 638, 643 (1984), that

> "'[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967)."

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only "cuts this Court loose from the force of precedent," *Mackey* v. *United States*, 401 U. S. 667, 680 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert "the clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966). Second, it is readily apparent that "law enforcement authorities and state courts have justifiably relied on a prior rule of law . . . ." *Solem*, 465 U. S., at 645–646. Today's holding clearly "overrule[s] [a] prior decision" and drastically "transform[s] standard practice." *Id.*, at 647. This fact alone "virtually compel[s]" the conclusion of nonretroactivity. *United States* v. *Johnson*, 457 U. S. 537, 549–550 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a "prima facie showing" of invidious intent, *ante*, at 97, and, if so, whether the state has a sufficient "neutral explanation" for its actions, *ibid.*, essentially requires re-

constructing the entire *voir dire*, something that will be extremely difficult even if undertaken soon after the close of the trial.[12] In most cases, therefore, retroactive application of today's decision will be "a virtual impossibility." *State* v. *Neil*, 457 So. 2d 481, 488 (Fla. 1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People* v. *Wheeler*, 22 Cal. 3d, at 283, n. 31, 583 P. 2d, at 766, n. 31; *State* v. *Neil*, *supra*, at 488; *Commonwealth* v. *Soares*, 377 Mass. 461, 493, n. 38, 387 N. E. 2d 499, 518, n. 38, cert. denied, 444 U. S. 881 (1979).[13] I therefore am persuaded by JUSTICE WHITE's position, *ante*, at 102 (concurring), that today's novel decision is not to be given retroactive effect.

## IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

> "The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that 'it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes

[12] Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

[13] Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see *Riley* v. *State*, 496 A. 2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

of society. . . .'" Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 82 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the adminstration of justice enjoyed by the white population," 380 U. S., at 224, might violate the guarantees of equal protection. See *id.*, at 222–228. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the

exclusion of blacks "in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*" *Id.*, at 223 (emphasis added). Nevertheless, the Court ultimately held that "the record in this case is not sufficient to demonstrate that th[is] rule has been violated . . . . Petitioner has the burden of proof and he has failed to carry it." *Id.*, at 224, 226. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See *id.*, at 228–247 (Goldberg, J., joined by Warren, C. J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.*, at 209–222. JUSTICE WHITE, writing for the Court, explained:

> "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. *Hayes* v. *Missouri*, 120 U. S. 68, 70 [1887]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' *Lewis* [v. *United States*, 146 U. S. 370,] 376 [1892], upon a juror's 'habits and associations,' *Hayes* v. *Missouri*, *supra*, at 70, or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' *Lewis*, *supra*, at 376. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people

summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory . . . ." *Id.*, at 220–222 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the *Swain* Court reiterated: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved* and the particular crime charged." *Id.*, at 223 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges "would

[not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case.*" *Id.*, at 245 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely . . . on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Ante*, at 89. Later, in discussing the State's need to establish a nondiscriminatory basis for striking blacks from the jury, the Court states that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Ante*, at 97. Neither of these statements has anything to do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain.* Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain* opinion at all.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." *Swain*, 380 U. S., at 219. In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so

on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment.[1] Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see—and the Court most certainly has not explained—how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See *ante*, at 84–85, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. See *ante*, at 87–88.

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. See *Swain, supra; United States* v. *Leslie*, 783 F. 2d 541 (CA5 1986) (en banc); *United States* v. *Carter*, 528 F. 2d 844 (CA8 1975), cert. denied, 425 U. S. 961 (1976). Indeed, given the need for reasonable

[1] I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in *United States* v. *Leslie*, 783 F. 2d 541, 558–561 (1986).

limitations on the time devoted to *voir dire*, the use of such "proxies" by both the State and the defendant[2] may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain*. Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.

[2] See, *e. g.*, *Commonwealth* v. *DiMatteo*, 12 Mass. App. 547, 427 N. E. 2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

***Georgia v. McCollum* (1992) 505 U.S. 42**

Syllabus

## GEORGIA *v.* McCOLLUM ET AL.

### CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 91–372. Argued February 26, 1992—Decided June 18, 1992

Respondents, who are white, were charged with assaulting two African-Americans. Before jury selection began, the trial judge denied the prosecution's motion to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner. The Georgia Supreme Court affirmed, distinguishing *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614—in which this Court held that private litigants cannot exercise peremptory strikes in a racially discriminatory manner—on the ground that it involved civil litigants rather than criminal defendants.

*Held:* The Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Pp. 46–59.

(a) The exercise of racially discriminatory peremptory challenges offends the Equal Protection Clause when the offending challenges are made by the State, *Batson* v. *Kentucky*, 476 U. S. 79; *Powers* v. *Ohio*, 499 U. S. 400, and, in civil cases, when they are made by private litigants, *Edmonson*, *supra*. Whether the prohibition should be extended to discriminatory challenges made by a criminal defendant turns upon the following four-factor analysis. Pp. 46–48.

