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The Sixth Amendment: Limiting the Use of Peremptory Challenges, 16 J. Marshall L. Rev. 349 (1983)

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COMMENTS

THE SIXTH AMENDMENT: LIMITING THE USE OF PEREMPTORY CHALLENGES

INTRODUCTION

The constitutionality of prosecutorial use of peremptory challenges to exclude blacks from juries, solely because of their race, has been the subject of frequent litigation.[1] Although prosecutors may deny any misconduct, there can be little doubt that they have exercised their peremptory challenges on racial grounds in cases involving black defendants and white victims.[2] Black defendants have often asserted that the exclusion of blacks from juries denied them due process and the equal protection of the law as guaranteed by the fourteenth amendment to the United States Constitution.[3] The Supreme Court, in the landmark case of *Swain v. Alabama*,[4] precluded such constitu-

1. *See* Annot., 19 A.L.R.3d 13, 27-32 (1977). While this comment will focus on cases involving black defendants and white victims, charges of prosecutorial misconduct have arisen in other instances. *See, e.g.*, Doepel v. United States, 434 A.2d 449 (D.C. 1981) (all whites peremptorily struck resulting in white defendant's conviction by an all-black jury); People v. Kagan, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (N.Y. Sup. Ct. 1979) (all Jewish prospective jurors peremptorily struck).

2. *See, e.g.*, United States v. Carter, 528 F.2d 844 (8th Cir. 1975) (evidence established that, in 15 criminal cases in 1974, prosecutors peremptorily challenged 81% of available blacks); Hall v. United States, 168 F.2d 161 (D.C. Cir.) (government peremptorily struck all 19 blacks), *cert. denied*, 334 U.S. 853 (1948); People v. Allen, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979) (state struck all 14 blacks); People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982) (state used all ten of its peremptories to exclude blacks); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (prosecutor peremptorily struck 92% of available blacks and only 34% of available whites), *cert. denied*, 444 U.S. 881 (1979); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981) (although the record was unclear, the prosecutor struck at least 10 blacks and an all-white jury was sworn).

3. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965) (all 6 blacks struck); United States v. Greene, 626 F.2d 75 (8th Cir. 1980) (all 5 blacks struck); Davis v. United States, 374 F.2d 1 (5th Cir. 1967) (3 blacks struck); People v. Harris, 17 Ill. 2d 446, 161 N.E.2d 809 (1959) (all blacks struck), *cert. denied*, 362 U.S. 928 (1960). The fourteenth amendment provides in pertinent part that "[no state shall] deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. 380 U.S. 202 (1965).

tional attacks when it held that race was an acceptable criterion for exercising peremptory challenges in a particular case.[5] The Court stated that a black defendant could establish a violation of the fourteenth amendment only by showing that the prosecution systematically used its peremptory challenges over a period of time to exclude blacks.[6]

The task of proving systematic exclusion proved to be virtually impossible, and courts in three states avoided the *Swain* rule by holding that their state constitutions afforded black defendants greater protection than that provided by the federal constitution.[7] In the recent case of *People v. Payne*,[8] however, an Illinois appellate court adopted a new approach. Instead of relying on the Illinois Constitution, the *Payne* court held that prosecutorial use of peremptory challenges to exclude blacks from juries solely because of their race violates the black defendant's sixth amendment right to an impartial jury drawn from a representative cross-section of the community.[9] This decision marks the first time that a court has applied the sixth amendment to the United States Constitution to limit the racial use of peremptory challenges.[10]

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5. *Id.* at 223.

6. *Id.* at 227.

7. 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); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981).

8. 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982).

9. *Id.* at 1037, 436 N.E.2d at 1048. The sixth amendment provides: "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. The representative cross-section requirement was subsequently incorporated into the sixth amendment by the Supreme Court in Taylor v. Louisiana, 419 U.S. 522 (1975). *See infra* note 45 and accompanying text.

10. A California appellate court previously held that the sixth amendment prohibited the peremptory exclusion of Spanish-speaking jurors. People v. Lucero, 99 Cal. App. 3d 17, 160 Cal. Rptr. 27 (1979) (opinion deleted from official reporter by order of the California Supreme Court dated January 24, 1980). In *Lucero*, the trial court had informed the prospective jurors that witnesses would testify who spoke only Spanish and that an interpreter would be sworn to translate the testimony into English. The prosecutor argued that jurors fluent in Spanish might apply their own interpretation to the testimony instead of relying solely on the interpreter's translation. As a result, the prosecutor, over the defendant's objections, peremptorily struck all Spanish-speaking prospective jurors. The *Lucero* court held that the prosecutor's action violated the defendant's right to a jury drawn from a representative cross-section of the community as guaranteed by both the sixth amendment and the California Constitution. 99 Cal. App. 3d at —, 160 Cal. Rptr. at 32.

