TAKING SOME RIGHTS TOO SERIOUSLY: THE STATE'S RIGHT TO A FAIR TRIAL

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A person accused of a crime has the right to a fair trial before an impartial jury.[1] The constitutional provisions which guarantee the right to a fair trial are commonly considered the fundamental rights of the accused.[2] Nevertheless, interpretations of these provisions often rely upon the assumption that the state also possesses trial-related rights which are equal in weight to those of the accused. For example, a frequent refrain in decisions on trial-related rights is that "[t]he state as well as the accused enjoys a right to an impartial jury."[3] Although an argument might be made that the state possesses rights,[4] that argument would be difficult to support.[5] Yet courts ascribing rights to the state do not even attempt to support their facile assumption.[6]

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1. U.S. CONST. amend. VI; *see id.* amend. XIV, § 1; *see also* Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968) (fourteenth amendment guarantees right to jury trial in all criminal cases); Strauder v. West Virginia, 100 U.S. 303, 308-10 (1879) (discrimination in selection of jurors violates right to fair trial). The right does not extend to petty offenses, *i.e.*, those punishable by less than six months imprisonment. Baldwin v. New York, 399 U.S. 66, 69 (1970).

2. *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979); Patton v. United States, 281 U.S. 276, 297 (1930).

3. Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *see* Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, *reh'g denied*, 441 U.S. 937 (1979); *see also* Wainwright v. Witt, 469 U.S. 412, 439 (1985) (Brennan, J., dissenting); Witherspoon v. Illinois, 391 U.S. 510, 535 (1967) (Black, J., dissenting), *reh'g denied*, 393 U.S. 898 (1968); Hayes v. Missouri, 120 U.S 68, 70 (1887); United States v. Leslie, 783 F.2d 541, 564 (5th Cir.), *cert. denied*, 106 S. Ct. 1943 (1986).

4. *See infra* note 22 (discussion of similar arguments in seventh and eleventh amendment contexts).

5. *See infra* notes 23-24.

6. *See infra* text accompanying notes 27-33.

The question of whether the state possesses trial-related rights is not merely semantic. If the state has a right to a fair trial, that right must be accorded a certain weight, perhaps a weight equal to that accorded the accused's right to a fair trial. When the courts are asked to determine the propriety of a certain practice, such as the state's use of peremptory challenges to exclude blacks from a jury,[7] or a requirement that the state consent to the defendant's waiver of a jury trial,[8] their task is to balance the countervailing interests at stake.[9] When the state's interest is inappropriately inflated to the status of a right, the balance becomes more likely to favor the state.

The unsupported ascription of rights to the state is a symptom, or perhaps a cause, of a greater problem in the field of constitutional criminal procedure. That problem stems from a pervasive failure to apply the correct analytical framework to decisionmaking in the criminal context. When state practices infringe the fundamental, trial-related rights of the accused,[10] those practices must be strictly scrutinized. Courts have the task of determining whether the interests served by the challenged practices are sufficiently compelling to justify the infringement of fundamental rights.[11] Yet, as I will demonstrate, strict scrutiny analysis is only sporadically employed in the criminal context.

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7. Batson v. Kentucky, 106 S. Ct. 1712, 1716-1718 (1986); Swain v. Alabama, 380 U.S. 202, 221 (1965).

8. Singer v. United States, 380 U.S. 24, 36 (1965).

9. Whether the countervailing interests to be weighed are *solely* those of the state and the accused is highly controversial. Chief Justice Burger, for example, has taken the position that the interests of the victims must also be placed in the balance. *See* Morris v. Slappy, 461 U.S. 1, 14-15 (1983); *see also* Press Enter. Co. v. Superior Court, 106 S. Ct. 2735 (1986) (balancing public's right to access to trials against defendant's right to fair trial); Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 948 (1985) (discussing victims' rights concept); O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 382 (1984) (discussing victims' rights concept); *cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 616 (1982) (Burger, C.J., dissenting) (victim's rights included in state's rights). Collective societal rights are also at stake, as I will discuss. This question has been discussed in the context of whether these other rights are adequately represented by the adversaries, or whether other parties may also assert them. *See* Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 106-07 (1985) (arguing for citizen standing to assert collective rights, including right to jury trial). I will discuss the extent to which collective rights and interests may be represented by the adversaries themselves *infra* text accompanying notes 152-87. Another interest which is sometimes recognized in fair trial cases is the interest of the excluded juror. *See, e.g.*, Lockhart v. McCree, 106 S. Ct. 1758, 1765-66 (1986); *Batson*, 106 S. Ct. at 1717-18.

10. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial held applicable to state courts); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

11. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1002 (1978).

I will argue that courts faced with weighing the fundamental trial-related rights of the accused against the interests of the state too often do so on an ad hoc basis without reference to the accepted analytical framework for constitutional decisionmaking. My focus will be on the courts' failure to employ the appropriate methodology for resolving conflicts between the rights of the accused and the interests of the state. This failure takes several interrelated forms. At times, courts fail to balance at all. They simply articulate a state right or interest and assume that it justifies any alleged infringement of the accused's rights.[12] Although some courts attempt to balance the rights of the accused against state interests, these courts mischaracterize the rights and interests at stake.[13] The assumption that the state has rights *equal* to those of the accused is associated with both errors; this assumption diverts courts from their task of carefully articulating and balancing the true interests of the parties by leading courts to accord overwhelming weight to state interests.

In part I, I will argue that the assnmption that the state has rights equal to those of the accused has, indeed, diverted courts from strictly scrutinizing the interests of the state and, therefore, from safeguarding the fundamental rights of the accused from unjustified governmental intrusion. Further, I will argue that courts have failed to characterize properly the nature of the interests to be weighed against the fundamental rights of the accused. In part II, I will examine two specific ways in which the courts have mischaracterized the interests of the state. In section A, I will discuss the error of ascribing to the state an interest in the representation of the accused's rights. In section B, I will discuss the error of assuming that the state represents all the rights of society. In part III, I will suggest a proper framework for balancing the rights of the accused against the interests of the state.

Throughout, I will examine several controversial areas of constitutional criminal law which relate to fair trial guarantees. These include limitations on the state's use of peremptory challenges,[14] the exclusion of jurors who are opposed to the death penalty from capital trials,[15] the

12. See, for example, the discussion of the courts' refusal to permit defendants to exercise their right to counsel and right to self-representation simultaneously [hereinafter referred to as hybrid counsel], *infra* text accompanying notes 63-69, 219-21.

13. Some examples include allowing the state to represent the rights of the accused or all the interests of society, or failing to recognize the fundamental nature of the rights of the accused. *See infra* text accompanying notes 71-187.

14. *See infra* text accompanying notes 137-50.

15. *See infra* text accompanying notes 43-61.

defendant's use of hybrid counsel,[16] the requirement that the state consent to the defendant's waiver of a jury trial,[17] the state's interest in reciprocal discovery,[18] and society's right to a public trial over the objection of the accused.[19] My intention is not to resolve these controversies. Rather, it is to suggest that the courts have too often failed to employ a principled mode of analysis when faced with infringements of the fundamental rights of the accused, to suggest some reasons for that failure, and to emphasize that the strict scrutiny standard of review is the correct model for evaluating incursions upon fundamental rights in the criminal context.

I. THE STATE'S INTERESTS MUST BE BALANCED AGAINST THE FUNDAMENTAL RIGHTS OF THE ACCUSED

The trial-related rights of the accused are enumerated in the Constitution and have long been held to be fundamental.[20] The Constitution

16. Hybrid counsel refers to the defendant's limited use of counsel for certain purposes during trial while shunning representation by counsel for other purposes, preferring to appear pro se. *See infra* text accompanying notes 63-69, 219-21.

17. *See infra* text accompanying notes 85-101.

18. That is, whether the prosecution should have access to information pertaining to the defendant's case prior to trial. *See infra* text accompanying notes 114-19.

19. *See infra* text accompanying notes 194-208.

20. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

All the rights contained in the sixth amendment have been held to be fundamental. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process and right to public trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

Not all trial-related rights are guaranteed by the sixth amendment. The fifth amendment provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

The privilege against self-incrimination was held fundamental in Malloy v. Hogan, 378 U.S. 1 (1964), and the prohibition against double jeopardy in Benton v. Maryland, 395 U.S. 784 (1969). Prosecution by indictment is the sole criminal procedural guarantee found in the Bill of Rights which has not been held to be fundamental. *See* Hurtado v. California, 110 U.S. 516 (1884); W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 15.1(a), at 616 (1985).

makes no mention of the state's right to a fair or impartial trial.[21] Although an argument might be made that the state possesses trial-related rights,[22] that argument would face serious constitutional[23] and jurisprudential[24] hurdles. In any case, no such argument has been

21. The sixth amendment, for example, speaks only of the rights of the accused. *See supra* note 20.

22. In other contexts, commentators have argued that the state possesses constitutional rights. For an argument that the state possesses a right to a civil jury trial in the seventh amendment context, see Note, *States as Litigants in Federal Court: Whether the Seventh Amendment Right to Jury Trial Applies to the States,* 37 HASTINGS L.J. 637 (1986). The question of whether the state possesses constitutional rights has spawned a debate in the eleventh amendment context as well. On the issue of whether a state could be held to have constructively waived its sovereign immunity by partaking of a privilege conditioned upon waiver, the Supreme Court held that the granting of a privilege may not be conditioned on the waiver of constitutional rights. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974). Commentators have objected to this reasoning, on the ground that "[i]t is disturbing to speak of the state as having constitutional rights that it may assert against individnal plaintiffs. Normally it works the other way." Baker, *Federalism and the Eleventh Amendment,* 48 U. COLO. L. REV. 139, 165 (1977); *see also* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 160 (1980).

23. The right to a jury trial has been deemed fundamental because it safeguards the accused's rights against abuse of state power. *See Duncan,* 391 U.S. at 155-56. Likewise, the right to counsel permits the accused to defend against the government, which spends "vast sums of money to establish machinery to try defendants accused of crime." *Gideon,* 372 U.S. at 344. The fifth amendment, which provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," U.S. CONST. amend. V, originated with the belief that the state must prove its case against an accused without the accused's aid, that it was "unjust, unnatural, and immoral to demand that a man furnish the evidence against himself." L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 330 (1968). The fourteenth amendment, through which the fifth and sixth amendments are made applicable to the states, *see supra* note 20, forbids purposeful discrimination against blacks in jury participation, Batson v. Kentucky, 106 S. Ct. 1712 (1986), Swain v. Alabama, 380 U.S. 202 (1965), and specifically forbids the states to abridge the rights of "[a]ll persons born or naturalized in the United States." U.S. CONST. amend. XIV, § 1. Its purpose was to protect the fundamental rights of citizens from state encroachment. L. TRIBE, *supra* note 11, § 7-2, at 417. In short, both the language and the origins of the trial-related rights establish that their purpose is to protect the individual from the excesses of state power.

