

**THE FOURTEENTH ANNUAL CHIEF JUSTICE
JOSEPH WEINTRAUB LECTURE**

**THE EVOLUTION OF RACE IN THE JURY SELECTION
PROCESS**

presented by
*The Honorable James H. Coleman, Jr.**

When preparing this lecture, I discovered that Chief Justice Weintraub and I share a few things in common: (1) we have a common Union County connection — he was born there and I practiced law and live there; (2) we were privates in the United States Army; and (3) we became Superior Court Judges after our 45th birthdays. Any other comparison is too risky.

His scholarly ability, leadership and energetic devotion describe him and explain why he had such enormous influence on the jurisprudence of this state and, in many ways, on the nation as a whole. During his tenure, the era properly became known as the Weintraub Court. Many of the decisions rendered by the Weintraub Court foreshadowed subsequent decisions of the United States Supreme Court and the highest courts in other states.

He believed, as I do, that the judiciary should refrain from

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encroaching on the operation of the legislative branch, a phenomenon called judicial restraint, but he would not hesitate to expand the common law to accommodate existing needs and ideals. He believed the common law is "not a compendium of mechanical rules but a living organism which must grow and move in response to the larger and fuller development of the nation."¹

INTRODUCTORY OVERVIEW

The topic I have chosen for this lecture is, in some ways, painful to me because of personal experiences. I chose it nevertheless because I agree with George Santayana, a Harvard Philosophy Professor who taught Judge Learned Hand and once said, "[t]hose who cannot remember the past are condemned to repeat it."²

The public learned more about the jury selection process and the entire judicial system through the O.J. Simpson trial than through any other single event in American history notwithstanding the media circus. The public outrage at the Simpson verdict, believed by some to have resulted from the racial composition of the jury,³ has led to demands for an overhaul of the jury selection process.⁴ Since three quarters of the Simpson jurors were African American, these demands suggest returning to a selection process that would reduce the numbers of, and in many cases exclude, African Americans from juries.

Combining the wisdom of Santayana, not to allow history to repeat itself, and that of Chief Justice Weintraub, that our

1. Justice John J. Francis, Proceedings Before the Supreme Court of New Jersey in Memory of Chief Justice Joseph Weintraub (May 24, 1977), in 72 N.J. XXV, XXIX (1977).

2. 1 GEORGE SANTAYANA, THE LIFE OF REASON; OR THE PHASES OF HUMAN PROGRESS 284 (1906).

3. See Richard A. Boswell, *Crossing the Racial Divide: Challenging Stereotypes About Black Jurors*, 6 HASTINGS WOMEN'S L.J. 233, 237 (1995) (noting the widely-held perception that the Simpson jurors were motivated by racial prejudice rather than the evidence).

4. See, e.g., Laura Mononerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, Nov. 4, 1995, § 1, at 9 (stating that state legislatures and courts across the nation are starting to rewrite the rules of the jury system).

common law should be a "living organism," I chose the topic "The Evolution of Race in the Jury Selection Process," to chart the racial exclusionary course followed in jury selection. In 1985, my belief that our state constitution should be viewed as a "living organism" influenced me to volunteer to write *Gilmore I*.⁵ *Gilmore I* laid the foundation for later abolishing centuries of court-approved invidious racial discrimination in jury selection. I felt it was time to heed the advice of Justice Brandeis and make our state "serve as a laboratory, and try novel social . . . experiments [with jury selection] without risk to the rest of the country."⁶

Doctrinally, relying more on state law for greater protection of individual rights than on federal law was the antithesis of what I had been taught in law school. Having grown up in the Old South, where reliance on state autonomy as a major source of individual rights permitted the separate but unequal doctrine to be established and perpetuated, and where all-white juries had become a way of life, it was difficult for me doctrinally to tap into that constitutional approach. I had come to rely, instead, on federal judges as the logical guardians of individual rights. This reliance was based on life experiences as a youth and later as an attorney. In law school, I received specific instruction with regard to the Federal Removal Statute.⁷ This statute was formerly part of the Revised Statutes of the United States section 641 that dates back to 1873 and provides for removal of cases from state to federal court. Removal could be attained by asserting that the state discriminated on the basis of race in violation of the United States Constitution or a federal statute.⁸

As a trial attorney representing plaintiffs in state courts, I observed attorneys exercise peremptory challenges to excuse African Americans from petit juries solely because of their race. Similarly, as a trial judge, I observed assistant prosecutors, defense attorneys, and attorneys for parties in civil litiga-

5. *State v. Gilmore*, 195 N.J. Super. 163, 478 A.2d 783 (N.J. Super. Ct. App. Div. 1984), *aff'd*, 103 N.J. 508, 511 A.2d 1150 (1986).

6. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

7. 28 U.S.C.A. § 1443 (West 1994).

8. *See id.*

tion engage in the same discriminatory conduct.

As a young lawyer and judge, I became aware that few African Americans were interested in serving on juries. Because of my active participation in civic affairs in the community, I had many opportunities to ask African Americans in churches, taverns, and on street corners why they lacked interest in serving as jurors. Some people told me that it was so painful to be told, by one of the attorneys, that he or she was unfit to serve, that African Americans frequently sought to be excused in other ways. Some would first attempt to be excused prior to reporting for jury duty. If that failed, they would express a strong viewpoint during voir dire that clearly favored one of the parties in the case so that the judge would discharge them.

In 1973, during the third month of my assignment as a trial judge in the criminal division, a prominent attorney asked if I knew of a recent New Jersey case that permitted a prosecutor to use peremptory challenges in a racially discriminatory manner. With much humiliation, I informed him that on November 7, 1973, the Appellate Division had found that a prosecutor's use of peremptory challenges to excuse all prospective African-American jurors did not deny a defendant "equal protection of the law and due process under the Fourteenth Amendment."⁹ I paused, and then informed the attorney that the same viewpoint had been expressed by the Supreme Court of New Jersey in 1970 in *State v. Smith*.¹⁰ My lawyer friend asked, "As a judge, are you going to change that rule?" My response was, "I will try my best because equal justice is one of my core values."

Whenever I saw peremptory challenges used to exclude excellent prospective jurors solely because of group bias, the defendant, the excluded prospective juror, and I believed that it reinforced group stereotypes, and we found it demeaning. We felt much like the swallow in *Aesop's Fables* who built her nest under the eaves of a court of justice. Before the young ones could fly, a serpent glided out of a hole and ate the newborn. When the swallow returned and found the nest empty, she

9. See *State v. Johnson*, 125 N.J. Super 438, 439, 311 A.2d 389, 390 (N.J. Super. Ct. App. Div. 1973) (citing *Swain v. Alabama*, 380 U.S. 202, 222 (1965)).

10. 55 N.J. 476, 483, 262 A.2d 868, 871 (1970) (relying upon *Swain v. Alabama*, 380 U.S. at 222).

began to mourn her loss. Seeing this, a dispassionate neighbor suggested, perhaps by way of comfort, that the swallow was not the first bird to have lost her young. "True," the swallow replied, "but it is not only my little ones that I mourn, but that I should have been wronged in the very place where the injured fly for justice."¹¹

Justice Blackmun expressed my feeling so eloquently when he said, "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice," both in terms of reality and in providing the appearance of injustice.¹²

Although the unbridled use of peremptory challenges continued unabated in New Jersey for fifteen years after *State v. Smith* was decided in 1970, the winds of change had begun to blow across this country. In the 1970s, the cherished common-law privilege of unbridled use of peremptory challenges was increasingly called into question in state courts from California to Massachusetts.¹³ In addition, many commentators in law review articles have expressed vehement disapproval of the way peremptory challenges were used.¹⁴

11. THOMAS JAMES, *The Swallow in Chancery*, in *AESOP'S FABLES* 122, 122 (Philadelphia, J.B. Lippincott & Co. 1873).

12. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

13. See, e.g., *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978); *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass.), cert. denied, 444 U.S. 881 (1979).

