St. John's Law Review

Volume 55
Number 4 *Volume 55, Summer 1981, Number 4*

Article 8

July 2012

CPL § 270.25: Prosecutor's Use of Peremptory Challenges for Sole Purpose of Excluding Blacks from Jury Violates Criminal Defendant's Right to Trial by an Impartial Jury

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claimants should not be allowed to do indirectly what they cannot do directly.[63]

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CRIMINAL PROCEDURE LAW

CPL § 270.25: Prosecutor's use of peremptory challenges for sole purpose of excluding blacks from jury violates criminal defendant's right to trial by an impartial jury

CPL section 270.25 requires a court to exclude from a jury a prospective juror against whom a peremptory challenge has been exercised.[64] Since no reason need be given to exercise a peremptory

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[63] Clearly, were as-of-right amendments to be permitted in all instances, claimants would be well advised to refrain from interposing claims which are prejudicial to the state until *after* the original late filing had been subjected to section 10(6) scrutiny. Irrespective of whether or under what restrictions amendments to late claims may be interposed, it is suggested that the practitioner should submit all contemplated actions in the original filing. Such an approach would be sensible in light of Jones v. State, 51 N.Y.2d 943, 416 N.E.2d 1050, 435 N.Y.S.2d 715 (1980), wherein the Court of Appeals refused to overturn a supreme court decision which held that a claimant may not amend a technical defect in a late claim. *Id.* at 994, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715. Indeed, the distinction between an amendment to a defective late filing (barred by *Jones* on a jurisdictional theory) and an amendment to a valid late filing (permitted by leave of court in *Iazzetta*) could disappear should the courts continue to embrace technical pleading requirements. *See, e.g.*, McGaughy v. State, 55 App. Div. 2d 823, 390 N.Y.S.2d 301 (4th Dep't 1976); Estate of Johnson v. State, 49 App. Div. 2d 136, 373 N.Y.S.2d 671 (3d Dep't 1975); Peterson v. State, 84 Misc. 2d 296, 374 N.Y.S.2d 1002 (Ct. Cl. 1975).

[64] CPL § 270.25(1) provides that "[a] peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." CPL § 270.25(1) (1971). Historically, the peremptory challenge existed only for the benefit and protection of the defendant. People v. McQuade, 110 N.Y. 284, 294, 18 N.E. 156, 159 (1888). Blackstone described the peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." 4 W. BLACKSTONE, COMMENTARIES 346 (1st ed. 1769). *But cf.* Swain v. Alabama, 380 U.S. 202, 213 (1965) (suggesting peremptory challenges could be exercised by both sides at common law).

In New York, such challenges were not granted to the prosecution until the middle of the nineteenth century. J. VAN DYKE, JURY SELECTION PROCEDURES 148-49 (1977). Today, peremptory challenges are a statutory right and can be exercised by the prosecution and the defendant in all state and federal courts. *Id.* at 281-84; FED. R. CRIM. P. 24(b). Although the use of a peremptory challenge is a substantial right given a defendant, People v. McQuade, 110 N.Y. 284, 293, 18 N.E. 156, 158 (1888); People v. Hamlin, 9 App. Div. 2d 173, 174, 192 N.Y.S.2d 870, 871 (3d Dep't 1959), it does not rise to the level of a constitutional right, Swain v. Alabama, 380 U.S. 202, 219 (1965), and "rests entirely with the Legislature." People v. Lobel, 298 N.Y. 243, 257, 82 N.E.2d 145, 152 (1948); People v. Doran, 246 N.Y. 409, 426, 159 N.E. 379, 385 (1927); People v. King, 47 App. Div. 2d 594, 595, 363 N.Y.S.2d 682,

challenge,[65] it has been used by prosecutors to exclude blacks from the petit jury despite the most obvious of discriminatory motives.[66] This practice almost invariably has been upheld notwithstanding the constitutional requirement that a criminal defendant be tried by an impartial jury drawn from a representative cross-section of the community.[67] Recently, however, in *People v. Thompson*,[68] the

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683 (4th Dep't 1975).

[65] The chief characteristic of the peremptory challenge is that it requires no explanation and permits no inquiry as to the reason for its use. Swain v. Alabama, 380 U.S. 202, 220 (1965). Blackstone defined the peremptory challenge as an "arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all." 4 W. BLACKSTONE, COMMENTARIES 346 (1st ed. 1769).

Additionally, the aim of the peremptory challenge is to remove "extremes of partiality on both sides [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." Swain v. Alabama, 380 U.S. 202, 219 (1965). The peremptory challenge permits a prosecutor or defense counsel to eliminate jurors whom they believe will not be favorable to their case and whom could not be shown to be actually or impliedly biased and thus excusable for cause. Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1774 (1979). The challenge often is used to excuse a juror who may have become hostile due to vigorous questioning at the voir dire. *See id.*; Comment, People v. Wheeler: *California's Answer to Misuse of the Peremptory Challenge*, 16 SAN DIEGO L. REV. 897, 903 (1979).