The validity of the *Lucero* court's utilization of the sixth amendment is subject to question. Prior to *Lucero*, the California Supreme Court, in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), held that the California Constitution precluded prosecutors from excluding members

PEREMPTORY CHALLENGES IN THE JURY SELECTION PROCESS

In order to understand the role of the peremptory challenge in the jury selection process, it is necessary to briefly outline the general procedure used in selecting juries.[11] A designated official initiates the process by compiling a pool of all persons eligible for jury service.[12] Names from the pool are placed in a jury wheel and are then drawn from the wheel to fill the venire. The Supreme Court has repeatedly recognized that racial discrimination at any level of this selection process violates a defendant's equal protection rights under the fourteenth amendment.[13] Historically, however, protection against discrimination was not

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of a "cognizable group" solely on the basis of their group membership. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. *See infra* notes 47-52 and accompanying text. The *Wheeler* holding was expressly based on the California Constitution; the court stated that all claims involving the discriminatory use of peremptory challenges were to be governed by the California Constitution. 22 Cal. 3d at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910. Thus, it would appear that the *Lucero* court erred in applying the sixth amendment. This conclusion is underscored by the fact that the California Supreme Court, while never overruling *Lucero*, ordered the opinion deleted from the official reporter.

11. For a full discussion of the jury selection process, see J. VAN DYKE, JURY SELECTION PROCEDURES (1977); Daughtrey, *Cross Sectionalism In Jury-Selection Procedures After* Taylor v. Louisiana, 43 TENN. L. REV. 1 (1975).

12. The selection of the jury pool is generally accomplished either through the random method or the key-man method. The random method, employed by most states, generally uses voter registration lists as the source of names for the jury pool. *E.g.*, ILL. REV. STAT. ch. 78, § 1 (1981) (voter lists or driver's license lists). In the federal system, jury selection is governed by the Jury Selection and Service Act of 1968. 28 U.S.C. §§ 1861-1869 (1976 & Supp. IV 1980). Under the Act, juries must be selected randomly from a fair cross-section of the community. *Id.* at § 1861. Names of prospective jurors must be chosen either from voter registration lists or from lists of actual voters. Other sources, however, may be used in order to ensure that the pool reflects a cross-section of the community. *Id.* at § 1863 (b)(2). Although the use of voter lists discriminates against individuals who do not register to vote, Congress concluded that the practice was not unfair "because anyone with minimal qualifications—qualifications that are relevant to jury service—can cause his name to be placed on the lists simply by registering or voting." H.R. REP. No. 1076, 90th Cong., 2d Sess. 8, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1794-95. For a discussion of jury selection in federal courts, see Imlay, *Federal Jury Reformation: Saving A Democratic Institution*, 6 LOY. L.A.L. REV. 247 (1973).

Under the key-man method, the jury commissioner or other designated official chooses "key men" in the community to solicit names of prospective jurors. *E.g.*, LA. CODE CRIM. PROC. ANN. arts. 408, 409 (West Supp. 1983); MASS. ANN. LAWS ch. 234, § 4 (Michie/Law. Co-op. Supp. 1982).

13. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Eubanks v. Louisiana, 356 U.S. 584 (1958); Patton v. Mississippi, 332 U.S. 463 (1947); Strauder v. West Virginia, 100 U.S. 303 (1880). *See generally* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968).

extended to the final stage of the jury selection process, the *voir dire*.[14]

During *voir dire*, each prospective juror is questioned regarding his or her ability to render an impartial verdict. Because the composition of a jury may affect its verdict,[15] *voir dire* is considered an important step in the selection process.[16] It gives to the prosecution and the defense the opportunity to challenge prospective jurors "who may be biased about the defendant, the prosecution, or the case, and who thus might threaten the jury's impartiality."[17]

Prospective jurors may be challenged either for cause or peremptorily. Challenges for cause, although unlimited in number, are subject to the court's control and permit the rejection of jurors only upon a legally provable basis of partiality.[18] The peremptory challenge, on the other hand, is the right to reject jurors without a reason.[19] The value of the peremptory challenge is that a prospective juror, not subject to a challenge for cause, can be struck on the belief that he or she possesses some

14. The apparent reason for not extending protection to the *voir dire* stage was the belief that if the venire was selected in a constitutional manner, the jury actually chosen must necessarily comply with the constitutional requirements. *See, e.g.*, People v. Harris, 17 Ill. 2d 446, 161 N.E.2d 809 (1959) (defendant failed to show that blacks were excluded from the venire), *cert. denied*, 362 U.S. 928 (1960); State v. King, 219 Kan. 508, 548 P.2d 803 (1976) (defendant did not show purposeful discrimination in the selection process).

