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State v. Neil: Approaching the Desired Balance Between Peremptory Challenges and Racial Equality in Jury Selection

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State v. Neil: Approaching the Desired Balance Between Peremptory Challenges and Racial Equality in Jury Selection

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I. INTRODUCTION

An all-white jury convicted Jack Neil, a black man, of second degree murder and unlawful possession of a firearm.¹ The attorneys chose Neil's jury from a pool that consisted of thirty-one whites and four blacks. Over the objections of the defense, the state exercised peremptory challenges² to remove the first three blacks called.³ After the prosecution removed the third black prospective juror,⁴ the defendant moved to strike the jury pool, claiming that the state was using its challenges in a constitutionally improper manner.⁵ The court denied the motion, holding that the

1. The charges grew out of Neil's shooting of a black Haitian immigrant. The primary issue before the jury was whether Neil had acted in self-defense. Brief for Petitioner at 6-7, *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

2. A peremptory challenge is "[a] challenge to a juror to be exercised by a party to a civil action or criminal prosecution without assignment of reason or cause." *BALLENTINE'S LAW DICTIONARY* 933 (3d ed. 1969).

3. The state used only four peremptory challenges throughout jury selection. Brief for Petitioner at 3, *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

4. The state asked no questions of this prospective juror before peremptorily challenging her. She was a single elementary school teacher who knew no one involved in the criminal proceeding. Brief for Petitioner at 4, *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

5. Counsel for Neil argued that the state's use of peremptory challenges in this fashion violated the defendant's sixth amendment right to trial by an impartial jury.

state need not explain its peremptory challenges. Nevertheless, the court granted each side five additional peremptory challenges, and the defense used all of them to strike intervening prospective jurors in an unsuccessful attempt to reach the remaining black in the jury pool.⁶ The district court affirmed Neil's conviction, but recognized that the issue presented was "particularly troublesome and . . . capable of repetition."⁷ The court, therefore, certified the following question to the Supreme Court of Florida as one of great public importance: "Absent the criteria established in *Swain v. Alabama* . . ., may a party be required to state the basis for the exercise of a peremptory challenge?"⁸ The Supreme Court of Florida answered the question with a qualified affirmative and *held*, reversed: The Florida Constitution's guarantee of the right to an impartial jury⁹ prohibits racially discriminatory use of peremptory challenges. Evidence of a party's practice in a single proceeding can be sufficient to compel that party to state the basis for particular questioned challenges. *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

II. THE BASIC CONFLICT AND SOME ATTEMPTS AT RESOLUTIONS

The significance of this decision derives from its place within an historical progression toward the resolution of a basic conflict. Specifically, this conflict is between the right to unbridled use of peremptory challenges and the fight against racial discrimination in our judicial system. Peremptory challenges are rooted in ancient English common law,¹⁰ since their introduction, it has been axiomatic that peremptory challenges are not subject to judicial inquiry. The struggle for racial equality in our courts had its constitutional beginnings with the passage of the fourteenth amendment in 1868;¹¹ since then, it has been equally axiomatic that our legal system does not permit racial discrimination.¹² Within the context

6. The attorneys eventually selected the remaining black as an alternate juror, but the alternate juror never served on the jury in this case.

7. *Neil v. State*, 433 So. 2d 51 (Fla. 3d DCA 1983).

8. *Id.*

9. FLA. CONST. art. I, § 16.

10. For a concise account of the history and purposes of peremptory challenges, see J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 145-51 (1977).

11. U.S. CONST. amend. XIV.

12. See, e.g., *Peters v. Kiff*, 407 U.S. 493 (1972); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935); *Carter v. Texas*, 177 U.S. 442 (1900); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

of jury selection, these two axioms¹³ unveil an inherent contradiction in the system. Ideally, they represent absolute discretion and the forbidden exercise of discretion, both of which are mutually exclusive in their pure forms. This conceptual exclusivity is largely responsible for the difficulty in developing a theoretically consistent, yet workable, balance between the two.¹⁴

A. *The Swain v. Alabama Resolution*

The Supreme Court of the United States first faced this troublesome conflict twenty years ago in *Swain v. Alabama*.¹⁵ In *Swain*, a jury convicted a black man of raping a white woman and sentenced him to death. The state peremptorily struck all six eligible blacks in the jury pool, resulting in an all-white jury.¹⁶ Additionally, in Talladega County where the state tried Swain, no black had served on any petit jury for at least fifteen years¹⁷ despite the fact that each jury pool included an average of six to seven blacks.¹⁸ After an in-depth recounting of the "very old credentials" of the peremptory challenge,¹⁹ the Supreme Court of the United States held that a defendant in any single case cannot overcome the presumption "that the prosecutor is using the State's challenges to obtain a fair and impartial jury."²⁰ The Court recognized the fact that peremptory challenges are "frequently exercised on

13. In the interests of simplicity and manageability, the basic propositions that "peremptory challenges are exempt from judicial inquiry" and that "discrimination based on race is not permitted in our courts" are referred to throughout this Note as the "two axioms." Cf. Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 158 (1967) (referring to the essential conflict between two opposing maxims).

14. See *Swain v. Alabama*, 380 U.S. 202, 222 (1965) ("The challenge, *pro tanto*, would no longer be peremptory."); *Neil v. State*, 433 So. 2d 51, 52 (Fla. 3d DCA 1983) ("When peremptory challenges are subjected to judicial scrutiny, they will no longer be peremptory.").

15. 380 U.S. 202 (1965).

16. See *id.* at 205. There were actually eight blacks in the original jury pool, but two were exempt. The prosecutor removed the remaining six under Alabama's "struck" jury system, a special form of peremptory challenge. Under this system, the defense strikes two people and the prosecution strikes one person in alternating turns until only twelve people are left in the jury pool. *Id.* at 210.

17. *Id.* at 205. A petit jury is the ordinary jury of 12 persons for the trial in a civil or criminal action. The title distinguishes it from the grand jury.

18. Swain also challenged the proportional number of blacks on his grand and petit jury venires. See *id.* at 205-06.

19. See *id.* at 212-21.

20. See *id.* at 221-22. It is important to note here that Swain's only claim in this litigation arose out of the fourteenth amendment's equal protection clause. See *infra* note 72 and accompanying text.

grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."²¹

The Court did note, however, that "the purposes of the peremptory challenge [could be] perverted."²² This would be the case where a defendant could establish that: (1) a particular prosecutor, (2) in every type of case, (3) under every set of circumstances, and (4) for an extended provable period of time, (5) has peremptorily excused black persons from venires with the result that no black person has ever served on a petit jury in a case tried by that prosecutor.²³ Because the defendant in *Swain* could not show by a complete record that the prosecutor was responsible for the absence of blacks on juries for fifteen years, the Court found that he had not carried his burden of proof.²⁴ Thus, through the artifice of a conclusive presumption, the Court effectively resolved the conflict in the case of a single defendant in favor of peremptory challenges.²⁵

The *Swain* decision immediately provoked a considerable amount of comment, most of which was critical.²⁶ The thirteen years that followed the decision appeared to bear out much of the criticism—abuses continued²⁷ and no litigant was able to meet the

21. 380 U.S. at 220.

22. *Id.* at 224. Only four members of the Court joined this section of the opinion without reservation. See *id.* at 228 (Harlan, J., concurring). Nevertheless, courts have generally accepted it as the operative part of the Court's holding. See, e.g., *McCray v. Abrams*, 750 F.2d 1113, 1130 (2d Cir. 1984) ("Part III of the *Swain* opinion, although dictum, set forth the circumstances that a defendant would have to show in order to subject the prosecution's use of peremptories to inquiry by the court. Although the standards set by *Swain* have proven to be practically impossible to meet, they were nevertheless enunciated.").

23. This is the statement of the *Swain* test found in the intermediate appellate court opinion. *Neil v. State*, 433 So. 2d 51 (Fla. 3d DCA 1983).

24. See 380 U.S. at 224-28.

25. In achieving this "resolution," however, the Court avoided the basic conflict altogether by interposing evidentiary problems. As Justice Goldberg astutely pointed out in his dissenting opinion, any true resolution to a head-on conflict between these axioms would require the nonconstitutional axiom (inviolate peremptory challenge) to give way to the constitutional one (inviolate racial equality). *Id.* at 244 (Goldberg, J., dissenting).

26. See, e.g., Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 135-39 (1965); Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

27. See J. VAN DYKE, *supra* note 10, at 152-60. The criticisms of *Swain* also continued. See, e.g., Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417 (1969); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967); Note, *Limiting the Peremptory Challenge: Representation of*

heavy burden of the *Swain* test.²⁸ The reality of a right without a reasonably obtainable remedy led commentators to advocate re-evaluation of the *Swain* decision.²⁹ Indeed, other Supreme Court decisions, bearing tangentially on discrimination in the selection of petit juries, suggested that perhaps the Court was itself undertaking such a reevaluation.³⁰ Against this background, the Supreme Court of California handed down the landmark decision of *People v. Wheeler*.³¹

B. *The Wheeler-Soares Alternative*

In *Wheeler*, a jury convicted two black men of murdering a white grocery store owner in the course of a robbery. During jury selection, the prosecutor used peremptory challenges to remove every prospective black juror from the box,³² resulting in a panel of twelve white jurors. The prosecutor struck the blacks after little or no questioning,³³ and without attempting to challenge them for cause. The defense counsel moved for a mistrial twice during the selection process, but the trial court denied the motions and held that the prosecutor need not explain his conduct. On appeal, the Supreme Court of California reversed the decision. The court held

Groups on Petit Juries, 86 YALE L.J. 1715 (1977); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974); 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).

