AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Criminal Justice/Juries and Lawyers/Juries

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Swain v. Alabama, 380 U.S. 202 (1965)

Robert Swain was a nineteen-year-old African-American male accused of raping a seventeen-year-old white female. At trial, Swain claimed that the grand jury that indicted him and the petit jury that was to hear his case were chosen by means that discriminated against persons of color. His attorney pointed out that African-Americans were historically underrepresented on grand juries in Talladega County, that no person of color had served on a petit jury in memory, and that the prosecutor in Swain's case had struck all African-Americans on the trial venire. The trial judge rejected Swain's motion. He was found guilty and sentenced to death. After the Supreme Court of Alabama affirmed the death sentence, Swain appealed to the Supreme Court of the United States.

During the thirty years before Swain, *the Supreme Court frequently ruled in favor of persons claiming race discrimination in the composition of grand juries. In* Smith v. State of Texas *(1940), Justice Black reversed a conviction in a case where the defendant demonstrated that in a country with a greater than 10 percent African-American population, only five African-Americans had recently served on grand juries. His unanimous opinion first emphasized the importance of ensuring that juries represented a fair cross section of the community. "It is part of the established tradition in the use of juries as instruments of public justice," Black wrote,*

> *that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.*

Black gave short shrift to claims that the underrepresentation of African-Americans might have resulted from random events.

> *Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list.*

Over the next decades, little changed in many parts of the United States. Justice Black's unanimous opinion in Eubanks v. State of Louisiana *(1958) noted,*

> *Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory. And this lone exception apparently resulted from the mistaken impression that the juror was white. From 1936, when the Commission first began to include Negroes in the pool of potential jurors, until 1954, when petitioner was indicted, 36 grand juries were selected in the parish. Six or more Negroes were included in each list submitted to the local judges. Yet out of the 432 jurors selected only the single Negro was chosen.*

The main issue in Swain *was the use of preemptory challenges to prevent persons of color from sitting on the petit jury that decides guilt or innocence. Defense attorneys and prosecutors in the United States are traditionally allowed to issue two kinds of challenges to potential trial jurors. They may challenge for cause whenever objective reasons exist for thinking that a juror has a preexisting bias such as a relationship with one of the witnesses or a belief that any person a police officer arrests is guilty. Both defense attorneys and prosecutors may also make a limited number of preemptory challenges whenever they have subjective reasons for suspecting bias. Potential jurors may be stricken from the jury because a defense lawyer thinks accountants are too prone to convict people or because a prosecutor thinks a potential witness was smiling too sweetly at the defense attorney. Traditionally, lawyers need not articulate any reasons for exercising a preemptory challenge. Alabama adopted a variation on this practice. The original jury venire consisted of 75 persons. After all challenges for cause were finished, the defense attorney then struck two jurors for any reason, the prosecutor one, and then the process repeated until only 12 jurors were left. Prosecutors routinely struck persons of color from trial juries, but did not have to assert that they were engaged in racial discrimination.*

The Supreme Court by a 6-3 vote declared that the all-white struck jury which sentenced Robert Swain to death was constitutionally composed. Justice White's majority opinion held that prosecutors did not violate the equal protection clause when they struck all persons of color from juries in a particular case. How did Justice White distinguish Swain *from the previous cases in which the justices had found unconstitutional discrimination? Do you find his distinction convincing?*

JUSTICE WHITE delivered the opinion of the Court.

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. . . Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. . . . It is not the soundness of these principles, which is unquestioned, but their scope and application to the issues in this case that concern us here.

We consider first petitioner's claims concerning the selection of grand jurors and the petit jury venire. The evidence was that while Negro males over 21 constitute 26% of all males in the county in this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes, there having been only one case in which the percentage was as high as 23%. In this period of time, Negroes served on 80% of the grand juries selected, the number ranging from one to three. There were four or five Negroes on the grand jury panel of about 33 in this case, out of which two served on the grand jury which indicted petitioner. Although there has been an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has actually served on a petit jury since about 1950. In this case, there were eight Negroes on the petit jury venire, but none actually served, two being exempt and six being struck by the prosecutor in the process of selecting the jury.

