JURY SELECTION—PEREMPTORY CHALLENGES SUBJECT TO SCRUTINY UNDER SIXTH AMENDMENT RIGHT TO IMPARTIAL JURY—*McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3671 (U.S. Mar. 4, 1985) (No. 84-1426).

The sixth amendment to the United States Constitution guarantees every criminal defendant the right to a trial by an impartial jury.[1] This requirement of impartiality thus lies at the heart of the jury selection process,[2] from the random draw of the venire[3] to the exercise of challenges.[4] Challenges allow the prosecution and the defense to eliminate members of the venire whose biases might interfere with the goal of impartiality.[5] Challenges for cause are generally used to remove potential jurors who have personal knowledge about the case or a personal relationship to the parties.[6] Such challenges require approval by the

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[1] U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

[2] The jury selection process is composed of three steps: (1) compilation of a list of potential jurors, (2) granting excuses to a few of those on the list who are called, and (3) challenging by the attorneys. J. VAN DYKE, JURY SELECTION PROCEDURES 24 (1977). For a further discussion of these steps, see *infra* notes 3-6.

[3] The venire is the group of potential jurors summoned to serve for a designated period. *See* BLACK'S LAW DICTIONARY 1395 (5th ed. 1979). The actual six or twelve member jury for any given trial is drawn from the venire. *See id.* This jury is referred to as a petit jury to distinguish it from a grand jury, which renders indictments. *Id.* at 768. A random selection of potential jurors drawn from a master list or "wheel" is expected to produce a fair cross-section of the community from which a jury may be chosen. *See* J. VAN DYKE, *supra* note 2, at 85-86. For a discussion of the cross-section of the community doctrine, see *infra* note 68 and accompanying text.

28 U.S.C. § 1863(b)(2) (1982) specifies voter lists as the primary source for the master wheel. Some state statutes, in addition to 28 U.S.C. § 1863(b)(2), provide for supplemental sources to be consulted, such as directories, motor vehicle registration lists, tax rolls, and the like. *See, e.g.*, N.Y. JUD. LAW § 503 (McKinney 1982). For a comprehensive discussion of this aspect of the jury selection process, see NATIONAL CENTER FOR STATE COURTS, FACETS OF THE JURY SELECTION SYSTEM: A SURVEY 11-14 (1976).

[4] Challenges are exercised by attorneys during the trial stage known as the *voir dire*, which is defined as "[t]o speak the truth." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979). During the *voir dire*, the potential jurors who have been impaneled are questioned by the judge or the attorneys in order to determine bias. *See, e.g.*, FED. R. CRIM. P. 24(a); N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1982).

[5] J. VAN DYKE, *supra* note 2, at 139. In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court noted that an impartial juror is one who will rest his decision on the evidence presented and not on any preconceived or unrelated notions. *Id.* at 219.

[6] *See generally* Swain v. Alabama, 380 U.S. 202, 220 (1965) (challenges for cause

court.[7] Peremptory challenges, on the other hand, require no proof and are exercised without stating a reason.[8]

Historically, peremptory challenges were viewed as a means of protecting the accused from jurors who might harbor hidden prejudices that could not be proven in a challenge for cause.[9]

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require a "narrowly specified, provable and legally cognizable basis of partiality"). Certain situations providing a basis on which to challenge for cause are established by statute. For example, New York's criminal procedure law provides:

> 1. A challenge for cause is an objection to a prospective juror and may be made only on the ground that:
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> (a) He does not have the qualifications required by the judiciary law; or
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> (b) He has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial; or
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> (c) He is related within the sixth degree by consanguinity or affinity to the defendant, or to the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or that he is or was a party adverse to any such person in a civil action; or that he has complained against or been accused by any such person in a criminal action; or that he bears some other relationship to any such person of such nature that it is likely to preclude him from rendering an impartial verdict; or
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> (d) He was a witness at the preliminary examination or before the grand jury or is to be a witness at the trial; or
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> (e) He served on the grand jury which found the indictment in issue or served on a trial jury in a prior civil or criminal action involving the same conduct charged in such indictment; or
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> (f) There is a possibility that the crime charged is punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of the death penalty as to preclude him from rendering an impartial verdict.

N.Y. CRIM. PROC. LAW § 270.20(1) (McKinney 1982).

[7] *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.20(2) (McKinney 1982) ("All issues of fact or law arising on the challenge must be tried and determined by the court. If the challenge is allowed, the court must exclude the person challenged from service.").

[8] Swain v. Alabama, 380 U.S. 202, 220 (1965) "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." *Id.* It must be noted, however, that peremptory challenges are limited in number by statute according to the seriousness of the charge. *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1982).

Peremptory challenges were designed to eliminate those jurors whose biases were evident, yet incapable of articulation. *See* Hayes v. Missouri, 120 U.S. 68, 70 (1887). As early as 1887, the Supreme Court stated that "[e]xperience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him." *Id.* at 70.

[9] The eighteenth century legal commentator, Sir William Blackstone, referred

Over the years, however, the prosecution was also deemed worthy of such protection against prejudice,[10] although the grant of peremptory challenges to the state was surrounded by controversy.[11] Today, most state statutes provide an equal number of peremptory challenges to prosecutors and defendants alike.[12]

In theory, the peremptory challenges exercised by the opposing parties, each attempting to exclude those most likely to favor the other side, will cancel each other out and preserve the goal of impartiality.[13] In practice, however, peremptory challenges, because of the autonomy with which they may be exercised, endow the parties with the ability to shape the jury according to a particular plan.[14] Sometimes the plan entails constructing the jury along racial lines, as in a case where the de-

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to the peremptory challenge as "a provision full of that tenderness and humanity to *prisoners* for which our English laws are justly famous." 4 W. BLACKSTONE, COMMENTARIES *353 (emphasis added). The right of the Crown to challenge peremptorily was abolished by statute in 1305, limiting the Crown to challenges for cause. J. VAN DYKE, *supra* note 2, at 148 (citation omitted). In practice, however, English judges permitted the Crown's attorneys to direct certain jurors to "stand aside" without stating any reason. *Id.* Once a panel of 12 jurors was selected, those who stood aside were dismissed. *Id.* Only if a panel of 12 could not be assembled would the prosecutor have to show cause why those who were standing aside should not serve on the jury. *Id.*

[10] *See, e.g.*, Hayes v. Missouri, 120 U.S. 68, 70 (1887) ("It is to be remembered that such impartiality 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.").

[11] *See* J. VAN DYKE, *supra* note 2, at 147-51. Where the state was granted the right of peremptory challenges, the number was quite limited in relation to the number of challenges allowed the defendant. *See generally* People v. Thompson, 79 A.D.2d 87, 98-99, 435 N.Y.S.2d 739, 747-48 (1981) (history of number of peremptory challenges allowed prosecutor and defendant in New York).

[12] *See* J. VAN DYKE, *supra* note 2, at 282-84 (chart listing number of peremptory challenges allowed for various classes of crimes in each state).

[13] If, for example, the prosecutor is looking for conservative jurors and the defense is seeking liberal jurors, the prosecutor will attempt to exclude as many of the most obviously liberal members of the venire as he can, and the defense will do the same vis-a-vis the obviously conservative members. *See generally* Fried, Kaplan & Klein, *Juror Selection: An Analysis of Voir Dire* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 49-64 (R. Simon ed. 1975) (suggestions on choosing which jurors to eliminate). By eliminating the extremes of partiality on either side, the use of peremptory challenges results in a fair and impartial jury because the remaining jurors are presumably capable of deciding the case based on the evidence presented, rather than on extraneous reasons. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965).

[14] *See, e.g.*, Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491 (1978) (trial lawyers often claim they win their cases at *voir dire* stage through shrewd use of peremptory challenges).

fendant is black and the victim of the crime is white.[15] When prosecutors in such cases have exercised their peremptory challenges to eliminate black jurors, defendants have asserted a denial of their constitutional rights.[16] The potential for unrestrained racial discrimination[17] inherent in the exercise of peremptory challenges has thus created a tension within the criminal justice system.[18]

In *Swain v. Alabama*,[19] the seminal case on this issue, the United States Supreme Court upheld the "arbitrary and capricious" right to challenge potential jurors even in the face of a strong equal protection challenge.[20] Despite the potential for abuse, the integrity of the peremptory challenge was maintained

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15 *See* Comment, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?*, 3 DET. C. L. REV. 703 (1984). By way of introduction, the author states:

> The scene is not uncommon in American criminal courtrooms. During voir dire, the prosecution and defense politely excuse prospective jurors. After the exercise of a number of peremptory challenges, it becomes obvious that counsel are systematically attempting to seat a jury with as many members of a particular race as their limited number of peremptories permits. The prosecution typically tries to unseat persons of the same race as the defendant, while the defense attempts to unseat persons of other than the defendant's race. Those in attendance realize that the similarity among those removed is not coincidental, and are dismayed at the freedom permitted counsel in removing prospective jurors.

