

Peremptory Challenges and the Meaning of Jury Representation

The Sixth Amendment requires that juries be impartial,¹ and both judicial doctrines and an elaborate system of jury selection preserve this right. In *Taylor v. Louisiana*,² the Supreme Court held that the requirement of impartiality includes a requirement that juries be selected from a cross section of the community.³ Because the jury acts as the representative of society, distinctive groups may not be excluded from the jury pool.⁴ The California and Massachusetts Supreme Courts recently extended these notions of representation and impartiality to rule that the peremptory challenge may not be used systematically to exclude members of social groups, not only from jury pools, but from juries themselves.⁵

This Note disputes the interpretation of *Taylor* that equates jury impartiality with cross-sectional representation. Such a view of impartiality and representation does not square with the full holding of *Taylor*, nor is it convincing in light of the way juries reach verdicts. Rather, the principle of jury representation should be understood to mean that certain characteristics of society that profoundly affect a jury's verdict should not be distorted in the jury selection process. The crucial aspect of the community that must be represented is not subgroup proportion, but the community's mean verdict impact—the mean tendency of its members to influence a verdict toward conviction or acquittal.

Such an understanding of impartiality and representation accounts for the holding of *Taylor*. The systematic exclusion of subgroups from jury venires warps juries' verdict impacts away from the social mean. Use of the peremptory challenge to remove disproportionate numbers of social subgroups, however, will distort the mean verdict impact only

1. The Sixth Amendment states:

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.

2. 419 U.S. 522 (1975).

3. *Id.* at 538.

4. *Id.*

5. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Commonwealth v. Soares*, 1979 Mass. Adv. Sh. 593, 387 N.E.2d 499, *cert. denied*, 100 S. Ct. 170 (1979).

under certain conditions. Because there currently is no empirical evidence that these conditions actually obtain, the courts are not justified in assuming such evidence in delimiting the contours of the constitutional requirement of an impartial jury. The decisions limiting use of the peremptory challenge thus misapply *Taylor* and misinterpret the Constitution.

I. The Implications of *Taylor v. Louisiana*

The rule of *Taylor* prohibits systematic exclusion of distinctive groups from jury pools and venires, and thus keeps that stage of the jury selection process from producing pools that are unrepresentative of the community.⁶ Other stages of jury selection, however, can prevent petit juries from resembling the community in subgroup proportions. In particular, the removal of prospective jurors by peremptory challenge can have this effect. Recent decisions proscribing such operation of the peremptory rest on a particular view of *Taylor* as to the meaning of a representative jury and the relationship between cross-sectionality and impartiality. An analysis of the problem these decisions address, then, requires discussion of impartiality through representation.

A. *The Jury Selection Process*

The constitutional concern that juries be impartial is reflected in the complex system that has developed for selecting juries—a series of steps that narrows the range of potential jurors from the community at large to groups of twelve or fewer. The process of jury selection, through various mechanisms, brings into court venires, the groups of people from which trial juries are drawn.⁷ The judge or attorneys subject members of the venire to voir dire examination, a questioning designed to elicit information about attitudes relevant to jury deliberation and voting.⁸ Challenges then are used to eliminate prospective

6. 419 U.S. at 538 (pools or venires “must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof”).

7. The Federal Jury Selection and Service Act of 1968 governs selection of federal court juries. 28 U.S.C. §§ 1861-1874 (1976). Selection begins with the compilation of a master wheel for the district from lists of registered voters. Lists of jurors to be contacted for a session of court then are drawn at random from the wheel. With the aid of mailed questionnaires, the eligibility of these prospective jurors is determined and smaller groups are summoned to court to serve on venires. Cf. UNIFORM JURY SELECTION AND SERVICE ACT §§ 5-11 (providing for similar procedure for state courts).

8. The importance of voir dire and the usefulness of the information it elicits was emphasized in *Ham v. South Carolina*, 409 U.S. 524 (1973). The voir dire employed by the trial court in *Ham* was held to be insufficiently probing on the question of racial

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jurors from the venire and to select the petit jury. The parties exercise two types of challenges: challenges for cause and peremptory challenges.

The challenge for cause eliminates jurors clearly unable to decide the case fairly. If the prospective juror fits some common-law category of persons unlikely to evaluate the case on its merits—for instance, relatives of the accused—the judge will dismiss the individual on challenge for cause.⁹ Similarly, if the challenging attorney convinces the judge that some other factor, frequently one brought out on voir dire, precludes impartial factfinding, the challenged individual will be dismissed.¹⁰ There is no limit to the number of prospective jurors who may be challenged for cause. Indeed, denial of a well-founded challenge for cause is a violation of the right to an impartial jury and grounds for reversal.¹¹

The peremptory challenge operates to eliminate prospective jurors without reference to the judge and without need for explanation.¹² A limited number of peremptories are given to each party,¹³ and counsel

prejudice, and the case was reversed and remanded for an improved voir dire. For a discussion of the importance of voir dire for guiding the peremptory challenge, see Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

9. See, e.g., *State v. Perry*, 44 N.C. 330 (1853) (excluding prospective juror because related to defendant in ninth degree, level proscribed by common law); *Churchill v. Churchill*, 12 Vt. 661 (1839) (common law replaced by legislation forbidding jurors related in fourth degree or closer to party); TEX. CRIM. PRO. CODE ANN. art. 35.16(a)1-8, 10 (Vernon Supp. 1980) (codifying common-law categories for automatic challenge for cause).

10. See, e.g., *Jackson v. United States*, 395 F.2d 615, 617-18 (D.C. Cir. 1968) (stating that challenge for cause would have been granted had it been known at time of murder trial that juror had had affair strikingly similar to that of victim six months earlier); TEX. CRIM. PROC. CODE ANN. art. 35.16(a)9 (Vernon Supp. 1980) (disqualifying jurors for actual bias or prejudice, or for conclusion on guilt or innocence that upon questioning appears predetermined).

11. See, e.g., *State v. West*, 200 S.E.2d 859, 864-65 (W. Va. 1973) (refusal to dismiss juror who was employee of state law enforcement agency held reversible error).

12. The Supreme Court's most extensive discussion of the peremptory challenge was in *Swain v. Alabama*, 380 U.S. 202 (1965), in which the Court upheld a prosecutor's use of the peremptory against the claim that it violated the equal protection clause by systematically excluding blacks from trial juries. According to the *Swain* Court, "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220. This statement is consistent with other court decisions regarding the nature and use of the peremptory. See, e.g., *State v. Wetmore*, 287 N.C. 344, 350-51, 215 S.E.2d 51, 55 (1975) (peremptories exercised according to party's judgment, without inquiry by court); *State v. Salinas*, 87 Wash. 2d 112, 115, 549 P.2d 712, 714 (1976) (peremptory not subject to court inquiry or control).

13. See, e.g., FED. R. CRIM. P. 24(b) (granting each side 20 peremptories in capital cases, government 6 and defendant 10 for cases in which punishment may exceed one year, and both sides 3 in other cases; alternative arrangements for multidefendant prosecutions). In state cases, the number of peremptories varies. See, e.g., OKLA. STAT. ANN. tit. 22, § 655 (West Supp. 1980) (granting each side nine peremptories in first-degree murder cases, five for other felonies, and three for nonfelonies); WIS. STAT. ANN. § 972.03 (West 1971) (granting each side six peremptories for crimes punishable by life imprisonment, and four for other crimes).

may use the peremptory to remove any venire member for any reason.¹⁴ The peremptory is employed by each party to eliminate those individuals most likely to be hostile whose prejudice cannot be proved to the judge's satisfaction. Extremes of partiality, arising from any source counsel can discern, are thus removed by the challenge process.