28. *People v. Wheeler*, 22 Cal. 3d 258, 286, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909 (1978). During this period, many criminal defendants tried unsuccessfully to meet the *Swain* test. See, e.g., *State v. Booker*, 517 S.W.2d 937 (Mo. Ct. App. 1974) (holding insufficient showing where a news reporter testified that over a 19-month period prosecutors peremptorily challenged 68% of the blacks on venires); *Ridley v. State*, 475 S.W.2d 769 (Tex. Crim. App. 1972) (holding insufficient showing where prosecutor struck seven of ten blacks on a 32 member venire to get an all-white jury, where three defense attorneys with combined experience of 60 years testified that this prosecutor customarily excluded blacks and where prosecutor testified that it was "common sense" to exclude blacks where the accused was black and the victim white).

It is doubtful whether anyone has ever really met the *Swain* test; at most, it has been satisfied twice in relation to the same prosecutor. *State v. Washington*, 375 So. 2d 1162 (La. 1979); *State v. Brown*, 371 So. 2d 751 (La. 1979).

29. See, e.g., J. VAN DYKE, *supra* note 10, at 166-69.

30. See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *infra* notes 73-76 and accompanying text.

31. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

32. Although the record was not entirely clear, it appeared that the prosecutor removed seven blacks. *Id.* at 265, 583 P.2d at 753, 148 Cal. Rptr. at 895.

33. The prosecutor only asked four brief questions of one black prospective juror, two questions of another, and no questions of at least three other black prospective jurors. *Id.* at 263 n.2, 583 P.2d at 753 n.2, 148 Cal. Rptr. at 894 n.2.

that peremptory challenges based solely on group bias³⁴ violate the right to an impartial jury guaranteed in the state constitution and are therefore impermissible.³⁵

The *Wheeler* court based its decision on the guarantee to a jury drawn from a "representative cross-section of the community."³⁶ The court fashioned a new test for courts to apply in California³⁷ that would permit a party to rebut the initial presumption of propriety if peremptory challenges are misused in a single case. This test places the burden on the movant to show: (1) on as complete a record as possible, (2) that the persons challenged were members of a cognizable group, and (3) that there is a strong likelihood that a party challenged such persons because of their group association rather than because of any specific bias.³⁸ If the trial court is convinced that the movant has made this prima facie showing, the burden shifts to the party who made the challenges to show that he did not exercise the challenges in question on the basis of group bias alone.³⁹ If that party is unable to justify the questioned challenges, jury selection must begin anew with a new jury pool.⁴⁰

Shortly after *Wheeler's* repudiation of *Swain*, the Supreme Judicial Court of Massachusetts followed California's lead. In *Commonwealth v. Soares*,⁴¹ a jury convicted three black men of the first degree murder of a white college football player. At trial,

34. Specific bias is the bias of a juror "concerning the particular case on trial or the parties or witnesses thereto"; on the other hand, group bias is juror bias that arises out of membership in an "identifiable group, distinguished on racial, religious, ethnic, or similar grounds." *Id.* at 274-76, 583 P.2d at 760-61, 148 Cal. Rptr. at 902.

35. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

36. The court began by analyzing a string of federal cases (in order): *Smith v. Texas*, 311 U.S. 128 (1940); *Glasser v. United States*, 315 U.S. 60 (1942); *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946); *Ballard v. United States*, 329 U.S. 187 (1946); *Peters v. Kiff*, 407 U.S. 493 (1972); and *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Wheeler*, 22 Cal. 3d at 267-70, 583 P.2d 755-57, 148 Cal. Rptr. at 896-98. Fearing the Supreme Court of the United States might not agree, the court ultimately rested its decision on analogous state constitutional provisions that the court had interpreted in light of the federal cases.

37. In effect, the Supreme Court of California interpreted its state constitution to provide more protection to its California citizens than the federal constitution presently provides to citizens in federal courts. This has become a trend among the states. See Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

38. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

39. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. The party whose peremptory challenges are under scrutiny need not give reasons equivalent to those required for a challenge for cause; he must simply satisfy the trial court that he exercised the challenges for reasons of specific, instead of group, bias.

40. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

41. 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979).

the prosecutor peremptorily challenged twelve of thirteen black members of the jury pool,⁴² representing ninety-two percent of the available black jurors, while striking only thirty-four percent of the available white jurors.⁴³ As a consequence, only one black juror was seated on the convicting jury. The Supreme Court of Massachusetts reversed the convictions, holding that the defendants had rebutted the initial presumption of propriety in the exercise of peremptory challenges. The test the court laid down closely resembled that set forth in *Wheeler*: a party must show that "(1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership."⁴⁴ The *Soares* test calls for the same burden-shifting procedure as in *Wheeler* where a movant makes a prima facie showing,⁴⁵ and provides the same start-over remedy if the challenger's reasons are inadequate.⁴⁶

Wheeler and *Soares* approached the basic conflict in axioms from an entirely different perspective than *Swain*. Instead of attempting to keep the axioms unadulterated and mutually exclusive,⁴⁷ the courts struck a balance by reducing the ideals to somewhat diluted versions. In other words, the courts qualified each axiom: peremptory challenges are exempt from judicial inquiry *unless* they are based solely on race; racial discrimination is not permitted *unless* it coincides with specific bias. This compromise provided a framework under which the two axioms could coexist.⁴⁸

One should note that *Wheeler* and *Soares* retained *Swain's* initial presumption that parties exercise peremptory challenges in a

42. Counsel for the defense made a timely objection, and carefully laid the foundation for an appeal. *Id.* at 473-74 n.8, 387 N.E.2d at 508-09 n.8.

43. The prosecutor used 44 of the 48 permissible peremptory challenges to remove 12 of the 13 blacks in the jury pool and 32 of the 94 whites. *Id.* at 473, 387 N.E.2d at 508.

44. *Id.* at 490, 387 N.E.2d at 517.

45. *Id.* at 491, 387 N.E.2d at 517.

46. *Id.* at 490, 387 N.E.2d at 518. Judicial interpretation later broadened the remedy in Massachusetts. See *infra* notes 157-60 and accompanying text.

47. See *supra* notes 13-14 and accompanying text.

48. The majority in *Swain* and the judges who have supported that decision seem to have intuitively concluded that what is true in the abstract is true in reality, i.e., the two cannot coexist. The assumption is that the entire worth of the peremptory challenge will be lost if it is not absolutely peremptory. See *Swain*, 380 U.S. at 221-22 ("To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge."). But experience has contradicted this assumption. See *infra* notes 135-39 and accompanying text.

constitutionally proper manner. Unlike *Swain*, however, they allow a party to rebut that presumption by convincing the trial court that there is a "reasonable inference"⁴⁹ of improper use based on a challenger's conduct in a specific case. This inference may be drawn from surrounding circumstances:

[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as failure of his opponent to engage these same jurors in more than desultory voir dire or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.⁵⁰

Whether the *Wheeler-Soares* balance is workable or even desirable has been the subject of great controversy.⁵¹ Several courts have adopted or applied the *Wheeler-Soares* rationale;⁵² others

49. *Wheeler* first requires the moving party to show a "strong likelihood" of improper use of peremptory challenges, and then requires the trial court to find a "reasonable inference" of such improper use. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *Soares* first requires a showing of only a "likelihood" of improper use, but requires the trial court to make the same finding of a "reasonable inference." 377 Mass. at 499, 387 N.E.2d at 517. In both jurisdictions, courts have held that the reasonable inference language controls. See *People v. Fuller*, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (Ct. App. 1982); *Commonwealth v. Walker*, 379 Mass. 297, 397 N.E.2d 1105 (1979).

50. *Wheeler*, 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06. The court intended this list to be illustrative rather than exhaustive, and the *Soares* court appears to have adopted it. See 377 Mass. at 490, 387 N.E.2d at 517.

51. See, e.g., Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Younger, *Unlawful Peremptory Challenges*, 7 LITIGATION 23 (1980); Note, *Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges*, 11 FORDHAM URB. L.J. 927 (1982-83); Note, *People v. Wheeler: Peremptory Challenges—A New Interpretation*, 14 NEW ENG. L. REV. 370 (1978); Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980); Comment, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L.J. 477 (1984); Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673 (1983).

52. See *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984) (adopting the *Wheeler-Soares* rationale based on the sixth amendment to the United States Constitution); *People v.*

have expressly rejected it,⁵³ preferring to adhere to *Swain*. Interestingly, some intermediate appellate courts abandoned the *Swain* test in favor of a single-case/rebuttable-presumption approach, only to be reversed by their state's highest court.⁵⁴

C. *The People v. Thompson Innovations*

One of these intermediate appellate court decisions is noteworthy because of its procedural innovation. In *People v. Thompson*,⁵⁵ the state tried and convicted a black defendant of grand larceny and possession of stolen property arising out of a car theft. During jury selection, the prosecutor used all ten of his peremptory challenges against black prospective jurors with the result that no blacks sat on the jury.⁵⁶ Although the court substantially adopted the *Wheeler—Soares* rationale, it "parted company" with the California and Massachusetts courts in defining the circumstances sufficient to rebut the initial presumption. Specifically, the *Thompson* court rejected *Wheeler* and *Soares*:

to the extent that they suggest that a defendant may compel inquiry into the reasons for a prosecutor's use of peremptory challenges merely because the prosecutor has used a particular number of his peremptory challenges to exclude black potential jurors, for it may well be that the prosecutor's peremptory challenges were properly exercised, but for reasons that are not as readily apparent to those who were not in the position of the Judge who attended the voir dire.⁵⁷

Thus, by making a total exclusion of blacks insufficient, by it-

Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (App. Ct. 1982), *rev'd*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983) (applying the *Wheeler-Soares* rationale based on the sixth amendment to the federal constitution); *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985) (adopting *Wheeler-Soares* based on the state constitution); *State v. Crespino*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980) (adopting *Wheeler-Soares* test but finding it unmet); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (App. Div. 1981) (adopting *Wheeler-Soares* test with a procedural change, discussed *infra* p. 9).

