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THE PROHIBITION OF GROUP-BASED STEREOTYPES IN JURY SELECTION PROCEDURES

I. INTRODUCTION

In Taylor v. Louisiana, a 1975 decision, the United States Supreme Court determined that the "selection of a petit jury from a representative cross section of the community" was required by the sixth amendment to the United States Constitution. The rationale for this representative cross-section rule is that the inclusion of various biases held by members of the jury will essentially offset each other, thereby leading to a final verdict which is the product of a "diffused impartiality." Significantly, however, the representative cross-section rule was applied by the Taylor Court only with respect to the composition of the venire—i.e., that group from which the final panel is selected. The Court's failure to require representativeness in the final panel has thus left unchanged the challenge system through which the venire is eventually shaped into the petit jury.

One of the major tools used in fashioning the petit jury from the venire is the peremptory challenge which allows either party, without stating a reason, to strike a fixed number of potential jurors from the venire. Re-
straints on the use of peremptory challenges were discussed by the United States Supreme Court in Swain v. Alabama, a 1965 decision in which the Court determined that the exercise of peremptory challenges on the basis of group affiliation was not a violation of the equal protection clause of the fourteenth amendment. The Court based this decision on its belief that the peremptory challenge is a vital element in the quest for an impartial jury.

It has been argued that the Court’s reluctance to limit the discriminatory use of the peremptory challenge in Swain, and its refusal in Taylor to extend the cross-section rule to the final panel, has effectively vitiated the representative cross-section rule and has made the goal of impartial juries unattainable. Accepting this view, the Supreme Court of California, in People v. Wheeler, attempted to limit the detrimental effects caused by the unfettered use of peremptory challenges, holding that "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." Wheeler, therefore, represents an attempt to reconcile the competing teachings of Swain and Taylor by carving out an exception to the Swain Court’s ruling which allows the arbitrary exercise of peremptory challenges.

This comment will discuss the reasonableness of the Wheeler court’s approach and whether, in fact, its limiting of peremptory challenges will ensure jury impartiality. In leading up to this discussion, it will first be

9. Id. at 221. As in Swain, the equal protection clause had been the basis for attacks upon state jury selection procedures prior to Taylor. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972); Hernandez v. Texas, 347 U.S. 475 (1954); Norris v. Alabama, 294 U.S. 587 (1935). For a discussion of trends in jury selection procedures, see notes 19-43 and accompanying text infra.
10. 380 U.S. at 219. The Swain Court noted that "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 will try the case will decide on the evidence placed before them, and not otherwise." Id. For a general discussion of peremptory challenges, see notes 70-109 and accompanying text infra.
11. See Comment, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L.J. 1715 (1977). Cf. Hall v. United States, 168 F.2d 161, 166 (D.C. Cir.) (Edgerton, J., dissenting), cert. denied, 334 U.S. 853 (1948) ("the rule against excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury" by peremptory challenges). See also Ashby, Juror Selection and the Sixth Amendment Right to an Impartial Jury, 11 Creighton L. Rev. 1137, 1161 (1978) (peremptory challenges often produce non-representative juries resulting in denial of a constitutional right); Kuhn, supra note 5, at 289 (arguing that the exercise of peremptories on a racial basis violates equal protection).
13. Id. at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The court’s decision in Wheeler was based on independent state grounds. Id. at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908. The court, nevertheless, analyzed the problem within the context of federal jury selection cases. Id. at 266-71, 583 P.2d at 754-58, 148 Cal. Rptr. at 896-99. For an analysis of Wheeler and its progeny, see notes 113-68 and accompanying text infra.
14. See notes 113-68 and accompanying text infra.
15. See notes 142-68 and accompanying text infra.
necessary to examine trends in jury selection litigation, as well as to focus upon the nature of the cross-section requirement and the ultimate role of the peremptory challenge.

II. A BRIEF HISTORY OF TRENDS IN JURY SELECTION LITIGATION

The prevailing thrust of litigation involving jury selection procedures has been the alleviation of discrimination against "cognizable groups" in the preliminary stages of the process. Approximately a century ago, in *Strauder v. West Virginia*, the Supreme Court held that a jury selection statute limiting jury service to white males violated the equal protection clause of the fourteenth amendment.

Under an equal protection analysis, the test to determine the legality of jury selection procedures was whether there existed a systematic exclusion of a cognizable group. If the petitioner was able to show "long-continued, unvarying wholesale exclusion" of his or her group from jury service, then

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16. See notes 19-43 and accompanying text infra.
17. See generally notes 44-71 and accompanying text infra.
18. See generally notes 72-112 and accompanying text infra.
21. 100 U.S. 303 (1879).
22. Id. at 310. In overturning the petitioner's conviction, the *Strauder* Court stated: The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. Id. at 308. Thus, the basis of the equal protection challenge in *Strauder* was a presumption that a litigant who faced a trial before a jury from which all members of his group were effectively excluded ran an unacceptable risk of being prejudiced solely because of his membership in that group. The possibility was too great that the jury could not be truly impartial vis-à-vis the particular defendant.
a prima facie case of discrimination was established, thereby, shifting the burden of rebuttal to the state.\textsuperscript{25}

Much of the litigation involving the systematic exclusion test concerned the determination of the percentage of exclusion necessary to make out a prima facie case of discrimination,\textsuperscript{26} as well as the validity of justifications offered in rebuttal.\textsuperscript{27} While the Supreme Court often sustained claims of

\textsuperscript{25} Id. at 598. In Norris, petitioner offered evidence that, in a county whose 1930 census showed a black population of 2,688 out of a total population of 36,881, not one black had ever been called for jury duty, nor had any black ever served on a grand or petit jury within anyone's memory. Id. at 590-91. The Court upheld the facial validity of the jury selection statute in question. Id. at 589. In its assessment of the record, however, the Court concluded: "We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service...established the discrimination which the Constitution forbids." Id. at 596. In response to the state's contention that there was no express discrimination because it generally adhered to the statute, the Court stated: "We think that this evidence failed to rebut the strong prima facie case which defendant had made." Id. at 598.

The approach taken by the Norris Court, known as the "rule of exclusion," became the test used in cases considering state jury selection schemes prior to Taylor. See notes 27-34 and accompanying text infra. This rule was considered to be a liberalizing force in the history of jury selection litigation. See J. Van Dyke, supra note 5, at 52-53.

26. See J. Van Dyke, supra note 5, at 53. The prima facie case test was comprised of two prongs. See Alexander v. Louisiana, 405 U.S. 625, 629-32 (1972). First, the court must have found a sufficient statistical disparity between the percentage of the excluded group to the general population, and the percentage of the excluded group to those who had served on juries over a certain period of time. Id. at 629-30. The major problem in applying this prong was that the Supreme Court had never defined what constituted sufficient statistical disparity. Id. at 630. Clearly, total exclusion of a group from venires was a disparity sufficient to indicate a denial of equal protection. See Norris v. Alabama, 294 U.S. 587, 590-92 (1935). Outside of total exclusion, however, the standard was indiscernible. Compare Turner v. Fouche, 396 U.S. 346, 359-60 (1970) (38% disparity was sufficient) with Brown v. Allen, 344 U.S. 443, 481 (1953) (81.5% disparity was not sufficient). As one commentator stated:

Throughout these cases, the Court has given only verbal bromides as guidance to the degree of racial disparity required to establish a prima facie case. On the one hand, "token summoning of Negroes for jury duty does not comply with equal protection," and on the other, "proportional representation" is not required.

Kuhn, supra note 5, at 254 (footnotes omitted). For a discussion of the problems created by the failure of the Court to set statistical guidelines, see generally id. at 251-57.

The second prong of the prima facie case test required the plaintiff to show that there had been an opportunity to discriminate. See Alexander v. Louisiana, 405 U.S. 625, 630-32 (1972). In Alexander, that opportunity was the fact that at two crucial stages of the selection process, racial identification was known to the jury commissioners. Id. at 630. Accord, Whitus v. Georgia, 385 U.S. 545, 551-52 (1967) (prospecitive jurors' names were selected from tax digests which were segregated on basis of race); Avery v. Georgia, 345 U.S. 559, 560-63 (1953) (prospective jurors' names were placed on tickets which were colored according to race).

