Limiting the Peremptory Challenge:
Representation of Groups on Petit Juries

The peremptory challenge of prospective jurors is exercised by prosecutors and defense attorneys without being subject to judicial approval. As traditionally understood, the peremptory challenge is exercisable for any reason, including the group associations of prospective jurors. In recent years, criminal defendants in state and federal courts have claimed that prosecutors use peremptory challenges to exclude racial groups from juries. The courts, however, have refused to accept the defendants' claims that this practice constitutes a violation of equal protection or due process.

In Taylor v. Louisiana, the Supreme Court held that a criminal

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5. See pp. 1722-24 infra and notes 3 & 4 supra (citing cases). In United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974), Judge Rubin ruled that, while the defendant had failed to show a Fifth Amendment violation, the peremptory challenging of six blacks by the prosecutor, in that particular trial, resulted in a trial that was "less than fair." Id. at 1250. In United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976), Judge Newman held that a pattern of peremptory challenges against blacks called for the exercise of his supervisory power. Id. at 475. The Second Circuit disagreed as to the sufficiency of the pattern. United States v. Newman, 549 F.2d 240, 243 (2d Cir. 1977). See note 36 infra.
defendant has a constitutional right to a jury selected from a representative cross-section of the community. This Note argues that, when applied to the composition of the jury itself, the rationale behind the holding of Taylor would modify the role of the peremptory challenge by prohibiting its exercise against prospective jurors on the basis of their group associations. The Note distinguishes between the group biases of prospective jurors and their “situation-specific” biases, that is, those relating to the unique aspects of a particular trial. The Note argues that the proper role of the peremptory is limited to removal of prospective jurors possessing situation-specific biases. Finally, the Note proposes a method of judicial control of the peremptory challenge that is designed to prevent use of the challenge to exclude groups while preserving its potential for the removal of jurors holding situation-specific biases.

I. The Role of the Peremptory Challenge

Every person accused of a serious crime is entitled to a jury trial. The right to be tried by one's peers gives the accused “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” But the mere interposition of a community body between the defendant and the state does not necessarily protect the defendant from arbitrary actions or guarantee that his case will be fairly adjudicated. The defendant's inter-

7. Id. at 530.
8. For a discussion of the meaning of “group” in this context, see pp. 1735-38 infra.
9. Restricting exercise of the peremptory to removal of jurors holding situation-specific biases would preserve a role for the peremptory more expansive than that of the challenge for cause. See pp. 1738-40 and notes 110 & 111 infra.
10. U.S. CONST. amends. VI & XIV; Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The Court in Duncan limited the Sixth Amendment right of trial by jury to “serious offenses,” as distinguished from “petty offenses,” Id. at 157-59.
11. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). See Johnson v. Louisiana, 406 U.S. 356, 367 (1972). The Sixth Amendment analysis of Taylor v. Louisiana, 419 U.S. 522 (1975), does not encompass civil juries; but to the extent such analysis can be applied to civil juries under the Seventh Amendment, the proposal of this Note would be applicable.
13. But the jury system has also been the subject of increasing criticism in recent years. See, e.g., M. Gleiser, JURIES AND JUSTICE (1968); Desmond, Juries in Civil Cases—Yes or No, 36 N.Y. St. B.J. 104 (1964); Devitt, Federal Civil Jury Trials Should Be Abolished, 60 A.B.A.J. 570 (1974); Harley, Where Jury Trial Fails, 55 JUDICATURE 94 (1971). See also J. Frank, COURTS ON TRIAL 108-45 (1960).
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ests also require that the jury be impartial: that its verdict be based on an unbiased consideration of the evidence presented at trial.\(^\text{12}\)

The venires from which juries are drawn are generally selected at random from a pool of jurors qualified by statute for jury service.\(^\text{13}\) The selection of jurors by a totally random process does not, however, ensure an impartial jury. Jurors with preconceived notions about the defendant or about the circumstances of the case threaten the impartial determination of guilt or innocence.\(^\text{14}\) The questioning of prospective jurors at voir dire and the subsequent exercise of challenges provide an opportunity to remove those veniremen who hold such a situation-specific bias.

The essential features of voir dire are similar in most jurisdictions. The prospective jurors are told something about the case and the parties to it, and they are questioned to determine whether any of them is subject to challenge.\(^\text{15}\) The prosecution and defense are given the opportunity to object to individual jurors either peremptorily or for cause. Challenges for cause are subject to approval by the


\(^{13}\) The Federal Jury Selection and Service Act, for example, provides that grand and petit jury panels be publicly drawn "at random" from the qualified jury list. 28 U.S.C. § 1864a (1970). Random selection is also the norm in most state jurisdictions. See, e.g., CAL. CIV. PROC. CODE § 219 (West Supp. 1977); CAL. PENAL CODE § 1046 (West 1970); CONN. GEN. STAT. ANN. § 51-239 (West 1960); PA. STAT. ANN., tit. 17, §§ 1141-1142 (Purdon 1962) (all providing for drawing of names by lot to form jury panel).

\(^{14}\) See Patterson v. Colorado, 205 U.S. 454, 462 (1907) (publication calling witness in pending case perjurer was, where likely to reach jurors, contempt, because verdict should be reached only on basis of evidence and argument in court); United States v. Burr, 25 F. Cas. 49, 50 (D. Va. 1807) (No. 14,692g) (Chief Justice John Marshall sitting as trial judge) (juror having formed opinion on essential part of criminal case was ground for challenge for cause). See also the view expressed in ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 55-56 (Approved draft 1968) (footnote omitted) [hereinafter cited as ABA ADVISORY COMM.]:

[Just as we now regard such primitive methods as trial by battle or by ordeal as only historical curiosities, so we have come to recognize that if guilt is to be a question of fact and not of rumor, the question must be determined on the basis of evidence rather than the general sentiment of the community. . . . It is important . . . that every effort be made to eliminate those jurors whose predispositions are such as to affect their perceptions and inferences differently in legally similar cases. That is why attempts to eliminate racial bias in the selection of juries are so essential.

\(^{15}\) See, e.g., FED. R. CRIM. P. 24(a); N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1971).


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court and must be based on a finding of actual\textsuperscript{16} or implied bias.\textsuperscript{17} Peremptory challenges may be exercised in limited number without giving reasons and at the sole discretion of the prosecution or defense.\textsuperscript{18}

The peremptory enables the defense counsel or the prosecutor to exercise judgment as to matters of bias which would not ground a challenge for cause, but which he senses might be prejudicial to his case.\textsuperscript{19} Historically, the peremptory challenge has protected the de-
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fendant from jurors who appear to be biased against him. Similarly, the provision of peremptories to the prosecution represents a recognition of the state's interest in trial by a jury not unduly biased in favor of acquittal. Each side is presumed to use the two kinds of challenge to remove those prospective jurors most likely to favor the other party. This process is expected to eliminate from the jury both extremes of bias and thus to result in a tribunal as impartial as could be drawn from the available venire.

prospective juror who has a nervous twitch; the attorney may be irritated by people with twitches. Such uses of the peremptory challenge should not be confused with the purpose of the peremptory: to eliminate jurors the attorneys believe to be biased with respect to the case.

Blackstone termed the peremptory "a provision full of the tenderness and humanity to prisoners, for which our English laws are justly famous," and assigned two reasons for that fact: first, the peremptory guarantees the accused a good opinion of his own jury and thus protects him from trial by anyone he intuitively dislikes, and, second, it protects the accused from jurors whose resentment has been provoked by questioning at voir dire. 4 W. BLACKSTONE, COMMENTARIES *353.

The right of the accused to peremptory challenges does not rise to constitutional stature. Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 583, 586 (1919). Professor Babcock, however, offers historical as well as functional arguments in favor of the constitutional necessity of peremptories. She suggests that the peremptory is essential to the selection of an impartial jury and that, "quite aside from the impartial jury guarantee, the peremptory challenge is inherent in the jury trial right itself." Babcock, supra note 15, at 555-56 & n.37.

