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People v. Payne and the Prosecution's Preemptory Challenges: Will They Be Preempted?

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PEOPLE V. PAYNE AND THE PROSECUTION'S PEREMPTORY CHALLENGES: WILL THEY BE PREEMPTED?

On the night of July 23, 1978, Frederick Perry, a black man, was shot in an altercation at a local park.[1] A jury of eleven whites and one black convicted Stanley Payne, another black man, of three counts of aggravated battery and one count of armed violence.[2] During voir dire,[3] the prosecution exercised eight peremptory challenges.[4] Six were used to exclude all but one of the seven prospective black jurors who had been drawn from the jury venire.[5] The defense objected after each prospective black juror was excused, claiming that the prosecution's use of peremptory challenges systematically excluded those veniremen solely because they were black and, consequently, deprived the defendant of his federal[6] and state[7] constitutional rights to a fair and impartial jury.[8] The judge overruled each objection,[9] and ultimately Payne was convicted.

On appeal, in *People v. Payne*, the Third Division of the First District of the Illinois Appellate Court held that a defendant's sixth amendment right[10] to an impartial jury drawn from a representative cross-section of the community is violated when the prosecution excludes discrete groups from the

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1. Brief for Appellant at 9-10, People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1st Dist. 1982) [hereinafter cited as Appellant].

2. Appellant, *supra* note 1, at 7.

3. Voir dire is the preliminary questioning of prospective jurors by either the court or counsel in order to determine the competency and potential partiality of individual jurors. *See* BLACK'S LAW DICTIONARY 1412 (5th ed. 1979) [hereinafter cited as BLACK'S].

4. People v. Payne, 106 Ill. App. 3d 1034, 1044, 436 N.E.2d 1046, 1054 (1st Dist. 1982). The jury selection procedure generally involves compiling a list of potential jurors from the eligible population. This list is then reduced by eliminating those individuals who lack minimum qualifications (e.g., age, residency, health), are exempt from jury service by statute, or are excused for various hardship reasons. Jury panels or "venires" are selected from those people remaining on the list. During voir dire examination, attorneys dismiss prospective jurors for cause or by exercising their peremptory challenges. *See* ILL. REV. STAT. ch. 78, §§ 1-36 (1981) (statutes governing jury selection procedures and challenges for cause); *see also* ILL. REV. STAT. ch. 38, § 115-4(e) (1981) (statute governing peremptory challenges).

5. Brief for Appellee at 7, People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1st Dist. 1982). After exercising its peremptory challenges, the prosecution allowed the last black on the panel to be seated as a juror. 106 Ill. App. 3d at 1044, 436 N.E.2d at 1054.

6. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." U.S. CONST. amend. VI.

7. The Illinois Constitution provides in pertinent part: "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." ILL. CONST. art. I, § 8.

8. Appellant, *supra* note 1, at 7.

9. 106 Ill. App. 3d at 1044, 436 N.E.2d at 1054.

10. *See supra* note 6.

petit jury[11] through the exercise of peremptory challenges which are based on an assumption of group bias.[12] In its attempt to ensure a cross-sectional petit jury, however, the *Payne* court failed to articulate a clear standard for limiting the use of peremptory challenges. Thus, *Payne* has created a procedural uncertainty which might hinder the efforts of counsel to obtain an impartial jury. Moreover, the decision will hamper the prosecution's use of peremptory challenges.

BACKGROUND

Fourteenth Amendment Challenges to Discriminatory Jury Selection

The United States Supreme Court first considered fourteenth amendment challenges to jury selection procedures in a trilogy of cases decided in 1880.[13] In upholding defendants' claims of equal protection violations, the Court observed that the exclusion of blacks from jury service not only injured the defendants, but also denied a class of potential jurors the "privilege of participating . . . in the administration of justice,"[14] and imposed on that class the stigma of being unfit for jury service. While defendants have no right to demand that members of their race be included on the jury,[15] the Court held, states are prohibited from systematically denying members of defendants' race the right to participate as jurors.[16]

Although it recognized the validity of defendants' fourteenth amendment challenges to jury selection procedures, the Supreme Court's equal protection analysis imposed upon them a difficult burden of proof. First, defendants were required to establish that the excluded group was recognized as a distinct class and constituted a substantial segment of the population.[17]

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11. The petit jury is that jury which is used in the trial of a civil or criminal action. The petit jury functions as the finder of fact and determines guilt or innocence. It is to be distinguished from the grand jury which is an accusatory body that determines whether there is probable cause to believe that a crime was committed and whether an indictment should be granted. *See* BLACK'S, *supra* note 3, at 768.

12. 106 Ill. App. 3d at 1036-37, 436 N.E.2d at 1048. Group bias is the general prejudice a prospective juror may harbor merely because of his particular societal associations. In contrast, specific bias is that bias which a prospective juror may have concerning the particular case on trial, the witnesses, or the parties. *See* People v. Wheeler, 22 Cal. 3d 258, 274-76, 583 P.2d 748, 760-61, 148 Cal. Rptr. 890, 901-02 (1978).

13. *See Ex parte* Virginia, 100 U.S. 339 (1879); Virginia v. Rives, 100 U.S. 313 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879). *See generally* Neal v. Delaware, 103 U.S. 370 (1880) (exclusion of blacks from petit jury panel violates right to equal protection).

14. Strauder v. West Virginia, 100 U.S. at 308.

15. Virginia v. Rives, 100 U.S. at 323.

16. *Ex parte* Virginia, 100 U.S. at 346-49.

17. *See* Theil v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (concept of distinct class may include "economic, social, religious, racial, political and geographical groups of the community"). Although factors used to determine a cognizable group are vague, some of the standards employed include the following: whether the persons "have a different outlook psychologically and economically. . . . a different social outlook, . . . a different sense of justice, and a different conception of a juror's responsibility. . . ." *Id.* at 230 (Frankfurter,

Second, in order to have standing, defendants had to be members of the excluded group.[18] In addition, they had to show that members of the group were qualified for jury service.[19] Finally, defendants had to demonstrate, with convincing evidence, a pattern of group exclusions which revealed that the selection procedures were implemented purposely to produce the exclusions.[20] The only objective evidence available to establish systematic

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J., dissenting). The Court has applied this analysis to many groups. *See, e.g.,* Hernandez v. Texas, 347 U.S. 475 (1954) (Mexicans are a cognizable group); Ballard v. United States, 329 U.S. 217 (1946) (lower socio-economic class status constitutes a cognizable group); *see also* Rubio v. Superior Ct., 24 Cal. 3d 93, 98, 593 P.2d 595, 598-99, 154 Cal. Rptr. 734, 737-38 (1979) (ex-felons and resident aliens are not cognizable groups because other members of the community are capable of representing these groups' perspectives on the petit jury).

18. Although not explicitly stating that a defendant must be a member of the class excluded from the jury in order to have standing, the Court in Strauder v. West Virginia, 100 U.S. 303 (1879), implied such a requirement by phrasing the issue before it as "whether, in the composition or selection of jurors by whom *he* is to be indicted or tried, all persons of *his* race or color may be excluded by law. . . ." *Id.* at 305 (emphasis added). Similarly, in holding that the application of Delaware's statutory qualifications for jury service unconstitutionally excluded blacks, the Court in Neal v. Delaware, 103 U.S. 370 (1880), stated that "while a colored citizen . . . cannot claim, as a matter of right, that *his* race shall have a representation on the jury . . . he is entitled, 'that in the selection of jurors . . . there shall be no exclusion of his race, and no discrimination against them, because of their color.' " *Id.* at 394 (emphasis added) (quoting Virginia v. Rives, 100 U.S. 313, 323 (1879)). Accordingly, a case involving an equal protection challenge to a petit jury's composition consists of a defendant of a particular class alleging an unconstitutional exclusion of that class. *See* Avery v. Georgia, 345 U.S. 559 (1953) (selection of jurors from county tax returns in which names of whites were printed on white tickets and names of blacks were printed on yellow tickets held to be a violation of equal protection); Hollins v. Oklahoma, 295 U.S. 395 (1935) (per curiam) (black defendant demonstrated an unconstitutional exclusion of blacks from jury service). For a criticism of those cases following the "same class" standing requirement, see Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 919-25 (1965) [hereinafter cited as Note, *Defendant's Challenge*]. Finally, in Peters v. Kiff, 407 U.S. 493 (1972), the Supreme Court granted standing to a nongroup member, but analyzed the claim under due process rather than equal protection. *Id.* at 504; *see also infra* note 117; Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After* Taylor v. Louisiana, 43 TENN. L. REV. 1, 14-15 (1975) [hereinafter cited as Daughtrey].

19. *See* Norris v. Alabama, 294 U.S. 587, 597 (1935).

20. Defendants who challenge the jury selection process or the composition of the jury pool must prove a discriminatory intent, and must demonstrate a substantial disparity between the representation of the group in the jury pool and the group's representation in the total population. *See* Castaneda v. Partida, 430 U.S. 482, 494 (1977). The equal protection analysis is the same whether a defendant challenges petit jury or grand jury venires. Furthermore, statistical proof alone may be insufficient to establish a prima facie case. A defendant also must prove that the actual selection procedures are not racially neutral. *See* Alexander v. Louisiana, 405 U.S. 625 (1972). For a discussion of Justice Jackson's view that there should be a distinction between improper grand jury and petit jury selection methods, see Gibson, *Racial Discrimination on Grand Juries*, 3 BAYLOR L. REV. 29, 33-37 (1950). For a discussion regarding group discrimination on the jury under a due process analysis, see generally Note, *Defendant's Challenge*, *supra* note 18.

The extent of proof required to establish a prima facie case of purposeful exclusion varies with the bases upon which the defendant rests the challenge. For example, in reviewing challenges to source lists, the Supreme Court has held that no source which is inherently discriminatory

underrepresentation of a group consisted of source lists and venire compositions.[21] As a result, defendants' equal protection challenges of jury compositions were limited to these early stages of jury selection.[22] Once the prima facie case was established, the state had to rebut the presumption of unconstitutionality by showing that the exclusions were either non-discriminatory or justified by a legitimate state interest.[23]

Later, in *Swain v. Alabama*,[24] a defendant challenged the composition of the petit jury that convicted him as being unrepresentative of the community due to the prosecution's exclusion of blacks through the exercise of its peremptory challenges.[25] The standard formulated by the Court to deal with such petit jury objections placed an even greater burden of proof on the defendant than was required in the earlier equal protection challenges to jury selection. The *Swain* Court required the defendant to show not only that peremptory challenges were employed systematically to exclude blacks over a period of time, but also that this exclusion resulted solely from the

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may be used, and that the defendant need not establish a discriminatory intent. *See* Sims v. Georgia, 389 U.S. 404 (1967) (per curiam) (jury list including only 9.8% of county's blacks and which was formed from a segregated county tax list showing that 24% of county's taxpayers were blacks held unconstitutional); Whitus v. Georgia, 385 U.S. 545 (1967) (segregated tax lists are prima facie proof of an unconstitutional jury selection). For a discussion of the inadequacies of various source lists, see J. VAN DYKE, JURY SELECTION PROCEDURES 85-106 (1977) [hereinafter cited as VAN DYKE]; Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776 *passim* (1977).

21. The venire is a group of prospective jurors, summoned to appear on a particular day, from which the petit jury is selected. BLACK'S, *supra* note 3, at 1395. For a general discussion of practices which result in underrepresentative juries and of suggested procedures for gathering evidence sufficient to establish a prima facie case of systematic exclusion, see A. GINGER, JURY SELECTION IN CRIMINAL TRIALS §§ 3.29-3.36, 6.9-6.23 (Supp. 1980) [hereinafter cited as GINGER].

22. For purposes of discussion, the "early stages of jury selection" refers to those procedures used by the jury commissioner in compiling the general jury list and does not include the processes of voir dire, challenging prospective jurors, and impaneling the jury.

23. Mere government assertions, however, that the excluded group was not qualified or that there was no discriminatory intent are insufficient to rebut the defendant's prima facie case. *See* Turner v. Fouche, 396 U.S. 346, 361 (1970); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958); Cassell v. Texas, 339 U.S. 282, 288-90 (1950); Patton v. Mississippi, 332 U.S. 463, 466-69 (1947); *cf.* Hoyt v. Florida, 368 U.S. 57, 61-65 (1961) (statute requiring women to register with court clerk in order to qualify for jury duty served legitimate state interest in promoting the integrity of the family).

24. 380 U.S. 202 (1965). The defendant, a black man, was convicted by an all white jury of raping a white woman. *Id.* at 203.

25. *Id.* at 209. Focusing on the prosecutor's trial tactics, the defendant in *Swain* contended that purposeful systematic exclusion was demonstrated by the exclusion of the eight blacks on the venire as well as by the state's consistent exercise of its peremptory challenges in criminal trials so that no blacks had served on a petit jury in 15 years. *Id.* at 222-28. The Court acknowledged that the Alabama jury selection system was imperfect, but held that such an imperfection was not evidence of purposeful discrimination. *Id.* at 224. Even though no blacks served on the jury that convicted Swain, eight blacks had appeared on the venire. *Id.* at 205. The Court, accordingly, found that Alabama had not excluded blacks from participation in the jury process. *Id.* at 206.

prosecution's peremptory challenges.[26] Thus, by requiring such a showing, the Court effectively insulated the peremptory challenge from judicial inquiry.[27]

In formulating its standard in *Swain*, the Supreme Court recognized that to achieve the underlying purpose of peremptory challenges, they must be exercised without reason and without subjection to the court's control or inquiry.[28] Peremptory challenges, according to *Swain*, were important in achieving an

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26. *Id.* at 226-27. The *Swain* Court noted that unlike selection procedures which were controlled completely by the state, both prosecution and defense counsel participate in challenging prospective jurors. Under an equal protection challenge to selection procedures, underrepresentation alone was sufficient to prove systematic discrimination, assuming the elements of a prima facie case were established, and the absence of a compelling state justification. In contrast, where defendants asserted that minorities were excluded from jury service because of the prosecution's exercise of its peremptory challenges, proof of the underrepresentative nature of the juries alone was insufficient. Rather, the *Swain* Court required defendants to demonstrate that the underrepresentation resulted solely from the prosecution's exercise of its challenges, as well as to show that no actions of the defense contributed to the lack of minority representation on a particular petit jury. *Id.*

27. Commentators have maintained that by insulating the peremptory challenge from judicial inquiry, the *Swain* Court placed a statutorily based right above the defendant's constitutional right of equal protection. *See* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 287-88 (1968) [hereinafter cited as Kuhn]; Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554, 558, 569-70 (1977); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1164-65 (1966).

