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Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: the Other Side of the One Color Jury

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UNRESTRICTED USE OF PEREMPTORY CHALLENGES BY CRIMINAL DEFENDANTS AND THEIR COUNSEL: THE OTHER SIDE OF THE ONE COLOR JURY*

In 1986, the Supreme Court took the controversial step of holding that the equal protection clause prohibits prosecutors from exercising peremptory challenges[1] on the basis of race.[2] The Court, however, left open the question of whether there are any constitutional limitations on the use of peremptory challenges in a racially discriminatory manner by criminal defendants and their counsel.[3] This Note will answer that question[4] in the negative, by demonstrating that (1) the equal protection clause of the fourteenth amendment is not implicated by a defendant's discriminatory use of peremptory challenges because such use does not constitute state action;[5] and (2) the sixth amendment does not place any restrictions on the defendant's use of peremptory challenges because the right to an impartial jury belongs to the defendant.[6] Futhermore, any dissatisfaction with the present system should

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1. Peremptory challenges are objections to prospective jurors for which no reason need be stated. Upon exercise of a peremptory challenge, the court must exclude the prospective juror from service on that case. *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982) for a typical statute. Peremptory challenges are limited in number, the number varying from jurisdiction to jurisdiction, and often within the jurisdiction based on the type of case. *See* 3 STANDARDS FOR CRIMINAL JUSTICE Standard 15-2.6 (1980). Challenges for cause, on the other hand, are unlimited in number but may be exercised only on certain grounds. *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982).

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

3. *Id.* at 89. In 1989, the Supreme Court denied certiorari in a case that presented this question. Alabama v. Cox, 109 S. Ct. 817 (1989).

4. The question is being litigated in at least two cases in New York as of this writing. First in June of 1987 Elizabeth Holtzman, in her capacity as District Attorney of Kings County, brought suit against the judges and justices who preside over criminal cases in Kings County. Her cause of action was based on the unconstitutionality, under both federal and state constitutional theories, of the judiciary enforcing criminal defendants' peremeptories when they are used for discriminatory purposes. Holtzman v. Supreme Court, 139 Misc. 2d 109, 526 N.Y.S.2d 892 (Sup. Ct. 1988), *aff'd*, 545 N.Y.S.2d 46 (App. Div. 1989). In a second case, the trial judge ruled that *Batson* did apply to defense counsel. State v. Kern, N.Y.L.J., Sept. 22, 1987, at 1, col. 3 (N.Y. Crim. Ct. Sept. 21, 1987). The appellate division ruled that because the issue was reviewable after trial, it was not necessary to address the merits. N.Y.L.J., Sept. 23, 1987, at 1, col. 3.

5. *See infra* notes 98-143 and accompanying text.

6. *See infra* notes 144-72 and accompanying text.

be remedied by legislative action because peremptory challenges themselves are statutory creations and are not constitutionally mandated or protected.[7]

I. History and Nature of the Problem

The history of peremptory challenges in the Anglo-American system of jury trial was outlined by Justice White in *Swain v. Alabama*.[8] While that history will not be repeated here,[9] the important factors which can be culled from Justice White's discussion will be noted. The system has a long tradition in Great Britain's criminal bar, dating back to the thirteenth century.[10] Originally, the use of peremptories was confined to felony cases.[11] Early on, the defendant was granted a fixed number of peremptories,[12] while the prosecution had an unlimited number. This was changed by statute[13] in 1305,[14] eliminating the prosecution's peremptories altogether. Nonetheless, "[s]o persistent was the view that a proper jury trial required peremptories on both sides"[15] that a system was devised which allowed the prosecutor to direct a prospective juror to "stand aside."[16] This system had the practical effect of once again giving the prosecution an unlimited number of peremptory challenges. The peremptory system was adopted in the United States soon after independence[17] either by statute[18] or by incorporation into the common law.[19]

Early Supreme Court cases emphasized the importance of the pe-

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7. *See infra* notes 173-77 and accompanying text.

8. 380 U.S. 202 (1965).

9. There already exists a considerable body of law review articles which summarize the historical underpinnings of the peremptory challenge in Anglo-American jurisprudence. *See, e.g.*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337 (1982); Comment, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?*, 3 Det. C.L. Rev. 703 (1984); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977).

10. *Swain*, 380 U.S. at 212 & n.9.

11. *Id.* at 212.

12. *Id.* at 212-13.

13. The Ordinance for Inquests, 33 Edw. 1, stat. 4 (1305), *noted in Swain*, 380 U.S. at 213.

14. *Swain*, 380 U.S. at 213.

15. *Id.*

16. *Id.* ("[T]he statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until after the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number.").

17. *Id.* at 214.

18. 1 Stat. 119 (1790), *noted in Swain*, 380 U.S. at 214.

19. *Swain*, 380 U.S. at 215-18.

remptory challenge to the defendant.[20] For example, the Supreme Court in *Pointer v. United States*[21] stated: "The right to challenge a given number of jurors without showing cause is one of the most important of the rights *secured to the accused.*"[22] The Court added:

> Any system for the impanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.[23]

Two years before the *Pointer* decision, the Court, in *Lewis v. United States*,[24] overturned a murder conviction because the trial court had interfered with the defendant's use of his peremptory challenges.[25] In *Lewis*, the Justices looked to *Blackstone's Commentaries* as a guide to discern the role that the challenge played in protecting the accused.[26]

> As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike.[27]

Whatever the reasons which originally supported the granting of peremptory challenges,[28] they took on an added significance towards the end of the nineteenth century. After the decision in *Strauder v. West Virginia*,[29] which held that a black defendant was denied equal

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20. *See* Pointer v. United States, 151 U.S. 396 (1894); Lewis v. United States, 146 U.S. 370 (1892).

21. 151 U.S. 396 (1894).

22. *Id.* at 408 (emphasis added).

23. *Id* at 408-09.

24. 146 U.S. 370 (1892).

25. *Id.*

26. *Id.* at 376.

27. 4 W. BLACKSTONE, COMMENTARIES 353, *quoted in Lewis*, 146 U.S. at 376.

28. For a discussion of the policy considerations behind the granting of peremptory challenges, see Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980).

