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Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges

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NOTES

SYSTEMATIC EXCLUSION OF COGNIZABLE GROUPS BY USE OF PEREMPTORY CHALLENGES

I. Introduction

An integral component of the jury selection process[1] is the individual challenge.[2] A party who invokes the challenge removes a potential juror from the jury venire.[3] An attorney calls on the challenge privilege to remove potential jurors when, in the attorney's opinion, the juror cannot deliver a fair and impartial decision because he or she appears to be biased against the defendant, the prosecution or the case.[4]

In the United States there are two conventional types of challenges.[5] The first is the challenge for cause. This challenge, based "on a narrowly specified, provable and legally cognizable basis of partial-

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1. A concise overview of jury selection procedures is located in Simon & Marshall, *The Jury System*, in THE RIGHTS OF THE ACCUSED IN LAW AND ACTION, 214-16 (S. Nagel ed. 1972). The jury selection process begins with the summoning of prospective jurors. Names are compiled, at random, from lists containing representative samplings of the population. In the past, lists frequently relied upon were found, among other places, in telephone directories, city directories, and on the rolls of the taxpayer-property owner lists. Now, jurors are summoned more frequently from lists of registered voters. These citizens, who must report for jury service when summoned, form what is known as the jury panel or venire. The petit juries, which will hear the cases scheduled for the trial term, are selected from the jury panels.

To select the petit juries, a jury officer randomly selects names from those on the panel. Each prospective juror is then subjected to examination during the voir dire stage of the selection proceeding. The underlying reasons for examining the juror are to determine his or her desire to sit as a juror, and whether the juror will be able to view the facts objectively. Such willingness and ability is determined through questions concerned with the potential juror's background, awareness of the case, relationship with any of the parties, and attitude towards facts and legal principles that are involved in the case. *Id.*

2. J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139 (1977). An individual challenge is a "remed[y] for removing objectionable jurors." M. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 62 (1968). A non-individual challenge is one directed at the jury panel and is asserted when the panel has been improperly selected. *Id.* In New York, only the defendant may challenge the panel. N.Y. CRIM. PROC. LAW § 270.10(1) (McKinney 1982). The challenge must be made on the ground that the panel was selected in a manner that deviated so much from the requirements enunciated by the judiciary law in the drawing or return of the panel that the defendant faced substantial prejudice. *Id.*

3. The jury venire is the panel of citizens assembled from which the petit jury which will hear the case is selected. *See* note 1 *supra.*

4. J. VAN DYKE, *supra* note 2, at 139.

5. *Id.*

ity," [6] is enumerated by statute.[7] The second type of challenge is the peremptory challenge.[8] This challenge has been defined by the Supreme Court as one "without cause, without explanation and without judicial scrutiny . . . ."[9]

Peremptory challenges may be used to remove jurors who possess a bias peculiar to the immediate case, but whose bias is not articulable in terms of a challenge for cause.[10] The underlying partiality, however, is not necessarily as apparent as that which is delineated in the forcause statutes.[11] Permitting the use of peremptories is an acknowledgment that the challenges for cause do not cover every instance where a potential juror may demonstrate bias.

Recognizing the potentially subjective nature of the peremptory challenge, and considering the problems of infinite delays and finite jury pools,[12] legislatures have limited the number of peremptories that each side may exercise.[13] Limiting the number of peremptories serves

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6. Swain v. Alabama, 380 U.S. 202, 220 (1965).

7. Some of the causes listed in some statutes are: a close degree of affinity or consanguinity to the defendant, N.Y. CRIM. PROC. LAW § 270.20(1)(c) (McKinney 1982); Cal. Penal Code § 1074 (West 1970 & Supp. 1983), having served as a juror in a substantially similar action involving the same defendant, *id.*, and having sat on the grand jury which found the indictment, N.Y. CRIM. PROC. LAW § 270.20(1)(e) (McKinney 1982); Cal. Penal Code § 1074 (West 1970 & Supp. 1983).

8. J. VAN DYKE, supra note 2, at 139. The peremptory challenge has existed in at least three variations. The traditional method is described by Van Dyke. "After all prospective jurors who have displayed any overt bias are challenged for cause, each litigant is permitted a certain number of peremptory challenges, which can be used to remove those jurors who are believed for some reason or another to favor the other side." *Id.* at 145.

The state of Alabama, at the time of *Swain*, had a system which varied only by degree. In Alabama's struck jury system, "[a]fter excuses and removals for cause, the venire in a capital case is reduced to about 75. The jury is then 'struck'—the defense striking two veniremen and the prosecution one in alternating turns, until only 12 jurors remain." 380 U.S. at 210 (citing ALA. CODE tit. 30, §§ 54, 60 (1958)).

In England, the prosecution has the right to exercise a limited type of peremptory challenge called "standing aside." *Id.* at 213. The prosecution is allowed "to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number." *Id. See* Mansell v. The Queen, 8 El. & Bl. 54, 108-09, 120 Eng. Rep. 20, 40 (1857).

9. Swain v. Alabama, 380 U.S. at 212.

10. J. VAN DYKE, *supra* note 2, at 146.

11. *Id.* at 140.

12. *See* M. BLOOMSTEIN, *supra* note 2, at 64: "such challenges could be made to every juror, and a lawyer whose party was not particularly eager to go to trial could indefinitely delay matters."

13. All states have statutes which set the number of peremptory challenges for the prosecution and defense in criminal cases, and for the plaintiff and defendant in

at least two functions: it prevents an attorney from avoiding the trial by forever removing jurors;[14] and, it forces an attorney to use his peremptories wisely, by weighing the bias demonstrated by a potential juror against the potential bias of one who has not yet been subject to voir dire.[15]

The limiting statutes, however, have failed to eliminate all abuses of peremptory challenges.[16] There have been numerous claims of systematic dismissals based solely on the juror's affiliation with certain cognizable groups. These groups include race,[17] sex,[18] ethnic origin,[19] and religion.[20] Some defendants complaining against such use of the peremptory challenge have asserted equal protection violations.[21] More recently, defendants have relied on state and federal requirements that a jury be impartial and that the jury panel represent a fair cross-section of the community.[22] Proponents of an unabridged right to exercise peremptory challenges, on the other hand, argue that both

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civil actions. A table which serves as a useful guide to the distribution of peremptory challenges in all state and federal courts appears in J. VAN DYKE, *supra* note 2, at 282 app. A majority of states grant the same number of peremptory challenges to the prosecution and the defense. *Id.*

14. *See* note 12 *supra* and accompanying text.