15. *See* Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1138-39 (1978); Comment, *Peremptory Challenge—Divining Rod for a Sympathetic Jury?*, 21 CATH. LAW. 56 (1975) (characteristics which influence juror selection). *See generally* H. KALVEN & H. ZIESEL, THE AMERICAN JURY (1966); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

16. *See* Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545 (1975).

17. VAN DYKE, *supra* note 11, at 139.

18. Swain v. Alabama, 380 U.S. 202, 220 (1965). Court rules or statutes usually define the grounds for challenges for cause. For example, a prospective juror who is related to the defendant, victim, or attorneys is subject to removal for cause, as is one who has previously served as a juror in the same type of case. MINN. R. CRIM. PRO. 26.02 subd. 5 (West 1979); N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982); OHIO REV. CODE ANN. § 2313.42 (Anderson 1981). In many states, a person is not disqualified even if he has formed an opinion about the case if he states under oath that he believes he can render an impartial verdict based on the evidence presented. *E.g.*, ILL. REV. STAT. ch. 78, § 14 (1981); IND. CODE ANN. § 35-37-1-5 (Burns Supp. 1982); TEX. CRIM. PROC. CODE ANN. art. 35.16 (Vernon Supp. 1982-83).

19. Swain v. Alabama, 380 U.S. 202, 220 (1965). The number of peremptories varies depending on the jurisdiction and offense charged. In Illinois, if there is a single defendant, both the state and the defendant are afforded 20 challenges in cases punishable by death, 10 in cases punishable by imprisonment, and 5 in all other cases. ILL. REV. STAT. ch. 38, § 115-4(e) (1981). *Cf.* FED. R. CRIM. P. 24(b); MASS. R. CRIM. P. 20(c)(1) (1979).

latent bias or prejudice.[20] In this regard, courts and commentators have recognized the peremptory challenge as one of the most important factors in securing an impartial trial.[21]

While peremptories can serve an important function in selecting an impartial jury, the potential for abuse is immense because the challenges generally are not subject to the court's control.[22] If exercised in a discriminatory manner, peremptory challenges can change what would have been a heterogeneous jury into a homogeneous one.[23] Indeed, the peremptory challenge has been referred to as "probably the single most significant means by which . . . prejudice and bias is injected into the jury selection process."[24]

SWAIN V. ALABAMA: THE SYSTEMATIC EXCLUSION TEST

In 1965, the issue of prosecutorial abuse reached the Supreme Court. In *Swain v. Alabama*,[25] a young black was convicted and sentenced to death for the rape of a 17-year-old white woman. The defendant contended that he was denied equal protection of the law when the prosecutor peremptorily challenged all six blacks on the venire. The Court noted that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without be-

20. The important function that the peremptory challenge plays in eliminating persons suspected of possessing some latent bias or prejudice is underscored by the fact that, during *voir dire*, some jurors will deceive the court either because they are ashamed to admit their beliefs or because they underestimate the impact of those beliefs on their ability to render an impartial verdict. Babcock, *supra* note 16, at 554. Moreover, " 'the more prejudiced or bigoted the jurors, the less can they be expected to confess forthrightly and candidly their state of mind in open court.' " *Id.* at n.32 (quoting A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 103 (1973)).

21. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 219 (1965); Pointer v. United States, 151 U.S. 396, 408 (1894); Hayes v. Missouri, 120 U.S. 68, 70 (1887) ("experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge"); Babcock, *supra* note 16, at 552-55; Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1493 (1975).

22. For this reason, it has been suggested that prosecutors should be denied the use of the challenge. Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 234 (1978) [hereinafter cited as *Traditional Use or Abuse*]. Other authors have suggested that the number of peremptories should be limited to five or less. Ashby, *supra* note 15, at 1166; Kuhn, *supra* note 13, at 222.

23. *See* VAN DYKE, *supra* note 11, at 222; *Traditional Use or Abuse, supra* note 22, at 287.

24. Imlay, *supra* note 12, at 270.

25. 380 U.S. 202 (1965).

ing subject to the court's control."[26] Reasoning that a radical change in the operation of the challenge would result if a prosecutor's motives were subject to scrutiny, the Court concluded that a prosecutor must be presumed to be exercising the state's challenges to obtain an impartial jury.[27] The Court rejected the defendant's claim and held that the equal protection rights guaranteed by the fourteenth amendment were not violated by the striking of Negroes in a particular case.[28] The Court stated that "[t]he presumption is not overcome and the prosecutor therefore subjected to examination by allegations that *in the case at hand* all Negroes were removed from the jury or that they were removed because they were Negroes."[29] The Court indicated in dicta, however, that the presumption could be overcome and a *prima facie* case of discrimination established if it could be shown that the prosecutor systematically excluded blacks in case after case, regardless of the circumstances, the crime, or the victim.[30]

The *Swain* decision has been widely criticized[31] because, unless a pattern of discrimination is established, a defendant cannot challenge the state's use of its peremptories.[32] While later defendants can point to earlier cases as establishing a pattern of prosecutorial discrimination, the constitutional rights of the first few defendants are left unprotected.[33] Observing this

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26. *Id.* at 220.