27. See J. Van Dyke, supra note 5, at 53. It must be noted that establishment of a prima facie case merely shifted the burden to the state to show that the reasons for the disparity were nondiscriminatory. See Norris v. Alabama, 294 U.S. 587, 598 (1935). Here, too, there was a complete lack of judicial guidance as to what constituted sufficient nondiscriminatory reasons. A mere showing by the state of a lack of discriminatory intent was not sufficient to rebut the presumption. Id. See also Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Turner v. Fouche, 396 U.S. 346, 361 (1970); Hernandez v. Texas, 347 U.S. 475, 481 (1954). For a general discussion of systematic exclusion litigation, see J. Van Dyke, supra note 5, at 45-83; Kuhn, supra note 5, at 251-57; Note, supra note 6, at 1096-105; Note, The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection, 74 Yale L.J. 919 (1965).
systematic exclusion, it did so on a case-by-case basis resulting in a lack of concrete standards. Other than the prohibition against completely excluding a particular group, the only clear standard which emerged was that a defendant had no particular right to a jury that included members of his or her group. Compounding the problems caused by the lack of clear standards was the general difficulty of obtaining statistical proof concerning jury selection processes. Even when statistics were available, they were often misused by courts unfamiliar with statistical theory. These problems led one commentator to conclude that the “systematic exclusion theory . . . failed to eliminate discrimination in jury selection.”

The 1940’s represented a turning point in jury selection litigation as the representative cross-section approach began to develop. Pursuant to its

29. See J. Van Dyke, supra note 5, at 53-54. Professor Kuhn has stated that the “‘prima facie rule’ rests on the court’s intuitive understanding of the laws of chance.” Kuhn, supra note 5, at 251. Indeed, the Court has stated that it “has never announced mathematical standards for the demonstration of ‘systematic’ exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors.” Alexander v. Louisiana, 405 U.S. 625, 630 (1972).
32. See Daughtrey, supra note 6, at 16. Professor Daughtrey observed that the defendant’s burden was “nearly impossible” because the mechanism of the selection process was in the hands of the state. Id. Another commentator has stated that “the problem of evidentiary logistics is rendered virtually insoluble by the pressure of time, the lack of extant records and the general unavailability to the defendant of those which do exist.” Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 VA. L. Rev. 1157, 1161 (1966).
33. See Swain v. Alabama, 380 U.S. 202 (1965). Swain appears to be a classic example of judicial misuse of statistics. The evidence in Swain was that while Negro males over age 21 constituted 26% of all males in Talladega County, Alabama, only 10 to 15% of those selected for the venire were black. Id. at 205. On the basis of these figures, Justice White stated that blacks were underrepresented by as much as 10%. Id. at 208-09. This clearly is an error as the figures used by the Court show approximately a 50% disparity between the percentage of blacks eligible for jury duty and the percentage of blacks who actually were venire members. See Note, Fair Jury Selection Procedures, 75 Yale L.J. 322, 325-26 & nn.20-23 (1966) (suggesting that Justice White really meant that blacks were underrepresented by 11 percentage points—i.e., 26%-15%).

The use of statistics in jury selection litigation has been the subject of numerous works. See, e.g., J. Van Dyke, supra note 5; Finklestein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966); Kairys, Juror Selection: The Law, A Mathematical Method of Analysis and a Case Study, 10 Am. Crim. L. Rev. 771 (1972).
34. Daughtrey, supra note 6, at 19.
35. See Smith v. Texas, 311 U.S. 128 (1940). Justice Black, writing for the Court in Smith, stated:

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. Id. at 130 (footnote omitted). Smith has been noted for being the theoretical harbinger of the cross-section doctrine. See, e.g., J. Van Dyke, supra note 5, at 54; Daughtrey, supra note 6, at 19; Kuhn, supra note 5, at 257-58.
supervisory power over the federal courts, the Supreme Court imposed the cross-section rule in federal criminal cases.\(^36\) At this point, however, cross-sectionalism was not considered to be constitutionally required, and the Court consequently refused to mandate the representative cross-section approach in state jury selection processes as a necessary component of due process.\(^37\) Moreover, the Court’s initial implementation of the representative cross-section approach was a negative directive in that its mandates were couched in systematic exclusion terms.\(^38\) In 1968, however, Congress made the cross-section standard a positive requirement in all federal jury trials.\(^39\) Finally, in Taylor, the Court rejected the approach of the systematic exclusion rule and determined that the sixth and fourteenth amendments require that venires be chosen from a cross-section of the community.\(^40\)

As previously indicated, the Taylor decision did not go so far as to require representative petit juries, since the Court applied its mandate only to the formation of the venire.\(^41\) Significantly, the Taylor Court did not discuss the voir dire stage of jury selection. This limitation in the Court’s opinion, although conceivably grounded in practical concerns,\(^42\) has been interpreted as signifying the Court’s continued adherence to the teachings of Swain


\(^{37}\) Fay v. New York, 332 U.S. 261, 287 (1947). The Court in Fay distinguished the federal cross-section cases on the grounds that they involved an exercise of the Supreme Court’s supervisory power over federal courts. Id. The Court stated: “Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.” Id.

\(^{38}\) See Ballard v. United States, 329 U.S. 187, 192-95 (1946). In Ballard, the Court stated: “The systematic and intentional exclusion of women . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society.” Id. at 195 (citations omitted). Thus, the standard of the 1946 case was still one of prohibiting exclusion as opposed to requiring that groups be included in the jury process in order for due process to be satisfied. See Daughtrey, supra note 6, at 23.

\(^{39}\) The Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 54 (codified at 28 U.S.C. § 1861, (1976)). This statute provides in part: “It is the policy of the United States that all litigants in 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.” Id.

\(^{40}\) 419 U.S. at 526-31. A major analytical barrier to making the cross-section rule a requirement of due process was the prohibitive “same class” rule. See Daughtrey, supra note 6, at 39-40. This rule limited standing to complain of jury discrimination only to those who were members of the group which was systematically excluded. See id. at 14-15. Implicit in this rule was the notion that a litigant was harmed only if fellow group members were excluded. See note 22 supra. The cross-section rule, however, reflects a view that a litigant, is entitled to the perspectives of members of all groups. See notes 55-61 and accompanying text infra. See generally Note, supra note 27. The “same-class” rule was found to be unconstitutional in Peters v. Kiff, 407 U.S. 493, 504 (1972).

\(^{41}\) See note 5 and accompanying text supra.

\(^{42}\) For a discussion of the practical considerations which weigh against mandatory inclusion of cognizable groups on the final jury panel, see notes 66-68 and accompanying text infra.
which condoned the discriminatory use of peremptory challenges. If this is so, the effectiveness of Taylor and the representative cross-section rule is severely limited. Thus, it is necessary to consider the relationship between Swain and Taylor with respect to the goal of attaining jury impartiality. The role of both the representative cross-section rule and the peremptory challenge in attaining this goal must also be explored.

III. THE REPRESENTATIVE CROSS-SECTION RULE, THE PEREMPTORY CHALLENGE, AND THE IDEAL OF IMPARTIALITY

A. The Representative Cross-Section Standard as a Substantive Definition of Jury Impartiality

The sixth amendment right to a jury trial expressly requires that the jury be an impartial one. Among the various purposes which the jury serves is that it grants legitimacy to society's perception of the jury as the collective conscience of the community. Furthermore, the jury fulfills the role of giving all citizens a sense of belonging to the American community. Thus, the function of the jury surpasses the immediate interests of the individual defendant.

43. See People v. Wheeler, 22 Cal. 3d at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908. See notes 11-13 and accompanying text supra; notes 124-26 and accompanying text infra.

44. U.S. Const. amend. VI. For the pertinent text of the sixth amendment, see note 3 supra. The term "impartiality" defies precise definition. Lord Coke stated that impartiality means that a juror should be "indifferent as he stands unsworne." I. E. COKE, INSTITUTES OF THE LAWS OF ENGLAND § 155b (17th ed. London 1817) (1st ed. London 1628). In another attempt at defining impartiality, it has been stated: "Impartiality [is a] relative concept—a term meant to describe a certain degree of neutrality." Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. CAL. L. REV. 916, 925 (1971) (emphasis in original).

45. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). See J. VAN DYKE, supra note 5, at xiii. Another author has stated:

In criminal cases, . . . perhaps the primary contemporary justification of the use of lay juries is that they can reflect the conscience and mores of the community in applying punitive sanctions to individual cases. Juries can ameliorate the harshness of the criminal law where strict application would offend the community's sense of justice. And if they apply the law in its full rigor, the participation of a body of citizens makes the application more acceptable to those against whom it is applied.

Kuhn, supra note 5, at 245 (footnote omitted).

46. See Federal Jury Selection: Hearings on S. 383, S. 384, S. 385, S. 386, S. 387, S. 989, S. 1319 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 63 (1967) (statement of Dale W. Broder, Esq.) [hereinafter cited as Hearings]. As one black juror on receipt of his summons said: "When I got my summons . . . I got a sense of really belonging to the American community. . . . It was a very proud moment when I opened my letter and found that I had been . . . selected to serve on a Federal jury." Id. In addition, the American Trial Lawyers Foundation has stated:

[J]ury service is one of the few ways in which the ordinary American is able to participate in the affairs of his or her government. . . . Jury service, in this way, provides concrete participation in an important government function—for some, the only participation they ever have. In an increasingly bureaucratic, impersonal time, this is a sometimes overlooked, but nonetheless vital, factor . . . .


47. See, e.g., Ashby, supra note 11, at 1137-40; Kuhn, supra note 5, at 241-49.
Within the societal context, as well as within the context of the rights of individual defendants, it has been asserted that the exclusion of any group from jury service undercuts the legitimacy and the stabilizing influence of the jury as a political and social institution. As one commentator has noted:

"Arbitrary exclusion of the members of any class of our society from jury service not only denies them an opportunity to participate in the administration of laws to which they themselves are subject, but also serves generally to undermine their faith in the quality of justice obtainable in our society."

Therefore, it is clear why the Supreme Court has determined that the political and social functions of juries will be enhanced when they are selected from a cross-section of the community.

In addition to its political and social ramifications, the representative cross-section approach is also "concerned with a substantive definition of jury impartiality." In a general sense, the cross-section standard recognizes "that those eligible for jury service are to be found in every stratum of society," and that competence for jury duty is a matter of individual ability.

48. See, e.g., Taylor v. Louisiana, 419 U.S. at 530 (community participation is critical to public confidence in jury system); Ballard v. United States, 329 U.S. 187, 195 (1946) (group exclusion injures the democratic ideal of the judicial process).


51. Comment, supra note 11, at 1726. For a discussion of how the representative cross-section rule theoretically ensures impartiality, see notes 52-61 and accompanying text infra.

52. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946). In Thiel, petitioner challenged the composition of his jury panel, alleging that daily wage earners were purposely excluded from the process resulting in discrimination against members of that group. Id. at 219. The Court's opinion was written by Justice Murphy who has been described as "cross-sectionalism's prime mover." See Daughtrey, supra note 6, at 27. In Thiel, Justice Murphy articulated the underpinnings of the cross-section rule when he wrote:

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. 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 not mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. 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.

328 U.S. at 220 (citations omitted).

Thus, the Court has been of the opinion that discharging an individual from a jury pool or venire on the basis of group affiliation "is at war with our basic concepts of a democratic society and a representative government." 54

More specifically, the cross-section requirement is supposed to ensure that the jury's verdict is the product of a "diffused impartiality." 55 It accomplishes this goal by mandating that a vast "range of biases and experiences will bear on the facts of the case." 56 In Peters v. Kiff, 57 Justice Marshall observed:

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 their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. 58

Thus, it is submitted that the substantive premise of the cross-section rule is that it is impossible to discover those members of the venire who possess certain inherent biases and preconceptions through voir dire. 59

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56. Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 STAN. L. REV. 545, 551 (1975). It has been noted that jurors do, in fact, possess biases and, thus, impartiality in its commonly defined sense does not truly exist. See J. VAN DYKE, supra note 5, at 162-64. See note 59 infra. For definitions of impartiality, see note 44 supra.
58. Id. at 503-04 (footnote omitted).
59. Id. See Babcock, supra note 54, at 551. The purpose of voir dire and the subsequent challenge system is to recognize extreme biases and to ensure that those who possess them are not part of the final panel. See A. GINGER, JURY SELECTION IN CRIMINAL TRIALS § 7.15, at 281 (1975). Professor Ginger lists the following functions of voir dire: 1) to motivate the jury as a group by attempting to find a "common denominator" among its members; 2) to discover prejudice; 3) to eliminate those who hold extreme positions; 4) to discover friendly jurors; 5) to exercise educated peremptories; 6) to cause jurors to face their own prejudices; 7) to teach jurors important facts in the case; 8) to expose jurors to damaging facts in the case; 9) to teach jurors the law of the case; 10) to develop personalized relationships between lawyers and jurors; 11) to introduce opposing counsel; and 12) to prepare for summation. Id. §§ 7.13-.24, at 250-87.

While voir dire may at times elicit the facts necessary to make a challenge for cause, it has been described as "grossly ineffective as a screening mechanism." Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503, 528 (1965). For a discussion of the grounds upon which challenges for cause may be based, see note 80 infra. A major problem with voir dire is that often it will fail to discover unconscious bias. Id. Unconscious bias has been described as arising "most often from lingering effects of pretrial publicity or from socioeconomic influences, including racial and ethnic background. In our heterogeneous society, socioeconomic factors are especially likely to create power prejudices, even though the holder may be unaware..."
Within this framework, the cross-section rule recognizes that the optimum way to attenuate the inherent biases of those who comprise the jury panel is by the inclusion of counter-biases.60 Therefore, the denial of jury participation to any group is essentially a denial of counter-bias and, arguably, deprives a defendant of the right to have the jury include those who hold perceptions which may be very important to the defendant's theory of the case.61

of their influence.” Note, Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges, 27 STAN. L. REV. 1493, 1496 (1975) (footnotes omitted). The recognition of the extent of unconscious bias has “directed attention to stereotypical peremptory challenges as means to eliminate jurors who may unconsciously be predisposed to conviction or acquittal.” Comment, supra note 11, at 1720 (footnote omitted).

In this sense, it is submitted that the cross-section rule recognizes that it is virtually impossible to completely rid the jury of the influence of unconscious bias. One commentator has opined that in addition to increasing the jury's political and social legitimacy, the cross-section rule ensures that, given differences in group behavior, group biases will be cancelled and the presence of persons from groups that are the objects of prejudice will inhibit the expression of prejudice by other jurors. See Ashby, supra note 11, at 1138-39.

60. See, e.g., Taylor v. Louisiana, 419 U.S. 522, 531-32 (1975); Ballard v. United States, 329 U.S. 187, 193-94 (1946); Ashby, supra note 11, at 1138-39. In Ballard, Justice Douglas stated why the exclusion of women from jury venires was violative of cross-sectional principles:

It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is 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.

329 U.S. at 193-94 (footnotes omitted).

There has not been uniform acceptance of the view that cross-sectionalism assures impartiality through the interplay of group bias. See Comment, supra note 11, at 1728-29. Justice Rehnquist has pointed out that the failure of the Court to extend representativeness to the final panel shows in the fact that the Court does not truly agree with its own analysis. See Duren v. Missouri, 439 U.S. 357, 371 n.* (1979) (Rehnquist, J., dissenting); Taylor v. Louisiana, 419 U.S. at 542 (Rehnquist, J., dissenting). One critic has voiced a more doctrinal objection to the theory that cross-sectionalism assures impartiality:

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.

People v. Wheeler, 22 Cal. 3d at 292, 583 P.2d at 771-72, 148 Cal. Rptr. at 913 (Richardson, J., dissenting).