15. J. VAN DYKE, *supra* note 2, at 146.

16. The claim that peremptories have been misused has frequently been made in federal courts, *see, e.g.*, United States v. Jones, 663 F.2d 567, 572 (5th Cir. 1981) (the defendant claimed that no blacks sat on his jury because the prosecutor discriminatorily used peremptory challenges); Hampton v. Wyrick, 606 F.2d 834, 835 (8th Cir. 1979) (defendant alleged that peremptory challenges were used in a discriminatory manner), and in state courts, *see, e.g.*, State v. Alford, 289 N.C. 372, 376-77, 222 S.E.2d 222, 225 (1976) (defendant alleged that the district attorney peremptorily challenged all prospective black jurors); Commonwealth v. Martin, 461 Pa. 289, 295, 336 A.2d 290, 293 (1975) (defendant asserted that the prosecutor prevented blacks from sitting on the petit jury by discriminatorily exercising his peremptory challenges).

17. *Jones*, 663 F.2d at 572; *Alford*, 289 N.C. 372, 222 S.E.2d 222.

18. Marquez v. State, 91 Nev. 471, 538 P.2d 156 (1975).

19. State v. Salinas, 87 Wash. 2d 112, 549 P.2d 712 (1976).

20. People v. Kagan, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. New York County 1979).

21. *Swain*, 380 U.S. 202, 221.

22. People v. Payne, 106 Ill. App. 3d 1034, 1036, 1042, 436 N.E.2d 1046, 1047, 1052 (1982) (defendant contended that the state frustrated his right to a jury drawn from a fair cross-section of the community and that therefore he was denied his sixth amendment rights); Commonwealth v. Soares, 377 Mass. 461, 473, 387 N.E.2d 499, 508, *cert. denied*, 444 U.S. 881 (1979) (defendants alleged that the prosecutor effectively deprived them of a fair trial and impartial jury); People v. Wheeler, 22 Cal. 3d 258, 263, 583 P.2d 748, 752, 148 Cal. Rptr. 890, 893 (1978) (defendants claimed that their right to an impartial jury was violated).

the traditional role of the peremptory challenge,[23] and the 1965 Supreme Court decision in *Swain v. Alabama*[24] support their view.

This Note will trace the origins of the peremptory challenge and the history of its use. It will then review Supreme Court decisions establishing the defendant's right to a fair and impartial jury under both the sixth[25] and fourteenth amendments.[26] After an examination of the *Swain* decision, there follows a discussion of cases which have circumvented or rejected the rule in *Swain* because of the sixth amendment's application to the individual states. Finally, this Note recommends a synthesis of criteria proposed by several sources to establish a more just standard for determining systematic exclusion.

II. The Evolution of Peremptory Challenges

A. Historical Background

Peremptory challenges are firmly entrenched in the Anglo-American history of trial by jury.[27] Originally peremptories were reserved solely for the Crown.[28] By the Fourteenth Century, however, the right to exercise peremptory challenges had been granted to defendants.[29]

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23. *See, e.g., Swain,* 380 U.S. at 212-21 (the nature of peremptory challenges in and of itself justifies the removal of any group of jurors although in all other respects, the group members are qualified jurors).

24. 380 U.S. 202; *see, e.g.*, People v. Teague, 108 Ill. App. 3d 891, 897, 439 N.E. 2d 1066, 1070 (1982).

25. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."). Since the sixth amendment applies only to criminal trials and not to civil actions, the scope of this Note is limited to systematic exclusion occurring at criminal trials.

26. U.S. CONST. amend. XIV, § 1: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

27. See Swain v. Alabama, 380 U.S. at 212-21 for a discussion of the history of peremptory challenges.

28. *See* L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 35 (1973). The Crown's original right to peremptory challenges may have evolved from William the Conqueror's inquests into the laws of England and the value of certain properties after his victory at the Battle of Hastings in 1066. "The king's justices summoned a jury in every county . . . ." *Id.* "The sheriffs were given complete charge of selecting persons to sit on the panel." Gutman, *The Attorney-Conducted Voir Dire of Jurors; A Constitutional Right,"* 39 BROOKLYN L. REV. 290, 292 (1972). Van Dyke has noted that the early English juries were in effect hand-picked by the Crown or its allies. If an unacceptable juror appeared on the jury list, the Crown could resort to its unlimited number of peremptory challenges to remove the juror. J. VAN DYKE, *supra* note 2, at 147.

29. Although the origins of the defendant's right to peremptory challenges are not clear, some authorities refer to the defendant's early right. *E.g.*, J. VAN DYKE,

In 1305, after recognizing that the Crown's exercise of peremptory challenges was resulting in "infinite delays and danger,"[30] Parliament completely revoked the Crown's right to use peremptory challenges.[31] To this day defendants in England have continued to enjoy the right of peremptory challenges, while peremptories have never been restored to the Crown.[32]

Both state and federal courts in the United States have long acknowledged the right of a defendant to make peremptory challenges.[33] Until the late Nineteenth Century, however, few jurisdictions recognized a prosecutorial right to exercise peremptory challenges.[34] During the 1800's state legislatures began granting to the states the right to exercise peremptory challenges,[35] and by the early Twentieth Century, peremptory challenges for both sides was the general rule.[36] In 1827, the Supreme Court decision in *United States v. Marchant*[37] opened the door for acceptance of the prosecutorial

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supra note 2, at 147 (after 1305 "criminal defendants were . . . still allowed to challenge jurors peremptorily").

30. COKE ON LITTLETON 156 (14th ed. 1791) (cited in Swain v. Alabama, 380 U.S. at 213). An early New York Court of Appeals case noted that the 1305 statute was enacted to prevent the king from causing unjust harm to the accused. People v. McQuade, 110 N.Y. 284, 293, 18 N.E. 156, 159 (1888).

31. 33 Edw. 1 Stat. 4 (1305) (if "they that sue for the King will challenge . . . jurors, they shall assign . . . a cause certain . . .").

32. J. VAN DYKE, *supra* note 2, at 148. The right to exercise peremptory challenges in England has never been restored to the prosecution. *See* note 7 *supra*.

33. A defendant's right to exercise peremptory challenges in federal court was granted by a federal statute in 1790. 1 Stat. 119 (1790). The Supreme Court observed that defendants in state courts were given peremptory challenges by state statutes early in United States history. Swain v. Alabama, 380 U.S. 202, 215 & n.16 (1965); *see* Brown v. State, 62 N.J.L. 666, 678-88, 42 A. 811, 814-18, *aff'd*, 175 U.S. 172 (1899); People v. McQuade, 110 N.Y. 284, 293, 18 N.E. 156, 158 (1888). The defendant's right at common law to exercise peremptory challenges was recognized by the Supreme Court in United States v. Marchant, 25 U.S. (12 Wheat.) 480, 481 (1827).

34. The Supreme Court recognized that after the Statute of 1305, the prosecutorial peremptory challenge was not a part of the English law. United States v. Marchant, 25 U.S.(12 Wheat.) at 483. The Court was also cognizant of the Crown's right to stand jurors aside, *id.*, and implied that this right had "prevailed" to become part of the common law. *Id.* at 484. The federal government did not specifically authorize a prosecutorial peremptory challenge until 1865. 13 Stat. 500 (1865). This statute granted to the United States five peremptory challenges in treason cases and two challenges for other offenses. *Id. See Swain*, 380 U.S. at 214-15.