In fact, the vast majority of defendants attempting to meet the requirements of *Swain* have failed. *See, e.g.*, United States v. Durham, 587 F.2d 799, 801 (5th Cir. 1979); United States v. McLaurin, 557 F.2d 1064, 1076 (5th Cir. 1977); State v. Williams, 535 S.W.2d 128, 129-30 (Mo. Ct. App. 1976); State v. Davis, 529 S.W.2d 10, 16-19 (Mo. Ct. App. 1975); Commonwealth v. Henderson, 497 Pa. 23, 31-34, 438 A.2d 951, 954-56 (1981); State v. Raymond, ___ R.I. ___, ___, 446 A.2d 743, 745 (1982); State v. Grady, 93 Wis. 2d 1, 10-13, 286 N.W.2d 607, 609-12 (Ct. App. 1979). At least two defendants, however, have successfully maintained a *Swain* challenge. *See* State v. Washington, 375 So. 2d 1162 (La. 1979) (prosecutor's consistent rejection of blacks by exercise of peremptory challenges established); State v. Brown, 371 So. 2d 751 (La. 1979) (defendant established that in a series of cases the prosecutor's exercise of his peremptory challenges consistently resulted in underrepresentation of blacks on the petit jury). For a discussion of earlier cases in which blacks have been excluded from jury service through the exercise of peremptory challenges, see VAN DYKE, *supra* note 20, at 154-60.

28. 380 U.S. at 220. The *Swain* Court examined the common law history, nature, and function of the peremptory challenge and concluded that it is "one of the most important of the rights secured to the accused." *Id.* at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). The Court added that:

> [a]lthough historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee "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."

Id. at 220 (citation omitted). Thus, the Court held that although peremptory challenges were not constitutionally required, they were a fundamental element of the jury trial and should be equally accessible to the defendant and to the state. *Id.* at 219-20. For an analysis of the common law that differs from the *Swain* Court's interpretation, see GINGER, *supra* note 21, at § 12.1; VAN DYKE, *supra* note 20, at 145, 152.

impartial jury because they enabled a party to excuse prospective jurors on the basis of either a real or imagined subjective perception of bias which ordinarily could not be established during voir dire. The *Swain* Court noted that these perceptions frequently were based on considerations such as juror appearance or demeanor, and characteristics such as religion, occupation, race, and socio-economic background.[29] The Court noted that permitting judicial inquiry into the reason for exercising a peremptory challenge would radically alter the function and nature of the device.[30] Therefore, even though an individual prosecutor exercised his challenges to shape the racial composition of a single petit jury, his peremptory challenges were not subject to the requirements of equal protection.[31]

Swain thus demonstrated the Court's fear that opening the peremptory challenge to attack would undermine its function. The Court's endorsement of the peremptory challenge acknowledged that racial factors were a legitimate trial-related basis for exercising the peremptory challenge.[32] Furthermore, *Swain* recognized the impossibility of applying a traditional systematic exclusion analysis to the small number of individuals present on the venire within a particular trial.[33]

The Sixth Amendment and the Cross-Sectional Analysis of Jury Selection Procedures

With the application of the sixth amendment to state criminal proceedings,[34] challenges that jury selection procedures excluded societal groups from jury service shifted from the purposeful systematic exclusion analysis of the fourteenth amendment to an analysis related to the fair cross-section requirement of the sixth amendment.[35] In *Taylor v. Louisiana*,[36] the Court held

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29. *Swain*, 380 U.S. at 220-21. The Court noted that unrestricted use of peremptory challenges was important to enable attorneys to conduct a thorough voir dire, and establish challenges for cause without fear of antagonizing jurors who ultimately sit on the petit jury. *Id.* at 219-20.

30. "To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge." *Id.* at 221-22.

31. "In the light of the purpose of the peremptory system and the function it serves . . . we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." *Id.*

32. The peremptory challenge frequently is exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the *race*, religion, nationality, occupation, or affiliations of people. . . ." *Id.* at 220 (emphasis added).

33. *Id.* at 221-22; *see* Note, *Prosecutorial Misuse of the Peremptory Challenge to Exclude Discrete Groups from the Petit Jury:* Commonwealth v. Soares, 21 B.C.L. REV. 1197, 1202-03 (1979) [hereinafter cited as Note, *Discrete Groups*].

34. Duncan v. Louisiana, 391 U.S. 145 (1968) (the right to a jury trial in criminal cases involving serious penalties as guaranteed by the sixth amendment is applicable to the states through the fourteenth amendment).

35. For the relevant text of the sixth amendment, see *supra* note 6.

36. 419 U.S. 522 (1975). The defendant challenged the validity of a state statute which required women to file a written request with the court commissioner in order to be included on the jury list. *Id.* at 523.

that a jury drawn from a representative cross-section of the community was an essential component of the defendant's sixth amendment right to a fair and impartial jury.[37] The *Taylor* Court stressed that in order for the actual jury to act as a community hedge against arbitrary and overzealous law enforcement, the jury pool must contain a broad "cross-section" of the community.[38] This broad cross-section was necessary to guarantee the "subtle interplay" of influence between distinct groups.[39] The Court also noted that total community participation in the administration of criminal justice was required by this country's democratic heritage.[40]

Having found that the sixth amendment confers a right to a jury drawn from a representative cross-section of the community, the *Taylor* Court declared that a defendant should have standing to challenge the composition of the jury pool, regardless of his relation to the excluded group.[41] The cross-sectional analysis in *Taylor* placed the initial burden on the defendant to prove a prima facie violation of his right to a representative cross-section.[42]

The elements of this prima facie showing were clearly delineated in *Duren v. Missouri*.[43] According to *Duren*, the defendant must demonstrate that a "distinctive" group[44] in the community had been systematically[45] underrepresented in the jury venires, and that the exclusion was inherent in the jury selection process.[46] Upon demonstration of a prima facie case, the state

37. *Id.* at 530-31.

38. *Id.*

39. *Id.* at 531-32 (quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)).

40. *Id.* at 530.

41. *Id.* at 526.

42. Although it did not formulate any specific test for establishing a prima facie case, the *Taylor* Court distinguished the burden of proving a violation under the sixth amendment cross-sectional analysis from that required under the fourteenth amendment. The Court noted that upon a demonstration that a distinctive class was excluded from jury service, "[t]he right to a proper jury cannot be overcome on merely rational grounds." *Id.* at 531-35.

43. 439 U.S. 357 (1979). The defendant challenged a Missouri statute which granted women an automatic exemption upon request by asserting that the statute resulted in an unconstitutional underrepresentation of women on jury venires; thus, it violated his constitutional right to a jury drawn from a cross-section of the community. *Id.* at 360-62; *see* United States v. Test, 550 F.2d 577, 585 (10th Cir. 1976) (pre-*Duren* case in which the court delineated similar prima facie elements in establishing a violation of the *Taylor* fair cross-section standard).

44. The requirement that the group excluded be "distinct" was established in Hernandez v. Texas, 347 U.S. 475 (1954), in which the Court noted that race, color and various "other differences from the community norm" define groups in need of equal protection. *Id.* at 478.

45. Under the *Duren* sixth amendment cross-sectional representation analysis, consistent systematic exclusion must be demonstrated. 439 U.S. at 366.

46. *Id.; see* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966) (use of mathematical analysis in determining the probability that discriminatory systematic exclusion has occurred); Comment, *The Civil Practitioner's Right to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases General*, 20 U.C.L.A. L. REV. 581 (1973) (discussing the proof of substantial underrepresentation through use of statistical analysis). *See generally* NATIONAL JURY PROJECT, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (Kairys ed. 1975) (providing a comprehensive guide for the practicing attorney faced with having to demonstrate systematic exclusion) [hereinafter cited as PROJECT].

had to justify the underrepresentation by showing the existence of a significant state interest which prevented compliance with the cross-sectional representation requirement.[47]

Initially, the *Taylor-Duren* analysis appears to be very similar to the equal protection prima facie test used to establish a presumption of discrimination.[48] The principal distinction between the two approaches is in the manner in which the prima facie case is rebutted. The presumption of discrimination in an equal protection claim would be rebutted by proving the lack of discriminatory intent.[49] In the *Taylor-Duren* fair cross-section analysis, purposeful discrimination is irrelevant because the emphasis is wholly on the composition of the venire.[50] Thus, the *Taylor-Duren* analysis significantly decreased the burden of defendants who challenged jury selection procedures. It must be noted, however, that the *Taylor-Duren* decisions are limited to the early stages of jury selection. The *Taylor* Court specifically stated that the actual petit juries need not reflect "various distinctive groups in the population,"[51] and confined its holding to "jury wheels, pools of names, panels, or venires from which juries are drawn."[52] By specifically limiting the cross-sectional analysis under the sixth amendment to these stages of jury selection, the Court did not directly overrule *Swain* since that case dealt with the composition of the petit jury.

Although federal courts have expressed a disfavor for the prosecution's use of peremptory challenges,[53] the *Swain* holding has been followed

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47. 439 U.S. at 368. The Court acknowledged the state's interest in assuring that family members responsible for the care of children should not be burdened with jury duty. By excluding all women as a group to accomplish this interest, however, the state engaged in overinclusive categorization. *Id.* at 370.

48. *See supra* text accompanying notes 14-18. In his dissent in *Duren*, Justice Rehnquist attacked the majority's cross-sectional approach as being nothing but a revived equal protection analysis which would cause confusion in state legislatures. He reasoned that judicial application of these apparently interchangable analyses would result in inconsistent decisions regarding the constitutionality of statutes regulating jury selection procedures. Justice Rehnquist concluded that this inconsistency would confuse legislators as they attempted to effectuate valid state interests through the provision of exemptions for particular groups of individuals. *Id.* at 371-78. *Compare* Hoyt v. Florida, 368 U.S. 57 (1961) (a statute requiring women to register with court clerk in order to qualify for jury service was a reasonable means to effectuate the state's interest under an equal protection analysis) *with* Taylor v. Louisiana, 419 U.S. 522 (1975) (a statute similar to the one in *Hoyt* was held to be a violation of the sixth amendment's cross-sectional representation requirement).

49. *See supra* notes 20-21 and accompanying text.

50. *See supra* note 48; *see also* United States v. Perez-Hernandez, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982) (distinction between fair cross-section rebuttal analysis and equal protection rebuttal analysis).

51. 419 U.S. at 538.

52. *Id.*

53. Two federal courts have used their supervisory powers to remedy prosecutorial abuse of peremptory challenges. In United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974), despite a finding that the *Swain* standard had not been met, the court relied on Rule 33 of the Federal Rules of Criminal Procedure to grant the defendant a new trial in the interest of justice, because blacks had been underrepresented in the venire and the prosecution had exer-

consistently.[54] Additionally, no attempt has been made by federal courts to extend the *Taylor* rationale to the petit jury selection stage.[55] Two state supreme courts, however, examining *Taylor* in conjunction with their state constitutional guarantees, have extended *Taylor* to the petit jury in fashioning a remedy for alleged prosecutorial abuse of peremptory challenges.[56]

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cised peremptory challenges against six of the seven prospective black jurors. *Id.* at 1248-50. The court in United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976), disallowed the prosecution's peremptory challenges. The *Robinson* court ordered the United States Attorney's office to maintain records of the prosecution's use of peremptory challenges to exclude blacks for the purpose of using the data to assist future defendants who assert a *Swain* challenge. The Second Circuit, however, vacated *Robinson* in United States v. Newman, 549 F.2d 240 (2d Cir. 1977), holding that the *Robinson* court based its order on an erroneous finding of fact. *See generally* Note, *Exclusion of Black Venire-Men Through Use of Prosecution's Peremptory Challenges Held to Be in Violation of Equal Protection Clause*, 8 CUM. L. REV. 307 (1977) (detailed analysis of *Robinson* and *Newman*).

54. *See, e.g.*, United States v. Jones, 663 F.2d 567 (5th Cir. 1980) (an all white jury resulting from the state's peremptory challenges was not systematic exclusion); United States v. Durham, 587 F.2d 799 (5th Cir. 1979) (the prosecution's exercise of its peremptory challenges in the context of a single case, such that the defendant is tried by an all white jury, does not constitute systematic exclusion); United States v. McLauren, 557 F.2d 1064 (5th Cir. 1977) (peremptory challenges by the prosecution against five of the six blacks on the venire does not constitute systematic exclusion in the context of a single case), *cert. denied*, 434 U.S. 1020 (1978); United States v. Nelson, 529 F.2d 40 (8th Cir. 1976) (finding evidence of systematic exclusion insufficient, but viewing the allegations against the prosecutor seriously and authorizing the lower courts to act if the statistics indicate such allegations are valid), *cert. denied*, 426 U.S. 922 (1976); United States v. Carter, 528 F.2d 844 (8th Cir. 1975) (finding systematic exclusion, but warning prosecutors that action would be taken should abuse continue), *cert. denied*, 425 U.S. 961 (1976); United States v. Conley, 503 F.2d 520 (8th Cir. 1974) (a low percentage of blacks in general population which results in representation on venires which the prosecution can eliminate through its peremptory challenges does not preclude an impartial jury); United States v. Carlton, 456 F.2d 207 (5th Cir. 1972) (trial by an all white jury resulting from state's exercise of its peremptory challenges does not violate equal protection); United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971) (the exclusion of blacks from a jury in a single case does not constitute systematic exclusion).