[66] Because its use is unrestrained, the peremptory challenge is the most effective tool of a prosecutor seeking to compose a "favorable" jury. If the prosecutor wishes to keep blacks off a jury, he may do so by peremptorily challenging each one, despite the most obvious of discriminatory motives. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 151-52 (1977); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283-84 (1968); Comment, *The Prosecutor's Exercise of the Peremptory Challenge To Exclude Nonwhite Jurors: A Valued Common Law Privilege In Conflict With The Equal Protection Clause*, 46 U. CIN. L. REV. 554, 559 (1977); Comment, *The Prohibition of Group-Based Stereotypes in Jury Selection Procedures*, 25 VILL. L. REV. 339, 339 (1980).

[67] The sixth amendment provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. The sixth amendment has been made applicable to the states through the fourteenth amendment's due process clause. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Additionally, the New York State Constitution reinforces the defendant's right to trial by an impartial jury. *See* Stokes v. People, 53 N.Y. 164, 171 (1873); N.Y. CIV. RIGHTS LAW § 12 (McKinney 1976).

Since the Supreme Court has declared that a prosecutor is presumed to exercise the challenges to obtain an impartial jury, the use of peremptory challenges to eliminate blacks from the petit jury traditionally has been upheld as constitutional. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 221-22 (1965); United States v. Nelson, 529 F.2d 40, 43 (8th Cir.), *cert. denied*, 426 U.S. 922 (1976); Hall v. United States, 168 F.2d 161, 164 (D.C. Cir.), *cert. denied*, 334 U.S. 853 (1948); United States *ex rel.* Dixon v. Cavell, 284 F. Supp. 535, 537 (E.D. Pa. 1968); Watts v. State, 53 Ala. App. 518, 301 So. 2d 280, 283 (Crim. App. 1974); People v. King, 54 Ill. 2d 291, 296 N.E.2d 731, 735 (1973).

The Supreme Court has construed the sixth and fourteenth amendments to afford a state criminal defendant the right to a jury drawn from a fair cross-section of the commu-

Appellate Division, Second Department, held that a prosecutor's use of peremptory challenges for the sole purpose of excluding blacks from a jury violates the criminal defendant's right to trial by an impartial jury.[69]

At the trial of a black defendant,[70] the prosecutor employed all twelve of his available peremptory challenges against prospective black jurors.[71] After the jurors were sworn, the defendant moved for a mistrial on the ground that the prosecutor had used his peremptory challenges systematically to exclude blacks from the jury panel.[72] Upon denial of the motion,[73] the all white jury convicted the defendant of criminal possession of stolen property.[74]

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nity. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); People v. Parks, 41 N.Y.2d 36, 42, 359 N.E.2d 358, 364, 390 N.Y.S.2d 848, 854 (1976). The Constitution, however, does not require that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Taylor v. Louisiana, 419 U.S. at 538. Rather, it mandates that the jury venires or pools of names from which the jurors are selected must not systematically exclude cognizable groups from the community. *Id.*

[68] 79 App. Div. 2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981).

[69] *Id.* at 88, 435 N.Y.S.2d at 741. The *Thompson* court based its decision on the criminal defendant's right to an impartial jury as derived from the New York State Constitution. *Id.* at 96, 435 N.Y.S.2d at 746. The constitution provides that "[n]o member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers . . . ." N.Y. CONST. Art. I, § 1. The defendant's right to an impartial jury explicitly is provided for in section 12 of the Civil Rights Law which provides that "[i]n all criminal prosecutions, the accused has a right to a . . . trial, by an impartial jury." N.Y. CIV. RIGHTS LAW § 12 (McKinney 1976). *See also* Stokes v. People, 53 N.Y. 164, 171 (1873).

[70] The defendant was charged with criminal possession of stolen property in the first degree and grand larceny in the second degree as a result of an automobile theft. 79 App. Div. 2d at 88, 435 N.Y.S.2d at 742.

[71] *Id.* Pursuant to CPL 270.25(2)(c), the prosecution and the defendant were each authorized to use 10 peremptory challenges for "regular" jurors and two for each alternate juror since the crime charged was a class D felony. The statute increases the number of peremptory challenges available to each side for "regular" jurors as the severity of the highest crime charged increases. Thus, each party would be entitled to 20 challenges if the highest crime charged were a class A felony, 15 if the highest crime charged were a class B or class C felony, and 10 in all other cases. CPL § 270.25(2) (1971). In the instant case, the prosecutor's use of all his peremptory challenges to excuse prospective black jurors resulted in an all white jury. People v. Thompson, 79 App. Div. 2d at 88 n.3, 435 N.Y.S.2d at 742 n.3.

[72] 79 App. Div. 2d at 88, 435 N.Y.S.2d at 742.