State statutes granting the governments a right to exercise peremptory challenges were first passed in the 1840's, but most states did not recognize the government's right to peremptory challenges until the second half of the Nineteenth Century. *Id.* at 216 n.18.

35. 380 U.S. at 216.

36. *Id.*

37. 25 U.S.(12 Wheat.) 480 (1827).

peremptory challenge in the federal courts.[38] The government's right to exercise peremptory challenges in federal courts is now well established.[39]

B. Jury Selection Procedures and the Issue of Jury Impartiality

The creation, limitation, and, more recently, the expansion of the right to make peremptory challenges have all been responses to an imbalance in the jury selection process.[40] The search for an equitable balance has characterized the history of peremptory challenges. Throughout the development of the peremptory challenge, the right to exercise such challenge has been qualified over time to prevent either side from gaining an unfair advantage. The ultimate goal of this dynamic process, ideally, has been to promote justice through the selection of impartial jurors.

The importance of maintaining jury impartiality has been emphasized by the Supreme Court in decisions which commended the jury's independence from special influence and its role as representative of the community. In *Smith v. Texas*,[41] the Supreme Court declared that the jury should be "a body truly representative of the community."[42] In a subsequent case, the Court praised the jury's role as a "shield against oppression."[43] The oppression guarded against is the domi-

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38. In *Marchant* the Supreme Court ruled that the British government's right to "stand aside" jurors had been inherited by the United States courts at common law. *See* note 34 *supra*. In 1840 Congress passed a statute which required jurors hearing cases in the federal courts to have the same qualifications and granted to them the same exemptions as the jurors in the state courts in which the United States court was located. 5 Stat. 394 (1840). The Supreme Court interpreted this statute as limiting the number of peremptory challenges in federal court to those challenges allowed by the relevant state court, and to those peremptory challenges specifically granted to the defendant by 1 Stat. 119 (1790). United States v. Shackleford, 59 U.S. (18 How.) 588, 590 (1855). *See* note 34 *supra*.

39. *See* 28 U.S.C. § 1870 (grants the right to the defense and prosecution in civil cases); FED. R. CRIM. P. 24 (b), (c) (prescribes peremptory challenges to the defendant and federal government in criminal cases).

40. In 1887 the Supreme Court accepted the notion that the protections of an impartial jury apply to both the accused and the prosecution. "Between [the defendant] and the state the scales are to be evenly held." Hayes v. Missouri, 120 U.S. 68, 70 (1887).

41. 311 U.S. 128 (1940).

42. *Id.* at 130. (In *Smith*, a conviction was reversed because the Texas method of selecting jurors for the grand jury, although not discriminatory on its face, was "applied in such manner as practically to proscribe any group thought by the law's administrators to be undesirable." *Id.* at 131. From 1931 through 1938, only 5 of 384 grand jurors in Texas' Harris County were black, although 20% of the population was black. *Id.* at 129.

43. Glasser v. United States, 315 U.S. 60, 84 (1942).

nance of any private group or special class from which a jury would be selected.[44] The possibility that a defendant would be convicted by an unrepresentative jury was considered to be of such pressing concern that the Court has commanded that "[t]endencies, no matter how slight"[45] which impinge on choosing a jury that is representative of the community "should be sturdily resisted."[46]

The early constitutional challenges to jury selection procedures in the state courts were based on fourteenth amendment equal protection arguments. In *Strauder v. West Virginia*,[47] a state statute limiting jury service to white males was found to violate the fourteenth amendment.[48] Twenty years later in *Carter v. Texas*,[49] the Supreme Court ruled that the state of Texas violated the equal protection clause by prohibiting a defendant from offering proof that blacks were excluded from the grand jury solely on account of their race.[50] The Supreme Court in *Carter* condemned "*any action* of a state [which excluded] all persons of the African race . . . solely because of their race or color."[51] In 1935, the Court relied on *Carter* in ruling that a defendant's equal protection rights are denied when blacks are prohibited from serving on petit juries.[52]

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44. *Id.* at 86 (the jury should not be "the organ of any special group or class"). In *Glasser*, the defendants appealed from convictions for conspiring to defraud the United States. *Id.* at 63. The defendants contended that the deliberate exclusion of women who were not members of the Illinois League of Women voters from serving as petit jurors deprived the defendants of an impartial jury. *Id.* at 82.

45. *Id.* at 86.

46. *Id.*

47. 100 U.S. 303 (1879).

48. *Id.* The West Virginia statute read "[a]ll white male persons who are twenty-one years of age and who are citizens of the State shall be liable to serve as jurors . . . ." *Id.* at 305 (citing Acts of 1872-73, at 102, enacted March 12, 1873). The defendant, who was on trial for murder, contended that this statute deprived him of the full and equal benefit of the law by making all black men ineligible for jury service. *Id.* at 304.

49. 177 U.S. 442 (1900).

50. *Id.* The defendant claimed that the jury commissioners responsible for selecting the grand jury to hear evidence against the defendant excluded from the list of grand jurors all persons of African descent. *Id.* at 444.

51. *Carter*, 177 U.S. at 447 (emphasis added).

52. Norris v. Alabama, 294 U.S. 587 (1935). The Court ruled that the principle asserted in *Carter* "is equally applicable to a similar exclusion of negroes from service on petit juries." *Id.* at 589.

The Supreme Court cited the requirements for a prima facie case of discrimination in the jury selection process in Hernandez v. Texas, 347 U.S. 475 (1954). The prima facie case is established when (1) the group allegedly discriminated against is a "substantial segment of the population"; (2) some members of the group were "qualified to serve as jurors"; and (3) "none had been called for jury service over an

C. *Swain:* A regression

Despite a number of decisions demonstrating its conviction that an impartial jury is crucial to equal protection, the Court in *Swain v. Alabama*[53] deviated from this line of cases by showing a greater concern for less restricted access to peremptory challenges.[54] In *Swain*, the Court afforded more protection to the prosecutor's right to make peremptory challenges than to the defendant's constitutionally guaranteed right to equal protection under the law. The petitioner in *Swain* raised a motion to void the petit jury selected to try his case.[55] Although all six blacks on the venire were struck from the petit jury[56] the Court held that the exercise of peremptory challenges against blacks in any individual case is not a denial of equal protection of the laws.[57] The petitioner also pointed out that no black had ever sat on a petit jury in the county.[58] Moreover, it was contended that, in criminal cases, prosecutors had methodically relied on their strikes to systematically exclude all blacks on jury venires from serving as petit jurors.[59] The Supreme Court agreed that such systematic exclusion can be the basis of an equal protection violation.[60] The Court, however,

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extended period of time." This three-part test has been coined "the rule of exclusion." *Id.* at 480. The rule has been used frequently since its inception to prevent systematic exclusion of cognizable groups of potential jurors from various aspects of jury service. *See, e.g.*, Morgan v. United States, 696 F.2d 1239, 1240-41 (9th Cir. 1983) (to show that an equal protection violation in the context of grand jury selection has occurred, the defendant must resort to the "method of proof, sometimes called the 'rule of exclusion' " (citing Castaneda v. Partida, 430 U.S. 482, 494-95 (1977)); Hillery v. Pulley, 533 F. Supp. 1189, 1203 (E.D. Cal. 1982) (prima facie case of systematic exclusion of members of defendant's race from the grand jury is established if the requirements of the rule of exclusion are met).