Id. (footnote omitted).

16 *E.g.*, United States v. Carter, 528 F.2d 844, 847 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); United States v. Pearson, 448 F.2d 1207, 1213 (5th Cir. 1971); Rogers v. State, 257 Ark. 144, 148, 515 S.W.2d 79, 82-83 (1974), *cert. denied*, 421 U.S. 930 (1975) (all dealing with defendants alleging discriminatory use of peremptory challenges by prosecution in violation of their fourteenth amendment rights). Defendants have brought similar claims under state constitutions providing for a right to trial by an impartial jury. *E.g.*, People v. Wheeler, 22 Cal. 3d 258, 263, 583 P.2d 748, 752, 148 Cal. Rptr. 890, 893 (1978); Commonwealth v. Soares, 377 Mass. 461, 473, 387 N.E.2d 499, 510, *cert. denied*, 444 U.S. 881 (1979).

17 " 'Discrimination' is a term well understood in the law. It is in general a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." Baker v. California Land Title Co., 349 F. Supp. 235, 238 (C.D. Cal. 1972) (citation omitted).

18 *See generally* Comment, *supra* note 15; Comment, *Peremptory Challenges in Transition*, 5 PACE L. REV. 185 (1984); Comment, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L. J. 1715 (1977) [hereinafter cited as Comment, *Limiting the Peremptory Challenge*] (all discussing impact of peremptory challenges on representative nature of juries).

19 380 U.S. 202 (1965).

20 *See id.* at 219. The defendant in *Swain*, a black man convicted by an all white jury, claimed an equal protection violation based on the fact that no black had served on his jury or on any jury in the county in which he was tried for the past 15 years. *See id.* at 205. For a further discussion of *Swain*, see *infra* text accompanying notes 50-64.

by the courts for over a decade through reliance on *Swain*.[21] As of 1978, however, a few state courts began to circumvent *Swain* by relying on the right to trial by an impartial jury found in their own state constitutions.[22] These opinions seriously questioned the sanctity of peremptory challenges in their traditional form.[23]

Recently, in *McCray v. Abrams*,[24] the United States Court of Appeals for the Second Circuit relied in part on the decisions of those state courts to side-step *Swain*.[25] The court based its opinion on the protections afforded a defendant by the sixth amendment to the United States Constitution.[26] In this case, Michael McCray, a black youth, was charged with the robbery of a white student in Brooklyn, New York.[27] He was tried by a jury of three blacks and nine whites, which was unable to reach a unanimous

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[21] *See infra* note 60 (examples of cases relying on *Swain*). Although the *Swain* Court in theory did not preclude future equal protection challenges in similar cases, it effectively barred the success of such challenges by requiring proof of unlawful use of peremptories by the prosecutor in question in all of his trials over a period of time. *See id.* at 223. For a further discussion of the holding in *Swain*, see *infra* note 59 and accompanying text.

[22] *E.g.*, People v. Wheeler, 22 Cal. 3d 258, 287, 148 Cal. Rptr. 890, 910, 583 P.2d 748, 768 (1978) (claims of discriminatory use of peremptory challenges to be governed by article I, § 16 of California Constitution rather than *Swain*); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (*Swain* test impedes right to trial by impartial jury found in article I, § 16 of Florida Constitution); Commonwealth v. Soares, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979) (discriminatory use of peremptory challenges contravenes Massachusetts Constitution). For a further discussion of these cases, see *infra* notes 81-103 and accompanying text.

[23] *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 281-82, 148 Cal. Rptr. 890, 906, 583 P.2d 748, 764-65 (1978); State v. Neil, 457 So. 2d 481, 486 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 491, 387 N.E.2d 499, 517 (1979). *Wheeler*, *Soares*, and *Neil* all hold that if a defendant establishes a prima facie case of discriminatory use of peremptory challenges, the party exercising those challenges must prove that the peremptories were not exercised on the basis of group bias alone. *See Wheeler*, 22 Cal. 3d at 281-82, 148 Cal. Rptr. at 906, 583 P.2d at 764-65; *Neil*, 457 So. 2d at 486; *Soares*, 377 Mass. at 491, 387 N.E.2d at 517. Such a burden of proof requires some explanation on the part of the party against whom the allegations were made, and thus alters the notion that no reasons need be given for peremptory challenges. *See Wheeler*, 22 Cal. 3d at 281-82, 148 Cal. Rptr. at 906, 583 P.2d at 765.

[24] 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3671 (U.S. Mar. 4, 1985) (No. 84-1426).

[25] *See id.* at 1122-23.

[26] *See id.* at 1124. The *McCray* court avoided *Swain* by choosing not to base its decision on equal protection grounds, but relying on the sixth amendment right to trial by an impartial jury instead. *Id.*

[27] *Id.* at 1115. The white student was assaulted and robbed on November 15, 1978 by three black youths. *Id.* On December 5th, as he was touring the neighborhood with the police, the victim identified McCray, who was standing on a street-corner. *Id.* McCray was subsequently charged with first and second degree robbery. *Id.*

verdict.[28]

During the *voir dire* at McCray's second trial, the prosecutor, who had also tried the first case, used eight of her peremptory challenges to exclude the seven blacks and one Hispanic on the panel.[29] McCray moved for a mistrial on the grounds that the prosecutor was making improper use of her challenges by excluding jurors solely on the basis of race.[30] Both this motion and a request for a hearing at which the prosecutor would explain her use of challenges were denied.[31] The trial court stated that the prosecutor's peremptory challenges had not been based on outright racial discrimination, but on the "potential affinity" black jurors would presumably have for a defendant of the same race.[32] Bound by *Swain*, which effectively shields peremptory challenges from inquiry, the court held that such potential affinity, or group affiliation as it is also known, was "a time honored basis for the exercise of peremptory challenges."[33] McCray was subsequently convicted by an all white jury.[34]

On appeal, McCray continued to assert improper use of peremptory challenges by the prosecutor, but his conviction was af-

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[28] *Id.* Nine jurors voted to convict McCray and three to acquit him. *Id.* McCray's attorney stated in an affidavit "that it was his recollection that the three jurors who had voted to acquit McCray. . .[were] black." *Id.* at 1116. The prosecutor, on the other hand, stated that in her recollection only two jurors who voted for acquittal were black and that the third, who was white, had been the "motivating force." *Id.* at 1118.

[29] *Id.* at 1115.

[30] *See id.* Pursuant to N.Y. CRIM. PROC. LAW § 270.25(2)(b) (McKinney 1982), each side was allowed 15 peremptory challenges. *McCray*, 750 F.2d at 1115. At the time the motion was made, the prosecutor had used 11 challenges. *Id.* Seven had been used to exclude blacks and one to exclude an Hispanic. *Id.* One black person did serve as an alternate. *Id.* at 1117.

[31] *McCray*, 750 F.2d at 1115. Although the trial court's opinion stated that the prosecutor denied exercising her challenges on the basis of race, People v. McCray, 104 Misc. 2d 782, 783, 429 N.Y.S.2d 158, 159 (Crim. Ct. 1980), *aff'd*, 84 A.D.2d 769, 444 N.Y.S.2d 972 (1981), *aff'd*, 57 N.Y.2d 542, 443 N.E. 2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983), the Second Circuit stated that the record did not include any statement by the prosecutor in response to this allegation. *McCray*, 750 F.2d at 1115.

[32] *See* People v. McCray, 104 Misc. 2d 782, 784, 429 N.Y.S.2d 158, 159 (Crim. Ct. 1980), *aff'd*, 84 A.D.2d 769, 444 N.Y.S.2d 972 (1981), *aff'd*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983).

[33] *Id.* (citation omitted).

[34] *McCray*, 750 F.2d at 1115. The jury found McCray guilty of both counts of robbery. *Id.* He "was sentenced to concurrent prison terms of two to six years on the first degree robbery charge and one and a half to four and a half years on the second degree robbery charge." *Id.* The victim's identification provided the sole evidence at the trial. *Id.*

firmed by both the appellate division[35] and the New York Court of Appeals.[36] The latter court stated that *Swain* clearly upheld the traditional two-challenge system of jury selection and that acceptance of McCray's position would change that system into one based solely on challenges for cause.[37] The court declined to follow the trend of relying on state constitutions and claimed that there was no indication that the New York Constitution intended to provide more protection than its Federal counterpart.[38]

McCray subsequently petitioned the United States Supreme Court for certiorari.[39] Although the Court declined to hear the case, Justice Stevens's opinion clearly expressed the importance of the peremptory challenge/group bias issue.[40] Because there was no conflict within the Federal system necessitating immedi-

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35 People v. McCray, 84 A.D.2d 769, 444 N.Y.S.2d 972 (1981), *aff'd*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). On November 9, 1981, in People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981), the appellate division held that peremptory challenges based on racial affiliation alone were prohibited. That decision, however, was prospective only. *See id.* at 111 n.22, 435 N.Y.S.2d at 755 n.22. Consequently, *Thompson* could not be applied to McCray since his jury had been selected in 1980, before *Thompson* was handed down. People v. McCray, 57 N.Y.2d 542, 552 n.1, 443 N.E.2d 915, 920 n.1, 457 N.Y.S.2d 441, 446 n.1 (1982) (Meyer, J., dissenting), *cert. denied*, 461 U.S. 961 (1983).