The exercise of peremptories by the prosecution has been the subject of long debate. The earliest juries were hand-picked by the Crown, which claimed an unlimited number of peremptory challenges. In 1305, Parliament passed the Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), providing that if "they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain," eliminating completely the right of the King's attorneys to exercise peremptory challenges. The statute was construed, however, to allow the prosecution to "stand aside" any juror without cause; only if there were an insufficient number of jurors after the entire panel had been challenged or passed over did the Crown have to show cause in respect to jurors recalled. This remains the practice in England. See J. VAN DYKE, supra note 1, at 147-48.

In early American courts, the provision of peremptory challenges to the defendant was accepted as part of the common law, but the prosecution's rights were more controversial. Not until the late nineteenth century did the Supreme Court explicitly recognize the government's need to challenge jurors peremptorily. Hayes v. Missouri, 120 U.S. 68 (1887). The government's right to exercise peremptory challenges is now firmly established. See Swain v. Alabama, 380 U.S. 202, 220 (1965) (recognizing differences in history of peremptory's provision to accused and prosecution, but noting that system should guarantee freedom both from bias against accused and from bias against prosecution).

The peremptory is thought also to preserve an appearance of impartiality in the judicial process. The parties and the community are presumably assured that the jurors before whom the case is tried will decide on the basis of the evidence, not on the basis of preconceived attitudes. The peremptory, moreover, protects voir dire questioning by allowing counsel to challenge jurors who may have resented particular questions. Without that option, counsel might be inhibited unduly in the attempt to elicit evidence of actual or implied bias. See id. at 219-20.

The effectiveness of the peremptory challenge in removing biased jurors has been the subject of some controversy and much uncertainty. Some commentators have suggested that peremptories inject bias into the selection process by allowing a party to ob-
The challenge for cause depends upon the ability of the court or of the attorneys to elicit information at voir dire that identifies prejudice. An increasing awareness of the importance of unconscious bias has directed attention to the peremptory challenge as a means to eliminate jurors who may unconsciously be predisposed to conviction or acquittal. Because attorneys often have insufficient

23. There is no single typical method of voir dire examination. Fed. R. Crim. P. 24(a) leaves considerable discretion to the trial judge to decide whether the court or the attorneys do the questioning. Federal judges have usually exercised this discretion in favor of court-conducted voir dire. See Judicial Conf. of the United States, Report of the Judicial Committee on the Operation of the Jury System, The Jury System in the Federal Courts, in 26 F.R.D. 409, 466 (1960). As an approximation, 10 states follow the federal practice; 10 others provide exclusively for questioning by the judge; and 20 provide for examination by both court and counsel. The remaining states leave the voir dire questioning to counsel alone. ABA Project, supra note 17, at 63.

24. One difficulty encountered by courts and attorneys attempting to elicit such information is the inability or unwillingness of jurors to recognize or admit their prejudices. See Broeder, supra note 15, at 528. On the basis of personal interviews with 225 jurors serving over a one and one-half year period in a federal district court in the midwest, Broeder concluded that "[v]oir dire is grossly ineffective as a screening mechanism" and that "[j]urors often, either consciously or unconsciously, lie on voir dire." Id. Further evidence that jurors often fail to be truthful in response to questions is found in ABA Advisory Comm., supra note 14, at 56-57, 187. The reasons for this lack of candor may include a desire to serve on the jury, a resistance to exclusion as a reflection on a juror's ability and good faith, or a reaction to questions posed in an intimidating or antagonistic manner. Id. at 57; Broeder, supra note 15, at 526.

25. In spite of evidence that unconscious bias is widespread and important, many courts have resisted recognition of its significance at trial. They prefer to operate on the assumption that jurors who take an oath to be impartial and who are carefully instructed on the presumption of innocence and the burden of proof, as well as on their obligation to decide on the basis of evidence presented at trial, will take their obligation seriously and abide by their oaths. For an example of a court operating on this assumption, see Commonwealth v. Johnson, 452 Pa. 130, 134-37, 305 A.2d 5, 7-9 (1973). The Advisory Committee on Fair Trial and Free Press of the American Bar Association suggests three weaknesses in this position: (1) the adoption of the assumption means abandonment of the higher standard that a juror should stand indifferent before lie is sworn; (2) jurors frequently lie or consciously disregard the court's instructions; and (3) bias may affect a juror's deliberations even though it is not perceived by the juror himself. ABA Advisory Comm., supra note 14, at 60-61.

One commentator, see Voir Dire, supra note 15, at 1494-1504, suggests that because of the increasing awareness of the existence and impact of unconscious bias, the role of the peremptory and of the challenge for cause should be reexamined. Id. at 1499. He points out three reasons why challenges for cause should not be used to screen out group biases and concealed or unconscious prejudices: (1) judges should not be placed in the position of challenging a juror who asserts his ability to be fair; (2) the detection of unconscious bias is not sufficiently certain to make it a ground for court-controlled challenges; (3) basing a challenge for cause on background or group association would give explicit recognition to the impact of these factors on verdicts and might undermine popular support for the legal system. Id. at 1500-01. The commentator concludes that peremptory challenges are an "essential tool" serving a vital function in eliminating unconscious bias, id. at 1503, 1526, and that increased information is necessary to
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information to make individual judgments about the unconscious prejudices of prospective jurors, they tend to act on the basis of stereotypes and presumptions. One indicator of unconscious bias has been group affiliation. The exercise of the peremptory chal-

facilitate the informed exercise of peremptories: “Greater information about panel members’ attitudes and backgrounds produces less reliance on conventional stereotypes and more accurate predictions of a juror’s receptivity to the party’s case.” Id. at 1504 (footnote omitted).


Even when appellate courts have not explicitly precluded questioning to elicit grounds for peremptories, voir dire has been subjected to severe limitations. See, e.g., United States v. Hamling, 411 F.2d 307, 314 (9th Cir. 1970), cert. denied, 418 U.S. 87 (1974) (trial court’s refusal to question jurors about views toward sex and obscenity was proper in obscenity prosecution); United States v. Workman, 454 F.2d 1124, 1128 (9th Cir.), cert. denied, 409 U.S. 857 (1971) (trial court’s refusal to question jurors about attitudes toward drug use, political activists, and antivar demonstrators was proper in prosecution of antivar demonstrator for assault on policeman and destruction of government property); Maguire v. United States, 358 F.2d 442, 444-45 (10th Cir.), cert. dismissed, 385 U.S. 801, cert. denied, 385 U.S. 370 (1966) (trial court’s refusal to question jurors about bias against homosexuals was proper, where defense to charge of auto theft was that car owner gave defendants auto after they had threatened to divulge his homosexuality). But see Ham v. South Carolina, 409 U.S. 524 (1973) (trial court’s refusal to question jurors about racial prejudice, in trial of black for possession of marijuana where defense was that police had framed defendant for his civil rights work, was error); United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (rejecting prosecution’s argument that voir dire may be limited to matters falling within challenge for cause); United States v. Robinson, 475 F.2d 376, 380-82 (D.C. Cir. 1973) (trial court’s refusal to question jurors about their attitudes toward self-defense was error). See generally Voir Dire, supra note 15, at 1304-21.

For proposed guidelines that would extend voir dire questioning, see Racial Prejudice, supra note 15, at 417-24; Voir Dire, supra note 15, at 1515-26.

27. See M. Bloomstein, supra note 11, at 64-67; Darrow, Attorney for the Defense, 80 Esquire 224 (1973) (originally published in May, 1936); Sutin, The Exercise of Challenges, 44 F.R.D. 286, 289-90 (1967); cf. Kallen, Peremptory Challenges Based Upon Juror Background—A Rational Use?, 1969 Trial Law. Guide 143 (results of trial lawyer survey indicates that while attorneys base their peremptory challenges upon juror background, there is little agreement among them concerning importance or effect of background).