It is wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels. . . . Moreover, we do not consider an average of six to eight Negroes on these panels as constituting forbidden token inclusion within the meaning of the cases in this Court. . . . Nor do we consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment.

. . .

Venires drawn [under Alabama law] unquestionably contained a smaller proportion of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him, nor on the venire or jury roll from which petit jurors are drawn. . . . Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. . . . Undoubtedly the selection of prospective jurors was somewhat haphazard, and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case.

Petitioner makes a further claim relating to the exercise of peremptory challenges to exclude Negroes from serving on petit juries.

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In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. . . . The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. . . . Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges," . . . nonetheless the challenge is "one of the most important of the rights secured to the accused." . . .

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way, the peremptory satisfies the rule that, "to perform its high function in the best way, *justice must satisfy the appearance of justice.*" . . .

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control. . . . While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. . . . It is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." . . . It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. . . . Hence, veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. 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. Hence, the motion to strike the trial jury was properly denied in this case.

Petitioner, however, presses a broader claim in this Court. His argument is that not only were the Negroes removed by the prosecutor in this case, but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County, and that, in criminal cases, prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself. This systematic practice, it is claimed, is invidious discrimination for which the peremptory system is insufficient justification.

We agree that this claim raises a different issue, and it may well require a different answer. . . . [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause,

with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. . . .

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The difficulty with the record before us, perhaps flowing from the fact that it was made in connection with the motion to quash the indictment, is that it does not, with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talledega County. The record is absolutely silent as to those instances in which the prosecution participated in striking Negroes, except for the indication that the prosecutor struck the Negroes in this case and except for those occasions when the defendant himself indicated that he did not want Negroes on the jury. Apparently in some cases, the prosecution agreed with the defense to remove Negroes. There is no evidence, however, of what the prosecution did or did not do on its own account in any cases other than the one at bar. . . .

. . . Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials. This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need elicit an admission from the prosecutor that discrimination accounted for his rejection of Negroes, any more than a defendant attacking jury selection need obtain such an admission from the jury commissioners. But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time.

JUSTICE HARLAN, concurring.

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JUSTICE BLACK concurs in the result.

JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE and JUSTICE DOUGLAS join, dissenting.

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It is unthinkable . . . that the principles of *Strauder v. West Virginia* (1880) and the cases following should be in any way weakened or undermined at this late date, particularly when this Court has made it clear in other areas, where the course of decision has not been so uniform, that the States may not discriminate on the basis of race. . . .

Regrettably, however, the Court today, while referring with approval to *Strauder* and the cases which have followed, seriously impairs their authority and creates additional barriers to the elimination of jury discrimination practices which have operated in many communities to nullify the command of the Equal Protection Clause. . . .

Petitioner, a 19-year-old Negro, was indicted in Talladega County for the rape of a 17-year-old white girl, found guilty, and sentenced to death by an all-white jury. The petitioner established by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama. Yet, of the group designated by Alabama as generally eligible for jury service in that county, 74% (12,125) were white and 26% (4,281) were Negro.

Under well established principles, this evidence clearly makes out "a *prima facie* case of the denial of the equal protection which the Constitution guarantees." . . . .

. . .

Alabama here does not deny that Negroes as a race are excluded from serving on juries in Talladega County. The State seeks to justify this admitted exclusion of Negroes from jury service by contending that the fact that no Negro has ever served on a petit jury in Talladega County has resulted from use of the jury-striking system, which is a form of peremptory challenge. . . .

I cannot agree that the record is silent as to the State's involvement in the total exclusion of Negroes from jury service in Talladega County. The Alabama Supreme Court found that "Negroes are commonly on trial venires, but are always struck by attorneys in selecting the trial jury."

[T]he State "many times" abandons even the facade of the jury-striking system and agrees with the defense to remove all Negroes as a class from the jury lists even before the striking begins, or . . . pursuant to an agreement, the State directly participates in the striking system to remove Negroes from the venire. . . . Since it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion from the record statement that only on occasion have Negro defendants desired to exclude Negroes from jury service, is that, in a good many cases, Negroes have been excluded by the state prosecutor, either acting alone or as a participant in arranging agreements with the defense.