27. *Id.* at 221-22. The Court's refusal to permit judicial inquiry into a prosecutor's motives for striking particular jurors was based on the Court's belief that the challenge would no longer be peremptory if a prosecutor's judgment were "subject to scrutiny for reasonableness and sincerity." *Id.* at 222. Such reasoning, however, is no longer tenable in view of the Court's subsequent interpretation of the sixth amendment. *See infra* text accompanying note 46.

28. 380 U.S. 202 (1965).

29. *Id.* at 222 (emphasis added).

30. *Id.* at 223-24. Because the Court concluded that the record was insufficient to establish systematic exclusion, the Court found it unnecessary to decide the issue. *Id.* at 224-25. *See infra* note 41.

31. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978) (*Swain* affords no protection to the first defendant to suffer discrimination); Commonwealth v. Martin, 461 Pa. 289, 294, 336 A.2d 290, 295 (1975) (Nix, J., dissenting) (*Swain* perpetuates discrimination); Imlay, *supra* note 12, at 270 (*Swain* allows prejudice to be injected into the jury); Kuhn, *supra* note 13, at 302 (*Swain* imposes an insurmountable burden); *Traditional Use or Abuse, supra* note 22, at 193 (*Swain* "presents an . . . unworkable standard of review and fails to remedy the most pervasive forms of prosecutorial misuse of the challenge").

32. Swain v. Alabama, 380 U.S. 202, 227 (1965).

33. *See, e.g.*, Blackwell v. State, 248 Ga. 138, 281 S.E.2d 599 (1981) (state struck 10 blacks to obtain all-white jury; defendant did not show systematic exclusion); People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982) (state used all 10 of its peremptories to exclude blacks; no systematic exclusion); State v. Edwards, 406 So. 2d 1331 (La. 1981) (state used 8 of its 10

anomaly, Justice Nix stated: "Is justice only obtainable after repeated injustices are demonstrated? Is there any justification within the traditions of Anglo-Saxon legal philosophy that permits the use of a presumption to hide the existence of an obvious fact?"[34] As is illustrated by two cases from the Court of Appeals for the Eighth Circuit, courts have been extremely reluctant to find the requisite unconstitutional pattern of prosecutorial discrimination. In *United States v. Carter*,[35] the government had peremptorily challenged all five prospective black jurors, and the defendant was subsequently convicted by an all-white jury. The defendant sought to show that the government systematically excluded blacks from juries. His evidence established that, in 15 cases, prosecutors in the Western District of Missouri had peremptorily struck 57 of the 70 blacks available for jury service, and in 7 of the cases, all available blacks were excused.[36] While the court acknowledged that the defendant had raised a serious question, it concluded that the defendant had failed to meet the systematic exclusion test set out in *Swain*.[37]

In *United States v. Nelson*,[38] the government peremptorily challenged all three blacks on the venire. Relying on the statistics used in *Carter*, the defendant again alleged that prosecutors in the Western District of Missouri systematically excluded blacks. The court rejected the defendant's claim, but noted that the case presented another example in which the prosecutor exercised his peremptories to obtain an all-white jury.[39] Of little consolation to the defendant was the court's belief that if such practices continued the district judges would take appropriate action.[40] The logical question presented by these decisions is left unanswered; how many defendants must raise the issue of discrimination before systematic exclusion is established?

These cases illustrate the difficulty of proving systematic exclusion. To meet the test, a defendant must show not only that the prosecutor consistently used his peremptories to discriminate, he must also show "when, how often and under what circumstances the prosecutor *alone*" has been responsible for

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peremptories to exclude blacks; no systematic exclusion) *cert. denied sub nom.*, Edwards v. Louisiana, — U.S. —, 102 S. Ct. 2011 (1982).

34. Commonwealth v. Martin, 461 Pa. 289, 294, 336 A.2d 290, 295 (1975) (Nix, J., dissenting).

35. 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976).

36. *Id.* at 848.

37. *Id.* at 850. The court, however, gave no indication as to the amount of evidence necessary to establish systematic exclusion.

38. 529 F.2d 40 (8th Cir.), *cert. denied*, 426 U.S. 922 (1976).

39. *Id.* at 43.

40. *Id.*

striking the available blacks.[41] Additionally, *Swain* has been interpreted as holding that a defendant must establish that the prosecutor excluded every available black juror in every case involving a black defendant.[42] The fact that only one defendant has been able to prove that the prosecutor systematically excluded blacks[43] demonstrates the difficulty of the defendant's burden of proof under the systematic exclusion test.