(b) A criminal defendant's racially discriminatory exercise of peremptory challenges inflicts the harms addressed by *Batson*. Regardless of whether it is the State or the defense who invokes them, discriminatory challenges harm the individual juror by subjecting him to open and public racial discrimination and harm the community by undermining public confidence in this country's system of justice. Pp. 48–50.

(c) A criminal defendant's exercise of peremptory challenges constitutes state action for purposes of the Equal Protection Clause under the analytical framework summarized in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922. Respondents' argument that the adversarial relationship between the defendant and the prosecution negates a peremptory challenge's governmental character is rejected. Unlike other actions taken in support of a defendant's defense, the exercise of a peremptory challenge determines the composition of a governmental body. The fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action, since

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whenever a private actor's conduct is deemed fairly attributable to the government, it is likely that private motives will have animated the actor's decision. Pp. 50–55.

(d) The State has third-party standing to challenge a defendant's discriminatory use of peremptory challenges, since it suffers a concrete injury when the fairness and the integrity of its own judicial process is undermined; since, as the representative of all its citizens, it has a close relation to potential jurors; and since the barriers to suit by an excluded juror are daunting. See *Powers*, 499 U. S., at 411, 413, 414. Pp. 55–56.

(e) A prohibition against the discriminatory exercise of peremptory challenges does not violate a criminal defendant's constitutional rights. It is an affront to justice to argue that the right to a fair trial includes the right to discriminate against a group of citizens based upon their race. Nor does the prohibition violate the Sixth Amendment right to the effective assistance of counsel, since counsel can normally explain the reasons for peremptory challenges without revealing strategy or confidential communication, and since neither the Sixth Amendment nor the attorney-client privilege gives a defendant the right to carry out through counsel an unlawful course of conduct. In addition, the prohibition does not violate the Sixth Amendment right to a trial by a jury that is impartial with respect to both parties. Removing a juror whom the defendant believes harbors racial prejudice is different from exercising a peremptory challenge to discriminate invidiously against jurors on account of race. Pp. 57–59.

261 Ga. 473, 405 S. E. 2d 688, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 59. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 60. O'CONNOR, J., *post*, p. 62, and SCALIA, J., *post*, p. 69, filed dissenting opinions.

*Harrison W. Kohler*, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J. Bowers*, Attorney General, and *Charles M. Richards*, Senior Assistant Attorney General.

*Michael R. Dreeben* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson*.

*Robert H. Revell, Jr.*, argued the cause for respondents. With him on the brief was *Jesse W. Walters.**

JUSTICE BLACKMUN delivered the opinion of the Court.

For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause. See, *e. g., Strauder* v. *West Virginia*, 100 U. S. 303 (1880). Last Term this Court held that racial discrimination in a civil litigant's exercise of peremptory challenges also violates the Equal Protection Clause. See *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Today, we are asked to decide whether the Constitution prohibits a *criminal defendant* from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

I

On August 10, 1990, a grand jury sitting in Dougherty County, Ga., returned a six-count indictment charging respondents with aggravated assault and simple battery. See App. 2. The indictment alleged that respondents beat and assaulted Jerry and Myra Collins. Respondents are white; the alleged victims are African-Americans. Shortly after the events, a leaflet was widely distributed in the local African-American community reporting the assault and urging community residents not to patronize respondents' business.

Before jury selection began, the prosecution moved to prohibit respondents from exercising peremptory challenges in

*Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent Scheidegger* and *Charles L. Hobson;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Julius L. Chambers, Charles Stephen Ralston,* and *Eric Schnapper.*

Briefs of *amici curiae* were filed for the National Association of Criminal Defense Lawyers by *Judy Clarke* and *Mario G. Conte;* and for *Charles J. Hynes, pro se,* by *Jay M. Cohen, Matthew S. Greenberg, Victor Barall,* and *Carol Teague Schwartzkopf.*

a racially discriminatory manner. The State explained that it expected to show that the victims' race was a factor in the alleged assault. According to the State, counsel for respondents had indicated a clear intention to use peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case gave them the right to exclude African-American citizens from participating as jurors in the trial. Observing that 43 percent of the county's population is African-American, the State contended that, if a statistically representative panel is assembled for jury selection, 18 of the potential 42 jurors would be African-American.[1] With 20 peremptory challenges, respondents therefore would be able to remove all the African-American potential jurors.[2] Relying on *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the Sixth Amendment, and the Georgia Constitution, the State sought an order providing that, if it succeeded in making out a prima facie case of racial discrimination by respondents, the latter would be required to articulate a racially neutral explanation for peremptory challenges.