29. 100 U.S. 303 (1880).

protection when blacks were systematically excluded from the jury pool, the peremptory challenge became a tool in the hands of both prosecutors and defense lawyers to keep blacks from serving on juries.[30] Apparently, the object was to keep the races segregated so that the only circumstance in which a black citizen might be impaneled on a jury was when both the accused and the victim were black and the entire jury impaneled was also black.[31]

This system resisted change until the general civil rights activism in the 1950s and 1960s. Then, in 1965, the use of peremptory challenges to exclude black citizens from juries, was attacked directly in a case in which the prosecutor excluded prospective black jurors through the use of peremptories and the defendant himself was black.[32] In *Swain v. Alabama*,[33] the Court stated that, while a systematic effort by the prosecutor to exclude blacks from serving on all juries might deny a black defendant equal protection under the fourteenth amendment,[34] there was nevertheless a presumption of validity in every individual case, which inured to the benefit of the prosecutor.[35]

In formulating this rule, the *Swain* Court accepted the traditional role of peremptory challenges by holding that the prosecutor could use the state's peremptory challenges on the presumption that individuals of certain identifiable groups would more likely be biased against the prosecutor in a specific case.[36] This presumption of group bias was allowed because the prosecutor could learn little about a prospective juror during the voir dire examination.[37] Furthermore, the very process of probing for bias during voir dire might cause resentment on the part of a prospective juror, thus making the exercise of a peremptory challenge necessary.[38]

It was only when the prosecution sought to keep members of a cognizable group off all juries that the presumption of a valid case-specific exercise of the challenges was overcome.[39] Thus, in order to

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30. Swain v. Alabama, 380 U.S. 202, 234-36 (1965) (Goldberg, J., dissenting).
31. *Id.*
32. *Id.* at 223-24.
33. 380 U.S. 202 (1965).
34. *Id.*
35. *Id.* at 222.
36. *Id.* at 220-21 ("[T]he question [that] a prosecutor . . . must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.").
37. *Id.* at 221. "Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried." *Id.*
38. *Id.* at 220 ("the bare questioning [a juror's] indifference may sometimes provoke a resentment") (alterations in original) (quoting *Lewis v. U.S.*, 146 U.S. 370, 376 (1892)).
39. *Id.* at 223.

show that a prosecutor was using his peremptories in a constitutionally impermissible manner, the defendant was saddled with an insurmountable evidentiary burden.[40] This result, which made the continuation of the all-white jury possible, was attacked strenuously from the start,[41] and *Swain* left in its wake a bitter controversy which has yet to fully subside.[42]

Dissatisfaction with the evidentiary requirements of *Swain* led several states[43] to reject the *Swain* theory. These states determined that a discriminatory use of peremptory challenges was prohibited under state constitutional theories.[44] Additionally, two circuit courts of appeal were able to sidestep *Swain* by holding that the sixth amendment prohibited discriminatory uses of peremptory challenges.[45]

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40. The Court stated:

> But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result *no Negroes ever serve* on petit juries, the Fourteenth Amendment claim takes on added significance.

Id. (emphasis added).

Whether the Court intended this to be the level of misuse of peremptories, that a defendant had to allege in order to make out a prima facie case under the fourteenth amendment, is unclear.

41. *See, e.g.*, Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury.*, 52 VA. L. REV. 1157 (1966); Note, *Peremptory Challenge-Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967).

42. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring) ("The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that 'justice . . . sit supinely by' and be flouted *in case after case* before a remedy is available.") (emphasis added) (citing Commonwealth v. Martin, 461 Pa. 229, 289, 336 A.2d 290, 295 (1975)).

43. The states which rejected *Swain* prior to *Batson* are: California in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Delaware in Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); Florida in State v. Neil, 457 So. 2d 481 (Fla. 1984); Massachusetts in Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); New Mexico in State v. Crespin, 94 N.M. 486, 612 P.2d 716 (App. 1980); *see also* State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) (decided on state constitutional grounds shortly after the *Batson* decision).

44. *See, e.g., Wheeler*, 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908 ("Because a fundamental safeguard of the California Declaration of Rights is at issue, however, 'our first referen[ce] is California Law' and divergent decisions of the United States Supreme Court 'are to be followed by California courts only when they provide no less protection than is guaranteed by California Law.' " (quoting People v. Pettingill, 21 Cal. 3d 231, 248, 578 P.2d 108, 119, 145 Cal. Rptr. 861, 872 (1978))); *Neil*, 457 So. 2d at 486; *Soares*, 377 Mass. at 477, 387 N.E.2d at 515; *Crespin*, 94 N.M. at 488, 612 P.2d at 718.

45. *See* McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986); Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *vacated and remanded sub nom.* Michigan v. Booker, 478 U.S. 1001 (1986), *reinstated sub nom.* Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987). For an invaluable discus-

The states adopted the rule as delineated in *People v. Wheeler*,[46] rejecting *Swain*'s evidentiary requirements. *Wheeler* held that, in any individual case, once the defendant made out a prima facie case to the court's satisfaction that the prosecutor was using peremptory challenges in a discriminatory manner, the prosecutor was required to advance racially neutral[47] reasons for its exercise. The *Wheeler* rule, as applied in California, Massachusetts, and Florida, was extended to both the prosecution and the defense even though the issue before the high court of each state was the prosecutor's allegedly biased use of peremptory challenges.[48] In each of the three cases, the issue of whether the rule applied to both parties was disposed of in a cursory manner;[49] the parties never briefed the issue and there were no adversarial proceedings on this point.[50]

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sion of *McCray*, a case which is still applicable law in the Second Circuit, see A. COHEN, PRACTICE NOTE: MCCRAY V. ABRAMS, PROSECUTORIAL ABUSE OF PEREMPTORY CHALLENGES (1985) (available at The Legal Aid Society, Criminal Defense Division, Special Litigation Unit, New York, N.Y.).

46. 22 Cal. 3d 258, 281, 583 P.2d 748, 764-65, 148 Cal. Rptr. 890, 906.

47. *Id.*

48. The New Mexico, Delaware, and New Jersey courts did not reach the issue nor did the Second Circuit in *McCray*. *See* United States v. Leslie, 783 F.2d 541, 565 (5th Cir. 1986) ("We note that every jurisdiction *which has spoken to the matter*, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation has held that the defense must likewise be so prohibited.") (emphasis added), *vacated*, 479 U.S. 1074 (1987); *see also* Batson v. Kentucky, 476 U.S. 79, 89 (1986). Justice Powell writes that the Court purports to "express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense counsel*." *Id.* at 89 n.12 (emphasis added).