36 People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). The Second Circuit in *McCray* noted that the New York Court of Appeals overruled *sub silentio* two prior cases holding that the New York Constitution protected defendants from improper use of peremptory challenges by the state: People v. Kagan, 101 Misc. 2d 274, 277, 420 N.Y.S.2d 987, 989 (Sup. Ct. 1979), which held that Jews are not challengeable simply because of their religion, and People v. Thompson, 79 A.D.2d 87, 106, 435 N.Y.S.2d 739, 752 (1981), which held that peremptory challenges based on racial affiliation alone are prohibited. *McCray*, 750 F.2d at 1123.

37 People v. McCray, 57 N.Y.2d 542, 546-47, 443 N.E.2d 915, 917, 457 N.Y.S.2d 441, 443 (1982), *cert. denied*, 461 U.S. 961 (1983).

38 *Id.* at 550, 443 N.E.2d at 919, 457 N.Y.S.2d at 445.

39 *McCray*, 750 F.2d at 1116.

40 McCray v. New York, 461 U.S. 961 (1983). Justice Stevens wrote an opinion denying the petition and was joined by Justices Blackmun and Powell. *Id.* Justice Marshall, joined by Justice Brennan, wrote an opinion dissenting from the denial of certiorari. *Id.* at 963. Justice Stevens stated:

> My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue—whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group.

Id. at 961-62. Justice Stevens noted that although *McCray* presented the issue of the misuse of peremptories by a prosecutor on racial grounds, the same claim could be made based on the exclusion of other cognizable groups. *Id.* at 962 n.*. Justice Stevens further noted that in *Commonwealth v. Soares*, the Massachusetts Supreme

ate action,[41] Justice Stevens reasoned that further experimentation in the state courts would provide a foundation for future determination of the issue.[42]

An undaunted McCray subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York.[43] The court granted the writ, held that a new trial was required under both the fourteenth and sixth amendments, and stated that *Swain* should be modified.[44] The district court found that McCray had established a prima facie showing of racial discrimination, which shifted the burden to the prosecutor to prove that the challenges in question were not based on race alone.[45]

In response to the state's appeal, the Second Circuit affirmed the lower court's finding that McCray had established a prima facie case of racial discrimination.[46] Unlike the district court, however, the circuit court held that a writ of habeas corpus should not be granted without first giving the state an opportunity to rebut.[47] Accordingly, it vacated the judgment and remanded to the district court for further proceedings.[48] Unwilling to modify *Swain*, the Second Circuit based its holding on the sixth

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Judicial Court held that both the state and the defense could bring claims of improper use of peremptories by the opposing party. *Id.*

41 *Id.* at 962.

42 *Id.* at 963. On April 23, 1985, the Supreme Court announced that it had accepted an appeal from a black Kentucky prison inmate who was tried by an all white jury after the prosecutor used his peremptory challenges against blacks on the panel. N.Y. Times, Apr. 23, 1985, at A15, col. 1. The case to be heard is Batson v. Kentucky, No. 84-SC-733-MR (Ky. Dec. 20, 1984), *cert. granted*, 105 S. Ct. 2111 (1985).

43 *McCray*, 750 F.2d at 1116. McCray brought the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1976). *Id.*

44 McCray v. Abrams, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983), *aff'd in part, vacated in part*, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3671 (U.S. Mar. 4, 1985) (No. 84-1426). Although conceding that "[i]t is unusual, to say the least, for a district court to reexamine a Supreme Court case squarely on point," the district court concluded that "there is some invitation implicit in Justice Stevens' opinion for the lower courts to engage in such reconsideration, and that invitation was not restricted to the state courts." *Id.* at 1246.

45 *Id.* at 1249.

46 *McCray*, 750 F.2d at 1115.

47 *Id.* at 1134. The court held that "principles of federalism and comity suggest that a writ of habeas corpus not be granted. . .without giving the state every opportunity to respond," even though the state in this case did not present an affidavit until after the lower court conditionally granted the writ. *Id.* Although not appearing in the record, the court also considered and relied on the prosecutor's affidavit to the district court, in which she stated that she had attempted to explain her use of peremptories, but had not been permitted to do so by the trial court. *Id.*

48 *Id.* at 1115.

amendment right to an impartial jury, rather than on the equal protection clause of the fourteenth amendment.[49]

Swain was decided before the right to an impartial jury was made applicable to the states through the fourteenth amendment.[50] The United States Supreme Court therefore addressed the peremptory challenge issue on equal protection grounds alone.[51] Swain, a young black man, was charged with raping a seventeen year old white girl in Talladega County, Alabama.[52] At the trial, the prosecutor struck all blacks from the venire and Swain was subsequently convicted under penalty of death by an all white jury.[53] Although no black venireman had survived a *voir dire* in Talladega County in fifteen years,[54] the Court upheld the prosecutor's use of the peremptory challenges against Swain's equal protection claim.[55]

In its decision, the *Swain* Court reasoned that the peremptory challenge had "very old credentials" dating back to the common law.[56] These credentials led the Court to create a presumption that a prosecutor uses his challenges to obtain a fair and impartial jury.[57] The Court conceded that this presumption

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49 *See id.* at 1123-24. Although the Second Circuit criticized the result in *Swain*, the court upheld its "clear, direct, and unequivocal" protection of a prosecutor's peremptory challenges from attack under the equal protection clause. *Id.*

50 *Swain* was decided in 1965. *See Swain*, 380 U.S. at 202. It was not until 1968, in Duncan v. Louisiana, 391 U.S. 145 (1968), that the sixth amendment right to trial by an impartial jury was guaranteed to all defendants in state as well as Federal courts. The *Duncan* court stated:

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

Id. at 149 (footnote omitted).

51 *See Swain*, 380 U.S. at 204. Swain based his claim on two cases: Strauder v. West Virginia, 100 U.S. 303 (1879), which held that a statute barring black people from jury service was contrary to the goals of the fourteenth amendment, *id.* at 308; and Carter v. Texas, 177 U.S. 442 (1900), which held that exclusion from jury service because of race or color denies equal protection of the laws, *id.* at 447. *Swain*, 380 U.S. at 203-04.

52 *Swain*, 380 U.S. at 203, 231.

53 *Id.* at 203, 210.

54 *See id.* at 205.

55 *See id.* at 211. The Court stated that "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.* at 221.

56 *See id.* at 212-13. For a discussion of the origins of the peremptory challenge, see *supra* notes 9-12 and accompanying text.

57 *See id.* at 222. In concluding that the Constitution does not require scrutiny of a prosecutor's reasons for exercising peremptory challenges, the Court stated: "The presumption in any particular case must be that the prosecutor is using the

might be overcome in the face of the total exclusion of black jurors.[58] It also stated, however, that there could not be an equal protection violation unless a particular prosecutor had excluded blacks from juries in "case after case," regardless of the crime or circumstances involved.[59] As a result of the Court's holding, Swain was the first in a long line of defendants unable to meet this burden of proof.[60]

As a rationale for establishing such a burden, the Court emphasized the need to protect the arbitrary nature of the peremptory challenge, which by its very definition precludes inquiry.[61] The Court stated that peremptories can legitimately be based on instinctive reactions—such as "sudden impressions and unaccountable prejudices"[62]—even to the extent of eliminating jurors because of their "race, religion, nationality, occupation or affiliations."[63] The Court concluded that, if every challenge were open

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State's challenges to obtain a fair and impartial jury to try the case before the court." *Id.*

58 *Id.* at 224.

59 *Id.* at 223. The Supreme Court established the standard of proof for a successful fourteenth amendment challenge with the following statement:

> [W]hen the prosecutor in a county, *in case after case, whatever the 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. . .and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

Id. (emphasis added).