55. *See, e.g.*, Brown v. Harris, 666 F.2d 782 (2d Cir. 1981) (when venire contains young adults, *Taylor* does not require that they appear on the petit jury), *cert. denied*, 456 U.S. 948 (1982); Smith v. Balckom, 660 F.2d 573 (5th Cir. 1981) (*Taylor* does not require representation on the petit jury of individuals opposed to the death penalty); United States v. Yazzie, 660 F.2d 422 (10th Cir. 1981) (underrepresentation of Indians on a petit jury is not a violation of the *Taylor* cross-sectional representation requirement), *cert. denied*, 455 U.S. 923 (1982).

56. *See* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). For examples of lower state court rulings extending the *Taylor* rationale to both the petit jury and the prosecution's exercise of its peremptory challenges, see People v. Thompson, 79 A.D.2d 87, 106-08, 435 N.Y.S.2d 739, 752-54 (1981); People v. Boone, 107 Misc. 2d 301, 304-05, 433 N.Y.S.2d 955, 957-58 (1980); People v. Kagan, 101 Misc. 2d 274, 276-77, 420 N.Y.S.2d 987, 989 (1979). In *Kagan*, systematic exclusion of a defendant's ethnic group was held unconstitutional; however, in the instant case the court found insufficient evidence of such systematic exclusion. 101 Misc. 2d at 278, 420 N.Y.S.2d at 990. Most courts, however, have declined to control the prosecution's peremptory challenges in the context of a single trial by following the *Wheeler-Soares* extension of the *Taylor* cross-section rationale to the petit jury. *See, e.g.*, McCray v. State, 395 So.2d 1057, 1059-60 (Ala. Ct. App. 1980); Doepel v. United States,

The Expansion of Taylor *in the State Courts*

The California Supreme Court, in *People v. Wheeler*,[57] held that the state's constitution[58] prohibited the elimination of cognizable groups from the petit jury through the use of peremptory challenges.[59] In justifying its conclusion, the *Wheeler* court equated *Taylor*'s requirement, that venires be representative of a community cross-section, with impartiality of the petit jury. The court reasoned that within the petit jury each individual possesses opinions which result from his association, or lack of association, with a particular societal subgroup.[60] These shared experiences produced common perspectives which were identified in *Wheeler* as group bias.[61] Overall impartiality of the petit jury can only be secured by the interaction of diverse beliefs and values among the jurors.[62] Through the exercise of peremptory challenges, prospective jurors could be excluded on the basis of their membership in a particular subgroup, resulting in a jury dominated by majoritarian prejudices.[63] Accordingly, the court ruled that peremptory challenges exercised on the basis of group bias conflicted with the purpose of a cross-sectional rule, and violated the defendant's state constitutional right to an impartial jury.[64]

Although it acknowledged the vitality of *Swain*, the *Wheeler* court declared

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434 A.2d 449, 457-59 (D.C.), *cert. denied*, 454 U.S. 1037 (1981); State v. Stewart, 225 Kan. 410, 415-17, 591 P.2d 166, 170-72 (1979); Lawrence v. State, 51 Md. App. 575, 584, 444 A.2d 478, 483 (1982); State v. Sims, 639 S.W.2d 105, 109 (Mo. Ct. App. 1982); People v. McCray, 57 N.Y.2d 542, 549, 443 N.E.2d 915, 919, 457 N.Y.S.2d 441, 445 (1982), *cert. denied*, 103 S. Ct. 2438 (1983); Commonwealth v. Henderson, 497 Pa. 23, 31-34, 438 A.2d 951, 954-56 (1981); State v. Raymond, ___ R.I. ___, ___, 446 A.2d 743, 745 (1982); State v. Grady, 93 Wis. 2d 1, 10-13, 286 N.W.2d 607, 609-12 (1979).

57. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

58. The California Constitution provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all. . . ." CAL. CONST. art. I § 16.

59. 22 Cal. 3d at 277, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

60. *Id.* at 271-73, 583 P.2d at 757-59, 148 Cal. Rptr. at 898-901.

61. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. For a detailed analysis of group attributes and opinions, see VAN DYKE, *supra* note 20, at 23-44. *See also supra* note 12.

62. 22 Cal. 3d at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896. The dissent rejected this contention, stating:

> Impartiality is not assured by balancing "biases." Quite the opposite. Such disagreement may indicate that individual prejudices so control the jurors that they are incapable of viewing the issues before them dispassionately. Such disharmony may make a unanimous verdict an impossibility from the outset thus rendering the criminal trial a futile exercise.

Id. at 292, 583 P.2d at 771-72, 148 Cal. Rptr. at 913 (Richardson, J., dissenting). For a discussion which disputes equating cross-sectional representation with jury impartiality, see Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 *passim* (1980).

63. 22 Cal. 3d at 277-78, 583 P.2d at 762, 148 Cal. Rptr. at 903.

64. *Id.* The *Wheeler* court, while reading the *Taylor* requirement of a cross-sectional venire as mandating the same requirement for petit juries, noted the divergence between its interpretation of *Taylor* and the Supreme Court's holding in *Swain*. The court evaded the apparent conflict in the federal law by basing its decision on state constitutional guarantees as independent grounds and noting that "our first referent is California law and divergent decisions of the United States Supreme Court are to be followed . . . only when they provide no less pro-

that *Swain* failed to protect defendants' right to an impartial jury.[65] Because in interpreting its constitution, a state court may grant its citizens greater rights than are available under the federal constitution,[66] the *Wheeler* court rejected the *Swain* rule and held that in California[67] a defendant was "entitled to a petit jury that [was] as near an approximation of the ideal cross-section of the community as the process of random draw permit[ted]."[68]

An identical approach towards peremptory challenges was adopted by the Massachusetts Supreme Court in *Commonwealth v. Soares*.[69] Relying on its Declaration of Rights,[70] the *Soares* court held that it was forbidden to use peremptory challenges to exclude prospective jurors who are members of "discrete" groups solely on the basis of their group membership.[71] Like *Wheeler*, the *Soares* court believed that more than a representative venire was necessary to achieve the desired interaction of a cross-section of the community;[72] such interaction was achieved only through deliberations within the jury room.[73] While supporting the *Wheeler* distinction between group and specific bias, the court rejected the use of a prospective juror's group bias as a basis for predicting potential juror impartiality.[74]

Wheeler and *Soares* adopted essentially the same procedure to identify and remedy an unlawful use of peremptory challenges. Both courts placed the initial burden on the party alleging the unlawful exclusion.[75] To overcome a rebuttable presumption at trial that the peremptory challenges were being exercised constitutionally, the challenging party must establish that the persons excluded were members of a "discrete" or "cognizable" group, and

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tection than is guaranteed by California law." *Id.* at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 907-08.

65. *Id.* at 284-87, 583 P.2d at 767-68, 148 Cal. Rptr. at 908-09. The *Wheeler* court noted that even though *Swain* was decided on the basis of the fourteenth amendment, the Supreme Court's concern with altering the basic nature of the peremptory challenge would prevail under a sixth amendment analysis. Accordingly, the California court did not distinguish *Swain* on the ground that the sixth amendment had become applicable to state criminal proceedings. *Id.* at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908.

66. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (a state, acting under its sovereign right, can adopt in its own constitution more expansive individual liberties than those guaranteed by the federal Constitution).

67. 22 Cal. 3d at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910.

68. *Id.* at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

69. 377 Mass. 461, 387 N.E.2d 499 (1979). The prosecution eliminated 12 of the 13 blacks on the venire by exercising its peremptory challenges. *Id.* at 473, 387 N.E.2d at 508.

70. Article 12 of the Massachusetts Constitution states in pertinent part: "And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges . . . but by judgment of his peers, or the law of the land." MASS. CONST. pt. 1, art. 12.

71. 377 Mass. at 488, 387 N.E.2d at 516.

72. *Id.* at 482-83, 387 N.E.2d at 513.

73. *Id.* at 480-83, 387 N.E.2d at 512-13. The *Soares* court cautioned that its holding did not require proportional representation of every group on every petit jury; such a requirement would not be administratively feasible. *Id.* at 481-82, 387 N.E.2d at 512-13.

74. *Id.* at 485-87, 387 N.E.2d at 514-15.

75. *Wheeler*, 22 Cal. 3d at 280-82, 583 P.2d at 764, 148 Cal. Rptr. at 905-06; *Soares*, 377 Mass. at 489-91, 387 N.E.2d at 516-17.

that there was a likelihood that such persons were challenged solely because of their group associations.[76] Provided that such exclusion is demonstrated, the other party then has the burden of justifying its peremptory challenges with reasons other than group bias. If that party fails to justify the use of its peremptory challenges, the judge must excuse the remaining venire, as well as the jurors already seated, and renew the jury selection process.[77]

Prior to *People v. Payne*,[78] Illinois had not adopted the position taken by the Massachusetts and California courts, even though several defendants had raised the issue of prosecutorial abuse of peremptory challenges. These defendants either attempted to meet the burdensome task of satisfying *Swain*, or urged the courts to adopt an interpretation of article I, section 8 of the Illinois Constitution[79] similar to that adopted in *Wheeler* and *Soares*.[80] Neither

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76. The standard established by the *Wheeler* court was that "from all the circumstances of the case [the defendant] must show a *strong* likelihood that such persons [were] being challenged because of their group association rather than because of any specific bias." 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905 (emphasis added). In comparison, the standard enunciated in *Soares* was based upon the "*likelihood* [that blacks were] being excluded from the jury solely by reason of their group membership." 377 Mass. at 490, 387 N.E.2d at 517 (emphasis added). Given the different phraseology employed by the two courts, and the fact that one black did sit on the petit jury in *Soares*, it appears that the Massachusetts Supreme Court intended to require a lesser burden for the defendant to establish an unconstitutional use of the peremptory challenge. *Compare* People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1982) (prosecution's exercise of two peremptory challenges to exclude the only two blacks on the venire does not violate the *Wheeler* standard) *with* Commonwealth v. DiMatteo, 81 Mass. App. Ct. Adv. Sh. 1777, 427 N.E.2d 754 (1981) (defense counsel's exercise of one of his peremptory challenges to exclude the only black on the venire violates the *Soares* standard).

77. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 756, 148 Cal. Rptr. at 906; *Soares*, 377 Mass. at 491, 387 N.E.2d at 517-18.

78. 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1st Dist. 1982).

79. *See supra* note 7.

80. Six years before *Swain*, the Illinois Supreme Court stated that the peremptory challenge was a substantial right which could be exercised according to the "judgment, will, or caprice" of the prosecution without assigning a reason. People v. Harris, 17 Ill. 2d 446, 451, 161 N.E.2d 809, 811 (1959). Since no blacks were excluded from the venire, the *Harris* court held that the resultant exclusion of blacks from the petit jury, through the use of peremptory challenges, did not violate the defendant's equal protection rights. *Id.* at 450-51, 161 N.E.2d at 811-12. Similarly, in People v. Butler, 46 Ill. 2d 162, 263 N.E.2d 89 (1970), the court, applying *Swain*, held that where blacks constituted 12% of the total population, the state did not act unconstitutionally by exercising its peremptory challenges to exclude the only black on the venire. *Id.* at 165, 263 N.E.2d at 91. More recently, in People v. Gaines, 88 Ill. 2d 342, 430 N.E.2d 1046 (1981), the defendant's failure to make a timely objection and to establish a sufficient record to meet either the *Wheeler-Soares* or *Swain* standard, resulted in the court's refusal to decide whether it should overrule *Harris* and adopt the *Wheeler-Soares* approach. *Id.* at 358-59, 430 N.E.2d at 1054. For examples of Illinois Supreme Court rulings reiterating the view that the prosecution's use of peremptory challenges in a single case is not subject to inquiry, see People v. King, 54 Ill. 2d 291, 298, 296 N.E.2d 731, 735 (1973); People v. Powell, 53 Ill. 2d 465, 477-78, 292 N.E.2d 409, 416-17 (1973); People v. Dukes, 19 Ill. 2d 532, 540, 169 N.E.2d 84, 88 (1960).

The Illinois appellate courts also have been reluctant to adopt the *Wheeler-Soares* standard. In People v. Smith, 91 Ill. App. 3d 523, 414 N.E.2d 1117 (1st Dist. 1980), the prosecutor

of these approaches was successful.[81]

THE *PAYNE* DECISION

The *Payne* court, echoing the reasoning of *Wheeler* and *Soares*, focused on the roles of the state, the prosecution, and the courts in a criminal proceeding.[82] Although the defendant asserted both federal and state constitutional grounds on appeal,[83] the court based its decision on the defendant's right to an impartial jury as guaranteed by the sixth amendment of the federal Constitution.[84]

Examining the roles of the parties involved, the *Payne* court ruled that any discriminatory action taken by the prosecutor was imputed to the state.[85]

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exercised four peremptory challenges to exclude nonwhites from the jury. Although the court criticized the use of peremptory challenges to strike blacks, the record was insufficient to meet either the *Wheeler-Soares* or *Swain* standard. The *Smith* court, however, indicated that given the opportunity it would adopt the *Wheeler-Soares* standard. *Id.* at 532, 414 N.E.2d at 1124. Nevertheless, in People v. Lavinder, 102 Ill. App. 3d 662, 430 N.E.2d 243 (1st Dist. 1981), the same court was given the opportunity to adopt *Wheeler-Soares*, but rejected the contention that achieving cross-sectional representation by placing limitations on the peremptory challenge would insure an impartial jury and held that *Swain* was dispositive of the issue. *Id.* at 667, 430 N.E.2d at 1246.