Justice Burger, in his dissent states:

> [T]he clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?
>
> Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'

Id. at 125-26 (Burger, C.J., dissenting) (footnote omitted) (quoting *id.* at 107 (Marshall, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

An answer to the former Chief Justice's question might be that it is for Congress and the state legislatures to decide what the "criminal justice system requires" and for the courts to decide what the Constitution requires. The two are not coterminous.

49. *Wheeler*, 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29; State v. Neil, 457 So. 2d 481, 487 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 489-90 n.35, 387 N.E.2d 499, 517 n.35, *cert. denied*, 444 U.S. 881 (1979).

50. *See, e.g., Wheeler*, 22 Cal. 3d at 282-83 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906-07 n.29.

Although in the present appeal the Attorney General for obvious reasons does not claim the right to object to the same misuse of premptory challenges on the part of defense counsel, we observe for the guidance of the bench and bar that he has that right

In two cases, *Commonwealth v. Soares*[51] and *State v. Neil*,[52] the state courts arrived at their decisions by exclusively relying on the rationale of *Wheeler*.[53] The *Wheeler* court, however, based its holding upon a construction of California's Constitution,[54] under which both the prosecution and the defense enjoy the right to a jury trial,[55] a point not even mentioned by the *Wheeler* court.[56]

The attack on *Swain* in the circuit courts proceeded by way of a rather unusual route. Realizing that the equal protection argument was foreclosed by *Swain*, two circuits ruled that the sixth amendment's fair-cross-section requirement was violated by the discriminatory use of peremptory challenges.[57] These courts reasoned that this avenue was open to them because *Swain* had been decided before the sixth amendment's fair-cross-section requirement had been applied to the states.[58] The fact that *Swain* had been applied consistently in the federal courts,[59] where the sixth amendment had, of course, always been in force, did not dissuade these courts, so hostile were they to the result in *Swain*.[60]

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under the constitutional theory we adopt herein: the People no less than the individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community.
Id.

51. 377 Mass. 461, 387 N.E.2d 499, *cert denied*, 444 U.S. 881 (1979).

52. 457 So. 2d 481 (Fla. 1984).

53. *See Soares*, 377 Mass. at 477 n.12, 387 N.E.2d at 510 n.12 (the court mentioned that it was especially aided by the California Supreme Court's groundbreaking *Wheeler* decision); *Neil*, 457 So. 2d at 485 (adopting *Wheeler* with only minor modifications).

54. *See supra* note 44.

55. CAL. CONST. art. I, § 16 ("A jury may be waived in a criminal case by consent of *both* parties . . . .") (emphasis added). Under Florida law, the state also enjoys the right to a jury trial. *See* FLA. R. CRIM. P. 3.260 ("A defendant may in writing waive a jury trial with the consent of the State.").

56. The *Wheeler* court addressed the issue of the public's right to a fair-cross-section jury without specifically citing the unusual provision of Art. I, § 16. *See* People v. Wheeler, 22 Cal. 3d 258, 282-83 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906-07 n.29 (1978).

57. *See supra* note 45 and accompanying text.

58. The sixth amendment's guarantee of trial by jury was not incorporated against the states through the fourteenth amendment until 1968 in Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth and fourteenth amendments secure defendant's right to trial by jury in a case of "simple battery" that was punishable under Louisiana statute by a maximum of two years imprisonment and a $300 fine). The sixth amendment's fair-cross-section requirement was made applicable to the states in Taylor v. Louisiana, 419 U.S. 522 (1975) (systematic exclusion of women from juries violates sixth amendment's fair-cross-section requirement).

59. In the federal courts, peremptory challenges are provided for by FED. R. CRIM. P. 24(b).

60. For a cogent criticism of the sixth amendment theory relied upon by the *McCray* and *Booker* courts, see United States v. Leslie, 783 F.2d 541 (5th Cir. 1986).

The possibility that other states or circuits would be willing to sidestep *Swain* engendered widespread litigation on the issue[61] during the eight years between *Wheeler* and *Batson v. Kentucky*.[62] It was in this atmosphere of conflict that *Batson* worked its way toward the Supreme Court through the courts of Kentucky.

II. *Batson*: A Procedural Analysis

Batson, a black man, was charged with second-degree burglary and receipt of stolen goods.[63] The prosecutor at his trial used four of his peremptory challenges to strike all the blacks from the venire,[64] leaving Batson with an all-white jury. Batson's counsel moved to dismiss the jury prior to its being sworn,[65] basing his motion on the theory that his client was being denied both his sixth amendment right to a fair-cross-section jury and equal protection of the laws under the fourteenth amendment.[66] Counsel maintained this posture in the appellate court[67] but, in the Supreme Court of Kentucky, dropped the equal protection claim and based the appeal solely on the sixth amendment's fair-cross-section requirement. Batson's attorney maintained this position through every step in the Supreme Court proceedings.[68] The equal protection argument, the argument upon which *Batson* was decided, *was not briefed by either party*.[69]

This procedural irregularity[70] is important in understanding not only what *Batson* held, but also what it did not hold and what it left for later decisions. In turn, these issues are significant in order to properly gauge the policy concerns which the Supreme Court will address should the question left open in *Batson*[71]—whether there are any constitutional limitations on the use of peremptory challenges by criminal defendants—come squarely before that tribunal.

By holding that Batson's fourteenth amendment right to equal

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61. Prior to Batson v. Kentucky, 476 U.S. 79 (1986), 29 states considered the issue. The cases between 1978 and 1983 are collected in Gilliard v. Mississippi, 464 U.S. 867, 871 n.3 (1983) (Marshall, J., dissenting from denial of certiorari). Cases decided after *Gilliard* but before *Batson* are listed in United States v. Leslie, 783 F.2d 541, 551 n.16 (5th Cir. 1986).

62. 476 U.S. 79, 82-84 (1986).

63. *Id.* at 82.

64. *Id.* at 83.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 117-18 (Burger, C.J., dissenting).