[73] The trial court concluded that although the Assistant District Attorney indeed had purposely excluded blacks from the jury who would have been "fair and impartial," "the law [was] clear" that the motivation underlying the exercise of peremptory challenges was not subject to question or scrutiny. *Id.* at 89, 435 N.Y.S.2d at 742.

[74] *Id.* at 89-90, 435 N.Y.S.2d at 743. After the guilty verdict was rendered, the defense counsel made a motion to set aside the verdict on the same ground as the motion for mistrial. The Assistant District Attorney responded to the motion by asserting that the constitution permitted the People to systematically exclude members of a group without provid-

On appeal, the Appellate Division, Second Department, held that because the defendant had established a substantial likelihood that race had formed the sole basis for the prosecutor's use of his peremptory challenges, the trial court committed reversible error in declining to question the prosecutor's motives.[75] Asserting that the court is not bound by interpretations of the federal Constitution when construing its own state constitution,[76] Justice Margett, writing for the majority,[77] refused to follow *Swain v. Alabama*,[78] a Supreme Court decision which held that the equal protection clause does not mandate an inquiry into the prosecutor's reasons for using peremptory challenges to eliminate blacks from a jury.[79] Rather, the court relied upon *Taylor v. Louisiana*,[80] in

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ing any explanation. Denying the motion, the trial judge reiterated emphatically that he was bound by the existing law to hold that the prosecutor's actions were not unlawful. At this point the Assistant District Attorney stated, for the first time, that it was not his intent to systematically exclude blacks from the jury. *Id.* at 90, 435 N.Y.S.2d at 743.

[75] *Id.* at 111, 435 N.Y.S.2d at 755.

[76] *Id.* at 92, 435 N.Y.S.2d at 744. A state may provide more stringent protections for defendants than are afforded to federal defendants. *Id.*; *see* Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1194, 424 N.Y.S.2d 168, 174-75 (1979), *cert. denied*, 446 U.S. 984 (1980); People v. Isaacson, 44 N.Y.2d 511, 519, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718 (1978); *see, e.g.*, People v. Elwell, 50 N.Y.2d 231, 235, 406 N.E.2d 471, 473, 428 N.Y.S.2d 655, 657 (1980); People v. Hobson, 39 N.Y.2d 479, 483-84, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976). *See also* Comment, *The Prohibition of Group-Based Stereotypes in Jury Selection Procedures*, 25 VILL. L. REV. 339, 355 (1980).

The *Thompson* court noted that *Swain* was decided upon equal protection grounds and not upon the sixth amendment, which is the federal provision corresponding to the state constitutional guarantee at issue. 79 App. Div. 2d at 93, 435 N.Y.S.2d at 745.

[77] Justices Hopkins and Gibbons joined Justice Margett in the majority. Justice Titone concurred in the dissent authored by Justice Mangano.

[78] 380 U.S. 202 (1965).

[79] 79 App. Div. 2d at 91-92, 435 N.Y.S.2d at 744. In *Swain* v. *Alabama*, the prosecutor peremptorily challenged all six black prospective jurors in the trial of a black defendant. 380 U.S. at 210. The Court rejected the defendant's assertion that the prosecutor's action infringed upon his rights under the equal protection clause because to hold otherwise would "entail a radical change in the nature and operation of the challenge." *Id.* at 221-22. The Court noted that the peremptory challenge often legitimately can be "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" and thus declared that an inquiry into the prosecutor's reasons in a particular case is not constitutionally mandated. *Id.* at 221. The Court further stated that in any given case the prosecutor is presumed to be using the challenges to "obtain a fair and impartial jury." *Id.* at 222. Although the presumption cannot be overcome with proof that potential jurors were challenged in a particular case because they were black, the Court noted in dictum that it may be rebutted when the defendant demonstrates that the prosecutor systematically has used the challenges to exclude blacks in case after case. *Id.* at 223-24.

To date, it has been virtually impossible for any defendant challenging a prosecutor's use of peremptories to meet the "systematic exclusion" test of *Swain*. Despite numerous

which the Supreme Court held that the systematic exclusion of women from the jury venire violates a criminal defendant's sixth amendment right to an impartial jury drawn from a fair cross-section of the community.[81] The *Thompson* court reasoned that this principle should be extended to apply to the selection of petit jurors because the exclusion of cognizable groups from the petit jury and from the jury venire has the same discriminatory impact.[82]

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charges of discrimination, no federal court has ever found the *Swain* presumption to be overcome. Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1770 (1979); *see, e.g.*, United States v. Newman, 549 F.2d 240, 246 (2d Cir. 1977); United States v. Nelson, 529 F.2d 40, 42 (8th Cir.), *cert. denied*, 426 U.S. 922 (1976); United States v. Carlton, 456 F.2d 207, 208 (5th Cir. 1972). Only one state court has held that the *Swain* burden of proof was met. *See* State v. Brown, 371 So. 2d 751, 754 (La. 1979).