CIRCUMVENTING THE SYSTEMATIC EXCLUSION TEST

Recognizing that *Swain* provided black defendants with only illusory protection against discrimination, a number of courts side-stepped the Supreme Court's systematic exclusion test.[44] These courts relied on *Taylor v. Louisiana*,[45] in which the Supreme Court held that the sixth amendment right to an impartial jury necessarily requires a jury drawn from a representative cross-section of the community.[46] The California

41. Swain v. Alabama, 380 U.S. 202, 224 (1965) (emphasis added). In *Swain*, this requirement was fatal to the defendant's claim. While the evidence showed that Negroes had never served on juries in Talladega County, the defendant failed to show in which cases the prosecution alone was responsible for striking all of the Negroes. *Id.* at 224-25. The Court reasoned that the selection of jury pools and venires is completely within the control of state officials; the total exclusion of blacks, therefore, would give rise to a *prima facie* case of discrimination on the part of the state. In the peremptory system, on the other hand, both the prosecution and defense participate in the rejection of jurors. Thus, an inference of state discrimination cannot arise unless the prosecution is shown to have participated in the exclusion of blacks. *Id.* at 226-27. It is virtually impossible, however, to establish how many blacks a prosecutor excluded because records of peremptory challenges are rarely kept. *See* Kuhn, *supra* note 13, at 302.

42. *See, e.g.*, State v. Williams, 535 S.W.2d 128, 130 (Mo. Ct. App. 1976) (defendant did not show that state excluded "*all*" Negroes) (emphasis added); Ridley v. State, 475 S.W.2d 769, 771 (Tex. Crim. App. 1972) (defendant failed to show "any effort to exclude *all* Negroes") (emphasis added).

43. State v. Brown, 371 So. 2d 751 (La. 1979). In *Brown*, the defendant was convicted by an all-white jury after the prosecutor peremptorily challenged all five blacks on the venire. The defendant's evidence established that the prosecutor had, on numerous occasions, exercised a disproportionately large number of challenges against blacks. *Id.* at 752. In addition, the court noted that in one case the prosecutor admitted that he had excluded a greater number of blacks because of their tendency to vote not guilty. *Id.* at 752 n.1. In view of the evidence, the court concluded that the defendant had sustained the burden of proving systematic exclusion. *Id.* at 754.

44. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981).

45. 419 U.S. 522 (1975).

46. *Id.* at 528-30. In *Taylor*, the Court reversed the male petitioner's kidnapping conviction on the ground that the Louisiana jury selection statute excluded women from participating as jurors. Under the statute, women were not selected for jury service unless they filed a written declaration of their desire to participate as jurors. The Court held that the exclusion of

Supreme Court, in *People v. Wheeler*,[47] became the first court to subject the state's use of its peremptories to judicial review without requiring proof of a pattern of discrimination. The *Wheeler* court incorporated the representative cross-section requirement into the California Constitution and concluded that the state constitution provided greater protection against discrimination than that afforded by *Swain*.[48] On this basis, the court reversed the murder convictions of two Negroes and held that the state's peremptory exclusion of blacks deprived the defendants of their right, under the California Constitution, to a jury drawn from a representative cross-section of the community.[49]

Although the *Wheeler* court adhered to the proposition that the state must be presumed to have exercised its peremptory challenges in a constitutionally permissible manner,[50] the court reduced the burden of proof necessary to rebut that presumption. Under *Wheeler*, a defendant must make as complete a showing as possible of the circumstances surrounding the utilization of peremptories, establish that the excluded persons were members of a "cognizable group," and show a "strong likelihood" that such persons were excluded because they were

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women from jury venires deprived the defendant of his sixth amendment right to an impartial jury drawn from a representative cross-section of the community. *Id.* at 535-37. The Court noted that while the statute did not affirmatively disqualify women, its effect was that women were rarely present on venires. *Id.* at 525. In discussing the importance of participation by all segments of the community in the criminal justice system, the Court stated:

> Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial . . . . "[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Id. at 530-32 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

It is important to note that the issue in *Taylor* was the exclusion of women from *venires*; the Court, however, was concerned primarily with the practical effects which resulted from the absence of women on *juries*. *Id.* at 530-32. The Court observed that juries were not only less representative of the community, but they also failed to reflect the "distinct quality" which women bring to the jury room. *Id.* at 531-32.

47. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

48. *Id.* at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908-09.

49. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. *See also* People v. Allen, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979) (prosecutor peremptorily struck all 14 blacks); People v. Johnson, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978) (prosecutor admitted he intentionally excluded blacks).