The division of the appellate court that decided *Payne* has followed its decision in subsequent cases. *See* People v. Gilliard, 112 Ill. App. 3d 799, 445 N.E.2d 1293 (1st Dist. 1983); People v. Gosberry, 109 Ill. App. 3d 674, 440 N.E.2d 954 (1st Dist. 1982). Two other divisions of the First District have considered *Payne* and, declining to review the exercise of peremptory challenges in a single case, they have held that it is not within the court's province to establish a rule which emasculates the function of the challenge. *See* People v. Newsome, 110 Ill. App. 3d 1043, 443 N.E.2d 634 (1st Dist. 1982); People v. Teague, 108 Ill. App. 3d 891, 438 N.E.2d 1066 (1st Dist. 1982). The Second and Third Districts also have considered *Payne* and rejected its rationale. *See* People v. Osborn, 111 Ill. App. 3d 1078, 444 N.E.2d 1158 (3d Dist. 1983); People v. Baylor, 111 Ill. App. 3d 286, 443 N.E.2d 1137 (2d Dist. 1982).

81. *See, e.g.*, People v. Belton, 105 Ill. App. 3d 10, 433 N.E.2d 1119 (1st Dist. 1982) (the exclusion of seven members of minority groups through the prosecution's use of peremptory challenges was held to be an insufficient demonstration of systematic exclusion); People v. Mims, 103 Ill. App. 3d 673, 431 N.E.2d 1126 (1st Dist. 1981) (a showing that six blacks were struck was insufficient proof of systematic exclusion); People v. Clearlee, 101 Ill. App. 3d 16, 427 N.E.2d 1005 (1st Dist. 1981) (striking of nine blacks was not systematic exclusion); People v. Vaughn, 100 Ill. App. 3d 1082, 427 N.E.2d 840 (1st Dist. 1981) (striking of three blacks held to be insufficient for either *Swain* or *Wheeler*); People v. Tucker, 99 Ill. App. 3d 606, 425 N.E.2d 511 (2d Dist. 1981) (the defendant waived his right to assert the issue because he neither objected to nor made a post-trial motion); People v. Allen, 96 Ill. App. 3d 871, 422 N.E.2d 100 (1st Dist. 1981) (disapproving of use of peremptory challenges to exclude blacks but rejecting *Wheeler* as contrary to existing precedent).

82. 106 Ill. App. 3d at 1035-38, 436 N.E.2d at 1047-49.

83. *See* Appellant, *supra* note 1, at 2, 18.

84. 106 Ill. App. 3d at 1035-36, 436 N.E.2d at 1047-48. The *Payne* court's reliance on the sixth amendment, as the basis for its decision, must be contrasted with the analysis used by the courts in *Wheeler* and *Soares*. Both of these courts based their decisions on their respective state constitutional guarantees to a jury trial. *See supra* notes 59, 65, 66, 70 and accompanying text.

85. 106 Ill. App. 3d at 1035, 436 N.E.2d at 1047. The *Payne* court declared that "[i]t

The issue, therefore, was whether the state, acting through its prosecutors, could exclude blacks from the jury. Such acts by the state were held to be repugnant to the defendant's sixth amendment rights.[86]

Turning to the roles of the prosecutor and the courts, the *Payne* court stated that the prosecution's primary function was to seek justice, not to accumulate convictions.[87] The court believed that whenever the prosecutor systematically excluded blacks from the petit jury solely on the basis of race, he was not seeking justice; rather, he was seeking convictions.[88] Furthermore, *Payne* determined that a criminal trial was an open theater in which society witnessed a system of justice.[89] Since "justice must satisfy the appearance of justice," when society viewed a prosecutor systematically excluding one race from the jury, there clearly was no appearance of justice.[90]

The *Payne* court then examined whether the cross-sectional requirement of the sixth amendment should apply to the petit jury. The court reasoned that only by prohibiting discrimination in the selection of the jury venire could exclusion of a group from the petit jury be prevented.[91] However, the goals of community participation and social interaction on the petit jury, which are requisite for impartiality, are not achieved by the mere presence of a group on the venire.[92] Systematic exclusion, therefore, is invidious at any stage of the jury selection process.[93] In order to secure public confidence in the fairness of the criminal justice system, and to insure that the jury functions as a guard against oppressive, arbitrary law enforcement, community participation on the petit jury must be guaranteed.[94] This guarantee, the court reasoned, does not exist when segments of the population are excluded by the prosecution's peremptory challenges.[95]

Dismissing the state's argument that peremptory challenges are not subject to judicial inquiry,[96] the court maintained that the law had been changed

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is not just the individual officer or attorney who is racially discriminating against the accused, but rather the State itself." *Id.*

86. *Id.* at 1037, 436 N.E.2d at 1048-49. Citing ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROCECUTION FUNCTION § 1.1(c) (1974) and MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979), the court stated that excluding blacks from the jury solely because of race not only violated the defendant's constitutional rights, but also constituted a clear violation of the attorney's professional responsibility.

87. 106 Ill. App. 3d at 1037, 436 N.E.2d at 1048; *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (the prosecution's duty is to seek justice).

88. 106 Ill. App. 3d 1037, 436 N.E.2d at 1048; *see supra* note 87.

89. 106 Ill. App. 3d 1038, 436 N.E.2d at 1049.

90. *Id.* (quoting Levine v. United States, 362 U.S. 610, 616 (1960)).

91. *Id.* at 1036, 436 N.E.2d at 1048.

92. *Id.*

93. *Id.* at 1036-37, 436 N.E.2d at 1048.

94. *Id.* at 1037, 436 N.E.2d at 1048-49.

95. *Id.* at 1037-38, 436 N.E.2d at 1049.

96. *Id.* at 1043-44, 436 N.E.2d at 1052-53. The state asserted that the Supreme Court, in *Swain*, held that the essential nature of the peremptory challenge was that it was never subject to judicial control. *Id.* at 1043, 436 N.E.2d at 1052-53. Furthermore, the state argued that

significantly by the incorporation of the sixth amendment guarantee of an impartial jury[97] drawn from a cross-section of the community.[98] Accordingly, the *Swain* decision, which was based solely on an equal protection analysis,[99] was not dispositive in evaluating the effect of peremptory challenges on defendants' sixth amendment rights. *Swain* indicated that peremptory challenges may be subject to judicial inquiry when they are used to violate a defendant's constitutional rights. Consequently, the *Payne* court maintained that the imposition of a similar inquiry in a sixth amendment context would not expand existing constitutional limitations on the use of these challenges.[100]

The *Payne* court declared that prior Illinois decisions were inapplicable because those cases either relied on a *Swain* equal protection analysis, or were based on an insufficient record—neither of which was present in *Payne*.[101] The court found that the peremptory challenge was a statutorily based right which was neither part of Illinois common law[102] nor constitutionally required.[103] *Payne* held that the statute granting peremptory challenges, although constitutional on its face, was unconstitutional in its application when peremptory challenges were used to exclude blacks systematically from the petit jury.[104] Accordingly, the court concluded, the statutory right must be subordinated to defendants' constitutional right.

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because *Swain* established a presumption that the prosecution was exercising its challenges for appropriate reasons, it followed that "peremptory challenges are *without exception* insulated from inquiry in each case. . . ." *Id.* at 1043, 436 N.E.2d at 1053 (emphasis in original).

97. *Id.* at 1041-42, 436 N.E.2d at 1051-52; *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial applies to state criminal proceedings involving serious sanctions).

98. 106 Ill. App. 3d at 1041-42, 436 N.E.2d at 1051-52; *see* Taylor v. Louisiana, 419 U.S. 522 (1975) (sixth amendment requires cross-sectionally representative venires).

99. *See supra* text accompanying notes 25-26; *cf.* People v. Wheeler, 22 Cal. 3d at 284-85, 585 P.2d at 767, 148 Cal. Rptr. at 908-09 (1978) (rejecting the proposition that *Taylor* has changed the law regarding peremptory challenges as established in *Swain*).

100. 106 Ill. App. 3d at 1042-43, 436 N.E.2d at 1053. While holding that the exercise of peremptory challenges to exclude blacks solely on the basis of race was permissible within the context of a single case, the Supreme Court, in *Swain*, noted that when the state "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 . . . with the result that no Negroes ever serve on petit juries," then the peremptory challenge may be subject to judicial control. *Swain*, 380 U.S. at 223; *see infra* notes 123-24 and accompanying text.

101. 106 Ill. App. 3d at 1043-44, 436 N.E.2d at 1053; *see* cases cited *supra* note 81.

102. 106 Ill. App. 3d at 1039, 436 N.E.2d at 1049. The court noted that in 1305, Parliament abolished the Crown's rights to peremptory challenges. *Id.* at 1039 n.4, 436 N.E.2d at 1050 n.4. Illinois adopted as its common law the laws of England as they existed in 1607. *Id.; see* Hardesty v. Mitchell, 302 Ill. 369, 371, 134 N.E. 745, 746 (1922); ILL. REV. STAT. ch. 1, § 801 (1981). Since the government had no right to peremptory challenges in 1607, the court concluded that the state's right to peremptory challenges did not exist in the common law of Illinois. 106 Ill. App. 3d at 1039, 436 N.E.2d at 1049-50; *see also* Swain v. Alabama, 380 U.S. 202, 243 n.4 (1965) (Goldberg, J., dissenting).

103. 106 Ill. App. 3d at 1039, 436 N.E.2d at 1049 (citing Stilson v. United States, 250 U.S. 583, 586 (1919)) (peremptory challenges are a statutorily granted right and not constitutionally required); *see also* Frazier v. United States, 335 U.S. 497, 505 n.11 (1948) (quoting *Stilson*).

104. 106 Ill. App. 3d at 1039, 436 N.E.2d at 1049 (quoting People v. Wheeler, 22 Cal. 3d at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28).

Holding that the state could not attempt to do during voir dire what it was precluded from doing at the venire stage of jury selection, the *Payne* court limited the application of its ruling solely to the prosecution.[105] The court further asserted that the right to a fair cross-section was not limited to the presence of racial minorities on the petit jury, but that it included "any discrete group."[106] While emphasizing that the defendant was not entitled to have every community group proportionately represented on the petit jury, the *Payne* court maintained that the defendant was "constitutionally entitled to a petit jury that [was] as near an approximation of the ideal cross-section . . . as the process of random draw and constitutionally acceptable procedures permit."[107] The state, therefore, could not affirmatively frustrate this constitutional right by excluding "discrete" groups through the use of peremptory challenges.

Having defined the purpose and scope of group interaction on the petit jury, as well as the function of peremptory challenges, the *Payne* court established a liberal procedure for demonstrating systematic exclusion. The procedure was designed to preclude the use of peremptory challenges based on group affiliation, but not inhibit their legitimate function of eliminating individual bias on the petit jury.[108] Although the state was presumed to be

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105. *Id.* at 1037, 1039, 436 N.E.2d at 1048, 1049. The *Payne* court asserted that it was the state, acting through its prosecutors, that was excluding blacks discriminatorily. Accordingly, the *Payne* court phrased the issue as "whether the State itself can so exclude Blacks," and held that it could not. *Id.* at 1035, 436 N.E.2d at 1047. Implicit in this holding is the notion that the state, unlike the defendant, is not entitled to any of the protections afforded to defendants by the Bill of Rights. Therefore, a court can curtail the prosecution's use of peremptory challenges while not similarly limitating the defendant's challenges. *See* Carey, *Some Thoughts on* People v. Payne: *Arguments in Support of* Payne, 13 ILL. CTS. BULL. JUD. AD. (Ill. St. B.A.) No. 2, at 7 (Aug. 1982) (Payne limitation on the prosecution's peremptory challenges, while not imposing similar limitations on the defendant's challenges, is constitutionally justified); Waltz, *Now It's Harder for Lawyers to Pick Biased Jury*, Chicago Sun-Times, July 13, 1982, at 30, col. 1 (*Payne* ruling is the only practical means of preserving defendant's right to impartial jury) [hereinafter cited as Waltz]; *cf.* Singer v. United States, 380 U.S. 24, 36 (1964) ("the Government, as litigant, 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."); Hayes v. Missouri, 120 U.S. 68, 70 (1887) (when the legislature grants the prosecution and the defendants the privilege of peremptory challenges, that right is to be equally accessible to both parties).

106. 106 Ill. App. 3d at 1037 n.2, 436 N.E.2d at 1048 n.2; *cf.* Commonwealth v. Soares, 377 Mass. 461, 488-89, 387 N.E.2d 499, 516 (1979) (limiting its holding to sex, race, color, creed, or national origin).

107. 106 Ill. App. 3d at 1037, 436 N.E.2d at 1048.

108. *Id.* at 1036, 436 N.E.2d at 1047-48 (quoting Taylor v. Louisiana, 419 U.S. 522, 526 (1975)). *See generally* Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979) (sixth amendment fair cross-section requirement is an inappropriate method of controlling abuse; the focus should be on the goal of increasing community participation on the petit jury in general) [hereinafter cited as Note, *Misuse*]; Note, *Impartial Jury—Restricting the Peremptory Challenge*, 13 SUFFOLK U.L. REV. 1084 (1979) (presenting a critical analysis of *Wheeler* and *Soares*, but concluding that the standard was the only practical means of remedying the problem). For a comprehensive assessment of the cross-

exercising its challenges constitutionally, that presumption was inapplicable, upon a motion by the defendant or the court acting on its own observations, where it reasonably appeared that the prosecution was using its challenges to exclude certain discrete groups.[109] Accordingly, the court could require the prosecution to demonstrate that it was exercising its challenges for reasons other than group bias.[110] Nevertheless, *Payne* failed to delineate any criteria to be considered by the judge in ruling on such objections.[111] Instead, the court expressed confidence in the trial judge's ability to determine when systematic exclusion arose, and to distinguish valid from invalid justifications for peremptory challenges.[112]

Adopting the *Wheeler-Soares* approach, the *Payne* court held that when the trial judge finds that the prosecution's exercise of peremptory challenges has improperly excluded a discrete group, the jurors already seated and any jurors remaining on the venire must be excused.[113] Upon such dismissal, a different venire must be drawn and a new jury selected.[114] Thus, by imposing this standard, the *Payne* court hoped to guarantee that the jury was, in fact, impartial and representative of the community's sense of justice.[115]

Analysis and Critique

The *Payne* court, relying foremost on the defendant's sixth amendment rights under the federal Constitution, based its decision on a questionable reading of federal precedent.[116] In its attempt to fashion a rule that would insure community participation in the jury system, *Payne* failed to distinguish between the federal constitutional limitations on state administered selection

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sectional requirement and its effect on selection procedures in the Fifth Circuit, see Daughtrey, *supra* note 18, *passim*.