The *Swain* decision has been criticized because it allegedly has perpetuated white control of the Southern judicial machinery and has violated the equal protection clause's prohibition against exclusion of blacks from the jury pool. *See, e.g.*, J. VAN DYKE, JURY SELECTION PROCEDURES 56-58 (1977); Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and his Peerless Jury*, 4 HOUS. L. REV. 448 (1966); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554 (1977); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

[80] 419 U.S. 522 (1975).

[81] 79 App. Div. 2d at 100, 435 N.Y.S.2d at 749. In *Taylor*, a state statute excluded women from jury service unless the woman filed a written statement of her desire to serve as a juror. 419 U.S. at 523. Consequently, virtually all women were excluded from the jury venire. *See id.* at 524. The defendant appealed his conviction by an all male jury. Holding that the exclusion of women had unconstitutionally deprived the defendant of a proper jury, the Supreme Court reversed the defendant's conviction. The Court declared 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." *Id.* at 530-31 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). Furthermore, the Court stated that large distinctive groups or identifiable segments of the community cannot constitutionally be excluded from the jury pool. *Id.* at 530. Thus, it appears that the *Taylor* Court did not intend that the application of its decision be limited solely to the systematic exclusion of women from jury service.

[82] 79 App. Div. 2d at 101, 435 N.Y.S.2d at 749. Whether it occurs with respect to the jury venire or the petit jury, the systematic exclusion of cognizable groups prevents the achievement of an impartial jury and the rightful participation of all races in the trial process. *Id.* The *Thompson* court emphasized the importance of attaining a "diffused impartiality" which is an element of an "impartial jury." *See* Taylor v. Louisiana, 419 U.S. at 530. When a significant portion of an identifiable group is excluded from jury service, the result is to "[deprive] the jury of a perspective on human events that may have unsuspected importance in any case that may be presented," Peters v. Kiff, 407 U.S. 493, 503-04 (1972), thus preventing the achievement of "diffused impartiality." 79 App. Div. 2d at 102, 435 N.Y.S.2d at 750. Furthermore, the court contended that the state constitution may require the achievement of "diffused impartiality" through its very language. *Id.* at 103, 435, N.Y.S.2d at 750. The state constitution provides that no person shall be deprived of his rights "unless by the law of the land, or the judgment of his peers. . . ." N.Y. CONST. art. 1,

In formulating a standard for determining whether peremptory challenges had been discriminatorily employed,[83] the court stated that the prosecutor initially is presumed to be exercising the challenges in a permissible manner.[84] To rebut this presumption, the defendant must show that the excluded jurors are members of a racial group, and that there is a "substantial likelihood" that these persons were excluded solely because of their race, rather

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§ 1. The court also stated that it considered jury service by members of all racial groups as important as the attainment of "diffused impartiality," because such service "fosters the confidence of the parties and the public in our criminal justice system." 79 App. Div. 2d at 103, 435 N.Y.S.2d at 751. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1730 (1977). The *Thompson* court declared, however, that it did not mandate that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." 79 App. Div. 2d at 104, 435 N.Y.S.2d at 751 (quoting Taylor v. Louisiana, 419 U.S. at 538). *But see* 79 App. Div. 2d at 113, 435 N.Y.S.2d at 757 (Mangano, J., dissenting). The court further noted that *Taylor's* basic tenet already had been accepted by the New York courts, *see* People v. Parks, 41 N.Y.2d 36, 42, 359 N.E.2d 358, 364, 390 N.Y.S.2d 848, 854 (1976), and by the legislature. *See* 79 App. Div. 2d at 100, 435 N.Y.S.2d at 749; N.Y. JUD. LAW § 500 (McKinney Supp. 1980); Memorandum of Office of Court Administration, *reprinted in* [1977] N.Y. Laws 2617-2618 (McKinney).

[83] In determining whether peremptory challenges were made on a discriminatory basis, the *Thompson* court patterned its decision after People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). In *Wheeler*, the California Supreme Court held that under the California Constitution, the use of peremptory challenges to exclude jurors for reasons predicated solely on group bias violates the right to a jury drawn from a representative cross-section of the community. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. Ruling that the trial judge had erred in failing to consider whether the prosecutor's reasons were based exclusively on group bias, the *Wheeler* court reversed the convictions of two black defendants who had been tried by all white juries. *Id.* at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907. In addition to *Thompson*, two other state courts have approved the *Wheeler* rationale and remedy. *See* Commonwealth v. Soares, 387 N.E.2d 499, 516-18 (Mass.), *cert. denied*, 444 U.S. 881 (1979); State v. Crespin, 612 P.2d 716, 718 (N.M. 1980).