69. *Id.*

70. *Id.* at 115. ("In reaching the equal protection issue despite petitioner's clear refusal to present it, the Court departs dramatically from its normal procedure without explanation.").

71. *See infra* notes 75-78 and accompanying text.

protection of the laws had been violated,[72] the Court was able to base its decision on a narrower ground than if it had employed a sixth amendment fair-cross-section analysis.[73] Thus, a narrow reading of the case limits its application to situations in which a criminal defendant of one cognizable racial group has members of his own group systematically excluded from the jury by the prosecution's use of peremptory challenges.[74] Reaching this conclusion, the Court was able to forestall any consideration of other related constitutional objections such as: if blacks were systematically excluded from jury participation by the use of the prosecutor's peremptories when the defendant is white;[75] what the application of the equal protection doctrine to other suspect classes would entail;[76] what other groups would not be subject to discrimination without the prosecutor being required to advance neutral criteria for the exercise of the peremptories;[77] and whether the *Batson* doctrine applied to defendants as well to prosecutors.[78]

The Supreme Court had reason to be wary of applying a fair cross section analysis to the peremptory challenge issue.[79] In case after case, the Court held the sixth amendment's requirement that a jury be selected from a fair-cross-section of the community applies only to the pool from which the jury is selected.[80] It has never held that any particular group must be represented on the jury actually impaneled, whether proportionately[81] or otherwise.[82] A sixth amendment jury-pool challenge does not require that the defendant challenging the composition of the pool be a member of the class which is allegedly underrepresented.[83] Therefore, a man can challenge a jury selected from a

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72. *Batson*, 476 U.S. at 97-98.

73. *See, e.g.*, Castenada v. Partida, 430 U.S. 482, 494 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976); Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972).

74. However, there is dicta in the case which can be read as giving a broader scope to the principle announced there. *Batson*, 476 U.S. at 99 (focusing on the rights of citizens not to be excluded from juries rather than on rights of criminal defendant).

75. *See* Peters v. Kiff, 407 U.S. 493 (1972) (white defendant had standing to challenge exclusion of blacks from jury pool).

76. *See* Taylor v. Louisiana, 419 U.S. 522 (1975) (male had standing to challenge statute which caused women to be underrepresented in jury pool).

77. Holtzman v. Supreme Court, Kings County, 139 Misc. 2d 109, 526 N.Y.S.2d 892 (Sup. Ct. 1988), *aff'd*, 545 N.Y.S.2d 46 (App. Div. 1989), lists gender, religion, and alienage as impermissible considerations on which to utilize peremptory challenges. For a discussion of the *Holtzman* case, see *supra* note 4.

78. *Batson*, 476 U.S. at 89 n.12.

79. *Id.* at 112 (Burger, C.J., dissenting).

80. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (citing a number of cases following the reasoning that a fair-cross-section of the community applies only to the jury pool).

81. *Id.*

82. *Id.*

83. *Id.* at 526.

pool in which women are underrepresented,[84] a white can challenge a jury selected from a pool in which blacks are underrepresented,[85] and so forth.

The fair-cross-section doctrine, as applied to jury-pool selection procedures, has engendered a considerable amount of litigation in its own right.[86] Applying that doctrine to the petit jury, however, would cause such theoretical incongruities and problems that litigation would be multiplied. For example, under a sixth amendment analysis, the defendant is entitled to a jury pool selected from a representative cross section of the community. Significant underrepresentation of a cognizable group in the jury pool is enough to shift the burden of proof to the state. The state must then prove that its selection methods are fair and non-discriminatory.[87] Statistical tests formulated by the courts in this area would be meaningless in the context of the small group of persons which comprises the petit jury.[88] A party's exercise of one challenge could entirely eliminate from the jury representation of a cognizable group in the community.[89] This alone would shift the burden of proof to the party exercising the challenge under traditional sixth

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84. *Id.*

85. *Id.* (citing Peters v. Kiff, 407 U.S. 493 (1972)).

86. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977); Duncan v. Louisiana, 391 U.S. 145 (1986); Hernandez v. Texas, 347 U.S. 475 (1954).

87. In *Castaneda*, the Supreme Court noted that "[w]hile the earlier cases involved absolute exclusion of an identifiable group, later cases established the principle that substantial underrepresentation of the group constitutes a constitutional violation as well, if it results from purposeful discrimination." *Id.* at 493. The Court next set forth its required degree of proof: "[T]he degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as jurors, *over a significant period of time.*" *Id.* at 494 (emphasis added).

The Court concluded by noting at what point the burden to rebut a prima facie case shifts to the state:

> [A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Id. at 494-95 (citation omitted).

88. *Id.* at 495.

89. For an illustrative case, see Commonwealth v. DiMatteo, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981). The defendant's peremptory challenge to the only black person on the venire was dissallowed because, "except for her race, the juror's background (e.g., age, occupation) was consistent with other jurors to whom the defense had signified no objection." *Id.* at 551, 427 N.E.2d at 757. The judge was skeptical of the reasons advanced by defendant's counsel, including his concerns about the way the juror looked at his client. Although the judge acknowledged that some of the reasons advanced were "credible", he nonetheless "found [that] they were insufficient and denied the challenge." *Id.* at 552, 427 N.E.2d at 757. The appellate court affirmed the conviction. *Id.* at 555, 427 N.E.2d at 759.

amendment jurisprudence. In sum, a typical fair-cross-section doctrine cannot function effectively at the petit jury level. Thus, it must have been prevalent in the minds of the Justices in *Batson* that to overrule *Swain*, an equal protection case, an equal protection analysis was necessary.

III. GROUND RULES

This Note will accept the underlying assumptions of the majority[90] holding in *Batson* as valid. None of the arguments which posit the desirability of allowing prosecutors to utilize their peremptory challenges without requisite monitoring will be advanced. Those arguments were made cogently by the State of Kentucky in *Batson*,[91] by the dissenting Justices in that case,[92] by judges in several state[93] and federal cases[94] which antedated *Batson*, and by the authors of articles which argued that the peremptory challenge system performed an important function and should not be tampered with.[95]

This Note similarly will try to avoid addressing arguments which can be applied to either side of the peremptory challenge equation. These theories include the need for lawyers to be able to base jury selection decisions on gut reactions, the difficulties inherent in having to articulate "seat-of-the-pants" instincts,[96] and the procedural morass which might follow in the wake of the adoption of the *Wheeler* rule.[97]

Instead, the focus will be on the need for a wholly different analysis when the issue is the *defendant's* use of peremptories as opposed to the *prosecutor's*. In short, the position taken here is: given the correctness of the *Batson* holding as to the prosecution, there is nothing in either the reasoning of that case or in the Constitution itself which requires that the rule, constraining the prosecution's use of peremptories, should extend to the defense as well.