28. One commentator, see Broeder, supra note 15, at 505-21, relates a series of cases in which attorneys questioned prospective jurors about their personal and occupational backgrounds in preparation for the use of peremptories. For further discussion of the impact of group affiliation on individual attitudes and juror behavior, see E. Hilgard & R. Atkinson, Introduction to Psychology 525-61 (6th ed. 1975) (impact on individual attitudes); H. Toch, Legal and Criminal Psychology 100-09 (1961) (impact on juror behavior).

Social scientists have been used to aid lawyers in identifying unconscious bias in jurors in important trials during the last decade. See Etzioni, Science: Threatening the Jury Trial, Wash. Post, May 26, 1974, § C, at 3, col. 1; Sage, Psychology and the Angela Davis
lenge on the basis of group affiliation, frequently urged as an effective trial strategy, was recognized and implicitly approved by the Supreme Court in *Swain v. Alabama*.

In *Swain* the Court considered a claim that exclusion of blacks by a prosecutor's use of peremptory challenges constituted a denial of equal protection. The prosecutor in *Swain* had challenged all six blacks on the venire. The Court rejected the petitioner's claim that this action violated the equal protection clause, because "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the equal protection clause would entail a radical change in the nature and operation of the challenge." The

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31. The petitioner in *Swain* presented three separate claims. First, he claimed that his grand jury and his petit jury venire had been selected discriminatorily. The Court held that the petitioner had not carried his burden of proof with respect to that claim. *Id.* at 205-09. Second, the petitioner asserted that the prosecutor's use of peremptory challenges against all six blacks on the venire violated the equal protection clause. The Court held that no equal protection violation had occurred in the particular trial. *Id.* at 210, 221-22. Third, he claimed that the prosecutor had systematically excluded blacks by use of the peremptory challenge over a period of years. The Court held again that the petitioner had not carried his burden of proof. *Id.* at 223-24. See note 36 infra.

In *Hall v. United States*, 168 F.2d 161 (D.C. Cir. 1948), the prosecutor peremptorily challenged nineteen black veniremen and thereby obtained an all-white jury. Rejecting the defendant's challenge to the jury array, the court said: "[t]he requirements of due process were met when there was no racial discrimination in the selection of the veniremen. . . . The Constitution does not require that the appellants, being Negroes, should be tried by a jury composed of or including members of that race." *Id.* at 164.


32. 380 U.S. at 210.

33. *Id.* at 221-22. The Court suggested that any holding other than denial of the petitioner's motion would open every challenge to inspection for "reasonableness and sincerity." *Id.* at 222. The Court seems to have felt that the peremptory challenge either must be subject to no form of judicial supervision or must cease to perform its useful function. The proposal of this Note, however, requires only that an attorney who has peremptorily challenged a disproportionate number of members of particular groups
peremptory, the Court wrote, 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." The presumption was that the prosecutor challenged members of the group because he believed them more likely to be partial "in the context of the case to be tried." Although a violation might be found where the prosecutor demonstrated a systemic use of challenges against blacks over a period of time, the presumption could not be overcome by an allegation that the prosecutor removed all blacks from a particular jury or that he removed them "because they were Negroes."

must come forward with nongroup reasons. This proposal would have little or no effect on the usefulness of the peremptory challenge to eliminate those jurors likely to hold situation-specific biases. See note 19 supra. The prosecutor and defense attorney would retain wide discretion so long as they avoided challenges based solely on group association. See pp. 1733-40 infra.

34. 380 U.S. at 220 (footnote omitted).
35. Id. at 221.
36. Id. at 222. Justice White, writing for the majority in Swain, stated that the Fourteenth Amendment claim would take on "added significance" when a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," peremptorily challenges blacks with the result that no blacks ever serve on petit juries. Id. at 223. Evidence of persistent exclusion would support the inference that "Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." Id. at 224. The Court was concerned that the peremptory challenge system, unlike the systems for selection of veniremen and grand jurors, involves both prosecutors and defense counsel. Id. at 227. The Court had difficulty with the record in Swain because it did not show "when, how often, and under what circumstances" the prosecutor, rather than defense counsel, had been responsible for precluding black participation on the jury. Id. at 224. Absent a showing of systematic exclusion through the prosecutor's use of the peremptory challenge, the Court was unwilling to recognize a prima facie case of discrimination. Id. at 227-28. Justices Harlan and Black concurred in the result. Id. at 228. Chief Justice Warren and Justices Goldberg and Douglas dissented, but on the ground that the record did support the finding of a systematic exclusion of Negroes from juries. Id. at 237-39 (Goldberg, J., dissenting).

Swain's systematic exclusion test has proven an insurmountable obstacle to defendants challenging a prosecutor's exercise of peremptories. No federal court in the decade following Swain, in spite of frequent claims of discrimination, found a violation under that standard. The difficulties which defendants and courts have encountered stem in part from the nature of the peremptory and the proof required. Few jurisdictions maintain comprehensive records of peremptory challenges, and it is difficult if not impossible for defendants to establish evidence of systematic exclusion by the prosecutor. See United States v. Nelson, 529 F.2d 40 (8th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976); United States v. Pollard, 483 F.2d 929 (8th Cir. 1973), cert. denied, 414 U.S. 1137 (1974); United States v. Carlton, 466 F.2d 207 (6th Cir. 1972); United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971). Each of these decisions held that the defendant had not carried his burden of proving systematic exclusion of blacks through the prosecutor's use of the peremptory challenge. The Eighth Circuit emphasized, however, that the burden imposed by Swain
Swain thus accepted group association as evidence of a type of partiality which may form the basis for peremptory challenges. Understood in this way, the peremptory may be used to exclude certain groups from juries. Both prosecutors and defense counsel look to factors such as sex, race, age, and occupation to identify those jurors likely to harbor attitudes potentially harmful to their case. Thus the peremptory can result in members of groups representing distinct attitudes within the community being eliminated from individual juries. This result and the role of the peremptory challenge generally must be examined in light of the Sixth Amendment guarantee of trial by an impartial jury selected from a representative cross-section of the community.

was “not insurmountable.” 528 F.2d at 850. In Carter the court found an 81% rate of exclusion of blacks, but ruled that it was not excessive where the data represented only 15 trials. Id. at 850. Subsequently, in Nelson, the Eighth Circuit indicated that a continuation of that same rate of exclusion over a longer period of time would warrant exercise of the trial court’s supervisory power. 529 F.2d at 43.

In United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976), vacated sub nom. United States v. Newman, 549 F.2d 240 (2d Cir. 1977), a district court ruled that the pattern of government peremptory challenges of blacks over the previous two years had reached an excessive point that called for the exercise of the court’s supervisory power over the conduct of criminal trials. Id. at 473. The data in Robinson showed that 82 blacks had been included in the final group eligible for jury service, and that the prosecutor had peremptorily challenged 57 of them—an exclusion rate of 69.5%. In cases involving white defendants, the exclusion rate was 59.2%; in those involving minority defendants, it was 84.8%. Id. at 469. Judge Newman termed the overall rate “substantial” and the rate in cases involving minority defendants “seriously disturbing.” Id. at 472.

The Second Circuit granted the government’s petition for mandamus and ruled that the evidence relied on by the district court was insufficient under Swain. United States v. Newman, 549 F.2d 240 (2d Cir. 1977). The Second Circuit objected to the district court’s reliance on statistics based on trials in both the New Haven and Hartford Divisions of the District of Connecticut. Separating the data according to the city of trial, the court found that the actual rate of “inclusion,” i.e., the percentage of trials in which blacks appeared on the final panel and a black juror served on the trial jury, in New Haven taken alone was 60%, while that in Hartford was 17%. The court did not comment on the acceptability of the lower rate in Hartford, but vacated the district court order because the New Haven figure compared favorably with the “expected” rate of 68%. Id. at 245.