[84] 79 App. Div. 2d at 108, 435 N.Y.S.2d at 753. Several policy considerations underlie the presumption that the prosecutor is using the challenges in a constitutionally permissible manner. These include a desire to achieve impartiality, the public's interest in the efficient administration of trials and the respect traditionally accorded to counsel as officers of the court. *Id.* at 107-08, 435 N.Y.S.2d at 753.

The *Thompson* court emphasized that if the defendant believes that the prosecutor is impermissibly excluding blacks, he must make a motion for mistrial early, at the risk of waiver. The court noted that double jeopardy rarely will be threatened if the motion is timely made "since jeopardy does not attach until the entire jury has been impaneled and sworn." *Id.* at 108 n.19, 435 N.Y.S.2d at 753 n.19. Furthermore, the defendant must create a thorough and complete record in support of his assertions. *Id.* at 108, 435 N.Y.S.2d at 754. *See, e.g.*, Commonwealth v. Walker, 397 N.E.2d 1105, 1107 (1979). This should include a transcript of the relevant portions of the voir dire. Although no record of the voir dire was made in the *Thompson* case, the court noted that the uncontroverted facts and the trial judge's comments clearly established that the prosecutor's motivation was to exclude persons solely on the basis of race. 79 App. Div. 2d at 111 n.22, 435 N.Y.S.2d at 755 n.22.

than for any specific bias relating to the case.[85] If such a substantial likelihood exists,[86] the burden shifts to the prosecutor to demonstrate that the peremptory challenges were not exercised exclusively on the basis of race.[87] If the prosecutor fails to meet this burden,[88] the court must dismiss the jurors selected, quash the venire, and start the selection process once again.[89]

Writing for the dissent, Justice Mangano agreed with the majority regarding the necessity to curtail the use of racial bias as a means of excluding petit jurors from service.[90] Justice Mangano argued, however, that the majority was not justified in extending the principle underlying the prohibition of systematic exclusion from the jury venire to encompass the use of peremptory challenges to the petit jury.[91] Such drastic action, in his view, was within the

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[85] 79 App. Div. 2d at 108, 435 N.Y.S.2d at 754. The *Thompson* court noted that the types of evidence set forth in *Wheeler* are all relevant to the defendant's case. *Id.* According to *Wheeler*, at least four sets of facts will assist the defendant in rebutting the presumption that the prosecutor used the challenges in a constitutionally permissible manner: (1) if the prosecutor has excused most or all of the group members from the venire, or has used an excessive number of challenges against that group; (2) if the only characteristic the struck jurors share is membership in that group; (3) if the prosecutor did not properly examine these jurors at the voir dire or failed to question them at all; and (4) if the defendant is a member of the same group as the excluded jurors and the victim belongs to the group which comprises the majority of the remaining jurors. People v. Wheeler, 22 Cal. 3d 258, 280-81, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905-06 (1978). A significant distinction, however, is that the language of the *Thompson* decision limits its holding to exclusions based on race while the *Wheeler* decision prohibits the intentional exclusion of the members of any identifiable group.

[86] 79 App. Div. 2d at 108-09, 435 N.Y.S.2d at 754. If the trial judge finds a "substantial likelihood" that the challenges were racially motivated does not exist, then no questions may be asked of the prosecutor. *Id.*

[87] *Id.* at 109, 435 N.Y.S.2d at 754. To meet his burden of proof, the prosecutor need not demonstrate that his reasons for the use of the peremptory challenge at issue "rise to the level of a challenge for cause." People v. Wheeler, 22 Cal. 3d 258, 281-82, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906 (1978); 79 App. Div. 2d at 109, 435 N.Y.S.2d at 754. All that need be shown is that the challenges were used for reasons related to the particular case, parties, or witnesses or to the individual characteristics of the prospective juror apart from his race. People v. Thompson, 79 App. Div. 2d at 109, 435 N.Y.S.2d at 754.

[88] The trial judge normally will decide whether the prosecutor has met his burden of proof on the basis of his observations of the jury selection, counsel's arguments and the prosecutor's explanations. A hearing may be appropriate only in the exceptional case. 79 App. Div. 2d at 109, 435 N.Y.S.2d at 754.

[89] *Id.* at 109-10, 435 N.Y.S.2d at 754-55. Because the party has the right to a complete venire, the venire must be quashed when it has been fleeced clean of "members of a cognizable group by the improper use of peremptory challenges." *Id.* at 109, 435 N.Y.S.2d at 754 (quoting People v. Wheeler, 22 Cal. 3d 258, 282, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906 (1978)).

[90] 79 App. Div. 2d at 114, 435 N.Y.S.2d at 757 (Mangano, J., dissenting).