B. *The Meaning of Taylor*

In *Taylor*, the Supreme Court held that the Sixth Amendment forbids the systematic exclusion of distinctive groups in the community from the pools or venires from which criminal trial juries are chosen.¹⁵ The Louisiana jury selection system challenged in that case had effectively excluded women from juries.¹⁶ In reversing *Taylor's* conviction for aggravated kidnapping, the Court held the state's method to be constitutionally defective.

Distinctive groups may not be excluded in jury pool selection, the Court reasoned, because the Sixth Amendment right to an impartial jury includes the right to have on pools a "representative cross section of the community."¹⁷ Unless such a cross section is present, the jury will fail to represent the judicial authority of the people.¹⁸ *Taylor* was an important innovation because it rested on the Sixth Amendment jury trial right¹⁹ and not on the Fourteenth Amendment's equal pro-

14. Recent California and Massachusetts cases now limit the use of the peremptory challenge. See p. 1183 *infra*.

15. 419 U.S. at 538.

16. Prior to *Taylor*, the Louisiana Constitution and Code of Criminal Procedure provided that women could not be summoned for jury service unless they affirmatively volunteered. *Id.* at 523 nn.1 & 2. Men were taken without volunteering. *Id.* at 524-25. The venire of 175 persons in *Taylor's* case included no women. *Id.* at 525.

17. *Id.* at 528 ("the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial").

18. *Id.* at 527. The Court recently restated the *Taylor* rule when it struck down Missouri's jury selection system, which granted, upon request, an automatic exemption from jury service only to women. *Duren v. Missouri*, 439 U.S. 357 (1979). *Duren* explained that a prima facie case of a violation of *Taylor* is made by showing:

(1) that the group alleged to be excluded is a "distinctive" group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364.

19. 419 U.S. at 528. Cases prior to *Taylor* suggested or mentioned the cross-section standard without holding that it was a Sixth Amendment right. For instance, in *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court reversed a conviction by a jury from which blacks had been excluded, holding that the equal protection clause of the Fourteenth Amendment forbade such discrimination. *Id.* at 307-08. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the protection of *Strauder* was extended to Mexican Americans, as the Court held that "[t]he exclusion of otherwise eligible persons from jury service solely

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tection clause.²⁰ The doctrinal and practical importance of the shift from the Fourteenth to the Sixth Amendment is considerable, for it generated new protections for groups in the jury selection process.²¹

Despite the clarity of its holding, *Taylor* leaves uncertain the theory of representation on which it rests and which it seeks to implement. Typically, an impartial juror is defined as one who will decide a case

because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." *Id.* at 479. Likewise, in *Ballard v. United States*, 329 U.S. 187 (1946), the Court forbade the systematic and intentional exclusion of women from federal juries in states in which women were eligible for jury service, as part of its function of supervising the federal courts. In *Ballard*, the court appealed to the principle of cross-sectionality as a congressional policy and not as a Sixth Amendment mandate. *Id.* at 191. In *Taylor*, the Court recognized that it previously had suggested cross-sectionality as part of the Sixth Amendment without holding it to be so, stating that its inquiry was "whether the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." 419 U.S. at 526. If the Court had answered that question conclusively in its prior cases, *Taylor* would not have been necessary.

20. *Cf.* *Carter v. Jury Comm'n*, 396 U.S. 320 (1970) (upholding right of prospective jurors under Fourteenth Amendment not to be discriminated against); *Brown v. Allen*, 344 U.S. 443 (1953) (racial discrimination in jury selection forbidden by Fourteenth Amendment); *Smith v. Texas*, 311 U.S. 128 (1940) (same).

21. Different and broader protections, as well as lighter burdens of proof, prevail under the Sixth Amendment or a state jury trial guarantee, *see* note 30 *infra*, than under the Fourteenth Amendment. This change is pronounced if *Taylor* is applied to the peremptory as some state courts suggest. Under *Swain v. Alabama*, 380 U.S. 202 (1965), only a consistent pattern of exclusion of a protected group from the jury with the peremptory can prove a violation of the equal protection clause, because only in this manner can the presumption that the prosecutor is using the peremptory to remove hostile jurors be overcome. If the prosecutor uses the peremptory for reasons related to the trial, no violation occurs at all, even if blacks are disproportionately challenged. *See United States v. Newman*, 549 F.2d 240 (2d Cir.), *cert. denied*, 432 U.S. 908 (1977) (writ of mandamus to district judge issued to prevent his inquiry into prosecutorial motives in exercise of peremptory challenge against blacks; prosecutor's challenge not act of invidious discrimination when based on judgment as to factors that may influence jurors' verdict); *State v. Kelly*, 362 So. 2d 1071, 1076-77 (La. 1978), *cert. denied*, 439 U.S. 1118 (1979) (state's use of 10 of 12 peremptories to remove blacks upheld because no showing of historical pattern; claim that *Taylor* impliedly modified *Swain* rejected). The *Swain* hurdle is a very high one in terms of both the definition of the offense and evidentiary requirements.

By contrast, a rule based on the Sixth Amendment or a parallel state jury trial right is of much broader application. Under the rule of *Wheeler* and *Soares*, misuse of the peremptory by one prosecutor in one case can be grounds for reversal. Further, it is not a defense under the Sixth Amendment to say that minority persons were challenged because of their probable views on the case. Rather, such use of the peremptory to exclude unfavorable jurors, privileged under *Swain*, is the very definition of the offense in *Wheeler* and *Soares* as long as the prosecutor's judgment as to juror predisposition is based primarily on subgroup membership. A prosecutor might violate *Wheeler* frequently without ever violating the rule of *Swain* at all, if he always used the peremptory for reasons related to the outcome of the case. Furthermore, only a prosecutor can violate the Fourteenth Amendment, because only state action is bound under equal protection strictures. Either side can violate *Wheeler*. Finally, the jury trial right protects all "distinctive groups," including women, while the coverage of the Fourteenth Amendment is more limited. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1063-70 (1978).

only on the basis of the facts the law deems relevant and not on extraneous factors.²² An impartial juror is one free from bias, and bias is usually defined as a tendency to judge on the basis of something other than the legally relevant facts.²³ Selecting an impartial jury can thus be viewed simply as a matter of eliminating those who are biased and hence unable to adjudicate the case fairly. The challenge for cause is the constitutionally mandated method for eliminating such biased jurors, those who will consider irrelevant factors in reaching their verdict.²⁴ Any jury that has been subjected to the challenge for cause, then, should be composed of impartial jurors and thus, by definition, be impartial.

This traditional understanding of impartiality and bias does not explain *Taylor*, however, for the case had nothing to do with challenges for cause. No claim was raised that members of the petit jury that convicted Taylor were prejudiced and should have been removed. Rather, the Louisiana system was held not to produce impartial juries because it systematically excluded women from venires. Thus, the selection of impartial juries must involve something more than the simple elimination of "bias."

Taylor does not delineate the additional requirements of impartiality;²⁵ it simply demands that juries in some way represent the com-

22. See, e.g., *Dobbert v. Florida*, 432 U.S. 282, 302 (1977) (quoting *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975)) (calling impartial juror one who will "render a verdict based on the evidence presented in court"); *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (defining the "indifferent" juror as one whose "verdict must be based upon the evidence developed at the trial").

23. In *State v. Brooks*, 563 P.2d 799 (Utah 1977), for example, the Utah Supreme Court reversed a conviction because the trial judge failed to accept a challenge to two biased jurors. The jurors were friends of prosecution witnesses, and the court reasoned that this would render them unable to adjudge the evidence at trial fairly. They were biased because their weighing of the evidence would be influenced by an extraneous factor. *Id.* at 801-02.