14. Gary L. Geeslin, Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 *MISS. L.J.* 157 (1967) (stating that decisions on systematic exclusion of jurors are largely ineffectual because of their deference to use of peremptory challenges); Marc L. Greenberg, 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) (discussing *Swain's* systematic exclusion test for racial discrimination in jury selection); Lisa Van Amburg, 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) (noting that because peremptory challenges cannot be questioned, constitutional discrimination challenges have constantly failed); see generally Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 *YALE L.J.* 1715 (1977) (arguing that courts have failed to recognize that using peremptory challenges to exclude racial groups from juries violates equal protection and

Eight years after my conversation with my attorney friend, in 1981, I was assigned to the Appellate Division. By the time *Gilmore I* was argued in 1984, I was more determined than ever to follow the teachings of Justices Brandeis and Brennan that judges should use state constitutions to afford citizens greater protection than accorded under the Federal Constitution.¹⁵ I accepted the challenge to use the New Jersey Constitution as a basis for eliminating racial discrimination in the jury selection process.

My approach to writing *Gilmore II*¹⁶ was to structure the issues narrowly, yet powerfully, and then marshal arguments from moral philosophy, public policy, and judicial precedents to maximize the soundness of the conclusion. The opinion was based on the four primary sources of law: constitutions, statutes, court rules and court decisions.

CONSTITUTIONAL ORIGIN OF THE RIGHT TO TRIAL BY JURY

The right to a fair trial had been problematic long before New Jersey became a state. During colonial times, the people in New Jersey theoretically enjoyed the right to trial by jury as it existed under English common law. One of the complaints against King George of Great Britain that led to the Declaration of Independence was that he deprived the colonies, in many cases, of the benefits of trial by jury.¹⁷

due process); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966) (arguing that *Swain* places an unjustifiable obstacle in the way of defendants who claim to be prejudiced by the jury selection process).

15. See, e.g., *Senn v. Tile Layers Protective Union Local 5*, 301 U.S. 468, 478 (1937) (Brandeis, J.) (holding that "[i]f the end sought by the unions is not forbidden by the Federal Constitution, the state may authorize working men to seek to attain it by combining as pickets" because construction and application of state law and Constitution are conclusively within the purview of the highest court of the state). See generally William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

16. *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (N.J. Super. Ct. App. Div. 1985), *aff'd*, 103 N.J. 508, 511 A.2d 1150 (1986).

17. See THE DECLARATION OF INDEPENDENCE para. 18 & 19 (U.S.

As a colony, New Jersey adopted its first constitution on July 2, 1776, two days before the Declaration of Independence was adopted. That constitution guaranteed the right to trial by jury to the same extent to which it theoretically existed in the colony before the King of England usurped that right.¹⁸ That right afforded jury trials in all major criminal cases and those civil cases in which the amount in controversy exceeded twenty dollars.¹⁹ Jury duty was restricted to white-male property holders.²⁰ This so-called "Blue Ribbon" jury continued in the federal system²¹ until 1968 when Congress enacted "The Jury Selection and Service Act."²²

The Articles of Confederation, enacted in 1789, did not specifically refer to the right of trial by jury.²³ They did, however, reserve unto each state "its sovereignty, freedom and independence, and every power, jurisdiction and right" not specifically delegated to the United States.²⁴ Thus, the Articles of Confederation left the states free to adopt the right of trial by jury.

The Constitution of the United States, ratified in 1787, guaranteed the right to trial by jury for all crimes except impeachment.²⁵ But under the Constitution, only *citizens* of a state could participate in jury service.²⁶ The United States Supreme Court held in *Dred Scott*,²⁷ that under the "original intent doctrine," persons of African descent were not citizens under the United States Constitution.²⁸ To put this in proper per-

1776; see also Donald S. Lutz, *The Declaration of Independence, in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 138-44 (Stephen L. Schechter ed., 1990); N.Y. CHARTER OF LIBERTIES OF 1683, *in id.* at 69-70; CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 63-64 (1960) (noting that a major objection to the Revenue Act of 1764 was deprivation of the right to a jury trial).

18. N.J. CONST. of 1776, art. XXII (1776).

19. U.S. CONST. amend. VII.

20. JEFFREY ABRAMSON, *WE THE JURY* 2 (1994).

21. *Id.* at 2-3.

22. 28 U.S.C. §§ 1861-69.

23. See ART. OF CONFED. of 1789.

24. *Id.* at II.

25. U.S. CONST. art. III, § 2, cl. 3.

26. *Id.*

27. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

28. *Id.* at 407 (construing article IV, section two, clause one of the

spective, Dred Scott was a contemporary of my paternal grandmother who was born as property and died as a citizen. As an aside, there were eight separate opinions filed in *Dred Scott*: the majority by Chief Justice Taney, five concurring opinions and two dissenting opinions.²⁹ Such plurality is similar to the way in which business at the Court is presently conducted, one hundred and forty years later.³⁰

Fortunately, the process for amending the United States Constitution made it possible to remedy the inequality initially imbedded in the document in deference to certain political and property interests that foreshadowed the *Dred Scott* decision. Pursuant to this process, the federal Constitution was amended in 1791 to add the Bill of Rights.³¹ The right to an impartial jury trial in criminal cases was guaranteed by the Sixth Amendment,³² and the right to trial by jury in civil cases was preserved by the Seventh Amendment.³³ The first eight amendments, however, were not made applicable to the states for many years after ratification. During the period in which the federal Bill of Rights did not apply to the states, and before ratification of the Fourteenth Amendment, many racially-discriminatory state laws effectively excluded African Americans from juries.³⁴

Before Congress adopted amendments to the Constitution affecting jury selection, New Jersey adopted its second constitution, effective September 2, 1844.³⁵ The New Jersey Consti-

U.S. Constitution).

29. Chief Justice Taney wrote the infamous opinion. Justices Wayne, Nelson, Grier, Campbell and Daniel concurred. Justice McLean joined by Justices Curtis and Catron dissented. *Id.*

30. See generally Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992); Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

31. U.S. CONST. amends. I-X.

32. U.S. CONST. amend. VI.

33. U.S. CONST. amend. VII.

34. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 38 (1976) (stating that African Americans were excluded from jury duty throughout the North during the 19th century).

35. N.J. CONST. of 1844.

tution of 1844 guaranteed a right to trial by jury in civil and criminal cases,³⁶ and required that trials in criminal cases be conducted before an impartial jury.³⁷ That constitution, however, did not expressly protect against non-religious, invidious discrimination.³⁸ The first African American did not serve on a jury anywhere in the United States until 1860, and that was in a criminal case in Worcester, Massachusetts.³⁹

Following the Civil War, the federal Constitution was amended in 1865 to abolish slavery under the Thirteenth Amendment.⁴⁰ It was further amended in 1868 to add the Fourteenth Amendment, which overruled the *Dred Scott* decision, declared African Americans citizens, prohibited the denial of equal protection of the laws, and proscribed the passage and enforcement of any state law that deprived citizens of procedural and substantive due process.⁴¹

Notwithstanding its explicit guarantees, the Fourteenth Amendment did not end invidious discrimination in the jury selection process, or anywhere else in society for that matter. The early cases interpreting the Fourteenth Amendment found it to be of limited application to the states. For example, the *Slaughter-House Cases*,⁴² decided four years after ratification of the Fourteenth Amendment, held that only those rights that "owe their existence to the federal government, its national character, its constitution, or its laws" were applicable to the states through the Fourteenth Amendment.⁴³ The federal Bill of Rights still had not been made applicable to the states. The Civil Rights Act of 1875,⁴⁴ which made it a crime to systematically exclude African-American males from juries, had little immediate effect.