53. *See, e.g.*, *State v. Wiley*, ___ Ariz. ___, 698 P.2d 1244 (1985); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979); *Commonwealth v. Henderson*, 497 Pa. 23, 438 A.2d 951 (1981); *State v. Grady*, 93 Wis. 2d 1, 286 N.W.2d 607 (1979).

54. *See People v. Payne*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983), *rev'd*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982); *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (App. Ct. 1982) (choosing *Swain* test as the New York rule despite *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (App. Div. 1981)).

55. 79 A.D.2d 87, 435 N.Y.S.2d 739 (App. Div. 1981).

56. Despite some ambiguity in the record, it appeared that the prosecutor had exercised an additional two peremptory challenges against blacks in selecting the alternate jurors. *Id.* at 88 n.3, 435 N.Y.S.2d at 742 n.3.

57. *Id.* at 110-11, 435 N.Y.S.2d at 755.

self, to warrant reversal of a trial court's determination not to make inquiry,⁵⁸ the *Thompson* court placed responsibility for implementation largely within the discretion of the trial court.

The *Thompson* court further required a stronger finding on the part of the trial court before a party could inquire into an opposing party's peremptory challenges. Whereas *Wheeler* and *Soares* call for the trial court to find a "reasonable inference"⁵⁹ of improper use, *Thompson* requires the trial court to find a "substantial likelihood" of improper use.⁶⁰ This difference in degree could certainly work against the moving party in marginal cases. Taken together, the *Thompson* innovations created a new balance of the conflicting axioms that lies somewhere between the requirements of *Swain* and those of *Wheeler* and *Soares*.⁶¹

D. *The Supreme Court's Position*

In 1983, the Supreme Court of the United States denied certiorari in *McCray v. New York*,⁶² a case that would have given the Court the opportunity to reconsider *Swain*. In doing so, however, the Court gave rise to speculation that a reevaluation was in fact taking place.⁶³ Justice Marshall, in a strong dissent with which Justice Brennan concurred, claimed that *Swain* "should be reconsidered in light of Sixth Amendment principles established by our recent cases."⁶⁴ Justice Stevens, joined by Justices Blackmun and Powell, concurred in the denial of certiorari, but only because of the belief that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date."⁶⁵ While specifically recognizing the importance of the underlying issue, Justice Stevens invited the states to "serve as laboratories in which the issue receives further study before it is addressed by this Court."⁶⁶ Thus,

58. For a comparison with the *Wheeler-Soares* approach on this issue, see *infra* notes 140-48 and accompanying text.

59. See *supra* note 49.

60. Under *Thompson*, both the showing by the moving party and the finding by the trial court must be a "substantial likelihood" of improper use of peremptory challenges. See 79 A.D.2d at 108, 435 N.Y.S.2d at 754.

61. Although *Thompson*, like *Wheeler* and *Soares*, allows the axioms to coexist through compromise, see *supra* notes 47-48 and accompanying text, its procedure is clearly less intrusive in to peremptory challenges.

62. 461 U.S. 961 (1983).

63. See *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 193-99 (1983).

64. *McCray v. New York*, 961 U.S. at 963-70.

65. *Id.* at 961-62.

66. *Id.* at 963.

it appears that a majority of the Supreme Court would be amenable to a reexamination of *Swain*.⁶⁷

III. A THEORETICAL ANALYSIS

A. *The Basis of an Appeal*

Any reexamination of *Swain* must begin with an analysis of a threshold issue: What is the basis of an appeal to reverse a conviction due to allegedly discriminatory use of peremptory challenges? There is clearly something *morally* wrong when no black person sits on any jury in a particular county over a fifteen-year period.⁶⁸ The Supreme Court admitted as much in *Swain*.⁶⁹ The problem has been in finding and defining the *constitutional* wrong necessary to reverse a conviction.⁷⁰ Attempts by courts and commentators have resulted in a confused mass of internally inconsistent justifications.⁷¹

67. One commentator has noted that because of Justice Stevens's past postures in denials of certiorari, "it seems unlikely that he would have written a concurrence that cast doubt on *Swain* if he believed that the *Swain* rule would ultimately remain unchanged." *The Supreme Court, 1982 Term, supra* note 63, at 197.

68. *Swain*, 380 U.S. at 205.

69. By finding that a showing of continued use of peremptory challenges to achieve exclusion of blacks over a period of time is sufficient to *prove* wrongful use, the Court implicitly determined that such use is wrongful in the single case. The Court simply held that such wrongful use could not be *proven* in the single case. *See id.* at 223-24; Comment, *supra* note 26, at 1167-68.

70. Note that the object of reversing the conviction of a particular defendant is to protect the integrity of the Constitution. It is a means to deter wrongful use of peremptory challenges and not a means to give the defendant a new trial in front of a more factually impartial jury. The basic assumption in our system is that race is not a valid indicator of juror impartiality. Therefore, an all-white jury composed of individuals who survive challenges for cause will be as *factually* impartial as a racially mixed jury composed of similar individuals. To state it otherwise is to undermine the entire premise of prohibited racial discrimination. Thus, constitutional impartiality must subsume more than simply factual impartiality. *See infra* notes 86-92 and accompanying text.

71. *See, e.g.,* United States v. Leslie, 759 F.2d 366 (5th Cir. 1985) (rehearing *en banc* granted) (using supervisory power over the lower federal courts coupled with the United States Attorney's obligation to adhere to the highest standards of fairness and justice); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (extending the cross-section requirement from venire to petit juries); Jorgenson, *Back to the Laboratory with Peremptory Challenges: A Florida Response*, 12 FLA. ST. U.L. REV. 559 (1984) (extending the cross-section requirement, but emphasizing the perceived community need for minority participation on juries for the appearance of fairness); Younger, *supra* note 51 (using the requirement of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979) that prosecutors seek justice, not just convictions); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979) (using the principle that group affiliation alone does not determine an individual's ability to be an impartial juror).

Swain effectively foreclosed the use of the equal protection clause of the fourteenth amendment.⁷² Supreme Court decisions following *Swain* shifted attention to the sixth amendment guarantee of an impartial jury.⁷³ In *Taylor v. Louisiana*,⁷⁴ the Court struck down, on sixth amendment grounds, state constitutional and statutory provisions exempting women from jury duty who had not specifically filed a written declaration of their desire to serve. In striking these provisions, the *Taylor* court held that a state may not systematically exclude distinctive groups from jury pools because petit juries must be comprised of a "representative cross-section of the community."⁷⁵ Focusing on the cross-section requirement, *Wheeler* and *Soares* attempted to extend the requirement from jury pools to petit juries.⁷⁶

Although this extension to petit juries has a basic appeal (because the unchecked discriminatory use of peremptory challenges can render the cross-section requirement meaningless), the reasoning behind it simply does not hold up under analysis. The functions of the two phases⁷⁷ of jury selection are fundamentally different, precluding such an extension. The beginning phase, drawing the venire, is necessary to have a manageable number of people from which to draw the petit jury. Imposing the cross-section requirement on venires, although bearing indirectly on impartiality, primarily ensures widespread community participation on juries.⁷⁸ But at the final phase, petit jury selection, the focus shifts to obtaining jurors who will be impartial in a particular case. Cross-section

72. *Swain v. Alabama* conclusively established the heavy burden a defendant had to meet under an equal protection analysis, and barring a direct overruling of *Swain*, any attempt to reach a more reasonable result would have to rest on another provision of the Constitution. 380 U.S. 202 (1965).

73. *Duncan v. Louisiana* made the sixth amendment applicable to the states through the fourteenth amendment. 391 U.S. 145 (1968).

74. 419 U.S. 522 (1975).

75. *Id.* at 528.

76. Both decisions were careful, of course, not to engage in the absurdity of requiring particular juries to reflect a cross-section of the community. See *Wheeler*, 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903; *Soares*, 377 Mass. at 488, 387 N.E.2d at 516.

77. There are three phases of the jury selection process. The first is the initial compilation of a list of prospective jurors. At the second phase, some of the prospective jurors are disqualified, exempted, or excused on grounds of incompetency, undue hardship, and other factors. The third phase entails questioning by the parties and the exercise of statutory challenges—challenges for cause and peremptory challenges. See J. VAN DYKE, *supra* note 10, at 85-175. For purposes of this discussion, the first two stages are lumped together as one, and the third stage is distinguished.

78. See Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 (1982), Note, *supra* note 71, at 1778-80.

tionalism and impartiality are clearly not equivalent,⁷⁹ and, indeed, they sometimes conflict within a given case.⁸⁰

It is apparent that the cross-section requirement only furthers factual impartiality of the jury through the venire stage. Recognizing this fact, some commentators have argued that if the jury is not in fact partial, then no litigant has a right to complain regardless of systematic exclusion in the selection process.⁸¹ This result-oriented argument is the constitutional equivalent of "the ends justify the means." Proponents of this argument further claim that the community has no right to complain either, because a black person who is systematically excluded after the venire stage still ultimately effects the makeup of the jury.⁸² This, they allege, is because the party that excluded him was forced to use one of a limited number of peremptory challenges against him and, thus, was unable to use that challenge to remove another prospective juror perceived to be unfavorable.⁸³

The flaw in the foregoing argument appears upon returning to *Taylor* and the way the courts applied it in *Wheeler*, *Soares*, and *Thompson*. Commentators have focused on the test the court adopted in *Taylor* (the representative cross-section requirement) rather than on what the test was set up to identify and what the holding precluded (*systematic* exclusion). The *Wheeler* and *Soares* courts were merely mistaken in their emphasis.⁸⁴ They were really concerned about the systematic exclusion of distinct groups from juries, and the level of factual impartiality of the post-exclusion

79. For example, on the facts of the *Soares* case, even though twelve out of thirteen blacks were excluded, the composition of the jury (one out of twelve jurors, or 8.33 percent was black) was fairly close to the composition of the venire (thirteen out of one hundred seven veniremen, or 12.15 percent black). 377 Mass. 461, 387 N.E.2d 499 (1979). Thus, assuming the composition of the venire reflected a cross-section of the community, the defendants in *Soares* had no reason to complain based on the cross-section test alone.