[91] *Id.* at 113, 435 N.Y.S.2d at 757 (Mangano, J., dissenting). Justice Mangano ques-

province of the legislature.[92]

The *Thompson* court has endeavored to limit the discriminatory effects of the prosecutor's statutory right to exercise peremptory challenges by carving out an exception to this hitherto inviolate rule.[93] While the court's aim of assuring jury impartiality is highly commendable, it is submitted that the decision poses a significant danger of unlimited expansion in subsequent cases. For example, it appears that the court rationally cannot confine its holding solely to *racially* based exclusions.[94] It is submitted that if the use of peremptory challenges to purposely exclude black jurors violates a defendant's right to an impartial jury, the exclusion of other cognizable groups would also violate that right.[95] Thus, it is

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tioned the majority's interpretation of an impartial jury, noting that according to *Taylor* the meaning of an "impartial" petit jury is not synonymous with the requirement of a fair cross-section of the community. Rather, he reasoned, an impartial petit jury is one which will decide the case solely on the basis of the evidence presented. *Id.* at 113-14, 435 N.Y.S.2d at 757 (Mangano, J., dissenting)(citing Swain v. Alabama, 380 U.S. 202, 219 (1965)). Justice Mangano further contended that the "substantial likelihood" test was too uncertain and vague to be amenable to objective application by the individual trial judges. 79 App. Div. 2d at 114-15, 435 N.Y.S.2d at 757-58. (Mangano, J., dissenting).

[92] 79 App. Div. 2d at 115, 435 N.Y.S.2d at 758 (Mangano, J., dissenting). The dissent took the view that the majority had "rewritten" CPL 270.25, thus altering the very nature and purpose of the peremptory challenge, which by its definition requires no explanation. *Id.* at 114, 435 N.Y.S.2d at 757 (Mangano, J., dissenting). Justice Mangano warned that such judicial legislation is "fraught with dangerous consequences for the efficient administration of criminal justice." *Id.* at 115, 435 N.Y.S.2d at 758 (Mangano, J., dissenting); *see* Bright Homes, Inc. v. Wright, 8 N.Y.2d 157, 162, 168 N.E.2d 515, 517, 203 N.Y.S.2d 67, 70 (1960); Austin v. Board of Higher Educ., 5 N.Y.2d 430, 443-44, 158 N.E.2d 681, 688, 186 N.Y.S.2d 1, 12 (1959).

[93] *See* note 65 *supra.*

[94] Although the *Thompson* court was influenced greatly by the rationale of People v. Wheeler, 122 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the holdings in the two cases differ significantly. In *Wheeler,* the California Supreme Court held that a prosecutor cannot challenge a juror solely because that juror is a member of any identifiable group, *id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903, while the *Thompson* court limited its decision to black jurors.

[95] The requirement that an impartial jury be drawn from a fair cross-section of the community, *see* note 68 *supra,* cannot be achieved if members of any identifiable or "cognizable" group are systematically excluded. *See* People v. Wheeler, 122 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902-03; Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, 515, *cert. denied,* 444 U.S. 881 (1979); People v. Kagan, 101 Misc. 2d 274, 277, 420 N.Y.S.2d 987, 989 (Sup. Ct. N.Y. County 1979), *aff'd on other grounds,* 441 N.Y.S.2d 256 (1st Dep't 1981). In *Kagan,* the court held that peremptory challenges which are used to systematically exclude jurors solely because of their "sex, race, color, creed or national origin, where the persons excluded are affiliated with the same ethnic group as the defendant" is a violation of the right to a trial by one's peers. *Id.* at 277, 420 N.Y.S.2d at 989. The *Kagan* court concluded, however, that four peremptory challenges of Jewish persons was insufficient to establish a violation. *Id.* at 278, 420 N.Y.S.2d at 990. In Taylor v. Louisiana,

probable that in similar cases courts will rely upon the *Thompson* rationale to prohibit the use of peremptory challenges to exclude members of any cognizable group.[96]

Additionally, it is questionable whether *Thompson* fairly can grant the defendant the right to object to the prosecutor's misuse of peremptory challenges without granting the prosecutor the same right when a defendant abuses the challenges.[97] Should the issue arise, it appears likely that *Thompson* will be extended further to require inquiry into the defendant's reasons for the discriminatory use of peremptory challenges.[98] Another potentially ripe sphere for expansion and application of the *Thompson* holding is that of civil litigation.[99] Although discriminatory use of the peremptory challenge would seem to create more serious consequences in the criminal area where the liberty of the defendant is at stake, such abuse may also seriously harm the civil litigant, whose property may well

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419 U.S. 522 (1975), the Supreme Court noted that "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Id.* at 530. Thus, it does not seem that the *Thompson* court, which relied upon *Taylor* in formulating its decision, logically can limit its holding to the discriminatory challenge of black jurors only.

[96] *See* note 95 and accompanying text *supra.*

[97] The *Thompson* court did not discuss whether the prosecutor may object to the defendant's discriminatory use of peremptory challenges. The *Wheeler* court, however, noted in dictum that "the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. . . . [T]o hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism." People v. Wheeler, 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29. The other essential functions include "legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups." *Id.* at 267 n.6, 583 P.2d at 755 n.6, 148 Cal. Rptr. at 896 n.6. *See also* Commonwealth v. Soares, 387 N.E.2d at 517 n.35.