The second most devastating Civil Rights case decided after

36. N.J. CONST. of 1844, art. I, § 7.

37. N.J. CONST. of 1844, art. I, § 8.

38. N.J. CONST. of 1844, art. I, § 4.

39. ABRAMSON, *supra* note 20, at 2.

40. U.S. CONST. amend. XIII.

41. U.S. CONST. amend. XIV.

42. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

43. *Id.* at 79.

44. 18 U.S.C.A. § 243 (West 1969).

Dred Scott was *Plessy v. Ferguson*.⁴⁵ *Plessy* is yet another example of the failure to apply the Fourteenth Amendment to prevent invidious discriminatory state action. *Plessy* held that the Fourteenth Amendment did not prevent the states from enforcing racial segregation in *all* public accommodations.⁴⁶ Only through a gradual process were provisions of the Bill of Rights made applicable to the states through the Fourteenth Amendment.⁴⁷ The Sixth Amendment right to a fair and impartial jury trial was not made applicable to the states through the Fourteenth Amendment until 1968.⁴⁸ Full incorporation did not occur until after New Jersey had adopted its present constitution.

By the time the present New Jersey Constitution was adopted in November 1947, numerous anti-discrimination statutes had been enacted.⁴⁹ Further, the state constitution for the first time prohibited discrimination against a person's enjoyment or exercise of any civil right because of race, color, ancestry or national origin.⁵⁰ It also guaranteed the right to trial by jury,⁵¹ and in criminal cases, entitled the accused to trial by an *impartial* jury.⁵² Notwithstanding the federal and New Jersey constitutional mandates of trial by jury, the methodology for selecting the jury pool and empaneling a petit jury was left to statutes, court rules, and decisional law.

STATUTES AND COURT RULES

To implement the federal and state constitutional requirements that in criminal cases, trials be conducted before an

45. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

46. *Id.* at 548-49.

47. See generally Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Due Process?*, 16 U. DAYTON L. REV. 313 (1991).

48. *Duncan v. Louisiana*, 391 U.S. 145, 149, (1968).

49. See, e.g., Act Creating Fair Employment Practice, ch. 169, 1945 N.J. Laws 590; Act Barring Discrimination in Public Accommodations, ch. 219, 1884 N.J. Laws 339; Act Barring Discrimination in Education, ch. 149, 1881 N.J. Laws 186.

50. N.J. CONST., art. I, para. 5.

51. N.J. CONST., art I, para. 9.

52. N.J. CONST., art I, para. 10.

impartial jury, and in civil cases, trials be conducted before a jury — various statutes and court rules were enacted in New Jersey to shape the jury selection process. I have focused, for the most part, on New Jersey's statutes and court rules.

Legislation was enacted in 1913 that established three Commissioners of Jurors in each county.⁵³ The duty of the Commissioner was to compile one list of qualified persons to serve on grand juries and another list of qualified persons to serve on petit juries.⁵⁴ The names of qualified persons were taken from voter registration lists and real estate tax assessment rolls.⁵⁵ The names of grand and petit juries were then randomly drawn through a lottery system.⁵⁶

There is nothing in either the United States or New Jersey Constitution that requires peremptory challenges. They have been created and controlled in New Jersey by court rules and statutes.⁵⁷ Those court rules and statutes comprised our state representative cross-section rule before the federal rule was established under the Sixth Amendment. A petit jury venire is drawn from a jury pool compiled pursuant to the representative cross-section rule. Twelve petit jurors are required for all criminal cases,⁵⁸ and six for civil cases.⁵⁹ The trial court, in its discretion, may impanel alternate jurors.⁶⁰

Recently, the statute was amended to require compilation of qualified juror lists from a source list of county residents whose names and addresses are obtained from a merger of registered voters, licensed drivers, State Gross Income Tax Returns and Homestead Rebate application forms.⁶¹ This amendment was recommended by a Task Force on Minority

53. Act of May 29, 1913, ch. 20, § 5, 1913 N.J. LAWS 828, 828.

54. *Id.* at 829-30.

55. *Id.* at 830.

56. *Id.* at 832-33.

57. N.J. CT. R. 1:8-3(c) and N.J. STAT. ANN. § 2A:78-7(a) (West 1994) (now N.J. STAT. ANN. § 2B:23-13 to -15 (West 1995)) for civil cases; and N.J. CT. R. 1:8-3(d) and N.J. STAT. ANN. § 2A:78-7(c) - (d) (West 1994) (now N.J. STAT. ANN. § 2B:23-13 to -15 (West 1995)) for criminal cases.

58. N.J. CT. R. 1:8-2(a).

59. *Id.* at 1:8-2(b).

60. *Id.* at 1:8-2(d).

61. Act of March 7, 1995, ch. 44, § 1, 1995 N.J. LAWS 171 (codified a. N.J. STAT. ANN. § 2B:20-2(a) (West 1995)).

Concerns in the Judiciary which I chaired initially.

Read together, our state statutes and court rules contain detailed provisions for juror qualifications and methods for selecting grand and petit jurors. No citizen of New Jersey possessing the qualifications required by statute⁶² "shall be disqualified for service on a grand or petit jury in any court on account of race, color, creed, national origin, ancestry, marital status or sex."⁶³

DECISIONAL LAW

The overwhelming majority of cases discussing race in the jury selection process have been decided under the federal Constitution, based on either a Sixth Amendment or Fourteenth Amendment analysis.

An understanding of the jury selection system begins with the recognition that it involves a two-step process. The first step involves the selection of a pool of qualified persons who are eligible to serve on grand and petit juries. The second step focuses on the methodology for removing prospective jurors through the exercise of peremptory challenges. This two-step process determines who arrives at the courthouse for jury duty and who actually sits on a petit jury to try a case. The entire process is controlled by the Sixth and Fourteenth Amendments, parallel provisions of our state constitutional Bill of Rights, statutes, and court rules.

The first significant post-Civil War case to focus on the jury selection process was the landmark decision in *Strauder v. West Virginia*.⁶⁴ *Strauder*, decided under the Equal Protection Clause of the Fourteenth Amendment about a decade after the Fourteenth Amendment was ratified,⁶⁵ focused on jury pool selection and contained some broad language that would be beneficial in future contexts.

Strauder involved a West Virginia statute that limited service on grand and petit juries in state court to "[a]ll white male persons who are twenty-one years of age and who are citizens

62. N.J. STAT. ANN. § 2A:69-1 (West 1994).

63. N.J. STAT. ANN. § 2A:72-7 (West 1994).

64. 100 U.S. 303 (1879).

65. *Id.* at 310.

of this State."⁶⁶ Although that statute was enacted four years after the Fourteenth Amendment was ratified,⁶⁷ it ignored the fact that the Fourteenth Amendment expanded the rights of African Americans, granting them rights as citizens of both the United States and their respective states of residence.⁶⁸ That statute also ignored the Fourteenth Amendment's explicit command that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁶⁹ The United States Supreme Court in *Strauder* relied on the Equal Protection Clause of the Fourteenth Amendment to declare the statute unconstitutional because it discriminated on the basis of race in the selection of persons comprising the jury pool.⁷⁰

Although the statute involved in *Strauder* was enacted in 1872, the Court also relied on the Civil Rights Act of 1875, which was enacted by Congress to enforce the Fourteenth Amendment.⁷¹ That Act made it a criminal offense to exclude persons from jury service because of race.⁷² Indeed, one of the three cases decided with *Strauder*, *Ex parte Virginia*,⁷³ affirmed the constitutionality of the Civil Rights Act of 1875, and upheld the conviction of a state judge who excluded African Americans from state grand and petit juries.⁷⁴

A decade after *Strauder* was decided, the highest court in New Jersey relied on *Strauder* and held that prospective jurors may not be "designedly excluded on account of color" from petit jury lists.⁷⁵ That decision was also based on the New Jersey Constitution of 1844, which required criminal trials to be conducted before an impartial jury.⁷⁶ This New Jersey constitutional provision was congruent to the Sixth Amendment of the United States Constitution.