The trial judge denied the State's motion, holding that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." App. 14. The issue was certified for immediate appeal. *Id.*, at 15 and 18.

The Supreme Court of Georgia, by a 4-to-3 vote, affirmed the trial court's ruling. 261 Ga. 473, 405 S. E. 2d 688 (1991). The court acknowledged that in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), this Court had found that the exercise of a peremptory challenge in a racially discriminatory manner "would constitute an impermissible injury" to the excluded juror. 261 Ga., at 473, 405 S. E. 2d, at 689.

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[1] Under Georgia law, the petit jury in a felony trial is selected from a panel of 42 persons. Ga. Code Ann. § 15–12–160 (1990).

[2] When a defendant is indicted for an offense carrying a penalty of four or more years, Georgia law provides that he may "peremptorily challenge 20 of the jurors impaneled to try him." § 15–12–165.

The court noted, however, that *Edmonson* involved private civil litigants, not criminal defendants. "Bearing in mind the long history of jury trials as an essential element of the protection of human rights," the court "decline[d] to diminish the free exercise of peremptory strikes by a criminal defendant." 261 Ga., at 473, 405 S. E. 2d, at 689. Three justices dissented, arguing that *Edmonson* and other decisions of this Court establish that racially based peremptory challenges by a criminal defendant violate the Constitution. 261 Ga., at 473, 405 S. E. 2d, at 689 (Hunt, J.); *id.*, at 475, 405 S. E. 2d, at 690 (Benham, J.); *id.*, at 479, 405 S. E. 2d, at 693 (Fletcher, J.). A motion for reconsideration was denied. App. 60.

We granted certiorari to resolve a question left open by our prior cases—whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.[3] 502 U. S. 937 (1991).

II

Over the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service. In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), the Court invalidated a state statute providing that only white men could serve as jurors. While stating that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race," *id.*, at 305, the Court held that a defendant does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria. See also *Neal* v. *Delaware*, 103 U. S. 370,

[3]The Ninth Circuit recently has prohibited criminal defendants from exercising peremptory challenges on the basis of gender. *United States* v. *De Gross*, 960 F. 2d 1433 (1992) (en banc). Although the panel decision now has been vacated by the granting of rehearing en banc, a Fifth Circuit panel has held that criminal defendants may not exercise peremptory strikes in a racially discriminatory manner. See *United States* v. *Greer*, 939 F. 2d 1076, rehearing granted, 948 F. 2d 934 (1991).

397 (1881); *Norris* v. *Alabama*, 294 U. S. 587, 599 (1935) (State cannot exclude African-Americans from jury venire on false assumption that they, as a group, are not qualified to serve as jurors).

In *Swain* v. *Alabama*, 380 U. S. 202 (1965), the Court was confronted with the question whether an African-American defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. *Id.*, at 209–210. Although the Court rejected the defendant's attempt to establish an equal protection claim premised solely on the pattern of jury strikes in his own case, it acknowledged that proof of systematic exclusion of African-Americans through the use of peremptories over a period of time might establish such a violation. *Id.*, at 224–228.

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the Court discarded *Swain*'s evidentiary formulation. The *Batson* Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial. *Id.*, at 87. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.*, at 97.[4]

Last Term this Court applied the *Batson* framework in two other contexts. In *Powers* v. *Ohio*, 499 U. S. 400 (1991), it held that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African-American jurors

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[4]The *Batson* majority specifically reserved the issue before us today. 476 U. S., at 89, n. 12. The two *Batson* dissenters, however, argued that the "clear and inescapable import" was that *Batson* would similarly limit defendants. *Id.*, at 125–126. Justice Marshall agreed, stating: "[O]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887)." *Id.*, at 107 (concurring opinion).

on the basis of race. In *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), the Court decided that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner.[5]

In deciding whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges, we must answer four questions. First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

## III

### A

The majority in *Powers* recognized that "*Batson* 'was designed "to serve multiple ends,"' only one of which was to protect individual defendants from discrimination in the selection of jurors." 499 U. S., at 406. As in *Powers* and *Edmonson*, the extension of *Batson* in this context is designed to remedy the harm done to the "dignity of persons" and to the "integrity of the courts." *Powers*, 499 U. S., at 402.

As long ago as *Strauder*, this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. 100 U. S., at 308. See also *Batson*, 476 U. S., at 87. While "[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." *Powers*,

[5] In his dissent in *Edmonson*, JUSTICE SCALIA stated that the effect of that decision logically must apply to defendants in criminal prosecutions. 500 U. S., at 644.

499 U. S., at 409. Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination.

But "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U. S., at 87. One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U. S., at 413. Selection procedures that purposefully exclude African-Americans from juries undermine that public confidence—as well they should. "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.*, at 412. See generally Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 748–750 (1992).