[98] *See* note 97 and accompanying text *supra.* It may be argued that the prosecutor should not be permitted to object to the defendant's unfettered use of peremptory challenges since such challenges historically existed for the benefit of the defendant. *See* People v. Thompson, 79 App. Div. 2d at 98-99, 435 N.Y.S.2d at 748; Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse,* 14 NEW ENG. L. REV. 192, 233 (1978); note 1 *supra. See also* Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge,* 92 HARV. L. REV. 1770, 1785-87 (1979).

[99] In People v. Wheeler, the court declined to resolve the question of whether its decision was applicable to civil cases. 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29. Several commentators, however, have maintained that *Wheeler* should be extended to civil litigation. *See, e.g.,* Comment, People v. Wheeler; *California's Answer to Misuse of the Peremptory Challenge,* 16 SAN DIEGO L. REV. 897, 905-09 (1979); Note, *Group Bias—An Improper Ground for the Peremptory Challenge in California,* 12 LOY. U.L.A.L. REV. 747, 762 (1979).

be at stake.[100]

Apart from the danger that the scope of application of the *Thompson* decision will be unduly expanded, it is submitted that it will prove to be ineffective to prevent the discriminatory use of peremptory challenges. Having been warned by the *Thompson* court that they must have a valid reason for excluding blacks from a jury, prosecutors will be certain to provide such reasons.[101] For example, a prosecutor might intentionally alienate a juror during the voir dire and then exercise a peremptory challenge for the facially valid reason that the juror is specifically biased.[102] It is submitted that a prosecutor also could circumvent *Thompson* by permitting only one black juror to remain on the panel, thereby thwarting a showing that the challenges were based solely on race.[103] Finally, it is suggested that the result in *Thompson* will delay further the already laborious process of jury selection by sanctioning what is sure to become a routine dilatory tactic. Defense attorneys will now move for a mistrial whenever a prosecutor uses his peremptory challenges to exclude blacks.

Thus, due to the unlikelihood of its effectiveness, it is con-

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[100] In New York, each party in a civil action is permitted three peremptory challenges for regular jurors and one peremptory challenge for each alternate juror. CPLR 4109 (Supp. 1980-1981). In civil actions, a jury is composed of six persons, rather than twelve as in criminal actions. Due to the reduced number of challenges available, a civil litigant is less able to shape the composition of the final panel than is a criminal defendant or prosecutor. Thus, it is submitted that there is a much less urgent need to extend the *Thompson* decision to civil litigation.

[101] One of the traditionally acceptable uses of the peremptory challenge is to permit the party to excuse a juror who may have become predisposed against that party during the voir dire interrogation. *See* People v. Wheeler, 22 Cal. 3d at 275 n.16, 583 P.2d at 761 n.16, 148 Cal. Rptr. at 902 n.16; note 65 *supra*. An inherent danger of the *Wheeler* decision is that prosecutors may begin to abuse this acceptable motive. Conversely, the trial judge may not believe a prosecutor who has unintentionally alienated a juror during the voir dire and legitimately wishes to use his peremptory challenge.

[102] *See* note 101 *supra*.

[103] On the same day that the *Thompson* decision was issued, the Appellate Division, Second Department, also decided People v. Goodrich, 80 App. Div. 2d 562, 435 N.Y.S.2d 758 (2d Dep't 1981), a case in which the prosecutor's use of peremptory challenges was alleged to be discriminatory. In *Goodrich* the prosecutor used thirteen peremptory challenges, seven against blacks and six against whites, with the result that one black was seated on the jury. *Id.* at 562, 435 N.Y.S.2d at 758. Unlike the situation in *Thompson*, the trial judge in *Goodrich* did not find that the prosecutor was purposely excluding blacks. *Id.* at 562, 435 N.Y.S.2d at 758-59. Based on these facts, the *Goodrich* court distinguished *Thompson* and held that there was not a substantial likelihood that the challenges were based only on race. *Id.* at 563, 435 N.Y.S.2d at 759. It is submitted that *Goodrich* demonstrates that a prosecutor may avoid the result in *Thompson* by excluding all but one black from jury service, at least where his peremptory challenges exclude equal proportions of whites and blacks.

tended that the *Thompson* decision has not altered the "very essence and nature" of the peremptory challenge, as argued by the dissent.[104] The decision, however, does lay the foundation for the erosion of the peremptory challenge through judicial expansion of the *Thompson* holding.[105] Moreover, the court's remedy for the discriminatory use of peremptory challenges appears to be open to circumvention through prosecutorial stratagem.[106] Commentators have suggested a number of alternate solutions which may be more effective to halt the abuse of peremptory challenges.[107] In light of the purpose and policy underlying the statutory right to exercise peremptory challenges,[108] it is suggested that the best alternative would be to reduce the number of peremptory challenges available to each side. Thus, a prosecutor still may eliminate the few jurors whom he deems unfavorable, if not specifically biased. While significantly reducing the prosecutor's ability to eliminate all blacks from a jury,[109] this alternative would preserve the basic objective

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[104] *See* notes 65 & 92 and accompanying text *supra*.