Since *Strauder* was decided, one and one-quarter centuries

66. *Id.* at 305 (citation omitted).

67. *Id.*

68. U.S. CONST. amend. XIV, § 1.

69. *Id.*

70. *Strauder*, 100 U.S. at 309-10.

71. *Id.* (citing 18 U.S.C. § 243 (1994)).

72. 18 U.S.C. § 243 (1994).

73. 100 U.S. 339 (1879).

74. *Id.* at 368-70.

75. *Bullock v. State*, 65 N.J.L. 557, 47 A. 62, 64 (1900).

76. N.J. CONST., art. 1, para. 8.

ago, the United States Supreme Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from systematically excluding members of a defendant's race from the jury venire on account of race.⁷⁷ Accordingly, while a defendant in a criminal case has no right to have members of his or her race serve on the jury. Under *Strauder*, a defendant "does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."⁷⁸

Despite *Strauder's* broad language interpreting the Fourteenth Amendment Equal Protection Clause, its holding only prevented the states from systematically excluding African Americans from the pool of persons *eligible* to render jury service. The Fourteenth Amendment was not interpreted to touch upon the source from which names were derived for the pool, or for that matter, what happened to prospective jurors once they arrived at the courthouse.

REPRESENTATIVE CROSS-SECTION RULE

The seemingly racially-neutral *Strauder* criteria resulted in few, if any, African Americans serving on petit juries because of subtle racial discrimination in the selection of persons to fill the jury pool. Eventually, the United States Supreme Court interpreted the Equal Protection Clause of the Fourteenth Amendment in *Smith v. Texas*⁷⁹ to require that the pool for petit and grand juries be selected from a representative cross-section of the community.⁸⁰

The purpose of the cross-section rule is to ensure that the jury wheel, pools of names, and panels or venires from which jurors are drawn, do not systematically exclude distinctive groups in the community. Community participation in the administration of justice through jury duty is consistent with both our democratic heritage and the maintenance of public confidence in the fairness of our judicial system. The cross-

77. *Norris v. Alabama*, 294 U.S. 587, 599 (1935); *Neal v. Delaware* 103 U.S. 370, 397 (1881).

78. *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986).

79. 311 U.S. 128 (1940).

80. *Id.* at 130.

section rule, however, does not *entitle* a defendant to a jury of any particular composition.⁸¹ The jury should "be a 'body truly representative of the community,' and not the organ of any social group or class."⁸²

Justice Marshall aptly explained the importance of the cross-section rule, stating:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.⁸³

Unlike New Jersey, states that had not adopted their own representative cross-section rule were not affected by the federal rule announced in *Smith v. Texas*, until the Sixth Amendment requirement for a fair jury trial, which was made applicable to the states in 1968 through the Fourteenth Amendment by *Duncan v. Louisiana*.⁸⁴ *Smith* and the Jury Selection and Service Act of 1968⁸⁵ (the "Act") established the representative cross-section rule for federal courts. The Act also prohibited exclusion of women from jury service in federal courts.⁸⁶

Thus, by 1968, state and federal courts in New Jersey were forbidden under the Sixth and Fourteenth Amendments from systematically excluding African Americans and women from a pool from which grand and petit jurors were selected. Why, then, did African Americans and women so infrequently serve on juries?

81. *Fay v. New York*, 332 U.S. 261, 289 (1947).

82. *Glasser v. United States*, 315 U.S. 60, 85-86 (1942).

83. *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

84. 391 U.S. 145, 149 (1968).

85. 28 U.S.C. § 1861 (1994).

86. 28 U.S.C. § 1862 (1994).

PEREMPTORY CHALLENGES PRIOR TO 1986

Although federal and state representative cross-section rules eliminated racial exclusion of African Americans from the jury pool, peremptory challenges on the basis of race were allowed. They were permitted for three reasons. First, the Sixth Amendment had never been interpreted as a proscription against the use of peremptory challenges in state court proceedings to exclude African Americans from serving on petit juries on the basis of group bias.⁸⁷

Second, during the 1960s, when our rights and liberties were becoming increasingly federalized, the Supreme Court ironically decided to expand neither the Bill of Rights nor the Fourteenth Amendment Due Process and Equal Protection Clauses to prevent the use of peremptory challenges to exclude African Americans from petit juries solely because of group bias. Five Justices in *Swain v. Alabama*⁸⁸ essentially closed the federal courthouse door to claims of invidious racial discrimination in the exercise of peremptory challenges absent a showing that was all but impossible to satisfy.⁸⁹

Swain, like *Strauder* eighty-five years earlier, was decided under the Fourteenth Amendment Equal Protection Clause.⁹⁰ Robert Swain, an African American, was convicted by an all-white jury for the rape of a seventeen-year old white girl and sentenced to death.⁹¹ The prosecutor used his peremptory challenges to excuse all six African Americans on the jury venire.⁹² The State of Alabama relied on its common-law right to use peremptory challenges to excuse venire persons without cause, without explanation, and without judicial scrutiny.⁹³

The Court sought to reconcile the constitutional command of racial neutrality in the jury selection process with the utility

87. *Holland v. Illinois*, 493 U.S. 474, 487-88 (1990); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986).

88. 380 U.S. 202 (1965).

89. *See id.* at 226-28 (requiring defendant to show proof of the prosecutor's participation in systematic discrimination in his use of peremptory challenges against African Americans).

90. *Id.* at 203.

91. *Id.* at 231 (Goldberg, J., dissenting).

92. *Id.* at 205.

93. *Id.* at 211-12.

and tradition of peremptory challenges.⁹⁴ Ultimately agreeing with the State of Alabama, the Court declined to permit an equal protection claim premised on a pattern of juror strikes in a particular case.⁹⁵ In its holding, however, the Court used language it would repudiate twenty years later. It reasoned:

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. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.⁹⁶

Robert Swain argued that he had established invidious discrimination because no African American had *ever* served on a petit jury in either a criminal or civil case in Taledega County, where he was convicted, due to the prosecutors' systematic exercise of their peremptory challenges to exclude all African Americans on the venire.⁹⁷ Swain contended that this history constituted "invidious discrimination for which the peremptory

94. *Id.* at 218-21.

95. *Id.* at 221.

96. *Id.* at 221-22.

97. *Id.* at 222-23.

system is insufficient justification."⁹⁸ Swain's argument sounds persuasive to me.

While the Court was not disposed to grant Swain any relief, it was somewhat favorably inclined to hold that a state's systematic exclusion of African Americans from petit juries through the use of peremptory challenges *may* violate the Fourteenth Amendment.⁹⁹ The Court, however, established a burden of proof for defendants that in time proved practically impossible to satisfy. According to the Court a defendant bore the burden to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."¹⁰⁰ This might occur when "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, [the prosecutor] is responsible for the removal of Negroes who have been selected as qualified jurors by the Jury Commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries."¹⁰¹

Clearly, this standard imposed an insurmountable burden on defendants. First, the prosecution enjoyed a presumption of propriety.¹⁰² Second, the standard suggests that defense counsel present evidence concerning *all* criminal trials that have occurred in that county involving both African-American and white defendants. Most jurisdictions including New Jersey, however, do not maintain comprehensive records independent of trial transcripts of peremptory challenges, let alone information regarding the race of venire persons excluded by those peremptory challenges.