60 *See, e.g.*, United States v. Carter, 528 F.2d 844, 848, 850 (8th Cir. 1975) (defendant's claim denied notwithstanding statistics covering trials of black defendants over one-year period indicating government excluded 81% of blacks resulting in all white juries 47% of the time), *cert. denied*, 425 U.S. 961 (1976); United States v. Pearson, 448 F.2d 1207, 1215, 1218 (5th Cir. 1971) (prosecutor's notes indicating improper exercise of peremptories against blacks in cases where defendant was black insufficient to overcome *Swain* presumption); United States v. Danzey, 476 F. Supp. 1065, 1066 (E.D.N.Y. 1979) (defendant's claim denied even though prosecutor admitted to routinely excluding "jurors of the same ethnic background as defendant"), *aff'd mem.*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 878 (1980); State v. Davis, 529 S.W.2d 10, 19 (Mo. Ct. App. 1975) (statistics indicating 75% black exclusion rate in cases where defendant was black held inadequate in light of 40% black exclusion rate when defendant was white).

61 *See Swain*, 380 U.S. at 220. Peremptory is defined as "putting an end to or precluding a right to action, debate, or delay . . . admitting no contradiction: ABSOLUTE, FINAL." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1677 (1963). The Court in *Swain* stated that "[t]he 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*, 380 U.S. at 220.

62 *Swain*, 380 U.S. at 220 (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)).

63 *Id.* The Court claimed that in exercising a peremptory challenge against a member of a particular racial group, attorneys were not deciding whether that per-

to examination and subject to equal protection scrutiny, prosecutors would be forced to defend those challenges on what would essentially amount to a showing of cause.[64]

By insulating peremptory challenges from attack, the *Swain* Court effectively placed its stamp of approval on group bias as a basis for excluding jurors.[65] Consequently, *Swain* gave prosecutors *carte blanche* to exclude blacks solely on the presumption that they would be automatically biased in favor of defendants of the same race.[66] Such use of group bias peremptories often resulted in juries devoid of minorities,[67] and thus raised a second constitutional issue—the right to an impartial jury drawn from a cross-section of the community.[68]

The concept of a representational cross-section was articulated by the Supreme Court as early as 1940 in a case involving

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son was actually partial, but whether another person would be less partial. *Id.* at 220-21.

64 *Id.* at 221-22. The *Swain* Court was unwilling to blur the line between peremptory challenges and challenges for cause. *See id.* Any scrutiny, according to the Court, would essentially destroy the peremptory challenge—a step the majority was not prepared to take. *See id.* at 222. The dissent, on the other hand, was less willing to protect the status of the peremptory challenge. *See id.* at 242 (Goldberg, J., dissenting). In weighing Swain's constitutional right to "a jury chosen in conformity with the requirements of the Fourteenth Amendment" against the right to peremptory challenges, the dissent stated that "Marbury v. Madison . . . settled beyond doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail." *Id.* at 244 (Goldberg, J., dissenting).

65 *See Swain*, 380 U.S. at 220-21 (listing "race, religion, nationality, occupation or affiliations" as valid bases for exercise of peremptory challenges); *see also id.* at 222 (Court refused to "hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case").

66 *See* Comment, *Limiting the Peremptory Challenge*, *supra* note 18, at 1724; Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1175 (1966) [hereinafter cited as Comment, *Constitutional Blueprint*].

67 *See, e.g.*, McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3671 (U.S. Mar. 4, 1985) (No. 84-1426); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); State v. Neil, 457 So. 2d 481 (Fla. 1984).

68 *See* Peters v. Kiff, 407 U.S. 493 (1972); Glasser v. United States, 315 U.S. 60, 85-86 (1942); Smith v. Texas, 311 U.S. 128, 130 (1940). The *Peters* Court stated:

> 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.

Id. at 503-04 (footnote omitted). For a discussion of the cross-section-of-the-community doctrine, see J. VAN DYKE, *supra* note 2, at 12.

the exclusion of blacks from a grand jury.[69] It was not until 1975, however, that the Court in *Taylor v. Louisiana*[70] declared the selection of a petit jury from a cross-section of the community to be an "essential component" of the right to an impartial jury as guaranteed by the sixth amendment.[71] In *Taylor*, a male defendant successfully challenged a Louisiana statute that exempted all women from jury service unless they specifically requested inclusion.[72] The Court held that the Louisiana statute deprived the defendant of his sixth amendment right to an impartial jury.[73] In reaching its decision, the Court relied in part on legislative history, which stated that the purpose of the jury was "to reflect the community's sense of justice."[74] Eliminating entire groups, the Court continued, would result in biased juries, which would not reflect the views of the community as a whole.[75]

Although *Taylor* championed the cross-section doctrine, it did not solve the peremptory challenge problem articulated in *Swain*. At the close of the *Taylor* opinion, Justice White emphasized that while the panel from which a jury is chosen must be representative of the community, the actual jury need not be.[76] In stating that a defendant does not have a right "to a jury of any particular composition,"[77] the Court separated the venire from the petit jury. As a result, the *Taylor* Court hesitated to fashion any "detailed jury selection codes" applicable once the venire is chosen, thereby leaving the peremptory challenge undisturbed.[78] The use of peremptory challenges to exclude minorities from ju-

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69 *See* Smith v. Texas, 311 U.S. 128, 130 (1940) ("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.").

70 419 U.S. 522 (1975).

71 *Id.* at 528.

72 *Id.* at 524-25.

73 *Id.* at 525.

74 *Id.* at 529 n.7 (quoting H.R. REP. No. 1076, 90th Cong., 2d Sess. 8 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1792, 1797).

75 *Id.*

76 *Id.* at 538. Justice White stated that the Court "impose[d] no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.*

77 *Id.* This statement has been used by other courts to support the notion that the peremptory challenge system, which functions after the venire is selected, is exempt from sixth amendment cross-section considerations. *See, e.g.*, United States v. Thompson, 730 F.2d 82, 85 (8th Cir. 1984); United States v. Childress, 715 F.2d 1313, 1319-20 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); People v. Payne, 99 Ill. 2d 135, 137-39, 457 N.E.2d 1202, 1203-04 (1983), *cert. denied*, 105 S.Ct. 447 (1984).

78 *Taylor*, 419 U.S. at 537.

ries was thus protected from constitutional attack by both *Swain*[79] and *Taylor*.[80]

In 1978, however, the California Supreme Court began a modern trend toward invalidating racially manipulated jury selection by relying on its own state constitution.[81] In *People v. Wheeler*,[82] the court held that the *Swain* rule would no longer be followed in California because challenges based on group bias alone violated a defendant's state constitutional right to trial by an impartial jury.[83]

Although conceding that peremptory challenges by definition allow that "no reason need be given," the *Wheeler* court held that this did not mean that "no reason need exist."[84] On the con-

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79 *Swain*, by strongly endorsing the "arbitrary and capricious" right to exercise peremptory challenges, shielded the prosecutor's motives from any scrutiny by the court. *See supra* notes 56-67 and accompanying text. As one commentator noted, "[m]ost courts, particularly after *Swain v. Alabama* (1965), have accepted the principle that we cannot inquire into the motives of any peremptory challenge exercised by the prosecutor." J. VAN DYKE, *supra* note 2, at 166 (footnote omitted).

80 The *Taylor* caveat, discussed *supra* in notes 76-78 and accompanying text, restricts judicial scrutiny to the representativeness of the venire. *See Taylor*, 419 U.S. at 538.

81 *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); 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).

82 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

83 *Id.* at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910. California cases which had previously followed the *Swain* rule include: People v. Wiley, 57 Cal. App. 3d 149, 166, 129 Cal. Rptr. 13, 23 (1976); People v. Anderson, 44 Cal. App. 3d 723, 727-28, 118 Cal. Rptr. 918, 920-21 (1975); People v. Allums, 47 Cal. App. 3d 654, 663-64, 121 Cal. Rptr. 62, 68 (1975).

84 *Wheeler*, 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901 (citation omitted). The *Wheeler* court noted that because the number of peremptory challenges is limited and there is no certainty that the person replacing the challenged juror will be any less biased, an attorney will not exercise his challenge merely because he has the right to do so. *See id.* at 274-75, 583 P.2d at 760, 148 Cal. Rptr. at 901. Instead, the limited number of available challenges forces an attorney to exercise his peremptories judiciously rather than capriciously. *See id.*

The dissent in *Wheeler* believed, however, that *Swain* should not be disregarded, nor *Taylor*'s venire/petit jury distinction reinterpreted. *See id.* at 289-90, 290-91, 583 P.2d at 770-71, 148 Cal. Rptr. at 911-12 (Richardson, J., dissenting). The dissent predicted that the majority's procedural plan would "prove illusory and unworkable" in practice. *Id.* at 288, 583 P.2d at 769, 148 Cal. Rptr. at 910 (Richardson, J., dissenting). Justice Richardson stated:

> 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. . . .I believe the foregoing test is so vague as to constitute no standard at all.