50. 22 Cal. 3d at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904.

members of the group.[51] If the trial court determines that a *prima facie* case of discrimination exists, the burden shifts to the prosecutor, and he must satisfy the court that his challenges were not exercised solely because of the individuals' membership in the excluded group.[52]

The test adopted by the California Supreme Court has found surprisingly little support. While the Supreme Judicial Court of Massachusetts[53] and two New York courts[54] have also made the *Taylor* cross-section requirement, as enunciated by *Wheeler*, an integral part of their state constitutions, the overwhelming majority of courts still apply *Swain*'s systematic exclusion test.[55] Accordingly, *People v. Payne*,[56] which based its holding on the federal Constitution, may have a greater impact

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51. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. The court enumerated several factors to consider in determining whether the prosecutor is practicing racial discrimination. *See infra* note 97.

52. 22 Cal. 3d at 282, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. If the prosecutor fails to show that his challenges were exercised in a constitutionally permissible manner, the trial court must dismiss those jurors already selected and begin a new selection process from a different venire. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

53. *See* Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (racial discrimination contravenes art. 12 of the Massachusetts Constitution), *cert. denied*, 444 U.S. 881 (1979).

54. People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981) (court held that New York Constitution prohibited exclusion on basis of race); People v. Kagen, 101 Misc. 2d 247, 420 N.Y.S.2d 987 (N.Y. Sup. Ct. 1979) (exclusion of Jewish jurors).

55. *See, e.g.*, Blackwell v. State, 248 Ga. 138, 281 S.E.2d 599 (1981) (state exercised 10 of its 11 peremptory challenges against blacks to obtain an all-white jury); People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982) (state exercised all 10 peremptories against blacks); State v. Stewart, 225 Kan. 410, 591 P.2d 166 (1979) (state's peremptory challenges of 8 blacks resulted in all-white jury); State v. Edwards, 406 So. 2d 1331 (La. 1981) (8 of state's 10 peremptories were used to exclude all blacks); State v. Gatlin, 295 N.W.2d 538 (Minn. 1980) (2 blacks peremptorily struck); Gaines v. State, 404 So. 2d 557 (Miss. 1981) (state struck only black on the venire); State v. Johnson, 616 S.W.2d 846 (Mo. Ct. App. 1981) (state struck remaining 4 blacks after 1 was removed for cause); State v. Shelton, 281 S.E.2d 684 (N.C. Ct. App. 1981) (8 of state's 11 peremptory challenges exercised against blacks to produce an all-white jury); Wheeler v. State, 539 S.W.2d 812 (Tenn. Crim. App. 1976) (state challenged the only 2 blacks on venire); State v. Grady, 93 Wis. 2d 1, 286 N.W.2d 607 (Wis. Ct. App. 1979) (state struck 3 blacks). *But see* State v. Crespin, 94 N.M. 486, 612 P.2d 716 (N.M. Ct. App. 1980) (court followed *Swain*, but indicated a willingness to follow *Wheeler* when the proper case arose).

56. 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982). In *Payne*, the prosecutor exercised eight peremptory challenges; six of the seven available black jurors were struck. Although one black was seated, the court observed that this occurred only after defense counsel had objected to each challenge on the ground that the state was excluding blacks solely because of their race. *Id.* at 1045, 436 N.E.2d at 1054. On appeal, the state argued that the excluded blacks had the distinguishing characteristic of being unmarried. The state admitted, however, that this fact was only discovered after it searched the appellate court record. *Id.* The state's argument was further weakened by

in limiting prosecutorial discrimination.[57]

Like *Wheeler*, the *Payne* court relied on *Taylor v. Louisiana*.[58] Although *Taylor* was concerned with the selection of the venire and not with the use of peremptory challenges during *voir dire*,[59] the *Payne* court reasoned that the discriminatory use of peremptory challenges could emasculate the constitutional right to a jury drawn from a representative cross-section of the community.[60] Concluding that it would be irrational to hold that a state may do at *voir dire* what it is constitutionally prohibited from doing during the venire selection, the court stated that a defendant "is constitutionally entitled to a petit jury that is near an approximation of the ideal cross section of the community as the process of random draw and constitutionally acceptable procedures permit."[61]

The court was careful to point out that a black defendant is not constitutionally entitled to have blacks included on the jury or to a jury which proportionately represents every group in the community.[62] This rule is necessitated by the fact that Illinois employs a random jury selection method and, therefore, there will invariably be instances when blacks do not appear on venires.[63] Once blacks are present on venires, however, *Payne* precludes the prosecution from "affirmatively" excluding them through the use of peremptories solely because of their race.[64] The court held that, when it "reasonably appears" to the trial court that the prosecutor exercised his challenges on purely racial grounds, the court should require the prosecutor to prove that blacks were not excluded simply because of their race.[65]

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the fact that the state allowed two unmarried nonblack jurors to be seated. *Id.*

57. *But see* Gaines v. State, 404 So. 2d 557 (Miss. 1981) (court rejected sixth amendment argument and applied *Swain* test); State v. Davis, 529 S.W.2d 10 (Mo. Ct. App. 1975) (evidence established that, in 31 cases, state struck 75% of the blacks; court reluctantly found no sixth amendment violation); *see also infra* note 105 and text accompanying notes 106-10.