My research did not uncover a single case in which a defendant succeeded in establishing a prosecutorial systematic exclusion of African Americans by use of peremptory challenges over a period of time under the *Swain* guidelines.¹⁰³ One of

98. *Id.* at 223.

99. *Id.* at 223-24.

100. *Id.* at 227.

101. *Id.* at 223.

102. *Id.* at 222.

103. See James O. Pearson, Jr., Annotation, *Use of Peremptory Challenge to Exclude From Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3D 56-73 (1977).

the reasons is *Swain's* rejection of the Rule of Exclusion, used to determine if protected groups have been excluded from the pool of venire persons. Proof of exclusion under this rule requires a defendant to establish a *prima facie* case of purposeful discrimination. The burden then shifts to the State to rebut the presumption.¹⁰⁴ The Rule of Exclusion helped inform our opinion in *Gilmore II*. The virtual certainty of a defendant's inability to prove invidious discrimination by a prosecutor in the use of peremptory challenges forced judges and commentators to look to state constitutions to provide a meaningful way around *Swain*.

The third reason why, prior to 1985, peremptory challenges could be exercised in New Jersey on the basis of race was because our state constitution and statutes were not interpreted to prohibit invidious discrimination through the use of peremptory challenges.

USE OF STATE CONSTITUTIONS

Despite the shortcomings of *Swain*, New Jersey applied *Swain* until *Gilmore I* was decided in 1985. Although the prosecutor used peremptory challenges to excuse all African Americans called to serve in *State v. Smith*¹⁰⁵ and *State v. Johnson*,¹⁰⁶ neither case considered whether the prosecutor's use of the challenges violated the Bill of Rights under either the United States or the New Jersey Constitutions.

Shortly after the appellate courts of this state decided *Smith* and *Johnson*, some state court judges and commentators in other jurisdictions urged enhanced use of state constitutions. Additionally, the United States Supreme Court acknowledged that its decisions did not limit the states' authority to adopt and construe the individual liberties granted in their own constitutions more expansively than those granted in the Federal Constitution.¹⁰⁷

104. See 47 AM. JUR. 2D *Jury* § 185 (1995).

105. 55 N.J. 476, 483-84, 262 A.2d 868, 871-72 (1970).

106. 125 N.J. Super. 438, 439, 311 A.2d 389, 389-90 (N.J. Super. Ct. App. Div. 1973).

107. See, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982) (Brennan, J., concurring); *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

It has been unmistakably clear for several decades that the federal Bill of Rights establishes minimum individual rights for citizens of the United States. The Fourteenth Amendment not only made African Americans citizens, it also protected most rights guaranteed by the Bill of Rights from interference by the states. Metaphorically, the federal Bill of Rights establishes a floor for fundamental rights, whereas state constitutions establish a ceiling.¹⁰⁸

Under this dual constitutional approach, a citizen is free to seek redress under both the federal and state constitutions. This was true unless of course, you grew up with me in the Old South during the late 1940s and 50s, when the United States Supreme Court dominated the development of constitutional law. Those years marked the beginning of the Second Civil Rights Era where outstanding litigators, such as Justice Thurgood Marshall, sought redress for invidious discrimination in the federal courts in a way unparalleled in American history. Redress was not sought in state courts because they were generally viewed as being part of the problem rather than the solution.

During the 1970s and 80s, however, when the membership and philosophy of the United States Supreme Court underwent significant change, federal courts became a less desirable forum for litigants' vindication of fundamental rights. Justice William Brennan described the trend in the United States Supreme Court opinions as a pulling back or suspending of the liberal construction of the federal Bill of Rights.¹⁰⁹ As the floor for fundamental liberties under the federal Bill of Rights was lowered, state courts were urged to raise their ceilings for the same rights under parallel provisions of state constitutions. Fortunately, electoral politics was creating more diversified and sensitive state judiciaries on a national level.

I responded to the challenge to use state constitutions to raise the ceiling for individual rights in 1984 when I authored *Gilmore I*.¹¹⁰ By then, New Jersey had already interpreted its

108. See generally Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

109. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

110. *State v. Gilmore*, 195 N.J. Super. 163, 478 A.2d 783 (App. Div.

constitution to afford its citizens greater protection of personal rights than those conferred by parallel provisions of the Federal Constitution.¹¹¹

When *Gilmore II*¹¹² was decided in 1985, four other jurisdictions had relied on their state constitutions to provide greater rights to their citizens than provided under *Swain*.¹¹³ In contrast, *five* states had declined to interpret their state constitutions as affording any greater protection. Instead they adhered to the *Swain* requirement that a defendant must prove systematic exclusion of African Americans from the jury to establish a potential Fourteenth Amendment violation.¹¹⁴ While four states had used their state constitutions to avoid the harshness of *Swain*, twenty-three other states had clearly interpreted their constitutions to confer greater liberties than

1984).

111. *State v. Hunt*, 91 N.J. 338, 359, 450 A.2d 952, 962 (1982); *Right to Choose v. Byrne*, 91 N.J. 287, 300-01, 450 A.2d 925, 931 (1982); *State v. Alston*, 88 N.J. 211, 225-27, 440 A.2d 1311, 1318-19 (1981) (retaining the rule of automatic standing to challenge searches and seizures); *State v. Schmid*, 84 N.J. 535, 559-60, 425 A.2d 615, 628 (1980) (holding that free speech is protected in some instances against private interference); *State v. Johnson*, 68 N.J. 349, 353-54, 346 A.2d 66, 68 (1975) (holding that consent to search is voluntary only where the consenting party knows of his or her right to refuse consent); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, 292 (1973) (holding that a state citizen has a fundamental right to a thorough and efficient public education), *cert. denied sub nom. Dickey v. Robinson*, 414 U.S. 976 (1973).

112. *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (App. Div. 1985).

113. *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978) (striking down use of peremptory challenges on the basis of group bias under state constitution); *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984) (holding that state constitutions require a more stringent test than that set forth in *Swain*); *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass. 1979) (holding that state constitution prohibited using peremptory challenges on basis of race), *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 612 P.2d 716, 718 (N.M. Ct. App. 1980) (holding that improper use of peremptory challenges can be shown under state constitution).

114. *Beed v. State*, 609 S.W.2d 898, 903 (Ark. 1980); *Blackwell v. State*, 281 S.E.2d 599, 599-600 (Ga. 1981); *Gilliard v. State*, 428 So. 2d 576, 579 (Miss.), *cert. denied*, 464 U.S. 867 (1983); *People v. McCray*, 443 N.E.2d 915, 916-919 (N.Y. 1982), *cert. denied*, 461 U.S. 961 (1983); *State v. Lynch*, 268 S.E.2d 161, 168-169 (N.C. 1980).