61. See Peters v. Kiff, 407 U.S. at 503-04. For the relevant language from Peters, see text accompanying note 58 supra. One commentator has posited that the problem is one of credibility, reasoning that a jury should have something in common with the defendant so that its members can understand what the accused is saying. See LaRue, A Jury of One's Peers, 33 WASH. & LEE L. REV. 841, 841-44 (1976).
Under this analysis, it is difficult to see how the cross-section rule's definition of impartiality can be effectuated without having the final panel be representative. Nevertheless, the Court has definitively rejected any notion that such representation is required. In Taylor, the Court stated:

[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, . . . but the 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.

Thus, it appears that the Court is willing to let the composition of the final jury panel be a function of random selection. The Court, therefore, will not find an unrepresentative jury panel objectionable unless the selection process itself makes the attainment of representative juries unlikely.

62. Taylor v. Louisiana, 419 U.S. at 538. For a discussion of the factors which may have led the Court to so conclude, see notes 63-69 and accompanying text infra.

63. 419 U.S. at 538. See also Duren v. Missouri, 439 U.S. 357, 364 n.20 (1979).

64. See Duren v. Missouri, 439 U.S. 357, 364 (1979). In Duren, the Court held:

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. (emphasis added). The systematic exclusion requirement in cross-section cases has been defined as exclusion "inherent in the particular jury-selection process utilized." Id. at 366. This is unlike the equal protection analysis which defined systematic exclusion in terms of a finding of discriminatory purpose. Id. at 368 n.26. As one commentator stated: "The disparity itself, without more, is impermissible and establishes that the selection system is defective and therefore invalid." Daughtrey, supra note 6, at 100.

65. As the Court stated in Thiel v. Southern Pac. Co., 328 U.S. 217 (1946), cross-sectionalism "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. . . . 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 220. The intentional aspect of the systematic exclusion rule is no longer a part of the cross-section test. See note 64 supra. Similarly, the California Supreme Court defined cross-sectionalism as meaning

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 to 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.

People v. Wheeler, 22 Cal. 3d at 277-78, 583 P.2d at 762, 148 Cal. Rptr. at 903. For a discussion of Wheeler, see notes 119-67 and accompanying text infra.
Factors which may have influenced the *Taylor* Court's reluctance to extend the cross-section rule to the final panel include: 1) the practical problems in attaining statistically representative panels; 66 2) the fact that mandatory inclusion of groups entails the inclusion of those who could theoretically be challenged for cause; 67 and 3) the undesirability of limiting in any way the traditional uses of the peremptory challenge. 68

It is suggested that the mechanical problem in attaining representative panels, 69 as well as the statutory limitation of challenges for cause, 70 may justify the *Taylor* Court's refusal to extend the cross-section rule to the final panel. It is further submitted, however, that the use of peremptory challenges to destroy a venire which is representative poses serious constitutional problems. 71

66. See J. Van Dyke, supra note 5, at 85-106; Ashby, supra note 11, at 1141-51. It has been asserted that the various selection methods which shape the jury venire are inherently unrepresentative because the master lists from which the pool is selected are frequently unrepresentative. *Id.* at 1149-51. See also Comment, supra note 11, at 1732. In order to overcome the unrepresentativeness in the pool of potential jurors, one author has suggested, *inter alia*, that master voting lists, which are the prevalent source for names of prospective jurors, be supplemented by lists which are more representative. See Ashby, supra note 11, at 1164.

Even assuming that representative master lists can be formulated, a major problem exists in defining what groups are "cognizable" and, therefore, must be included to make these lists representative. One lower federal court has listed three criteria to be used in determining what is a cognizable group: 1) there must be a factor which both defines and limits the group; 2) the group must be cohesive in the sense that its members share a "basic similarity in attitudes or ideas or experience ... which cannot be represented if the group is excluded from the jury selection process;" and 3) the absence of the group will cause bias in the sense that the group's community of interest ... cannot be adequately protected by the rest of the populace." United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), aff'd, 468 F.2d 1245, 1249 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973). For examples of how the United States Supreme Court has dealt with the problems of cognizable groups, see *Taylor* v. Louisiana, 419 U.S. at 531-33 (women are a cognizable group); Witherspoon v. Illinois, 391 U.S. 510, 518-23 (1968) (believers in capital punishment are cognizable); *Thiel* v. Southern Pac. Co., 328 U.S. 217, 222 (1946) (daily wage earners are cognizable). Lower federal courts have defined other groups as cognizable but have not done so consistently. Compare *Carmical* v. *Craven*, 457 F.2d 582, 585 (9th Cir. 1971) (persons from lower income neighborhoods are a cognizable group) with *United States* v. *McDaniels*, 370 F. Supp. 298, 312 (E.D. La. 1973) (poor people not cognizable). See United States v. Duke, 263 F. Supp. 828, 832 (S.D. Ind. 1967) (young adults are cognizable).

The problems in this area were exemplified when the California Supreme Court held that ex-felons were not a cognizable group, yet could not agree on what test should be used in coming to such a determination. See *Rubio* v. Superior Court, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

A possible method open to state courts in defining cognizable groups is the use of classifications in state equal rights amendments. See Commonwealth v. *Soares*, __ Mass. __, 387 N.E.2d 499, 516, *cert. denied*, 100 S. Ct. 170 (1979). For a more detailed discussion of the problems involved in defining cognizable groups, see generally J. Van Dyke, supra note 5, at 47-51; Ashby, supra note 11, at 1147-49; Comment, supra note 11, at 1735-38.

67.See notes 77-78 and accompanying text *infra*. See also Comment, supra note 11, at 1732 (maintaining that if panel is truly representative then it may include those who are actually biased).


69. As the discussion of cognizable groups has indicated, the potential variety of such groups is almost limitless. See note 66 supra. Indeed, one author has stated: "So many identifiable interests have already emerged that the mathematical problems are almost insurmountable." J. Van Dyke, supra note 5, at 18.

70. See notes 79-88 and accompanying text *infra*.

71. See notes 96-101 and accompanying text *infra*.
B. Swain v. Alabama—The Role of the Peremptory Challenge and the Impartial Jury

The major function of voir dire, the final stage of the jury selection process, is the elicitation of facts for the educated exercise of challenges. Challenges to individuals on the venire, like the representative cross-section rule, supposedly ensure an impartial jury and, thus further the jury's political and social functions.

The representative cross-section rule, however, is based upon the assumption that complete impartiality is unattainable since jurors influence the decisionmaking process by bringing various degrees of unconscious bias to the jury box. The role of challenges within this framework should therefore be the removal of those with conscious or fixed unconscious biases, thereby leaving jurors who, though somewhat biased, "would at least be willing to be persuaded and influenced by the life experiences of others."

There are two types of jury challenges. The challenge for cause is made on a "narrowly specified, provable and legally cognizable basis of partiality." Normally, these challenges are exercised when actual or implied bias...
exists. The other type of challenge is the peremptory challenge and it is exercised when grounds for a causal challenge are not present, yet common sense indicates that there is a strong bias on the part of the juror. Although the peremptory challenge has a long and storied history, and has been deemed to be "one of the most important of the rights secured to the accused," it is a statutory right and has never been accorded the status of a constitutional requirement.

80. See People v. Wheeler, 22 Cal. 3d at 273, 583 P.2d at 759, 148 Cal. Rptr. at 901. Actual bias has been defined as "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 impartiality and without prejudice to the substantial rights of either party." CAL. PENAL CODE § 1073 (West 1970). As has been indicated, it is often difficult to discern actual bias. See note 59 supra.

Implied bias, on the other hand, is bias presumed by the law on the basis of certain relationships between the prospective juror and the case, such as a pecuniary interest, or a relationship to one of the parties in the action. See, e.g., CAL. PENAL CODE § 1074 (West 1970); N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1971).


82. Blackstone stated that the peremptory challenge is "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." 4 W. BLACKSTONE, COMMENTARIES * 353. The right to exercise peremptory challenges originally belonged only to the accused. See J. VAN DYKE, supra note 5, at 147. Today, however, the use of peremptories is also available to the state. See, e.g., People v. Wheeler, 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29. Recognition of this historical background has led one commentator to suggest that a way to mitigate the problem resulting from the discriminatory uses of peremptory challenges is by prohibiting the state from using them. See J. VAN DYKE, supra note 5, at 167. For opposing points of view concerning the history of the peremptory challenge, compare Swain v. Alabama, 380 U.S. at 212-19 (suggesting peremptories have historically belonged to both sides) with id. at 242-43 (Goldberg, J., dissenting) (suggesting peremptory challenge historically has been viewed as a device to protect defendants).