109. 106 Ill. App. 3d at 1039-40, 436 N.E.2d at 1049-50. The *Payne* court stated that "[o]nce it reasonably appears to the trial court that the accused is being affirmatively denied an impartial jury . . . there is no reason to presume that the State is not affirmatively violating the accused's constitutional entitlement." *Id.* at 1040, 436 N.E.2d at 1050.

110. *Id.*

111. *Id. But see* People v. Wheeler, 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905. Some relevant factors proposed by the *Wheeler* court were the following: the party struck all or most of the cognizable group from the venire; the party exercised a disproportionate number of challenges against a particular group; the jurors excluded were as heterogeneous as the community except for their race; and the party engaged in only desultory voir dire with the excluded jurors. *Id.*

112. The *Payne* court stated as follows:

> [T]rial judges, given their presence in the court room during the entire proceeding and their ability to observe all facets of the *voir dire* selection, their experience with *voir dire* examinations, and the benefit of their judicial trial experience, should be able to distinguish bona fide reasons for exclusion from contrived declarations of motives.

106 Ill. App. 3d at 1040 n.5, 436 N.E.2d at 1050 n.5.

113. *Id.* at 1040, 436 N.E.2d at 1050.

114. *Id.* at 1040, 436 N.E.2d at 1051.

115. *Id.* at 1038-39, 436 N.E.2d at 1049.

116. *Id.* at 1036-38, 436 N.E.2d at 1048-50.

procedures and the prosecution's legitimate, uncurtailed right to reject potentially biased jurors. Furthermore, in permitting judicial inquiry of the peremptory challenges in the context of a single trial, the *Payne* court summarily contravened the policies underlying such challenges.

The premise relied upon in *Payne* is that the application of the sixth amendment to the states, and *Taylor*'s cross-section representation requirement, significantly changed the law as defined in *Swain* regarding the prosecution's use of peremptory challenges.[117] Quoting broad language from *Taylor*, the *Payne* court held that the *Taylor* rationale requires a petit jury to be comprised of that cross-sectional composition which results from the random draw.[118] *Taylor* and its progeny, however, dealt only with state administered selection procedures which exclude groups from the jury venires, not from the petit jury.[119] Thus, in contrast to the Supreme Court's test for purposeful systematic exclusion under the fourteenth amendment, the sixth amendment

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117. *Id.* at 1042, 436 N.E.2d at 1052. In making this assertion, *Payne* relied on the Supreme Court's statement that the sixth amendment right to a petit jury trial "made applicable to the States . . . in *Duncan v. Louisiana* does not apply to state trials that took place before the decision in *Duncan*." *Id.* (citing Peters v. Kiff, 407 U.S. 493, 496 (1972) (citation omitted)). In *Peters*, the defendant, a white male, challenged a state statute which effectively excluded blacks from the petit jury. The Court made that statement in reference to the issue of whether the defendant had standing to challenge the exclusion of a group of which he was not a member. In holding that defendant had standing, the *Peters* Court examined the issue under a due process, rather than an equal protection, analysis. Peters v. Kiff, 407 U.S. at 501; *see supra* text accompanying notes 17-18. It is apparent, therefore, that the Court in *Peters* was referring solely to the effect that incorporation of the sixth amendment had on a defendant's standing to challenge a group's exclusion. Accordingly, the *Peters* Court did not elaborate on the sixth amendment's effect on the defendant's right to cross-sectional representation.

Since its decision in Duncan v. Louisiana, 391 U.S. 145 (1968), incorporating the sixth amendment right to a jury trial in state criminal proceedings, the Supreme Court has cited repeatedly to *Swain* as authority. *See, e.g.*, University of Cal. Bd. of Regents v. Bakke, 438 U.S. 265, 319 n.53 (1978) ("Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate . . . purpose"); Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (unanimous jury verdicts are not a necessary condition precedent for effective application of the cross-section requirement; reaffirming the *Swain* principle that only systematic exclusion is forbidden, and rejecting the argument that lower minority participation would not adequately represent the viewpoint of certain groups because they might be outvoted; *see also* Brief for Appellant at 9-12, People v. Payne, No. 56907 (Ill. S. Ct. argued June 22, 1983).

118. 106 Ill. App. 3d at 1035-37, 436 N.E.2d at 1047-48.

119. In fact, Justice Rehnquist, dissenting in Duren v. Missouri, 439 U.S. 357 (1979), specifically noted that under the current fair cross-section analysis of the sixth amendment, the Court was concerned more with vindicating the excluded classes' rights to participate in the administration of the judicial process than with seeking cross-sectional representation on the petit jury itself. *Id.* at 371-72 n.* (Rehnquist, J., dissenting); *see* Apodaca v. Oregon, 406 U.S. 404, 412-13 (1972) (the sixth amendment cross-section requirement protects a group's right to participate in the legal process, but does not give every group the right to be represented on a particular petit jury). *Compare* Duren v. Missouri, 439 U.S. 357 (1979) (exclusion of women under cross-sectional analysis of the sixth amendment); *with* Hoyt v. Florida, 368 U.S. 57 (1961) (statutory exclusion of women under equal protection analysis).

cross-sectional analysis has been limited to the venire composition.[120] Under both the fourteenth and sixth amendments, group affiliation appears to be only a means by which a court identifies the scope of the community's participation in the jury system.[121] According to *Swain* and *Taylor*, the constitutional requirement of community participation under either the fourteenth or sixth amendment is satisfied when the venire represents a cross-section of the community, and when groups are not excluded systematically from the petit jury.[122]

Swain authorized judicial review when systematic exclusion occurred in case after case. Premised on the incorporation of the sixth amendment, however, the *Payne* decision expanded the *Swain* standard by permitting judicial review within the context of a single trial. *Payne*'s interpretation is unsound because although the cross-sectional analysis of the sixth amendment significantly alleviates the burden of establishing systematic exclusion, the defendant still is required to establish that the underrepresentation of

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120. The Court's limitation of the cross-sectional requirement may be explained by the administrative difficulties which would arise if no such limitation existed. The vagaries inherent in a random draw selection scheme often result in the disproportionate representation of groups. Challenges for cause also may result in an unrepresentative jury. To insure cross-sectional representation, a court would have to identify which groups need to be represented in order to implement an affirmative selection procedure that would make petit juries representative. *See* Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 347 n.47 (1982) [hereinafter cited as Saltzburg & Powers].

Any affirmative effort to create a proportionately representative jury, however, might increase the chances of jury manipulation and also be constitutionally impermissible. *See* Shepard v. Florida, 341 U.S. 50, 54-55 (1951) (reversing a state court decision which upheld the selection of a grand jury on the basis of proportional representation). *But cf.* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595, 610 n.77 (1982) (arguing that the cross-sectional analysis delineated in *Taylor* and *Duren* was confined to venires since the Court did not need to analyze the issue, as it pertains to petit juries, in order to reach its decision) [hereinafter cited as Colussi]. For a discussion of the problems with extending the cross-sectional rule to petit juries, see Note, *Limiting the Peremptory Challenge: Representation of Groups and Petit Juries*, 86 YALE L.J. 1715, 1732 (1977).

121. *See, e.g.*, Daniel v. Louisiana, 420 U.S. 31, 33 (1975); Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Apodaca v. Oregon, 406 U.S. 404, 412-13 (1972); Carter v. Jury Comm'n, 396 U.S. 320, 322 (1970); Strauder v. West Virginia, 100 U.S. 303, 308 (1879); *see also* Note, *Discrete Groups*, *supra* note 33, at 1212-13; Note, *Misuse*, *supra* note 108, at 1778-79. The Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 (Supp. 1982), states that "all citizens shall have the *opportunity* to be *considered* for service on grand and petit juries." *Id.* § 1861 (emphasis added).

122. *See supra* note 121; *see also* People v. Hyche, 77 Ill. 2d 229, 396 N.E.2d 6 (1979) (right to a fair trial was not denied when veniremen served in co-defendant's venire); People v. Connolly, 55 Ill. 2d 421, 303 N.E.2d 409 (1973) (fair trial right not denied when no blacks are on petit jury); People v. Joyner, 110 Ill. App. 3d 1083, 441 N.E.2d 1214 (4th Dist. 1982) (exclusion of blue collar workers from venire does not violate the sixth amendment); People v. Mitchell, 98 Ill. App. 3d 398, 424 N.E.2d 658 (3d Dist. 1981) (defendant was not denied the right to a fair trial when his trial was removed to an all white county); People v. Fernandez, 66 Ill. App. 3d 103, 383 N.E.2d 663 (5th Dist. 1978) (the absence of Latinos on panel and petit jury does not deny a defendant's right to a fair trial).

the group has occurred over a period substantially longer than the context of a single case.[123] Thus, under either the fourteenth amendment analysis of *Swain* or the sixth amendment cross-sectional analysis of *Taylor* and *Duren*, inquiry into the reasons for exercising peremptory challenges should be limited to the extreme situation in which the peremptory challenge has been used consistently to exclude groups in a significant number of cases, and not just within the particular case before the court.[124] Unless a consistent underrepresentation is demonstrated, there should be no constitutional violation.

This reasoning was followed recently by the Rhode Island Supreme Court in *State v. Raymond*,[125] decided approximately one week after *Payne*. In *Raymond*, the defendant claimed that the prosecution's use of peremptory challenges to strike three young female jurors[126] from the venire denied her the sixth amendment right to a trial by a representative cross-section of the community. The *Raymond* court, focusing on *Taylor*, *Duren*, and *Swain*, ruled that even under the sixth amendment cross-sectional analysis, systematic exclusion through the use of peremptory challenges must be demonstrated on a case after case basis.[127]

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123. *See supra* note 45; *see also* Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981) (underrepresentation of individuals opposed to death penalty declared not cross-sectionally infirm); United States v. Carter, 528 F.2d 844 (8th Cir.) (eight out of 15 cases held to be insufficient systematic exclusion for either sixth or fourteenth amendment violation), *cert. denied*, 425 U.S. 961 (1975); State v. Simpson, 326 So. 2d 54 (Fla. Dist. Ct. App. 1976) (five cases is an insufficient demonstration of systematic exclusion); Commonwealth v. Boykin, 276 Pa. Super. 56, 419 A.2d 92 (1980) (case after case demonstration is required by both the sixth and fourteenth amendments).

124. *See supra* notes 45, 123. *Swain*'s authorization of judicial control is limited specifically to circumstances which indicate that the peremptory challenge has been used over a period of time to exclude a racial group. It is only then, "giving even the widest leeway to the operation of irrational but trial related suspicions and antagonisms it would appear that the purpose of the peremptory [is] being perverted." Swain v. Alabama, 380 U.S. at 223-24. At least one court has held that even where such a case is demonstrated by the defendant the inquiry is permitted only as to the attorney's conduct (i.e., questions regarding the number of cases in which he exercised his challenges with the result that no black sat on the petit jury), and not as to his thought processes and reasons for exercising his challenges. United States v. Pearson, 448 F.2d 1207, 1216 (5th Cir. 1971).

125. ___ R.I. ___, 446 A.2d 743 (1982).

126. *Id.* at ___, 446 A.2d at 745.

127. Although the defendant is entitled to a jury chosen from a cross-sectionally representative venire, "the fair cross-section requirement does not mean that the jury actually chosen must reflect this cross-section." *Id.* The *Raymond* court further stated that the cause of the underrepresentation must be systematic, rather than occasional, and that "[s]uch a showing [would be] virtually impossible with respect to the exercise of peremptory challenges in a particular case." *Id.* at ___, 446 A.2d at 745 n.3; *see* State v. Ucero, ___ R.I. ___, 450 A.2d 809 (1982) (same court ruling that the prosecution's use of peremptory challenges to exclude three male jurors does not justify inquiry into the reasons for such challenges); *see also* Hoskins v. State, ___ Ind. ___, 441 N.E.2d 419 (1982) (the prosecution need not give reasons for exercise of peremptory challenges).

This line of precedent is difficult to reconcile with the *Payne* standard. The *Payne* court found that when all blacks on the venire but one are excluded, such "token" representation does not comply with the fair cross-section requirement. 106 Ill. App. 3d at 1045, 436 N.E.2d

Focusing on the principles established by the Supreme Court under the fourteenth and sixth amendments, it is apparent that contrary to the *Payne* court's analysis, the incorporation of the sixth amendment's guarantee of an impartial jury drawn from a fair cross-section of the community has not significantly changed federal constitutional law regarding the prosecution's use of the peremptory challenge. Accepting *Payne*'s ruling that logic compels the extension of *Taylor*'s cross-sectional rationale[128] to the petit jury, it is still necessary under *Taylor*, *Swain*, and *Duren* for the court to find that there has been a recurrent abuse of peremptory challenges.