otherwise provided under the Federal Constitution.¹¹⁵

115. *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985) (affording broader protection against searches and seizures under state constitution); *Pool v. Superior Court*, 677 P.2d 261, 271 (Ariz. 1984) (holding that, under a state constitution, double jeopardy attaches when a mistrial is granted due to intentional, improper and prejudicial conduct by the prosecutor); *People v. Disbrow*, 545 P.2d 272, 280 (Cal. 1976) (holding that, in contrast to the United States Constitution, under a state's constitution, any self-incriminating statement made in violation of the Miranda standard may not be used as affirmative evidence or for impeachment purposes); *People v. Sporleder*, 666 P.2d 135, 144 (Colo. 1983) (holding that, under a state constitution, a defendant has a reasonable expectation of privacy against the installation of a pen register on his home telephone); *State v. Kimbro*, 496 A.2d 498, 506 (Conn. 1985) (holding that the state constitution requires the *Aguilar-Spinelli* test and rejecting the more lenient "totality of the circumstances" test for determining probable cause); *State v. Sarmiento*, 397 So. 2d 643, 645 (Fla. 1981) (holding that warrantless electronic eavesdropping of defendant's home conversation violates the state constitution though permitted under United States Constitution); *State v. Armstead*, 262 S.E.2d 233, 235 (Ga. Ct. App. 1979) (holding that, though permissible under the United States Constitution, compelling a defendant to provide a handwriting exemplar violates the right against self-incrimination under the state constitution); *State v. Tanaka*, 701 P.2d 1274, 1276-77 (Haw. 1985) (holding that, under the state constitution, a defendant has a reasonable expectation of privacy in household garbage); *Bierkamp v. Rogers*, 293 N.W.2d 577, 585 (Iowa 1980) (holding that guest statutes which did not violate the equal protection clause of the United States Constitution, violate the state constitution); *State v. Eames*, 365 So. 2d 1361, 1368-69 (La. 1989) (Dennis, J., concurring) (finding that the state constitution provides greater protection against racial discrimination by the state than the Fourteenth Amendment of the United States Constitution by preventing the use of peremptory challenges on the basis of race or religion); *Commonwealth v. Upton*, 476 N.E.2d 548, 553-54 (Mass. 1985) (holding that state constitution provides greater protection than the federal Constitution in rejecting the "totality of the circumstances" standard for probable cause for the *Aguilar-Spinelli* two-prong test); *Pfost v. State*, 713 P.2d 495, 500-01 (Mont. 1985) (noting that the equal protection clause of the state constitution provides for greater fundamental rights than the Federal Constitution); *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) (holding that, unlike the Fifth Amendment of the United States Constitution, the state constitution protects its citizens from dual state and federal prosecutions for the same conduct); *People v. Ferber*, 441 N.E.2d 1100, 1101 (N.Y. 1982) (recognizing that the state constitution may provide its citizens greater protection than the United States Constitution); *State v. Nordquist*, 309 N.W.2d 109, 113 (N.D. 1981) (holding that, though the Fifth Amendment

When writing *Gilmore I*, I faced a dilemma. On the one hand, the constitutional and statutory mandates required impartiality, and the representative cross-section rule applied in selecting the pool of prospective jurors. On the other hand, the use of peremptory challenges under *Swain* essentially rendered the cross-section rule a nullity. First as a trial lawyer and then as a trial judge, I personally found the *Swain* rule offensive and an affront to my dignity, much like *Plessy v. Ferguson*.¹¹⁶ Indeed, *Strauder* had foreshadowed as much in 1880.

To be sure, an improper exclusion of potential jurors solely based on race not only violated the right of a defendant who belonged to the same cognizable group as the prospective juror,

of the United States Constitution does not require that a defendant be allowed to challenge all evidence brought before a grand jury, the state constitution provides that the legislature may establish greater protection for defendants targeted by grand-jury investigations); *Planned Parenthood Ass'n v. Department of Human Resources*, 663 P.2d 1247, 1261 (Or. Ct. App. 1983) (holding that a rule denying funding for medically necessary abortions to indigent women violated the privileges and immunities clause of the state constitution, though no such requirement existed under the United States Constitution); *Commonwealth v. Sell*, 470 A.2d 457, 469 (Pa. 1983) (holding that under the state constitution, a defendant charged with a possessory offense has automatic standing to challenge the admissibility of evidence alleged to be fruit of an illegal search and seizure); *State v. Benoit*, 417 A.2d 895, 901 (R.I. 1980) (holding that the state constitution provides greater protection against warrantless delayed searches and seizures of a vehicle than the United States Constitution); *State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976) (holding that, unlike the Federal Constitution, the state constitution protects its citizens from all inventory searches except those based on items in plain view); *Kelley v. State*, 676 S.W.2d 646, 650 (Tex. 1984) (holding that the state constitution provides greater protection against warrantless arrests with probable cause than the Fourth Amendment of United States Constitution); *State v. Simpson*, 622 P.2d 1199, 1205-06 (Wash. 1980) (holding that a defendant charged with a possessory crime has automatic standing under the state constitution); *State v. Pitsch*, 369 N.W.2d 711, 714 (Wis. 1985) (noting that it is the state's prerogative to afford greater protection to its citizens than that provided by the United States Supreme Court); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (holding that, under the state constitution, education is a fundamental right).

116. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

but it offended the potential juror's rights as well. In psychological terms, I experienced "transference." The way in which prospective jurors were treated at that time was transferred to me because, as *Strauder* said, such treatment became "practically a brand upon them, affixed by the law, an assertion of their inferiority."¹¹⁷ In addition, the defendant was harmed by the fear that the invidious discrimination practiced in the jury selection process would infect the entire proceeding.¹¹⁸ This, in turn, caused a loss of confidence in the judicial system as a whole.

As a trial judge, I felt incapable to change the course chartered by *Swain*. Later, as an appellate judge in 1984, I felt differently. I was no longer reluctant to use state constitutionalism to protect and expand individual rights on a limited basis. By then, state constitutionalism had evolved and states had begun using their constitutions to expand rights beyond the federal level.

The most significant factor driving those changes was the fact that the pendulum in the United States Supreme Court, that previously had swung in the direction of eradicating invidious discrimination, as illustrated by the holding in *Brown v. Board of Education*,¹¹⁹ was instead moving in the direction of toleration. By this time, too many non-economic, metaphorical "promissory notes" payable at "the High Court of Justice" were being returned, marked "insufficient funds." This realization persuaded me to move away from my heretofore almost intractable jurisprudential philosophy of parallelism between federal and state constitutional interpretation.

Thus, when the presiding judge in *Gilmore I* asked me to be the first speaker at our conference on the case, the court was looking to me for leadership. As an American and simultaneously an African American, I felt the "duality status," the "twoness" that W.E.B. DuBois described in his classic book, *The Souls of Black Folk*.¹²⁰ Just think how tragic it would have been if I had informed the court that there was nothing

117. *Strauder*, 100 U.S. at 308.

118. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

119. 347 U.S. at 483.

120. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 2 (Kraus Thomson Org. Ltd. 1973) (1953).

the court *could* do, or worse still, there was nothing the court *should* do in light of *Swain*. But I responded, as I would hope Chief Justice Weintraub would have, that we must make the New Jersey Constitution a "living organism" to continue eradicating the cancer of invidious discrimination in the jury selection process.

Gilmore II relied on the state constitutional and legislative history with respect to the representative cross-section rule and concluded that our "State Constitution guarantees that the use of peremptory challenges may not restrict unreasonably the possibility that the petit jury will comprise a representative cross-section of the community."¹²¹ The decision was grounded in Article I, paragraph 5 of the state's constitutional guarantee to a trial by an impartial jury drawn from a representative cross-section of the community.¹²² Analytically, this was a Sixth Amendment approach based on a defendant's right to trial by an impartial jury of peers, rather than *Swain's* Fourteenth Amendment denial of equal protection rights of prospective jurors.

The State's Petition for Certification in *Gilmore II* was granted,¹²³ and while that appeal was pending, the United States Supreme Court decided *Batson v. Kentucky*.¹²⁴ *Batson* overruled *Swain v. Alabama*¹²⁵ and held that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from exercising peremptory challenges to remove prospective jurors on the basis of their race.¹²⁶ Notwithstanding the holding in *Batson*, the New Jersey Supreme Court, in affirming *Gilmore II*,¹²⁷ relied on the New Jersey constitutional guarantee to trial by an impartial jury.¹²⁸ Together, *Gilmore* and *Batson* represent a constitutional revolution that transformed the jury selection system.

121. *Gilmore*, 199 N.J. Super. at 401, 489 A.2d at 1181.

122. *Id.* at 397-98, 489 A.2d at 1179.

123. 101 N.J. 285, 501 A.2d 948 (1985).