53. 380 U.S. 202 (1965).

54. *Id.* This inclination has been followed many times since *Swain*. *See, e.g.*, United States v. Jones, 663 F.2d 567, 572 (5th Cir. 1981); Hampton v. Wyrick, 606 F.2d 834 (8th Cir. 1979); People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982); People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982).

55. 380 U.S. at 203.

56. *Id.* at 210.

57. *Id.* at 221-22. The Court argued that subjecting the peremptory challenge to the standards of the equal protection clause would radically change the nature and function of the challenge. The challenge would cease being peremptory; every challenge would be subject to review, either when exercised, or at a subsequent hearing. The prosecutor's judgment would be open to evaluation. The Court feared that as a result many uses of the challenges would be prohibited. *Id.* at 222.

58. *Id.* at 222-23.

59. *Id.* at 223.

60. *Id.* at 223. The Supreme Court spelled out the requisite scenario for systematic exclusion.

held that the petitioner's motion did not evince, with satisfactory precision, "when, how often, and under what circumstances"[61] the prosecutor himself was responsible for excluding those blacks who appeared on petit jury venires, and therefore did not show the requisite "purposeful discrimination."[62] Thus, no constitutional violation was found.

D. *Duncan* and *Taylor:* A new perspective

Swain is the leading Supreme Court decision on the question of whether the improper use of peremptories is a violation of the equal protection clause.[63] *Swain* was decided three years before the Supreme Court decided in *Duncan v. Louisiana*[64] that the sixth amendment applied to the states through the fourteenth amendment. After *Duncan*, a defendant in state court is able to assert that his right to an impartial jury is violated without relying on an equal protection claim.[65] With the right to an impartial jury established as a constitutional right, subsequent decisions actually defined the scope of that

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> But when the prosecutor in a county, in case after case, whatever the circumstances whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

Id.

61. *Id.* at 224.

62. *Id.* at 226.

63. *See, e.g.* United States v. Jones, 663 F.2d 567, 572 (5th Cir. 1981) (the court described *Swain v. Alabama* as "controlling Supreme Court authority"); Hampton v. Wyrick, 606 F.2d 834, 834-35 (8th Cir. 1979), *cert. denied*, 444 U.S. 1022 (1980) (appellant failed to meet the standards set forth in *Swain*); People v. Teague, 108 Ill. App. 3d 891, 897, 439 N.E.2d 1066, 1070 (1982) (the court embraced *Swain*, and said that *Payne* holding "effectively emasculated" the function of the peremptory challenge which was recognized by *Swain*); People v. McCray, 57 N.Y.2d 542, 549, 443 N.E.2d 915, 919, 457 N.Y.S.2d 441, 445 (1982) ("[w]e find no compelling basis for rejecting the holding of the Supreme Court in *Swain v. Alabama* ").

64. 391 U.S. 145 (1968). Defendant was convicted by a judge after his request for a jury trial was denied. The Louisiana Constitution guaranteed a jury trial only in cases in which the punishment could be hard labor or death. Defendant, who faced a maximum punishment of two years imprisonment and a fine contended that the sixth and fourteenth amendments of the United States Constitution assured him of a jury trial for a criminal prosecution in state court. *Id.* at 146-47. The Court ruled that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which —were they to be tried in a federal court —would come within the Sixth Amendment's guarantee." *Id.* at 149.

65. The defendants in *Strauder, Carter, Hernandez, Swain*, etc. presumably would be availed of this new constitutional protection. *See* notes 47-54 *supra* and accompanying text.

right. *Taylor v. Louisiana*[66] was a significant development in this direction.

In *Taylor*, the Court condemned the practice of excluding from the jury panel women who did not request in writing to be selected for the panel as a violation of the defendant's sixth amendment rights.[67] The Court asserted that a petit jury must be selected from a representative cross-section of the community.[68] The cross-section requirement was held to be an "essential component"[69] of the Constitution because the jury is supposed to represent the "commonsense judgment of the community."[70] The Court stated that jury pools composed of special segments of the community, or lacking an identifiable group, will damage the public's faith in the fairness of the criminal justice process.[71]

The Supreme Court has not decided whether the guidelines for determining a sixth amendment claim based on the alleged discriminatory use of peremptories are the same as for determining a similar fourteenth amendment claim. Defendants, nevertheless, have relied on the synergism of the *Duncan* and *Taylor* decisions in challenging the states' use of peremptory challenges, apparently hoping that the sixth amendment will provide them greater protection than the fourteenth.[72] Most courts have spurned the opportunity to decide the issue and have ruled strictly in favor of the unbridled peremptory challenge.[73]

In addition, courts in two states have relied not on *Taylor* and *Duncan* but on their own state constitutions to condemn the systematic exclusion practiced by way of peremptory challenges. In *Commonwealth v. Soares*,[74] the Supreme Judicial Court of Massachusetts held that if the state constitutionally guaranteed right to a jury drawn from a cross-section of the community is to be more than "hollow

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66. 419 U.S. 522 (1975).

67. *Id.*

68. *Id.* at 528. The Court held that "[w]e accept the fair-cross section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment. . . . " *Id.* at 530.

69. *Id.* at 528.

70. *Id.* at 530.

71. *Id.*

72. *See* People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982); People v. Payne, 106 Ill. App. 3d 1034, 1042, 436 N.E.2d 1046, 1052 (1982).

73. *See, e.g.*, Commonwealth v. Futch, 492 Pa. 359, 368 424 A.2d 1231, 1235 (1981) (the Pennsylvania Supreme Court refused to decide whether Pennsylvania should abandon the *Swain* standards).