Id. at 293, 583 P.2d at 772, 148 Cal. Rptr. at 913-14 (Richardson, J., dissenting).

trary, after distinguishing group bias,[85] which is based on group affiliation alone, from specific bias,[86] which relates to the case, parties, or witnesses, the court stated that an attorney must have reason to believe that a juror harbors a specific bias before a peremptory challenge may be exercised properly.[87] Unlike the use of group bias, which alters the demographic balance, the court found that the use of specific bias is color blind and "cut[s] across many segments of our society," thereby preserving the cross-section requirement.[88] While acknowledging the *Taylor* rule that a defendant is not entitled to an exactly representational jury, the court held that a defendant is entitled to a jury that—as nearly as the random selection allows—approximates a cross-section of the community.[89]

In analyzing whether such an approximate cross-section was present, the *Wheeler* court, following *Swain*, began with the presumption that an attorney uses his peremptory challenges properly.[90] The California court extended *Swain*, however, and stated

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85 A party who exercises a peremptory on the basis of group bias "presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. In discussing the effect of group bias as a basis for the exercise of peremptory challenges, the *Wheeler* court noted that it "not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose. . .is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences." *Id.* For a discussion of the cross-section-of-the-community doctrine, see *supra* note 68.

86 In discussing the application of specific bias-based peremptories, the *Wheeler* court stated:

> 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.

Wheeler, 22 Cal. 3d at 275, 583 P.2d at 760, 148 Cal. Rptr. at 902.

87 *See id.* at 278, 583 P.2d at 762, 148 Cal. Rptr. at 903.

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

89 *Id.* at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903. Notwithstanding the element of chance, which might produce an unbalanced jury, the court concluded that further tampering with the demographic balance through the use of peremptory challenges based on group bias alone clearly reduces the possibility of a representative cross-section. *See id.*

90 *Id.* at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904. The court gave the following reasons for adopting such a presumption: "in deference to the legislative intent underlying such challenges, in order to encourage their use in all proper cases, and

that the presumption was rebuttable.[91] The *Wheeler* court held that if a party[92] suspects his opponent of using peremptories to exclude jurors based solely on group bias,[93] he must point this out to the court in a timely fashion.[94] The objecting party must then, in order to establish a prima facie case of discrimination, show that a significant number of peremptories were used by his opponent to remove "members of a cognizable group."[95] The *Wheeler* court stated that the objecting party must also show a "strong likelihood" that such peremptories were based on group rather than specific bias.[96] As a result, the *Wheeler* court placed a burden on the objecting party to keep a record of the *voir dire*, including the race of the veniremen being questioned.[97] The court held that the burden shifts, however, once the complaining party establishes a prima facie case of discrimination.[98] The op-

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out of respect for counsel as officers of the court." *Id.*, 583 P.2d at 762-63, 148 Cal. Rptr. at 904.

91 *See id.*, 583 P.2d at 763, 148 Cal. Rptr. at 904.

92 The *Wheeler* decision, though based on a complaint made by a defendant concerning the prosecutor's use of peremptory challenges, applies to both prosecutors and defendants alike. *See id.*, 583 P.2d at 762, 148 Cal. Rptr. at 904. Therefore, the state may also move for a mistrial if the defendant was exercising his peremptories against members of a cognizable group. *See id.* One commentator has suggested that the discriminatory use of peremptories is objectionable only when practiced by the prosecutor; it is the defendant's rights which are protected by the Constitution. *See* Comment, *supra* note 15, at 705 n.11. *But see* Commonwealth v. Soares, 377 Mass. 461, 489 n.35, 387 N.E.2d 499, 517 n.35 (majority stated: "While we have highlighted a defendant's right to be protected from the improper use of peremptory challenges, we recognize the Commonwealth's interest in prosecutions that are 'tried before the tribunal which the Constitution regards as most likely to produce a fair result.' ") (quoting Singer v. United States, 380 U.S. 24, 36 (1965)), *cert. denied*, 444 U.S. 881 (1979).

93 Although *Wheeler* was based on the discriminatory use of peremptory challenges pertaining to race, *Wheeler* went beyond race to preclude group bias as a sole basis for exercising challenges. *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 761, 148 Cal. Rptr. at 902. For the *Wheeler* court's definition of group bias, see *supra* note 85.

94 *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. At Wheeler's trial, his attorney made two separate motions for a mistrial during the *voir dire* as soon as it became apparent to him that the prosecutor was using his peremptory challenges against all the blacks on the venire. *Id.* at 263-65, 583 P.2d at 752-54, 148 Cal. Rptr. at 894-95. The court then asked the prosecutor if he wished to respond to the charge, but advised him that it was unnecessary. *Id.* The prosecutor took the court's advice and remained silent as to his motives. *Id.* Both motions were denied. *Id.*

95 *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

96 *Id.*

97 *See id.*

98 *See id.* at 281-82, 583 P.2d at 764, 148 Cal. Rptr. at 905. By way of example, the court described ways in which a party might establish a prima facie case:

> 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 dispro-

ponent must then prove that he had not exercised his peremptory challenges on the basis of group bias alone.[99] Failure to meet this burden, the court held, would require dismissal of the jury, as well as the remaining venire, and the summoning of another venire from which a new jury must be selected.[100]

The *Wheeler* decision was soon followed in other states.[101]

> portionate 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. Next, the showing may be 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.

Id. at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905 (footnote omitted). Although conceding that such a standard required trial judges to make difficult determinations, the court expressed confidence in the ability of the judiciary to distinguish true claims of discrimination from spurious ones. *Id.* at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906.

99 *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. Although not requiring a showing amounting to cause, the court stated that in order to meet the burden of proof the challenged party must show that his reasons for excluding the jurors in question were related in some *specific* manner to their ability to try the case at hand. *Id.*, 583 P.2d at 765, 148 Cal. Rptr. at 906. For examples of specific bias as defined by the court, see *supra* note 86.

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

101 The first case to follow *Wheeler* was Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). In *Soares*, the Supreme Judicial Court of Massachusetts relied on its own state constitution to prohibit the use of group bias as a sole basis for the exercise of peremptory challenges. *See id.* at 488, 387 N.E.2d at 516. The *Soares* court stated that the presumption that peremptories are being properly exercised is rebutted when "(1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership." *Id.* at 490, 387 N.E.2d at 517. A discrete group, the *Soares* court stated, is comprised of members of the same "sex, race, color, creed or national origin." *Id.* at 488-89, 387 N.E.2d at 516. The *Soares* court followed the *Wheeler* rule and applied its decision to both prosecutors and defendants. *Id.* at 489 n.35, 387 N.E.2d at 517 n.35.

In State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980), the Court of Appeals of New Mexico supported the *Wheeler-Soares* reasoning. *See id.* at 487-88, 612 P.2d at 718. The *Crespin* court, however, found that the defendant had not established a prima facie case where the only black venireman was challenged by the prosecutor. *Id.* at 488, 612 P.2d at 718. Similarly, in People v. Kagan, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. 1979), a New York court held that although the defendant had not made out a prima facie case, Jews could not be peremptorily challenged on the basis of their religion alone. *Id.* at 277, 420 N.Y.S.2d at 989-90.

Although the facts in *Wheeler* were based on a defendant's objection to the prosecutor's improper use of racial bias, the holding precluded the use of all group bias as a sole basis for the exercise of peremptory challenges by either the prosecutor or the defendant.[102] Some courts accepted *Wheeler's* basic premise that peremptory challenges may be scrutinized, but limited the reach of the scrutiny.[103]

In *McCray*, the Second Circuit held that the sixth amendment to the United States Constitution prohibits a prosecutor from exercising peremptory challenges simply on the basis of race.[104] The court began its analysis with a critical review of *Swain*'s underlying premise that black jurors will necessarily be partial to those of the same race.[105] Because the majority found that the logical extension of this premise is that blacks are less capable of fairness and impartiality than whites,[106] it concluded that *Swain* was "perpetuat[ing] an invidious proposition of racial inferiority that has been outlawed in virtually every area of public affairs."[107] The court also criticized the unrealistic burden of proof established in *Swain*, dubbed it "Mission Impossible," and cited numerous cases in which the defendant was unable to meet it.[108]

Notwithstanding these criticisms,[109] post-*Swain* sixth amend-

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102 *See Wheeler*, 22 Cal. 3d at 280-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 905-06.

103 *See, e.g.*, People v. Thompson, 79 A.D.2d 87, 110-11, 435 N.Y.S.2d 739, 755 (1981) (elimination of significant number of blacks insufficient to establish prima facie case; substantial likelihood that prosecutor's challenges were based on racial grounds needed); State v. Neil, 457 So. 2d 481, 487 (Fla. 1984) (limiting scrutiny of peremptory challenges to racial bias).