The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes. See Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 195–196 (1989) (describing two trials in Miami, Fla., in which all African-American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal).

"[B]e it at the hands of the State or the defense," if a court allows jurors to be excluded because of group bias, "[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens'

confidence in it." *State* v. *Alvarado*, 221 N. J. Super. 324, 328, 534 A. 2d 440, 442 (1987). Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.[6]

B

The fact that a defendant's use of discriminatory peremptory challenges harms the jurors and the community does not end our equal protection inquiry. Racial discrimination, although repugnant in all contexts, violates the Constitution only when it is attributable to state action. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172 (1972). Thus, the second question that must be answered is whether a criminal defendant's exercise of a peremptory challenge constitutes state action for purposes of the Equal Protection Clause.

Until *Edmonson*, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved assertions of discrimination by a prosecutor, a quintessential state actor. In *Edmonson*, by contrast, the contested peremptory challenges were exercised by a private defendant in a civil action. In order to determine whether state action was present in that setting, the

[6] The experience of many state jurisdictions has led to the recognition that a race-based peremptory challenge, regardless of who exercises it, harms not only the challenged juror, but the entire community. Acting pursuant to their state constitutions, state courts have ruled that criminal defendants have no greater license to violate the equal protection rights of prospective jurors than have prosecutors. See, *e. g.*, *State* v. *Levinson*, 71 Haw. 492, 795 P. 2d 845 (1990); *People* v. *Kern*, 149 App. Div. 2d 187, 545 N. Y. S. 2d 4 (1989), aff'd, 75 N. Y. 2d 638, 555 N. Y. S. 2d 647 (1990); *State* v. *Alvarado*, 221 N. J. Super. 324, 534 A. 2d 440 (1987); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979); *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978).

Court in *Edmonson* used the analytical framework summarized in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982).[7]

The first inquiry is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.*, at 939. "There can be no question" that peremptory challenges satisfy this first requirement, as they "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." *Edmonson*, 500 U. S., at 620. As in *Edmonson*, a Georgia defendant's right to exercise peremptory challenges and the scope of that right are established by a provision of state law. Ga. Code Ann. §15–12–165 (1990).

The second inquiry is whether the private party charged with the deprivation can be described as a state actor. See *Lugar*, 457 U. S., at 941–942. In resolving that issue, the Court in *Edmonson* found it useful to apply three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." 500 U. S., at 621–622.

As to the first principle, the *Edmonson* Court found that the peremptory challenge system, as well as the jury system as a whole, "simply could not exist" without the "overt, significant participation of the government." *Id.*, at 622. Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources for creating a pool of qualified jurors representing a fair cross section of the community. Ga. Code Ann. §15–12–40. State law fur-

[7] The Court in *Lugar* held that a private litigant is appropriately characterized as a state actor when he "jointly participates" with state officials in securing the seizure of property in which the private party claims to have rights. 457 U. S., at 932–933, 941–942.

ther provides that jurors are to be selected by a specified process, § 15–12–42; they are to be summoned to court under the authority of the State, § 15–12–120; and they are to be paid an expense allowance by the State whether or not they serve on a jury, § 15–12–9. At court, potential jurors are placed in panels in order to facilitate examination by counsel, § 15–12–131; they are administered an oath, § 15–12–132; they are questioned on *voir dire* to determine whether they are impartial, § 15–12–164; and they are subject to challenge for cause, § 15–12–163.

In light of these procedures, the defendant in a Georgia criminal case relies on "governmental assistance and benefits" that are equivalent to those found in the civil context in *Edmonson*. "By enforcing a discriminatory peremptory challenge, the Court 'has . . . elected to place its power, property and prestige behind the [alleged] discrimination.'" *Edmonson*, 500 U. S., at 624 (citation omitted).

In regard to the second principle, the Court in *Edmonson* found that peremptory challenges perform a traditional function of the government: "Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact." *Id.*, at 620. And, as the *Edmonson* Court recognized, the jury system in turn "performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people'" *Id.*, at 624 (citation omitted). These same conclusions apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function. Compare *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) (making Sixth Amendment applicable to States through Fourteenth Amendment), with *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211 (1916) (States do not have a constitutional obligation to provide a jury trial in civil cases). Cf. *West* v. *Atkins*, 487 U. S. 42, 53, n. 10, 57 (1988) (private

physician hired by State to provide medical care to prisoners was state actor because doctor was hired to fulfill State's constitutional obligation to attend to necessary medical care of prison inmates). The State cannot avoid its constitutional responsibilities by delegating a public function to private parties. Cf. *Terry* v. *Adams*, 345 U. S. 461 (1953) (private political party's determination of qualifications for primary voters held to constitute state action).