58. 419 U.S. 522 (1975). *See supra* text accompanying note 46.

59. *See supra* note 46.

60. 106 Ill. App. 3d at 1037, 426 N.E.2d at 1048.

61. *Id. Accord* 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 449, *cert. denied*, 444 U.S. 881 (1979); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981).

62. 106 Ill. App. 3d at 1037, 436 N.E.2d at 1048.

63. *See supra* note 12.

64. 106 Ill. App. 3d at 1037, 436 N.E.2d at 1048.

65. *Id.* at 1040, 436 N.E.2d at 1050. As in *Wheeler*, if the prosecutor fails to demonstrate that his peremptories were properly exercised, the trial court must dismiss those jurors already seated and begin a new selection process from a different venire. 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050-51.

The Sixth Amendment: A Valid Basis for Preventing Racial Discrimination Through the Use of Peremptories?

The validity of using the sixth amendment to limit prosecutorial discrimination must be examined in light of the objectives of the cross-section requirement mandated by *Taylor*.[66] Unquestionably, the primary goal is to ensure that a defendant receives an impartial jury.[67] To achieve this end, juries must reflect the broad perspectives of the community. Indeed, the Supreme Court, in *Peters v. Kiff*,[68] stressed the importance of participation by all segments of the community:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[69]

Implicit in the cross-section requirement, therefore, is the recognition that each juror brings his or her own experiences and views into the jury room.[70] If jurors are selected from venires which represent a cross-section of the community, these diverse experiences and views will interact with each other so that individual biases are eliminated or lessened, thereby enhancing jury impartiality.[71] The critical point is that the interaction only occurs between those individuals who actually sit as jurors. If courts allow prosecutors to peremptorily exclude blacks solely because of their race, juries will not reflect the distinctive values and attitudes of the black community. In such cases, the broad

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66. *See supra* text accompanying note 46. At the outset, it is important to note that *Swain* can be distinguished on two grounds. First, the *Swain* Court addressed the question of whether the peremptory exclusion of blacks denied a defendant the right to the equal protection of the law under the *fourteenth amendment*. Secondly, *Swain* was decided in 1965; it was not until 1968 that the Supreme Court made the sixth amendment binding on the states. Duncan v. Louisiana, 391 U.S. 145 (1968).

67. Taylor v. Louisiana, 419 U.S. 522, 530-32 (1975). The *Taylor* Court cited with approval Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). "[T]he broad representative character of the jury should be maintained, . . . as assurance of a diffused impartiality . . . ." 419 U.S. at 530.

68. 407 U.S. 493 (1972) (white defendant has standing to challenge state system which excludes blacks from grand and petit juries).

69. *Id.* at 503-04.

70. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 531-32 (1975) (women bring a "distinct quality" into the jury room); VAN DYKE, *supra* note 11, at 160.

71. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530-32 (1975); People v. Wheeler, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978); VAN DYKE, *supra* note 11, at 24.

representation of views which is essential to jury impartiality will be destroyed, and the cross-section requirement will be rendered meaningless.[72] As one author aptly noted: "If a jury [venire] is truly representative, why single out some people for their biases and once again unbalance the jury?"[73]

While the black defendant suffers the greatest injustice, injury also extends to the black community as a whole. The Supreme Court, in *Strauder v. West Virginia*,[74] noted that a system which denies blacks the opportunity to participate as jurors in the administration of the law "is practically a brand upon them, . . . an assertion of their inferiority and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[75] Whether the exclusion occurs during the selection of the jury pool as in *Strauder*, or during *voir dire* through the use of peremptory challenges, the effect is to label all members of the black community as unfit for jury service.

The exclusion of blacks also endangers the second objective of the cross-section requirement—ensuring respect for the integrity of the judicial process.[76] Juries are democratic institutions which foster public involvement in the administration of the law.[77] Courts and commentators have repeatedly recog-

72. People v. Payne, 106 Ill. App. 3d 1034, 1037, 436 N.E.2d 1046, 1048 (1982). This is not to say that a black defendant may challenge the composition of the jury whenever blacks are not represented, for the Supreme Court has often stated that a defendant cannot dispute the makeup of the jury simply because no members of his race are present. *E.g.*, Swain v. Alabama, 380 U.S. 202, 203 (1965); Fay v. New York, 332 U.S. 261, 284 (1947). It is necessary, however, to examine the reason underlying the absence of blacks. If the result is due to the failure of blacks to appear on the venire, the defendant clearly has no grounds to challenge the composition of the jury. The representative cross-section rule does not require venires to represent every segment of the community. All that is demanded is that "venires . . . must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Taylor v. Louisiana, 419 U.S. 522, 538 (1975). If, on the other hand, the absence of blacks is due to the discriminatory use of peremptory challenges, an altogether different situation arises. In this instance, the prosecutor affirmatively excludes an identifiable segment of the community, not on the basis of individual beliefs, but because of beliefs adhered to by the group as a whole. In so doing, the prosecutor destroys the broad representation of views which the cross-section requirement was designed to protect and thereby deprives the defendant of his right to a jury drawn from a cross-section of the community.