24. If the state's right to a fair trial is not contained in the Constitution, it is difficult to discern its source. A brief review of the principal theories about the source of rights fails to suggest a source outside of the Constitution. The Lockean theory of natural rights assumes a compact in which the people permit the government to represent them. The nature of the compact is that the government is obligated to the people, not they to it. "Thus, the government may not properly insist upon any rights accrning to it from the people's compact." Doernberg, *supra* note 9, at 61. The positivist theory, which looks to the duly adopted laws of a society to determine what rights it recognizes, *e.g.,* R. DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977), does not permit a search for rights outside of the Constitution. The Constitution is, of course, the supreme law of the land, U.S. CONST. art. VI, § 2, and thus its failure to grant the state a right to a fair trial would be dispositive. The deep consensus theory speaks of a shared consensus toward such basic values as democracy, freedom, equality, and justice—values which most members of society consider to be fundamental to our well-being. *E.g.,* Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?,* 73 CALIF. L. REV. 1482, 1505 (1985). Although deep consensus theory does assume the existence of extra-constitutional rights, these are rights of the individual against the state; these

explicitly advanced. Instead, courts have simply proceeded on the unsupported assumption that the state has rights,[25] or, in a similar vein, that the state must enjoy rights equally with the accused.[26]

Hayes v. Missouri[27] generated the notion that the state has a right to a fair trial. *Hayes* upheld, against an equal protection challenge, the validity of a state statute granting prosecutors in large cities more peremptory challenges than it granted those in smaller cities. The Court observed that it was a high legislative duty to secure the impartiality of jurors in criminal cases, and that this impartiality "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."[28]

This rather off-hand dictum, unaccompanied by citation of precedent, has since been routinely relied upon as authority for the state's right to a fair trial.[29] *Hayes* seems correct to the extent that the accused's right is only to an impartial jury, composed of a representative cross-section of the community,[30] and not to a jury which favors the accused over the prosecution. The issues obfuscated by *Hayes* concern the nature and source of the prohibition against prejudice to the prosecution. The implication is that this prohibition, rather than inhering in the definition of the impartial jury to which the accused is entitled, constitutes a countervailing right to an impartial jury belonging to the prosecution.

The *Hayes* Court does not explicitly label the requirement that the jury be free from bias against the prosecution as a right. Arguably, the

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are rights which outweigh, or "trump," the interests of the state. Sherwin, Book Review, 5 DALHOUSIE L.J. 818, 820 (1979) (review of R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977)). Although arguments could certainly be made that, for example, a consensus exists in favor of equal treatment of the adversaries in a trial, these arguments remain to be advanced.

25. Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), *modified,* 671 F.2d 858, *cert. denied,* 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denied,* 440 U.S. 976, *reh'g denied,* 441 U.S. 937 (1979).

26. Wainwright v. Witt, 469 U.S. 412, 439 (1985) (Brennan, J., dissenting); Witherspoon v. Illinois, 391 U.S. 510, 535 (Black, J., dissenting), *reh'g denied,* 393 U.S. 898 (1968); Hayes v. Missouri, 120 U.S. 68, 70 (1887); United States v. Leslie, 783 F.2d 541, 564 (5th Cir.), *cert. denied,* 106 S. Ct. 1943 (1986).

27. 120 U.S. 68 (1887).

28. *Id.* at 70.

29. *See, e.g.,* Batson v. Kentucky, 106 S. Ct. 1712, 1729 (1986) (Marshall, J., concurring); *Witherspoon,* 391 U.S. at 535 (Black, J., dissenting); Swain v. Alabama, 380 U.S. 202, 220 (1965); *Leslie,* 783 F.2d at 564; *Balkcom,* 660 F.2d at 579; *Spinkellink,* 578 F.2d at 596.

30. *Batson,* 106 S. Ct. at 1712; Taylor v. Louisiana, 419 U.S. 522 (1975); Glasser v. United States, 315 U.S. 60 (1942).

state has an interest in trial by impartial jury, although it seems this interest can be sufficiently served by safeguarding the right of the accused to an impartial jury. However, the Court's implication that the state's interest is not only *in opposition* to that of the accused, but also *of equal weight* with it, is reinforced by the often quoted line from *Hayes* that "[b]etween [the defendant] and the state the scales are to be evenly held."[31]

That the scales must be evenly held has become a truism.[32] The *Hayes* language has become authority for the widely accepted proposition[33] that the prerogatives of the state are on an equal plane with those of the accused. Yet this "truism" is highly questionable. It may be argued, to the contrary, that the purpose of the Bill of Rights is to redress the inherent *imbalance* between the "awesome power"[34] of the state and the unprotected position of the individual accused of crime. In this view, the trial-related rights possessed by the accused protect the accused from the overreaching state and place limits on the state's power.[35] The accused's rights deliberately place burdens on the prosecution which may not be reciprocal to the accused.[36]

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31. 120 U.S. at 70.

32. *See supra* note 3; *infra* note 33.

33. The language from *Hayes* is frequently cited. For example, in *Batson,* both Justice Marshall, in his concurrence, and Chief Justice Burger, in his dissent, cited it in support of their positions on racially-based uses of peremptory challenges. *See Batson,* 106 S. Ct. at 1729 (Marshall, J., concurring) (arguing that peremptory challenges should be abolished for both prosecution and defense); *id.* at 1738 (Burger, C.J., dissenting) (arguing that equal protection limitations on racially-based uses of peremptory challenges must apply to the defense if they apply to the prosecution). In *Witherspoon* and its progeny, *Hayes* is often cited in support of excusing for cause jurors with scruples against the death penalty. *See Witherspoon,* 391 U.S. at 535 (Black, J., dissenting); *Balkcom,* 660 F.2d at 579; *Spinkellink,* 578 F.2d at 596.

34. Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

35. *See supra* note 23.

36.

> The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedures to be followed in criminal trials. . . . [T]hese rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State.

Williams v. Florida, 399 U.S. 78, 111-12 (1970) (Black, J., concurring in part and dissenting in part). In practice, this means that the state must, for example, shoulder the burden of proving each element of the crime charged beyond a reasonable doubt, *In re* Winship, 397 U.S. 358, 361-64 (1970), that the state has a constitutional obligation to provide discovery to the defense, *see, e.g.,* Brady v. Maryland, 373 U.S. 83, 87 (1963), and that the state is limited in its use of otherwise admissible testimony at trial where its use violates the defendant's right to confront the witnesses against him, California v. Green, 399 U.S. 149, 155-58 (1970).

The ascription of trial-related rights to the state, of which *Hayes* is an example and an apparent cause, underlies the courts' failure to apply the correct constitutional norms to the area of constitutional criminal procedure. The rights of the accused which insure a fair trial, such as the right to counsel and the right to trial by jury, are fundamental.[37] The accused's underlying liberty interest has been called " 'an interest of transcending value.' "[38] The rights of the accused are not absolute; they may be limited or overridden by sufficiently strong state interests.[39] However, the interests asserted by the state must be strictly scrutinized, and held insufficient, unless they are compelling and are exercised in a manner consistent with fundamental rights.[40]

Despite the familiarity of the compelling state interest requirement to most areas of constitutional law, it is only sporadically observed in decisions in the field of constitutional criminal procedure. When the prosecution asserts an interest in opposition to the rights of the accused, courts too often rely on rote incantation of the maxim that the accused and the prosecution must be treated equally, without examining the true nature of the state interests that the prosecution represents.[41] The proper inquiry is whether the professed interests are compelling and whether they provide sufficient justification for the means used to achieve them.[42]

The Supreme Court cases dealing with "death-qualified" juries provide illustrations of these tendencies. In *Witherspoon v. Illinois*,[43] the Court observed, in a footnote, that the prosecution at a capital sentencing hearing may exclude for cause jurors who state that they could not, under any circumstances, impose the death penalty.[44] The Court failed

37. Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

38. Wainwright v. Witt, 469 U.S. 412, 445 (1985) (Brennan, J., dissenting) (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

39. *See* Illinois v. Allen, 397 U.S. 337, 347 (1970).

40. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); *accord* L. TRIBE, *supra* note 11, § 16-7, at 1002.

41. *See supra* text accompanying notes 21-33.

42. L. TRIBE, *supra* note 11, § 16-7, at 1002; *see also* Lockhart v. McCree, 106 S. Ct. 1758, 1776-81 (1986) (Marshall, J., dissenting).

43. 391 U.S. 510 (1968). The Court in *Witherspoon* held that at the sentencing phase of a capital trial, the prosecution may not exclude for cause jurors who are ambivalent about whether they could impose capital punishment.

44. The Court thus created, in a footnote, the class hereinafter referred to as "*Witherspoon*-excludables"—jurors who may be excused for cause because they state that they cannot, under any circumstances, vote to impose the death penalty. 391 U.S. at 522 n.21; *see also* Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark.), *modified*, 637 F.2d 575 (1980). The discussion of *Witherspoon*-excludables was not necessary to the holding, since the challenged exclusion was of ambivalent jurors, not those unalterably opposed to the death penalty. 391 U.S. at 513. Yet, as the Court later

to address whether barring *Witherspoon*-excludables infringed the accused's fundamental right to an impartial trial.[45] Only Justice Douglas, in a separate opinion, identified the constitutional right at stake. He argued that the systematic exclusion of *Witherspoon*-excludables violated the right to an impartial trial.[46] The Court further failed to address what state interest was at stake and whether it justified burdening the fundamental rights of the accused.[47] The issues which should have been addressed were whether the right of the accused to a representative jury was infringed by barring *Witherspoon*-excludables, and if so, whether that right outweighed the state's interest in empaneling jurors capable of applying the law.[48]

In *Wainwright v. Witt,*[49] the Court liberalized the requirements for excluding jurors with ambivalence about the death penalty. It relied upon *Witherspoon*'s cursory discussion as support for the proposition that the state's interest in exclusion was a *legitimate* one,[50] but again failed to ask whether the interest was a *compelling* one. Justice Brennan justifiably objected that the majority was "[c]hampioning the right of the

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recognized, the language was widely considered to set the standard for judging the proper exclusion of a juror opposed to capital punishment. In Wainwright v. Witt, 469 U.S. 412 (1985), the Court relaxed the standard for exclusion of jurors with scruples against the death penalty, and questioned whether "ritualistic adherence" to the *Witherspoon* footnote had ever been required. *See id.* at 418-26.

45. The sixth amendment right to an impartial trial encompasses the right to be tried by a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 526-27 (1975). The cross-section requirement has been construed to guarantee that the petit jury is drawn from a pool containing a fair cross-section of the community, not that any particular petit jury will be so composed. *See* Fay v. New York, 332 U.S. 261, 284 (1947). Thus, the systematic exclusion of certain groups from juries would violate the fair cross-section requirement. W. LAFAVE & J. ISRAEL, *supra* note 20, § 21.2(d), at 836-38. Excluding for cause all jurors with scruples against the death penalty from capital trials arguably violates the defendant's right to a representative jury. *See Witt,* 469 U.S. at 439 (Brennan, J., dissenting). *But see Lockhart,* 106 S. Ct. at 1765; *infra* note 56.

46. 391 U.S. at 524 (Douglas, J., writing separately); *see also* Note, *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 168 (1968); Comment, *Toward Assuring Fair Trials in Capital Cases: Some Reflections on* Witherspoon v. Illinois, 42 S. CAL. L. REV. 329, 343-44 (1969).

47. A partial explanation for the failure undoubtedly lies in the circumstances under which the issue was addressed. *See supra* note 44. Later cases have referred to the *Witherspoon* Court's recognition of the state's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a state's death penalty scheme. *Witt,* 469 U.S. at 418-19. However, this language does not appear in the footnotes addressing the issue. *See* Witherspoon v. Illinois, 391 U.S. 510, 516 n.9, 523 n.22 (1968). In any case it speaks only to the legitimacy of the interest and not to its weight.

48. It has been suggested that in death penalty cases the function of the jury is not merely to apply the law but to act as the conscience of the community, in accord with the eighth amendment, and thus to act as a check on the legislature. *See* Comment, *supra* note 46, at 330. An examination of the state's interests might consider this point.

49. 469 U.S. 412 (1985).

50. *See id.* at 416-17.

State to a jury purged of all possibility of partiality toward a capital defendant" and ignoring the impact of the accused's guarantee of a jury drawn from a fair cross-section of the community.[51] He argued that the Court had increased the defendant's risk of being tried by a biased jury in order to decrease the state's risk of empaneling jurors biased against the death penalty.[52] Indeed, the Court evinced no recognition that the state should be assigned the burden of justifying any incursion on the rights of the accused, implying instead that the burden should be equally shared.[53]

When the Court decided *Lockhart v. McCree,*[54] it treated as settled the question of whether barring *Witherspoon*-excludables from capital sentencing hearings was constitutionally permissible. The Court in *Lockhart* was faced with the separate question of whether *Witherspoon*-excludables could be barred from the guilt stage of a trial in which the death penalty might be imposed at the sentencing stage. The Court upheld the exclusion, basing its decision on the state's interest in obtaining a single jury for both guilt and sentencing.[55] Again the Court circumvented the issues of whether the rights of the accused had been infringed[56] and, if so, whether the state's interest in using a single jury for guilt and sentencing, which might be characterized as administrative convenience,[57] was compelling enough to outweigh the incursion on the accused's right to an impartial jury. As Justice Marshall suggested in dissent, the state's interests could easily have been met by less restrictive

51. *Id.* at 440 (Brennan, J., dissenting).