Finally, the *Edmonson* Court indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action. These concerns are equally present in the context of a criminal trial. Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State.[8]

Respondents nonetheless contend that the adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge. Respondents rely on *Polk County* v. *Dodson*, 454 U. S. 312 (1981), in which a defendant sued, under 42 U. S. C. § 1983, the public defender who represented him. The defendant claimed that the public defender had violated his constitutional rights in failing to provide adequate representation. This Court determined that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant.[9]

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[8] Indeed, it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors, thus enhancing the perception that it is the court that has rejected them. See Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 751, n. 117 (1992).

[9] Although *Polk County* determined whether or not the public defender's actions were under color of state law, as opposed to whether or not they constituted state action, this Court subsequently has held that the

*Polk County* did not hold that the adversarial relationship of a public defender with the State precludes a finding of state action—it held that this adversarial relationship prevented the attorney's public employment from *alone* being sufficient to support a finding of state action. Instead, the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing. For example, in *Branti* v. *Finkel*, 445 U. S. 507 (1980), this Court held that a public defender, in making personnel decisions on behalf of the State, is a state actor who must comply with constitutional requirements. And the *Polk County* Court itself noted, without deciding, that a public defender may act under color of state law while performing certain administrative, and possibly investigative, functions. See 454 U. S., at 325.

The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body—indeed, the institution of government on which our judicial system depends. Thus, as we held in *Edmonson*, when "a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality." 500 U. S., at 625.

Lastly, the fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed "fairly attributable" to the government, it is likely that private motives will have animated the actor's decision. Indeed, in *Edmonson*, the Court recognized that the private party's exercise of peremptory challenges consti-

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two inquiries are the same, see, *e. g.*, *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 838 (1982), and has specifically extended *Polk County*'s reasoning to state-action cases, see *Blum* v. *Yaretsky*, 457 U. S. 991, 1009, n. 20 (1982).

tuted state action, even though the motive underlying the exercise of the peremptory challenge may be to protect a private interest. See *id.*, at 626.[10]

C

Having held that a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection, we move to the question whether the State has standing to challenge a defendant's discriminatory use of peremptory challenges. In *Powers*, 499 U. S., at 416, this Court held that a white criminal defendant has standing to raise the equal protection rights of black jurors wrongfully excluded from jury service. While third-party standing is a limited exception, the *Powers* Court recognized that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party's ability to protect its own interests. *Id.*, at 411. In *Edmonson*, the Court applied the same analysis in deciding that civil litigants had standing to raise the equal protection rights of jurors excluded on the basis of their race.

In applying the first prong of its standing analysis, the *Powers* Court found that a criminal defendant suffered cog-

[10] Numerous commentators similarly have concluded that a defendant's exercise of peremptory challenges constitutes state action. See generally Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 197–198 (1989); Note, State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for *Georgia v. McCollum*, 67 Notre Dame L. Rev. 1049, 1061–1074 (1992); Note, Discrimination by the Defense: Peremptory Challeges after *Batson v. Kentucky*, 88 Colum. L. Rev. 355, 358–361 (1988); Comment, The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges, 93 Dick. L. Rev. 143, 158–162 (1988); Tanford, Racism in the Adversary System: The Defendant's Use of Peremptory Challenges, 63 S. Cal. L. Rev. 1015, 1027–1030 (1990); Underwood, 92 Colum. L. Rev., at 750–753.

nizable injury "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." 499 U. S., at 411 (citation omitted). In *Edmonson*, this Court found that these harms were not limited to the criminal sphere. 500 U. S., at 630. Surely, a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined.

In applying the second prong of its standing analysis, the *Powers* Court held that *voir dire* permits a defendant to "establish a relation, if not a bond of trust, with the jurors," a relation that "continues throughout the entire trial." 499 U. S., at 413. "Exclusion of a juror on the basis of race severs that relation in an invidious way." *Edmonson*, 500 U. S., at 629.

The State's relation to potential jurors in this case is closer than the relationships approved in *Powers* and *Edmonson*. As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State to deny persons within its jurisdiction the equal protection of the laws.

In applying the final prong of its standing analysis, the *Powers* Court recognized that, although individuals excluded from jury service on the basis of race have a right to bring suit on their own behalf, the "barriers to a suit by an excluded juror are daunting." 499 U. S., at 414. See also *Edmonson*, 500 U. S., at 629. The barriers are no less formidable in this context. See Note, Discrimination by the Defense: Peremptory Challenges after *Batson v. Kentucky*, 88 Colum. L. Rev. 355, 367 (1988); Underwood, 92 Colum. L. Rev., at 757 (summarizing barriers to suit by excluded juror). Accordingly, we hold that the State has standing to assert the excluded jurors' rights.

D

The final question is whether the interests served by *Batson* must give way to the rights of a criminal defendant. As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial. See *Frazier* v. *United States*, 335 U. S. 497, 505, n. 11 (1948); *United States* v. *Wood*, 299 U. S. 123, 145 (1936); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); see also *Swain*, 380 U. S., at 219.