74. 377 Mass. 461, 387 N.E.2d 499, *cert denied*, 444 U.S. 881 (1979).

words" the peremptory challenge must not be exercised with "unbridled discretion."[75] In *People v. Wheeler*,[76] the California Supreme Court borrowed from *Swain* in announcing a rebuttable presumption that peremptories are exercised within constitutional limits. However, the hurdles for rebutting the presumption are lower under California law than they are under federal law. In California, a prima facie rebuttal of the presumption is established when the defendant demonstrates a "strong likelihood" that the jurors' exclusion was based on group association, rather than on specific bias.[77]

The motivation behind these state court decisions has been a desire to promote impartial juries.[78] The high courts of Massachusetts and California both appear to recognize the conflicting signals in *Swain* and *Taylor*. Without a clearer statement by the Supreme Court, however, these innovative state courts have felt compelled to rely solely on their own state constitutions to prohibit systematic exclusion.[79]

The Illinois Court of Appeals, however, has relied directly on the decisions in *Duncan* and *Taylor* to infer a greater protection against the discriminatory use of peremptory challenges than was afforded in *Swain*.[80] In *Payne*, six of the eight peremptory challenges allocated to the prosecution were employed against six of seven blacks on the jury venire.[81] The *Payne* court determined that the prosecutor systematically excluded the blacks from the jury and that the defendant's right

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75. *Id.* at 484, 387 N.E.2d at 514.

76. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

77. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *See* notes 121-28 *infra* and accompanying text for a discussion of the *Wheeler* approach.

78. The *Soares* and *Wheeler* courts described the defendant's trial right using strong terms. "The right to a fair and impartial jury is one of the most sacred and important guaranties of the constitution." *Wheeler*, 22 Cal. 3d at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907, (*quoting* People v. Riggins, 159 Cal. 113, 120, 112 P. 862, 865 (1910)). The Massachusetts Court deemed the defendant's rights to be tried by a jury composed of a representative cross-section of the community as "critical." *Soares*, 377 Mass. at 479, 387 N.E.2d at 511.

79. *See* Commonwealth v. Soares, 377 Mass. 461, 486, 387 N.E.2d 499, 515, *cert. denied*, 444 U.S. 881 (1979) (article 12 of the Massachusetts Constitution proscribes the use of peremptory challenges to systematically exclude jurors on the basis of their group membership; a failure to read the Massachusetts Constitution this way would subject the representative cross-section rule to nullification); People v. Wheeler, 22 Cal. 3d 258, 287, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909-10 (1978) (the court ruled that in California courts all claims that peremptory challenges are being exercised discriminatorily will be governed by art. I, § 16 of the CAL. CONST.).

80. People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982).

81. *Id.* at 1044, 436 N.E.2d at 1053-54.

to an impartial jury selected from a fair cross-section of the community was "affirmatively frustrate[d]."[82] Thus, the court accepted the defendant's contention that the prosecutor's employment of peremptory challenges violated his sixth amendment rights.[83]

III. Comparing the Case Law

The facts and ruling of *Taylor v. Louisiana*[84] apply specifically to the jury panel from which the petit jury is selected[85] while *Swain* was decided with reference to the composition of the petit jury.[86] The Supreme Court has defined the criteria for a violation of the cross-section rule only with regard to the jury panel. In *Duren v. Missouri*[87] the Supreme Court outlined a test for determining a prima facie cross-section violation. When the defendant shows that a "distinctive" segment of the community is unfairly and unreasonably represented on the jury panel because of systematic exclusion,[88] the state must demonstrate that the fair cross-section requirement in the particular case is inconsistent with a "significant state interest."[89] Presumably this test would not apply effectively to the petit jury because it would be extremely difficult to reasonably reflect the many groups in a heterogeneous community on a twelve person jury.[90] At least two states, however, have established a standard based on state constitutions for defining a fair cross-section on the petit jury. In California, a defendant is constitutionally entitled to a petit jury composed of a cross-section of the community which approximates that jury which would have been selected by a random draw.[91] The Massachusetts courts share this view.[92]

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82. *Id.* at 1045-46, 436 N.E.2d at 1054.
83. *Id.*
84. 419 U.S. 522 (1975).
85. *Id.* at 524.
86. Swain v. Alabama, 380 U.S. 202, 209 (1965).
87. 439 U.S. 357 (1979).
88. *Id.* at 364. In *Duren* the petitioner was indicted for first degree murder. *Id.* at 360. He successfully challenged his conviction on the ground that while 54% of the adult inhabitants in the county of his trial were women, only 15.5% of the prospective jurors on his panel were women. *Id.* at 362-63.
89. *Id.* at 368.
90. The Supreme Court apparently recognized the difficulty in reflecting the entire community on the petit jury. Therefore the Supreme Court "impose[d] no requirement that petit juries actually chosen must mirror the community. . . ." *Taylor*, 419 U.S. at 538. Instead the Court insisted that the jury panels be reasonably representative of the "distinctive groups in the community." *Id.*
91. People v. Wheeler, 22 Cal. 3d 258, 277, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 903 (1978).
92. Commonwealth v. Soares, 377 Mass. 461, 488, 387 N.E.2d 499, 516 (1979).

The Supreme Court has not decided what effect the fair cross-section requirement will have either on petit jury selection or the *Swain* standard governing peremptory challenges. A number of authorities, however, have been highly critical of the rigid *Swain* standard. The standard has been condemned as being "overly harsh and unmanageably vague."[93] One commentator wrote that "White's 'purposeful discrimination test'[94] ladens the negro defendant with almost impossible burdens."[95] Still another posited that the *Swain* burden "seems an impossible one for the defendant to carry."[96] Van Dyke noted that "the burden of proof . . . can be sustained only if the accused has an associate sitting in courtrooms throughout the area over a long period of time . . . ."[97] Furthermore, the highest courts of Massachusetts and California have circumvented the *Swain* decision by relying on their state constitutions to find a violation of defendants' rights by systematic exclusion.[98]

The *Payne* court asserted that no "rational difference" exists between discrimination at the venire selection stage and at the voir dire stage.[99] The Illinois court declared that the reason for prohibiting

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93. Note, *Prima Facie Case Requirement in Attacking Prosecutor's Systematic Discriminatory use of Peremptory Challenges to Exclude Members of Race from Jury Service—Swain v. Alabama*, 380 U.S. 202 (1965), 15 AM. U.L. REV. 104, 109 (1965).

94. *See* note 61 *supra* and accompanying text.

95. Comment, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 324 (1965).

96. Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1160 (1966).

97. J. VAN DYKE, *supra* note 2.

The defendant is a party only to his trial and does not have personal knowledge of the practices at other trials. Information about the voir dire in other cases is not easily obtainable. The cost of investigation is high, especially to indigent defendants and the time needed for a thorough investigation may be prohibitively long. The California court is not aware of any "central register" which contains the names and races of those jurors who were peremptorily challenged. The court concluded that there is no practical method for establishing a pattern of discrimination, or even for determining that the excluded jurors were black. *Wheeler*, 22 Cal. 3d at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 909.

98. *See* notes 74-77 *supra*.