84. See Swain v. Alabama, 380 U.S. at 219; Stilson v. United States, 250 U.S. 583, 586 (1919). There are basically two ways in which peremptory challenges are exercised. The prevailing practice has been described as follows:

Twelve veniremen are called and examined, after which the prosecutor exercises such challenges for cause as may appear and then exercises such peremptories as he then desires to use. Anyone excused is immediately replaced in the box, so the prosecutor will tender 12 jurors to the defendant, who likewise exercises challenges for cause and whatever peremptories he then desires to use. Again those excused are immediately replaced, and when he is satisfied the defendant tenders the jury to the prosecutor. This procedure continues until both parties have exhausted their challenges or indicate their satisfaction with the jury.

ABA Project on Standards for Criminal Justice, Standards Relating to Trial by Jury 77 (Tent. Draft 1968) (citation omitted). The other method, known as the struck jury, operates in the following manner:

[J]urors are first examined and challenged for cause by both sides. Excused jurors are replaced on the panel, and the examination of replacements continues until a panel of qualified jurors is presented. The size of the panel at this time is the sum of the number of jurors to hear the case plus the number of peremptories to be allowed all parties. The parties then proceed to exercise their peremptories, usually alternately or in some similar way which will result in all parties exhausting their challenges at approximately the same time.

Id. at 77-78. It is generally a matter of the trial court's discretion as to which method will be used; however, some states have enacted statutes governing the procedures. Id. at 76. See, e.g.,
Throughout its long history, the peremptory challenge system has been “subject to abuse.” A major criticism of the system is that it allows the parties to manipulate the process by injecting bias into—rather than removing bias from—the proceedings. While the merits of this criticism are debatable, it is clear that the peremptory challenge system can be manipulated to keep minority “cognizable groups” off the jury in seeming contradiction to the representative cross-section rule.

The Supreme Court, however, expressly approved the exercise of peremptories on the basis of group affiliation in Swain v. Alabama. Swain not only approved group-based peremptories, but, for all practical purposes, placed the long-term misuse of the challenge beyond review under the systematic exclusion rule.

Cal. Penal Code §§ 1069, 1070, 1070.5, 1088 (West 1970); N.Y. Crim. Proc. Law § 270.15 (McKinney 1971). The number of peremptory challenges allotted to either side is determined by statute and will fluctuate depending on the severity of the crime. See Swain v. Alabama, 380 U.S. at 217 & n.20. For a state-by-state breakdown, see J. Van Dyke, supra note 5, at 282-84.

85. See J. Van Dyke, supra note 5, at 147. Another commentator has explained the abuse of peremptory challenges as being that the goal of both prosecutor and private counsel is to obtain not an impartial jury, but rather the friendliest possible jury. See Kuhn, supra note 5, at 286.

86. See Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loy. L.A. L. Rev. 247, 270 (1973). The “injection of bias” argument relies on the theory of the “numbers game.” For example, if one side has more peremptories than there are jurors deemed to be potentially favorable to the other side, the first side might be able to create a biased jury by using its excess of peremptories. See Note, supra note 59, at 1504 n.43. Moreover, the use of social science research to predict juror reaction and to lay the framework for peremptory challenges has been prominent in many trials involving political persons. See Note, supra note 81, at 56-58.

87. See Note, supra note 81, at 80-81 (arguing that the process is incapable of manipulation due to the insufficient number of challenges and the unpredictable nature of social science research techniques).

88. See, e.g., Swain v. Alabama, 380 U.S. at 210 (all six blacks peremptorily struck); Hall v. United States, 168 F.2d 161, 164 (D.C. Cir.), cert. denied, 334 U.S. 853 (1948) (all 19 blacks peremptorily struck); Swope v. State, 263 Ind. 148, 156, 325 N.E.2d 193, 196, cert. denied, 423 U.S. 870 (1975) (removal of all five blacks); State v. Holloway, 219 Kan. 245, 249, 547 P.2d 741, 746 (1976) (removal of only black). Cognizable group exclusion through peremptory challenges is a perfect example of how the “numbers game” operates. See note 86 supra. As the cases cited in this footnote indicate, even if the venire is representative, one side may have more challenges than there are members of the cognizable group on the venire. When this fact is coupled with the significant limitations in attaining representative venires, it is submitted that the peremptory challenge becomes a sword of injustice.

89. Id. The Court stated: “[W]e 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 a cause.” Id.

90. Id. The Court ruled: “[W]e 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 a cause.” Id.

91. See Comment, supra note 11, at 1723 & n.36. While the Swain Court insulated the individual peremptory challenge from judicial review, a plurality of the Court opined that when such challenges are consistently used over a period of time in a discriminatory manner, a possible equal protection violation may exist. See 380 U.S. at 223. Nevertheless, the plurality determined that, unlike the situation where the challenge is to the composition of the venire, a mere showing that blacks had not served on final panels over a period of time was not sufficient to establish a prima facie case of exclusion. Id. at 227. Cf. Norris v. Alabama, 294 U.S. 587 (1935) (total exclusion over a period of years constitutes a prima facie case). The claimant, according to
In Swain, a nineteen year-old black man was convicted of raping a seventeen year-old white woman and sentenced to death by an all-white jury. 92 The venire included eight blacks—two of whom were exempt, while the other six were peremptorily struck. 93 The Supreme Court, in holding that the prosecutor's exercise of the peremptory challenge in an individual case was beyond review, stated that "subject[ing] 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." 94 The Court, in approving peremptories on the basis of group affiliation, observed that the peremptory challenge is "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." 95

the Court, must also show that the exclusion was due to the prosecutor's systematic use of peremptory challenges against the group in question over a period of time. 380 U.S. at 227. This test requires that the petitioner be able to prove the prosecutor's actions in many cases.

Id.

The burden created by Swain has proven to be an impossible one to meet. See People v. Wheeler, 22 Cal. 3d at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 909; Annot., 79 A.L.R.3d 14, 24 (1977). In Wheeler, the court listed the following reasons for its conclusion that the Swain test furnished no real limitation on long-term prosecutorial misuse of the peremptory challenge: 1) the inability of indigent defendants to pay investigators to uncover the facts necessary to prove a case of systematic exclusion; 2) the unwillingness of trial judges to permit time-consuming investigation; and 3) the lack of data as to what group those challenged belong. See 22 Cal. 3d at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 909.

The contention that Swain's burden is essentially insurmountable is born out by the fact that as of this date no case can be found where the claimant has successfully met the Swain burden of proof. See, e.g., United States v. Nelson, 529 F.2d 40, 43 (8th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Carlton, 456 F.2d 207, 208 (5th Cir. 1972); State v. Gray, 285 So. 2d 199, 200 (La. 1973), cert. denied, 416 U.S. 974 (1974); State v. Collor, 502 S.W.2d 258, 261 (Mo. 1973); State v. Salinas, 87 Wash. 2d 112, 119-20, 549 P.2d 712, 716-17 (1976). But see United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976), vacated sub nom. United States v. Newman, 549 F.2d 240, 243 (2d Cir. 1977) (court of appeals vacated district court's finding of a Swain violation on the basis that the lower court had used erroneous statistical evidence).


92. 380 U.S. at 231 (Goldberg, J., dissenting).
93. Id. at 205.
94. Id. at 221-22. After examining the history of the peremptory challenge, the Court explained that "[t]he essential nature of the peremptory is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Id. at 220. In failing to place any restraint on the use of the peremptory challenge, the Court relied upon Blackstone's characterization of the challenge as discussed by the Supreme Court in an earlier case: "[T]he court, of course, has the power to change the jury when satisfied that it is incompetent to do its duty; but it is never to be considered that the court's change is a reasonable or proper reason for discharging a particular juror." Lewis v. United States, 146 U.S. 370, 378 (1892).
95. 380 U.S. at 220 (footnote omitted).
It is submitted that the result in *Swain* is inconsistent with the representative cross-section standard of *Taylor*. *Swain* simply suggests that impartiality is attainable through the elimination of unconscious group bias, whereas *Taylor* reflects the view that impartiality can be attained only through the "interplay of group bias." Thus, the ultimate problem is how this conflict should be resolved. It has been argued that since the cross-section rule is a constitutional requirement, elementary principles of constitutional law mandate that the exercise of statutorily created peremptories must yield. *Swain*, however, reflects a strong policy favoring the continued use of peremptory challenges without severe restrictions, and it is therefore submitted that any limitation imposed must not make every challenge subject to scrutiny. Further, it is submitted that the inherent difficulties in attaining representative jury panels will force the Court to hesitate before sanctioning a solution to this problem which may limit the role of the peremptory challenge.