52. *See id.* at 442-43 (Brennan, J., dissenting).

53. For example, the Court strenuously rejected the notion that in a capital case an accused should be "entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." *Id.* at 423. Justice Brennan responded that the *Witherspoon* criteria, which had permitted exclusion not of ambivalent jurors but only of those unalterably opposed to the death penalty, had properly placed the cost of uncertainty upon the state rather than risk violation of the accused's sixth amendment rights. *See id.* at 443-44 (Brennan, J., dissenting).

54. 106 S. Ct. 1758 (1986).

55. *See id.* at 1768.

56. *See id.* at 1776 (Marshall, J., dissenting). The Court's opinion is rather confusing. It does contain discussion on whether excluding *Witherspoon*-excludables violates the cross-section requirement. It concludes that it does not, because the exclusions serve the state's "concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law [in both phases]." *Id.* at 1766. This conclusion fails to address the initial issue of whether an infringement has occurred, and it moves directly to the question of whether, if an infringement has occurred, it is justified by a legitimate state interest. As to the question the conclusion does address, it does an unsatisfactory job. As Justice Marshall observes, the Court merely identifies a state interest and fails to ask whether it is compelling or whether it could be achieved in a less intrusive manner. *Id.* at 1776 (Marshall, J., dissenting).

57. *Id.* at 1780 (Marshall, J., dissenting).

means, such as a bifurcated trial, which did not subject the accused to the risk of death prone juries.[58]

The problem illustrated by the *Witherspoon* cases is not that the Court has balanced incorrectly; it is that the Court has failed to balance at all. The Court has been satisfied with identifying a state interest without examining the importance of that interest, the importance of the countervailing constitutional rights of the accused, whether those rights have been infringed, or whether the state interest could have been substantially achieved in a way less likely to intrude on fundamental rights. In short, in the nearly two decades since the decision in *Witherspoon,* the Court has never applied a strict scrutiny analysis to the issue of death-qualifying[59] juries which will decide on the guilt or the sentence of capital defendants.

The lack of a principled analysis in the *Witherspoon* cases has led to justifiable objections that the Court, by weakening an accused's sixth amendment right to an impartial jury, is constructing a state's right to an impartial jury and placing it on the same plane as the rights of the accused.[60] Lower courts have unsurprisingly read the Supreme Court's language as providing authority for just such a right on the part of the state.[61] The Court's facile assumption that it must guard equally against the danger of prejudice to both the accused and the state has diverted it from asking the proper questions when faced with incursions upon life and liberty.

This paucity of analysis is not confined to the *Witherspoon* progeny; it pervades the field of criminal procedure.[62] Courts are reaching results

58. *Id.* at 1776-81. Justice Marshall pointed out that the Court had in the past rejected administrative convenience as a sufficieut reason to threaten the accused's right to an impartial jury. *See id.* at 1778-79 (citing Ballew v. Georgia, 435 U.S. 223 (1978) iu which the Court held that a five-member jury was too prone to bias to be permitted).

59. To death-qualify a jury is to excuse for cause all *Witherspoon*-excludables, that is, all those who state they are unalterably opposed to the death penalty.

60. *See Lockhart,* 106 S. Ct. at 1776-81 (1986) (Marshall, J., dissenting) (death-qualified juries at guilt phase skews cross-section unconstitutionally; serves no legitimate state interest); Note, *The Supreme Court—Leading Cases,* 99 HARV. L. REV. 120, 126-30 (1985); *see also* Wainwright v. Witt, 469 U.S. 412, 439 (1985) (death-qualification can enable prosecutors to create biased juries); Witherspoon v. Illinois, 391 U.S. 510, 528 (1968) (Douglas, J., writing separately) (excluding opponents of capital punishment biases juries toward its imposition).

61. *See* Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), *modified,* 671 F.2d 858, *cert. denied,* 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denicd,* 440 U.S. 976, *reh'g denied,* 441 U.S. 937 (1979); Williams v. Wainwright, 427 F.2d 921, 923 (5th Cir. 1970), *modified,* 408 U.S. 941 (1972). *But see* Grigsby v. Mabry, 483 F. Supp. 1372, 1387 n.19 (E.D. Ark.), *modified,* 637 F.2d 575 (1980).

62. See, for example, the discussion of hybrid counsel, *infra* text accompanying notes 63-69; prosecution discovery of defense witnesses, *infra* text accompanying notes 114-16; use of peremptory

which, whether or not they are justifiable, are not properly justified. The courts simply fail to recognize that they are dealing with fundamental rights which trigger a strict scrutiny standard of review. This leads not only to the obvious error of elevating states' interests to the same plane as defendants' rights, but also to more subtle errors. To the extent the state's interest is not carefully articulated, it cannot be accurately evaluated. The courts' failure to determine whether the interest is compelling, and whether it could be achieved by less restrictive means, inevitably follows.

The treatment of hybrid counsel is illustrative. In addition to the right to counsel,[63] the Court has recognized a constitutionally based right of the accused to self-representation.[64] Yet lower courts,[65] and recently the Supreme Court,[66] have uniformly rejected arguments that the accused should be permitted to exercise both rights simultaneously and with full autonomy: representing herself in part and accepting the assistance of counsel in part. The courts were asked to weigh, on the side of the defendant, the exercise of two constitutional rights. They might conceivably have concluded that the state possessed compelling interests which outweighed the combined exercise of these rights.[67] The courts, however, never inquired into whether the state's interest was compelling, and in fact, made little effort to determine what the state's interest was. Instead, the courts relied on the conclusory, unsupported assertion that a

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challenges to exclude blacks from juries, *infra* text accompanying notes 137-51; and the state's interest in barring the defense from waiving a jury trial, *infra* text accompanying notes 85-100.

63. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

64. *See* Faretta v. California, 422 U.S. 806 (1975).

65. *See, e.g.*, United States v. Hill, 526 F.2d 1019, 1024 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976); United States v. Wolfish, 525 F.2d 457, 463 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); United States v. Swinton, 400 F. Supp. 805, 806 (S.D.N.Y. 1975); *see also* United States v. Anderson, 716 F.2d 446, 449 (7th Cir. 1983); United States v. Coupez, 603 F.2d 1347, 1349-51 (9th Cir. 1979) (court tried to create a conditional right to self-representation but would have required attorney-advisor as to all counts).

66. *See* McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (*Pro se* defendant allowed to represent himself with standby counsel. Court found that "[o]nce a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence," thus effectively negating defendant's ability to represent himself *autonomously*, even under a "hybrid counsel" model.).

67. Virtually every commentator, however, has reached the opposite conclusion. *See, e.g.*, Note, Faretta v. California *and the* Pro Se *Defense: The Constitutional Right of Self-Representation*, 25 AM. U.L. REV. 897 (1976);Note, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U.L. REV. 570 (1977); Note, *The Problems of Self-Representation and the Hybrid Defense*, 45 UMKC L. REV. 130 (1976); Note, *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 VAL. U.L. REV. 329 (1978).

defendant must make a choice between the two rights because they cannot be exercised at the same time.[68] Although countervailing state interests do exist,[69] the questions remain whether they outweigh the rights of the accused and whether they could be satisfied without a blanket denial of hybrid representation.

Accurate balancing of the parties' interests is thus impeded, not only by the unsupported assumption that the states have rights or interests equal to those of the accused,[70] but also by the failure to examine the nature of the state's interests. The latter error may have the same dangerous result as the former: It may encourage courts to imbue the state's interests with weight to which these interests are not entitled. This results in poorly reasoned holdings in which the fundamental rights of the accused are balanced away to preserve unarticulated, and perhaps chimerical, state interests.

II. THE STATE'S INTERESTS MUST BE ACCURATELY DESCRIBED BEFORE THEY CAN BE BALANCED AGAINST THE RIGHTS OF THE ACCUSED

Since the trial-related rights of the accused, however fundamental, are not absolute, they may be overridden or restricted by the sufficiently compelling interests of the state.[71] As the Supreme Court has observed, balancing does not always lead to striking down a state policy.[72] An examination of the state's asserted trial-related interests, however, reveals a lack of clarity in their characterization. Specifically, interests ascribed to the state often belong to other parties. Two major areas of confusion

68. *See Swinton,* 400 F. Supp. at 806; *supra* note 65. In *McKaskle,* the Court simply held that since *Faretta* had not mentioned hybrid counsel, the defendant had no right to it. *See* 465 U.S. at 183.

69. Professors LaFave and Israel identify several countervailing interests: "the need to grant the trial judge sufficient authority to maintain the 'dignity and decorum' of the courtroom and to ensure an orderly and expeditious trial"; the impact on the role of counsel as "manager of the lawsuit"; and the suspicion that hybrid representation would be used to permit the defendant to submit an unsworu statement to the jury. W. LAFAVE & J. ISRAEL, *supra* note 20, § 11.5, at 500. It is arguable that these interests may properly be characterized as interests of society rather than interests of the state.

70. *See supra* text accompanying notes 25-33.

71. They may also be overridden or restricted by other constitutional rights. *See infra* text accompanying notes 191-205.

72. Holbrook v. Flynn, 106 S. Ct. 1340, 1345 (1986) (despite the principle that guilt or innocence must be decided based solely on evidence presented, "not . . . every practice tending to single out the accused from everyone else in the courtroom must be struck down." Compelling state interests may justify certain practices.). For example of non-criminal cases in which the Court upheld state action burdening fundamental rights, *see* Buckley v. Valeo, 424 U.S. 1, 25 (1976); Korematsu v. United States, 323 U.S. 214 (1944).

emerge. First, the state is erroneously permitted to represent the rights of the accused. Second, the state is assumed to represent the rights of society, although the interests of society and the state are not necessarily congruent.

A. In An Adversary System, the Government Cannot Represent the Rights of the Accused

The trial-related rights of the accused, such as the privilege against self-incrimination, the right to counsel and to call witnesses on one's own behalf, and the right to an impartial trial, were designed to ensure both fair play and the appearance of fair play to the criminally accused.[73] The Bill of Rights embodies a recognition that, were the accused and the prosecution simply left to their own devices, the contest would not be an equal one. As Justice Douglas observed:

> The Bill of Rights does not envision an adversary proceeding between two equal parties. . . . But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution.[74]

The guarantee of fair play is exemplified by the universally accepted[75] principle of proof beyond a reasonable doubt, and by the concomitant burden on the prosecution of rebutting the presumption of the accused's innocence.[76] The state is charged with the responsibility of building a case against the accused within the strictures of due process. The accused may put the state to its proof[77] or may defend herself. The accused is under no obligation to assist the state in making its case.[78]

Given the structure of the adversary system, it is unreasonable to assume that the state will represent the rights and interests of the accused. Yet this assumption underlies many decisions that balance among the state's interests the protection of the accused's rights. For example,

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73. L. Levy, *supra* note 23, at 331.

74. Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

75. J. Israel & W. LaFave, Criminal Procedure in a Nutshell: Constitutional Limitations 79 (3d ed. 1980).

76. *In re* Winship, 397 U.S. 358, 361-64 (1970); L. Levy, *supra* note 23, at 332.

77. Following from the fifth amendment privilege against self-incrimination and the due process guarantee of proof beyond a reasonable doubt is the principle that the accused need not testify or present a defense, but may leave the state to its proof. Schmerber v. California, 384 U.S. 757, 760-62 (1966); *see* Brown v. United States, 356 U.S. 148, 154-56 (1958) (waiver of right against self-incrimination occurs only when witness voluntarily offers direct testimony).