Yet in *Swain*, the Court reviewed the "very old credentials," *id.*, at 212, of the peremptory challenge and noted the "long and widely held belief that the peremptory challenge is a necessary part of trial by jury," *id.*, at 219; see *id.*, at 212–219. This Court likewise has recognized that "the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts." *Edmonson*, 500 U. S., at 630.

We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, "if race stereotypes are the price for acceptance of a jury panel as fair," we reaffirm today that such a "price is too high to meet the standard of the Constitution." *Id.*, at 630. Defense counsel is limited to "legitimate, lawful conduct." *Nix* v. *Whiteside*, 475 U. S. 157, 166 (1986) (defense counsel does not render ineffective assistance when he informs his client that he would disclose the client's perjury to the court and move to withdraw from representation). It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.

Nor does a prohibition of the exercise of discriminatory peremptory challenges violate a defendant's Sixth Amendment right to the effective assistance of counsel. Counsel can ordinarily explain the reasons for peremptory challenges without revealing anything about trial strategy or any confidential client communications. In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged. See *United States* v. *Zolin*, 491 U. S. 554 (1989); cf. *Batson*, 476 U. S., at 97 (expressing confidence that trial judges can develop procedures to implement the Court's holding). In any event, neither the Sixth Amendment right nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct. See *Nix*, 475 U. S., at 166; *Zolin*, 491 U. S., at 562–563. See Swift, Defendants, Racism and the Peremptory Challenge, 22 Colum. Hum. Rights L. Rev. 177, 207–208 (1991).

Lastly, a prohibition of the discriminatory exercise of peremptory challenges does not violate a defendant's Sixth Amendment right to a trial by an impartial jury. The goal of the Sixth Amendment is "jury impartiality with respect to both contestants." *Holland* v. *Illinois*, 493 U. S. 474, 483 (1990). See also *Hayes* v. *Missouri*, 120 U. S. 68 (1887).

We recognize, of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice. We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism. See *Ham* v. *South Carolina*, 409 U. S. 524, 526–527 (1973); *Rosales-Lopez* v. *United States*, 451 U. S. 182, 189–190 (1981) (plurality opinion of WHITE, J.). Cf. *Morgan* v. *Illinois*, 504 U. S. 719 (1992) (exclusion of juror in capital trial is permissible upon showing that juror is incapable of considering sentences other than death).

But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice. This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." 499 U. S., at 410. "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino* v. *Ross*, 424 U. S. 589, 596, n. 8 (1976). We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.

IV

We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges. The judgment of the Supreme Court of Georgia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

CHIEF JUSTICE REHNQUIST, concurring.

I was in dissent in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case on the

issue of "state action" under the Fourteenth Amendment. I therefore join the opinion of the Court.

JUSTICE THOMAS, concurring in the judgment.

As a matter of first impression, I think that I would have shared the view of the dissenting opinions: A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action. Yet, I agree with the Court and THE CHIEF JUSTICE that our decision last Term in *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991), governs this case and requires the opposite conclusion. Because the respondents do not question *Edmonson*, I believe that we must accept its consequences. I therefore concur in the judgment reversing the Georgia Supreme Court.

I write separately to express my general dissatisfaction with our continuing attempts to use the Constitution to regulate peremptory challenges. See, *e. g.*, *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Powers* v. *Ohio*, 499 U. S. 400 (1991); *Edmonson*, *supra*. In my view, by restricting a criminal defendant's use of such challenges, this case takes us further from the reasoning and the result of *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). I doubt that this departure will produce favorable consequences. On the contrary, I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.

In *Strauder*, as the Court notes, we invalidated a state law that prohibited blacks from serving on juries. In the course of the decision, we observed that the racial composition of a jury may affect the outcome of a criminal case. We explained: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.*, at 309. We thus recog-

nized, over a century ago, the precise point that JUSTICE O'CONNOR makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial. *Post*, at 68–69.

I do not think that this basic premise of *Strauder* has become obsolete. The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of whites and blacks that sit on juries in important cases.[1] Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

In *Batson*, however, this Court began to depart from *Strauder* by holding that, without some actual showing, suppositions about the possibility that jurors may harbor prejudice have no legitimacy. We said, in particular, that a prosecutor could not justify peremptory strikes "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." 476 U. S., at 97. As noted, however, our decision in *Strauder* rested on precisely such an "assumption" or "intuition." We reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly.

Our departure from *Strauder* has two negative consequences. First, it produces a serious misordering of our priorities. In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Un-

[1] A computer search, for instance, reveals that the phrase "all white jury" has appeared over 200 times in the past five years in the New York Times, Chicago Tribune, and Los Angeles Times.

less jurors actually admit prejudice during *voir dire*, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. Cf. Fed. Rule Evid. 606(b) (generally excluding juror testimony after trial to impeach the verdict). In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause.