124. 476 U.S. 79 (1986).

125. 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

126. *Batson*, 476 U.S. at 93-97.

127. 103 N.J. 508, 511 A.2d 1150 (1986).

128. 103 N.J. at 522-23, 511 A.2d at 1157.

Analytically, *Batson's* equal protection jury selection approach is not novel. It is rooted in the 1880 *Strauder* decision in which West Virginia required African Americans to be tried by all-white male juries. Both *Strauder* and *Batson* focused on the equal protection right of prospective jurors.¹²⁹ *Batson*, unlike *Strauder*, avoided any discussion about a defendant's right not to have certain persons excluded from the jury. Because *Batson* is based on the right of certain prospective jurors not to be invidiously discriminated against, who has standing to assert that right?

ASSERTION AND IMPLEMENTATION OF JURORS' RIGHTS

Historically, one remedy afforded to prospective jurors who have been discriminated against has been injunctive relief.¹³⁰ Recently, anyone connected with the litigation, regardless of whether that person belonged to the "same class" as the prospective juror discriminated against in the selection process, has been given vicarious standing to assert the constitutional rights of the juror. First recognized in the implementation of the representative cross-section rule, this broad standing rule was granted because jurors would seldom challenge their exclusion.

In *Taylor v. Louisiana*,¹³¹ a male defendant successfully argued that he had standing to challenge the exclusion of women from the jury pool.¹³² The United States Supreme Court held that systematic exclusion of women from the juror pool deprived the defendant of his Sixth Amendment right to trial by an impartial jury drawn from a representative cross-section of the community.¹³³ In *Peters v. Kiff*,¹³⁴ a white male defendant successfully argued that he had standing to challenge the systematic exclusion of African Americans from

129. *Batson*, 476 U.S. at 89; *Strauder*, 100 U.S. at 305-06.

130. See, e.g., *Carter v. Jury Comm'n*, 396 U.S. 320, 322 (1970); *Turner v. Fouche*, 396 U.S. 346, 350 (1970).

131. 419 U.S. 522 (1975).

132. *Id.* at 526.

133. *Id.* at 531.

134. 407 U.S. 493 (1972).

his grand and petit jury pool.¹³⁵ Still another cross-class challenge to invidious discrimination was permitted in *Powers v. Ohio*,¹³⁶ in which a white defendant challenged the use of peremptory strikes to excuse African Americans as prospective jurors.¹³⁷

Batson also conferred standing to defense attorneys asserting the equal protection rights of prospective jurors. In *Georgia v. McCollum*,¹³⁸ prosecutors were permitted to assert the right of prospective jurors to prevent defense attorneys from engaging in invidious discrimination without violating a defendant's Sixth Amendment right to effective assistance of counsel.¹³⁹ *Batson* has been applied to civil litigants as well.¹⁴⁰

Although the United States Supreme Court has been expanding the number of groups with standing to present a *Batson* challenge, the Court has only once expanded the cognizable group protected from discrimination in peremptory challenges beyond race. In that extension, the Court held that peremptory challenges may no longer be exercised on the basis of gender.¹⁴¹ Those two cognizable groups, race and gender, share a common element: members of both were historically precluded from serving on juries. Arguably, limiting the protection to those two groups might be one way of correcting historical invidious discrimination. Accordingly, the Court will undoubtedly be urged to next expand the cognizable groups to include age and religion. Because *Gilmore* was decided under a Sixth Amendment analysis, *Gilmore* may be the basis under which our state courts expand the cognizable groups beyond race and gender to further effectuate the purpose of the representative cross-section rule.

Implementing *Batson* and *Gilmore* has become somewhat problematic for trial courts. Both decisions require trial judges to determine whether a *prima facie* case of invidious discrimi-

135. *Id.* at 496, 504.

136. 499 U.S. 400 (1991).

137. *Id.* at 403.

138. 505 U.S. 42 (1992).

139. *Id.* at 58.

140. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

141. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

nation against a prospective juror belonging to a cognizable group has been established. If the judge is so persuaded, the offending attorney must give racial and gender-neutral explanations for using the challenged peremptory strikes. The trial judge must then make a credibility determination with respect to whether there was an invidious discriminatory intent. Because a mere hunch may satisfy the requirement for a racial or gender-neutral basis for the use of peremptory challenges, one might seriously question the effectiveness of *Batson* and *Gilmore* in precluding invidious discrimination in the jury selection process.

The United States Supreme Court has not expanded on what constitutes a race-neutral explanation. In *Hernandez v. New York*,¹⁴² a Spanish prospective juror was excluded because the prosecutor feared that he wouldn't rely on the interpreters' translation, rather on his own knowledge of Spanish in deciding what the witnesses said.¹⁴³ The disparate impact of that ruling was not deemed sufficient to expand the discriminatory-intent standard.¹⁴⁴

Similarly, in *Purkett v. Elem*,¹⁴⁵ the prosecutor exercised peremptory strikes against several African-American males because they had long hair.¹⁴⁶ The trial judge found the explanation credible, and dismissed a defense challenge.¹⁴⁷ On appeal, the Eighth Circuit Court of Appeals found that the explanation was not *plausible*.¹⁴⁸ Moreover, it found that any *implausible* explanation is not racially-neutral.¹⁴⁹ The Supreme Court reversed, holding that a plausible explanation is not required.¹⁵⁰ The Court concluded that the absence of invidious discrimination is established so long as the trial court finds the explanation credible, even if not plausible.¹⁵¹ Consequently,

142. 500 U.S. 352 (1991).

143. *Id.* at 356-57.

144. *Id.* at 369-70.

145. 115 S. Ct. 1769 (1995).

146. *Id.* at 1771.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1770-72.

151. *Id.*

the issue of whether a race or gender-neutral explanation exists has become a credibility call to be made by the trial court. Like so many other credibility determinations made by trial judges, it is virtually impossible for an appellate court to reverse such a factual finding. Thus the *Purkett* implausible standard may become as ineffective as *Swain* in preventing invidious discrimination in the use of peremptory challenges.

Although "hunch" challenges are permitted under *Gilmore*, judges must be sensitive to the possibility that hunches, gut reactions, and "seat of the pants instincts" may be euphemisms for invidious discrimination.¹⁵² New Jersey has adopted a stricter rule than *Purkett's* implausible rule. Under *Gilmore*, the explanation for a hunch challenge must be "reasonably relevant to the particular case on trial or its parties or witnesses."¹⁵³ New Jersey's rule is similar to that urged by Justices Stevens and Breyer in *Purkett*, which required that a race-neutral explanation for peremptory strikes be related to the circumstances of the trial.¹⁵⁴

WHY THE GILMORE-BATSON IDEALS SHOULD NOT CHANGE

A color-conscious selection process, as mandated by *Gilmore* and *Batson*, reduces the likelihood of having all-white juries. Criminal cases tried before all-white juries, with African Americans as either victims or defendants, evoke disturbing images of injustice.¹⁵⁵ For example, Byron De La Beckwith, a white man, was tried two times in Mississippi by an all-white jury for the 1963 murder of Civil Rights Leader, Medgar Evers.¹⁵⁶

152. *State v. Gilmore*, 103 N.J. 508, 538-39, 511 A.2d 1150, 1166-67 (1986); see also *State v. Townes*, 220 N.J. Super. 38, 43, 531 A.2d 381, 383 (N.J. Super. Ct. App. Div. 1987), *certif. denied*, 110 N.J. 296, 540 A.2d 1278 (1988).

153. 103 N.J. at 538, 511 A.2d at 1166.

154. *Purkett v. Elem*, 115 S. Ct. 1769, 1774-75 (Stevens, J., dissenting).

155. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV., 1, 5-6 (1990) (citing recent sociological data showing jury prejudices).