99. 106 Ill. App. 3d at 1036, 436 N.E.2d at 1048. *See* note 71 *supra*. Other arguments have been made supporting this proposition. "The fair cross section-impartiality requirement is meaningless if in any case involving a defendant of a given race the prosecutor can intentionally and systematically exclude all members of that race without cause." People v. McCray, 57 N.Y.2d 542, 554, 443 N.E.2d 915, 922, 457 N.Y.S.2d 441, 448 (1982) (Meyer, J., dissenting). A concurring opinion in a Pennsylvania case declared that if the right to a representative jury is to be meaningful, it is "incumbent upon this Court" to establish a test that will ban the use of peremptory challenges based on group affiliation. Commonwealth v. Futch, 492 Pa. 359, 369, 424 A.2d 1231, 1236 (1981) (Nix, J., concurring). The Supreme Judicial Court of Massachusetts noted that a representative venire is not sufficient by itself.

racial discrimination when summoning prospective jurors for the jury panel "is to prevent the State's systematic exclusion of any racial group in the composition of the jury itself."[100] Relying on this rationale, *Payne* determined that the defendant's right to a jury composed of a representative cross-section of the community was violated.[101]

The *Payne* decision is a bold and necessary departure from a process of jury selection which is prone to misuse. *Payne* supports a system which recognizes a fair trial as the paramount goal, and the peremptory challenge as a tool to be used towards that end.[102] A slight encroachment on the attorney's right to exercise unrestricted peremptory challenges will facilitate the selection of impartial juries. Such an approach is consistent with the evolution of the jury selection process in the United States.[103]

In the past the right to exercise peremptory challenges has been expanded or restricted to advance the cause of a balanced impartiality when one side was perceived as having an unfair advantage in the jury selection process.[104] It is clear from an historical[105] and a pragmatic[106] perspective, however, that the peremptory challenge alone does not

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The desired interaction of a cross-section of the community does not occur on the venire. The goal is effectuated only on the petit jury. Commonwealth v. Soares, 377 Mass. 461, 482, 387 N.E.2d 499, 513 (1979). The issue of applying venire stage protections to the petit jury has roots which extend at least as far back as 1948. A dissent in a circuit court of appeals case cautioned that the protection of the equal protection clause against the exclusion of "Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury." Hall v. United States, 168 F.2d 161, 166 (D.C. Cir. 1948) (Edgarton, J., dissenting).

100. 106 Ill. App. 3d at 1036, 436 N.E.2d at 1048. If the petit jury is not required to reflect the nature of the jury panel, all minority group members can be eliminated from the jury while the majority continues to dominate. The majority is drawn from a pool whose number is greater than the number of peremptories available to the opposition. The same may not be true for the minority. "The result is a jury composed wholly of the majority which in the context of racial differences is neither a cross section nor impartial." Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968).

101. 106 Ill. App. 3d at 1045-46, 436 N.E.2d at 1054.

102. People v. Payne, 106 Ill. App. 3d 1034, 1037, 436 N.E.2d 1046, 1048 (1982) (no individual black juror is insulated from being peremptorily challenged, but the state may not use peremptory challenges to frustrate the defendant's constitutional right to a representative jury).

103. Beginning in the Nineteenth Century, and continuing throughout the Twentieth Century, Supreme Court decisions have emphasized the importance of impartial representative juries. *See* Strauder v. West Virginia, 100 U.S. 303 (1880); Norris v. Alabama, 294 U.S. 587 (1935); Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482 (1977).

104. *See* notes 27-40 *supra* and accompanying text.

105. *See* note 30 *supra*.

106. *See* note 68 *supra*.

guarantee impartiality. The underlying reasons for exercising the challenge are equally important in maintaining impartiality.[107] The *Swain* Court correctly viewed peremptory challenges as a desirable tool to which both the prosecution and defense could resort in order to promote an impartial decision.[108] The *Swain* Court failed, however, to appreciate the valuable lesson of history: when peremptories no longer promote impartiality, the right to exercise the peremptory challenge must be restricted.[109]

After the *Payne* court discussed the erosion of *Swain* it established a less onerous test for determining systematic exclusion. *Payne* proposed that the trial judge have the authority to order the prosecutor to explain his use of peremptory challenges when it "reasonably appears" to the trial court that the prosecutor is systematically excluding blacks,"[110] and presumably other cognizable groups. While essentially adopting a case by case approach, the *Payne* court indicated that the trial judge should consider two factors. First, the judge should consider the backgrounds of the excluded jurors.[111] Then, he should look at the characteristics which distinguish the excluded jurors from the chosen jurors.[112]

The *Payne* standard of "reasonably appears," which was not defined by the *Payne* court and which has yet to be construed by any other court, lends little guidance to the courts. The determination of whether it reasonably appears that systematic exclusion has occurred may vary greatly from judge to judge. Without more explicit criteria, some judges may entertain frivolous claims of systematic exclusion.

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107. The fact that peremptory challenges can be exercised to eliminate the extremes of partiality does not guarantee that the device will be used in such an exemplary manner. The successful claims of discrimination in the jury selection process, *see, e.g.*, Duren v. Missouri, 439 U.S. 357 (1979) (women underrepresented on jury panels); Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-Americans systematically excluded from sitting as grand jurors), are indicative of attempts by the prosecutors to manipulate the jury system not towards impartiality, but towards the biases of select segments of society.

108. Swain v. Alabama, 380 U.S. 202, 209 (1965).

109. *See* notes 28-32 *supra* and accompanying text. Since impartiality is the ultimate goal, any proposal to restrict the unfettered exercise of the peremptory must be weighed in terms of its potential contribution or imposition upon impartiality.

110. 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050.

111. *See id.* at 1044-45, 436 N.E.2d at 1054. the court compared the backgrounds of the excluded jurors in order to determine whether the excluded blacks shared a common characteristic other than race. *Payne* determined that these excluded prospective jurors were heterogeneous except for their race. *Id.*

112. *Id.* This consideration is concerned with those characteristics found in the excluded jurors that mandated their exclusion, and which were not found in the included jurors. "[T]he single distinguishing characteristic that the excluded blacks shared is their race." *Id.* at 1045, 436 N.E.2d at 1054.

The *Payne* court also did not indicate whether or not the number of excluded jurors from the cognizable group would enter into a determination of systematic exclusion. Presumably, in *Payne*, this factor did contribute as the court noted that six of seven blacks were excluded.[113] A strictly numerical test, however, poses serious line drawing problems for future courts.

IV. Alternative Approaches

While *Payne* makes commendable progress by articulating the guidelines already mentioned,[114] it is worthwhile to consider the approaches that other sources have embraced. These alternative approaches do not necessarily solve all the questions unanswered by *Payne*. Nonetheless, some of these approaches do provide worthy considerations that, when read in conjunction with the *Payne* guidelines, create a more constructive analytical tool.

A. *People v. Wheeler*

In *People v. Wheeler*,[115] the California Supreme Court established a three step approach that places a greater burden on the defendant than *Payne* does. In California, where only the defendant can initiate the claim of systematic exclusion, the defendant must "make as complete a record of the circumstances as is feasible."[116] After proving that the persons excluded belong to a cognizable group, as recognized by the cross-section rule,[117] the defendant "must show a strong likelihood that such persons are being challenged because of their group

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113. *See* notes 84-87 *supra*.