80. It is easy to visualize a jury pool containing several members of a racial group, none of whom happen to be impartial in this case. In a jury pool containing a representative number of blacks, all of whom have either read newspaper stories about the case, are related to the defendant, or are friends of the victim of the crime, no impartial jury could contain a black juror.

81. See, e.g., Saltzburg & Powers, *supra* note 53; Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980).

82. See Brief for Respondent at 8 n.4, *State v. Neil*, 457 So. 2d 481 (Fla. 1984); Saltzburg & Powers, *supra* note 51, at 357; Note, *supra* note 81, at 1192-93.

83. This argument places all prospective jurors on a continuum of bias, with the purpose of peremptory challenges to eliminate the extremes on each end. Therefore, each prospective juror who is challenged affects the composition of the jury by forcing a choice between him and the next least favorable juror to the party. See *supra* note 82.

84. *Accord* Younger, *supra* note 51, at 24; Note, *supra* note 71, at 1785-86.

jury was irrelevant to them.⁸⁵

The true basis for the *Wheeler* and *Soares* decisions is that "constitutional impartiality"⁸⁶ requires more than factual or statistical impartiality—it requires procedural integrity. Thus, a criminal defendant⁸⁷ is entitled to a factually impartial jury *chosen in a constitutionally proper manner*.⁸⁸ That a constitutionally proper manner, under the fourteenth amendment, precludes systematic exclusion based on race has already been decided by the Supreme Court in *Swain*.⁸⁹ State constitutional provisions,⁹⁰ statutory enactments,⁹¹ and common sense mandate the same conclusion.⁹²

The reason that systematic exclusion based on race is unconstitutional is not merely that race is not a true indicator of a juror's impartiality.⁹³ Many proxies that litigants choose are not true indicators of juror qualification;⁹⁴ it is the essence of the peremptory challenge that a litigant may exercise it on *perceived* partiality regardless of whether that perception is correct.⁹⁵ If the litigant is incorrect, he wastes one of his limited peremptory challenges,

85. Both decisions held systematic exclusion to be prejudicial per se—the error could not be harmless. See *Wheeler*, 22 Cal. 3d at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907; *Soares*, 377 Mass. at 492, 387 N.E.2d at 518.

86. This reference is to a true guarantee to an impartial jury in the federal or any state constitution.

87. Article I, § 16 of the Florida Constitution and the sixth amendment to the United States Constitution apply only to criminal cases. Nevertheless, a persuasive argument can be made that civil litigants are also entitled to a constitutionally impartial jury. Even though neither article I, § 22 of the Florida Constitution nor the seventh amendment to the federal constitution mention the word *impartial*, courts have held "anything less than an impartial jury is the functional equivalent of no jury at all." *City of Miami v. Cornett*, 463 So. 2d 399, 402 (Fla. 3d DCA 1985); see also *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (Ct. App. 1983) (holding that failure to require explanation of basis for challenge where prima facie showing is made constitutes reversible error).

88. The federal and state constitutions are process-oriented, not result-oriented; in constitutional questions, the end cannot justify the means. See *supra* note 81.

89. See *supra* note 69.

90. See, e.g., FLA. CONST. art. I, § 2 (equal protection).

91. A "constitutionally proper manner" means in accordance with the Constitution and the laws passed under that Constitution. See, e.g., 18 U.S.C. § 243 (1982) (providing: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . ."); cf. *Peters v. Kiff*, 407 U.S. 493, 505 (1972) (White, J., concurring).

92. "[J]ustice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Ironically, this passage is quoted in *Swain*. 380 U.S. at 219.

93. Cf. Note, *supra* note 71, at 1781.

94. Dress, mannerisms, and occupation are common examples. See J. VAN DYKE, *supra* note 10, at 146.

95. See *supra* note 10.

and he must pay the price in the form of opportunity cost. Nonetheless, race as a proxy is different in kind, rather than degree, from proxies such as style of dress. It is an insidious, pervasive, self-perpetuating proxy that is intolerable in our democratic society.⁹⁶ A peremptory challenge wasted by reason of a racial proxy hurts more than the litigant who wasted it—society suffers for it.⁹⁷ Therefore, a litigant does not have an unfettered right to utilize proxies that are constitutionally impermissible.

Analytically, this discussion focuses upon two separate distinctions. First, there is the difference, and occasionally the conflict, between cross-sectionalism and impartiality. Second, there is the distinction between factual impartiality and constitutional impartiality, the latter including both factual impartiality and procedural integrity. From these distinctions, it is apparent that the cross-section test by itself is inadequate as a decision-making tool beyond the venire stage of jury selection. Also, because jurors who survive challenges for cause are considered to be factually impartial,⁹⁸ tests bearing on this element are not helpful. Thus, focus necessarily shifts to the procedural integrity element of constitutional impartiality. In other words, constitutional guarantees to an impartial jury require us to look at the manner in which litigants choose the petit jury.

At this point in the analysis, the conclusions proceed by their own weight. To the extent that this constitutional requirement

96. One of the values that sets our society apart from others is the respect for the integrity of the individual and his right to be judged for what he is. Nothing is so destructive of that value as proxies based on factors such as race. Some studies have purported to show that certain groups, including blacks, are statistically more likely to vote against the state in a criminal trial. If this is a justification for systematically excluding blacks, and if the statistics reflect a basic mistrust of a system in which blacks feel they have little say, it seems that we have created a vicious circle, a self-fulfilling prophecy. The worst part is that, even though a real opportunity cost exists, the system cannot work like a market, with participants minimizing opportunity costs for themselves. For fifteen years, nobody in Talladega County, Alabama, realized or cared to realize that they were incurring opportunity costs.

97. The profound societal effects of real and perceived racial discrimination in the Miami area, where this case arose, are persuasively set forth in the text and appendix to the Brief of Amici Curiae, *State v. Neil*, 457 So. 2d 481 (Fla. 1984). See also Jorgenson, *supra* note 71, at 579-80.

98. The states and the federal government have set standards by statute that allow prospective jurors to be dismissed for cause. See, e.g., FLA. STAT. § 913.03 (1984). Because peremptory challenges are not constitutionally required and could, therefore, be eliminated altogether, these statutory standards essentially define impartiality. Therefore, impartiality does not mean complete absence of bias. It would be impossible for any human being who brings with him all of his life's experiences to be absolutely neutral to every issue in a given case.

conflicts with the traditional inviolability of peremptory challenges, the latter must yield. Constitutional guarantees to an impartial jury, whether state or federal, mandate the repudiation of *Swain*.

B. *The Proper Balance*

The foregoing analysis would appear to resolve the conflict in axioms unequivocally against peremptory challenges. But the axioms do not exist in a vacuum, and doctrinal conclusions are not self-executing. To this point, we have assumed a perfect world where it is possible to know the motivating factor behind a given peremptory challenge. Of course, that is not the case at all; the crucial question is one of state of mind. Problems naturally inhere in a constitutional mandate to forbid the exercise of a highly valued,⁹⁹ lawful right where wrongful intent motivates such an exercise. Therefore, we must consider a third major factor.

This third consideration is the administration of justice. Constitutional requirements in the use of peremptory challenges may impose certain burdens on the administration of justice, including uncertainty and inefficiency,¹⁰⁰ nonfinality of trial court determinations,¹⁰¹ overuse of appellate judicial resources,¹⁰² and a possible flood of frivolous litigation.¹⁰³ In attempting to deal with these burdens, we must give consideration to the workability of the initial

99. Indeed the peremptory challenge has long been regarded as "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894), quoted in *Swain*, 380 U.S. at 219. As Blackstone noted two centuries ago, peremptory challenges serve at least two valuable functions: first, they allow a party to remove prospective jurors he feels, but cannot prove to the court, are prejudiced against him, and second, they allow a party to remove prospective jurors he may have alienated through probing voir dire questioning. See 4 W. BLACKSTONE, COMMENTARIES* 353. Today, peremptory challenges are seen as a means to achieve an impartial jury (when used correctly) by eliminating both extremes of partial prospective jurors. See *Swain*, 380 U.S. at 219.

100. When trial courts are uncertain how to apply rules, they are forced to make ad hoc determinations. This in turn results in uncertainty for litigants planning trial tactics. To the extent that parties and trial judges have incentives to test or argue over the interpretations of rules, inefficiency results.

101. If trial court determinations are not perceived as the final word on particular issues, especially preliminary ones like jury selection, the process of conducting trials would become longer and more costly to both parties.

102. Appellate judicial resources are limited and already overburdened. Improvidently created appealable issues are not in the interest of judicial economy.

103. In a racially diverse community, it is foreseeable that this may be an appealable issue that is almost always available. If the standard used by the courts does not distinguish the real from the frivolous, the parties who lost in the trial court will flood the courts with meritless claims.

evidentiary requirement, the efficacy of the sanction imposed, and the practicality of the standard on review of the initial determination. In addition, it would be improper to over-deter the use of peremptory challenges.¹⁰⁴ Thus, even after resolving the theoretical conflict in axioms, we are faced with a tough balancing problem. The question becomes: To what extent are we willing to disrupt the administration of justice and the sanctity of peremptory challenges in order to root out racial discrimination?