Moreover, the record shows that, in one case, the only one apparently in the history of the county where the State offered Negroes an opportunity to sit on a petit jury, the state prosecutor offered a Negro accused an all-Negro jury where the case involved an alleged crime against another Negro. The offer was refused, but it tends to confirm the conclusion that the State joins in systematically excluding Negroes from jury service because it objects to any mixing of Negro and white jurors and to a Negro sitting in a case in which a white man is in any way involved.

Furthermore, the State concededly is responsible for the selection of the jury venire. As the Court recognizes, . . . the evidence showed that while Negroes represent 26% of the population generally available to be called for jury service in Talladega County, Negroes constituted a lesser proportion, generally estimated from 10% to 15%, of the average venire. . . . It may be, for the reasons stated by the Court, that this "haphazard" method of jury selection, standing alone as an alleged constitutional violation, does not show unlawful jury discrimination. However, this method of venire selection cannot be viewed in isolation, and must be considered in connection with the peremptory challenge system with which it is inextricably bound. When this is done, it is evident that the maintenance by the State of the disproportionately low number of Negroes on jury panels enables the prosecutor, alone or in agreement with defense attorneys, to strike all Negroes from panels without materially impairing the number of peremptory challenges available for trial strategy purposes.

. . . Even if the Court were correct that the record is silent as to state involvement in previous cases in which Negroes have been systematically excluded from jury service, nevertheless it is undisputed that no Negro has ever served on any petit jury in the history of Talladega County. Under *Norris*, . . . it is clear that petitioner, by proving this, made out a *prima facie* case of unlawful jury exclusion. The burden of proof then shifted to the State to prove, if it could, that this exclusion was brought about for some reason other than racial discrimination in which the State participated.

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. . . The Court concedes that if this case involved exclusion of Negroes from jury panels, under *Norris v. Alabama* (1935) . . . , a *prima facie* case of unconstitutional jury exclusion would be made out. However, the Court argues that, because this case involved exclusion from the jury itself, and not from the jury venire, the burden of proof on a defendant should be greater. This distinction is novel, to say the least.

The Court's jury decisions, read together, have never distinguished between exclusion from the jury panel and exclusion from the jury itself. Indeed, no such distinction can be drawn. The very point of all these cases is to prevent that deliberate and systematic discrimination against Negroes or any other racial group that would prevent them not merely from being placed upon the panel, but from serving on the jury.

. . .

. . . The Court in . . . other cases . . . held that it would be unreasonable to assume where Negroes were totally excluded from venires that this came about because all Negroes were unqualified, unwilling, or unable to serve. It would be similarly unreasonable to assume, where total exclusion from service has

been established and the prosecutor has used peremptory challenges to exclude all Negroes from the jury in the given case, that, in all previous cases, Negroes were excluded solely by defense attorneys, without any state involvement. If the instant case is really a unique case, as the Court implies, surely the burden of proof should be on the State to show it.

. . .

The Court departs from the long-established burden of proof rule in this area, and imposes substantial additional burdens upon Negro defendants such as petitioner because of its view of the importance of retaining inviolate the right of the State to use peremptory challenges. I believe, however, that the preference granted by the Court to the State's use of the peremptory challenge is both unwarranted and unnecessary.

. . .

While peremptory challenges are commonly used in this country both by the prosecution and by the defense, we have long recognized that the right to challenge peremptorily is not a fundamental right, constitutionally guaranteed, even as applied to a defendant, much less to the State.

. . . Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.

It would not mean, as the Court's prior decisions, to which I would adhere, make clear, that Negroes are entitled to proportionate representation on a jury. . . . Nor would it mean that, where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection. This holding would mean, however, that a conviction cannot stand where, as here, a Negro defendant, by showing widespread systematic exclusion, makes out a *prima facie* case of unconstitutional discrimination which the State does not rebut. Drawing the line in this fashion, in my view, achieves a practical accommodation of the constitutional right and the operation of the peremptory challenge system without doing violence to either.