114. *See* notes 110-13 *supra* and accompanying text.

115. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

116. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. In California, the defendant must object in a timely manner. *Id.* In *Payne*, the court held that the judge or defendant may initiate the challenge to the prosecutor's use of peremptories. *Payne*, 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050.

117. Id. at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *Taylor* never referred to "cognizable groups" as an element of the cross-section requirement. Courts, in general, have not used consistent terminology to refer to groups that have been excluded from one stage or another of jury service. Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1735. "Cognizable," however, may be the most accurate term for describing those groups. *Id.* at 1735 n.83. Such groups are "defined in terms of any identifiable group characteristic that results in its members sharing distinctive experiences and perspectives. The defining characteristic should clearly identify any individual as within or without a group's membership. . . . [T]he community's perception of it as a group makes its representation important to the legitimacy of the jury system." *Id.* at 1736-37.

association rather than because of any specific bias."[118] If the defendant successfully demonstrates this "strong likelihood" to the satisfaction of the court, the prosecution is then allowed to present evidence rebutting the defendant's prima facie case of systematic exclusion.[119]

The defendant's burden of a "strong likelihood"[120] of systematic exclusion appears, on the surface, to be a stricter requirement than *Payne*'s "reasonably appears."[121] Like *Payne*, *Wheeler* allows for a showing of systematic exclusion in any particular case without requiring that such exclusion be demonstrated in past cases. *Wheeler* does not solve the problem of determining how many excluded jurors establish a case of systematic exclusion. *Wheeler* does require a more objective determination before the subjective view of the judge becomes a factor.[122]

B. Justice Goldberg's View

A second, intermediate approach is that adopted by Justice Goldberg's dissent in *Swain*.[123] Justice Goldberg relied on the "rule of exclusion."[124] This rule established certain criteria for determining whether jury selection was conducted in a discriminatory manner.[125] Justice Goldberg considered the rule of exclusion to be pragmatic and believed that it should not be limited only to the selection of the jury panel.[126] When the criteria delineated by the rule of exclusion are

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118. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. A specific bias relates to the trial at hand or to the parties or witnesses at such trial. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. Such bias is not necessarily one for which a challenge for cause could be exercised. *Id.* at 281-82, 583 P.2d at 765, 148 Cal. Rptr. at 906.

119. *Id.* at 281, 583 P.2d at 764-65., 148 Cal. Rptr. at 906.

120. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

121. *Payne*, 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050. The *Payne* standards have not yet been relied on outside the state of Illinois, and within the state, only one case has followed *Payne*. People v. Gosberry, 109 Ill. App. 3d 674, 440 N.E. 2d 954, 958 (1982).

122. In California the prosecutor is not required to explain his use of peremptories until the judge determines that the defendant has demonstrated a strong likelihood that he has been discriminated against. 22 Cal. 3d at 280, 583 P.2d at 765, 148 Cal. Rptr. at 905. In Illinois, when the judge determines that a reasonable appearance of discrimination is established the prosecutor must explain his exercise of peremptory challenges. 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050.

123. 380 U.S. at 228 (Goldberg, J., dissenting).

124. *Id.* at 232. *See* note 53 *supra* and accompanying text.

125. Hernandez v. Texas, 347 U.S. 475, 480 (1954). The rule of exclusion is still a viable test in jury selection cases. *See* note 53 *supra* and accompanying text.

126. *Swain*, 380 U.S. at 240 (Goldberg, J., dissenting). The Court has never distinguished between exclusion from the jury venire and exclusion from the petit

met[127] the state is obliged to demonstrate that it did not engage in discriminatory jury selection.[128] The *Swain* dissent rejected the majority's requirement that the defendant prove the circumstances and intent relating to the prosecutor's use of peremptories against members of cognizable groups in earlier cases.[129] The majority and dissent in *Swain* agree that some evidence of discrimination at earlier trials is a prerequisite to a determination of systematic exclusion.[130] The *Swain* dissent is more protective of the individual defendant, however, because it required less detail.[131]

C. The Van Dyke Approach

Other approaches for dealing with systematic exclusion through peremptories call into question the value of the peremptory challenge itself. Van Dyke suggests that in order to curtail misuses of the peremptory challenge, the number of peremptories available to the prosecution should be severely reduced.[132] This approach would require a prosecutor to be cautious with his exercise of peremptory challenges.[133]

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jury. "Indeed, no such distinction can be drawn." *Id.* at 239. Application of the rule of exclusion is "neither 'blind' nor 'wooden,' but is realistic" because the same facts "exist whether exclusion from the jury panel or exclusion from the jury itself is involved. . . ." *Id.* at 240.

127. The criteria are met when the group excluded is a significant portion of the population, some members of the group were eligible for jury service, and no member of the group had been called for jury service over a period of time. *See* note 53 *supra*.

128. 380 U.S. at 245 (Goldberg, J., dissenting).

129. *Id.* at 239 (Goldberg, J., dissenting). While the majority required the defendant to provide details about the state's involvement in jury discrimination, *id.* at 224, the dissent noted that the defendant's access to the relevant information is limited. *Id.* at 240 (Goldberg, J., dissenting). Justice Goldberg suggested that the rule of exclusion is better able "to effectuate the Constitution's command." *Id.*

130. *Id.* "[W]here, as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out. . . ." *Id.* at 244-45. *See* notes 60-62 *supra* and accompanying text for *Swain* requirements.

131. Justice Goldberg called for lower "barriers to the elimination of jury discrimination," 380 U.S. at 231, and concluded that a prima facie case of systematic exclusion existed on the basis of the facts in *Swain*. *Id.* at 237.

132. J. VAN DYKE, *supra* note 2, at 169. Van Dyke suggests this approach as the best among several which he discusses. *Id.* at 167-69.

133. Although Van Dyke does not thoroughly explain why his solution is the best, his rationale is apparent. Theoretically, a prosecutor would hesitate before using a peremptory challenge based solely on a prospective juror's affiliation with a cogniza-

Taking Van Dyke's theory to its extreme raises the possibility of abolishing the peremptory challenge and expanding the causes articulated in the "for cause"[134] statutes. Since the peremptory challenge historically has been subject to abuse, and its role has been questioned[135] it is arguable that their elimination would result in no great loss. This assertion should be rejected, however, in light of the favorable functions that peremptory challenges serve for both sides of a proceeding.[136] Challenges for cause, which traditionally deal with only a few apparent biases, could not possibly encompass all the reasons for exclusion that would be valid under a properly applied peremptory challenges. Van Dyke's proposal for reducing the number of peremptory challenges has validity, but it is flawed in that any number of peremptory challenges may be used discriminatorily. Even if the number of peremptories available is severely limited, the ultimate problem persists. A procedure in which peremptory challenges are subject to judicial scrutiny whenever the danger of abuse arises is more likely to contribute to impartiality than is merely limiting the number of peremptory challenges.