[105] *See* notes 94-100 *supra*. Should the *Thompson* holding be expanded, the number of situations in which a party's reasons for exercising peremptory challenges may be subjected to inquiry will increase substantially. Thus, this type of challenge, which by its very definition is "arbitrary" and "not admitting of question," BLACK'S LAW DICTIONARY 1295 (rev. 4th ed. 1968), will no longer be peremptory.

[106] *See* notes 101 & 102 and accompanying text *supra*.

[107] J. VAN DYKE, JURY SELECTION PROCEDURES 166-69 (1977). Professor Van Dyke discusses a number of proposals which may help to remedy the abuse of peremptory challenges. One suggestion is to withhold from the prosecution the right to use any peremptory challenges at all. Another would be to bar the use of peremptory challenges by both the prosecution and the defense. *Id.*

[108] *See* note 65 and accompanying text *supra*.

[109] *See* J. VAN DYKE, *supra* note 107, at 166-69. Professor Van Dyke asserts that most states, including New York, provide for an excessive number of peremptory challenges. He urges states to follow the New Mexico procedure of granting the prosecution three peremptory challenges and the defense five. This system, he maintains, is more than sufficient to permit the elimination of the truly biased juror and would prevent counsel from changing the random nature of the jury. It is submitted that New York prosecutors realistically do not require ten to twenty peremptory challenges to obtain a fair and impartial jury. The prosecutor should be able to eliminate the great majority of biased jurors through the voir dire. The net effect of providing for such a great number of challenges has been to permit the prosecutor to obtain a jury that is partial to the victim rather than a jury that is partial to neither side. Reducing the number of challenges, it is contended, will force the prosecutor to use the few available challenges in a more prudent manner—to excuse jurors who truly seem biased rather than to use them for the wholesale elimination of black citizens from jury service.

Recognizing that peremptory challenges may not further the goal of juries drawn from a fair cross-section of the community, the United States Supreme Court proposed an amendment to the Federal Rule of Criminal Procedure 24(b) which would lower the number of peremptory challenges granted to prosecutors and to defendants. H.R. Doc. No. 94-464,

and character of the peremptory challenge. Since the peremptory challenge is a purely statutory right,[110] however, it is suggested that this remedy properly should be addressed by the legislature rather than by the judiciary.[111]

Ziporah J. Szydlo

REAL PROPERTY LAW

Real Prop. Law § 235-b: Implied warranty of habitability held applicable to cooperative housing

Section 235-b of the Real Property Law appends to residential leases an implied warranty that leased premises are fit for human habitation.[112] Although this warranty of habitability clearly applies

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94th Cong., 2d Sess. 1 (1976). While the amendment did not pass, it reflects an acknowledgment by the Supreme Court that an excessive number of peremptory challenges may foster the creation of unrepresentative juries. For a discussion of the proposal see Note, *The Defendant's Right To Object To Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1774-76 (1979).

[110] *See* note 64 *supra*.

[111] *See* note 92 and accompanying text *supra*.

[112] Section 235-b provides in part:

> 1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.
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> 2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1980-1981).

At early common law, a lease was viewed as a conveyance of an estate in real property. Park West Mgt. Corp. v. Mitchell, 47 N.Y.2d 316, 322, 391 N.E.2d 1288, 1291, 418 N.Y.S.2d 310, 313, *cert. denied*, 444 U.S. 992 (1979); 2 R. POWELL, REAL PROPERTY ¶ 221[1] (P. Rohan ed. 1977); *see, e.g.*, Fowler v. Bott, 6 Mass. 62, 67 (1809). The only defense to a nonpayment of rent action was the lessor's failure to provide for the quiet enjoyment of the lessee's land. 47 N.Y.2d at 322, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; L. JONES, LANDLORD AND TENANT § 364 (1906). Absent an express agreement requiring the landlord to make repairs, the tenant took the premises as he found them. Franklin v. Brown, 118 N.Y. 110, 115, 23 N.E. 126, 127 (1889); *see* Comment, *Landlord-Tenant—Caveat Emptor—Implied Warranty of Habitability in Residential Leases*—Tonetti v. Penati, 21 N.Y.L.F. 613, 616 (1976). Even with a repairs agreement, a breach of this duty was not a ground to withhold rent. 47 N.Y.2d at 323, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; Comment, *supra*, at 616; *see* Kaufman v. Tarulli, 136 N.Y.S. 36, 36 (Sup. Ct. App. T. 1st Dep't 1912). Eventually, however, the lower