Social science evidence has been used by defense counsel to determine jurors’ attitudes. See note 28 supra. In the 1972 Harrisburg Seven case, the defense used its 28 peremptories to eliminate the most prosperous of the prospective jurors. Schulman, supra note 28, at 42. The defense in the John Mitchell-Maurice Stans conspiracy trial used a sophisticated sociological study to determine what type of juror would be most likely to acquit, then used its 20 peremptories to eliminate any juror who did not fall within the group boundaries. Zeisel and Diamond, supra note 28.

The prosecution, in cases involving black defendants, frequently looks for a juror who is middle-aged, middle-class, and white, on the assumption that this juror identifies with the government rather than the defendant. This tendency is evidenced by the cases cited at notes 3 & 4 supra.

II. Taylor v. Louisiana: The Sixth Amendment and Representation of Groups

A. The Representative Cross-Section Standard

A belief that jury composition contributed to their convictions has long been the basis of challenges by defendants to the impartiality of their juries.\(^3\)\(^9\) Indeed, the Supreme Court has for some time recognized the right of a criminal defendant, in cases involving the supervisory power of the federal courts, to challenge the exclusion of certain groups of citizens from federal jury panels.\(^4\)\(^0\) Congress, moreover, has provided that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status,"\(^4\)\(^1\) and 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."\(^4\)\(^2\) But it was not until Taylor v. Louisiana,\(^4\)\(^3\) decided in 1975, that the Supreme Court recognized the Sixth Amendment right of every criminal defendant in state or federal court to a jury selected from a representative cross-section of the community.\(^4\)\(^4\)

\(^3\)\(^9\) For instance, as early as 1879 a black defendant successfully challenged his conviction on the ground that blacks had been excluded from jury service by statute. Strauder v. West Virginia, 100 U.S. 303 (1879). For a discussion of the historical background of challenges to jury selection procedures, see J. Van Dyke, supra note 1, at 45-83.


\(^4\)\(^3\) 419 U.S. 522 (1975).

\(^4\)\(^4\) Id. at 530. Prior to Taylor, the cross-sectional idea had been applied as a requirement of the Sixth Amendment by a few lower federal courts. E.g., Witcher v. Peyton, 405 F.2d 725, 727 (4th Cir. 1969); Labat v. Bennett, 365 F.2d 698, 727 (5th Cir. 1966), cert. denied, 386 U.S. 991 (1967). Further, the Supreme Court in cases prior to Taylor had noted in dictum the relationship between the cross-section rule and the Sixth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 410 (1972) (commonsense judgment depends upon jury being "a group of laymen representative of a cross section of the community"); Williams v. Florida, 399 U.S. 78, 100 (1970) (number of jurors should be large enough "to provide a fair possibility for obtaining a representative cross-section of the community"); Witherspoon v. Illinois, 391 U.S. 510, 524 (1968) (opinion of Douglas, J.) (jury should be impartially drawn from cross-section of community). The Court in Taylor incorporated into the Sixth Amendment the "unmistakable import" of its prior opinions. 419 U.S. at 528.

For a thorough history of the cross-sectional idea, see Daughtrey, Cross-Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana, 43 Tenn. L. Rev. 1, 7-82 (1975). Cf. J. Van Dyke, supra note 1, at 45-83 (tracing idea of jury impartiality in Supreme Court).
In *Taylor*, women had been excluded from jury service by a state statute which provided that no woman was to be called to a venire unless she filed a written declaration of her desire to be subject to jury duty.\(^4^5\) The conceded impact of this statutory scheme was the virtual exclusion of women from juries in the judicial district where Taylor was tried.\(^4^6\) Asserting that the "‘broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility,’ "\(^4^7\) the Court approved the male petitioner's claim that the exclusion of women had deprived him of the "‘kind of fact finder to which he was constitutionally entitled.’"\(^4^8\)

The *Taylor* Court's Sixth Amendment approach to jury selection is distinct from the approach of the *Swain* Court, which reached its decision in response to an alleged denial of equal protection.\(^4^9\) In *Swain* the Court was concerned with the proscription of purposeful discrimination: a racial group was not to be systematically excluded from juries over time by means of peremptory challenges.\(^5^0\) The representative cross-section standard of *Taylor*, on the other hand, is concerned with a substantive definition of jury impartiality. The jury is to be drawn from a venire which represents identifiable and significant groups within the community.

The Court in *Taylor* regarded the representation of groups as essential to the impartiality\(^5^1\) and legitimacy\(^5^2\) of the jury system. A jury that is expected to serve impartially as "the conscience of the community"\(^5^3\) should include as widespread a set of community at-

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45. 419 U.S. at 523.
46. Id. at 524.
47. Id. at 530-31 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
48. Id. at 526.
49. In a case decided before the Court, in Duncan v. Louisiana, 391 U.S. 145 (1968), applied the Sixth Amendment to state court proceedings, the Court rejected a challenge to an exemption system similar to that involved in *Taylor*, on the ground that it did not deny due process or equal protection of the laws because there was a sufficiently rational basis for the exemption. Hoyt v. Florida, 368 U.S. 57, 62-63 (1961). The *Taylor* Court noted that "Hoyt did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community," and added that "[t]he right to a proper jury cannot be overcome on merely rational grounds." 419 U.S. at 534.
50. See note 36 supra.
51. 419 U.S. at 530 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) ("[T]he broad representative character of the jury should be maintained ... as assurance of a diffused impartiality ... ") (Frankfurter, J., dissenting)).
52. Id. at 530 ("Community participation ... is also critical to public confidence in the fairness of the criminal justice system. ... [E]xcluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.")
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titudes and biases as possible. Although the elimination of jurors with situation-specific biases is necessary to ensure impartiality in individual trials, the goal of impartiality is also served by fair representation on juries of the various groups in the community. The exclusion of identifiable segments of the community from the venire deprives the jury of this “diffused impartiality.”

In *Peters v. Kiff* Justice Marshall stated that

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.

54. See 419 U.S. at 530. The Court cited with approval the House Report on the Federal Jury Selection and Service Act:

It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.

*Id.* at 529 n.7 (quoting H.R. Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968)).

55. *Id.* at 530.


57. *Id.* at 503-04. In *Peters* a white defendant alleged that blacks had been systematically excluded from his grand and petit juries in a state court. The Court rejected the state's assertion that the defendant did not have standing to challenge the exclusion of a class of which he was not a member. Justice Marshall, in an opinion joined by Justices Goldberg and Stewart, based the holding in the case on the due process clause of the Fourteenth Amendment. *Id.* at 498-504 (opinion of Marshall, J.). Justice White, in a concurring opinion joined by Justices Brennan and Powell, relied on the legislative purpose behind 18 U.S.C. § 243 (1970) (crime for any person charged with selection of jurors to disqualify citizen on account of race). *Id.* at 506-07 (opinion of White, J.). The state argued that

a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.

*Id.* at 498. Justice Marshall felt that argument took “too narrow a view of the kinds of harm that flow from discrimination in jury selection.” *Id.* Discriminatory selection was unacceptable not only because it offends basic principles of fairness and creates the appearance of bias, *id.* at 501-08, but also because it excludes a significant group and thereby deprives the jury of a unique perspective. The Court held that, “whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process.” *Id.* at 504. Justice Marshall relied on the due process clause because the defendant's trial in a state court took place prior to Duncan v. Louisiana, 391 U.S. 145 (1968). He suggested, however, that if the defendant had been challenging a post-Duncan jury, the Sixth Amendment would have given him “standing to challenge the systematic exclusion of any identifiable group from jury service.” 407 U.S. at 500.
According to this view, the outcome of an individual trial may depend upon the attitudes and experiences the various jurors bring to bear upon the determination of facts and the application of law. The presence of a juror who is a member of a particular group may make available desired information and may provide a different perspective on the community. Those additions may be crucial, because the course of a jury's deliberations will often depend on the familiarity of the jurors with all facets of the community and on their willingness to believe the testimony of particular witnesses and the defendant. A representative jury will likely discourage the expression of group prejudice and ensure that the accused will be tried according to the same standards as any other member of the community.