24. Although the challenge for cause is constitutionally required, see, e.g., *State v. Brooks*, 563 P.2d 799, 801-02 (Utah 1977) (failure to grant well-grounded challenge for cause is ground for reversal), the peremptory challenge, the only other tool for removing bias, is not, see *Stilson v. United States*, 250 U.S. 583, 586 (1919). If impartiality is simply a matter of removing bias, the challenge for cause is sufficient to attain it.

25. Although *Taylor* rests on the impartiality requirement, 419 U.S. at 525, the decision's discussion of impartiality is so obscure that its reliance on that requirement has been subject to attack. Justice Rehnquist, dissenting in *Duren v. Missouri*, 439 U.S. 357 (1979), accused the majority of duplicity in claiming to derive the *Taylor* rule from impartiality, or even from the Sixth Amendment. *Id.* at 370-74 (Rehnquist, J., dissenting). Rehnquist argued that the Court was passing off equal protection holdings as rulings on impartiality, and asserted that if the Court really meant what it said about cross-sections it would extend its ruling to forbid unrepresentative juries as well. *Id.* at 371-73, n.*. Justice Rehnquist's argument proceeds from the same premise as *Wheeler* and *Soares*, that the purpose of cross-sectional pools is to provide cross-sectional juries. This Note argues that such a premise is unfounded.

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munity. The decision makes clear, however, that representation does not entail racial, sexual, or other cross-sectionality in petit juries. The Court in *Taylor* announced that it would "impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."²⁶

Nonetheless, *Taylor* could be extended to make juries more cross-sectional without requiring quotas. In particular, if a party applies its peremptory challenges disproportionately to members of some subgroup, the peremptory can produce a jury with group proportions that differ substantially from those of the population.²⁷ Faced with such situations, the Supreme Courts of California and Massachusetts recently proscribed this use of the peremptory as violative of the requirement of impartiality. Those courts in *People v. Wheeler*²⁸ and *Commonwealth v. Soares*²⁹ followed what they perceived to be the definition of representativeness suggested by *Taylor*. The courts read their respective state jury trial guarantees³⁰ to prohibit the use of the peremptory chal-

26. 419 U.S. at 538 (citing *Fay v. New York*, 332 U.S. 261, 284 (1947) and *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972) (plurality opinion of White, J.)).

27. Commentators have argued that this use of the peremptory violates the Sixth Amendment and *Taylor*. See, e.g., Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977) [hereinafter cited as *Peremptory Challenge*] (resting squarely on *Taylor* for argument that peremptory must not be allowed to cause "unrepresentative" and hence partial juries). This argument that the Sixth Amendment impartiality requirement requires control of the peremptory was recently approved in an article lauding *Soares* and *Wheeler*. See Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use Or Abuse*, 14 NEW ENG. L. REV. 192, 228-34 (1978). But see Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979) (approving outcome in *Wheeler* and *Soares*, not on the basis of *Taylor*, the cross-section requirement, or impartiality, but on other values in Sixth Amendment). For a general treatment of the meaning of *Taylor*, see Daughtrey, *Cross Sectionalism in Jury Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975).

This use of the peremptory also has been attacked for violating the equal protection clause of the Fourteenth Amendment. See, e.g., 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, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 Sr. Louis U.L.J. 662 (1974).

Similarly, it has been argued that the "representativeness" requirement also mandates that voter lists be supplemented when they are "unrepresentative." See Kairys, Kadane, & Lehoczy, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776 (1977). For a discussion of the constitutional implications of unrepresentativeness at various stages of jury selection, see J. VAN DYKE, *JURY SELECTION PROCEDURES* (1977).

28. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

29. 1979 Mass. Adv. Sh. 593, 387 N.E.2d 499, cert. denied, 100 S. Ct. 170 (1979).

30. The California and Massachusetts decisions rest on state jury trial guarantees and not directly on the Sixth Amendment. Both *Wheeler* and *Soares*, however, interpret their state constitutions as mandating impartiality and then use *Taylor* to explicate that mandate. The right to trial by jury is "inviolable" according to CAL. CONST. art. I, § 16. *Wheeler* notes that this includes the requirement that juries be impartial and charac-

lenge systematically to remove members of subgroups from petit juries.³¹

II. Representation and Impartiality

Taylor holds that to be impartial juries must represent the community. Proportional subgroup cross-sectionality does not accomplish this representation, however, and should not be seen as the goal of *Taylor*. Rather, under the Sixth Amendment, juries should represent the community in one characteristic and one characteristic only: the mean impact of the jurors on the jury's verdict. In order to ensure the requisite impartiality, the jury should not systematically differ from the mean tendency of the members of the community to influence the verdict one way or another. This understanding of representation best accounts for the holding of *Taylor*.

A. *The Failure of Literal Cross-Sectionality*

At the outset, any simplistic interpretation of the representation requirement must be rejected: impartiality cannot mean that the jury should even tend to be a mirror of the subgroup proportions of the community.³² Not only would this interpretation violate clear language

terizes *Taylor* and its antecedents as standing for the proposition that impartiality is best achieved by encouraging the representation of a variety of groups on trial juries. 22 Cal. 3d at 266-67, 583 P.2d at 754-55, 148 Cal. Rptr. at 895-96. According to *Soares*, similar protection of the jury trial is provided in Massachusetts under MASS. CONST. pt. 1, art. XII. 1979 Mass. Adv. Sh. at 608, 387 N.E.2d at 508. *Soares* draws on *Taylor*, 1979 Mass. Adv. Sh. at 615-16, 387 N.E.2d at 511-12; see Comment, *People v. Wheeler: Peremptory Challenges—A New Interpretation*, 14 NEW ENG. L. REV. 370, 389 (1970) (uncritical exposition of *Wheeler*, characterizing it as "logical extension" of *Taylor*); 44 MO. L. REV. 559 (1979) (report of *Wheeler* without comment); Note, *People v. Wheeler*, 58 N.C.L. REV. 152 (1979) (praising *Wheeler* but worrying that case creates uncertainties and may reduce value of peremptory to defense); 48 U. CIN. L. REV. 599 (1979) (characterizing *Wheeler's* holding as fully in accord with purpose of peremptory).

31. *Wheeler* concluded that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community." 22 CAL. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The rule of *Soares* is that "exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group, contravenes the requirement inherent in art. 12 of the Declaration of Rights." 1979 Mass. Adv. Sh. at 627, 387 N.E.2d at 516.

32. The California and Massachusetts courts seemed to understand that the rule derived by *Taylor* from the impartiality requirement mandates some approximation of cross-sectionality in petit juries. *Wheeler* reasoned that the purpose of *Taylor's* rule about jury pools and venires was "to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experience." 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. Similarly, the *Soares* court thought the cross-section rule applied directly to the petit jury itself and that it was not enough for the

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in *Taylor*,³³ it also would fail to account for the rejection of Sixth Amendment claims when all the defendant demonstrated was that some group was unrepresented on the jury that convicted him.³⁴ The only way in which one could reconcile the current cases with a requirement of literal representativeness would be to acknowledge that no single jury could ever fully represent every subgroup in the population.³⁵ Yet even this tack must fail, for if a literal concept of representativeness were to have any meaning, the defendant, at a minimum, would be entitled to a jury from some range of adequately cross-sectional panels. Such, however, is not the case: a demographically unrepresentative jury constitutionally may convict a defendant.³⁶

On the other hand, *Taylor* cannot be interpreted simply to prohibit jury selection procedures that systematically produce unrepresentative juries. It is not sufficient to guarantee a defendant that he will receive, if not a cross section on his jury, at least a system not rigged to deny him one.³⁷ If the defendant has a constitutional interest in a cross-

venire to be representative: "The desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself." 1979 Mass. Adv. Sh. at 620, 387 N.E.2d at 513. Literal cross-sectionality in trial juries is the goal of *Wheeler* and *Soares*.