78. *See* Miranda v. Arizona, 384 U.S. 436, 442-43 (1966) (quoting Brown v. Walker, 161 U.S. 591, 596-97 (1896)). *But see* Jenkins v. Anderson, 447 U.S. 231 (1980).

in *Lockhart v. McCree*,[79] the Court rejected the defendant's argument that a death-qualified jury, even if permitted for sentencing a capital defendant, should not be permitted for deciding the defendant's guilt or innocence.[80] The Court rejected the argument that a bifurcated trial would provide a constitutionally preferable alternative, finding that " 'repetitive trials could not be consistently fair to the State and perhaps not even to the accused.' "[81] Justice Marshall replied that if the unitary trial system were meant to serve the defendant's best interests, the state should be " 'willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction.' "[82]

The Court in *Lockhart* was balancing the state's interest in a unitary trial against the right of the accused to an impartial jury.[83] To place the accused's interests on the state's side of the scale upsets the adversarial balance.[84] Inherent in Justice Marshall's rejoinder are dual assumptions: that the rights of the accused should not be used against him, and that since these rights belong to the defendant, the defendant should be able to waive them.

A more subtle variant of the issue is raised by Federal Rule of Criminal Procedure 23(a), which was upheld in *Singer v. United States*.[85] The rule provides that the accused may waive the right to a jury trial only with approval of both the court and the prosecution. The Court rejected the argument that since the provisions relating to jury trial are for the protection of the accused, the accused should be allowed to waive them without consent.[86] The Court reasoned that the ability to waive the right did not carry with it the right to insist on the opposite of that right.[87] That is, the accused has no right to a bench trial.

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79. 106 S. Ct. 1758 (1986).

80. *See supra* text accompanying notes 54-58.

81. 106 S. Ct. at 1769 (quoting Rector v. State, 280 Ark. 385, 396, 659 S.W.2d 168, 173 (1983)). Justice Rehnquist (now Chief Justice) found that some defendants might benefit, in a unitary trial, from the jurors' "residual doubts" about evidence presented at the guilt phase. *Id. But see id.* at 1781-82 (Marshall, J., dissenting).

82. 106 S. Ct. at 1781 (Marshall, J., dissenting) (quoting Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 69 (1986)).

83. *See supra* text accompanying notes 54-58.

84. It might be argued in response that the Court is itself attempting to protect the defendant, rather than permitting the state to do so. However, the objection is the same whether it is directed at the court or the prosecution: The interests of the accused should not be weighed against him, unless he is found incompetent to represent his own interests. By characterizing the interest in a unitary trial as an interest of the defendant, above that defendant's strenuous objections, the balance of interests is misrepresented.

85. 380 U.S. 24 (1965).

86. *Id.* at 26.

87. *Id.* at 34-35.

Singer thus contradicts Justice Marshall's assumption that the defendant may necessarily waive personal rights. The conditions on waiver upheld in *Singer* go beyond those necessary to ensure that the defendant's waiver is knowing and intelligent.[88] These conditions introduce other interests which must be weighed before the waiver will be accepted. In *Singer*, the Court premised its holding on the interest of the prosecutor and society in the jury as "the tribunal which the Constitution regards as most likely to produce a fair result."[89]

Assuming, for the sake of argument, the correctness of the Court's holding that the defendant has no right to a bench trial,[90] its characterization of the interests at stake still requires examination. Having waived the right to a jury trial, the accused is still left with an interest in being tried by the tribunal of his choosing. This interest must be balanced against the state's interest in a jury trial and society's interest in a jury trial. The Court characterized the latter two as interests in achieving a fair result.[91] Unfortunately, beyond making this characterization and rejecting the argument that the accused had a right to a bench trial, the Court made no further attempt to examine or balance the countervailing interests of the accused, the state, and society. Instead, it merely identified the interests of the state and society, and held that they prevailed. In fact, the Court, citing its confidence in the role of the prosecutor, approved Rule 23(a)'s failure to require the government to articulate any reasons for demanding a jury trial.[92] Some lower courts since *Singer*

88. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

89. *Singer*, 380 U.S. at 36.

90. *Singer* examined the historical antecedents of the right to jury trial and concluded that the Framers' concern was with insuring that the accused receive a jury when he asked for one. They evinced no interest in assuring a bench trial. *Id.* at 29. An opposing argument could be made, stressing the concern underlying the right to a jury trial, that the defendant must feel satisfied that he is being tried by an impartial fact-finder. *See* Lewis v. United States, 146 U.S. 370 (1892); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975). Arguably this concern is best effectuated by permitting the defendant to place his fate in the hands of a judge rather than a jury. Faretta v. California, 422 U.S. 806 (1975), seems to provide support for this argument as well, since it recognized the personal nature of sixth amendment rights and held that forcing the defendant to accept counsel would violate the logic of the amendment by stripping the right to counsel of its personal character. *Id.* at 820. However, *Faretta* specifically distinguished *Singer*, holding that the right to waive a right (to counsel, to jury trial) does not give rise to a right to its opposite. It held that the right to self-representation, unlike the defendant's interest in a bench trial, has an independent basis in the Constitution. *Id.* at 819-20 n.15.

91. *See Singer*, 380 U.S. at 36.

92. 380 U.S. at 37. The New Jersey District Court later considered a case in which it found the defendant's reasons for wanting to waive a jury to be compelling (the case concerned intricate issues of Medicaid fraud). It further found that the state had advanced no reason for refusing consent other than that it was policy not to consent. The court weighed the interests of the accused against those of the state and held that "the government puts nothing in the balance other than good

have required the accused to advance a compelling interest to outweigh the state's interest in a jury trial.[93] This turns the concept of sixth amendment protection on its head.

The Court in *Singer* relied on the superior fairness of the jury, without directly addressing the problem of allowing this "fairness," which was intended as a protection for the accused, to be used against him. The *Singer* opinion merely expressed the Court's certainty that the government would not demand a jury trial for an "ignoble purpose."[94] Few courts or commentators have examined the issue.[95] *Singer* relied on the rather confusing precedent of *Patton v. United States,*[96] in which the Court discussed the issue at length in the context of whether the defendant could waive trial by a jury of fewer than twelve persons.

The Court in *Patton* began its discussion auspiciously, with the assertion that to deny the accused's power to forego the right "is to convert a privilege into an imperative requirement."[97] It reasoned that the jury trial provisions of the Constitution are for the protection of the interests of the accused,[98] and that:

> "It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.
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> . . . Such a theory . . . is based more upon useless fiction than upon reason."[99]

The Court, having thus sensibly observed that the defendant's right to a jury trial should not be used against the defendant, in a startling about-face reached the conclusion that the maintenance of the jury as a

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reputation" which does not outweigh the good reasons of the accused. United States v. Braunstein, 474 F. Supp. 1, 14 (D.N.J. 1979).

93. *See* United States v. Morlang, 531 F.2d 183, 188 (4th Cir. 1975). *But see Braunstein,* 474 F. Supp. 1; United States v. Panteleakis, 422 F. Supp. 247 (D.R.I. 1976).

94. 380 U.S. at 37.

95. Lower court cases since *Singer* have dealt solely with the statutory issue of when the accused's reasons are compelling enough to require a bench trial without court or prosecutorial consent. *See Morlang,* 531 F.2d 183; *Braunstein,* 474 F. Supp. 1; *Panteleakis,* 422 F. Supp. 247; *see also* Higley, *Constitutional Law: Trial by Jury: The Judge's Authority to Deny the Accused's Request to Be Tried By the Court Alone,* 27 JAG J. 412 (1973); Note, *Waiver of Jury Trial:* Singer v. United States, 51 CORNELL L. REV. 339 (1966).

96. 281 U.S. 276 (1930).

97. *Id.* at 298.

98. *Id.* at 297; *see also* Gannett v. DePasquale, 443 U.S. 368 (1978).

99. 281 U.S. at 295-96 (quoting Dickinson v. United States, 159 F. 801, 820 (1st Cir. 1908)).

fact-finding body is so important that the government and the court must consent to the accused's waiver.[100] This holding was delivered in a cursory fashion, without explanation for its seeming incongruence with the preceding reasoning. In light of the holding, the Court's position on whether the prosecutor may represent the interests of the accused remains ambiguous and unexplained.[101]

In any case, the argument that the state may represent the rights of the accused continues to be relied upon. The American Bar Association has recently endorsed a standard requiring consent of the prosecutor before jury waiver shall be accepted.[102] The commentary states as one reason for requiring consent: "The state has an interest in protecting its citizens, even if an individual refuses that protection. If an accused acts against his best interests in waiving a jury trial, the prosecutor can, in the interest of justice, require a jury trial."[103]

The way in which the role of the prosecutor is defined may have a bearing on whether the prosecutor should be permitted to represent the interests of the accused. Case law reveals a deep ambivalence about the prosecutorial role, which reflects a similar ambivalence about the goals of the adversary system.

It is often said that the prosecutor has an interest in a process which will reach a fair result.[104] This statement appears uncontroversial; in fact, it appears to dovetail the state's interests with those of the defendant and society. The interest safeguarded by the trial-related rights of the

100. *Id.* at 312.

101. Arguably, the Court was permitting the prosecution to represent the interests of society. *See* Doernberg, *supra* note 9, at 107. Yet the Court seemed to reject this posture, as well. *See* 281 U.S. at 306.

102. *See* STANDARDS FOR CRIMINAL JUSTICE Standard 15-1.2 (ABA 2d ed. 1980). The commentary mentioned, but rejected without explanation, the argument that it is unsound to rely upon the prosecutor to protect the defense since the prosecutor might withhold consent for tactical reasons, and since it is inconsistent with the adversary system to entrust one party with the rights of the other. *See id.* comment.

103. *Id.* The commentary states that the most convincing arguments for the consent provision were that the prosecution and the defense must be treated equally and that the public must be protected from biased judges. *Id.* I have addressed the former argument at *supra* text accompanying notes 32-36. As to the latter argument, it has been pointed out that provisions for the disqualification of judges address this issue, and that if bias remains a problem, that problem should be addressed directly. *See* Note, *supra* note 95, at 342.

104. *See, e.g.*, Lockhart v. McCree, 106 S. Ct. 1758, 1766 (1986); Faretta v. California, 422 U.S. 806, 838-39 (1975) (Burger, J., dissenting); Hayes v. Missouri, 120 U.S. 68, 69-72 (1887). *Faretta,* while recognizing the interest, presents a fascinating anomaly. As Chief Justice Burger points out, the Court there recognizes a right of the accused which threatens the right to a fair trial and places the accused in jeopardy of wrongful conviction. *Faretta,* 422 U.S. at 838-39.

defendant is not in acquittal,[105] but in a fair result. Likewise, society, as I will discuss below,[106] has an interest in seeing that justice is achieved.[107]

To say that the prosecutor has an interest in a fair result, however, does not address the means by which the prosecutor should attempt to obtain that result. The ambiguity of the goal itself poses a related problem. A fair result may be defined as an accurate result, or as a result reached through fair play. I will describe two antithetical models of the prosecutorial role, which I will call the "search for truth" model and the "fair play" model. I will then demonstrate that permitting the prosecutor to represent the rights of the accused is improper under either model. Finally, I will discuss the currently controversial issue of whether the prosecution should be deprived of the use of peremptory challenges, and I will suggest that the debate thus far has been clouded by the assumption that the state represents the rights of the accused.

1. *The Search for Truth Model*

The classic view of the trial is that it is a "search for truth."[108] In this view, the adversary system is a contest between equals. The role of the prosecutor is to obtain a conviction,[109] while the role of the defense attorney is to obtain an acquittal. If each carries out this role, then the truth will emerge. The goal of this model is to arrive at an accurate result. The search for truth model demands that the "scales must be evenly held,"[110] so that the parties may be equally armed for adversarial combat.