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90. *See supra* notes 72-74 and accompanying text.

91. *See* Brief for Respondent, Batson v. Kentucky, 476 U.S. 79 (1986), *reprinted in* CRIM. L. SERIES No. 24 (1985/86 Term) (Congressional Information Service, Inc.).

92. Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting).

93. *See, e.g.*, 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).

94. *See, e.g.*, Roman v. Abrams, 608 F. Supp. 629 (S.D.N.Y. 1985), *rev'd*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 109 S. Ct. 1311 (1989).

95. *See, e.g.*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980).

96. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

97. *McCray*, 57 N.Y.2d at 549, 443 N.E.2d at 918-19, 457 N.Y.S.2d at 444-45; *see also* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

IV. Equal Protection and the State Action Doctrine

Batson was decided on equal protection grounds;[98] and therefore, a logical place to begin looking for the answer to the question being examined here would be with that clause of the fourteenth amendment.[99] By its express terms, the application of the fourteenth amendment is limited to state action,[100] and nothing in its terms can be read to prohibit private discrimination. Accepting this premise, however, does not lead to easy solutions to problems that occur when definitions of "private parties" and "state action" are sought.[101] Indeed, the history of state action jurisprudence suggests that it is one of those flexible constitutional constructs which allows the Court to decide cases according to their equities, without feeling too constrained by previous decisions in the area.[102]

With this caveat in mind, the question is whether a criminal defendant's use of his statutorily granted peremptory challenges in a racially discriminatory manner, or the court's subsequent excusing of the prospective jurors so challenged, meets the level of state action required for the invocation of the equal protection clause?

No bright line has ever been drawn by the Supreme Court[103] as to the level of state involvement in a challenged act necessary to invoke the equal protection clause.[104] Nevertheless, the cases contain certain guidelines which are useful in making the determination required.[105] The most basic approach is to view the challenged activity in the context of the function that the state plays in the activity.[106]

The Court has identified several situations in which discrimination with a private origin will rise to the level of state action because of the nexus between the private actor and the state.[107] These situations can be broadly categorized as follows:[108]

1) where the state delegates one of its functions as sovereign to a

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98. *Batson*, 476 U.S. at 93-100.

99. U.S. Const. amend. XIV, § 1.

100. *Id.*

101. *See* Sharrock v. Dell Buick, 45 N.Y.2d 152, 158, 379 N.E.2d 1169, 1172, 408 N.Y.S.2d 39, 42 (1978) ("Despite its outward simplicity as a concept, State action is in fact an elusive principle . . . .").

102. For a discussion of recent developments in the doctrine, see Note, *State Action and the Burger Court*, 60 Va. L. Rev. 840 (1974).

103. *Id.*

104. Marsh v. Alabama, 326 U.S. 501 (1946) (balancing approach).

105. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (state not sufficiently involved even though company was heavily regulated by state and had been granted a partial monopoly).

106. *Id.*

107. *Id.*

108. These categories were listed in *In re* Wilson, 59 N.Y.2d 461, 476-77, 452 N.E.2d 1228, 1235-36, 465 N.Y.S.2d 900, 907-08 (1983).

private entity and that entity in turn discriminates;[109]

2) where the state does not itself engage in discrimination, but facilitates it and realizes a substantial profit from it;[110] and
3) where the state has a regulatory function in the field and the effect of its regulations compels discrimination.[111]

These categories will be discussed as they relate to the situation in which a prosecutor alleges that a defendant's peremptory challenges are being used in a discriminatory manner, but the presiding judge nonetheless excuses the challenged venireperson without asking defense counsel for any reasons. In such a case, there are four actors to consider in a search for state action: the legislature which passed the statute allowing the challenges;[112] the defendant; the defendant's counsel,[113] who for purposes here will be deemed a public defender paid by the state;[114] and the presiding judge.

Applying the functional analysis, the first question is whether the statute granting peremptory challenges delegates to the defendant a role which is "traditionally exclusively reserved to the State."[115] This is clearly not the case because, as has already been noted,[116] a criminal defendant's use of peremptory challenges has a long tradition in its

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109. Evans v. Newton, 382 U.S. 296 (1966) (delegation of state functions where a will required white board of managers to control whites-only park formed from land willed in trust to mayor and city council); *see also* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968); Terry v. Adams, 344 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); *Wilson*, 59 N.Y.2d at 461, 452 N.E.2d at 1228, 465 N.Y.S.2d at 900.

110. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state action where parking authority, an agent of state, profited from leasing space in its building to segregated restaurant).

111. Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (no state action where bailor sold goods pursuant to U.C.C. § 7-210; statute merely permits the sale, it does not compel it).

112.

> Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:
> "MR. NIEHAUS: . . . [t]here is no state action involved where the defendant is exercising his peremptory challenge.
> "QUESTION: But there might be under an equal protection challenge if it is the *state system* that allows that kind of a strike.
> "MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question . . . ."

Batson v. Kentucky, 476 U.S. 79, 114-15 (1986) (Burger, C.J., dissenting) (citation omitted) (emphasis added).

113. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (fourteenth amendment requires appointment of counsel for indigent criminal defendant).

114. The situation is skewed by making the attorney a public defender.

115. *Flagg Bros.*, 436 U.S. at 157; *see also* Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

116. *See supra* text accompanying notes 8-19.

own right. If the question were whether jury selection in and of itself is a sovereign activity, the answer would be the same. This is because of the distinction between the selection of the jury pool,[117] which is a state function,[118] and that aspect of voir dire conducted by the defendant as an individual which is clearly not a state function.

The argument that but for the statute granting peremptory challenges the defendant would not have had the opportunity to discriminate, and therefore his actions can be attributed to the state, is incongruous[119] because the logic in that contention would make almost every event that takes place during a trial state action.[120] For example, if a defendant were sent to prison based on the perjured testimony of a private party which the prosecution presented in good faith, the defendant could argue that state action was responsible for his wrongful imprisonment because, but for the state's rules on evidence, the witness would not have been in a position to perjure himself.