An additional problem with the *Payne* court's curtailment of the prosecutor's use of peremptory challenges is that it does not adequately consider the distinction between a group's right to be selected to participate in the jury process, and the litigant's right to reject potentially partial jurors.[129] The constitutional limitation imposed by the sixth amendment on pre-trial selection procedures that are administered entirely by the state neither requires that petit juries be cross-sectionally representative, nor is it premised on the belief that group representation assures the impartiality of the petit jury.[130] If group representation were a requisite for jury impartiality and

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at 1054. It is uncertain whether such tokenism refers to the number of blacks impaneled or the order in which they are impaneled. For example, if the state allows the first black to sit and excludes the remaining blacks, it is likely, though not certain, that the *Payne* standard would be violated. Additionally, if the prosecutor challenges the first few blacks, then allows a black to sit and continues to strike the remaining blacks, it also is uncertain whether the *Payne* standard would be violated.

128. *Id.* at 1036-37, 436 N.E.2d at 1048. The *Payne* court reasoned that the "very purpose of refusing to tolerate racial discrimination in the composition of the venire [was] to prevent . . . systematic exclusion of any racial group in the composition of the jury itself." *Id.* The court further asserted that since "[t]he desired goal of interaction of . . . the community [did] not occur within the venire but . . . by the petit jury," it logically followed that "systematic exclusion of prospective jurors solely because of their race [was] equally invidious . . . at any stage of the jury selection." *Id.*

129. *See supra* note 123 for cases cited therein; *see also* United States v. Marchant, 25 U.S. (12 Wheat.) 480, 482 (1827) (peremptory challenge is a statutory right to reject, not to select); State v. White, 622 S.W.2d 939 (Mo. 1981) (cross-sectional analysis is applicable only to selection, not rejection, procedures); 4 W. BLACKSTONE, COMMENTARIES *359-61; Saltzburg & Powers, *supra* note 120, at 373. Once the legislature has granted the prosecution the right to reject prospective jurors, it should be able to exercise that right equally with defendants. Hayes v. Missouri, 120 U.S. 68, 70 (1887); *see also* Stilson v. United States, 250 U.S. 583, 586 (1919) (where prosecution has a greater number of peremptory challenges, the defendant's sixth amendment rights are not violated).

130. *See* Daniel v. Louisiana, 420 U.S. 31, 32 (1975) (jury was fair even though it was not cross-sectionally representative); Peters v. Kiff, 407 U.S. 493, 503 (1972) (although the Court implied that impartiality was linked with cross-representation, it stated that it is not "necessary to assume that the excluded group will consistently vote as a class"); Apodaca v. Oregon, 406 U.S. 404, 412-13 (1972) (rejecting the notion that the majority will decide a minority defendant's guilt on the basis of racial prejudice). In Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968), prospective jurors were challenged for cause because of their anti-death penalty views. The Court held that exclusion of this group, and the resultant unrepresentative jury, had no effect on the jury's impartiality in determining the defendant's guilt or innocence. *Id.* The *Witherspoon* Court also implied that the fair cross-section requirement must not interfere with

community participation, then a jury that lacks participation by certain groups, as a result of the random draw, would be just as impartial as the unrepresentative jury that is produced by the exercise of peremptory challenges.[131] The purpose of the cross-sectional requirement is to assure that various societal groups are given an opportunity to participate in the criminal justice system.[132] The state, absent significant justification,[133] has no legitimate interest in selecting which groups can participate in the jury system.

During the petit jury selection stage, however, the concern should shift from an emphasis on cross-sectional selection procedures to a rejection process in which both parties eliminate those jurors who are most partial to their opponent's case.[134] The peremptory challenge allows counsel to evaluate the effect that certain portions of the trial may have on potential jurors, and permits them to exclude people who they feel will be adverse to their client.[135] To the extent that the prosecutor rejects jurors on the basis of an intuitive perception of potential partiality within the context of a single trial, he is fulfilling his obligations as an advocate on behalf of the community and the victim to secure a jury in which partiality against the state has been minimized.[136] Under *Taylor* and *Duren*, the constitutional proscription of state selection procedures that result in systematic exclusion of certain groups should not impose similar fair cross-section requirements that hinder counsel's right to reject prospective jurors for perceived partiality.[137] The cross-section that remains after the rights of rejection have been exercised should be fair, not representational, because "[a] cross-section of the fair and impartial is

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traditional practices such as peremptory challenges. *Id.* at 530 (Douglas, J., dissenting); *see also* Colussi, *supra* note 120, at 604; Note, *Misuse*, *supra* note 108, at 1778.

131. *See* Note, *Misuse*, *supra* note 108, at 1778-80 (arguing that the fair cross-section requirement is an unsound basis for curtailing abuse of peremptory challenges); *see also* Duren v. Missouri, 439 U.S. 357, 371 (1979) (Rehnquist, J., dissenting).

132. *See* Taylor v. Louisiana, 419 U.S. 522, 526-38 (1975); *see also supra* notes 121-22 and accompanying text.

133. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 369-70 (1979); United States v. Beonmuhar, 658 F.2d 14 (1st Cir. 1981) (the state has an interest in excluding those who cannot read or understand English); United States v. Van Scoy, 654 F.2d 257, 262 (3d Cir. 1981) (the state has an interest in excusing attorneys and doctors).

134. *See* Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981) ("The guarantee [of impartiality] cannot mean that the state must present its case to the jury least likely to convict"); People v. Gregory, 95 Ill. App. 2d 396, 411-18, 237 N.E.2d 720, 728-31 (1st Dist. 1968) (the standard used in analyzing abuse of peremptory challenges differs from that used in determining systematic exclusion in state selection procedure); State v. White, 622 S.W.2d 939 (Mo. 1981) (cross-sectional analysis is applicable to state selection procedures, but not to an attorney's right to reject); *see also* Note, *Misuse*, *supra* note 108, at 1780.

135. *See supra* notes 29-33 and accompanying text.

136. *See* Berger v. United States, 295 U.S. 78 (1935) (a prosecutor may prosecute vigorously and can use every legitimate means to bring about a just conviction). For a thorough discussion of the ethical problems confronting the prosecutor, see Alderstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755 (1978).

137. *See* cases cited *supra* note 123.

more desirable than a fair cross-section of the prejudiced and biased."[138]

The policies which support an uncurtailed right to reject within a trial, however, become inapplicable when it is apparent that in case after case, regardless of the circumstances, a pattern of discriminatory underrepresentation of a cognizable group is demonstrated. The prosecutor, rather than exercising a statutorily granted right to reject, is carrying out an affirmative policy of the state's attorney's office to select juries which exclude particular groups. In doing so, the peremptory challenge is transformed into a selection procedure whereby the state's attorney's office violates the duty imposed on the state by the sixth amendment.[139] It is only at this point[140] that the attorney violates his ethical duty to seek justice, and the constitutional limitations of the sixth amendment concerning jury selection procedures should be imposed to curtail the abuse of the peremptory challenge.

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138. Smith v. Balckom, 660 F.2d 573, 583 (5th Cir. 1981) (the cross-sectional character of the jury must yield to the state's interest in an impartial jury when prospective jurors who are unalterably opposed to the death penalty are challenged for cause).

139. *See, e.g.*, Schultz v. Gilbert, 300 Ill. App. 417, 20 N.E.2d 884 (4th Dist. 1939) (a peremptory challenge is a right to reject, and not to select, jurors); State v. White, 622 S.W.2d 939, 940 (Mo. 1981) (the cross-sectional representation requirement of the sixth amendment is not applicable to rejection of jurors through peremptory challenges); *see also* cases cited *supra* note 121.

140. One criticism of the *Swain* "case after case" standard for proving prosecutorial abuse of peremptory challenges is its failure to provide a remedy for the defendants in those cases which established a systematic pattern of exclusion. These defendants, however, also have suffered violations of their sixth and fourteenth amendment rights. This criticism is not without merit. Nevertheless, there are means by which these defendants may be granted relief. When material evidence is discovered after trial, which with due diligence could not have been discovered before trial, it can be used as a basis for a new trial if it is likely to change the result upon retrial. *See* People v. Pavic, 104 Ill. App. 3d 436, 450-51, 432 N.E.2d 1074, 1085 (1st Dist. 1982) (articulating criteria for determining whether evidence is newly discovered); *see also* People v. Freeman, 26 Ill. App. 3d 443, 446-47, 326 N.E.2d 207, 210 (1st Dist. 1975) (newly discovered evidence can be used as a basis for a new trial).

Nevertheless, courts may be hesitant to grant relief in the form of a new trial because it cannot be established, with any degree of certainty, that the existence of systematic exclusion had any effect on the outcome of the case. *See* People v. Rogers, 375 Ill. 54, 30 N.E.2d 77 (1940). An alternative approach is to provide relief through a writ of habeas corpus.

The Illinois habeas corpus statute provides that a prisoner in legal custody can be discharged "[w]here, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge." ILL. REV. STAT. ch. 65, § 22 (1981). Since constitutional violations or errors of fact may be remedied by a writ of habeas corpus, evidence that the prosecution systematically excluded blacks in violation of defendant's constitutional rights could be construed as a basis for discharging the defendant. *See* People v. Freeman, 26 Ill. App. 3d 443, 326 N.E.2d 207 (1st Dist. 1975). Providing the defendant with this form of collateral relief is likely to have a greater effect in deterring prosecutors from abusing their peremptory challenges than would requiring prosecutors to justify their challenges within the context of a single trial. For examples of events subsequent to conviction that entitle a prisoner to habeas corpus relief, see People *ex rel.* Castle v. Spivey, 10 Ill. 2d 586, 141 N.E.2d 321 (1957) (serving more than the maximum sentence); People *ex rel.* Lowe v. Ragen, 387 Ill. 131, 55 N.E.2d 83 (1944) (prison transfer without a hearing); People *ex rel.* Titzel v. Hill, 344 Ill. 246, 176 N.E. 360 (1931) (prisoner satisfied judgment under which he was imprisoned).

A peremptory challenge, unlike a challenge for cause,[141] permits an attorney to reject prospective jurors during pre-trial voir dire for any reason, or for no reason at all. The peremptory challenge allows the attorney to reject prospective jurors whom he believes to be partial when, due to the inherent limitations of the voir dire process, he is unable to gather sufficient evidence to establish a challenge for cause.[142] Furthermore, the peremptory challenge promotes the function of challenges for cause by allowing the attorney to remove those jurors he may have antagonized during questioning in an attempt to highlight biases.[143] The peremptory challenge also guarantees not only that the jury is comprised of fair-minded jurors, but that the jury's partiality has been minimized to counsel's satisfaction.[144] Because racial, religious, and sexual prejudices are an extremely sensitive subject, judges might be hesitant to strike a juror for cause on this basis, even though the answers given during voir dire suggest a possibility of bias.[145] Use of the peremptory challenge to strike persons with prejudices adverse to a particular side, which happen to be shared by a cognizable group, avoids the possibility of a judicial ruling which sanctions the imputation of bias arising from an individual's group membership.[146] The Constitution permits peremptory challenges to be exercised because of the litigant's rational or irrational belief that certain group associations indicate partiality.[147]

The *Payne* court, in subjecting the peremptory challenges of a single trial to judicial inquiry, has substantially undermined the purpose and policies underlying the challenge. The prosecutor faced with the *Payne* limitation

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141. *See infra* note 148.

142. In Illinois, the voir dire process is conducted by the courts which, in their discretion, may permit parties to submit additional questions or supplement the judge's questions with direct examination. *See* ILL. REV. STAT. ch. 110A, §§ 234, 431 (1981). For a discussion of the hearings concerning this matter, see Rolewick, *Voir Dire Examination of Jurors: A Brief Study of the Action of the Illinois Judicial Conference in Recommending Revision in the Supreme Court Rule 234*, 25 DEPAUL L. REV. 50 (1975). The right to trial by jury does not include the right to conduct voir dire questioning. *See* People v. Jackson, 69 Ill. 2d 252, 260, 371 N.E.2d 602, 606 (1977); People v. Brumfield, 51 Ill. App. 3d 637, 644-45, 366 N.E.2d 1130, 1133-34 (3d Dist. 1977). Because judges generally are hostile to extensive voir dire, the attorney's ability to elicit unconscious bias is curtailed severely. *See, e.g.*, People v. Delordo, 350 Ill. 118, 182 N.E. 726 (1932) (only failure to permit inquiries which would constitute a basis for a challenge for cause is reversible error). Accordingly, many commentators have called for the expansion of the voir dire process to aid in eliciting unconscious bias. *See generally*, Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975) [hereinafter cited as Babcock]; Norman, *The Supreme Court Rule Governing Jury Selection*, 67 ILL. B.J. 152 (1978); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1975) [hereinafter cited as Note, *Minimum*].

143. *See supra* note 132; *see also* Swain v. Alabama, 380 U.S. 202, 219-20 (1965) (peremptory challenge permits detailed questioning during voir dire and removes the fear of incurring juror hostility resulting from the questioning).

144. *See* Note, *Minimum*, *supra* note 142, at 1502-04.

145. People v. McCray, 57 N.Y.2d 542, 545, 443 N.E.2d 915, 919, 457 N.Y.S.2d 441, 444 (1982), *cert. denied*, 103 S. Ct. 2438 (1983).

146. *See* Babcock, *supra* note 142, at 553; *see also* Note, *Misuse*, *supra* note 108, at 1782.

147. Swain v. Alabama, 380 U.S. 202, 220-21 (1965).

on his peremptory challenges may be reluctant to engage in a thorough inquiry during voir dire. In attempting to establish the specific bias required for a challenge for cause,[148] the prosecutor may not want to risk antagonizing a member of a racial group if he knows that the court could void[149] his peremptory challenge of that individual on the basis that the challenge was exercised out of group bias.[150]

Payne emphasizes the importance of cross-sectional representation over the goal of impartiality, and as a result, introduces a novel perspective of the jury's function.[151] The court's goal of preserving cross-sectonal representation on the petit jury implies that individual jurors hold biases, derived from their group memberships, which will be asserted vigorously in the course of jury deliberation.[152] Thus, a diverse jury is needed to balance these potential group biases. This focus, however, ignores the fact that biases frequently

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148. *See* ILL. REV. STAT. ch. 78, § 14 (1981) (statutory grounds requisite for a challenge for cause). The grounds for challenges for cause have been limited to eliminating admitted bias or bias which clearly is implied from the prospective juror's connection with the case. Note *Minimum*, *supra* note 142, at 1500. For cases demonstrating limited bases for challenges for cause, see United States v. Cross, 474 F.2d 1045 (5th Cir. 1973) (challenge for cause was not allowed where prospective juror stated that he would give more credibility to an FBI agent than to any other witness); Bateman v. United States, 212 F.2d 61 (9th Cir. 1954) (juror's prejudice against the defense attorney was not a sufficient basis for a challenge for cause).