The search for truth formulation equates a fair result with an accurate result, and it believes that accuracy results from an equal contest between adversaries. It places the responsibility for safeguarding the rights of the accused *with* the accused, and it tends to view those rights as

105. *See* Wainwright v. Witt, 469 U.S. 412, 423 (1985).

106. *See infra* text accompanying notes 151-86.

107. *See Faretta,* 422 U.S. at 840.

108. *E.g.,* Wardius v. Oregon, 412 U.S. 470, 474 (1973); Williams v. Florida, 399 U.S. 78, 81-82 (1970).

109. *See* United States v. Leslie, 783 F.2d 541 (5th Cir.), *cert. denied,* 106 S. Ct. 1943 (1986).

110. *See supra* text accompanying notes 32-33.

impediments to the search for truth.[111] It is criticized for placing a concern with accuracy above concern with individual rights.[112] It is also vulnerable to criticism on its own terms: Assuming the adversaries do not begin on equal footing, treating them equally may inaccurately skew the result in favor of the prosecution[113] (the party usually in the better position).

The decision in *Williams v. Florida*[114] was based on the search for truth model. The question in *Williams* was whether reciprocal discovery rights should be given to the prosecution in a criminal case, and more specifically, whether the prosecution could demand advance notice of the defendant's alibi. The Supreme Court rejected due process and fifth amendment challenges to the notice of alibi.[115] The Court gave great weight to the state's interest in advance disclosure, observing that the adversary system was not "a poker game" but a "search for truth,"[116] and that the search for truth is enhanced by giving each party equal access to the other's information.[117]

111. Examples of this view are found in the opinions critical of the *Miranda* warnings. Whereas supporters of the *Miranda* rule argue that *Miranda* protects defendants from the excesses of state power and insures that the cooperation of the accused is voluntary, detractors focus on *Miranda*'s cost to the truth-seeking function of excluding probative evidence. *See* Miranda v. Arizona, 384 U.S. 436, 516-17 (1966) (Harlan, J., dissenting); *see also* Oregon v. Elstad, 420 U.S. 298, 306-309 (1985) (discussing *Miranda* warnings' potential to inhibit the accused from providing information).

112. *See* Smith v. Murray, 106 S. Ct. 2661, 2671-72 (1986) (Stevens, J., dissenting); Blumenson, *Constitutional Limitations on Prosecutorial Discovery,* 18 HARV. C.R.-C.L. L. REV. 123, 133-34 (1983).

113. Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring); Blumenson, *supra* note 112, at 134 n.39; *see also infra* text accompanying notes 146-50 (discussion of peremptory challenges). Of course, some rights, such as the rights which guard against coerced confessions, specifically protect the accuracy of the fact-finding process. *See Miranda,* 384 U.S. 436 (1966) (fifth amendment privilege against self-incrimination); Spano v. New York, 360 U.S. 315 (1959) (fourteenth amendment right to due process of law).

114. 399 U.S. 78 (1970).

115. The Court held that the due process clause was not violated since the challenged rule was tailored to meet the state's legitimate interest in advance disclosure. *Id.* at 81-82. It held that the fifth amendment privilege against self-incrimination was not violated because the rule merely accelerated the disclosure of information which would eventually have come out at trial. *Id.* at 82-86. For criticism of the Court's reasoning, see Blumenson, *supra* note 112, at 136-38, and W. LAFAVE & J. ISRAEL, *supra* note 20, § 19-4, at 745.

116. *Williams,* 399 U.S. at 82.

117. *Id.* at 81-82. *Williams* did not resolve the issue of the constitutionality of excluding the testimony of the undisclosed alibi witness as a sanction for failure to disclose, and the question was again left open in *Wardius,* 412 U.S. at 473. The Ninth Circuit later struck down an exclusion sanction in Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1984), recognizing that it might compromise the accuracy goal. The court observed that excluding a witness for failure to comply with discovery might defeat the objects of discovery by distorting the fact-finding process and leading to an unfair conviction. *Id.* at 1186 n.9.

2. *The Fair Play Model*

Justice Black's dissent in *Williams v. Florida* illustrates the countervailing model of the adversarial system which exalts the goal of fair play over that of accuracy. The fair play model rejects the premise that the parties must be treated equally and argues that the defendant must have an advantage since the parties do not begin on equal footing. That advantage is provided by the protections in the Bill of Rights.[118] Thus Justice Black objected that the due process and fifth amendment rights asserted by the defendants in *Williams* were entitled to greater weight than the majority accorded them since they were necessary to protect the defendant against state power. He argued that the criminal trial is not just a search for truth; rather, that goal is tempered by the value of protecting freedom.[119]

An assumption inherent in the fair play model is that not only the court, but also the prosecutor, must insure that the constitutional rights of the accused are not infringed. The most famous description of the prosecutorial role in the fair play model is contained in a passage from *Berger v. United States*:[120]

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done .... [H]e is ... the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[121]

Under this model the prosecutor seeks conviction only when it is warranted, thereby safeguarding the innocent from unwarranted conviction.[122] Even when seeking conviction, the prosecutor is vigilant in the protection of the rights of the accused. This role does not necessarily require the prosecutor to switch sides and assist defense counsel. A more

118. *Williams*, 399 U.S. at 112-14 (Black, J., concurring in part and dissenting in part); *see also* Blumenson, *supra* note 112, at 133 (arguing that viewing the criminal trial as simply a search for truth conflicts with the Bill of Rights).

119. *Williams*, 399 U.S. at 114 (Black, J., concurring in part and dissenting in part).

120. 295 U.S. 78 (1935).

121. *Id.* at 88.

122. In Singer v. United States, however, the Court cited this passage from *Berger* for the proposition that the government has a legitimate interest in seeing that cases *in which it believes a conviction is warranted* are tried before the tribunal which the Constitution regards as most likely to produce a fair result. 380 U.S. 24, 37 (1965).

plausible interpretation is that the prosecutor, as an officer of the court, must uphold the Constitution. This duty transcends his role as an adversary and requires him to refuse to jeopardize the defendant's right to an impartial jury,[123] or otherwise violate the prosecutorial oath.

In the fair play formulation, then, the prosecutor has an interest, identical to that of the accused, in protecting the rights of the accused. His interest in a fair result is also an interest in fair play. A fair result is thus defined as one arrived at by fair, constitutional means.

In sum, there exists a deep philosophical division regarding the proper role of the prosecutor in the adversary system. This complicates the issue of whether the prosecutor's role includes representation of the rights of the accused. However, an examination of the search for truth formulation and the fair play formulation reveals that neither supports an affirmative answer to the question.

3. *The Prosecutor May Not Represent the Rights of the Accused Under the Search for Truth Model*

The more obvious problem is with permitting such representation under the search for truth model. The role of the prosecution is to obtain a conviction, a goal which is clearly antithetical to the protection of the accused. Yet even courts subscribing to this model may count protection of the accused as a state interest.

In *Spinkellink v. Wainwright*,[124] for example, the court endorsed the state's single-minded focus on obtaining a conviction; yet the court permitted the state to claim, among its interests, the protection of the rights of the accused. In that case, the Fifth Circuit upheld the state practice of death-qualifying jurors at the guilt phase of a trial, as the Supreme Court later did in *Lockhart v. McCree*.[125] The court dismissed the argument that since death-qualified juries are more likely to convict, they violate the right of the accused to an impartial jury. It further reasoned that the state, in the exercise of its right to an impartial jury, may choose jurors who are likely to convict.[126] The court apparently assumed that the accused will choose acquittal-prone jurors and that the jury as a whole will

123. United States v. Leslie, 783 F.2d 541, 567 (5th Cir.) (Williams, J., dissenting), *cert. denied*, 106 S. Ct. 1943 (1986).

124. 578 F.2d 582 (5th Cir. 1978).

125. 106 S. Ct. 1758 (1986). *Compare Spinkellink*, 578 F.2d 582 *with* Lockhart v. McCree, 106 S. Ct. 1758, 1765-70 (1986). This question had been left open in *Witherspoon*, which upheld death qualification of the sentencing jury. *See* Witherspoon v. Illinois, 391 U.S. 510, 517-19 (1968).

126. *Spinkellink*, 578 F.2d at 593-96.

be balanced and, therefore, impartial. If the jury prefers conviction, then this will be because conviction is deserved.[127]

The court thus accepted the view that the parties must be equally treated, and that the prosecution may deliberately choose jurors who are partial to conviction, as opposed to jurors who are impartial. It implicitly rejected the view that the prosecution has a duty to protect the accused's right to a fair trial and to strive, not for a conviction, but for a fair result.

When the *Spinkellink* court balanced the opposing interests, it provided a classic example of how placing the accused's interests on the side of the state skews the balance between state and accused. This is how the court characterized the state's interests:

> The state has decided that the parties' right under the Sixth and Fourteenth Amendments to an impartial trial and the state's interest in the just and evenhanded application of its laws, including Florida's death penalty statute, are too fundamental to risk a defendant-prone jury from the inclusion of [*Witherspoon*-excludables].[128]

The court thus uncritically accepted the state's own judgment of the proper balance between the interests of the state and those of the accused. Its review of the state's recitation of its own interests failed to meet even a minimal level of scrutiny, although strict scrutiny was required.[129] Having accepted the state's placement of the fundamental right to an impartial jury on the state's side of the balance, the court (not surprisingly) found in favor the state's interests. The court thus permitted the state to safeguard the rights of the accused, although it had endorsed the state's role of unabashedly pursuing conviction.[130] The single-minded pursuit of conviction, however, is antithetical to the protection of the rights, or the best interests, of the accused.

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127. This reasoning has been widely criticized on the ground that the systematic exclusion of a class of jurors skews the pool, violating the cross-section requirement. *See, e.g., Lockhart,* 106 S. Ct. at 1777 (Marshall, J., dissenting); Wainwright v. Witt, 469 U.S. 412, 440 (1985) (Brennan, J., dissenting); White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries,* 58 CORNELL L. REV. 1176 (1973); Comment, *supra* note 46, at 332-34; Note, *supra* note 46, at 63 (foreword); Note, *supra* note 60, at 123-24; *see also* Grigsby v. Mabry, 483 F. Supp. 1372, 1387 n.19 (E.D. Ark. 1980) (rejecting reasoning of *Spinkellink*).

128. *Spinkellink,* 578 F.2d at 596 (footnote omitted).

129. *See supra* text accompanying notes 32-42; *infra* text accompanying notes 187-89.

130. *See Spinkellink,* 578 F.2d at 582; *see also Lockhart,* 106 S. Ct. at 1768 (describing right as state interest while state pursued felony murder conviction); Smith v. Balkcom, 660 F.2d 573, 580 (5th Cir. 1981) (viewing right as state interest while state pursued murder conviction).

4. *The Prosecutor May Not Represent the Rights of the Accused Under the Fair Play Model*

Assuming that the prosecutorial role is defined through the fair play formulation, the issue of whether the state may represent the rights of the accused becomes more subtle. That is, if the state is charged with safeguarding the rights of the accused, should it be acceptable to count these rights among the interests of the state?

The difficulty is that the balancing issue arises when a challenged state rule or practice is alleged to violate the rights of the accused. The rights of the accused are weighed against the interests of the state. Presumably, if the interests of the parties were identical, there would be no challenge. To put it another way, assuming a competent defendant with competent counsel, it is safe to assume that an interest asserted by the state and opposed by the defendant is not in the defendant's interest.[131]

Another reason why the state cannot represent the accused's rights is that the practice violates the doctrine of third party standing. Third party standing is generally permitted ouly when the party wishing to assert the third party right has both a continuity of interests and a special relationship with the third party, such as a doctor-patient relationship or a fiduciary relationship.[132] The concern is with whether the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.[133] Even if this concern is met, courts may be reluctant to permit third party standing unless the third party is unable to assert his or her own right.[134]

Permitting the state to represent the rights of an accused where the accused is capable of representing her own rights is problematic. The more serious problem is with permitting the state to represent rights which the accused does not wish to assert, or which she in fact claims *violate* the rights she wishes to assert. The scenario breaks every rule of third party standing. It creates an irreconcilable conflict of interests.[135] It defies common sense to expect one's adversary to argue one's case with

131. For example, in *Lockhart,* 106 S. Ct. 1758, the Court allowed the state to assert the defendant's interest in a unitary trial over and against defendant's vehement protests that unitary trials violated his right to an impartial trial. *See supra* text accompanying notes 79-82. The Court's reasoning in reaching this result prompted an acid reply from Justice Marshall. 106 S. Ct. at 1781-82; *see supra* text accompanying notes 81-82.