Before any solution to this dilemma can be formulated, it must be recognized that the *Swain* Court's definition of the peremptory challenge should no longer be controlling. A suggested way to distinguish *Swain* is by noting that the Court there was concerned with whether discriminatory peremptories violated the equal protection clause; the Court did not discuss


98. See 419 U.S. at 531-32; Comment, supra note 11, at 1728-29. For criticism of the view that cross-sectionalism assures the jury impartiality, see note 60 supra. It has been suggested that "the legal fiction of the 'impartial' juror should be disposed of as a cultural lag hopelessly out of tune with reality . . . . Perhaps the issue of partiality has to be redirected . . . . to separate the problem of preconceptions from the ability to act with detachment." A. GINGER, supra note 59, § 10.12, at 471.

99. See notes 1-3 and accompanying text supra.

100. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

101. See Kuhn, supra note 5, at 287-88. See also Swain v. Alabama, 380 U.S. at 244 (Goldberg, J., dissenting).

102. See 380 U.S. at 220-22. The *Swain* Court emphasized not only the purpose of the peremptory challenge in relation to impartiality, but also the "function it serves in a pluralistic society in connection with the institution of jury trial." *Id.* at 222. One author has contended that although *Swain* recognizes that historically the right to peremptory challenge was created by statute, it also stands for the proposition that peremptories are essential for a fair trial and, thus, are constitutionally required. See Babcock, supra note 56, at 555-58.

103. See notes 65-68 and accompanying text supra.

104. It should be noted that state courts are not bound to follow *Swain*. See, e.g., People v. Wheeler, 22 Cal. 3d at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910; Commonwealth v. Soares, Mass. n.15, 367 N.E.2d 499, 511 n.15, *cert. denied*, 100 S. Ct. 170 (1979). In Wheeler, the court opined that the United States Supreme Court would most likely decide *Swain* the same way today. See 22 Cal.3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908. It is submitted, however, that while *Swain* represents a recognition of the importance of the peremptory challenges, it does not necessarily follow that the Court would presently decide the issue the same way. It is suggested that the Court might accept a redefinition of the peremptory challenge if the basic nature of the challenge is maintained in the sense that every challenge is not subject to scrutiny. See notes 102-12 and accompanying text infra.
any substantive definitions of impartiality, which would be the focus of a representative cross-section due process analysis. 105 Moreover, it is clear that Swain's approach to removing group bias 106 is of questionable efficacy and is certainly contrary to the Court's holding in Taylor. 107 Furthermore, it must be realized that continued adherence to Swain will emasculate the representative cross-section rule: 108 a result that appears to be occurring in jurisdictions where courts have refused to limit the use of the challenge. 109 The fact that the Taylor Court held that the final panel need not "mirror the community" 110 should not, it is submitted, be taken as any indication that the Court continues to adhere to Swain. 111 Random unrepresentativeness, it is suggested, is certainly different from the intentional destruction of representativeness. 112 Thus, it is possible for a court to strike the balance between the representative cross-section rule and the proper use of peremptory challenges without being constrained by the Court's decision in Swain.

IV. STRIKING THE BALANCE

The difficult problems caused by using peremptory challenges against cognizable groups has led commentators to suggest various solutions, including 1) requiring cognizable groups to be included in the final panel; 113 2) abrogating the government's right to peremptory challenge; 114 3) modifying

106. See text accompanying note 97 supra.
107. See notes 55-65 and accompanying text supra.
108. Cf. People v. Wheeler, 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 900 (court felt that its decision was mandated by its desire to make sure that the representative cross-section standard did not become a hollow guarantee).
Prior to Wheeler, the only case which had held that the use of the peremptory challenge in a particular case was offensive enough to warrant judicial intervention was United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974). Although the McDaniels court conceded that there was no equal protection violation under Swain, id. at 1248, it nevertheless held that the exercise of peremptories in this case against all blacks resulted in an unfair trial. Id. at 1250. The court emphasized, however, that its holding should not be interpreted as creating any general limitation on the peremptory challenge but was limited to the circumstances of the particular case. Id.
110. 419 U.S. at 538.
111. See Comment, supra note 11, at 1732; cf. J. Van Dyke, supra note 5, at 17-19 (explaining why random selection is necessary).
112. See notes 64-71 and accompanying text supra.
114. See J. Van Dyke, supra note 5, at 167.
Swain's burden of proof standard in cases of long-term misuse of the peremptory challenge; 115 and 4) requiring members of cognizable groups to be tried only by members of their own group. 116 While each of these proposed solutions may or may not be meritorious and should be individually judged, it must be noted that, with the exception of modifying Swain's burden of proof standard, each one suggests a radical change in the peremptory system. As previously indicated, however, it is doubtful that the Court would sanction any severe infringement on that system. 117 Thus, the goal of a court that wishes to impose any solution which may eventually be adopted by the Supreme Court must be to "preserve a legitimate and significant role for the peremptory challenge." 118

The California Supreme Court has attempted to attain this goal in People v. Wheeler. 119 In Wheeler, two black defendants were convicted of murdering a white store owner during the course of a robbery. 120 During jury selection, an undefined number of blacks were called to the venire whereupon they were all peremptorily challenged and struck. 121 On appeal, the defendants claimed that striking all black jurors denied them the right to an impartial jury guaranteed by the California Constitution. 122 In reversing the convictions, the California Supreme Court attempted to infuse a degree of control over the peremptory process by holding that "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." 123 Although the Wheeler court based its decision on adequate and independent state grounds, 124 it opined that it considered Swain inconsistent with the representative cross-section stan-

115. See Comment, supra note 32, at 1161.
116. See A. GINGER, supra note 59, § 10.13 at 472-73. In discussing the trial of Huey P. Newton, former Black Panther Party Minister of Defense, Professor Ginger stated that, due to the pervasive influence of white racism in our society, a black person cannot get a trial of his peers unless the relevant community is drawn from black communities. Id.
117. See notes 102-03 and accompanying text supra; cf. notes 104-12 and accompanying text supra.
120. Id. at 262, 583 P.2d at 752, 148 Cal. Rptr. at 893.
121. Id.
122. Id. See generally CAL. CONST. art. I, § 16.
124. 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. Even though the Wheeler court based its decision on state grounds, it is suggested that the United States Supreme Court could still review the case. A defendant can certainly put forth the claim that any limitation on one's right to peremptory challenge may violate the right to a trial by an impartial jury. For a discussion of the arguments for making peremptories a constitutional requirement, see Babcock, supra note 56, at 552-58.
Theoretical underpinnings of the *Wheeler* analysis rest in the California Supreme Court's refusal to treat peremptory challenges as those for which no reason need exist. Justice Mosk, writing for the majority, stated that the role of the challenge system is to screen out those parties who are "specifically biased"—i.e., those who have a "bias concerning the particular case on trial or the parties or witnesses thereto." He contrasted this type of bias with what he defined as "group bias," which exists when "a party presumes that certain jurors are biased merely because they are members of an identifiable group." Focusing upon the role of the peremptory challenge in this system, the court concluded that although no reason for the peremptory challenge need be stated, its use must be limited to situations where there is a belief that *specific bias*, either conscious or unconscious, exists. Accordingly, the exercise of peremptories on the sole ground of group bias was held to be absolutely impermissible.