Indeed, the difficulty inherent in the attempt to attribute the actions of a criminal defendant to the state permeates every step of the analysis. Thus, there is no logical way to maintain that the state is in some way profiting from the discrimination which the defendant engaged in, or that the state is compelling[121] the defendant to discriminate, since there is no requirement that he use any of his peremptories.

For fourteenth amendment purposes, the public defender's actions are more consonant with the notion that he is "standing in the shoes of the state." However, from a case law perspective, the question is made easier by the Supreme Court's decision in *Polk County v. Dodson*,[122] which specifically rejected the theory that a public defender, employed and appointed by the state,[123] can be considered a state actor "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."[124]

In *Polk*, a prisoner brought a section 1983[125] action against a pub-

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117. *See supra* text accompanying notes 79-85.

118. *Id.*

119. Amicus Curiae Brief for Elizabeth Holtzman, District Attorney, Kings County, New York, Batson v. Kentucky, 476 U.S. 79 (1986), *reprinted in* 17 CRIM. L. SERIES No. 24, at 161 (1985/1986 Term) (Congressional Information Service, Inc.).

120. *Id.*

121. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of a racially restrictive covenant violates fourteenth amendment).

122. 454 U.S. 312 (1981) (eight to one decision).

123. *Id.* at 314.

124. *Id.* at 325.

125. 42 U.S.C. § 1983 (1982) provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

lic defender, alleging that she failed to adequately represent him.[126] The district court dismissed the complaint for lack of state action,[127] but the court of appeals reversed,[128] citing as the "dispositive point" the fact that the public defender was paid by that county and that the county was a political subdivision of the state.[129] In reversing, the Court stated:

> Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are "officers of the court." But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of § 1983. In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client." This is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.[130]

The Court then went on to reject the view advanced by Dodson that the question should be decided on the basis of the public defender's employment relation with the state and not her function within the judicial system.[131] In holding that a public defender's status for section 1983 purposes did not differ materially from other defense attorneys, the Court listed two factors which it felt mandated the result (1) the fact that the public defender is not subject to the same type of administrative direction as other state employees,[132] and (2) the fact that the Constitution mandates the state "to respect the professional independence of the public defenders whom it engages."[133]

The decision in *Polk* is especially significant in that it was the first case in which the fact that the defendant was employed by the state,

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by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

126. *Polk*, 454 U.S. at 314.

127. 483 F. Supp. 347 (S.D. Iowa 1979).

128. 628 F.2d 1104 (8th Cir. 1980).

129. *Id.* at 1106.

130. 454 U.S. at 318-19 (Powell, J.) (footnote omitted) (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).

131. *Id.*

132. *Id.* at 320.

133. *Id.* at 321-22.

and was concededly performing routine tasks associated with that employment, was not dispositive of the state action issue.[134] In other words, the Court carved out an exception to the state action doctrine, apparently in recognition of the unique role that public defenders play in the criminal justice system.

Finally, we turn our attention to the presiding judge in our search for action which can be fairly attributed to the state. Any discussion of the circumstances in which judicial activity will raise what would have been private discrimination to the level of state action must begin with the restrictive covenants case, *Shelley v. Kraemer*.[135] In *Shelley*, the Court held that judicial enforcement of a racially restrictive covenant violated the fourteenth amendment. It is important, however, to look at the facts of the case and its subsequent construction by the Court. The case involved a willing seller of property that was covered by the restrictive covenant to a willing buyer.[136] Neighbors, who were also parties to the covenant, sought to have the covenant enforced in court under typical property concepts.[137] The state court enforced the covenant thereby *compelling* the willing seller to discriminate against his will.[138] It is this element of compulsion which the later cases have found to be the key factor when they have examined the question of colorable judicial action. Mere judicial administration of an otherwise private choice does not rise to the level of state action because the state is not compelling the private party in the first instance to discriminate against someone against his will.[139] Once the implications of this theory are grasped, it becomes clear that the judge in our case is not required to take affirmative steps to eliminate what he perceives to be discrimination.[140] As long as the state has not compelled the discrimination, or substantially profited from it,[141] the action will not rise to the level of state activity. The analysis is the same whether the party challenging the action of the defendant is the prosecutor or a prospective juror excluded because of his race.[142] No matter how dis-

134. *Id.* at 320.

135. 334 U.S. 1 (1948).

136. *Id.* at 5-6, 19.

137. *Id.* at 4.

138. *Id.* at 1.

139. *Id.* at 19.

140. *See In re* Wilson, 59 N.Y.2d 461, 479-80, 452 N.E.2d 1128, 1237, 465 N.Y.S.2d 900, 909 (1983) (surrogate court has no affirmative obligation to prohibit administration of private charitable trusts financing education of male students only because trust law neither encourages nor affirmatively promotes sex discrimination).

141. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

142. While the constitutional analysis of the state action requirement is the same in either case, difficult issues of standing are raised if a prosecutor brings an action asserting the rights of the excluded juror. This was a key question presented in Holtzman v. Supreme Court, 139 Misc. 2d 109, 526 N.Y.S.2d 892 (Sup. Ct. 1988), *aff'd*, 545 N.Y.S.2d

tasteful the defendant's discriminatory use of the peremptory challenge may be to the judge, and to society as a whole, there is simply nothing in the Constitution which protects one individual from the private discrimination of another.[143]

V. THE PUBLIC'S RIGHT TO A FAIR-CROSS-SECTION TRIAL UNDER THE SIXTH AMENDMENT

It is conceded here that the public[144] has an interest[145] in the sixth amendment guarantee of fair trials and that one of the attributes of a fair trial is a jury selected from a fair-cross-section of the community.[146] This public interest, however, does not give rise to any constitutional rights on the part of the public.[147] Under the state action doctrine already discussed, the public would have no cause of action against any of the actors involved, even if there was a recognized right.[148] Leaving aside the lack of state action, it is imperative that the sixth amendment be viewed in the light of its historical function of preventing prosecutorial abuse of the criminal justice system.[149]

A prosecutor employed by the state has a markedly different function from his counterparts in other areas of the law.[150] The prosecutor is not working on behalf of an individual client but on behalf of the state. It is in the state's interest that none of its citizens be wrongfully convicted of a crime. Therefore, the prosecutor must seek to serve that state interest by seeing that in all cases justice is done.[151] Over-zealousness on the part of the prosecutor is to be guarded against, lest in her

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46 (App. Div. 1989). In *Holtzman*, a prosecutor was denied standing to sue as a representative of excluded potential jurors as those excluded were not barred from bringing an action on their own behalf. *Id.* at 114, 526 N.Y.S.2d at 895.