132. Tileston v. Ullman, 318 U.S. 44 (1943).

133. *See* Craig v. Boren, 429 U.S. 190, 193-96 (1976).

134. Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 955 (1984).

135. W. LAFAVE & J. ISRAEL, *supra* note 20, § 11.9, at 514-15.

the "necessary adversarial zeal."[136]

5. *Prosecutorial Use of Peremptory Challenges: Application to a Current Controversy*

The debate over the prosecutor's use of peremptory challenges[137] is illustrative of the pitfalls of permitting the state to claim among its interests the rights of the defendant. For more than two decades, arguments that unbridled prosecutorial use of peremptory challenges violates the right to an impartial jury were rebuffed, often on the theory that peremptory challenges are " 'one of the most important of the rights secured to the accused.' "[138] Although *Batson v. Kentucky*[139] has placed limitations on the use of peremptories the question remains whether the prosecution should be permitted to use them at all.[140] It is crucial in addressing this question to separate the legitimate interests of the state from the rights and interests of the accused.

Justice Marshall, concurring in *Batson,* proposed that completely eliminating peremptory challenges would be the most effective means of ending their discriminatory use.[141] He rejected the view, espoused by some commentators, that only prosecution challenges should be eliminated. He reasoned, citing the *Hayes* "scales evenly held" language,[142] that the balance between accused and prosecution can be maintained only if the state, stripped of its right to use peremptory challenges, may eliminate those of the defense as well.[143]

This reasoning is open to question. As Professor Van Dyke has documented, peremptory challenges were historically the privilege of the defense only. Their purpose was to allow the defendant to choose a jury, not which would acquit the defendant, but which defendant believed to

136. *J.H. Munson Co.,* 467 U.S. at 956; *Boren,* 429 U.S. at 193-94 (party seeking relief must allege personal stake in the outcome of the controversy to assure concrete adverseness which sharpens presentation of issues).

137. *See infra* text accompanying notes 162-67.

138. Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

139. 106 S. Ct. 1712 (1986).

140. *Batson* specifically left this question open. *See id.* at 1718 n.12.

141. *Id.* at 1729 (Marshall, J., concurring). The Constitution does not guarantee the use of peremptory challenges. *Id.* at 1724.

142. *See supra* text accompanying notes 32-36.

143. 106 S. Ct. at 1729.

be fair and impartial.[144] The challenge was thus seen as a means of protecting the accused from the great power of the Crown.[145] As Professor Van Dyke reports, the trend to give challenges to the prosecution began in the United States because of the belief that in America, the government did not have to be feared.

> There cannot exist the same cause of jealousy, in regard to challenge on the part of the prosecution *here* that might be well founded in *England*, where the influence of the crown, especially in former times, was exerted to convict those who were obnoxious to the king. *Here*, the accused has nothing to fear from those in power. The sole object of prosecutions . . . is to maintain the public peace and safety, by enforcing laws of unexampled mildness.[146]

The passage, naive as its seems in light of the purposes of the Bill of Rights[147] and the American acceptance of the death penalty, reflects the still current misconception that the prosecutor can safeguard the accused's right to an impartial jury. *Batson* recognizes that this assumption is incorrect, insofar as the prosecution will use peremptory challenges to exclude jurors based on race, a factor unrelated to their fitness as jurors.[148] Although Justice Marshall may ultimately be correct that the only answer is to eliminate all challenges,[149] the view cannot be supported solely by reference to the *Hayes* dictum. The courts should consider whether permitting the accused peremptory challenges might help safeguard his right to an impartial trial against "arbitrary and oppressive government"[150] and whether it is in fact necessary to protect the government itself to an equal degree.[151] When the interests of the parties are weighed, it will be crucial to strictly scrutinize the state's interests, and to

144. J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977).

145. *Id.* Originally, the Crown was allowed unlimited challenges, but this obviously led to a jury biased toward the prosecution. To eliminate the bias, the Crown's right to challenges was eliminated.

146. *Id.* at 149 (quoting ROBERTS, A DIGEST OF SELECT BRITISH STATUTES COMPRISING THOSE WHICH ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT, APPEAR IN FORCE IN PENNSYLVANIA 229-30 (1817) (emphasis in original).

147. *See supra* note 23.

148. *See* 106 S. Ct. at 1721.

149. This view seems based on the assumption that neither side will choose impartial jurors, but rather that each will try to choose partial jurors so that the two forces will balance out to an impartial jury. *See infra* note 164.

150. *See* Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

151. Professor Van Dyke suggests permitting peremptories for only the defendant. *See* J. VAN DYKE, *supra* note 144, at 147-50; *see also* Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. 192, 193 (1978). This position was also espoused by Justices Goldberg, Warren and Douglas in their dissent in Swain v. Alabama. *See* 380 U.S. 202, 242-44 (1965) (Goldberg, J., dissenting).

insure that they do not include protection of the right of the accused to an impartial trial.

B. The Government Cannot be Assumed to Represent the Rights and Interests of Society

I have argued that the state cannot claim to represent the accused's rights. The state can, of course, represent its own interests, but these must be weighed on their own merits, and not be imbued with the borrowed weight of those of the accused. The state's interests are distinct from the accused's interests.

The courts' characterization of the state's interests contains an additional ambiguity which impedes principled analysis. The state's interests are often equated with society's interests. A congruence does exist in some instances, but when it does not, an assumption that such a congruence exists skews the balance between the accused and the state improperly in favor of the state.

The Supreme Court has recognized trial-related state interests: dignity, order and decorum in the conduct of court proceedings,[152] a fair result at trial,[153] the jury as the forum which is most likely to produce a fair result,[154] impartial jurors,[155] the exclusion of jurors who would frustrate the administration of a state's death penalty scheme,[156] a unitary (as opposed to bifurcated) trial to decide all issues,[157] and notice as protection against an eleventh hour defense.[158]

Many of these enumerated interests do serve the public as well as the state. Certainly, the public interest is served by orderly, impartial trials which produce fair results. The public interest would be disserved by acquitting the guilty or convicting the innocent.[159] Likewise, that interest would be disserved by permitting the jury, as an institution, to lose its credibility or to lose its appearance of fairness. The question remains whether these public interests should be balanced against the interests of

152. *See* Illinois v. Allen, 397 U.S. 337, 342-43 (1970).

153. *See* Singer v. United States, 380 U.S. 24, 36 (1965).

154. *See id.* at 36.

155. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965).

156. *See* Wainwright v. Witt, 469 U.S. 412, 423 (1985).

157. *See* Lockhart v. McCree, 106 S. Ct. 1758, 1768 (1986).

158. *See* Wardius v. Oregon, 412 U.S. 470, 473 (1973); Williams v. Florida, 399 U.S. 78, 81-82 (1970).

159. Although the presumption of innocence reflects the value that the former is preferable to the latter.

the accused, or whether they are instead equally congruent with the interests of the accused.

The state does not always represent the people.[160] Sometimes the rights of the people are represented by the accused. Arguably, the societal interest in an impartial jury is best served by safeguarding the right of the accused. The right to jury trial was placed in the Bill of Rights to safeguard the people against government oppression,[161] not to safeguard the state against threats to law enforcement. Historically, the legitimacy of the jury system depended in large part on the good opinion of those whose cases it adjudicated. If the jury system maintained the appearance of justice in the eyes of the accused, the community would also accept its decisions as just.[162] Insuring the accused a fair and impartial trial should therefore protect the interests of society as well.

The decision regarding whether to place societal interests on the accused's side or the state's side of the balance may dictate the result of the weighing process. For example, where do the societal interests fall when the issue is whether the prosecutor may use peremptory challenges to exclude all blacks from the jury? In *Swain v. Alabama,*[163] the Court was willing to presume that such prosecutorial actions were done in furtherance of the societal goal of empaneling an impartial jury which would

160. The *parens patriae* doctrine permits the state to represent the rights and interests of the people. However, the doctrine has never been refined to provide any but the vaguest guidelines to insure that the interest asserted by the state is in fact that of the people it purports to represent. *See* Curtis, *The Checkered Career of* Parens Patriae: *The State as Parent or Tyrant?,* 25 DE PAUL L. REV. 895 (1976). The constitutional rights of individuals, which belong to the citizens of the state, may conflict with the *parens patriae* interests asserted. *Id.* at 906. Professor Doernberg, in his argument for the recognition of collective rights, mentions that the *parens patriae* concept is one which embodies such a recognition. *See* Doernberg, *supra* note 9, at 111. However, the collective rights he espouses are those of the people against the government, *i.e.,* the right to protest when the government is violating the Constitution. *Id.* at 61. The vagueness of the *parens patriae* concept may actually support the undesirable result of permitting the state to represent interests antithetical to federal constitutional rights. (Fortunately, a longstanding exception to the doctrine, which forbids a state to sue on behalf of its citizens against the federal government, arguably forbids that result. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923).)

161. Ballew v. Georgia, 435 U.S. 223, 229 (1978); Williams v. Florida, 399 U.S. 78, 87 (1971); Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

162. Babcock, *supra* note 90, at 552; Note, *The Case for Abolishing Peremptory Challenges,* 21 HARV. C.R.-C.L. L. REV. 227, 236 (1986) [hereinafter Note, *Peremptory Challenges*]; Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse,* 38 STAN. L. REV. 794 (1986) [hereinafter Note, *Affirmative Selection*].

163. 380 U.S. 202 (1965).

reach a fair result.[164] The Court thus assumed that the state interest and societal interest were congruent, without examining whether the state's interest in obtaining a conviction could be harmonized with the fair trial interest.[165] In *Batson v. Kentucky,*[166] the Court, in overruling *Swain,* recognized additional societal interests, and held that the harm inflicted upon the accused by racially discriminatory selection was also inflicted upon the community because discrimination undermines public confidence in the fairness of our system of justice.[167] That is, the Court found a congruence between the interests of the accused and those of society. Although this shift in the balance was not the sole basis for the overruling of *Swain,*[168] it was nevertheless crucial.

Although the public has an interest in an orderly society protected by law enforcement,[169] it has a greater interest in a society which observes the protections of the Bill of Rights.[170] The latter interest, which

164. *See id.* at 220-22. The Court held that exclusion of blacks would be impermissible only if done purposefully to "deny the Negro the same right and opportunity to participate in the administration of justice," *id.* at 224, but not if the exclusion was related to the outcome of the particular case. *Id.*

165. Several commentators have pointed out that when using peremptory challenges, neither side tries to select impartial jurors, but rather each side tries to choose those biased in his or her favor. *See* J. VAN DYKE, *supra* note 144, at 167; Babcock, *supra* note 90, at 552; Note, *Peremptory Challenges, supra* note 162, at 230. The ambivalence about this fact reflects an inherent tension between the impartial jury ideal, which requires each juror to be impartial, and the representative cross-section ideal, which assumes that each juror has biases but that these will cancel each other out, producing impartiality. Comment, *The Cross-Section Requirement and Jury Impartiality,* 73 CALIF. L. REV. 1555, 1595-96 (1985). A major criticism of permitting the prosecutor to use his peremptory challenges to exclude blacks is that the practice violates both ideals, since he is excluding jurors on a basis unrelated to their ability to be impartial and, in addition, is skewing the cross-section since the prosecutor can eliminate all members of a minority, whereas the defendant cannot eliminate all members of the majority race. *See* Note, *Rethinking Limitations on the Peremptory Challenge,* 85 COLUM. L. REV. 1357, 1367 (1985); Note, *Affirmative Selection, supra* note 162, at 799-800.