Qualitatively, the answer to this question is relatively easy. We should seek a resolution that maximizes benefits in terms of reduced racial discrimination without incurring excessive marginal costs in terms of the other considerations. It is possible to be somewhat more specific without engendering excessive disagreement. We need to strive for a procedure¹⁰⁵ that promotes low cost correction of discriminatory challenges early in the process (i.e., at the trial court level), provides relative certainty and finality of trial court determinations, allows for limited appellate review, and still preserves the integrity of the peremptory challenge. Such a solution requires that determination of the issue be largely committed to the discretion of the trial judge, tempered by a presumption that parties will act in a constitutional manner.

Even if most people would agree on this qualitative solution,¹⁰⁶ the debate remains over how to practically implement it to achieve the desired results. Because the courts can only implement the resolution in conflicting axioms through a judicial procedure, the development of such a procedure becomes the crucial issue. Because the workability of a procedure is difficult, if not impossible, to predict in advance, empirical evidence is invaluable to that development. This, apparently, is the current posture of the Supreme Court.¹⁰⁷ While the Court seems to have decided that peremptory challenges must yield to racial equality in the context of jury selection,¹⁰⁸ it is waiting until states compile enough empirical evidence

104. As noted above, peremptory challenges serve a very valuable purpose in our system of justice through trial by jury. See *supra* note 99.

105. The use of the word procedure here, referring to the judicial method of determining misuses of peremptory challenges, is not to be confused with the earlier use of that word in connection with the phrase "procedural integrity," which refers to the process of petit jury selection.

106. Even in these general terms, this solution presupposes several value-laden policy choices. Among others, it assumes that there are other societal goals of equal or more importance than deterrence of racial discrimination. Therefore, it is not to be expected that everyone will agree.

107. See *supra* Part II D p. 786.

108. Whether the Court decides to directly overrule *Swain* or repudiate it on sixth

to justify adoption of a procedure with predictable results. The Court's approach is sensible because the procedure it adopts will define, in a very practical sense, the substantive constitutional rights of litigants.

IV. THE *Neil* DECISION

Florida is the first state¹⁰⁹ to accept the Supreme Court's tacit invitation in *McCray* to experiment with alternatives to *Swain*.¹¹⁰ Furthermore, the Supreme Court of Florida acceded to the wishes of Justice Stevens's concurrence by fashioning a new procedure in *State v. Neil*, rather than simply importing that of *Wheeler-Soares*. But *Neil* is not an intricate, independently reasoned opinion; the *Neil* court relies heavily on *Wheeler, Soares*, and *Thompson*, and reaches its holding essentially through a smorgasbord technique.¹¹¹ The significance of the decision, therefore, lies in the procedure the court actually adopted, particularly those areas of the procedure that differ from *Wheeler* and *Soares*.

The *Neil* court succinctly identified what it considered to be the basis of a claim of allegedly discriminatory use of peremptory challenges:

Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the Constitutional guaran-

amendment or other grounds, procedural implementation will be the crucial issue.

109. Pointing to language in the Stevens concurrence to the effect that "[t]here is presently no conflict of decision within the federal system," the federal district court hearing McCray's petition for habeas corpus adopted the *Wheeler-Soares* rationale and ordered that McCray be retried. See *McCray v. Abrams*, 576 F. Supp. 1244, 1246 (E.D.N.Y. 1983) (quoting 461 U.S. at 962). On appeal to the Second Circuit, the state joined McCray in urging that *Swain* be repudiated, but differed on the procedure advocated. The court affirmed the district court's repudiation of *Swain* on sixth amendment grounds, but reversed because the lower court should have allowed the state a hearing to attempt to overcome McCray's prima facie case. 457 So. 2d at 483-84; see *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984).

110. Because the Supreme Court of Florida in *Neil* mentioned the *McCray* concurrence and dissent, it appears that this invitation may in fact have provided some impetus to repudiate *Swain*, especially in light of the four-to-three split on the court.

111. After summarizing *Wheeler, Soares*, and *Thompson*, the court simply chose the elements from each decision, adding little of its own analysis. See 457 So. 2d at 486-87.

tee of an impartial jury.¹¹²

The court rested its decision entirely on the Florida Constitution and specifically avoided federal constitutional issues.¹¹³ The court went on to find that "adhering to the *Swain* test of evaluating peremptory challenges impedes, rather than furthers, article I, section 16's guarantee,"¹¹⁴ and held that "the test set out in *Swain* is no longer to be used by this state's courts when confronted with the allegedly discriminatory use of peremptory challenges."¹¹⁵

In devising the test to be used in such a situation, the court borrowed substantially from *Thompson*. The initial presumption is that parties will properly exercise peremptory challenges. To rebut this presumption, a party must make a timely objection and demonstrate on the record a "strong likelihood" that particular persons have been challenged solely because of their membership in a distinct racial group.¹¹⁶ The trial court must then decide whether the party's showing is sufficient using *Thompson's* "substantial likelihood" standard. In applying this standard, the supreme court afforded the trial court abundant discretion in deference to its superior position from which to observe and evaluate. As in *Thompson*, the exclusion of a number of blacks, by itself, is insufficient to require an inquiry, and if the trial court does not find a substantial likelihood of impropriety, it will make no such inquiry. If, however, the court determines that a moving party's showing is sufficient, the burden shifts to the other party to show that he did not exercise the questioned challenges solely because of race. If, in answer to the court's inquiry, the party cannot demonstrate that his challenges were "based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race,"¹¹⁷ the court will deem him to have acted improperly. The remedy in such a case is to strike the entire jury pool and begin voir dire again with a new pool.

Note that in fashioning this test, the Supreme Court of Florida imported both of *Thompson's* innovations.¹¹⁸ This is especially

112. *Id.* at 486.

113. *See id.* at 487 n.12; *cf.* *Michigan v. Long*, 463 U.S. 1032 (1983).

114. 457 So. 2d at 486.

115. *Id.*

116. *Neil* is limited in scope to the use of peremptory challenges on the basis of race, with extension to other groups expressly left open. *See infra* notes 174-75 and accompanying text.

117. 457 So. 2d at 487. As under *Wheeler-Soares*, the party making the challenge need not give reasons equivalent to those required for a challenge for cause.

118. *See supra* Part II C p. 785.

significant in light of *McCray* because Florida is the only jurisdiction that has repudiated *Swain* and has incorporated refinements of the *Wheeler-Soares* procedure.¹¹⁹ But the court's deliberate choice to refine the test shows more than a desire to experiment. It also reflects a different view of what the court meant the test to accomplish.¹²⁰

The court went on to hold that this new test applied to both the prosecution and the defense.¹²¹ The court accompanied its holding with a one-sentence justification: "The state, no less than a defendant, is entitled to an impartial jury."¹²² Under this author's analysis, the state is thus entitled to a jury chosen in a constitutionally proper manner. Because jury selection in criminal proceedings is "state action" with respect to the general public,¹²³ the actions of the defendant are within the ambit of the rule.¹²⁴ In any case, the holding makes good practical sense because a single standard, applicable to all parties, is necessary to achieve a workable system with desired results.¹²⁵

The Supreme Court of Florida went on to narrow its decision. The court restricted application of the case to peremptory chal-

119. Although *Thompson* was never reversed, the New York Court of Appeals implicitly rejected it in *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982).

120. See *infra* note 134 and accompanying text.

121. See 457 So. 2d at 487. This holding takes on added meaning because in the instant case Neil himself challenged white prospective jurors solely on the basis of race, attempting to reach the remaining black in the jury pool. See *supra* note 6 and accompanying text.

122. 457 So. 2d at 487. Clearly, the state does have an interest in the composition of the jury. The defendant cannot waive a jury trial without the consent of the state. See FLA. R. CRIM. P. 3.260. Further, the rule specifically allows peremptory challenges, and in the case where the state tries defendants jointly, the rule allows the state the aggregate number of peremptory challenges given to the defendants. See FLA. R. CRIM. P. 3.350. An appellate court has also interpreted this statement in *Neil* to mean that the constitutional right to a jury is the right to an impartial jury. See *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d DCA 1985).

123. Cf. *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (actions of privately retained defense counsel amounted to state action); *Terry v. Adams*, 345 U.S. 461 (1953) (private "pre-primary" elections are a public function and are, therefore, state action); *Shelly v. Kraemer*, 334 U.S. 1 (1948) (state court enforcing a private agreement amounts to state action).

124. This argument may be extended to apply even in civil trials. The state provides a forum for the resolution of private disputes partly because it provides a means for enforcing its public policy. When litigants use the civil courts and select juries, they are acting as state actors with respect to the rest of the community. In these circumstances, it would be constitutionally improper for a litigant to systematically exclude blacks.

125. Much of the concern, at least in the Miami area, has been directed toward defendants' abuses of peremptory challenges. Three cases in particular have held the public eye, all of which involved white police officers acquitted by all-white juries of beating or shooting blacks to death. See Brief of Amici Curiae at 8-11, *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

lenges based on race¹²⁶ and held its decision to be nonretroactive.¹²⁷ Then, after noting the cross-section requirement for jury venires in *Taylor v. Louisiana*, the court admonished:

No one is entitled to a jury of any particular composition, and it is possible that the cross-section requirement might have to give way before article I, section 16's guarantee of an impartial jury It may even be possible that, on the peculiar facts of a particular case, no member of some distinct group could be impartial. If this occurs, an attorney should be able to state with certainty that this is so and that peremptories have been exercised because of empathy or bias.¹²⁸

The scope of the *Neil* opinion depends in large part on how this passage is interpreted. If instances where "no member of some distinct group could be impartial" include most cases involving racially sensitive issues, the exception will have swallowed the rule, and *Neil* will mean little. If those cases encompass only extraordinary fact patterns, as they should and probably will,¹²⁹ it is a valid exception that will leave the rule essentially intact. Although the *Wheeler* and *Soares* courts would probably have reached the same conclusion on this exception,¹³⁰ *Neil* is the first opinion to suggest overtly that such cases might exist.