104 *McCray*, 750 F.2d at 1118. *McCray* applied its prohibitions to the prosecutor without mentioning its possible application to the defendant. *See id.* In its review of certain state court decisions, the majority did not refer to the fact that the holdings in those decisions applied to both parties. *See id.* at 1122-23. For a discussion of whether the scrutiny of peremptory challenges should apply to both the prosecutor and the defendant see *supra* note 92. The court in *McCray* specifically referred to racial affiliation in its holding. *McCray*, 750 F.2d at 1118. When setting forth the requirement for establishing a prima facie case of improper use of peremptories, however, it referred to all group affiliations. *Id.* at 1131.

105 *See id.* at 1121-22. The court stated that "it is fallacious to assume that all persons sharing an attribute of skin color. . .will *ipso facto* be partial to others sharing that attribute." *Id.* at 1121. The court further stated that this "assumption" had been rejected by it in other decisions. *See id.* at 1121-22 (citations omitted).

106 *Id.* at 1121.

107 *Id.* at 1122.

108 *Id.* at 1120. The *McCray* court noted that the burden of proof established in *Swain* had been met only twice in the two decades since *Swain* was decided. *Id.* The court cited 12 cases in which defendants claiming equal protection violations had not met the *Swain* burden of proof. *Id.* at 1120 & n.2 (citations omitted).

109 The *McCray* court's criticism of *Swain* was clear:

> The premise of *Swain* and the rarity of wholesale challenges to white

ment cases,[110] state court developments,[111] and Justice Marshall's suggestion that *Swain* should be reconsidered,[112] the *McCray* court avoided a collateral attack on *Swain*.[113] The majority acknowledged *Swain's* protection of peremptories from equal protection challenges.[114] The court did not interpret *Swain*, however, as barring scrutiny of peremptory challenges on other constitutional grounds, specifically those of the sixth amendment.[115]

The *McCray* court next discussed the sixth amendment's guarantee of an impartial jury, which became applicable to the

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> venirepersons thus serve only to limit artificially the opportunity of blacks for participation in our system of justice, and to perpetuate an invidious proposition of racial inferiority that has been outlawed in virtually every area of public affairs. . . .How unfortunate that the invidious proposition has been allowed to flourish in the administration of justice.

Id. at 1122. The *McCray* court is not alone in its criticism of *Swain*. *See, e.g.*, Note, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 135-39 (1965); Comment, *Constitutional Blueprint*, *supra* note 66, *passim*; Comment, *Limiting the Peremptory Challenge*, *supra* note 18, at 1724.

110 *See infra* notes 116-142 and accompanying text (discussion of sixth amendment arguments).

111 *McCray*, 750 F.2d at 1122-23; *see supra* notes 81-103 and accompanying text (discussion of state court rulings on peremptory challenges).

112 *See* McCray v. New York, 461 U.S. 961, 966 (1983) (Marshall, J., dissenting from denial of certiorari).

113 *See McCray*, 750 F.2d at 1123-24; *supra* note 49 and accompanying text.

114 *See McCray*, 750 F.2d at 1124.

115 *Id.* at 1123-24. The *Swain* Court declined to hold that "the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." *Swain*, 380 U.S. at 222. One commentator has read this statement literally to mean that peremptory challenges are immune from all constitutional scrutiny. *See* Note, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 194-95 (1983). The *McCray* court decided, however, that because *Swain* was based on the equal protection clause alone, it would be "inappropriate and improvident" to interpret the statement out of its narrow context. *McCray*, 750 F.2d at 1124.

The *McCray* court similarly dispensed with United States v. Newman, 549 F.2d 240 (2d Cir. 1977), the only other Second Circuit opinion dealing with the peremptory challenge issue. *McCray*, 750 F.2d at 1124. In *Newman*, the defendants, one black and one white, claimed a due process violation when the prosecutor challenged all four black veniremen. *Newman*, 549 F.2d at 241. The defendants presented statistics indicating a 69.5% exclusion rate of blacks and Hispanics in all cases and an 84.8% exclusion rate in cases where the defendant was black. *Id.* at 242-43. The court determined that the evidence was inadequate because the statistics covered not only the division in which the defendants were tried, but another division as well. *See id.* at 243. The *McCray* majority distinguished *Newman* because it was decided on due process grounds; *McCray* was argued on the basis of the sixth amendment right to an impartial jury. *McCray*, 750 F.2d at 1124. The *McCray* court stated: "We see no evidence in the *Newman* opinion that the parties presented any substantial argument that the government's racially discriminatory use of its peremptories in a given case might violate the Sixth Amendment." *Id.*

states through the fourteenth amendment in 1968.[116] The court noted that the Supreme Court has since decided various issues concerning the selection of jury panels,[117] in addition to determining the size [118] and unanimity requirements[119] for petit juries.[120] The common denominator in these cases, the *McCray* court stated, was the cross-section of the community doctrine,[121] and the underlying question was whether the defendant had been deprived of a jury drawn from a representative cross-section.[122] The court noted that the defendant never before had to prove that the jury was actually biased in order to prevail on sixth amendment grounds.[123] Rather, it was enough to prove that the cross-section doctrine had been violated.[124]

The court next addressed the venire/petit jury distinction raised in *Taylor*.[125] Despite the fact that a majority of jurisdictions adhere to the *Taylor* dichotomy, the court reasoned that such a distinction was illogical.[126] In the majority's view, the purpose of a representative venire extends beyond the venire itself; its function is to insure that "the defendant ha[s] the chance that the petit jury will be similarly constituted."[127] The court reasoned that it is not the venire that tries cases, but the jury.[128] Thus, the *McCray* court held that the sixth amendment impliedly guaran-

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116 *See McCray*, 750 F.2d at 1124-28. *See generally* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (fourteenth amendment guarantees jury trial in all criminal cases).

117 In reference to the composition of the venire, the *McCray* court cited the following cases: Duren v. Missouri, 439 U.S. 357, 359 (1979) (holding women cannot be systematically excluded from jury service); Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (same); and Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (barring routine exclusion of daily wage earners from jury service). *McCray*, 750 F.2d at 1126-27.

118 In reference to the size of the jury, the *McCray* court cited Williams v. Florida, 399 U.S. 78, 103 (1970) (holding six-person jury constitutional), and Ballew v. Georgia, 435 U.S. 223, 239 (1978) (holding five-person jury too small to represent adequate cross-section of the community). *McCray*, 750 F.2d at 1125.

119 In reference to unanimity, the *McCray* court cited Apodaca v. Oregon, 406 U.S. 404, 413-14 (1972), which held that a jury need not reach a unanimous verdict in order to represent a cross-section of the community. *McCray*, 750 F.2d at 1125.

120 *See generally McCray*, 750 F.2d at 1124-28 (section entitled *The Development of Sixth Amendment Doctrine As Applicable to the States*).

121 *Id.* at 1125.

122 *See id.*

123 *Id.* at 1127.

124 *Id.* at 1127-28.

125 *See id.* at 1128-29 (section entitled *The Import of the Sixth Amendment for the Final Phase of the Jury Selection Process*).

126 *See id.* at 1128.

127 *Id.*

128 *Id.*

tees the *possibility* of a representative jury drawn at random from the venire.[129] In this respect, *McCray* echoed the *Taylor* maxim that a defendant is not entitled to a jury of any particular composition.[130] The court held, however, that it is the randomness of the venire composition alone, and not the state's systematic challenges, that can legitimately alter the demographics of the jury.[131] Notwithstanding the holding in *Swain*, the *McCray* court stated that peremptory challenges are not "sacrosanct."[132] The court further reasoned that the right to challenge prospective jurors is not found in the Federal Constitution.[133] Consequently, the court believed that the impunity traditionally afforded the exercise of peremptory challenges should be questioned in the face of a possible sixth amendment violation.[134]

The court also observed that although *Swain* established a Herculean burden of proof, the opinion did suggest that scrutiny of peremptory challenges would be in order in those circumstances where the burden was met.[135] Departing from the *Swain* Court's analysis of the equal protection clause,[136] the Second Cir-

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129 *Id.* at 1128-29.

130 *Id.* at 1128. The *McCray* majority "agree[d] entirely with the proposition that the defendant has no right to a petit jury of any particular composition." *Id.*

131 *See id.* at 1128-29. The court stated: "We thus agree that the Sixth Amendment does not require any action to ensure that the representative character of the venire be carried over to the petit jury; we think the Amendment simply prohibits the state's systematic elimination of the possibility of such a carry-over." *Id.* at 1129.