143. *See Shelley*, 334 U.S. at 13 (fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful.").

144. *Batson* itself purports in part to address broader public concerns. *See* 476 U.S. 79, 98-99 (1986).

145. To the extent that any member of the public may at some point become entangled in the criminal justice system, it can be argued that the sixth amendment protects the *present* rights of criminal defendants and the future rights of all.

146. *See* Hernandez v. Texas, 347 U.S. 475 (1954).

147. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) ("Recognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public.").

148. *Id.*

149. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.") (citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)).

150. *See* STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION Standard 3-1.1(c) (1980) ("The duty of the prosecutor is to seek justice, not merely to convict.").

151. *Id.*

zeal to convict, the ends of justice are thwarted. These precepts are not just empty phrases; instead they deserve and have received constitutional protection.[152]

The defense attorney, however, is not saddled with the constraints of overriding justice. The public's interest in a fair trial is not her present interest except to the extent that it is congruent with her client's interest.

Guarantees under the sixth amendment are specifically made applicable to the accused.[153] The federal government, and the states, by incorporation of the sixth amendment[154] through the fourteenth, may not deny a criminal defendant any of the rights guaranteed by the sixth amendment. Of course, the guarantee of an impartial jury does not mean a jury partial to the accused.[155] Stating the obvious, however, does not answer the question being examined here. The question is not whether the sixth amendment guarantees the defendant a partial jury, but whether it guarantees the government an impartial one.[156] If the sixth amendment can be said to extend its guarantees to the state, it seems odd that most jurisdictions allow the defendant to unilaterally waive a jury altogether.[157] A right waivable at the option of your adversary is a strange right indeed. The response to this argument could be that if the defendant elects to proceed by a jury trial, it must be an impartial one. This argument proves too much. It posits that the sixth amendment's constitutionally granted minimum of an impartial jury is also the constitutionally permitted maximum, and that if Congress or a state grants the defendant more than the constitutionally required minimum, the Constitution has been violated. This turns typical constitutional jurisprudence on its head,[158] yet the Sixth Circuit reached precisely this result in *Booker v. Jabe*.[159]

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152. *See, e.g., Taylor*, 419 U.S. at 530; *Duncan*, 391 U.S. at 155-56.

153. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. CONST. amend. VI.

154. *Duncan*, 391 U.S. 145 (1968).

155. Booker v. Jabe, 775 F.2d 762, 772 (6th Cir. 1985), *vacated and remanded sub nom.* Michigan v. Booker, 478 U.S. 1001, *reinstated sub nom.* Booker v. Jabe, 801 F.2d 871 (6th Cir), *cert. denied*, 479 U.S. 1046 (1986).

156. The sixth amendment has long been viewed as a vehicle to protect the accused from the arbitrary exercise of governmental power. *See, e.g., Taylor*, 419 U.S. at 530; *Duncan*, 391 U.S. at 155-56.

157. *See, e.g.*, N.Y. CRIM. PROC. LAW § 320.10 (McKinney 1982) (subject to approval by the *court*, defendant may waive jury trial except in the case of first degree murder).

158. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978) (rights granted by the Federal Constitution are a floor and not a ceiling).

159. 775 F.2d at 772 ("Although the Sixth Amendment by its terms protects the right of 'the accused' to trial by an impartial jury, it does not guarantee a criminal defendant the right to trial before a jury that is partial to his cause.").

Booker is an important case in this context for two reasons. First, it is the only case which applied restrictions on the use of peremptory challenges by criminal defendants based upon a construction of the Constitution.[160] Second, its subsequent history provides at least some material on which to base speculation as to how the Supreme Court views the analysis engaged in by the *Booker* court.

After concluding that "a prosecutor's systematic use of peremptory challenges to excuse members of a cognizable group from a criminal petit jury offends the Sixth Amendment's protection of the defendant's interest in a fair trial and the public's interest in the integrity of the judicial process,"[161] the court continued:

> Although the Sixth Amendment by its terms protects the right of "the accused" to trial by an impartial jury, it does not guarantee a criminal defendant the right to trial before a jury that is partial to his cause. *The spectacle* of a defense counsel systematically excusing potential jurors because of their race or other shared group identity while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury. Therefore, we hold that under the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury.[162]

Significantly, the *Booker* court fails to mention that in order for a federal court to invoke its remedial powers it must find a constitutional right and a violation of that right.[163] A finding of a "spectacle" is insufficient. Furthermore, since the sixth amendment was incorporated against the states through the fourteenth amendment,[164] and *Booker* involved a state proceeding,[165] there must be a finding of state action even if the state does have a right to an impartial jury. In other words, if the state has the right, it must also be the one to violate it. In actuality, the *Booker* court assumed that the Michigan legislature would not have granted unrestricted peremptories to the defendant unless the prosecutor had the same advantage.

This questionable decision is made somewhat more interesting by

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160. Previously, restrictions on defendants' uses of peremptories were based on state constitutions. *See supra* text accompanying notes 51-56.

161. 775 F.2d at 772.

162. *Id.* (emphasis added).

163. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("[I]t is important to remember that judicial power may be exercised only on the basis of a constitutional violation.").

164. Duncan v. Louisiana, 391 U.S. 145 (1968).

165. 775 F.2d at 763.

the fact that the Supreme Court vacated the decision for reconsideration in light of *Batson*.[166] The Sixth Circuit stated that nothing in *Batson* was inconsistent with its holding and reinstated the decision.[167] The Supreme Court then denied certiorari,[168] which leads one to wonder whether the Court is willing to accept a sixth amendment analysis of the problems raised in *Batson*. The use of the sixth amendment as a sword against criminal defendants, instead of as a shield against the state's power, carries with it implications that should not go unconsidered by any court.