33. 419 U.S. at 538 (no requirement that individual juries be demographically representative).

34. Such cases demonstrate that the refusal in *Taylor* to mandate representativeness in the literal sense is more than just dictum. Unrepresentative juries are allowed to convict. *See, e.g.*, *United States v. Turcotte*, 558 F.2d 893, 895 (8th Cir. 1977) (lack of American Indians on petit jury no violation because no right to proportionate representation of groups); *United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977) (all-white jury acceptable although three blacks removed with peremptory; no right to proportional representation); *Jeffers v. United States*, 451 F. Supp. 1338, 1347 (N.D. Ind. 1978) (no violation in lack of blacks on petit jury). *Taylor* is sometimes cited in support of this outcome. *See, e.g.*, *United States v. D'Alora*, 585 F.2d 16, 22 (1st Cir. 1978) (challenge to jury containing no minorities rejected; no requirement that jury mirror community); *Stewart v. Ricketts*, 451 F. Supp. 911, 917 (M.D. Ga. 1978) (habeas corpus challenge to jury with no blacks rejected). This interpretation of the federal Constitution is also adhered to by the states. *See, e.g.*, *State v. Tucker*, 118 Ariz. 76, 80, 574 P.2d 1295, 1299, *cert. denied*, 439 U.S. 846 (1978) (first-degree murder conviction by all-white jury, in itself, not error); *State v. Stewart*, 225 Kan. 410, 417, 591 P.2d 166, 172 (1979) (all-white jury produced by peremptory acceptable; *People v. Wheeler* specifically rejected).

35. *Soares* makes the point that "no jury of reasonable size could possibly reflect all the distinctive groups in the community." 1979 Mass. Adv. Sh. at 619, 387 N.E.2d at 512.

36. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (no requirement individual juries be demographically representative). If a thoroughly unrepresentative jury—in a demographic sense—is constitutionally permissible, then it is uncertain what constraints the representativeness requirement actually imposes.

37. *Wheeler* seems to argue that so long as unrepresentative juries are produced unsystematically—*i.e.*, by chance—they are unavoidable and hence acceptable. The rule of *Wheeler* gives random selection, and its unsystematic effects, a special status; the defendant is entitled to "a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." 22 Cal. 3d at 277, 583

sectional jury, the fact that he was not deprived of it systematically should be irrelevant. He still would be harmed by the operation of the jury selection system. Random chance, which would cause some unrepresentativeness even in a system that generally produced representative juries, has no special status that would permit deprivations of cross-sectionality if that was otherwise required.³⁸ Chance is not a necessary element in jury selection, and providing a defendant with the possibility of a cross section is not the best the State can do. The requirement of the Sixth Amendment is unequivocal and if a jury must be cross-sectional to be impartial then it must be cross-sectional in every case.

These interpretations of *Taylor*—that it requires literal representativeness on each jury, or that it only proscribes systematic denials of a cross-sectional jury—simply are untenable as reasons for controlling the use of the peremptory challenge on subgroups. Not only is the concept of representation implicit in these interpretations unfounded in *Taylor* or other case law, the concept is based on an unpersuasive theory of the relationship between impartiality and cross-sectional representativeness.

It has been argued that impartiality requires a cross section of the community on the jury because an impartial jury is the result of mixing a variety of attitudes and insights and that these insights are specially connected to subgroup membership;³⁹ the claim is that if certain subgroups are not represented on the jury, their point of view will not have been heard and the jury will not be impartial. This “group bias”⁴⁰ argument is not persuasive. The attitudes of jurors that influence verdicts are not necessarily associated with subgroup membership.⁴¹

P.2d at 762, 148 Cal. Rptr. at 903. *Soares* quotes this passage. 1979 Mass. Adv. Sh. at 627, 387 N.E.2d at 516. Neither opinion explains why the convenience of random selection prevails against the constitutional requirement of representativeness, even though *Wheeler* admits that chance predictably will result in some wholly unrepresentative juries. 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

38. There is no constitutional requirement that jury selection be random as long as the jury is impartial. See *United States v. Hawkins*, 566 F.2d 1006, 1012 (5th Cir.), cert. denied, 439 U.S. 848 (1978) (randomness a statutory, not constitutional, requirement).

39. Both *Wheeler* and *Soares* subscribe to the notion that impartiality is to be achieved by mixing a variety of views on the jury itself, and that these views are associated with subgroup membership. See *Wheeler*, 22 Cal. 3d 266-67, 583 P.2d at 754-55, 148 Cal. Rptr. 896; *Soares*, 1979 Mass. Adv. Sh. at 617-21, 387 N.E.2d at 512-13.

40. *Wheeler* and *Soares* denominate the attitudes associated with group membership as “group bias” and prohibit the use of the peremptory to exclude prospective jurors because of those attitudes. See *Wheeler*, 22 Cal. 3d at 274-77, 583 P.2d at 760-62, 148 Cal. Rptr. at 901-03; *Soares*, 1979 Mass. Adv. Sh. at 626, 387 N.E.2d at 515-16.

41. Factors other than subgroup membership also are important in determining verdicts. The jury selection in the trial of H.R. Haldeman, John Ehrlichman and John Mitchell brought out this importance. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976). The Court of Appeals lauded the trial court’s use of voir dire to eliminate juror

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Even when they are, the importance of subgroup-associated viewpoints varies from case to case.⁴² Moreover, the claim that subgroup membership is uniquely related to some attitude or verdict input is unsupported.⁴³ Any number of jury characteristics can affect both the juror's judgment and the influence he has on the jury.

A more sophisticated argument for representing subgroups on petit juries is similarly flawed. This view distinguishes between situation-specific bias—a juror attitude related to the particular facts of a case—and non-situation-specific bias—an attitude operating across a wide range of cases. The claim is that the community's non-situation-specific biases must be represented on the jury and that such biases are especially related to subgroup membership.⁴⁴

The argument that jurors should be eliminated only on the basis of situation-specific attitudes is not tenable, however. A prospective juror who will vote to convict anyone of anything has a bias that is not specific to the facts of any one situation, but he is also the prototypical biased juror, and the defendant is seriously disadvantaged by his presence on the jury. Non-situation-specific bias is just another form of

bias: voir dire inquiry included juror employment, attitudes toward defendants, political activities, views on witness credibility, and exposure to publicity. *Id.* at 65-66. Similarly, one guidebook for defense attorneys suggests inquiry into connection with law enforcement agencies, volunteer work, military service, and experience with the crime charged. A. GINGER, *JURY SELECTION IN CRIMINAL TRIALS* 374-79 (1975).

42. *Ristaino v. Ross*, 424 U.S. 589 (1976), demonstrates that the impact of subgroup-associated attitudes will vary. In *Ross*, the defendant was black and the victim white. Defense counsel demanded that the judge's voir dire go directly to the question of racial prejudice. The *Ross* Court held, however, that the "generalized but thorough inquiry into the impartiality of the veniremen" was sufficient, distinguishing *Ham v. South Carolina*, 409 U.S. 524 (1973), in which the Court had demanded that voir dire explicitly include the issue of racial bias. Race was more important in *Ham* than in *Ross*, the Court reasoned, because in *Ham* the defendant claimed that he had been framed because of civil rights activities. The races of the defendant and victim in *Ross*, by contrast, were unrelated to the facts of the case. The impact of racially associated attitudes thus differed even in two cases in which they may well have been operative. In other instances they would have no relevance at all to the jury's verdict.