Second, our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen.[2] See, *e. g.*, *State* v. *Carr*, 261 Ga. 845, 413 S. E. 2d 192 (1992). Next will come the question whether defendants may exercise peremptories on the basis of sex. See, *e. g.*, *United States* v. *De Gross*, 960 F. 2d 1433 (CA9 1992). The consequences for defendants of our decision and of these future cases remain to be seen. But whatever the benefits were that this Court perceived in a criminal defendant's having members of his class on the jury, see *Strauder*, 100 U. S., at 309–310, they have evaporated.

JUSTICE O'CONNOR, dissenting.

The Court reaches the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection. The Court purports merely to follow

[2] The NAACP Legal Defense and Educational Fund, Inc., has submitted a brief arguing, in all sincerity, that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors." Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 3–4. Although I suppose that this issue technically remains open, it is difficult to see how the result could be different if the defendants here were black.

precedents, but our cases do not compel this perverse result. To the contrary, our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.

I

It is well and properly settled that the Constitution's equal protection guarantee forbids prosecutors to exercise peremptory challenges in a racially discriminatory fashion. See *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Powers* v. *Ohio*, 499 U. S. 400, 409 (1991). The Constitution, however, affords no similar protection against private action. "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendmen[t] . . . , and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *National Collegiate Athletic Assn.* v. *Tarkanian*, 488 U. S. 179, 191 (1988) (footnote omitted). This distinction appears on the face of the Fourteenth Amendment, which provides that "*No State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, §1 (emphasis added). The critical but straightforward question this case presents is whether criminal defendants and their lawyers, when exercising peremptory challenges as part of a defense, are state actors.

In *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), the Court developed a two-step approach to identifying state action in cases such as this. First, the Court will ask "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.*, at 939. Next, it will decide whether, on the particular facts at issue, the parties who allegedly caused the deprivation of a federal right can "appropriately" and "in all fairness" be characterized as state actors. *Ibid.*; *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991). The

Court's determination in this case that the peremptory challenge is a creation of state authority, *ante*, at 51, breaks no new ground. See *Edmonson, supra*, at 620–621. But disposing of this threshold matter leaves the Court with the task of showing that criminal defendants who exercise peremptories should be deemed governmental actors. What our cases require, and what the Court neglects, is a realistic appraisal of the relationship between defendants and the government that has brought them to trial.

We discussed that relationship in *Polk County* v. *Dodson*, 454 U. S. 312 (1981), which held that a public defender does not act "under color of state law" for purposes of 42 U. S. C. § 1983 "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U. S., at 325. We began our analysis by explaining that a public defender's obligations toward her client are no different than the obligations of any other defense attorney. *Id.*, at 318. These obligations preclude attributing the acts of defense lawyers to the State: "[T]he duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are 'officers of the court.' But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor . . . ." *Ibid.*

We went on to stress the inconsistency between our adversarial system of justice and theories that would make defense lawyers state actors. "In our system," we said, "a defense lawyer characteristically opposes the designated representatives of the State." *Ibid.* This adversarial posture rests on the assumption that a defense lawyer best serves the public "not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.*, at 318–319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)). Moreover, we pointed out that the independence of defense attorneys from state control has a constitutional dimension. *Gideon* v. *Wainwright*,

372 U. S. 335 (1963), "established the right of state criminal defendants to the guiding hand of counsel at every step in the proceedings against [them]." 454 U. S., at 322 (internal quotation marks omitted). Implicit in this right "is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Ibid.* Thus, the defense's freedom from state authority is not just empirically true, but is a constitutionally mandated attribute of our adversarial system.

Because this Court deems the "under color of state law" requirement that was not satisfied in *Dodson* identical to the Fourteenth Amendment's state action requirement, see *Lugar, supra,* at 929, the holding of *Dodson* simply cannot be squared with today's decision. In particular, *Dodson* cannot be explained away as a case concerned exclusively with the employment status of public defenders. See *ante,* at 54. The *Dodson* Court reasoned that public defenders performing traditional defense functions are not state actors because they occupy the same position as other defense attorneys in relevant respects. 454 U. S., at 319–325. This reasoning followed on the heels of a critical determination: Defending an accused "is essentially a private function," not state action. *Id.*, at 319. The Court's refusal to acknowledge *Dodson*'s initial holding, on which the entire opinion turned, will not make that holding go away.