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125. See 22 Cal. 3d at 283-87, 583 P.2d at 766-68, 148 Cal. Rptr. at 907-10.
126. Id. at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. It is suggested that the *Wheeler* court felt compelled to grant a remedy for misuse of peremptory challenges because of the severe burden of proof that the defendants were required to carry under *Swain*.
127. 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908-99.
128. Id. at 274-76, 583 P.2d at 760-61, 148 Cal. Rptr. at 900-93.
129. Chief Justice Bird filed a concurring opinion which was limited to the prohibition of racially based peremptories. Id. at 287, 583 P.2d at 769, 148 Cal. Rptr. at 910 (Bird, C.J., concurring). The Chief Justice refused, however, to concur with any "dicta in the majority opinion which suggest other restrictions on the use of peremptory challenges." Id. Justice Richardson, joined by Justice Clark, filed a dissenting opinion. Id. at 289-95, 583 P.2d at 769-73, 148 Cal. Rptr. at 910-15 (Richardson, J., dissenting).
130. Id. at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.
131. Id. at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. It is suggested that the *Wheeler* court's distinction between group and specific bias is not altogether clear. The court's definition of specific bias seems to suggest that if race is a factor in a case, then peremptory challenges on that basis are permissible. However, in a companion case to *Wheeler*, *People v. Johnson*, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978), the California Supreme Court held that racially based peremptory challenges are invalid even though key witnesses would use terms which were racially derogatory. Id. at 299, 583 P.2d at 775, 148 Cal. Rptr. at 916.
132. Id. at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901. The court found that since the number of peremptory challenges available are limited by statute, a party is not likely to use the challenge in instances where no reason exists. Id.
133. Id. at 274-75, 583 P.2d at 760, 148 Cal. Rptr. at 901 (emphasis added). The court explained the reason for the existence of peremptory challenges as follows: "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." Id. at 275, 583 P.2d at 760, 148 Cal. Rptr. at 902.
In determining how to implement this rule against group-based peremptories, the court refused to make every peremptory subject to question; indeed, the court stated that "in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground."\(^{134}\)

In order to overcome this presumption, the *Wheeler* court formulated a three-step prima facie test: 1) the claimant’s record should be as complete as possible;\(^{135}\) 2) the claimant must establish that those being excused belong to a cognizable group;\(^{136}\) and 3) the claimant must show from all the circumstances that the reason for the challenge is group bias.\(^{137}\) Once a claimant has overcome the presumption of validity by establishing, to the satisfaction of the trial judge,\(^{138}\) a prima facie case, the proponent of the peremptory challenge can re-establish its validity by showing that the challenge was not based on "group bias alone."\(^{139}\) Significantly, the court stated that the proponent’s "showing need not rise to the level of a challenge for cause."\(^{140}\) If the trial court finds a misuse of peremptory challenges, it

134. *Id.* at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904.
135. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.
136. *Id.* For a discussion of what constitutes a cognizable group, see note 66 supra.
137. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. The court did not delineate the manner in which a party could satisfy this three-pronged test. It did indicate, however, that a plaintiff must establish that the only similarity shared by jurors who have been challenged is their membership in a cognizable group. *Id.* Moreover, the court found that a prosecutor could strike a prospective juror for any number of reasons, including 1) the juror’s prior record; 2) his or her previous complaints of police abuse; or 3) his or her unconventional lifestyle. *Id.* at 275-76, 583 P.2d at 760-61, 148 Cal. Rptr. at 902. Similarly, the court opined that a defendant can challenge jurors when 1) the juror has been a victim of a crime; 2) he or she has relatives in law enforcement; or 3) he or she has indicated excessive respect for authority through voir dire. *Id.* Stating that the evidence of bias need not be concrete, the court maintained that it would sustain challenges based upon the personal likes or dislikes of either party. *Id.* at 275, 583 P.2d at 761, 148 Cal. Rptr. at 902.

Sanctioning peremptories based on the aforementioned reasons, the court stated that 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 veniremen and resentment among the remaining jurors. *Id.* at 275, 583 P.2d at 760-61, 148 Cal. Rptr. at 902 (citations and footnotes omitted). The court, however, stated that any statistical showing of exclusion can be supplemented by evidence that the party exercising the challenge engaged in no, or merely desultory, voir dire. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. Furthermore, the court indicated that the fact that the challenged jurors are members of the same group as the defendant is relevant to its determination of the issue. *Id.* at 281, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.

138. See *id.* at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906. The court declared its confidence in the ability of trial judges “to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay.” *Id.*
139. *Id.* at 281, 583 P.2d at 765, 148 Cal. Rptr. at 906.
140. *Id.* at 281-82, 583 P.2d at 765, 148 Cal. Rptr. at 906. In rebutting these presumptions, both the proponent and the opponent of the peremptory challenge may rely upon the totality of the circumstances. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. The totality of the circumstances, however, does not include the fact that group bias may be present in the case. *See* People v. Johnson, 22 Cal. 3d 296, 299, 583 P.2d 774, 775, 148 Cal. Rptr. 915, 916 (1978) (expected use of the word “nigger” by prosecution witnesses does not justify the striking of blacks from the venire).
is then obligated to dismiss the jurors already selected and quash the remaining venire.\textsuperscript{141}

Wheeler, it is submitted, represents a judicial commitment to the view that a substantive definition of impartiality is encompassed within the representative cross-section rule.\textsuperscript{142} While the Taylor court’s formulation of the rule enhanced the jury’s political role in terms of ensuring greater community participation in jury duty, it is submitted that the Wheeler court went further by making it possible for the desired community interaction to take place during the jury’s deliberations.\textsuperscript{143} This has been accomplished by sacrificing as little as possible of the traditional role of the peremptory challenge. The court has not taken away the ability to exercise peremptory challenges on the basis of non-group-based, stereotypical and spurious reasons so long as they are related to the case at bar;\textsuperscript{144} the court merely forbade certain types of stereotypes from being the basis of a peremptory challenge.\textsuperscript{145} As the court stated in another case decided on the same day: “Decision-making by racial stereotype, [is] a technique that should be anathema in our courts.”\textsuperscript{146} This ruling at least deters the practice of many attorneys who exercise blanket peremptory challenges on the basis of supposed group bias.\textsuperscript{147}

That the Wheeler court did not place severe limitations on the use of the peremptory challenge is best understood by considering the relationship between the cross-section rule and peremptory challenges. The cross-section rule, as defined by Taylor and Wheeler, does not mandate that those with bias be allowed to sit on jury panels.\textsuperscript{148} Indeed, if this were so, challenges for cause against cognizable group members would necessarily be eliminated. The cross-section rule, however, is an express recognition that a truly bias-free jury cannot be achieved due to varying inherent perspectives of members of society.\textsuperscript{149} Thus, the goal of any litigant will be to remove those persons in the venire who are extremely biased.\textsuperscript{150}

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\textsuperscript{141} 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. The court left open the possibility of imposing alternative sanctions. Id. n.29.
\textsuperscript{142} See notes 44-68 and accompanying text supra.
\textsuperscript{143} See Commonwealth v. Soares, --- Mass. ---, 387 N.E.2d 499, 513, cert. denied, 100 S. Ct. 170 (1979). The Soares court found that it was not enough that the venire or panel be representative because “[t]he desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself.” --- Mass. at ---, 387 N.E.2d at 513 (citation omitted).
\textsuperscript{144} See note 132 supra.
\textsuperscript{145} See notes 127-33 and accompanying text supra.
\textsuperscript{146} People v. Johnson, 22 Cal. 3d 296, 299, 583 P.2d 774, 775, 148 Cal. Rptr. 915, 916 (1978).
\textsuperscript{147} Cf. United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979). In Danzey, the prosecutor admitted that he routinely “exclude[s] . . . all jurors . . . of the same ethnic background as the defendant.” Id. at 1066. The court upheld the prosecutor’s actions on the basis of Swain. Id. at 1067.
\textsuperscript{148} See notes 51-61 and accompanying text supra.
\textsuperscript{149} See notes 51-61 and accompanying text supra.
\textsuperscript{150} See People v. Wheeler, 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.
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the peremptory challenge in this process is, *inter alia*, a recognition that is simply impossible to codify all relationships which would probably lead to extreme bias. It is submitted, then, that *Wheeler* simply stands for the proposition that it is impermissible to presume that one is *extremely* biased just because one is a member of a cognizable group.