43. Bias unrelated to subgroup affiliation can be more important than that related to group membership. In *Ristaino v. Ross*, 424 U.S. 589 (1976), discussed in note 42 *supra*, racial bias was not sufficiently important to require direct treatment on voir dire. A juror's blood relationship to the defendant, for instance, would have been considerably more important. Indeed, the argument that jurors of different races cannot represent one another—cannot have the same influence on a verdict—proves too much. Although it may be the case that two individuals of different subgroups would not have the same effect on the deliberations of a jury, no two individuals would ever have exactly the same influence on a jury, for no two individuals are exactly alike. Subgroup membership is no different from any number of characteristics that distinguish people from one another. The impartiality requirement thus provides no basis for granting group characteristics a privileged status.

44. See *Peremptory Challenge*, *supra* note 27, at 1718-19, 1726-32 (arguing that representation of subgroups on juries furthers impartiality for this reason).

juror attitude and should not be entitled to special treatment. Even if certain non-situation-specific biases are deemed desirable, their presence cannot be ensured by protecting subgroups.⁴⁵ Moreover, subgroup membership may correlate with situation-specific biases,⁴⁶ which presumably are disfavored. The representation of subgroups thus will protect many situation-specific biases and fail to protect many non-situation-specific biases. In any event, such representation will not further impartiality.

B. *The Meaning of Jury Representation*

Although extension of *Taylor* to require that a jury mirror the community demographically is inappropriate, that decision's emphasis on representation as an aspect of impartiality is critical. As an initial matter, it is not obvious that a jury should be representative at all. Democracy requires that citizens be the ultimate decisionmakers on questions of policy—questions of what the law should be. Such decisions are reached through the political process, and for its legitimacy, that process must represent the people. Juries, however, do not decide what the law should be; they decide facts. Their role is the technical one of applying the law and not making it. Once the people have decided political issues through the legislative process, it might seem that the need to represent the citizenry has been satisfied.

The use of juries, however, assumes that lay people are uniquely competent, not only to make the law, but also to apply it.⁴⁷ If these people did not possess this second competence, the jury system would irrationally substitute the untrained insights of juries for the professional expertise of judges.⁴⁸ Given this special competence, however, ordinary citizens are called on to judge guilt and innocence using the decision methods, not of politics, but of judicial fact-finding. Because the confidence that justifies the jury system is in the people as a whole, juries should continue to represent the citizenry even though they make different kinds of decisions and employ different methods than lawmakers.

45. For example, an anarchist might always vote to acquit the defendant. Not all anarchists belong to a protected subgroup, however, nor do anarchists—who are united by a non-situation-specific bias—constitute such a group.

46. For example, a male's inability to convict accused rapists could have much to do with his being male, but this might have no effect on his judgment in a robbery case.

47. *Taylor* states that the purpose of the jury is to make available the "commonsense judgment of the community" in deciding cases. 419 U.S. at 530.

48. *Id.* (community judgment preferred to "overzealous or mistaken prosecutor" and "overconditioned or biased response of a judge").

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This interest in representation through juries is part of the constitutional requirement of impartiality. Traditionally, bias has been considered a trait the juror either has or has not. However, judicial reasoning on impartiality sometimes refers to bias as a matter of degree rather than as a discrete characteristic.⁴⁹ It is also frequently noted that the significance of juror bias rests in the way in which it influences verdicts.⁵⁰

This viewpoint, seeming to treat bias as a generalized trend of thought rather than as a simple discrete characteristic, suggests a more sophisticated concept of impartiality. Although it is difficult to describe the full range of factors that influence how a juror will deliberate and vote—certainly the task is not accomplished by saying that he is or is not biased⁵¹—the characteristics that all jurors have that influence verdicts can be summarized on a single, continuous scale that measures each juror's "verdict impact" for a given venire and a given case.

The significance of individual jurors' verdict impacts is reflected in the conduct of trial attorneys. These attorneys intuitively rely on a concept of verdict impact to remove those veniremen most likely to have an unfavorable impact on the verdict—those most hostile to the challenging side.⁵² In order to use the peremptory, attorneys must rank prospective jurors on a single scale. For any case and any venire, an attorney could in theory be asked to estimate the probability that a jury would convict knowing only that it contained a particular juror. The attorney would be estimating that juror's verdict impact—the in-

49. The Court in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), described the function of the peremptory as the elimination from both sides of extremes of partiality. Because extremes only exist in matters of degree, the Court was implicitly referring to the location of jurors on some continuous scale.

50. See, e.g., *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) (trial judge erred in ruling that juror clearly biased against defendants could not have influenced jury verdict); *United States v. Bowles*, 574 F.2d 970, 971-73 (8th Cir. 1978) (trial court erred in failing to determine whether prospective jurors' verdict would be influenced by racial bias); *State v. Taylor*, 282 So. 2d 491, 502 (La. 1973), *rev'd on other grounds sub nom. Taylor v. Louisiana*, 419 U.S. 522 (1975) (challenge for cause to remove prospective juror whose relationship with victim "would influence him in arriving at a verdict and thus cause him to be biased against the defendant").

51. "Bias" is sometimes used as a generic term for any attitude that may influence the verdict, rather than being limited to those attitudes so unacceptable as to trigger the challenge for cause. This is illustrated by the use of "group bias" in *Wheeler* and *Soares*. See note 40 *supra*. That sort of bias does not warrant removal, according to those opinions; rather, it warrants inclusion.

52. For an empirical study of the information relied on by prosecutors in exercising the peremptory, based on information requested by actual prosecutors given hypothetical cases in experiment, see Hayden, Senna, & Siegel, *Prosecutorial Discretion In Peremptory Challenges: An Empirical Investigation of Information Use In the Massachusetts Jury Selection Process*, 13 *NEW ENG. L. REV.* 768 (1978).

fluence he would have on the jury's verdict as a result of the innumerable traits ordinary people bring into the jury box. Verdict impact would be defined on a scale from zero to one. Each individual would have a verdict impact, and the mean of the verdict impacts of the jurors would correlate with the verdict tendency of the jury as a whole. Juries with higher mean verdict impacts would tend to convict more frequently than those with low means.⁵³

The relationship of verdict impact to impartiality is clear: a jury will be impartial—that is, able to reach a verdict fairly and accurately—only if its mean verdict impact is not dissimilar to the mean verdict impact of society as a whole. This is so because juries are empowered to decide cases precisely because they represent the innumerable traits and insights of the people—because ordinary individuals are thought to be good fact-finders. The measure summarizing those traits is the verdict impact, and the social mean verdict impact summarizes them for the entire populace.⁵⁴ The impartial jury, then, is to be measured, not only by the simple standard proscribing explicit bias, but also by the social mean verdict impact.⁵⁵

53. Although strong, this correlation will not be perfect. The requirement that jurors deliberate assumes it is possible, for example, for a single juror with a high verdict impact to convince the rest to convict even though they have low verdict impacts. In general, however, verdict impact by definition relates to the likeliness of a jury to convict.

54. *Taylor* assumed that there is more than mere membership in the population involved in representing the citizenry, since it reversed a conviction by an all-lay panel. That additional factor of representation is the relation between the jury's mean and the social mean.