Taylor's suggestion that impartiality results from the interplay of

58. The available studies suggest that a jury's socioeconomic profile is related to the outcome of its deliberations. The Chicago Jury Project discovered that persons with higher status jobs, more income, and more education were less likely to acquit by reason of insanity than were persons of lower socioeconomic status. R. Simon, The Jury and the Defense of Insanity 98-119 (1967). Another study found that jurors of higher socioeconomic status were more likely to return a guilty verdict than were jurors of lower socioeconomic status. Reed, Jury Deliberations, Voting, and Verdict Trends, 45 Sw. Soc. Sci. Q. 961, 965-67 (1965). See generally Stephen, Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts, in The Jury System in America: A Critical Overview 95-121 (R. Simon ed. 1975).

The desirability of trial by jury, in the eyes of a defendant, stems primarily from the possibility that a jury may be more lenient in the application of the law than a professional judge. See H. Kalven & H. Zeisel, The American Jury 56-62 (1966). The study showed that a defendant tried before a jury, rather than before a judge, fared better 16% of the time. Id. at 62 (Table 15). Further, the composition of the jury may determine its attitude towards the defendant. Juries often respond to their sympathy or dislike for the accused in resolution of an evidentiary doubt. Id. at 165-66. This is what Kalven and Zeisel term "the liberation hypothesis": the jurors are "freed" by doubt about the facts to follow their emotions. The study suggests that juries are lenient more often where they view the defendant as "sympathetic," and that racial minorities fall disproportionately into the "unattractive" category. Id. at 211-12 (Tables 65, 66).

59. See Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases, 73 Mich. L. Rev. 615, 670-73 (1975) (larger juries more likely to be representative and thus more likely to be familiar with community and receptive to testimony of particular witnesses and defendant). Cf. Broder, The Negro in Court, 1965 Duke L.J. 19, 30 (reporting case in which ability of black juror to explain why young black would flee from police even if innocent may have influenced jury's verdict).

60. See Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (opinion of Marshall, J.); Lempert, supra note 59, at 670. Lempert suggests that a "remark such as 'After all, he's black; he's probably committed some other crime if not this one'" might influence jurors who are uncertain, particularly if made at the end of a long and tiring deliberative process when a minority may be searching for reasons to change its position. "The possibility of resolving a difficult decision-making problem by this kind of rationalization might not occur to some jurors who would assent to the remark if it were made. Or, each juror, so long as he thinks he alone holds the belief in question, might be reluctant to act on it." Id. Lempert argues that larger juries are more likely to be representative of the population, and that such juries will suppress prejudice and return more reliable and impartial verdicts. Id. at 688-73. Cf. Broder, supra note 59, at 23 (relating case in which presence of black juror may have offset violent racial prejudice of two white jurors).
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group biases contemplates the representation of certain groups on venires. But the reasoning in Taylor does not depend upon any assumption that the absence of such a group would necessarily introduce situation-specific bias into the deliberative process. By contrast, the Court in Witherspoon v. Illinois61 framed its discussion of group exclusion in terms of the probability that it would result in situation-specific bias in the jury room. The contrast provided by the reasoning in Witherspoon helps clarify the focus of the representative cross-section standard.

Witherspoon was a capital case in which any venireman who had expressed qualms about capital punishment had been challenged for cause. The Court felt that such a jury fell “woefully short” of the constitutional standard of impartiality with respect to the determination of punishment.62 The Court noted that the state had given the jury “broad discretion to decide whether or not death is the ‘proper penalty’ in a given case,” and that “a juror’s general views about capital punishment play an inevitable role in any such decision.”63 The selection process created the presumption that the jury had in fact been partial in a specific sense. By excluding all who expressed scruples against capital punishment, the state had “crossed the line of neutrality” and produced a jury “uncommonly willing to condemn a man to die.”64

The crucial point in Witherspoon is that members of the excluded group of prospective jurors were likely to cast identical votes on a specific issue. The jury was deprived of its “diffused impartiality” on the issue of punishment. But the Court explicitly stated that the same group could be excluded in a case that did not involve capital punishment, without impinging upon the jury’s impartiality.65 That result follows from the fact that the excluded group was identifiable only by reference to the issue of capital punishment. The represen-

62. Id. at 518.
63. Id. at 519.
64. Id. at 521.
65. The Court was unwilling to conclude “that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt.” Id. at 518. Justice Douglas, in a separate opinion, took issue with this position. Couching the issue in terms of the right to a jury selected from a representative cross-section of the community, id. at 524, he concluded that “wholesale exclusion” of a class based on their attitudes toward capital punishment resulted in an “unrepresentative” jury. Id. at 530. He focused on the necessary interaction of sentencing and determination of guilt. If a particular community were overwhelmingly opposed to capital punishment, a jury representing the conscience of that community would choose to avoid the death penalty by finding guilt of a lesser offense. Id. at 528. But even Justice Douglas’s broader reading would only reach those cases in which capital punishment may be an issue.
tative cross-section rule, however, focuses on groups that are identifiable independent of the specific case or issue; such groups may not be excluded from any jury without endangering its impartiality.

In addition to ensuring an impartial determination of guilt or innocence, the representative cross-section standard adds to the legitimacy of the judicial process in the eyes of the public. The Court in Taylor stated that community participation in the administration of the criminal law is “critical to public confidence in the fairness of the criminal justice system.” Representation of a group on juries provides the group’s members with a sense of participation in the application of the laws by which they are governed. Denial of jury participation to distinctive groups, however, can create an appearance of partiality and therefore damage public confidence in the legal process.

Jury service may also contribute to the preservation of a group’s interests and rights in a community. The absence of a group from petit juries in communities where the group represents a substantial portion of the population may lead to jury decisionmaking based on prejudice rather than reason. Exclusion from juries will in-

67. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court emphasized the importance of trial by jury to the sense of justice and democracy in the criminal system: [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. Id. at 156.
68. The Court’s efforts to prevent discrimination in the selection of juries has always derived in part from the belief that exclusion from juries has a severe impact on the status of a group in society and on public confidence in the judicial system. For example, in Strauder v. West Virginia, 100 U.S. 303, 308 (1879), the Court observed that [t]he 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.
In Carter v. Jury Commission, 396 U.S. 320 (1970), the Court validated the right of a group of black citizens to bring a class action alleging racial discrimination in the administration of the state’s jury-selection laws. The Court found no discrimination on the record, id. at 337, 339, but cited the language quoted above from Strauder in emphasizing that exclusion from juries can violate the rights of prospective jurors as well as defendants. Id. at 329-30. Cf. Foster v. Sparks, 506 F.2d 805, 808-09 (5th Cir. 1975) (upholding class action claiming that exclusion of blacks and women from jury service skewed public action in county).
69. For example, a black defendant, faced with an all-white jury, consistently runs a greater risk of conviction, of conviction of a more severe offense, and of harsher punishment than a white defendant. White jurors, satisfied that blacks will never sit in judg-
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which inevitably imply official approval of this prejudice and may encourage disregard for the rights of group members. Furthermore, a group may be conspicuous by its absence, and such absence may carry with it pronounced social and personal stigma.70

Jury representativeness is thus a fundamental element of a trial by one's peers. Taylor's holding that a jury must be selected from a representative cross-section of the community signifies acceptance by the Supreme Court of the idea that exclusion of identifiable groups imperils the fairness and impartiality of the jury process. Further, group representation on juries adds to the legitimacy of the legal process by providing an opportunity for community participation in government.