Although the *Neil* decision lacks a thorough analysis, its holding and reasoning are consistent with this author's analysis. The court rested its decision on the constitutional guarantee of an impartial jury, and clearly focused on the procedural integrity aspect of constitutional impartiality. The court also distinguished between cross-sectionalism and impartiality. In essence, *Neil* holds that mere absence or legitimate exclusion¹³¹ of a racial group from a particular jury is not wrong—only systematic exclusion is constitutionally impermissible. The exception in *Neil* states that in unique circumstances the court will permit systematic exclusion, but only when the proxy of race is a correct indicator of juror qualification.¹³² Establishing that race is a correct proxy in a given case

126. See 457 So. 2d at 487. ("The applicability to other groups will be left open and will be determined as such cases arise."); see *infra* notes 174-75 and accompanying text.

127. 457 So. 2d at 488. This part of the holding has already been somewhat modified. See *infra* note 164 and accompanying text.

128. 457 So. 2d at 487 (citation and footnotes omitted).

129. See *infra* note 176 and accompanying text.

130. In such a situation, group bias would coincide with specific bias.

131. This reference is to challenges for cause and to the proper exercise of peremptory challenges.

132. Compare this characterization with the compromised axioms in *Wheeler* and

will probably require a showing that approaches the level of a challenge for cause, considering the *Neil* court's statement that "an attorney should be able to state with certainty that this is so."¹³³

The *Neil* court also implicitly balanced conflicting interests. In substantially following *Thompson*, the court opined that that decision "charts a more even course"¹³⁴ than either *Wheeler* or *Soares*. The main difference in the *Thompson* procedure is that its application is more restricted at both the trial and appellate court levels. Thus, the Supreme Court of Florida made a statement of policy: Florida is not willing to disrupt the administration of justice in its courts as much as California and Massachusetts are for the purpose of discouraging racial discrimination. This statement could represent one of two views: (1) Florida is generally less concerned with discouraging racial discrimination than are California and Massachusetts or, more likely, (2) Florida has benefitted from California's and Massachusetts's experience and has determined that the marginal benefit in terms of racial equality does not justify the marginal cost in terms of burdens on the administration of justice.

V. A PRACTICAL ANALYSIS

A. A Comparative Commentary on *Wheeler*, *Soares* and *Neil*

In order to predict the practical effect of the *Neil* decision, it is necessary for comparison purposes to review the California and Massachusetts experiences after *Wheeler* and *Soares*. No commentator has yet undertaken an empirical analysis of either state's experience; still, one may glean some general impressions from the case law and literature. First, deterrence of racial discrimination has proven quite satisfactory.¹³⁵ Second, the feared problems from the theoretical conflict in axioms¹³⁶ have apparently not materialized. That is, allowing limited, discretionary inquiry into particular questioned challenges has not profoundly changed the preemptory

Soares. See *supra* notes 47-50 and accompanying text.

133. 457 So. 2d at 487. This language tends to indicate that the trial court will then decide the issue.

134. *Id.* at 485.

135. Justice Mosk of the Supreme Court of California, author of the *Wheeler* opinion, has reported that racial discrimination in California courtrooms has almost disappeared. See Mosk, *Jury Selection: One State's Racial Bias Remedy*, N.Y. Times, June 24, 1983, at A24, col. 3.

136. See *supra* notes 10-14 and accompanying text.

challenge system.¹³⁷ Third, although the *Wheeler* and *Soares* decisions have required some further appellate adjudication to clarify the standards laid down,¹³⁸ there has not been an inordinate amount of appellate review.¹³⁹

Yet, before we too readily accept the desirability of *Wheeler* and *Soares*, we should remember the nature of what they corrected. We cannot realistically hope to eliminate racial prejudice within our justice system, or even significantly change bigoted views by law. At most, a sound, well-applied procedure can restrict overt manifestations of those views. The more intricate the procedure in terms of opportunity for judicial intervention and availability of appeals, the more effective it will be. But at some point,

137. This is not to say that the peremptory challenge system has not been changed at all. But, on the whole, the changes have not been fundamental. See *People v. Hall*, 35 Cal. 3d 161, 170, 672 P.2d 854, 859-60, 197 Cal. Rptr. 71, 77 (1983). Explaining particular challenges is not nearly as burdensome or destructive to peremptory challenges as some courts make it out to be. The Dade County State Attorney has voluntarily adopted the policy of explaining peremptory challenges in any case where the trial court perceives improper use, and apparently the system works well. See Brief of Amici Curiae at 10 n.3, *State v. Neil*, 457 So. 2d 481 (Fla. 1984). In addition, New York State has taken the position that during the two-year period between *Thompson* and *McCray*, the *Thompson* rule did not create any practical problems whatsoever. *McCray v. Abrams*, 750 F.2d 1113, 1132-33 (2d Cir. 1984).

138. In late 1983, the Supreme Court of California noted that there had been but three published court of appeals opinions since the *Wheeler* decision in 1978. See *People v. Hall*, 35 Cal. 3d 161, 169-70, 672 P.2d 854, 859, 197 Cal. Rptr. 71, 76-77 (1983). Since that time, there have been five published appellate court reviews of post-*Wheeler* trials where the *Wheeler* issue was a major one. See *People v. Alexander*, 159 Cal. App. 3d 75, 205 Cal. Rptr. 387 (Ct. App. 1984) (clarifying standard on review); *People v. Walker*, 157 Cal. App. 3d 1060, 205 Cal. Rptr. 278 (Ct. App. 1984) (affirming the trial court and applying *Wheeler*); *People v. Superior Court*, 157 Cal. App. 3d 55, 203 Cal. Rptr. 519 (Ct. App. 1984) (clarifying the *Wheeler* remedy); *People v. Ortega*, 156 Cal. App. 3d 63, 202 Cal. Rptr. 657 (Ct. App. 1984) (clarifying the timing allowed for making a *Wheeler* motion); *People v. Clay*, 153 Cal. App. 3d 433, 200 Cal. Rptr. 269 (Ct. App. 1984) (affirming the trial court and distinguishing *Hall*).

In Massachusetts, appellate courts have reviewed the issues raised in *Soares* on six occasions where the trial court had the benefit of the *Soares* decision and where the issue was comparatively serious. See *Commonwealth v. Wood*, 389 Mass. 552, 451 N.E.2d 714 (1983) (defining cognizable groups to exclude age); *Commonwealth v. Reid*, 384 Mass. 247, 424 N.E.2d 495 (1981) (defining the *Soares* remedy); *Commonwealth v. Thomas*, 19 Mass. App. Ct. 1, 471 N.E.2d 376 (1984) (affirming the trial court based on adequate explanations); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 467 N.E.2d 214 (1984) (clarifying the trial court's permissible role); *Commonwealth v. Perry*, 15 Mass. App. Ct. 932, 444 N.E.2d 1298 (1983) (affirming the trial court's refusal to accept explanations); *Commonwealth v. Di Matteo*, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981) (affirming the trial court and clarifying the extent of its discretion).

139. Compare the amount of appellate review required by the *Wheeler* and *Soares* decisions with that required by *Miranda v. Arizona*, 384 U.S. 436 (1966) (pertaining to fifth amendment right against self-incrimination and sixth amendment right to counsel); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (pertaining to fourteenth amendment due process requirements for personal jurisdiction); *Swain v. Alabama*, 380 U.S. 202 (1965).

the marginal costs of administering the procedure necessarily will exceed the marginal benefits of deterred racial discrimination. Locating that point in practice, and even in theory, is not easy. Nevertheless, the *Wheeler—Soares* solution lies somewhere past that point.

A concrete example illustrates one of the major differences between *Neil* and *Wheeler—Soares*. In *Holley v. J & S Sweeping Co.*,¹⁴⁰ the defendant in a civil negligence action¹⁴¹ used three of its six peremptory challenges to excuse three of four black prospective jurors.¹⁴² Either the court or the plaintiff, who was black, questioned all three of the jurors, but the defendant questioned none of them. After the defendant removed the third prospective juror, the plaintiff complained about what he perceived to be the defendant's attempt to systematically exclude blacks from the jury. After argument, the trial judge specifically found that there was no "exclusion by race"¹⁴³ and refused to inquire into the defendant's reasons. The defendant used its remaining three peremptory challenges to remove white prospective jurors, but only after extensive questioning by the defendant or after unsuccessful challenge for cause. The all-white jury returned a special verdict for the defendant on the issue of liability.

Wheeler and *Soares* authorize reversal of the trial court's determination not to inquire into a party's peremptory challenges based solely on the statistically disproportionate removal of members of particular racial groups.¹⁴⁴ Indeed, that is precisely what the California appellate court did in the *Holley* case.¹⁴⁵ In contrast, *Neil* allows reversal of the trial court's determination only upon a

140. 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983).

141. The court in *Holley* extended the *Wheeler* rule to civil cases. *Id.* at 592, 192 Cal. Rptr. at 77. A Florida appellate court made a similar extension of *Neil*. See *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d DCA 1985). Massachusetts courts have also strongly suggested that the *Soares* rule applies in civil cases. See *Rosenthal v. Weckstein*, 19 Mass. App. Ct. 944, 473 N.E.2d 202 (1985); *Terrio v. McDonough*, 16 Mass. App. Ct. 163, 450 N.E.2d 190, *rev. denied*, 453 N.E.2d 1231 (Mass. 1983).

142. The court excused the fourth black prospective juror. See 143 Cal. App. 3d at 590, 192 Cal. Rptr. at 75.

143. *Id.* at 590, 192 Cal. Rptr. at 76.