Indeed, it is clear from *Wheeler* and its companion case, *People v. Johnson*, that the California Supreme Court will not allow group-based peremptories even when there are factors present in the case which reflect an antagonism toward the group in question. In *Johnson*, the court reversed a rape conviction because the prosecutor admitted that he intentionally challenged and struck all blacks on the venire. His reason for doing so was that his witnesses would use the word "nigger" in their testimony.

One may argue, as did the dissenting judge in *Johnson*, that application of the *Wheeler* rationale in a case such as *Johnson* would lead to a biased jury, since the racial slur may more likely have a distasteful effect on blacks than on whites. The *Johnson* majority, however, refused to presume such a bias, maintaining that it is very likely that whites would also be adversely affected by the epithet, and thus, the group-based peremptory would not serve any bias-removing function.

While *Wheeler*, it is submitted, in its abstract analysis is an admirable opinion because it furthers constitutional rights, its practical application in *Johnson* raises some serious questions. One must question whether impartiality is truly advanced by having members of a cognizable group serve on a jury where the defendant has openly stated prejudices towards that group. Assume, for instance, that a Nazi is on trial for desecrating a synagogue: should not the defendant be allowed to strike all Jews from the jury? *Wheeler* and *Johnson* clearly indicate that if the sole reason for striking them is that they are Jews, then the striking is impermissible. While this rule is understandable in terms of *Wheeler's* condemnation of group-based presumptions, the result may make one uncomfortable since common sense teaches that extreme partiality will exist in such a case. Thus, it is suggested that unless the *Wheeler* approach can be adapted to somehow deal with those situations where common sense gives rise to a feeling that extreme partiality exists, it will fail in its attempt to carve out a continued role for peremptory challenges.

151. See id. at 273-74, 583 P.2d at 759-60, 148 Cal. Rptr. at 901.
153. See note 140 supra.
154. 22 Cal. 3d at 298, 583 P.2d at 775, 148 Cal. Rptr. at 916.
155. Id. at 298, 583 P.2d at 775, 148 Cal. Rptr. at 917.
156. Id. at 301, 583 P.2d at 776, 148 Cal. Rptr. at 918. (Richardson, J., dissenting).
157. Id. at 300, 583 P.2d at 776, 148 Cal. Rptr. at 917.
158 See notes 122-26 and accompanying text supra.
159. See 18 PA. CONS. STAT. ANN. § 5509(a) (Purdon 1973) (statute makes desecrating a place of worship a crime in Pennsylvania).
160. See notes 113-57 and accompanying text supra.
It is suggested that Wheeler and Johnson do offer a solution to this problem in that they do not per se preclude a challenge against a cognizable group member on grounds of specific bias.\(^{161}\) A necessary prerequisite to finding specific bias is that the litigant must be able to engage in extended voir dire.\(^{162}\) It cannot be emphasized enough that the Wheeler court did not limit in any way the ability of counsel to exercise peremptory challenges on the basis of personalities, lifestyles, and attitudes of jurors.\(^{163}\) Therefore, in the hypothetical involving the Nazi defendant, counsel should ask, for example, whether the juror has ever had anti-Semitic experiences, or whether he has any relatives who were victims of Nazi persecution? Pointed and relevant voir dire, it is submitted, will flush out most of those who fall within "the core of truth in most common stereotypes."\(^{164}\)

It must also be recognized, however, the approach taken by the Wheeler court is not, of course, a panacea. The dissent in Wheeler expressed concern over practical problems caused by the court's decision, suggesting that the test put forth by the majority will, "in fact, become all too frequently a time consuming inquiry leading . . . into procedural quicksand and a quagmire of questionable efficacy."\(^{165}\) This criticism, it is submitted, shows little respect for the ability of trial judges to distinguish between valid and frivolous claims of discrimination.\(^{166}\) It is further suggested that although the practical concerns raised by the dissent are serious, they can be avoided. One method of alleviating the potential for abuse is by limiting the cognizable groups entitled to protection under Taylor to those whose interests cannot be protected by other members of society.\(^{167}\) This would keep litigants from attempting to establish a prima facie case under Wheeler any time a juror is struck who has similar characteristics to a litigant or a witness. Another method of avoiding the practical problems and, it is submitted, the only way for Wheeler to succeed without eradicating the peremptory challenge, is through the use of extended voir dire. If litigants are allowed to uncover specific bias among prospective jurors, they will be less prone to rely on group stereotypes in making their challenges.\(^{168}\)

\(^{161}\) See notes 127-41 and accompanying text supra.

\(^{162}\) See People v. Johnson, 22 Cal. 3d at 299, 583 P.2d at 775, 148 Cal. Rptr. at 917.

\(^{163}\) See note 132 supra.

\(^{164}\) Babcock, supra note 56, at 533. Thus, it is submitted that in order for Wheeler to be a workable solution to the problem of group-based peremptories, courts must expand the scope of voir dire. See note 59 supra. See generally Note, supra note 59.

\(^{165}\) 22 Cal. 3d at 293, 583 P.2d at 772, 148 Cal. Rptr. at 913 (Richardson, J., dissenting).

\(^{166}\) Cf. id. at 281, 583 P.2d at 764, 145 Cal. Rptr. at 906 (majority declared confidence in trial judges' ability to recognize spurious claims).

\(^{167}\) See, e.g., Rubio v. Superior Court, 24 Cal. 3d 93, 99, 593 P.2d 595, 599, 154 Cal. Rptr. 734, 738 (1979) (ex-felons are not a cognizable group because many who are not ex-felons have experienced loss of liberty and social stigmatization); Commonwealth v. Soares, Mass. __, 387 N.E.2d 499, 516, cert. denied, 100 S. Ct. 170 (1979) (cognizable groups limited to sex, race, color, creed, or national origin). For a discussion of what constitutes a cognizable group, see note 66 supra.

\(^{168}\) See Note, supra note 59, at 1504-08. Extended voir dire will also be helpful to the judge in determining the validity of a discrimination claim. See People v. Wheeler, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906; notes 135-39 and accompanying text supra.
V. Conclusion

The continued exercise of peremptory challenges on the basis of group affiliation has tended to vitiate the representative cross-section rule as a substantive definition of impartiality. If a litigant can effectively remove all members of a cognizable group from the petit jury, then it is suggested that the diffused impartiality which is the goal of the representative cross-section standard can never be attained. Without any limitation on the use of group-based peremptories, it is submitted that the representative cross-section standard “smacks more of mysticism than of law.” The peremptory challenge, however, plays a major role in the quest for impartial juries and, thus, there must be an accommodation between the peremptory challenge and the cross-section standard.

The California Supreme Court in People v. Wheeler has, it is suggested, forged that accommodation in a manner which has afforded maximum respect for the peremptory challenge. Wheeler may best be understood as a judicial prohibition of stereotyping which has been castigated in the other branches of government. Wheeler ends the anamoly of having the jury’s political role effectuated by one standard of impartiality—the cross-section rule—only to be destroyed by another—the peremptory challenge.

Wheeler, however, does lay the roots for changing the nature of the peremptory challenge since, in certain defined circumstances, it forces the litigant to explain the reasons for its exercise. Because of Swain’s traditional approach to the peremptory challenge, however, courts may hesitate before implementing any change in their peremptory systems. Swain, however, should no longer be considered controlling, and, it is submitted, protecting the constitutional right recognized in Taylor is a sufficient justification for forcing a litigant to justify his or her use of the peremptory challenge. Furthermore, any negative implications of Wheeler in terms of the peremptory process can, it is submitted, be mitigated through the practical steps of narrowly defining cognizable groups and allowing extended voir dire.

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169. See notes 55-65 and accompanying text supra.
171. See generally notes 72-112 and accompanying text supra.
172. See generally notes 102-18 and accompanying text supra.
173. See generally notes 119-68 and accompanying text supra.
174. See notes 144-46 and accompanying text supra.
175. See generally notes 44-46 and accompanying text supra.
176. See notes 135-39 and accompanying text supra.
177. See notes 102-03 and accompanying text supra.
178. See notes 104-12 and accompanying text supra.