149. The remedy articulated in *Payne* is that the court "*must* dismiss the jurors thus far selected . . . [and] it must quash the remaining venire." 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050-51 (emphasis added). One Massachusetts court following the *Soares* standard, which requires a similar remedy, *see supra* notes 75-77, 113-14 and accompanying text, has ruled that dismissal of the venire is not the only appropriate relief. In Commonwealth v. Reid, 1981 Mass. App. Ct. Adv. Sh. 1803, 424 N.E.2d 495 (1981), defendant exercised her peremptory challenges to exclude all of the prospective male jurors in the venire. The prosecution moved to dismiss the jurors already selected, quash the remaining venire, and have a new venire selected. *Id.* at ____, 424 N.E.2d at 500. The judge denied the motion and held that the appropriate remedy was to disallow the challenges and permit the challenged individuals to be seated. *Id.* The appellate court affirmed the decision of the trial court, stating that the remedy outlined in *Soares* did not preclude judges from using other means in order to implement the *Soares* holding. *Id.* The court further reasoned that limiting trial judges to the specific remedy outlined in *Soares* would provide an opportunity for the parties to have mistrials declared because of their own misconduct. *Id.*

150. *See* Note, *A New Standard for Peremptory Challenges:* People v. Wheeler, 32 STAN. L. REV. 189, 199 (1979) (criticizing the *Wheeler* standard for its emphasis on a group's right to serve on juries at the expense of the parties' right to an impartial jury) [hereinafter cited as Note, *Standard*]. Moreover, limiting the peremptory challenge to circumstances of specific bias faced within a single case might force counsel to accept individuals who are on the extreme edge of partiality, because the exclusion of those prospective jurors through peremptories would result in an unrepresentative jury. As a result, the *Payne* ruling, by focusing on a group's participation in the jury system, grants a group the right to remain on the jury even though the litigants subtly may perceive potential partiality, but are unable to demonstrate sufficiently that partiality to the judge's satisfaction. *See supra* notes 142, 148; *see also* People v. McCray, 57 N.Y.2d 542, 545, 443 N.E.2d 915, 918, 457 N.Y.S.2d 441, 444 (1982), *cert. denied*, 103 S. Ct. 2438 (1983).

151. *See* Note, *Discrete Groups*, *supra* note 33, at 1215-19.

152. *See* Saltzburg & Powers, *supra* note 120, at 369-72; Note, *Discrete Groups*, *supra* note

overlap. By implying that these unconscious biases must balance, the *Payne* court provides judicial recognition that prejudices may so dominate jurors that they are controlled by their biases, incapable of viewing the evidence as dispassionate finders of fact.[153] This judicial recognition of unconscious bias is precisely what the peremptory challenge seeks to avoid. Individuals, now cognizant that prejudices affect their deliberations, may read the court's recognition of these biases as a mandate to assert their prejudices, rather than attempt to set them aside in reviewing the evidence presented.[154] As a result, the goal of achieving an impartial jury could become more difficult under the *Payne* standard.

IMPACT

The ultimate result of *Payne* is that if peremptory challenges can be exercised only in a certain way, dependent upon circumstances and subject to judicial scrutiny, they will no longer be peremptory. Furthermore, the *Payne* decision creates a standard which provides little direction for judges to follow in determining the validity of the prosecution's motives for exercising its peremptory challenges. As a result, several practical procedural problems arise.

The initial problem with the *Payne* standard lies in determining the point at which it "reasonably appears" that there is an unconstitutional systematic exclusion of a group.[155] The *Payne* court maintains that under its approach, the Illinois statute providing for peremptory challenges is invalid only when it is applied unconstitutionally. In practice, however, the *Payne* standard

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33, at 1212; Note, *Misuse*, *supra* note 108, at 1778-82; Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1185-89 (1980).

153. *See* Taylor v. Louisiana, 419 U.S. 522, 541-42 (1975) (Rehnquist, J., dissenting); People v. Wheeler, 22 Cal. 3d at 290-93, 583 P.2d at 771-72, 148 Cal. Rptr. at 912-13; *see also* Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N.U.L. REV. 571 (1978) (review of demographic and psychological characteristics that may influence a juror's decision, and techniques used by social scientists to assist in jury selection).

Requiring that jurors' biases balance presumes that society is divided into a majority and a minority which are in absolute conflict with each other, and that the elimination of one biased juror results in a replacement that is reciprocally biased. Saltzburg & Powers, *supra* note 120, at 369-72. Such a presumption is disputed:

> The real and realistic aim of our jury selection method is not to achieve the impossible complete impartiality but rather to minimize the range of predispositions that may influence the jury's verdict. Conceptually, we can rank the members of a jury venire in a spectrum from those most predisposed toward the plaintiff to those most predisposed toward the defendant.

GINGER, *supra* note 21, § 7.15, at 281 (quoting Affidavit of H. Zeisel, *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Action (D. Minn., No. 4-71, Civ. 435, pending)).

154. The detection of unconscious prejudice is too intuitive and subjective to impose a judicial pronouncement that an individual may be unfit to serve in a particular case. Note, *Minimum*, *supra* note 142, at 1495. Peremptory challenges permit parties to determine biases based on societal characteristics which ordinarliy would not be acknowledged in the context of a challenge for cause. *See* Babcock, *supra* note 142, at 553; Saltzburg & Powers, *supra* note 120, at 356.

155. *See* Decker, *Some Thoughts on* People v. Payne*: Arguments in Opposition to* Payne, 13 ILL. CTS. BULL. JUD. AD. (Ill. St. B.A.) No. 2, at 8 (Aug. 1982) [hereinafter cited as Decker].

would invalidate the statute whenever there is a "reasonable appearance" that the peremptory challenges were exercised to exclude group biases from the jury.[156] For example, when there are only two blacks on the venire and the prosecution strikes one with its peremptory challenge, it is uncertain whether this striking of fifty percent of the black representation would "reasonably appear" to constitute systematic exclusion. Furthermore, should the defendant decide to appeal an adverse ruling by the trial court, the fact that the excluded jurors may have subtly conveyed hostility to the prosecutor, thereby indicating a potential for partiality, would not appear in the record before the appellate court.[157] Thus, there is a tremendous potential that many of the prosecution's peremptory challenges, legitimate even under the *Payne* standard, will be incorporated under the rubric of "reasonably appears." Consequently, the state will be forced to forfeit its statutory right to an uncurtailed use of peremptory challenges whenever it is accused of misusing that right as a tool of racial discrimination, and such an accusation impresses the trial court as having merely a "reasonable appearance" of being true.[158] Rather than forfeit the right to exercise his peremptory challenges, counsel faced with curtailed challenges simply will risk the judicial inquiry. Even more disturbing, however, is the possibility that when it would be to the prosecution's advantage, the prosecution may use its challenges in order to have the venire quashed and the selection process repeated.[159]

A second problem with the *Payne* standard is that the meaning of "systematic exclusion" is left to the "trial judge's experience."[160] Other courts that have considered this question have determined that no systematic exclusion exists when the defense has used its peremptory challenges to strike minorities.[161] Courts also have ruled that where there are any other circumstances which explain the dismissal of blacks,[162] or where there is evidence

156. *See* People v. Thompson, 79 A.D.2d 87, 114-15, 435 N.Y.S.2d 739, 757 (1981) (Mangano, J., dissenting) (rejecting the proposition that the statute granting peremptory challenges is invalidated only when applied unconstitutionally).

157. *See supra* note 155.

158. *Id.*

159. *See* Commonwealth v. Reid, 1981 Mass. Adv. Sh. 1803, 424 N.E.2d 495 (1981) (discussing potential abuse of the *Soares* standard and holding that dismissal of venire is not the only remedy; rather, judges may disallow the peremptory challenge and allow the juror to sit).

160. 106 Ill. App. 3d at 1040 n.5, 436 N.E.2d at 1050 n.5; *see* Commonwealth v. DiMatteo, 1981 Mass. App. Ct. Adv. Sh. 1777, 427 N.E.2d 754 (1981) (holding that where a defendant strikes the only black on the venire, a "pattern" of conduct is not required for the prosecution to succeed on a *Soares* challenge).

161. *See, e.g.*, Weems v. United States, 361 F. Supp. 922 (D. Md. 1973) (co-defendant's exercise of peremptory challenges to obtain an all white jury did not constitute prejudice to the defendant). For a thorough survey of the case law regarding the use of peremptory challenges to exclude groups from the jury, see Annot., 79 A.L.R.3d 14 (1977).

162. *See, e.g.*, United States v. Nelson, 529 F.2d 40 (8th Cir.) (statistics used were inappropriate to determine whether systematic exclusion occurred), *cert. denied*, 426 U.S. 922 (1976); United States v. Carter, 528 F.2d 844 (8th Cir. 1975) (rejecting statistical evidence as being clearly indicative of systematic exclusion in the county where a court sits); McKinney v. Walker,

that blacks actually served on a petit jury, systematic exclusion does not exist.[163] With this precedent, and the failure to delineate any factors the trial judge is to consider, *Payne*'s individual case standard offers little to assist trial judges in reaching a decision.

While condemning the use of group classifications as a proxy for predicting potential bias, the *Payne* court, unlike the court in *Soares*, failed to articulate what is meant by "discrete groups."[164] *Payne* explicitly mentioned that Jews, Mexicans, Italians, and women would constitute such groups for purposes of its standard.[165] Focusing on these examples, there appear to be two distinct analyses used in determining whether a group is discrete. First, a group may be classified as discrete if its members possess biases which result from their association with a particular societal subgroup.[166] This analysis would justify categorizing blacks, hispanics, and women as discrete. Alternatively, discrete status could be conferred on those who, because of their shared beliefs and biases, constitute a homogeneous group.[167] Under

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394 F. Supp. 1015 (D.S.C.) (defects in the drawing of venire and the exercise of peremptory challenges which resulted in the absence of blacks from the jury was not systematic exclusion), *aff'd without opinion*, 529 F.2d 516 (4th Cir. 1974). *See generally* Annot., 79 A.L.R.3d 14 (1977).

163. *See, e.g.*, United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974) (the fact that blacks served on juries in a lesser percentage than they appeared on voter registration lists was constitutionally permissible); State v. Gray, 285 So. 2d 199 (La. 1973) (the fact that blacks were represented on the jury in a lesser percentage than other groups as a result of the prosecution's peremptory challenges was not systematic exclusion), *cert. denied*, 416 U.S. 774 (1975); State v. Booker, 517 S.W.2d 937 (Mo. Ct. App. 1974) (the fact that blacks sat on 32% of trials involving black defendants was not systematic exclusion); Ridley v. State, 475 S.W.2d 769 (Tex. Crim. App. 1972) (the fact that all but three blacks on the venire were excused through the use of peremptory challenges was not systematic exclusion). *See generally* Annot., 79 A.L.R.3d 14 (1977).

164. The *Payne* court stated that group classifications never are acceptable proxies for determining potential bias; however:

> Whatever it is about group associations that suggests that members of one group are somehow different from non-members also suggests that any differences might include a greater likelihood of certain shared feelings, which might imply partiality in some instances. If so, a challenge would be made to all members of the group precisely because they share special feelings.

Saltzburg & Powers, *supra* note 120, at 360. These "special feelings" may create prejudice in a particular case.

The *Wheeler* court, in making a distinction between impermissible group bias based peremptory challenges and permissible specific bias based challenges, stated that where the prosecutor challenges those who have a prior arrest record, have complained of police harassment, have "unconventional" hairstyles or lifestyles, or smile, gesture or look a certain way, such challenges are permissible. In each of these examples, however, as in the case of racial stereotypes, bias is still being presumed from a prospective juror's membership in a group. People v. Wheeler, 22 Cal. 3d at 776, 583 P.2d at 760, 148 Cal. Rptr. at 902.

165. 106 Ill. App. 3d at 1037 n.2, 436 N.E.2d at 1048 n.2.

166. People v. Wheeler, 22 Cal. 3d at 275-77, 583 P.2d at 760-61, 148 Cal. Rptr. at 901-02.

167. *See* People v. Benard, 129 Cal. App. 3d 833, 181 Cal. Rptr. 436 (1982) (individuals unalterably opposed to the death penalty are not a cognizable group); Rubio v. Superior Court, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979) (ex-felons and non-resident aliens are not a discrete group because others can represent their perspectives adequately); People v. Kagan,

this analysis religious groups such as Jews, Catholics, and Protestants would constitute discrete groups. Applying either approach, it certainly can be asserted that young adults, Republicans, Democrats, Nazis, Ku Klux Klan members, married or single individuals, and the elderly would constitute discrete groups. Under either analysis, the potential harm of the *Payne* standard is unlimited.[168] As courts gradually recognize more groups as being "discrete," the utility of peremptory challenges in excluding perceived biases will be practically destroyed.