144. *Wheeler* places the burden on the moving party to make out a prima facie case and to show a reasonable inference of improper use. The opinion goes on to state that "the party may show that his opponent has . . . used a disproportionate number of his peremptories against the group." See 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *Soares*, although not phrased in terms of a prima facie case, specifically states that "[t]he disproportionate exclusion by the prosecution . . . sufficiently indicated the likelihood that blacks were being challenged because they were black." 377 Mass. at 490, 387 N.E.2d at 517.

145. See 143 Cal. App. 3d at 280, 192 Cal. Rptr. at 78.

finding of abuse of discretion.¹⁴⁶ A party may not inquire into the reason for a peremptory challenge unless the trial court finds that there is a "substantial likelihood" of the party's improper use of the challenge.¹⁴⁷ A finding on the record that, in a Florida court's opinion, the party properly exercised his peremptory challenges effectively insulates the case from reversal on this issue in all but the most flagrant of abuses. Under *Neil*, a Florida court would have affirmed the lower court's judgment in *Holley*.¹⁴⁸

The *Neil* approach makes eminently more sense in such a situation. There is little, if any, benefit in substituting the opinion of several appellate judges based on a cold record for the determination of a trial judge who actually witnessed the process. On the other hand, the costs of such a practice are great. Expansive appellate review forces trial courts either to require an explanation for peremptory challenges that they may believe are valid, or to leave the door open for reversal. Such a rule derogates the competence of trial judges, needlessly erodes the integrity of peremptory challenges, and unnecessarily burdens the administration of justice.

The increased latitude given a trial judge in deciding whether to inquire into a party's challenges is the biggest textually supported difference between the *Neil* and *Wheeler-Soares* approaches. But, in addition, *Neil* reads very differently from *Wheeler* and *Soares*; it is not the same type of expansive, ground-breaking, remedial decision, intent on combatting a perceived evil at any cost. A sense of intentional circumspection pervades the opinion.¹⁴⁹ Although it is difficult to discern from case law,¹⁵⁰ one

146. *Neil* explicitly states: "If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories." 457 So. 2d at 486. The court later added in a footnote: "We emphasize that the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion." *Id.* at 487 n.10.

147. The difference between the required showing of a "strong likelihood" and a finding by the trial court of a "substantial likelihood" will probably be of little importance. Just as California and Massachusetts have held the required finding of a reasonable inference to control, so too will the substantial likelihood standard probably prevail. *See supra* note 49. But because the trial court is given so much discretion, the difference is purely semantic.

148. Application of *Neil* so far appears to support this conclusion. *See infra* notes 165-69 and accompanying text.

149. Note the following features of the *Neil* opinion: the finding required by the trial court is a tougher standard than that in *Wheeler* or *Soares*; the trial court has wide discretion as to whether to inquire into a party's peremptory challenge; there is an explicit exception to the general rule set out in the opinion; the decision applies only to racial discrimination; and the decision is declared to be nonretroactive.

150. Because courts have an interest in protecting their decisions, the appellate court versions of the facts on this issue are of little help. Unlike a difference in the rule, which can be demonstrated in a concrete way through the facts of a particular case as with *Holley*,

can reasonably expect that in view of this difference in attitude, appellate courts in Florida will reverse less often on the same set of facts than will California and Massachusetts courts. This will be so where the trial court has inquired and accepted a party's answer, as well as where the court has made no inquiry.

Accepting this latter observation as true, it appears that the Supreme Court of Florida intended to allow one strike at racially discriminatory peremptory challenges in the vast majority of cases. This one strike, at the trial court level, is a low-cost¹⁵¹ improvement in equality calculated to have extremely beneficial results.¹⁵² In other words, the primary goal of *Neil's* innovation is to provide for correction of the parties' misuse of peremptory challenges. *Neil* does not evidence a willingness to review, in the great run of cases, the trial court's supervision of the parties' peremptory challenges.¹⁵³ At some point it ceases to be worthwhile to supervise the supervisor; the *Neil* court concludes that the trial court level is an appropriate stopping point.

A graphic representation may help to illustrate and contrast

supra, this difference in attitude is much more difficult to show. See *supra* note 140 and accompanying text.

151. The *Neil* one-strike procedure is extremely low cost deterrence, because most of the deterrent effect comes from the fact that the trial court can do something about misuse of peremptory challenges. Dealing with motions on the issue and making inquiry into a party's use of peremptory challenges is simple, every-day business for a court. The only part of the *Neil* procedure that significantly changes time or financial cost is when the court finds it necessary to strike the jury pool and begin voir dire again. Yet, the court will only infrequently need to invoke this sanction.

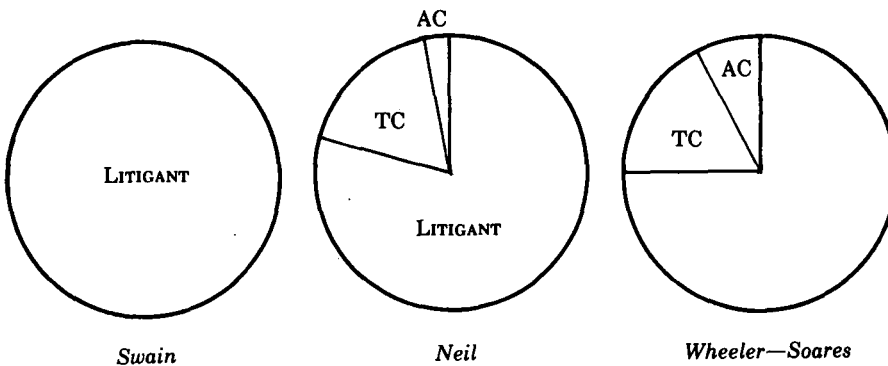
152. Before *Neil*, a bigoted party disposed to misuse peremptory challenges could do so. Now, *Neil* also requires the concurrence of a bigoted judge disposed to disregard his duty. If we arbitrarily assume that twenty percent of the population is both bigoted and disposed to misuse or allow misuse of peremptory challenges, *Neil* cuts successful discrimination from twenty percent to four percent in one swipe.

153. Trial judges may be more or less sensitive to stopping racial discrimination based on their personal views. But it would be a mistake to assume that even bigoted judges would, as a matter of course, let their own prejudices override their sworn duties.

the approaches.¹⁵⁴ Picture as "the whole" the aggregate power to decide who may be peremptorily challenged. Under *Swain*, the parties have absolute discretion in a given case; therefore, all uses of discretion are by definition legitimate, and "the whole" resides in the parties. In the alternatives to *Swain*, "the whole" is divided into three parts. The greatest part resides in the litigant, the next largest part in the trial court,¹⁵⁵ and the smallest part in the appellate court.¹⁵⁶ The difference between the *Wheeler-Soares* approach and that of *Neil* relates to the proportional divisions of the whole. Under *Neil*, the court wrested less discretion from the parties to be placed in the hands of the courts; and of the discretion given to the courts, a much smaller proportion is allocated to the appellate courts.

This characterization of the *Neil* decision makes it clear that Florida will not follow some of the recent case law developments in Massachusetts. In 1981, the Supreme Judicial Court of Massachusetts recognized the authority of trial courts to fashion remedies other than that explicitly defined in *Soares*.¹⁵⁷ Specifically, the court ratified the trial court's disallowance of a party's peremptory challenges.¹⁵⁸ Such an extension of a court's power to

154.



TC = trial court

AC = appellate court

155. This part represents the trial court's discretion in overseeing the use of peremptory challenges.

156. This part represents appellate court review of the trial court's use of discretion.

157. See *Commonwealth v. Reid*, 384 Mass. 247, 424 N.E.2d 495 (1981).

158. Although *Soares* imported verbatim the *Wheeler* language that the court "must

intrude into peremptory challenges is antithetical to the *Neil* rationale. In Massachusetts, where this practice has become commonplace,¹⁵⁹ trial courts assume an adversarial stance rather than remaining neutral. By passing judgment on whether to allow each peremptory challenge, the court has more authority to regulate the composition of the jury than the parties. *Neil* does not sanction such an intrusion into the parties' peremptory challenges.¹⁶⁰

In addition, some Massachusetts trial courts are making inquiries into uses of peremptory challenges on their own initiative.¹⁶¹ The *Neil* opinion did not contemplate that trial courts would raise the issue sua sponte, but it did not specifically prohibit them from doing so. Nevertheless, if the basis of any objection stems from a right to an impartial jury, that right belongs to the parties in the action and, like other rights, it can be waived.¹⁶² A trial court should not exercise its power to indiscriminately right every wrong it perceives. Florida, under *Neil*, is not likely to permit its trial courts to assume such an adversary-like role.

B. *A Forecast of Practical Workability*

In practice, Florida attorneys will probably begin noting the race of each prospective juror during voir dire as a matter of course, at least in those cases where it may become an issue. Until Florida develops definitive case law, attorneys will no doubt probe the limits of the *Neil* rule. Within a few years, the case law will probably mold the basic contours: Absent extremely compelling facts or application of the wrong standard on the record,¹⁶³ the trial court's determination will stand. This general rule will govern both determinations of whether or not to require an explanation and determinations as to the sufficiency of such explanations.

dismiss the jurors thus far selected" and "must quash any remaining venire," 377 Mass. at 488, 387 N.E.2d at 518, the court in *Reid* held that *Soares* did not intend dismissal of the entire venire to be the only appropriate relief. 384 Mass. at 255, 424 N.E.2d at 500.

159. See, e.g., *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 467 N.E.2d 214 (1984); *Commonwealth v. Di Matteo*, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981).

160. California has taken this tack and has decided not to allow other remedies other than the one set out in *Wheeler*. See *People v. Superior Court*, 157 Cal. App. 3d 55, 203 Cal. Rptr. 519 (1984).