In support of this proposition, the *McCray* court relied on Witherspoon v. Illinois, 391 U.S. 510 (1968), which invalidated a statute permitting the state to challenge for cause those prospective jurors who stated that they did not believe in capital punishment. *Id.* at 513. The Court noted that a jury made up exclusively of those who favored the death penalty did not represent a cross-section of the community because statistics showed that only 42% of Americans favored capital punishment. *Id.* at 519-20. The *McCray* majority viewed *Witherspoon* as vitiating the *Taylor* notion that the challenge stage of jury selection is immune to constitutional scrutiny. *McCray*, 750 F.2d at 1129. As noted by the *McCray* court, in *Witherspoon*, the scrutiny was directed at the challenge stage of the jury selection process, not at the composition of the venire. *Id.*

132 *McCray*, 750 F.2d at 1130.

133 *Id.*

134 *Id.* The court stated that "[a]s a matter of sound jurisprudence, therefore, when a defendant has made a prima facie showing that the prosecution's use of its peremptories conflicts with a fundamental right that is protected by the Sixth Amendment, it is the inscrutability of the peremptory challenge that must yield, not the constitutional right." *Id.*

135 *Id.*

136 *Swain* established that in order to succeed on an equal protection violation claim, a defendant had to produce evidence of the prosecutor's improper use of peremptories in "case after case," not merely in his own case. *See Swain*, 380 U.S. at

cuit stated that the sixth amendment provides individual protection to each defendant.[137] Thus, the court held that a defendant claiming a sixth amendment violation need only challenge what took place during his own *voir dire*, and not what happened in prior cases.[138]

In concluding that the sixth amendment precludes the exercise of peremptory challenges based on group affiliation alone,[139] the court suggested that the flip side of the theory that black jurors will favor black defendants is that white jurors will favor the state.[140] Consequently, the court viewed the fashioning of an all white jury in such situations as antithetical to a prosecutor's primary duty, which is not merely to convict, but to do justice.[141] The *McCray* court therefore held that justice is not served by a jury from which cognizable groups have been systematically eliminated.[142]

The court next proceeded to set out the criteria for establishing a prima facie case against a prosecutor who has allegedly used his challenges in violation of the sixth amendment.[143] First, the defendant must show that those excluded are members of a cognizable group in the community.[144] Second, he must demonstrate that there is a "substantial likelihood" that those persons

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223. For a discussion of *Swain*'s burden of proof, see *supra* note 59 and accompanying text.

137 *See McCray*, 750 F.2d at 1130. The court noted that the sixth amendment provides the accused with the right to "trial by an impartial jury. . .in '*all* criminal prosecutions.' " *Id.* Although expressing confusion over why the equal protection clause should only protect the last in a series of defendants subject to discrimination, the court held that such a standard should not be applied to the sixth amendment. *Id.*

138 *See id.* at 1131.

139 *Id.*

140 *See id.*

141 *See id.* The court stated: "Obviously, the responsibility of the state and its prosecutor is not to secure a conviction at all costs; it is to see that justice is done." *Id.*

142 *Id.*

143 *Id.* In establishing the necessary criteria, the court relied on Duren v. Missouri, 439 U.S. 357 (1979), which set forth a test for a prima facie case of a sixth amendment violation in relation to the makeup of the venire. The *Duren* test requires the following proof:

> (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. at 364.

144 *McCray*, 750 F.2d at 1131-32. In creating the applicable criteria, the court

were excluded on the basis of group affiliation alone.[145] The court held that once the defendant has established this prima facie case, the burden of proof shifts to the prosecutor, who must rebut by presenting a "genuine" reason other than potential group bias for each allegedly discriminatory challenge.[146] The *McCray* court stated that the burden of assessing the prosecutor's response necessarily rests with the judge, who must distinguish between genuine and pretextual reasons for each challenge.[147] The court further held that if the judge finds that the prosecutor has not met the burden of proof, he must declare a mistrial, and another jury must be chosen from a new venire.[148]

The Second Circuit affirmed that McCray had established a prima facie case of discrimination because his objection to the prosecutor's improper use of peremptories was timely and specific.[149] The court also noted that McCray's counsel had specified that several of those challenged had not exhibited any discernible potential bias during the *voir dire*.[150] Furthermore, the court remarked that one black venireman was eliminated even though his comments indicated that he would be more apt to identify with the victim than the defendant.[151] The court concluded that McCray's showing was strong enough to shift the burden of proof to the prosecutor, notwithstanding that one black venireman had actually served as an alternate.[152] The court suggested that the selection of one black alternate might fall into the category of tokenism.[153] In any event, the court stated that the presence of

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used the first and third prongs of the *Duren* test. *Id.* The complete test is set forth *supra* note 143.

145 *McCray*, 750 F.2d at 1132. The court's prima facie requirements closely mirror those in *Wheeler*. For a discussion of *Wheeler's* prima facie test, see *supra* text accompanying notes 92-98.

146 *McCray*, 750 F.2d at 1132. The court noted that the prosecutor's reason need not rise to the level of cause. *Id.*

147 *Id.* In People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) (en banc), the California Supreme Court, following the *Wheeler* criteria, determined that the prosecutor had not met the burden of proof because his proffered reasons for challenging blacks were equally applicable to the whites who had not been challenged. *See id.* at 168, 672 P.2d at 858, 197 Cal. Rptr. at 75.

148 *McCray*, 750 F.2d at 1132. The *Wheeler* court had suggested a similar remedy. *See supra* note 100 and accompanying text.

149 *Id.* at 1133.

150 *Id.*

151 *Id.* In an affidavit supporting the habeas corpus petition, the attorney who represented McCray at his second trial stated that he remembered one of the excused black jurors stating that a friend of his had been the victim of a robbery and had been shot. *See id.* at 1116.

152 *Id.* at 1133.

153 *See id.*

this alternate would not serve to rebut the defendant's claim because he was chosen only after McCray's motion for a mistrial had been made.[154]

Because the court determined that McCray had established a prima facie case, it held that the trial judge should have questioned the prosecutor at that time.[155] The state contended that the trial court had questioned the prosecutor and had accepted her denial of any improper use of peremptories.[156] The state further argued that the district court should have relied on the lower court's acceptance of this denial.[157] The Second Circuit rejected this argument, but agreed that the district court should have given the state an opportunity to present its rebuttal evidence before granting the conditional writ of habeas corpus.[158]

McCray thus held that the burden was on the state to prove that it had genuine reasons, other than group affiliation, for exercising peremptory challenges against eight minority veniremen at McCray's trial.[159] In so holding, the court conceded that it had modified the traditionally arbitrary nature of peremptory challenges by allowing scrutiny of the prosecutor's motives upon a prima facie showing of discrimination.[160] In the court's opinion, however, such a limited modification was "a small price to pay for the vindication of a constitutional right."[161]

Judge Meskill's dissenting opinion viewed the majority's modification of peremptory challenges as imposing a great and unnecessary burden on the legal system.[162] Unwilling to circumvent *Swain* and a majority of circuit court decisions,[163] Judge

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154 *Id.*

155 *Id.*

156 *Id.* at 1118. The court conceded that the trial court opinion included the prosecutor's denial of using peremptories in a discriminatory manner. *Id.* at 1134. The *McCray* court stated, however, that the denial statement was not supported by the record because the trial transcripts at the time of McCray's objection did not contain such a statement. *Id.* The court noted that the trial court had expressly declined to conduct any hearings on the matter. *Id.* Therefore, the *McCray* court concluded that the trial court could not have made a finding of fact upon which the district court could rely. *See id.*

157 *Id.* at 1133.

158 *Id.* at 1133-34. For a discussion of the court's reasons for not affirming the granting of the writ, see *supra* note 47.

159 *See id.* at 1134.

160 *See id.* at 1132.

161 *Id.* The court predicted that successful prima facie showings would be few and it hoped that eventually there would be even less. *Id.*

162 *See id.* at 1140-41 (Meskill, J., dissenting).