156. *De La Beckwith v. State*, 615 So. 2d 1134, 1135 (Miss. 1992), *cert. denied*, 510 U.S. 884 (1993).

Each time the jury was deadlocked.¹⁵⁷ When he was tried a third time in 1994 by a racially-mixed jury, he was found guilty of murder.¹⁵⁸ The Rodney King verdict was reached by a jury comprised of ten whites, one Asian, and one Latino, and was considered by many to be unfair and fraught with prejudice.¹⁵⁹

The color-conscious petit jury selection process required by *Gilmore* under a Sixth Amendment analysis and *Batson* under a Fourteenth Amendment Equal Protection analysis — though the *Batson* majority insisted that it created a color blind process — should not be subjected to the kinds of criticism leveled against affirmative action measures. First, the process does not require that African Americans or women be placed on petit juries. It requires only that they not be excluded solely because of their group membership. Second, it is unlikely that a white prospective juror who is peremptorily challenged to permit an African American to serve on a predominantly white jury would be branded inferior, or even feel inferior for that matter.¹⁶⁰ As the *McCullum* Court recognized, “[t]he ability to use peremptory challenges to exclude majority race members may be crucial to impaneling a fair jury.”¹⁶¹ The *Gilmore-Batson* cases will continue to be important as our multi-ethnic society struggles to provide both the appearance and the reality of justice to all the people, by the people, who serve as jurors.

Following the verdict in the O.J. Simpson case, some have urged that the method of jury selection delineated in *Gilmore-Batson* be changed to reduce the possibility of such verdicts recurring in the future. The suggestion that a large number of African-American jurors are disproportionately acquitting African-American defendants is not an established fact in New Jersey. In any event, I suggest that more careful studies be

157. *Id.*

158. Robert P. Burns, *The History and Theory of the American Jury*, 83 CAL. L. REV. 1477, 1485 n. 22 (1995).

159. *E.g.*, Stephen L. Carter, *After L.A., How to Heal*, WALL ST. J., May 1, 1992, at A14 (describing the verdict as incomprehensible and frightening).

160. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 705, 723-24 (1995).

161. *Georgia v. McCollum*, 505 U.S. 42, 68 (1992).

conducted to understand this phenomenon and to determine whether it has any validity. Those studies should also address any impact that perceived police impropriety had over the verdicts. Given that seventy-five percent of the state's twenty-one counties have African-American populations of fifteen percent or less, I remain as confident today as I was in *Gilmore II*¹⁶² that rarely, if ever, will a jury be comprised of predominantly African Americans.¹⁶³

The *Gilmore-Batson* jury selection procedure alone did not account for the racial composition of the jury in the O.J. Simpson case. The African-American population in Los Angeles County was eleven percent and the white population was fifty-seven percent.¹⁶⁴ In Ventura County, where the trial of Rodney King's assailants was conducted, the African-American population was two and one-half percent.¹⁶⁵ Thus, in the O.J. case there were many other non-racial variables that led to a trial by a jury that was seventy-five percent African American.

One explanation for the acquittal in the O.J. Simpson case is that the jury did not find the evidence sufficiently credible to satisfy the reasonable doubt standard. Justice Oliver Wendell Holmes posited another option in 1932 when he reiterated Justice Learned Hand's conclusion that an acquittal may be "no more than [the jurors'] assumption of a power which they had no right to exercise, but to which they were disposed through lenity."¹⁶⁶

162. 199 N.J. Super. 389, 407 n.4, 489 A.2d 1175, 1185 n.4 (1985).

163. The 1990 census reveals counties the African-American and Puerto Rican populations, respectively, of persons eighteen years of age and older in the following New Jersey counties: Atlantic 17.5% and 5%; Bergen 5% and 1.5%; Burlington 14% and 2%; Camden 16% and 5.5%; Cape May 5.5% and 1%; Cumberland 17% and 11.5%; Essex 40.5% and 6.5%; Gloucester 9% and 1%; Hudson 14.5% and 10.5%; Hunterdon 2% and .5%; Mercer 19% and 4%; Middlesex 8% and 4%; Monmouth 8.5% and 2%; Morris 3% and 1.5%; Ocean 3% and 2%; Passaic 14.5% and 9.5%; Salem 15% and 1.5%; Somerset 6% and 1%; Sussex 1% and 1%; Union 20% and 3.5%; and Warren 1.5% and 1%. U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS OF NEW JERSEY 23 (1992).

164. U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS OF CALIFORNIA 28 (1992).

165. *Id.* at 32.

166. *Dunn v. United States*, 284 U.S. 390, 393 (1932) (quoting *Steckler*

Similarly, the Supreme Court of New Jersey stated:

a jury has the prerogative of returning a verdict of innocence in the face of overwhelming evidence of guilt. . . . This is indicative of a belief that the jury in a criminal prosecution serves as the conscience of the community and the embodiment of the common sense and feelings reflective of society as a whole.¹⁶⁷

I view the current debate over whether cross-sectionalized juries should be modified as part of "the spirit of liberty" Judge Learned Hand advocated. It involves a willingness to reexamine the premise underlying an opinion. I have reexamined *Gilmore* under both a Sixth and a Fourteenth Amendment analysis, and remain committed to its ideals. Further, I remain persuaded that the Fourteenth Amendment was intended to be an explicitly color-conscious solution to this country's racial problems after slavery was abolished. Thus, a cross-sectionalized jury is one remedial method of effectuating the intent of the Fourteenth Amendment. A similar result was reached in *Gilmore* under the New Jersey Constitution. A person, however, selected to be a member of a cross-sectionalized jury does not sit as a representative of a particular racial or ethnic group. The representative cross-section rule "is a structural mechanism for preventing bias, not enfranchising it."¹⁶⁸

CONCLUSION

The ultimate objective of a cross-sectionalized jury is twofold. First, it enhances the quality of jury deliberation through group dynamics, thereby promoting the quality of justice. Second, it helps to prevent subjugation of African Americans throughout the criminal justice system and beyond. By interpreting our State constitution as a "living organism," we have made some strides in eradicating the cancer of discrimination involved in the jury selection process, but more challenges

v. United States, 7 F.2d 59 (1925) (Hard, J.).

167. *State v. Ingenito*, 87 N.J. 204, 212, 432 A.2d 912, 916 (1981).

168. *J.E.B. v. Alabama*, 511 U.S. 127 (Kennedy, J., concurring); see *Ballard v. United States*, 329 U.S. 217 (1946).

await on the horizon.

The importance of jury selection to lawyers was best described by a famous lawyer who compared trials in England with those in the United States. The lawyer said that in England, the trial begins when jury selection ends. In the United States, however, the trial ends with the jury selection. Clearly, this lawyer believed that in the United States the composition of the jury determines the ultimate verdict. That observation suggests that lawyers will continue to manipulate the jury selection process as much as possible to eliminate prospective jurors with the so-called wrong characteristics which include race and gender. Race has always been, and will continue to be, a substantial factor in the jury selection process.

Those who advocate a color-blind jury-selection system see the statue of justice as a blind goddess. Many African Americans, however, view that statue in the same way as Langston Hughes when he wrote, "Her bandage hides two festering sores that once perhaps were eyes."¹⁶⁹

I hope that the New Jersey Constitution and *Gilmore* will continue to be "living organisms" that prevent *Purkett's* "implausible rule" from becoming, in reality, a reestablishment of the *Swain* standard. Until the dawn of a new day when African-American prospective jurors are judged by the content of their character rather than the color of their skin, a race-conscious jury selection process must be utilized to ensure cross-sectionalism in the jury room.

169. LANGSTON HUGHES, *Justice*, in THE COLLECTED POEMS OF LANGSTON HUGHES 31 (Arnold Rampersad & David Roessel eds., 1994).