161. See, e.g., *Commonwealth v. Wood*, 389 Mass. 552, 451 N.E.2d 714 (1983); *Commonwealth v. Joyce*, 18 Mass. App. Ct. 417, 467 N.E.2d 214 (1984).

162. Cf. *Queenan v. Territory*, 11 Okla. 261, 71 P. 218, *aff'd*, 190 U.S. 548 (1903) (opinion by Holmes, J.) (right to challenge a juror for cause may be waived even in a capital case).

163. Cf. *People v. Hall*, 35 Cal. 3d 161, 168, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 75 (1983).

The case law so far, although not directly on point, has supported in spirit these broad statements. The only cases decided to date have been those in which courts have applied *Neil* retroactively.¹⁶⁴ Therefore, no appellate court has yet reviewed a trial court's determination based on its application of the *Neil* test. Nevertheless, the Florida Third District Court of Appeal has reviewed a trial court determination on the issue and has affirmed its respect for the discretion of the trial court.

In *City of Miami v. Cornett*,¹⁶⁵ a civil suit¹⁶⁶ arising out of a police shooting,¹⁶⁷ the defendants exercised all four of their peremptory challenges against black prospective jurors. Although the plaintiff made timely objections to the defendants' peremptory challenges, the court overruled their objections without a hearing. The resulting all-white jury returned a verdict for the defendants. The trial court then decided to grant Cornett a new trial, anticipating that the supreme court would repudiate *Swain* in Florida. The trial court issued a lengthy order in which it set out its opinion that the defendants had misused their peremptory challenges.¹⁶⁸ After *Neil* proved the trial court correct, the Third District Court of Appeal of Florida affirmed the grant of a new trial, "[c]ognizant of *Neil's* view that the judge attending voir dire is in a better position than a reviewing court to determine whether there is a 'substantial likelihood' that peremptory challenges are being exercised on the basis of race."¹⁶⁹

In view of the trial court's enormous discretion and the paucity of case law, it is difficult to make meaningful predictions as to the limits of the rule. At the trial court level, determinations will depend to a great extent on the views of the individual judge.¹⁷⁰ It

164. Despite the explicit holding in the opinion to the contrary, *Neil* has been retroactively applied to cases in which the issue was raised at trial and which were pending when *Neil* was decided, the so-called "pipeline" cases. See, e.g., *Andrews v. State*, 459 So. 2d 1018 (Fla. 1985); *Jones v. State*, 466 So. 2d 301 (Fla. 3d DCA 1985); *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. 3d DCA 1985). *Contra* *Wright v. State*, 471 So. 2d 1295 (Fla. 5th DCA 1985).

165. *Cornett*, 463 So. 2d 399 (Fla. 3d DCA 1985).

166. In *Cornett*, the Third District Court of Appeal of Florida extended the *Neil* rule to apply in civil cases. 463 So. 2d at 402.

167. Plaintiff Cornett was shot in the back while being apprehended by two police officers. He sued the City of Miami and the two officers. 463 So. 2d at 400.

168. The trial judge formed its opinion by applying the *Wheeler-Soares* test. *Id.* at 401 n.4. Even so, the Third District found that the order as a whole supported a reading of a "substantial likelihood" of improper use of peremptories. *Id.* at 402.

169. *Id.*

170. Some judges will probably tend to question peremptories more often and then accept the justification more often. Others will not inquire until they are pretty well convinced

is conceivable that, in rare circumstances, a trial judge might impose the *Neil* sanction based on his observation of only one peremptory challenge.¹⁷¹ At the appellate level, it is easier to speculate as to the outer bounds of the *Neil* rule. As a general proposition, an appellate court will probably not disturb any trial court determination involving one or two peremptory challenges,¹⁷² even if a party used them against the only members of a particular racial group in the jury pool.¹⁷³ At the other end of the spectrum, an appellate court will probably closely scrutinize a court's refusal to inquire into the exercise of the full statutory number of peremptory challenges against members of a distinct racial group. Beyond stating these likely limits, it is not possible to generalize; the individual fact patterns of cases will control the outcome of the cases.

On a larger scale, *Neil* is presently limited to peremptory challenges based on race.¹⁷⁴ Nevertheless, much of what this Note argues regarding distinctions based on race is equally applicable to distinctions based on other protected characteristics such as sex, religion, and national origin. It is probable that in time the courts will extend *Neil* to cover these areas also. The *Neil* one-step-at-a-time approach will, however, tend to discourage creative lawyers from attempting to develop new "cognizable groups."¹⁷⁵

Aggressive lawyers will also probe the width of the explicit exception set out in *Neil*; but, they will probably find the opening very narrow. The exception allows for systematic exclusion where *no* member of a distinct group *could be* impartial. A reasonable interpretation of this language is that the exception shall apply only where the case, the parties, and the racial identity of the group are so interrelated that a conscientious juror of that racial group would find it difficult, if not impossible, to be impartial. This interpretation would not encompass situations where the victim and prospective juror, or the defendant and prospective juror, are of the same racial group without some strong interrelationship between the parties and the facts of the case regarding race. This

of an injustice and then tend not to accept the justification of the party.

171. See, e.g., *Commonwealth v. Di Matteo*, 12 Mass. App. Ct. 547, 427 N.E.2d 754 (1981).

172. Cf. *People v. Harvey*, 163 Cal. App. 3d 90, 208 Cal. Rptr. 910, 922 (1984).

173. See, e.g., *People v. Rousseau*, 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1982).

174. See *supra* note 126 and accompanying text.

175. See, e.g., Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and A Constitutional Analysis*, 81 MICH. L. REV. 1 (1982) (advocating extension of *Wheeler* to "death-scrupled" jurors as a cognizable group).

interrelationship will exist only in extraordinary cases.¹⁷⁶

C. A Proposed Rule Change

The Supreme Court of Florida overlooked one significant procedural matter that would have facilitated application of the *Neil* procedure. Under the present Florida rules, there is no way to obtain review of a trial court's disposition of a *Neil* motion before completion of the entire trial.¹⁷⁷ This state of affairs will not create a problem even in the majority of non-frivolous appeals based on *Neil*. Situations will undoubtedly arise, however, where a post-trial appeal would be inadequate.¹⁷⁸ Once such a situation arises, it is too late. The rules, therefore, should provide for limited access to the appellate courts through interlocutory appeals in such cases.

Because the Supreme Court of Florida is vested with rule-making authority,¹⁷⁹ the court could have formulated such a restricted appellate procedure in the *Neil* opinion.¹⁸⁰ The court can also achieve the same result by amending the Rules of Appellate Procedure with or without the help of the advisory committee. Minimal additions to either Rule 9.100¹⁸¹ or Rule 9.140¹⁸² would

176. An example of such an extraordinary case would be where three Ku Klux Klan members, while in robes, beat a black man to death, claiming self-defense as their sole defense.

177. See FLA. R. APP. P. 9.100(a), 9.130(a). The closest possibility is a writ of prohibition under rule 9.100(a), but such writs are restricted to cases where the lower tribunal has exceeded its jurisdiction. See Brummer, Morris & Rosen, *Extraordinary Writs: A Powerful Tool for the Florida Practitioner*, 33 U. MIAMI L. REV. 1045, 1049 (1979).

178. More than diseconomy is at stake in a racially volatile community such as Miami. The application of *Neil*, coupled with an interlocutory procedure for appeal, could possibly have prevented the riots and social unrest that arose out of highly publicized cases. See generally Appendix to Brief of Amici Curiae, *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

179. FLA. CONST. art. V, § 2(a).

180. Perhaps the court decided against this option because it might have lent an expansive tone to an otherwise narrow opinion.

181. For example, rule 9.100(a) provides:

(a) *Applicability*. This rule applies to those proceedings which invoke the jurisdiction of the courts described in Rule 9.030(a)(3); (b)(2); (b)(3); (c)(2) and (c)(3) for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, habeas corpus and all writs necessary to the complete exercise of the court's jurisdiction; and for review of non-final administrative action.

Id. That provision could properly be amended by adding the phrase "and jury selection determinations." By adding a corresponding phrase to 9.100(f) (Order to Show Cause), the court would achieve a procedure restricted to those litigants who could show that an appeal after final judgment would provide an inadequate remedy.

182. The court could add a subsection (F) to rule 9.140(b)(1) (Appeals by Defendant) which would state: "Orders denying motions to strike the jury pool where review after a full trial would be an inadequate remedy;" and could also add a subsection (J) to Rule 9.140(c)(1) (Appeals by the State) which would state: "denying a motion to strike the jury

suffice to effect the change. In any case, the court should adopt some restricted procedure for review of nonfinal *Neil* orders in cases where review after final disposition of the case would not provide an adequate remedy.

VI. CONCLUSION

In terms of achieving a workable resolution to the inherent conflict in axioms: "inviolable peremptory challenges" versus "inviolable racial equality," the Supreme Court of Florida has done the best job of any court so far. Analysis based on the constitutional guarantee to an impartial jury requires the repudiation of *Swain* and leads inexorably to the conclusion that in limited circumstances the courts may question peremptory challenges. But the significance of the *Neil* decision does not result from its doctrinal conclusions; rather, it results from the procedure the court chose to implement its conclusions and the policies that choice implicates. The *Neil* procedure principally relies on the discretion of the trial court to implement the substantive change in the law. This procedure is designed to: (1) deter and correct discriminatory uses of peremptory challenges at a low administrative cost, (2) promote certainty and finality of trial court determinations on the issue, and (3) preserve the integrity of peremptory challenges. A qualitative cost-benefit analysis suggests that the *Neil* balance will prove to be superior to that of the *Wheeler—Soares* approach. But the Supreme Court of the United States is watching, and it does not want mere predictions; a qualitative and empirical analysis now awaits in the Florida judicial laboratory.

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pool where review after a full trial would be an inadequate remedy." This rule amendment would, however, only apply to criminal cases.