B. From Venires to Petit Juries

Taylor was concerned with the exclusion of groups from petit jury venires. The Court stated that the jury's functions as a "guard against the exercise of arbitrary power" and as a measure of the "commonsense judgment of the community" could not be fulfilled if "large, distinctive groups are excluded from the [jury] pool."71 Yet the harm to the defendant and to the jury system that Taylor identifies results not only from a group's exclusion from venires, but also from its absence from petit juries. The interplay of group perspectives and the participation of groups in the judicial process contemplated by Taylor occurs only at the petit jury level.

The conclusion that the harm identified by Taylor can result from a group's absence from petit juries compels the extension of Taylor's reasoning beyond the venire to the jury level. The need for this extension is further demonstrated by those cases in which prosecutors have been able to exclude racial minorities from juries through

1. 419 U.S. at 530.

the exercise of peremptories. Yet the Court in *Taylor* explicitly refused to impose any requirement that petit juries “reflect the various distinctive groups in the population.” There are two reasons that may account for the Court’s reluctance to apply the representative cross-section standard of *Taylor* to petit jury composition.

First, jury panels and venires are randomly selected from lists of qualified jurors. Such random selection inevitably results in some juries that include no members of particular groups represented on the lists. A requirement that petit juries actually represent each group in the community would compel court officials to select individual jurors, a practice that would provide an opportunity for abuse and an appearance of partiality. Any attempt to require proportionate representation would also present insurmountable administrative problems. Selection officials would have to consider the race, sex, age, income, occupation, educational level, and religion of each juror in order to ensure that all groups were represented. In addition, the very process of assigning jurors as representatives of specific groups might influence the deliberative process by accentuating identifiable differences among jurors.

Second, individuals whose situation-specific biases become apparent at voir dire must be excused for cause. The effect of challenges for cause might be to remove all members of a particular group from the jury. Yet to disallow those challenges would leave specifically biased jurors on the panel and would introduce actual prejudice into the trial.

Thus a defendant has no right to a representative jury as such. But the reasoning behind *Taylor’s* representative cross-section rule can be reconciled with the Court’s reluctance to extend its analysis beyond the venire to the jury. The reconciliation can be achieved by requiring the selection of petit juries in a manner that does not permit the exclusion of certain groups within the community, except by means of random selection and the challenging of jurors on the basis of situation-specific biases. In short, a criminal defendant should be entitled to a jury from which no such group has been excluded by the peremptory challenging of prospective jurors on the basis of their group associations.

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72. See notes 3 & 4 supra (citing cases).
73. 419 U.S. at 538.
74. See note 13 supra.
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III. A Proposal for Judicial Control of the Peremptory Challenge

A. The Limits of the Peremptory Challenge

The purpose of challenges for cause and of peremptory challenges is to remove individual jurors who may be biased with respect to the defendant, the prosecution, or the facts of the case. Although peremptories are frequently used to exclude identifiable groups from juries, the rationale behind Taylor's representative cross-section rule suggests that an impartial jury is one in which group biases have the opportunity to interact. This rationale can be viewed as narrowing the range of permissible grounds for the peremptory challenge. Group association is evidence not of situation-specific bias, but of the kind of group bias that Taylor indicates ought to be included on the jury. Jurors should be challenged as individuals, because counsel believes that they harbor situation-specific biases. They should not be challenged because they are members of a group likely to represent distinctive perspectives within the community.

Courts have rarely held that group affiliations are sufficient to ground a challenge for cause. Rather, court-controlled challenges have

75. See notes 3, 4, 27 & 28 supra.
76. See note 19 supra.
77. It may be argued that the exclusion of jurors on the basis of group membership would be acceptable where it is believed that, for example, blacks are consistently more biased in favor of acquittal than whites. The argument misses the point of the right to an impartial jury under Taylor. Blacks may, in fact, be more inclined to acquit than whites. The tendency might stem from many factors, including sympathy for the economic or social circumstances of the defendant, a feeling that criminal sanctions are frequently too harshly applied, or simply an understandable suspicion of the operations of government. Whites may also be more inclined to convict, particularly of crimes against a white victim. But these tendencies do not stem from individual biases related to the peculiar facts or particular party at trial, but from differing attitudes toward the administration of justice and the nature of criminal offenses. The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard elaborated in Taylor is designed to foster.

One commentator considered the case where exclusion of blacks is justified because they are consistently more biased in favor of acquittal than whites. He questioned whether such exclusion is distinguishable from removal of a cab driver venireman from a jury trying another cab driver for reckless driving. He answered that the cases are distinguishable and argues that in the case of the cab driver, the choice for the prosecution is between a hostile juror and an impartial one. But in the case of a black, a juror presumptively sympathetic to the defendant is eliminated in favor of a juror who is presumptively hostile. Kuhn, supra note 69, at 290-91.

78. These few instances concern narrowly drawn groups. See, e.g., Sims v. United States, 405 F.2d 1381, 1384 (D.C. Cir. 1968) (in prosecution for murder of taxicab driver, judge should excuse prospective jurors who are, or are related to, taxicab drivers). The author has found no cases where members of groups defined by race, sex, or economic class have been successfully challenged on the basis of group affiliation. Court are likely to presume impartiality despite group affiliations. See Dennis v.
been restricted to eliminating bias identified during voir dire or inferred from the juror's connection with the case or with the parties.\textsuperscript{70} Peremptory challenges, on the other hand, frequently are exercised on the basis of group association.\textsuperscript{80} The conclusion that the peremptory may not be so exercised effects a significant change in the traditional understanding of the challenge. That conceptual shift, however, need not impair the peremptory's effectiveness as a means to eliminate jurors likely to be biased with respect to the particular case. Judicial controls can be implemented that will both prevent the challenging of groups and preserve the potential of the peremptory as a shield against situation-specific biases.

\section*{B. The Elements of a Claim of Exclusion}

Under the Sixth Amendment, a criminal defendant is entitled to a trial by an impartial jury. The courts have also recognized the state's interest in prosecutions that are "tried before the tribunal which the Constitution regards as most likely to produce a fair result."\textsuperscript{81} As the Court stated in \textit{Swain}, "the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution.'"\textsuperscript{82} Thus both the prosecution and the defense should be allowed to object to the exclusion of a group by the other party's use of peremptory challenges.


\textsuperscript{79} See notes 16 & 17 supra.
\textsuperscript{80} See notes 3, 4, 27 & 28 supra.
\textsuperscript{81} Singer v. United States, 380 U.S. 24, 36 (1965). In Singer the Court upheld the constitutionality of \textit{FED. R. CRIM. P.} 23(a), which requires the consent of the government and the approval of the court in order for a defendant's waiver of jury trial to be effective, 380 U.S. at 37.
\textsuperscript{82} 380 U.S. at 220 (quoting \textit{Hayes v. Missouri}, 120 U.S. 68, 70 (1887)). See United States v. Tijerina, 412 F.2d 661 (10th Cir.), \textit{cert. denied}, 396 U.S. 990 (1969) (upholding gag order against defendant). The court in \textit{Tijerina} said that "'[t]he public has an overriding interest that justice be done in a controversy between the government and individuals and has the right to demand and expect 'fair trials designed to end in just judgments.'" \textit{Id.} at 666 (citations omitted).
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finding of two elements by the court: (1) that the excluded individuals are members of a "group" for purposes of the Sixth Amendment; and (2) that the individual jurors were challenged peremptorily on the basis of their group association.