An additional problem with the *Payne* standard is that the prosecution's task of establishing the validity of its peremptory challenges is unclear and may burden the voir dire process.[169] By subjecting the peremptory challenge to judicial inquiry, *Payne* requires that an attorney gather objective evidence in order to prove that his challenges are being exercised to eliminate group members who harbor biases specific to the case. To accomplish this, it is likely that the prosecutor will turn to the voir dire process. Because voir dire is designed only to reveal the narrow bias requisite to establish a challenge for cause,[170] it rarely is used to reveal more general biases or prejudices. Therefore, the added necessity of justifying peremptory challenges may result in an excessive burden that voir dire is not designed to handle.[171] The more likely result, however, is that judges, many of whom feel that the voir dire process is already too burdensome, may refuse a prosecutor's request to expand the questioning of jurors so that the state can establish that an individual does in fact harbor some specific bias to the case.[172] Consequently, under the *Payne* standard, the prosecution could be curtailed both in the use of its peremptory challenges and in its attempt to establish the validity of such challenges.

Assuming that a judge does not limit counsel's questioning during voir dire, it is doubtful that extensive questioning would effectively reveal grounds sufficient to constitute specific bias because jurors probably will be unaware of their biases or reluctant to answer truthfully.[173] The *Payne* ruling will

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101 Misc. 2d 274, 420 N.Y.S. 2d 987 (1979) (systematic exclusion of Jews on the basis of their ethnic affiliations and shared beliefs deprives a Jewish defendant of the right to a trial by his peers).

168. *See* Saltzburg & Powers, *supra* note 120, at 367-72; Decker, *supra* note 155, at 9.

169. *See supra* note 129. "To the extent that restrictions on a party's exercise of the peremptory challenge would require more extensive *voir dire* . . . [limiting peremptory challenges] would invite . . . additional delay at trial which our justice system can ill afford." People v. McCray, 57 N.Y.2d 542, 546, 443 N.E.2d 915, 918, 457 N.Y.S.2d 441, 444 (1982), *cert. denied*, 103 S. Ct. 2430 (1983); *see also* Spence, *Voir Dire: Guaranteed Right to Fair and Impartial Jury*, 56 FLA. B.J. 304 (1982) (demonstrating the fallacy behind the argument that restricted voir dire saves time); Note, *Standard*, *supra* note 150, at 205.

170. *See supra* notes 132, 148.

171. *See* Note, *Discrete Groups*, *supra* note 33, at 1212-15.

172. *See supra* note 132.

173. *See* People v. McCray, 57 N.Y.2d 542, 545-46, 443 N.E.2d 915, 918-19, 457 N.Y.S.2d 441, 444-45 (1982) (voir dire is inadequate to filter out potential biases); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 510 (1965); Saltzburg & Powers,

place counsel in the precarious position of either attempting to highlight any bias through further inquiry while risking alienation of the jurors, or exercising his peremptory challenges while risking an adverse finding by the trial judge. The more likely result is that attorneys will circumvent the standard by developing the ability to provide legitimate responses to judicial inquiry, thereby rationalizing the true motive behind their challenge.[174]

The *Payne* court, in its attempt to insure community participation in the jury system, offers little guidance for the trial judge who must determine when the prosecution is exercising its peremptory challenges to exclude a societal group systematically. Prosecutors faced with allegations that they are sexist, anti-Semitic, or racist, and confused as to how many peremptory challenges are "too many," may abandon their use completely.[175] The defendant, on the other hand, will still be able to exercise his peremptory challenges unhindered by any group or specific bias limitations. If this occurs, it hardly could be said that between the state and the defendant the "scales are evenly held" when these parties attempt to obtain a jury that they perceive to be impartial.[176]

ALTERNATIVES

The major reason that a significant number of defendants fail to establish systematic exclusion of cognizable groups under *Swain* is that there is a lack of objective evidence of case after case abuse.[177] As a result, many commentators view the *Wheeler-Soares* standard as being the only practical solution to prevent discriminatory use of peremptory challenges.[178] Although the problem occurs in the courtroom,[179] the solution does not lie in establishing a vague constitutional rule of law. Rather, exercising their supervisory powers,

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supra note 120, at 355, 360-63; *see also* People v. Oliver, 50 Ill. App. 3d 665, 365 N.E.2d 618 (1st Dist. 1977) (example of prospective juror misleading the defendant by falsely denying any preconceived opinion of guilt).

174. *See* Younger, *Unlawful Peremptory Challenges*, 7 LITIGATION 23, 24 (1980); *see also* People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978) (racially inflammatory testimony by the principal government witness was an insufficient justification for exclusion of blacks by use of peremptory challenges); Commonwealth v. Little, 81 Mass. Adv. Sh. 1818, 424 N.E.2d 504 (1981) (prevailing racial tensions held to be an insufficient justification); Commonwealth v. Smith, 81 Mass. App. Ct. Adv. Sh. 1920, 428 N.E.2d 348 (1981) (individual's participation on previous jury was a sufficient justification for exclusion); Commonwealth v. Brown, 81 Mass. App. Ct. Adv. Sh. 238, 416 N.E.2d 218 (1981) (the prosecution's response that it excluded minorities in retaliation for the defendant's exclusion of whites held to be an insufficient justification).

175. Decker, *supra* note 155, at 10.

176. Hayes v. Missouri, 120 U.S. 68, 70 (1887).

177. *See* GINGER, *supra* note 21, at 443-76; PROJECT, *supra* note 46, at 15-40.

178. *See* Saltzburg & Powers, *supra* note 120, at 338 n.8; Note, *Misuse*, *supra* note 108, at 1777-80.

179. People v. Gosberry, 109 Ill. App. 3d 674, 678-80, 440 N.E.2d 954, 959-60 (1st Dist. 1982). The courts also have contributed to the defendant's burden by rationalizing blatant examples of case after case discrimination. In United States v. Carter, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976), the defendant demonstrated that in 15 cases a total

the courts should implement internal procedures and have their clerks maintain records of the prosecution's exercise of peremptory challenges. Such a record of discriminatory misuse will enable defendants to prove more easily that some prosecutors use their challenges to eliminate minority participation systematically in the administration of justice.[180] The courts, by establishing an adequate and objective record, will enable defendants to meet the requirements of *Taylor* and *Swain*, and will avoid a subjective, ad hoc inquiry into the reasons for exercising peremptory challenges.

The legislature, as well as the courts, should listen to the message sent by *Payne*. That is, the Illinois legislature should reassess the propriety of the prosecution's peremptory challenges in light of the fairness to the defense and potential for abuse. Various legislative alternatives to increase minority representation on the petit jury have been proposed. These generally consist of coordinated programs which use additional source lists,[181] implementing random selection procedures,[182] curtailing exemptions,[183] and improving the administrative efficiency of the jury system.[184] Some commentators advocate a reduction in the number of peremptory challenges in order to prevent manipulation of the jury's composition.[185] Others have proposed the absolute elimination of prosecutorial challenges.[186] These alternatives, which seek to increase minority representation through improved jury selection procedures, and which limit the potential abuse of the peremptory challenge without altering its fundamental nature, are superior to the vague standard set forth in *Payne* which transforms a challenge "for no cause" into a challenge "for no impermissible cause."

Legislatures, however, have been slow to adopt any of these proposals. For example, in 1974 a bill was introduced in the Massachusetts House of Representatives which would have eliminated all peremptory challenges.[187] Although supported by the Massachusetts Bar Association, on the condition that attorneys conduct the questioning during voir dire, the bill did not

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of 70 blacks were on the venire; 57, or 81% were stricken by the prosecution. In the fifteenth case, the government excluded all the prospective black jurors through the exercise of its peremptory challenges. Despite this evidence, the *Carter* court concluded that there was no *Swain* violation. For other examples of judicial unwillingness to find a *Swain* violation despite a substantial showing of case after case abuse, see VAN DYKE, *supra* note 20, at 155-56.

180. It may be true that this is an "open secret." *See generally* Waltz, *supra* note 105.

181. *See* Kuhn, *supra* note 27, at 255 (proposal to make source list truly representative of the community); Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970) (suggesting redistricting in order to obtain more representative source lists).

182. *See* VAN DYKE, *supra* note 20, at 85-106; Saltzburg & Powers, *supra* note 120, at 374-76.

183. *See* VAN DYKE, *supra* note 20, at 111-34.

184. *Id.* at 219-24.

185. *See, e.g.,* Saltzburg & Powers, *supra* note 120, at 376-80.

186. *See* VAN DYKE, *supra* note 20, at 167; Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247, 269 (1973); Comment, *Curbing Prosecutorial Abuse of Peremptory Challenges—the Available Alternatives*, 3 W. NEW ENG. L. REV. 223, 245-46 (1980).

187. For a discussion of this bill, see VAN DYKE, *supra* note 20, at 168-69.

pass.[188] Similarly, in 1976 a proposal by the United States Supreme Court[189] which would have reduced the number of peremptory challenges available to both the prosecution and defendants was rejected by Congress.[190] Although neither of these bills became law, the fact that some legislatures have begun to reexamine the propriety of peremptory challenges, coupled with the express judicial dissatisfaction with the abuse of such challenges, as evidenced by *Payne*, should send a message to the Illinois legislature that a reevaluation of the policies, principles, and function of this device is clearly warranted.

It is apparent that the intent behind *Payne* is to impose judicial control over alleged prosecutorial abuse of peremptory challenges. A reasonable legislative compromise would be to divide the total number of peremptory challenges the prosecution may exercise into two equal categories. The prosecution would be given total discretion in exercising the challenges in the first category. These challenges would be exercised without the threat of being required to show justification. The second category of peremptory challenges, however, could be withheld by the trial judge if he observed that the prosecution was acting "improperly."[191] The *Payne* "reasonably appears" standard could be used to determine whether to dispense the remaining peremptory challenges, rather than as a basis to decide when the judge should inquire into the reasons behind exercise of the challenges. By allowing the judge to withhold only the second category of challenges, inquiry into the first category of peremptory challenges would be eliminated and the total exclusion of a cognizable group from participation on the petit jury would be prevented. The effect would be to preserve the integrity of the premptory challenge while simultaneously permitting judicial intervention where it is warranted.

CONCLUSION

The *Payne* decision may have a significant impact on both the propriety of exercising peremptory challenges and the prosecution's ability to achieve a fair and impartial jury. No one would accept the use of the peremptory challenge as a means of effectuating a discriminatory selection procedure on a case after case basis. Within the context of a single trial, however, the attorney's uncurtailed right to reject those he intuitively perceives to be partial should outweigh an individual's right to participate on any particular jury.

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188. *See* VAN DYKE, *supra* note 20, at 169.

189. U.S. SUPREME COURT, RULES OF CRIMINAL PROCUDURE, H.R. DOC. No. 464, 94th Cong., 2d Sess. 2 (1976). The Supreme Court proposed reduction of peremptory challenges from 20 to 12 in capital cases, from 6 (for government) and 10 (for defense) to 5 each in felony cases, and from 3 to 2 in misdemeanor cases. *Id.* at 12-13 (App. A).

190. Act of July 30, 1977, Pub. L. No. 95-78, § 2(c), 91 Stat. 319; *see* Note, *Misuse*, *supra* note 108, at 1774-75 nn.37-43 (extensive discussion of this act).

191. The court would observe whether a prosecutor has struck all or most of the members of a particular group, whether a disproportionate number of challenges have been exercised against a particular group, and whether the prosecution engaged in more than desultory voir dire. People v. Wheeler, 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905.

In *Swain*, the Supreme Court recognized the importance of an uncurtailed exercise of the peremptory challenge. Even under the fair cross-section analysis of the sixth amendment established in *Taylor* and *Duren*, a case after case demonstration of underrepresentation is required to determine if a group's right to participate in the jury system has been denied.

Subjecting peremptory challenges to judicial inquiry within the context of a single trial undermines the policies upon which the peremptory challenge is based. The prosecutor, uncertain as to whether his peremptory challenges may be ruled invalid, might be hesitant to engage in thorough questioning during voir dire for fear that failure to establish a challenge for cause would result in the impaneling of a hostile juror. Furthermore, judicial recognition of the important role that group biases play in determining a jury's impartiality may encourage individuals to assert their prejudices in deliberations, rather than to set them aside and impartially review the evidence before them.

Instead of implementing an impractical rule of law, the courts should take the initiative by establishing a record of the prosecution's use of peremptory challenges from which defendants may prove discriminatory misuse of the device. Moreover, in protecting the defendant's right to a fair trial, courts should be more liberal in holding that a defendant has established a case after case claim of systematic exclusion. Finally, the legislature should reassess the necessity of the peremptory challenge and impose some method of control in order to prevent potential misuse of the challenge as a jury selection procedure.*

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* Subsequent to submission of this Note for publication, the Illinois Supreme Court granted petitioner's leave to appeal and heard oral arguments on *Payne*. People v. Payne, No. 56907 (Ill. S. Ct. argued June 22, 1983). Although final resolution of *Payne* is pending, in two cases decided after *Payne*, the court refused to extend the sixth amendment requirement of cross-sectional representation to the petit jury. Without citation to *Payne*, the court in People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353 (1983), stated that it was not prepared to abandon the case after case standard. *Id.* at 16-17, 447 N.E.2d at 360.

More recently, in People v. Williams, No. 53240 (Ill. S. Ct. May 22, 1983), the court specifically rejected the *Payne* court's conclusion that the cross-sectional representation requirement established by the United States Supreme Court had changed federal constitutional law significantly. *Id.* at 11-13. Noting that *Payne* "did not satisfactorily meet the questions which must be addressed in considering the problem," the court found that there was "no retreat . . . from the view that it is an essential part of our system of trial by an impartial jury that both sides be allowed in particular cases to exercise peremptory challenges on any ground they select." *Id.* at 11, 14.

These two decisions assume additional significance in light of the United States Supreme Court's recent refusal, in McCray v. New York, 103 S. Ct. 2438 (1983), to review a New York Court of Appeals decision which held that in order to establish systematic exclusion, the defendant must demonstrate that the prosecution's exercise of its peremptory challenges resulted in a case after case exclusion of blacks. *See* People v. McCray, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982). By refusing to consider whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, the Court has deferred consideration of the substantive and procedural ramifications of the problem until other state and federal courts clarify the issues. *McCray*, 103 S. Ct. at 2438—*Ed.*