55. The peremptory challenge is also part of this scheme of impartiality. Indeed, only in the context of a single, continuous characteristic that all jurors have and that importantly conditions verdicts is the peremptory explicable at all; the traditional notion of bias does not account for the peremptory challenge. The challenge for cause removes potential jurors whose bias is a discrete characteristic—they are either biased or not, and if they are biased they may not serve as jurors. *See pp. 1181-82 supra*. This is all the Constitution requires, and it seems to leave no place for the peremptory; a properly functioning challenge for cause will remove all bias. If the challenge for cause fails in any particular case, the remedy need only concern that case; it would not be necessary to institute an additional peremptory challenge system.

The peremptory, then, does not operate on bias in the traditional sense, and it is inaccurate to characterize it as doing so, even though such a characterization is common. *See, e.g., State v. Singletary*, 80 N.J. 55, 62, 402 A.2d 203, 206 (1979) (purpose of peremptory to make trier of fact as nearly impartial as possible by removing bias); *Staiger v. Gaarder*, 258 N.W.2d 641, 645 (N.D. 1977) (peremptory intended to remove jurors who would not be impartial).

Instead, the peremptory removes the extremes of verdict impact from both sides. This reduction of the "spread" of verdict impact could reduce the danger that the deliberative mechanism will magnify extreme views that might be presented forcefully in the jury room, and also could prevent the unanimity rule from exaggerating the influence of such extreme positions. It also could facilitate deliberation by making the jury less polarized. Finally, the peremptory, by removing extremes, will serve to dampen the effects of random selection on the jury's mean verdict impact as compared to society's.

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It would be impossible, of course, to reproduce the social mean on any single jury. Determining either the social mean or a jury's mean would be a prodigious task, and doing so confidently in countless cases would not be feasible. Nevertheless, certain jury selection methods would predictably distort the means of the juries they choose, even though that distortion is not measurable in any one case. In *Taylor*, the Court confronted just such a system. The Louisiana jury selection system tended to eliminate women, and the Supreme Court found that women as a group have a mean verdict impact for many cases that differs significantly from society's.⁵⁶ Hence, the mean of all-male juries would differ systematically from the social mean, and juries so selected would not represent the community.⁵⁷ The rule of *Taylor*—that distinctive groups may not systematically be kept off venires⁵⁸—thus follows directly from the need to prevent systematic deviation of the jury's mean verdict impact⁵⁹ from society's.

III. Representation and the Peremptory Challenge

The representation component of impartiality is preserved by preventing systematic jury deviation from the social mean verdict impact. This view of impartiality accounts for the holding of *Taylor* that distinctive groups in the community may not be excluded systemat-

56. This is the point of *Taylor's* claim that a distinct "flavor" is lost in jury deliberation if either sex is excluded. 419 U.S. at 531-32. Of course, the Court did not find that this "flavor" is essential to impartiality in every case. 419 U.S. at 538.

57. It is in this sense that men and women are not "fungible," as *Taylor* puts it. 419 U.S. at 531. A pool composed wholly of men differs in mean verdict impact from one containing both sexes. As groups they are not fungible; as individuals, they may be—a man and a woman could have the same verdict impact.

58. In implementing the rule of *Taylor*, lower courts identify "distinctive groups" with criteria that indicate a mean verdict impact different from society's. *See, e.g., United States v. Test*, 550 F.2d 577, 591 (10th Cir. 1976) (distinctive group has cohesiveness of attitudes that sets members off from social milieu).

59. The characteristic of the community that may not be distorted need not be conceptualized in exactly this fashion. Instead of verdict impact as here defined, it is natural to look at jurors in terms of their judgment on guilt prior to deliberation, their individual proneness to convict, without reference to their influence on and from deliberation. Although the use of conviction proneness as the privileged community characteristic would not change the analysis of this Note, verdict impact is used because of its closer connection to empirical reality. Attorneys especially are concerned primarily with verdict impact, insofar as they can estimate it, and they are concerned with individual proneness to convict as a factor in verdict impact. Verdict impact has the added advantage of making it possible to take into account the unique rule of unanimity that frequently applies to jury verdicts; part of the calculation going into an individual's verdict impact is the likelihood that he will, by himself, prevent an adverse verdict through the unanimity requirement.

ically from venires. It also explains why *Taylor* refused to extend this rule to petit juries. Because the effect of excluding individuals from a jury by either random chance or the peremptory differs from that of excluding the same individuals from jury pools or venires, juries themselves do not have to be representative of the community in subgroup proportions.

The effect of the peremptory on the mean verdict impact of the jury depends on the distribution of verdict impact in the community. For some distributions, the normal operation of the peremptory will distort the jury's mean from that of the community. For other distributions, however, the peremptory will produce no such distortion; in these cases, *limitation* of the peremptory would distort the jury's mean from the community's. *Wheeler* and *Soares* did not rest on evidence about which distribution existed in the community in question, nor is such evidence now available. Thus, the conclusions in those decisions that the uncontrolled use of the peremptory caused juries to be unrepresentative of the community was unwarranted, and limitation of peremptory challenges in order to protect subgroups on the petit jury was not sound.

A. *The Effect of the Peremptory*

Chance operates to eliminate many potential jurors in the steps from venires to the petit jury, but it does not do so in the fashion found unacceptable in *Taylor*. Chance has no systematic effect either on subgroup proportions or on the petit jury's verdict impact. All individuals are equally likely to be eliminated randomly. Because chance does not have a systematic effect on mean verdict impact, *Taylor* rightly refused to control its effects on petit jury composition.

The effects of eliminating an individual from a jury by the peremptory are also sufficiently unlike those of eliminating the same individual by exclusion from the jury pool that the simple rationale of *Taylor* does not apply. A venire member who is challenged peremptorily still has some effect on the mean verdict impact of the jury simply by being on the venire, and hence is unlike an individual who is eliminated prior to that point. For example, if the formerly excluded women who are added to the jury venire after *Taylor* have a conviction impact higher than any other venire members, they will be challenged by the defense in place of the next least conviction-promoting venire members, who otherwise would have been removed. Thus, the mean conviction impact of the jury will rise, even though the newly included women are

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removed by the peremptory. Because the verdict impact of individuals and groups affects petit juries even if they are eliminated by the peremptory, the systematic deviation from the social mean found in *Taylor* does not result.

B. *Attitude Distributions and the Impact of the Peremptory*

The rationale of *Taylor* does not mandate limitation of the peremptory challenge, nor, of course, do arguments linking impartiality to literal notions of representativeness. If *Wheeler* and *Soares* are not interpreted to rest on a demographic notion of representativeness, then they must be interpreted to rely on empirical premises concerning the distribution of verdict impact in the population that were not found in *Taylor*. Neither *Wheeler* nor *Soares* established this empirical claim, however, and they scarcely could have, for the subject is discussed tangentially at best in the current literature.⁶⁰

Any distortion caused by the peremptory of the jury's mean verdict impact from that of society depends on the social distribution of verdict impact.⁶¹ Suppose that the social distribution, correctly reproduced on the venire,⁶² is asymmetrical about the mean—that the extremes in favor of acquittal are farther away from the mean than the extremes in favor of conviction.⁶³ Suppose further that the acquittal extreme is