166. 106 S. Ct. 1712 (1986).

167. *Id.* at 1718. The Court also recognized that discriminatory exclusion harmed the excluded juror and, thus, placed the juror's right to serve on the accused's side of the balance. *Swain* has been criticized for placing the rights of the excluded juror in opposition to, and above, those of the accused. *See* Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611, 1666 (1985); Comment, *supra* note 165, at 1590. But see then Associate Justice Rehnquist's dissent in *Batson,* in which he argued that "because case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving non-black defendants, it harms neither the excluded jurors nor the remainder of the community." 106 S. Ct. at 1745 (Rehnquist, J., dissenting).

168. The Court also noted that since *Swain,* it had held that a defendant may establish a prima facie case of purposeful discrimination through proof of discriminatory impact, and relied upon this precedent to permit easing the defendant's burden of proving that the prosecutor's use of peremptory challenges violated equal protection. *See Batson,* 106 S. Ct. at 1722-23.

169. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

170. The rights contained in the Bill of Rights are fundamental, whereas society's interest in order and peace is not. *See supra* note 20; *see also* Loewy, *Protecting Citizens from Cops and Crooks:*

is a direct limitation on the former,[171] is best represented by the accused, and thus must be weighed in his favor when his rights are balanced against the state's or society's interest in law enforcement.

The collective or societal interests recognized by the courts usually accrue to the state rather than to the individual.[172] The Court has refused to recognize a collective fourth amendment privacy interest, although the amendment speaks of the "right of the people."[173] Likewise, it has not recognized a collective fifth amendment right, although the origins of the amendment are premised on the societal benefit of prohibiting involuntary admissions.[174] By treating each individual's interests in the protections of the Constitution as atomistic,[175] the Court deflates those interests so that each accused is arguing merely his own self-interest and not on behalf of the constitutional rights of society as a whole. The Court compounds the imbalance when it inflates the opposing interests of the state, such as the interest in law enforcement, by calling them the interests of society.

An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term, 62 N.C.L. REV. 329 (1984). Professor Loewy argues that the fourth amendment protects citizens from both criminal activity and excessive governmental intrusion, and he emphasizes the importance of stating the true balance between the need for law enforcement and the protection of the individual. *See id.* at 339.

171. Professor Amsterdam quotes Justice Jackson's description of the Bill of Rights as " 'the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself.' " Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 353 (1974) (quoting Watts v. Indiana, 338 U.S. 49, 61 (1949) (Jackson, J., concurring)). "They deny to government . . . desired means, efficient means . . . to obtain legitimate and laudable objectives." *Id.* at 353.

172. Professor Doernberg illustrates this point in the fourth amendment context, demonstrating that the Court has treated the amendment as collective to limit the exclusionary rule, and as individual to limit standing. *See* Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment,* 58 N.Y.U. L. REV. 259 (1983).

173. Amsterdam, *supra* note 171, at 353, 367-72; Doernberg, *supra* note 172. Professor Doernberg has elsewhere argued that the Court should recognize a wide range of collective rights which members of the public should have standing to assert. *See* Doernberg, *supra* note 9.

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

174. Professor Amsterdam argues that the *Miranda* warnings are best described as a general command to government to respect the collective security of the people. *See* Amsterdam, *supra* note 171, at 367-72; *see also* L. LEVY, *supra* note 23, at 331-32 (tracing evolution of rule against involuntary confessions and of right against self-incrimination, to ensure "fair play" for the criminally accused). Yet the Court, particularly in recent years, has been more inclined to treat *Miranda* warnings as impediments to the societal interest in obtaining probative evidence of crime. *See, e.g.,* Oregon v. Elstad, 470 U.S. 218 (1985); New York v. Quarles, 467 U.S. 649 (1984).

175. *See* Amsterdam, *supra* note 171, at 353.

The Court's treatment of the eighth amendment provides a stark example of the disparity between its willingness to find collective state interests and its unwillingness to find collective individual rights. The Court has consistently recognized a state interest in the administration of the state's death penalty scheme.[176] The state presumably represents the will of the people, as reflected by the legislature, to impose the death penalty. In *Gilmore v. Utah,*[177] the defendant, who had been sentenced to death under a statute which possibly violated the eighth amendment, refused to appeal his sentence, and thus chose to die. The majority upheld his sentence, rejecting his mother's standing to intervene.[178] The Court refused to recognize not only the concrete injury to Gilmore's mother,[179] but also society's collective interest in "ensuring that state authority is not used to administer barbaric punishments."[180] The impression created is that the Court is more receptive to claims of a societal interest in imposing the death penalty than to claims of a societal interest in refusing to impose it in violation of the Constitution.

Two other recent developments indicate the Court's willingness to recognize collective interests which limit the rights of the accused. Chief Justice Burger has frequently expressed the opinion that the rights of the victim must be weighed in the balance.[181] Commentators have observed the lack of authority for the concept that the victim has such rights,[182] and have argned that such rights are used as a makeweight on the state's side of the balance.[183] A related development is the recent shift in application of the independent and adequate state ground doctrine.[184] The

176. *See* Lockhart v. McCree, 106 S. Ct. 1758, 1766 (1985); Wainwright v. Witt, 469 U.S. 412, 416 (1985).

177. 429 U.S. 1012 (1976).

178. *Id.* at 1016.

179. Although the Court was probably correct in refusing to grant Gilmore's mother third party standing, since her interests were not congruent with her son's, *see supra* text accompanying notes 131-32, it seems obvious that she had a personal stake in the controversy independent of her son's interest, and thus should have been granted standing. *See* Baker v. Carr, 369 U.S. 186 (1962).

180. *Gilmore,* 429 U.S. at 1019 (Marshall, J., dissenting).

181. *See supra* note 9.

182. *See, e.g.,* Henderson, *supra* note 9, at 940-48.

183. *See id.* at 948. An illustration that the victim's interests are not always congruent with those of the state was provided when a rape victim was jailed for thirty days for refusal to testify against her alleged assailant whom she was afraid of seeing in court. *See Rape Victim is Jailed for Refusal to Testify,* N.Y. Times, June 27, 1986, pt. 1, at 7, col. 6.

184. The independent and adequate state ground doctrine is based on the premise that the Supreme Court will not review state court determinations of state law that have no effect on federal issues. *See* Murdock v. City of Memphis, 87 U.S. 590, 603 (1875). When an appeal presents both state and federal grounds for decision, the Court will not review the lower court decision if the state ground is independent of the federal ground and is adequate to support the judgment. Herb v. Pitcairn, 324 U.S. 117, 126 (1945). Conversely, if a lower court opinion relies upon federal law, the

Court's increasing care in ensuring that state courts do not overprotect federal rights[185] reflects a concern that expansive interpretations of federal rights will unduly encroach upon state interests. The interest which the Court seems to be protecting most strenuously from undue federal encroachment is the state's interest in the enforcement of its laws.[186] Formerly, the doctrine was employed to protect society's interest in safeguarding individual rights, an interest also shared by the citizens of the states.[187]

The malleability of the concept of societal interests is apparent. When balancing the trial-related rights of the accused against the interests of the state, the courts have consistently permitted the state to represent the interests of society. Although the state is capable of representing certain of those interests, others should be represented by the accused. By giving the state a virtual monopoly on the public interest, the courts have skewed the balance in a manner detrimental to individual rights.

V. THE PROPER APPROACH TO BALANCING

The strict scrutiny standard of judicial review is the appropriate standard for evaluating state rules or enactments which are alleged to burden the fundamental trial-related rights of those accused of crime.[188] The strict scrutiny test is familiar: it demands that when political choices burden fundamental rights, the means employed must be the least restrictive available to achieve the desired end. Additionally, the ends

Supreme Court has the power to review and correct it. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Recently, the Court has tended to review lower court decisions which give too expansive an interpretation of individual federal rights to a far greater degree than previously. Indeed, the Court has been criticized for doing this even when the lower court decision rested on an independent and adequate state ground. *See infra* note 186.

185. That is, state courts may not purport to rely on federal constitutional guarantees in upholding claims of individual rights, when in fact those guarantees do not support the claim. Oregon v. Hass, 420 U.S. 714, 719 (1975).

186. *See* Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments,* 10 HASTINGS CONST. L.Q. 819, 820 (1983); Comment, Ohio v. Johnson*: The Continuing Demise of Adequate and Independent State Ground Rule,* 57 U. COLO. L. REV. 395, 409 (1986). *But see* Schlueter, *Federalism and Supreme Court Review of Expansive State Court Decisions: A Response to Unfortunate Impressions,* 11 HASTINGS CONST. L.Q. 523, 546 (1984).

187. Justice Stevens argues that the Court has no interest in reviewing interpretations of state laws which are too expansive; its only role is to insure that those who seek to vindicate federal rights have been fairly heard. *See* Michigan v. Long, 463 U.S. 1062, 1068 (1982) (Stevens, J., dissenting). This seems incorrect, since uniform interpretation of federal law insures that rights will not unduly encroach upon other rights as well as upon nonconstitutional interests. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). However, Justice Stevens is correct to question the Court's docket priorities which bespeak greater concern for state prerogatives than individual rights.

188. L. TRIBE, *supra* note 11, § 16-6, at 1000; *see supra* text accompanying notes 37-42.

themselves must be sufficiently compelling to justify infringement.[189] To a troubling degree, the strict scrutiny test is not used to evaluate state rules which are alleged to burden fundamental criminal rights.[190]

In this part, I will briefly examine two areas of criminal procedure in which the proper test has been employed.[191] In section A, I will examine a situation in which the courts must balance two conflicting fundamental rights: the right to a fair trial against the right to a public trial. This will provide a contrast to the more common situation in which the courts must balance a fundamental right against the state's interests. In section B, I will discuss *Illinois v. Allen,*[192] in which the Supreme Court balanced the state's interest in courtroom decorum against the defendant's right to be present at her trial, and I will contrast the hybrid counsel cases in which the courts have simply deferred to that same interest in lieu of balancing.

A. BALANCING FUNDAMENTAL RIGHTS

The Supreme Court's evolving treatment of the right to a public trial, and its efforts to harmonize this right with the accused's right to an impartial trial, have produced a rich debate about the rights and interests concerned. In this context, the Court has engaged in an analysis of the questions raised in this Article: To whom do these rights belong? Who may assert them? And what other rights or interests may outweigh them?

In *Gannett Co. v. DePasquale,*[193] the Court examined the sixth amendment right to a public trial[194] and concluded that it belonged only to the accused and not to the public.[195] The Court relied on precedent and the language of the Constitution to conclude that the right is for the benefit and protection of the accused—that its purpose is to assure that the accused will receive a fair trial.[196] The Court dismissed the idea that the Constitution implied a public right in a public trial that was adverse

189. *Id.* at 1001-02.

190. *See supra* text accompanying notes 37-68.

191. The separate question of whether the courts reached a proper result will not be addressed here.

192. 397 U.S. 337 (1970).

193. 443 U.S. 368 (1979).

194. For the text of the sixth amendment, see *supra* note 20.

195. 443 U.S. at 379-81.

196. *See id.*

to the right of the accused and that might actually burden the accused's fair trial guarantee.[197]

The Court recognized that the public has an interest in public trials, but it emphasized that "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."[198] The Court assumed that the prosecution would represent the public interest in the administration of justice[199] and would also be "sensitive to the due process rights of a defendant to a fair trial."[200] However, the right to a public trial was placed squarely in the hands of the accused.[201] The Court proceeded to examine the importance of the societal interests and the means the state had employed to achieve them, and held that the right of the accused outweighed the state's interest in an open trial.[202]

In *Richmond Newspapers v. Virginia,*[203] the Court held that the public has a first amendment right to attend criminal trials. It thus reaffirmed that the sixth amendment right belongs to the accused as the

197. *See id.*

198. *Id.* at 383; *see also id.* at 381 n.9 (various commentators supporting proposition that only defendant has right to public trial under sixth amendment).