The guarantee of an impartial jury may be interpreted by the defendant to mean a jury which *he perceives* to be impartial. Of course, this is not to say that defendants are unrestricted in their courtroom activities. The point is that they are under no obligation to police themselves when the state is attempting to convict them. Indeed, attorneys would be violating their constitutional obligation of providing effective counsel if their personal concepts of justice were allowed to interfere with their decisions of what would be in the client's best interest.[169]

As will be discussed,[170] there are adequate remedies to correct any perceived abuses in the system. The incongruity, however, of holding criminal defendants to the public interest standard at their own expense is certainly apparent. Once it is granted that the defendant has no constitutional obligation to be fair, it must follow that the lawyer, who represents the defendant's viewpoint, also is immune from constitutional scrutiny when exercising peremptories on the defendant's behalf.

Any other result would force the attorney into a conflict of interest with his client. It would be tantamount to instructing the attorney that he is to be a forceful advocate for his client in some areas but not in others. Once this road is started on, defendants truly will have reason to regard their attorneys as just another cog in the state's machinery of conviction and imprisonment.[171]

Certainly, an argument can be made that no such result would fol-

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166. 478 U.S. 1001 (1986).

167. Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986).

168. 479 U.S. 1046 (1986).

169. Imposing on defense lawyers an additional duty to the public will only compound the problems already present in the field of lawyer-client trust. It is no secret that many criminal defendants already believe their lawyers are working on behalf of the state. The notion is particularly acute when the lawyer is a public defender or Legal Aid attorney. *See* J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 106-15 (1972) [hereinafter CASPER] (interviews with criminal defendants being prosecuted by Connecticut).

170. *See infra* text accompanying notes 174-76.

171. CASPER, *supra* note 169.

low from a finding that the discriminatory use of peremptories was prohibited. After all, three states have apparently survived with their criminal justice systems intact after just such a finding.[172] The problem, however, is not limited to peremptory challenges, it inheres in the consequences of what such a holding would entail. A constitutional decision based on the theory that the actions of a defendant or his attorney constitute state action for purposes of the fourteenth amendment would create far more problems than those posed by abuses made possible by the peremptory challenge system. It is to the elimination of these abuses that this Note now turns.

VI. Is the System Abused? A Doubt and Some Suggestions

Is the peremptory challenge system actually abused by criminal defendants and their attorneys? The answer depends on the perspective that is brought to bear on the question. What is a criminal defendant saying to society when he uses his peremptories to exclude members of a certain race from his jury? Is he saying that the prospective jurors are inferior? Is not the defendant really saying, "I am just not sure that these people are not prejudiced against *me*, whatever my feelings are towards them?" Although *Batson* says that the state cannot indulge in any such generalizations,[173] it does not necessarily follow that the defendant should not be allowed such an indulgence.

Even if it is granted that the discriminatory use of peremptory challenges is undesirable, there is still no reason to undermine the crucial constitutional doctrines discussed above. A remedy for any *real abuses* is readily available through legislative enactment of statutes which would either limit the number of peremptories available to both parties or would apply the *Batson* rule to criminal defendants.[174]

The first alternative would make it more difficult to exclude whole groups from the petit jury by forcing the defendant and the prosecutor to be more selective in their use of the challenges. At the same time, it would retain the peremptory nature of the challenge for the defendant by allowing him to continue to exercise his fewer challenges for any or no reason. The prosecutor would still be subject to the strictures of *Batson*, but the asymmetry would presumably be minimized in most cases because neither party would want to waste their challenges by

172. *See supra* text accompanying notes 43-56.

173. Batson v. Kentucky, 476 U.S. 79, 89 (1986). *Contra id.* at 112 (Burger, C.J., dissenting).

174. *See* S. 953, A. 1677, 210th Sess., New York (1987) ("Where the court determines that a party has engaged in purposeful discrimination against prospective jurors in the exercise of peremptory challenges, it shall seat the juror, discharge the jury panel or fashion any other appropriate remedy.").

using them ineffectively.[175]

The second approach would simply apply the *Batson* rule to criminal defendants. This would avoid the troublesome implications inherent in a judicial holding that a criminal defendant's exercise of his peremptory challenges constitutes state action. At the same time, it would restore symmetry to the system without resorting to complete abolition of peremptory challenges, a course advocated forcefully by Justice Marshall.[176]

Having noted the possible solutions which are available to state legislatures, I would recommend that no action be taken until it is firmly established that some type of reform is indeed necessary. The criminal justice system, after all, abounds with examples wherein the burdens on the prosecution and defense are less than perfect mirror images.[177] Until there is some evidence that discriminatory use of peremptory challenges by criminal defendants actually results in unfair trials, the legislatures should leave the present system intact.

VII. CONCLUSION

Any problems which are alleged to exist in the peremptory challenge system are amenable to correction through legislative action. The courts should leave the remedy of such problems to the state legislatures rather than developing novel constitutional theories, the implications of which are far from clear.

Harry Zirlin

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175. *See* Roman v. Abrams, 608 F. Supp. 629, 639 (S.D.N.Y. 1985) ("[A]n attorney would be foolish to waste his not unlimited challenges to exclude persons solely on the basis of race, since this would render him helpless to challenge other jurors who might find it more difficult to accept that attorney's view of the case."), *rev'd*, 822 F.2d 214 (2d Cir. 1987) (where jury actually selected represented a fair-cross-section of community in which trial took place, habeas corpus petitioner not entitled to relief due to state's improper use of peremptory challenges based soley on race), *cert. denied*, 109 S. Ct. 1311 (1989). Judge Brieant made the quoted statement in the context of a case in which each side was entitled to fifteen peremptory challenges. 608 F. Supp. at 632. *Roman* exemplifies an opinion written by a judge constrained to follow what he believes to be terrible precedent, namely, the Second Circuit's decision in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986). Judge Brieant's opinion also contains a categorical statement that the use of peremptory challenges by a defendant is not state action. 608 F. Supp. at 633.

176. Batson v. Kentucky, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring) ("We can maintain [the] balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and *by allowing the States to eliminate the defendant's peremptories as well.*") (emphasis added). Note that Justice Marshall implies that the Supreme Court would not have the power to ban the defendant's peremptory.

177. The prosecution's burden of proof is an obvious example.