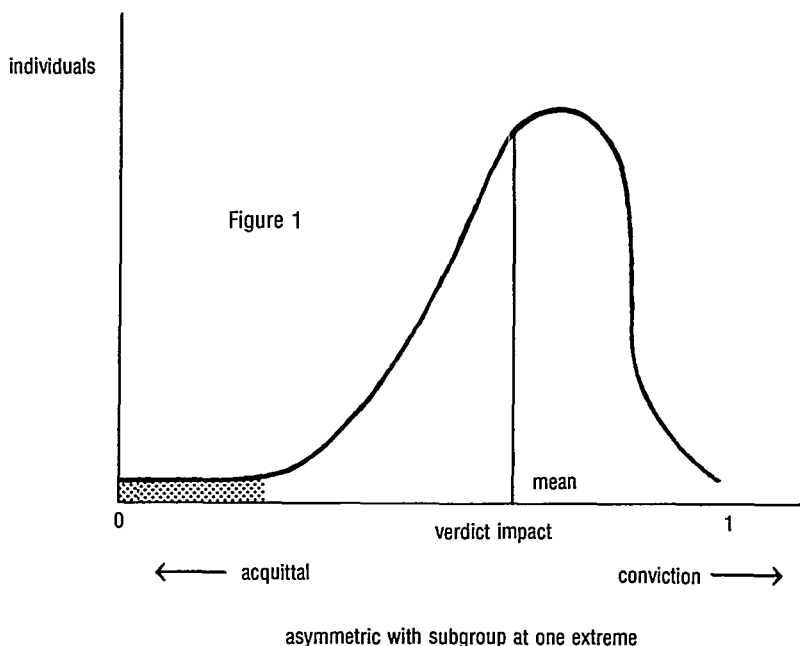
60. Empirical studies relating to juries generally address other subjects. See, e.g., Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970) (arguing that exclusion of "scrupled" jurors renders jury more conviction-prone and less representative); Suggs & Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629 (1978) (experiments and use of psychological methods to estimate juror suitability); note 68 *infra* (citing sources).

61. This entire discussion rests on the assumption that both sides are equally able to identify hostile jurors. For evidence indicating that this ability is still very limited in many circumstances, see Zeisel & Diamond, *The Effects of Peremptory Challenge on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978). It might be suggested that the point of *Wheeler* and *Soares* is to mitigate such an imbalance. There was no showing, however, that one exists or that it is especially pronounced in situations in which members of minority groups are subject to disproportionate challenge. In any event, the logical remedy for an informational imbalance would be to grant additional challenges to the disadvantaged side as a matter of general policy, rather than to accomplish the same effect for fortuitously chosen venires in which members of subgroups seem to cluster at one end.

62. Systematic distortion of the venire's mean is prevented by the rule of *Taylor*, and only chance would operate to alter its distribution from that of the total social pool from which it is drawn. When chance does so, the effect of the peremptory becomes unpredictable.

63. Such a pattern could be charted on a graph, as in Figure 1:

occupied by members of some subgroup. In this case, the normal operation of the peremptory⁶⁴ will have a disproportionate impact on members of that subgroup. More importantly, it will distort the jury's mean in favor of conviction, because the prosecution's removal of subgroup members will not be fully balanced by the defense's peremptory elimi-



For a similar graph designed around a completely different assumption as to the purpose of the peremptory challenge, see Zeisel & Diamond, *supra* note 61, at 527 (assuming purpose of peremptory to eliminate certain degree of bias no matter what community distribution is).

64. The statutory peremptory does not always operate with numerical symmetry: in some jurisdictions, for some cases the defense receives more peremptories than does the prosecution. *E.g.*, ALASKA RULES CRIM. P. 24(d) (granting state six and defendant 10 peremptories when offense is punishable by more than one-year imprisonment); S.C. CODE § 14-7-1110 (1976) (granting state five and defendant 10 peremptories in trials for murder, manslaughter, burglary, arson, rape, grand larceny, breach of trust, perjury, or forgery). It might appear from this that the peremptory is permitted to change the social mean verdict impact when the legislature specifically decides that it should do so. Such a legislative power to determine the community judgment also underlies the authority to prescribe a "death-qualified" jury in cases involving capital punishment, where prospective jurors whose attitudes would prevent them from ever imposing the death penalty are challenged for cause under a specific legislative mandate. *E.g.*, MONT. REV. CODES ANN. § 46-16-304(h) (1979). The Court has approved this legislative definition of the community judgment. *Witherspoon v. Illinois*, 391 U.S. 510, 513-14 (1968) (elimination of those opposed to death penalty prohibited; elimination of those unwilling ever to impose death penalty approved). It has never questioned the asymmetrical grant of peremptory challenges. No such exercise of legislative authority, however, justifies a court's fortuitous alteration of the community mean when it applies the rule of *Wheeler* and *Soares*.

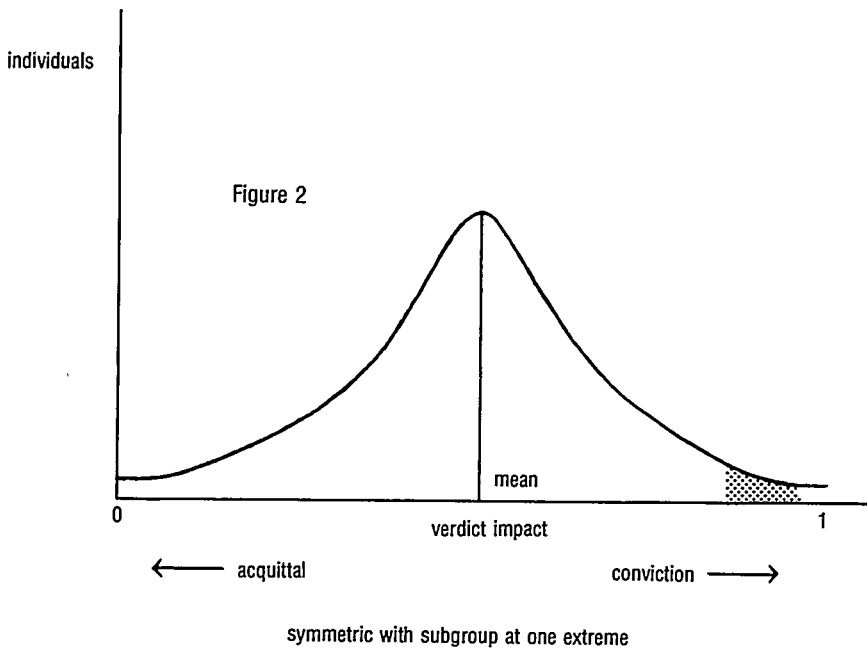
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nation of pro-conviction jurors. In this case, limiting the peremptory's disproportionate use on subgroups would serve *Taylor's* goal of protecting the community mean represented in the jury. This may have been the situation that existed in *Wheeler and Soares*.⁶⁵

On the other hand, the social distribution might be symmetrical about the mean, with extremes on both sides equally far away.⁶⁶ If members of a subgroup are again supposed to occupy one of the extremes, the disproportionate removal of that subgroup will have absolutely no effect on the jury's mean impact. The effect of these removals would be fully offset by the removal of jurors at the other extreme. In such a case, a rule protecting subgroups by limiting the peremptory would shift the jury's mean away from that of society, toward the extreme at which the protected group clustered. Under these circumstances, limiting the peremptory would cause the jury to be unrepresentative. This too might have been the situation that obtained in *Wheeler and Soares*; it is impossible to know which of these two situations exists simply from observing that disproportionate

65. In both these cases the prosecution struck a disproportionate number of blacks without advancing any reason for its action other than verdict tendencies believed to be associated with race.

66. Such a situation would appear as follows:



numbers of a subgroup are challenged.⁶⁷ Only if that subgroup is at an extreme of an asymmetrical social distribution will limiting the peremptory protect representation of the community. Otherwise, such a limitation would distort the community mean.