1. Defining Cognizable Groups

The initial problem is to define those groups that should not be excluded from juries. This Note will refer to these groups as "cognizable." In cases involving exclusion from jury pools or venires, federal and state courts have upheld claims of groups defined by race, sex, national origin, religion, age, economic status, and occupation. Such recognition has not been consistent, however, and most decisions offer little guidance beyond the particular circumstances of each case. But the problem of group definition is inescapable, and the courts are in need of defining guidelines. General guidelines may be derived from the rationale behind the representative cross-section requirement of Taylor.

The first goal of the Taylor rule is to ensure jury impartiality...
through the interplay of group biases in the jury system.\textsuperscript{92} In finding that women could not be excluded from the venire in \textit{Taylor}, the Court noted that "the two sexes are not fungible," and that "a flavor, a distinct quality is lost if either sex is excluded."\textsuperscript{93} In \textit{Peters v. Kiff} Justice Marshall warned that the effect of group exclusion is "to remove from the jury room qualities of human nature and varieties of human experience."\textsuperscript{94} These observations suggest that certain characteristics of groups imbue their members with unique perspectives on events. The representation of diverse perspectives in the jury room contemplated by \textit{Taylor} can be ensured if courts recognize groups defined in terms of characteristics likely to lead to shared perspectives among group members. A cognizable group defined in this manner need not include only individuals who share a given perspective; nor need the group include all the individuals who share that perspective. But the bulk of the group's members should share a perspective within the community that cannot adequately be represented if the group is excluded.\textsuperscript{95}

\textit{Taylor}'s representative cross-section requirement is designed not only to ensure the impartiality of the deliberative process, but also to enhance the legitimacy of the judicial process in the eyes of the public. The latter goal requires that the community not perceive any identifiable group as excluded from petit juries. Commonly recognized community groups should, therefore, be represented. The identification of these groups will depend both on the demography of the community and on the perceptions of its citizens. Groups peculiarly subject to discrimination within the community should be viewed with special consideration.\textsuperscript{96}

A cognizable group can thus be defined in terms of any identifiable group characteristic that results in its members sharing distinctive experiences and perspectives.\textsuperscript{97} The defining characteristic should

\textsuperscript{92} See pp. 1726-28 \textit{supra}.
\textsuperscript{93} 419 U.S. at 531-32 (quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)).
\textsuperscript{94} 407 U.S. at 503-04.
\textsuperscript{95} See United States v. Guzman, 337 F. Supp. 140, 143 (S.D.N.Y.), aff'd, 468 F.2d 1245 (2d Cir. 1972) (stating that group, to be cognizable, should have, \textit{inter alia}, "a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process").
\textsuperscript{96} Members of such groups may be further disadvantaged by the group's absence from juries, and the fact of discrimination suggests the group is commonly recognized and possesses a unique perspective within the community. \textit{Cf. United States v. Carolene Prods. Co.}, 304 U.S. 114, 152 n.4 (1938) (suggesting that prejudice against "discrete and insular" minorities may call for especially "searching judicial inquiry").
\textsuperscript{97} This definition is to be distinguished from those which might be used to identify groups in an equal protection context. For example, Professor Owen Fiss has suggested

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clearly identify any individual as within or without a group's membership. Objective characteristics such as race and sex suggest themselves as both precise and easily administrable.

The fact that a group is distinct from the rest of the community and that its members possess unique experiences and attitudes argues for the group's representation on juries. Further, the community's perception of it as a group makes its representation important to the legitimacy of the jury system. But the crucial questions are whether a member of the group will possess a distinctive outlook because he shares the characteristic that defines the group, and whether other members of the community are capable of representing that perspective on petit juries. The answers are likely to depend upon a court's judgments about the impact that certain characteristics and social positions have on a group's members. For instance, the size of a group may be important in determining whether exclusion of its members would deprive the jury of a perspective crucial to the formulation of a community verdict.

As the Court wrote in Taylor, "[c]ommunities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." Population statistics, samplings of group attitudes, testimony of local citizens, and social science evidence may be relevant to the

classification of a group. "Social group" is defined by, among other factors, its members' interdependence: "the identity and well-being of the members" are linked, and they identify themselves "by reference to their membership in the group." Fiss, Groups and the Equal Protection Clause, 5 PHILOSOPHY AND PUB. AFF. 107, 148 (1976). Interdependence is crucial if one is concerned with protection of a group, but it may be necessary in the jury representation area, where the courts are also concerned with what a group's members bring to the jury room. For example, the well-being of an individual woman may not necessarily be linked to that of other women, but she is nonetheless likely to share a perspective peculiar to her sex. Thus, whatever their status with respect to the equal protection clause, women clearly constitute a group under the present analysis.

99. Compare United States v. Ross, 468 F.2d 1213, 1217 n.4 (9th Cir. 1972) with United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970) (Ross relies on smallness of class of young people from twenty-one to twenty-four to distinguish Butera, which held twenty-one to thirty-four year olds cognizable).
substantiation of a group’s cognizability within a community.\textsuperscript{102} Generally, groups defined by race and sex are clearly identifiable and likely to share a distinctive perspective. Other groups, including those defined by age, economic status, national origin, occupation, or religion may be treated with more flexibility.\textsuperscript{103} The burden should be on the party objecting to demonstrate that the excluded jurors are members of a cognizable group.\textsuperscript{104}

2. Finding a Violation: Group-Based Peremptories

Requiring representation of all community groups on juries would undermine the peremptory’s usefulness in removing specifically biased jurors.\textsuperscript{105} Objections to a party’s use of peremptory challenges should therefore be sustained only where the peremptories have been exercised on the basis of group association. Individual peremptories should be presumed to have been exercised for situation-specific reasons.\textsuperscript{106} That presumption should be overcome only when it is established that a party has used its challenge to exclude a disproportionate number of jurors who are members of a cognizable group.\textsuperscript{107}

\textsuperscript{102} Such evidence has been found acceptable in other contexts. See, e.g., Brown \textit{v.} Board of Educ., 347 U.S. 483, 494-95 n.11 (1954) (Court relied upon social science findings in school desegregation context); \textit{Hernandez v. Texas}, 347 U.S. 475, 479 (1954) (“testimony of responsible officials and citizens” used to substantiate existence of community prejudice).

\textsuperscript{103} Drawing on an example suggested above, see note 77 supra, taxicab drivers would not be a cognizable group under these guidelines. The group is clearly identifiable, but the group is likely to be neither large enough to constitute a significant segment of the community nor sufficiently distinct in its experience that its outlook could not be represented adequately by others.

\textsuperscript{104} Otherwise, counsel for the defendant or the prosecution might be tempted to make life difficult for his adversary by objecting and forcing opposing counsel to come forward with evidence that the challenged jurors do not constitute a cognizable group.

\textsuperscript{105} See p. 1732 supra.

\textsuperscript{106} This presumption preserves the wide discretion of the prosecutor and defense attorney. See notes 19 \& 33 supra. They will be subject to no limitation on that discretion until the other party has carried its burden in overcoming this presumption.