199. *See id.* at 383-84.

200. *Id.* at 384 n.12.

201. *See id.* at 385-87. The Court had little difficulty with the problem posed by *Faretta* and *Singer. See supra* note 90. It reasoned, in accord with *Singer,* that " '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.' " 443 U.S. at 382 (quoting Singer v. United States, 380 U.S. 24, 34-35 (1965)). It concluded that the defendant could not, by waiving a public trial, insist upon a private trial. *Faretta* did not hold otherwise since it was based on a separately grounded right to self-representation. *See* Faretta v. California, 422 U.S. 806 (1979). But no such separate right to private trial is contained in the Constitution. The defendant could thus be prevented from demanding a private trial by other parties, such as the prosecutor and the judge in their capacities as guardians of the public interest. The public itself had no assertable right; all interests were presented by the adversaries themselves. *Singer,* 443 U.S. at 382-83; *see also id.* at 421-23 (Blackmun, J., concurring in part and dissenting in part).

202. The Court also noted that the ban on access to the trial was not absolute since a transcript would later be made available. 443 U.S. at 392-93. Justice Blackmun's position, which has never gained majority support, *see* Richmond Newspapers v. Virginia, 448 U.S. 555, 601-04 (1980) (Blackmun, J., concurring), was that the sixth amendment right to public trial was not solely the right of the accused, but rather belonged in part to society, serving its interest in the integrity of the trial process "exist[ing] apart from, and conceivably in opposition to, the interests of the individual defendant." *Singer,* 443 U.S. at 421-23 (Blackmun, J., concurring in part and dissenting in part). Justice Powell's position, which has since prevailed, was that the public has a first amendment interest in a public trial, which must be balanced against the right of the accused. *See id.* at 397-403 (Powell, J., concurring). Justice Rehnquist rejected this position and argued that the lower courts should be given greater leeway to determine the manner in which they are administered. *See* 443 U.S. at 403-06 (Rehnquist, J., concurring).

203. 448 U.S. 555 (1980).

party with the greatest interest in a public trial.[204] It assigned representation of the countervailing public right not to the state, but to the citizenry and to the media as society's surrogate.[205] The Court, attempting to accommodate two fundamental rights—the first amendment right of the public and the sixth amendment right of the accused—began to apply the balancing process which Justice Powell had advocated in *Gannett*.[206] The debate in *Gannett* and the cases following it has spawned careful examination of the asserted state rights and interests, the proper weight to be accorded them, and whether they are being pursued through means which do not unduly burden countervailing rights.[207]

There is nothing remarkable about the Court's mode of analysis in the open trial/fair trial debate. The analysis employs the familiar language of strict scrutiny, which pervades constitutional law. It insists upon distinctions between rights and interests, and insists upon assigning each right or interest to the party to whom it properly belongs. It becomes remarkable only because it is somewhat anomalous in the field of criminal constitutional law,[208] and because its rigorous debate is all too rare in the field.

204. *See id.* at 584 n.2 (Stevens, J., concurring).

205. *See id.* at 572-73.

206. *See* 443 U.S. at 400.

207. In *Richmond Newspapers*, Justice Brennan argued that although closure of a trial to protect the sixth amendment rights of the accused might be justified under some circumstances, to permit it at the unfettered discretion of the judge and parties would unduly burden the first amendment right of the public. 448 U.S. at 598 (Brennan, J., concurring). Justice Stewart noted that neither was the first amendment right absolute: it could be limited by time, place and manner restrictions. *See id.* at 600 (Stewart, J., concurring). Justice Rehnquist argued that the state's discretion should be given greater weight. *See id.* at 605-06 (Rehnquist, J., dissenting). In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1981), the interest advanced in opposition to the first amendment guarantee was not the sixth amendment right of the accused, but rather an asserted state interest in closure. *See id.* at 606. The Court, over the objection of the dissent, rejected the protection of minor victims as a state interest sufficiently compelling to justify closure of a trial. In Press Enter. Co. v. Superior Court, 106 S. Ct. 2735 (1986), the Court again balanced first and sixth amendment rights, holding that the first amendment right to an open trial could be contravened only if there was a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity which closure would prevent, and if reasonable alternatives to closure did not exist. *See id.* at 2740. The dissent took issue with the majority's articulation of the balance, arguing that the burden on the accused of demonstrating prejudice to his sixth amendment rights should not be so great. *See id.* at 2751-52.

208. Perhaps the introduction of a non-criminal right—the first amendment right—helps explain the use of traditional constitutional analysis.

B. Balancing Fundamental Rights Against the State Interest in Judicial Decorum

The open trial cases force an accommodation between two fundamental rights and pose the difficult problem of how best to insure that neither right is unduly burdened. When fundamental rights conflict with state interests, the accommodation is not, as a rule, as difficult. The state interests must give way to the fundamental rights unless the former are compelling.[209] The courts' treatment of the state interest in the dignity and decorum of the courtroom provides examples both of a legitimate balancing process which finds an interest compelling, and of a failure to balance, the result of which is to give illegitimate weight to the interest of the state.

In *Illinois v. Allen,*[210] the Supreme Court considered whether the accused's fundamental right to be present at his trial[211] could be forfeited if the accused "engage[d] in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial."[212] The Court recognized the fundamental nature of the right at stake, and proceeded to examine the countervailing interest. It identified the state's interest in protecting the proper administration of the criminal justice system, not ouly for the particular accused, but for all citizens. It found that preservation of dignity, order and decorum was essential to protect this interest.[213] Justice Brennan concurred that the accused's right to be present at his trial must give way when it threatens the operation of the very process prescribed by the Constitution.[214]

Having found the state's interest compelling, the Court turned to the means employed to achieve it. It held that removing the defendant from the courtroom was a justifiable means of achieving the state's compelling interest.[215] It also considered two alternative means: shackling

209. L. Tribe, *supra* note 11, § 16-7, at 1002.

210. 397 U.S. 337 (1970).

211. The sixth amendment right to confrontation, *see supra* note 20 (text of sixth amendment), insures the right of the accused to be present at every stage of his trial. *See also Allen,* 397 U.S. at 338.

212. 397 U.S. at 338.

213. *See id.* at 343-47.

214. *See id.* at 351 (Brennan, J., concurring).

215. *See id.* at 346.

and gagging the defendant,[216] and citing the defendant for criminal contempt.[217] The Court noted that each method might be justified, depending on the circumstances of the particular case.

Allen has been roundly criticized by the commentators.[218] Their criticisms center on whether the Court achieved the correct balance between the rights of the accused and the interests of the state. This is an important issue for debate, but one which is irrelevant to this discussion. The significance of *Allen* herein is that it used the correct *mode* of analysis. It applied a strict scrutiny standard to the state's asserted interests when the means used to effectuate those interests burdened fundamental rights.

The hybrid counsel cases[219] provide a comparison to the Court's approach in *Allen.* When discussing whether an accused should be permitted the option of hybrid counsel, courts sometimes invoke the state's fear of disruption of the proceedings.[220] This is essentially the decorum interest identified in *Allen.* Another interest sometimes invoked is that of protecting the traditional status of the attorney.[221] Thus, the courts considering requests for hybrid counsel, like the Court in *Allen*, made some effort to identify the countervailing state interests. The resemblance to *Allen*, however, ends there. The courts rejecting hybrid counsel consistently have done so with only the most cursory attempt to explain their reasoning. They have not made explicit the ways in which hybrid

216. *See id.* at 344.

217. *See id.* at 345.

218. *See, e.g.,* Note, *The Supreme Court, 1969 Term,* 84 HARV. L. REV. 32, 94-96 (1970) (arguing that the Court failed to spell out what degree of disorder or disrespect should be deemed destructive of criminal process, and that the Court gave too much weight to state's interest). Note, Illinois v. Allen*: The Unruly Defendant's Right of a Fair Trial,* 46 N.Y.U. L. REV. 120 (1971) (accord); Note, *The Power of the Judge to Command Order in the Courtroom: The Options of* Illinois v. Allen, 65 NW. L. REV. 671 (1970) (Court's balance failed to consider reasons for lack of decorum in particular case and gave too little weight to right to be present); Note, *Exclusion from the Trial as Controlling Defendant Misbehavior: An Alternative Approach,* U. ILL. L. REV. 273 (1970) (less restrictive alternatives to exclusion were available). *But see* Note, *Excluding the Unruly Defendant,* 42 U. COLO. L. REV. 485 (1970) (exception to right of confrontation provides trial court with positive means of preserving order and decorum necessary for fair and orderly procceding).

219. *See supra* text accompanying notes 63-69.

220. *See, e.g.,* United States v. Mitchell, 137 F.2d 1006, 1010-11 (2d Cir. 1943) (court concerned that defendant's request to dismiss assigned counsel may be strategic attempt to delay and obtain mistrial).

221. *See, e.g.,* United States v. Wolfish, 525 F.2d 457, 463 (2d Cir. 1975) (client has responsibility not to invade counsel's sphere); Overholser v. DeMarcus, 149 F.2d 23, 26 (D.C. Cir. 1945) (where party is represented by competent counsel, counsel should conduct case unless "interests of justice require the party's active participation pro se"); Eury v. Huff, 141 F.2d 554, 555 (4th Cir. 1944) (court found it necessary to decorum and orderly conduct for attorney to retain control of procedural matters "to the exclusion of his client").

counsel would interfere with the state interests asserted. In *Allen* the disruption of the courtroom was apparent, having already occurred. It is not equally apparent why hybrid counsel would cause disruption. Likewise, the courts rejecting hybrid counsel have not discussed the importance of the asserted interests, as the *Allen* opinion did. The attorney's reputational interest scarcely seems to outweigh the rights of the accused. Although the interest in decorum might do so, the issue is simply not addressed. Finally, whereas in *Allen* the Court examined various alternative methods of protecting the state's interest in decorum, the hybrid counsel cases fail to recognize that the rights at stake are fundamental rights. Their analysis at best consists of identifying a state interest.[222] The apparent assumption is that its mere existence justifies the denial of two fundamental rights.

The *Allen* case demonstrates that fundamental rights may be legitimately outweighed by compelling state interests. The open trial cases likewise demonstrate that fundamental rights may be legitimately outweighed by other constitutional rights. Both examples further demonstrate that when the courts take fundamental rights seriously and strictly scrutinize state interests which would burden them, they generate principled analyses and reasoned debate. It is distressing that these examples are not more representative of the field.

CONCLUSION

The fallacy of taking the state's rights too seriously is often coupled with the mistake of not taking the fundamental rights of the accused seriously enough. For reasons that are not apparent, the field of constitutional criminal procedure has not always incorporated the modes of analysis generally employed in constitutional cases. The first step to correcting this problem is to begin a careful articulation of the nature of the interests which the state asserts to justify infringement of the rights of the accused. The next step is to examine these interests in order to determine their legitimacy and their importance. This examination has been distorted by the incorrect assumptions that the state must be treated equally with the accused, that the state can represent the interests of the accused, and that the state represents all the interests of society. Once the state's true interests are identified, the final step is to determine whether they are being pursued by means which are unduly intrusive upon the fundamental rights of the accused. As *Illinois v. Allen* and the

222. Often no attempt is made to identify a state interest at all. *See supra* text accompanying notes 63-69.

open trial cases demonstrate, the rights of the accused are not absolute and may be outweighed by compelling state interests and by countervailing constitutional rights. The issue therefore is not that individual rights must always prevail, but that the decision as to which party prevails must be reached in a principled manner, consistent with accepted constitutional doctrine. Following the steps I have suggested will produce results which are both analytically sound and far less likely to sacrifice fundamental rights to chimerical or frivolous interests.