Numerous other distributions of verdict impact in society can be imagined. In those that are symmetrical but that do not have a subgroup clustered at one end, both the normal and limited peremptory will have no systematic effect on the jury's mean. In those that are asymmetrical but that have subgroups distributed evenly throughout, both the normal and limited peremptory will distort the jury mean toward the nearer extreme. There is currently no empirical evidence as to which distribution exists in any given community for any range of cases.⁶⁸ In the absence of knowledge as to the actual distribution for the geographic community from which a jury is drawn, neither the normal nor the limited peremptory has a predictable, systematic effect on the jury's mean verdict impact as compared to that of society.

Wheeler and *Soares* did not seek this information before limiting the peremptory challenge. The courts reviewed disproportionate challenges to certain subgroups and simply determined that this use of the peremptory was based on characteristics thought to be associated with subgroup membership that they called "group bias."⁶⁹ *Wheeler* and *Soares* thus could be read to identify a situation in which one end of the venire distribution was occupied by members of a subgroup. They failed to determine, however, what the entire distribution looked like, and in particular, the distance of the extremes from the mean. In the

67. Such a disproportionate removal of subgroup members on the basis of subgroup-associated attitudes was all that was observed by the courts in *Wheeler* and *Soares*.

68. The question apparently never occurred to the courts in *Wheeler* or *Soares*. Neither has it been a subject for scientific or empirical research. Such research on jury trials and juries is generally concerned with other subjects. See, e.g., Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. L. & SOC. CHANGE 1 (1973) (examining empirical testing of effects of socio-economic disparity between jurors and defendants on verdicts); Comment, *Loaded for Acquittal? Psychiatry in the Jury Selection Process*, 7 U.W.L.A. L. REV. 199 (1975) (describing use of psychological survey techniques to identify favorable jurors in criminal trials); Silver, *A Case Against the Use of Public Opinion Polls as an Aid in Jury Selection*, 6 RUTGERS J. COMPUTERS & LAW 177 (1978) (describing and opposing use of survey techniques on population); Sonaike, *The Influence of Jury Deliberation on Juror Perception of Trial, Credibility, and Damage Awards*, 1978 BRIGHAM YOUNG U.L. REV. 889 (studying changes in juror perceptions resulting from deliberation).

69. In order to implement their rules, *Wheeler* and *Soares* design tests to determine whether prospective jurors were being challenged on the basis of "group bias." See *Wheeler*, 22 Cal. 3d at 280-83, 583 P.2d at 764-66, 148 Cal. Rptr. at 905-07; *Soares*, 1979 Mass. Adv. Sh. at 628-32, 387 N.E.2d at 516-18. These tests should identify distributions in which subgroups cluster at one or both ends of the spectrum, as the peremptory is used to remove extremes of conviction tendency. Such a test will do nothing, however, to determine how far those ends are from the mean as compared to the opposite extreme.

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absence of such information, it is impossible to say what effect any disproportionate use of the peremptory has on the jury's mean as compared to society's. Without such a judgment it is impossible to employ the notion of impartiality inherent in *Taylor*. The holdings of *Wheeler* and *Soares* thus do not represent a sound application of *Taylor*.

Instead, the state court cases represent constitutional adjudication on the basis of empirical assumptions that the courts did not discuss and could not prove. Moreover, such proof would be difficult to make. The complaining party would have to furnish a convincing operational definition of verdict impact and a way to measure it in society for a broad range of cases.⁷⁰ In addition, empirical research would have to demonstrate that the social distribution of verdict impact was significantly asymmetrical about the mean,⁷¹ and that a social subgroup occupied the more distant extreme. The court would have to determine a means by which to extend the rule to all situations of sufficient asymmetry, to identify those situations and to keep the rule current as society's distribution changed over time.⁷²

In any event, the question depends on an empirical showing about the social verdict impact distribution,⁷³ a showing that was not made in

70. This would necessitate measurement substantially more accurate than that required or made by real attorneys in exercising the peremptory. See pp. 1189-90 *supra*.

71. In fact, both research and adjudication on these issues should focus primarily on identifying asymmetrical distributions and only secondarily on social subgroups as they are commonly understood. The distorting effect of the symmetrical peremptory depends on the presence of a cluster at one end of an asymmetrical distribution, not on the fact of that cluster's being occupied by members of a subgroup.

72. Moreover, this proof as to the distribution of verdict impact would have to be of the kind and degree required for constitutional decisions. Holdings limiting the normal operation of the statutory peremptory challenge rest, not on the courts' authority to supervise the operation of the statutory scheme, but rather on the claim that the constitutional requirement of impartiality overrides that scheme.

73. Only an empirical showing can even conceivably justify a limitation of the peremptory, because the jury must represent the community. Since the peremptory challenge is a device to further impartiality, see note 55 *supra*, the representational component of impartiality must be respected by its operation; no use of the peremptory that systematically renders the jury's mean verdict impact unrepresentative of society's can be tolerated. It might, however, seem needlessly complicated to assess a state prosecutor's use of the peremptory against certain groups in the context of the complex theory of impartiality and representation developed in this Note; a prosecutor is bound by the Fourteenth Amendment and may not discriminate against groups protected by it. Hence, it could appear that whatever the Sixth Amendment scheme of impartiality, whatever the point of jury representation and the peremptory challenge, a prosecutor at least may not remove prospective jurors on the basis of certain characteristics. It is the whole burden of *Swain v. Alabama*, 380 U.S. 202 (1965), however, that this is not the case. The point of that much-criticized and possibly misunderstood opinion is that the use of the peremptory on the basis of a good-faith judgment as to the prospective juror's likely impact on the verdict is permitted, even if that judgment is based on information normally proscribed for use by public officials—in *Swain*, race. *Id.* at 221-22. A prosecutor

Wheeler or *Soares*. Without that information a court cannot apply the rationale of impartiality and representation in *Taylor* to the peremptory challenge.⁷⁴ Unless the social distribution is known, there is no way to say what the peremptory does to the jury's mean as compared to society's. The subtle notion of impartiality and representation inherent in *Taylor* protects society's mean verdict impact, not its demographic composition.

or a defense attorney uses the peremptory challenge properly, and thus comports with the Sixth Amendment scheme of impartiality, when he challenges the juror most likely to have an unfavorable impact on the verdict.

74. This requirement is a very high one. It might be objected that if the demands of systematic inquiry set a standard that cannot be met, then systematic methods should be abandoned and courts left free to rely on their intuitions as to the distribution of verdict impact in society. This still does not justify *Wheeler* and *Soares*, however, for they do not rest on even an intuitive claim that the extremes of the distribution of verdict impact occupied by members of subgroups are farther from the community mean than the other extremes. Rather, those decisions rely on a literal definition of impartiality as subgroup cross-sectionality and avoid asking the questions raised here by assuming that subgroups have qualitatively different viewpoints rather than that they occupy different positions on the continuous scale of verdict impact. The California court evidences this simplistic thinking when it argues that juries from which subgroups have been eliminated will reflect the "prejudices of the majority," again assuming that different groups cannot "represent" one another. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902-03. This is as close as *Wheeler* comes to addressing the real issue of the distribution of attitudes with respect to subgroup membership.

Moreover, to say that courts may rely on their intuitions as to the effect of the peremptory on the jury's representation function is to give to judges an unguided and unreviewable discretion to police representation as they see fit. Confronted with black defendants and near or total exclusion of black veniremen, any court will be tempted to invoke its discretion and imitate the decisions in *Wheeler* and *Soares*. Some evidence more persuasive than a court's feeling about a phenomenon it can neither measure nor even observe should underlie constitutional adjudication of the requirement of an impartial jury.