\textsuperscript{107} The test proposed here is similar to that used in equal protection cases where the composition of venires is in question. The general practice has been to require a twofold showing by the defendant: first, a significant disparity between the proportion of the group in the population and its representation on jury panels; second, a showing that the disparity originated, at least in part, at some point in the selection process where state officials invoked their subjective judgment rather than objective and racially neutral criteria. Early venire cases were easy, for they asserted total or virtually total exclusion of blacks in a community in which blacks represented a substantial minority. See, e.g., \textit{Eubanks v. Louisiana}, 356 U.S. 584 (1958); \textit{Hernandez v. Texas}, 347 U.S. 475 (1954); \textit{Avery v. Georgia}, 345 U.S. 559 (1953); \textit{Patton v. Mississippi}, 332 U.S. 463 (1947); \textit{Hill v. Texas}, 316 U.S. 400 (1942); \textit{Smith v. Texas}, 311 U.S. 128 (1940); \textit{Norris v. Alabama}, 294 U.S. 587 (1935). More recent cases, however, have posed the problem of determining the degree of exclusion that is unacceptable and the procedures that are discriminatory. See \textit{Swain v. Alabama}, 380 U.S. 202 (1965); \textit{Brown v. Allen}, 344 U.S. 443 (1953); \textit{Akins v.
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When an objection is raised, the court should examine the "rate of exclusion" of the group. This percentage figure is arrived at by dividing the number of group members challenged peremptorily by the allegedly offending party by the number of group members on the venire (or on that part of the venire from which the jury has been chosen) who have not been successfully challenged for cause. This figure should be compared with the rate that would be expected were challenges exercised independent of group association. The latter percentage, the "expected rate of exclusion," is arrived at by dividing the number of peremptory challenges available to the allegedly offending party by the number of members of the venire (or of that part of the venire from which the jury has been chosen) who have not been challenged for cause. If the actual rate of exclusion is significantly larger than the expected rate, a presumption should be raised that group association was the basis for the challenges.

When a court finds that a party's use of its peremptories has resulted in disproportionate exclusion of a cognizable group, a prima

Texas, 325 U.S. 398 (1945). In each of these cases, the Court suggested that the prima facie rule was applicable, but either rejected the significance of the statistical disparity or accepted the explanation of the government.

For federal cases in which a prima facie case of discrimination has been found on the basis of underrepresentation, see Alexander v. Louisiana, 405 U.S. 625 (1972) (ruling that prima facie case of discrimination was made out where 21% of eligible population was Negro, but 14% of pool, 7% of list, and 5% of venire were Negro, and where selection procedures themselves were shown not to be racially neutral); Whitus v. Georgia, 385 U.S. 545 (1967) (reversing conviction where Negroes represented 42% of eligible population, 27% of taxpayers from whom jury lists were drawn, and only 9% of lists themselves); Smith v. Yeagar, 465 F.2d 272 (3d Cir. 1972) (6% of grand jury Negro compared with 25% of population); Witcher v. Peyton, 405 F.2d 725 (4th Cir. 1969) (25% of population nonwhite, 8% of jury list); Labat v. Bennett, 365 F.2d 698 (6th Cir. 1966), cert. denied, 386 U.S. 991 (1967) (Negroes constituted 25.8% of eligible population, an average of 6.2% of venires).

108. For an example comparison, if there are 48 jurors on the venire not challenged for cause and the party has six peremptory challenges, the expected rate of exclusion would be one in eight, or 12.5%. If the party challenged peremptorily four of the five blacks on the venire not challenged for cause, the actual rate of 80% would be compared with the 12.5% figure.

109. For an example of a court using a rate of exclusion test in a jury discrimination case, see United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976), vacated sub nom. United States v. Newman, 549 F.2d 240 (2d Cir. 1977). The court in Robinson relied upon the rate of exclusion of black jurors by peremptory challenge over a two-year period to find a violation under the Swain "systematic exclusion" test. See note 36 supra. If the prosecutor's challenges in Robinson had been exercised without regard to race, he would have been expected to strike, on the average, 21.4% of any one racial group. Figures three and four times that rate suggested to the court that the prosecutor was challenging on the basis of membership in a racial group. 421 F. Supp. at 469-71. The Second Circuit objected not to the use of the exclusion rate as a measure of discrimination, but to the accuracy and adequacy of the statistics actually used. 549 F.2d at 243-50. For a discussion of the application of statistical probability theory to jury discrimination cases, see Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 HARV. L. REV. 399 (1966).
facie case is established. This should shift the burden to the allegedly offending party to show that its challenges were not exercised on the basis of group association. This burden may be carried by offering reasons for individual challenges which are not related to group associations. These reasons need not be sufficient to ground a challenge for cause. They should appear, however, to have been applied consistently to similarly situated jurors of other groups, and they should be reasonably relevant to the particular trial or to non-group characteristics of the parties or witnesses. The court should be prepared to consider whether the reasons are contrived to avoid admitting that peremptories were based on group association.

The proposal outlined here contemplates cases in which the allegedly offending party will be required to justify its peremptory challenges or be subjected to some penalty. The threatened application of a penalty would deter continued use of group association as a basis for the peremptory challenge. In cases involving improper selection of jury venires, the venire is generally discharged and a new one selected according to constitutional procedures. This would also be necessary in cases involving abuse of the peremptory challenge. Merely selecting a new venire, however, while it would set right the harm to the particular defendant or his prosecution, would have little deterrent value. The offending party could simply take the chance that no objection would be raised; if the gamble fails, the party has lost nothing but the time involved in recommencing the selection process.

Hence, where a party is found to have exercised its peremptory challenges on the basis of group association, that party should forfeit all or a proportion of the challenges that were used against members of the cognizable group in the original venire. The threat of forfeiture of peremptory challenges would deter a party contemplating the use of peremptory challenges based on group associations. The party would be encouraged to consider what non-

110. There may, for example, be instances where a particular fact regarding a prospective juror has not been deemed sufficient to show "cause." An attorney might then challenge the juror peremptorily, either for that same reason (e.g., that he or she is a cab driver and the victim was also a cab driver) or because he is afraid the juror was antagonized by vigorous voir dire questioning or by the attempt to challenge him for cause.

111. If, for example, an attorney were to challenge three blacks and then offer as reasons that one was too tall, another too talkative, and another too short, a court might not be justified in rejecting these reasons. The court's observations during voir dire questioning should be helpful in guiding its decision.

112. See ABA Project, supra note 17, at 61-62.

113. Where the number of peremptory challenges to be granted to a party is prescribed by statute, forfeiture of challenges may require a statutory amendment.
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group reasons it could successfully offer for having eliminated a particular juror. Such increased consideration of individual jurors would not only diminish reliance on group affiliation, but would also result in the challenging of jurors on bases consistently relevant to the particular trial.\footnote{114}

Conclusion

The Court in \textit{Swain v. Alabama} held that the peremptory challenging of blacks in a particular case did not violate the equal protection clause. In doing so, the Court implicitly approved peremptory challenges based on group affiliations of prospective jurors. Subsequently, in \textit{Taylor v. Louisiana}, the Court reaffirmed the principle that juries should be drawn from a representative cross-section of the community. \textit{Swain}'s concern for the traditional function of the peremptory challenge can be reconciled with \textit{Taylor}'s concern for group representation in the jury system. The proposal of this Note attempts to strike the proper balance between the peremptory challenge as a method by which to remove situation-specific bias and the reasoning behind \textit{Taylor}. The proposal is suitable for adoption by courts or by legislatures, including Congress, when revising their rules of criminal procedure.

Adoption of this proposal should be accompanied by a reexamination both of the effects of the peremptory challenge and of the scope of voir dire questioning. An empirical evaluation of the effect of peremptory challenges on jury impartiality, in light of their potential use to exclude cognizable groups, is essential to determine whether the challenge should be preserved. Similarly, it might be found advisable to expand the scope of voir dire questioning so that attorneys can exercise peremptory challenges on a more informed and individualized basis.

\footnote{114. Where the defendant objects to the prosecutor's use of peremptory challenges at trial and the court rejects the Sixth Amendment claim, the issue should present a valid ground for appeal from a conviction. As in other jury discrimination cases, if the appellate court finds that the trial court erred in overruling the objection the defendant should be granted a new trial. Double jeopardy would prevent the prosecution from appealing an acquittal, even where it had raised a timely objection to the defendant's use of peremptory challenges. See \textit{United States v. Burroughs}, 289 U.S. 159, 161 (1933); \textit{United States v. Sanges}, 144 U.S. 310, 312 (1892).}