163 *See id.* at 1135-36 (Meskill, J., dissenting). Judge Meskill noted that "[a]t least five circuits have rejected the notion that the Supreme Court's later Sixth Amend-

Meskill believed that the line the majority attempted to draw between showing cause and giving genuine reasons was "gossamery"[164] and would lead to the death of the peremptory challenge system.[165] Following the *Swain* view that group affiliation is an acceptable basis for peremptory challenges, Judge Meskill stated that the exercise of such challenges is the duty of an advocate seeking the least biased jurors.[166] He was also unwilling to take the step required to circumvent the *Taylor* venire/petit jury distinction, and thus found the majority's sixth amendment arguments unpersuasive.[167] In his view, the systematic exclusion prohibited by the sixth amendment decisions involved a standard similar to that established in *Swain*, and thus applied not to individual juries but to jury panels over time.[168]

Although the majority opinion was directed at the prosecutor alone, the dissent anticipated its application to defendants as well.[169] Judge Meskill predicted that black defendants wishing to exercise their peremptories against whites would be forced to challenge some blacks in order to avoid an objection by the prosecutor.[170] The dissent also foresaw problems in defining a cognizable group.[171] Judge Meskill envisioned objections based on the peremptory challenge of "men, women, old people, young people, laborers, professionals, Democrats, Republicans, etc.," leaving only those challenges based on the most trivial of reasons intact.[172] Furthermore, the dissent stated that defendants would all too easily succeed in establishing prima facie cases simply by showing that two out of three members of a cognizable group had been challenged.[173] As a result, Judge Meskill believed that

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ment decisions, particularly *Taylor v. Louisiana*,. . .have undercut *Swain*." *Id.* at 1136 (Meskill, J., dissenting).

164 *Id.* at 1140 (Meskill, J., dissenting).

165 *Id.* at 1139 (Meskill, J., dissenting).

166 *See id.* at 1137 (Meskill, J., dissenting).

167 *Id.*

168 *See id.* at 1136-37 (Meskill, J., dissenting).

169 *Id.* at 1138 (Meskill, J., dissenting). The dissent stated that "it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant, and not when it harms the law abiding community represented by the prosecutor." *Id.* (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

170 *Id.* at 1139 n.4 (Meskill, J., dissenting).

171 *Id.* at 1139 (Meskill, J., dissenting). Judge Meskill defined "distinctive" or "cognizable" groups under the sixth amendment as those "that 'are sufficiently numerous and distinct' that if they are systematically excluded from jury venires, 'the Sixth Amendment fair-cross-section requirement cannot be satisfied.' " *Id.* (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

172 *Id.*

173 *Id.* at 1140 n.6 (Meskill, J., dissenting).

courts would be forced to spend precious time assessing the legality of an attorney's "internal motives."[174] Such investigations, the dissent stated, would restrict the ability of attorneys to function freely as advocates.[175] Judge Meskill feared that many attorneys would find themselves "under enormous pressure to lie" when forced to explain their motives for exercising challenges, thereby "foster[ing] hypocrisy and disrespect" for the judicial system.[176] In conclusion, the dissent stated that although the majority's attempt to "fine tune" the peremptory challenge system may have been "well-intentioned," its impact would surely be negative.[177]

In the short run, Judge Meskill may indeed be correct in his prediction of a negative impact on the criminal justice system.[178] Clearly, the hearing required once a prima facie case of discrimination has been established will necessarily prolong the already protracted jury selection process.[179] Defense attorneys will most likely jump on the *McCray* bandwagon and raise the discrimination issue as a matter of course. Each time it is raised the proceedings will stop, and the judge will have to determine whether there is a "substantial likelihood" that members of a cognizable group were excluded on the basis of presumed group bias alone.[180] Judge Meskill suggested that such determinations will be time consuming and will require an "extremely difficult" subjective assessment.[181]

Although it may require a measure of intuitive skill, this type of decision should not prove too burdensome for a judge who has been carefully observing the proceedings. As was pointed out by the majority, courts are daily faced with similar determinations in dealing with claims of discrimination brought under Title VII of the Civil Rights Act of 1964.[182] Consequently, the administrative delay caused by such determinations will be a short term effect, which will diminish as attorneys and trial judges become accustomed to dealing with this issue.[183] Furthermore, although

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174 *Id.* at 1140 (Meskill, J., dissenting) (citation omitted).

175 *See id.*

176 *Id.* (citation omitted).

177 *Id.* at 1141 (Meskill, J., dissenting).

178 *See id.*

179 For a discussion of the procedure involved in establishing a prima facie case of discrimination, see *supra* notes 143-148 and accompanying text.

180 *See supra* notes 143-148 and accompanying text (discussing procedural steps).

181 *McCray*, 750 F.2d at 1140 (Meskill, J., dissenting) (citation omitted).

182 *Id.* at 1132.

183 The *McCray* majority noted that five years after *Wheeler* was handed down, the

administrative delays are surely not to be encouraged, neither are they to be so feared that constitutional violations are overlooked.

Perhaps, as Judge Meskill predicted, some prosecutors will lie when made to explain their seemingly discriminatory use of peremptory challenges.[184] Nevertheless, this is a short term effect. An observant judge will see through such lies,[185] and those prone to lying will soon realize its futility. When something as serious and socially debilitating as group discrimination is involved, we must look beyond the short term effects. In the long run, *McCray* will prevent discrimination by keeping prosecutors honest.

Judge Meskill laments the demise of the peremptory challenge.[186] Such a lament is unwarranted. The peremptory challenge still retains its vitality after *McCray*. It has merely been disciplined. A prosecutor may indeed have an unexplainable "gut feeling" that a certain black juror should be challenged. Even after *McCray* the arbitrary nature of peremptory challenges allows him that freedom. His motives become suspect only when a disproportionate number of challenges are exercised against blacks, especially in a case where the defendant is black. Under such circumstances, it strains credibility to believe that the prosecutor has negative intuitions about so many black veniremen. This does not mean, however, that race or group affiliation can never be a valid basis for the exercise of a peremptory challenge. For instance, a black juror who displayed a hostile attitude toward whites during the *voir dire* would be a likely candidate for exclusion in a case where the defendant is black and the victim, state's witness, and prosecutor are all white. In such a situation, the prospective juror's racially engendered hostility is the basis upon which the challenge is exercised. On the other hand, pre-

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California Supreme Court was presented with an opportunity to overrule *Wheeler*. *Id.* The California court upheld *Wheeler*, however, because it could not find any evidence that the system of scrutiny was unworkable. *Id.* (citing People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983)).

184 *See McCray*, 750 F.2d at 1140 (Meskill, J., dissenting) (citation omitted).

185 For example, in a recent case a district court stated that a prosecutor's reasons for exercising his peremptory challenges to "skew the jury selection process so as to remove as many white jurors as possible" were "childish and pretextual, as well as unbelieveable." Roman v. Abrams, 608 F. Supp. 629, 634-35 (S.D.N.Y. 1985). In *Roman*, the prosecutor exercised his peremptories against whites because his principal witness was a black ex-convict whom he described as " 'not very bright' " and " 'violent enough not to have people even listen to who he is.' " *Id.* at 634 (citation omitted). Apparently, the prosecutor believed his witness's credibility would hold up only among members of his own race. *See id.* at 635.

186 *See McCray*, 750 F.2d at 1139 (Meskill, J., dissenting).

sumed group affinity alone is not a valid basis upon which to base a peremptory challenge.

There is no question that in allowing scrutiny of such challenges, *McCray* blurs the line between peremptory challenges and those made for cause. It must be remembered, however, that an intrusion is made upon the prosecutor's free use of peremptories only after it becomes clear to the court that the defendant has established a prima facie case of discrimination.[187] The prosecutor intrudes upon a constitutional right first. Then, and only then, is the court allowed to tamper with his statutorily created right to exercise peremptory challenges. Such a modification does not signify "the end of the peremptory challenge as an effective jury selection tool,"[188] but rather spells the beginning of a more equitable jury selection process.

As it stands, the arbitrary and capricious nature of peremptory challenges may indeed be effective in enhancing the impartiality of the jury by weeding out subliminally biased jurors. It is clear, however, that in their present state they can also be used to achieve the opposite effect.[189] Perhaps the answer to avoiding this latter situation lies in a legislative reduction of the number of peremptory challenges allowed in any given case.[190] In a robbery case like *McCray*, for example, each side is allowed fifteen challenges.[191] If that number were reduced by one-third, the prosecutor would have less opportunity to construct a jury along racial lines, while at the same time maintaining the ability to protect the interests of the state against unfairly biased jurors.

In *McCray*, the Second Circuit joined those courts which held, contrary to the rule in *Swain*, that the protection of constitutional rights takes precedence over the traditional exercise of peremptory challenges.[192] In deference to *Swain*, however, the *McCray* court avoided the equal protection issue despite evidence of invidious discrimination.[193] Although the *McCray* court achieved the same result by relying on the sixth amendment right to an impartial jury, perhaps it is time for the Supreme Court to

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187 *See id.* at 1132.
188 *Id.* at 1139.
189 *See* J. VAN DYKE, *supra* note 2, at 166.
190 *See id.* at 166-67.
191 *See* N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1982).
192 *See McCray*, 750 F.2d at 1130-31.
193 *Id.* at 1124.

follow the advice of Justice Marshall and "reexamine the standard set forth in *Swain*."[194]

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[194] McCray v. New York, 461 U.S. 961, 966 (1983) (Marshall, J., dissenting from denial of certiorari).