D. Synthesis of *Wheeler* and *Payne*

A synthesis of the *Wheeler*[137] and *Payne*[138] guidelines establishes the best approach among those recommended for determining systematic exclusion. The defendant would be obliged to demonstrate that the

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ble group when the prosecutor has only a few peremptories available to challenge those jurors with an obvious, non-statutory bias.

134. *See* note 7 *supra* and accompanying text.

135. *See* notes 27-40 *supra* and accompanying text.

136. Peremptory challenges allow the attorney to probe into the prospective jurors' backgrounds while trying to ascertain bias; the attorney need not fear the possibility that he will alienate a juror by conducting an extensive examination, or by challenging a juror for cause. Lewis v. United States, 146 U.S. 370, 376 (1892) (a juror may be 'provoked' to the point of resentment by the attorney's questions). Recently, the New York Court of Appeals affirmed its support for peremptory challenges because peremptories allow counsel to exclude prospective jurors who shield or conceal subtle biases which are not immediately apparent, but of which counsel is cognizant. People v. McCray, 57 N.Y.2d 542, 548, 443 N.E.2d 915, 918, 457 N.Y.S.2d 441, 444 (1982). *See also* Judge Fuchsberg's dissent in *McCray, id.* at 556, 558, 443 N.E.2d at 923, 924, 457 N.Y.S.2d at 449, 450 (peremptory challenges "eradicate the smaller incidence of patent prejudice rather than the far greater one of latent prejudice . . . ").

137. See notes 115-20 *supra* and accompanying text for a discussion of the *Wheeler* approach.

138. See notes 110-12 *supra* and accompanying text for a discussion of the *Payne* approach.

excluded jurors were members of a cognizable group.[139] The jury's function is frustrated if the impartial but peculiar views of a cognizable group are excluded. A segment of society is then prohibited from sharing its unique perspective and understanding of events.[140] The defendant might also follow a suggestion made in *Wheeler* by showing that the prosecution used a disproportionate number of peremptories to strike members of the cognizable group.[141] The significance of this showing will vary greatly from case to case, but in no instance should it be considered in isolation.

Next the defendant could be required to demonstrate that the backgrounds of the excluded jurors do not reveal any basis for exclusion.[142] Statements made by jurors during voir dire which reveal traits of both included and excluded jurors should be introduced.[143] The court can compare these traits in order to determine whether characteristics of the excluded jurors in any way justified the prosecutor's conclusion that excluded jurors might have been biased.

Still another factor the court could consider is whether the prosecutor's questions were sufficiently probative.[144] If counsel has relied solely on superficial questioning to establish bias, the court has additional justification for considering the attorney's motives to be suspect. Cursory examinations combined with a significantly higher proportion of peremptory challenges against members of a cognizable group provides further evidence to the court that the attorney was predisposed to exclude group members.

Proving each of these factors will be facilitated by a record of the voir dire proceedings. The record will contain the exchange between the prospective jurors and the questioning attorneys, and will note against whom peremptory challenges were exercised. Therefore, an opportunity to maintain a record of voir dire should be made available by the court to any defendant who requests it.

The factors suggested above are not conclusive of systematic exclusion. They are proposed as elements contributing to the establishment

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139. *See* note 117 *supra*.

140. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Peters v. Kiff, 407 U.S. 493, 503 (1972) (plurality opinion of Marshall, J., joined by Douglas and Stewart, JJ.).

141. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

142. *See* note 111 *supra* and accompanying text.

143. *See* note 112 *supra* and accompanying text.

144. 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905.

of a prima facie case of discriminatory dismissals. A prima facie case is established when the court is not satisfied that there is a reasonable explanation for the prosecutor's inference that certain jurors may have been biased.

Once a prima facie case has been established the prosecutor should be given an opportunity to articulate the reasons for his conclusion that a juror showed signs of impartiality.[145] To prevent the state from inventing reasons for exclusion the judge should be allowed to inquire as to the specific actions or responses of the excluded jurors which gave the impression of bias.[146] The court then should accept the prosecutor's explanation if it is not based solely on that juror's affiliation with a cognizable group[147] and if a reasonable attorney relying on the same information would have deduced that a particular juror might be biased. If, however, the state's explanation is insufficient on either of these accounts, the court has persuasive evidence of systematic exclusion.

There are several advantages to this proposal. Prosecutors will be discouraged from using peremptories discriminatorily because defendants will have a reasonable chance of successfully voiding an improperly selected jury. Prosecutors will want to avoid beginning the jury selection process anew.

The defendant's burden of proof, based on several specific considerations is manageable. The fact that the county or the individual prosecutor does not have a history of systematic exclusion is not, and should not be, a factor in evaluating any individual's objection.[148] Furthermore, the defendant is not required to conduct an exhaustive search for evidence of past discriminatory practices at voir dire.[149]

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145. *Swain*, *Wheeler*, *Soares*, and *Payne* all require this step. The state should be allowed the opportunity to present facts on its behalf to rebut the conclusion that the state acted improperly.

146. Judges can effectively evaluate the reasons submitted because they are familiar with the conditions surrounding the trial and with the practices of the local prosecutors. Kuhn, *supra* note 100, at 295.

147. *See Wheeler*, 22 Cal. 3d at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906 (to justify the use of peremptory challenges the party allegedly misusing them must show that group association was not the sole reason for excluding the jurors); *see also Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, *supra* note 117, at 1740 (demonstration of a prima facie case of discrimination "shift[s] the burden to the allegedly offending party to show that its challenges were not exercised on the basis of group association").

148. *Swain* requires a history of systematic exclusion by insisting that all claimants prove that they are not the first victim of systematic exclusion. *See* notes 57-62 *supra* and accompanying text. *See also* notes 93-97 *supra* and accompanying text for criticisms of *Swain*.

149. "The defendant is party to only one criminal proceeding, and has no personal experience of racial discrimination in the other trials held in that court. Nor can he

Finally, this approach pays proper deference to defendants' constitutional rights while preserving the essential integrity of the peremptory challenge. The state is not required to explain itself until the defendant has met his burden of proof. The burden requires enough detail that a defendant's frivolous claim will not establish a prima facie case and consequently will not require the prosecutor to justify his use of the peremptory challenge. Also, the prosecutor's motives are open to question only in those limited instances involving discrimination against cognizable groups. All other uses of peremptory challenges remain closed to scrutiny.

V. Conclusion

Recently, peremptory challenges have been exercised to systematically exclude cognizable groups from petit juries. Such practices undermine the integrity of the sixth amendment's guarantee that juries will represent a fair cross-section of the community. In order to maintain the import of the constitutional guarantee, courts should not feel restrained from inquiring into an attorney's motives when it appears that peremptories have been applied discriminatorily. An intrusion into the expanse of the peremptory challenge can be justified if the result is the elimination of systematic exclusion and the facilitation of more representative juries.

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easily obtain such information. . . ." *Wheeler*, 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 909.