The Court also seeks to evade *Dodson*'s logic by spinning out a theory that defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions. See *ante,* at 54. *Dodson,* however, established that even though public defenders might act under color of state law when carrying out administrative or investigative functions outside a courtroom, they are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a

criminal proceeding." 454 U. S., at 325. Since making peremptory challenges plainly qualifies as a "traditional function" of criminal defense lawyers, see *Swain* v. *Alabama*, 380 U. S. 202, 212–219 (1965); *Lewis* v. *United States*, 146 U. S. 370, 376 (1892), *Dodson* forecloses the Court's functional analysis.

Even aside from our prior rejection of it, the Court's functional theory fails. "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982). Thus, a private party's exercise of choice allowed by state law does not amount to state action for purposes of the Fourteenth Amendment so long as "the initiative comes from [the private party] and not from the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). See *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 165 (1978) (State not responsible for a decision it "permits but does not compel"). The government in no way influences the defense's decision to use a peremptory challenge to strike a particular juror. Our adversarial system of criminal justice and the traditions of the peremptory challenge vest the decision to strike a juror entirely with the accused. A defendant "may, if he chooses, peremptorily challenge 'on his own dislike, without showing any cause;' he may exercise that right without reason or for no reason, arbitrarily and capriciously." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (quoting 1 E. Coke, Institutes 156b (19th ed. 1832)). "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, *supra*, at 220. See *Dodson*, *supra*, at 321–322; *Lewis*, *supra*, at 376, 378.

Certainly, *Edmonson* v. *Leesville Concrete Co.* did not render *Dodson* and its realistic approach to the state action inquiry dead letters. The *Edmonson* Court distinguished

*Dodson* by saying: "In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury selection process, the government and private litigants work for the same end." *Edmonson*, 500 U. S., at 627. While the nonpartisan administrative interests of the State and the partisan interests of private litigants may not be at odds during civil jury selection, the same cannot be said of the partisan interests of the State and the defendant during jury selection in a criminal trial. A private civil litigant opposes a private counterpart, but a criminal defendant is by design in an adversarial relationship with the government. Simply put, the defendant seeks to strike jurors predisposed to convict, while the State seeks to strike jurors predisposed to acquit. The *Edmonson* Court clearly recognized this point when it limited the statement that "an adversarial relation does not exist between the government and a private litigant" to "the ordinary context of *civil litigation in which the government is not a party.*" *Ibid.* (emphasis added).

From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see. Rather than squarely facing this fact, the Court, as in *Edmonson*, rests its finding of governmental action on the points that defendants exercise peremptory challenges in a courtroom and judges alter the composition of the jury in response to defendants' choices. I found this approach wanting in the context of civil controversies between private litigants, for reasons that need not be repeated here. See *id.*, at 632 (O'CONNOR, J., dissenting). But even if I thought *Edmonson* was correctly decided, I could not accept today's simplistic extension of it. *Dodson* makes clear that the unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State, whatever is the case in civil trials. How could it be otherwise when the underlying question is

whether the accused "c[an] be described in all fairness as a state actor"? 500 U. S., at 620. As *Dodson* accords with our state action jurisprudence and with common sense, I would honor it.

II

What really seems to bother the Court is the prospect that leaving criminal defendants and their attorneys free to make racially motivated peremptory challenges will undermine the ideal of nondiscriminatory jury selection we espoused in *Batson*, 476 U. S., at 85–88. The concept that the government alone must honor constitutional dictates, however, is a fundamental tenet of our legal order, not an obstacle to be circumvented. This is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct. See *Brady* v. *Maryland*, 373 U. S. 83 (1963) (disclosure of evidence favorable to the accused); *Berger* v. *United States*, 295 U. S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Considered in purely pragmatic terms, moreover, the Court's holding may fail to advance nondiscriminatory criminal justice. It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence. See Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559–1560 (1988); Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110–112 (1990). Using peremptory challenges to secure minority representation on the jury may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury. See *id.*, at 112–115; Developments in

the Law, *supra*, at 1559–1560. As *amicus* NAACP Legal Defense and Educational Fund explained in this case:

> "The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race." Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 9–10 (footnote omitted).

See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 56–57; *Edmonson, supra*, at 644 (SCALIA, J., dissenting). In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions.

That the Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure. But such limitations are the necessary and intended consequence of the Fourteenth Amendment's state action requirement. Because I cannot accept the Court's conclusion that government is responsible for decisions criminal defendants make while fighting state prosecution, I respectfully dissent.

JUSTICE SCALIA, dissenting.

I agree with the Court that its judgment follows logically from *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). For the reasons given in the *Edmonson* dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd:

A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. JUSTICE O'CONNOR demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and the contrived nature of the Court's justifications. I see no need to add to her discussion, and differ from her views only in that I do not consider *Edmonson* distinguishable in principle—except in the principle that a bad decision should not be followed logically to its illogical conclusion.

Today's decision gives the lie once again to the belief that an activist, "evolutionary" constitutional jurisprudence always evolves in the direction of greater individual rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair. I dissent.