73. VAN DYKE, *supra* note 11, at 160.

74. 100 U.S. 303 (1879).

75. *Id.* at 308.

76. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975); People v. Gilliard, No. 81-913, slip op. at 13 (Ill. App. Feb. 16, 1983); People v. Payne, 106 Ill. App. 3d 1034, 1038-39, 436 N.E.2d 1046, 1049 (1982).

77. *See* Imlay, *supra* note 12, at 259-62; Kuhn, *supra* note 13, at 246-47.

nized that community involvement promotes public confidence in the fairness of the judicial process.[78] The jury system plays an important role in this regard because the jury is a conduit through which the community expresses its "sense of justice."[79] This "sense of justice" is not accurately reflected if an identifiable segment of the community is affirmatively discriminated against and is denied the opportunity to participate as jurors. In such cases, not only is the legitimacy of the verdict subject to question,[80] but the entire judicial process is tainted because the courts are perceived as condoning the discrimination.[81]

When viewed in the context of the objectives of the representative cross-section rule, the sixth amendment provides a legitimate means of curbing racial discrimination. The *Swain* Court's systematic exclusion test, by requiring proof of a pattern of discrimination, clearly affords black defendants inadequate protection. Courts must recognize that racial discrimination, whether it occurs in a single trial or over a period of time, imperils the right to an impartial jury.

Subjecting a prosecutor's motives to judicial review obviously alters the nature and operation of the peremptory challenge.[82] In as much as the *Swain* Court expressly sought to avoid such a result,[83] courts may be reluctant to use the sixth amendment in future cases.[84] Courts, however, must not become engrossed with concern over the impact of judicial review on the peremptory system. Since the peremptory challenge is

78. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Kuhn, *supra* note 13, at 246.

79. [T]he jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.

H.R. REP. No. 1076, 90th Cong., 2d Sess. 8, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1797.

80. VAN DYKE, *supra* note 11, at 42; Kuhn, *supra* note 13, at 246. Justice Jackson, dissenting in Cassell v. Texas, 339 U.S. 282 (1950), stated: "A trial jury on which one of the defendant's race has no chance to sit may not have . . . the appearance of impartiality, especially when the accused is a Negro and the alleged victim is not." *Id.* at 302 (Jackson, J., dissenting).

81. *See* People v. Payne, 106 Ill. App. 3d 1034, 1038-39, 436 N.E.2d 1046, 1049 (1982).

82. *Compare* text accompanying note 26 *with* text accompanying note 65.

83. *See supra* note 27 and accompanying text.

84. Indeed, in recent cases, courts refused to subject the challenge to judicial control because they feared that the nature of the peremptory system would be radically changed. *See, e.g.*, People v. Teague, 108 Ill. App. 3d 891, 897, 439 N.E.2d 1066, 1070 (1982) (rejecting the *Payne* rationale); State v. Grady, 93 Wis. 2d 1, 13, 286 N.W.2d 607, 612 (Ct. App. 1979) (peremptory challenges would not be peremptory if subject to judicial review).

not constitutionally required,[85] the sole issue is the black defendant's right to an impartial jury. Because the discriminatory use of peremptory challenges impairs that right, the system must be changed.[86]

Establishing Prosecutorial Discrimination: Overcoming the State's Presumption

Although courts must have the ability to eradicate abuses of the peremptory system, a difficult question arises with respect to when a court should subject a prosecutor's motives to judicial scrutiny. While *Wheeler* and *Payne* both presumed that the state properly exercised its peremptories,[87] the courts adopted dissimilar views concerning who can raise the issue of prosecutorial discrimination and the burden of proof necessary to rebut the presumption. Under *Wheeler*, the defendant must raise the issue and establish a *prima facie* case of discrimination.[88] Only then does the burden shift to the state to establish that its peremptories were exercised for reasons other than race.[89] *Payne*, on the other hand, permits either the defendant or the trial court to raise the issue once it "reasonably appears" that blacks were excluded solely on racial grounds.[90] At that point, the presumption is rebutted, and the prosecutor must demonstrate that the exercise of the challenges was not discriminatory.[91]

Payne significantly reduces the strength of the presumption, and, in turn, the defendant's burden of proving discrimination. Unlike *Wheeler*, which requires evidence of a "strong likelihood" of discrimination,[92] *Payne* permits a defendant to challenge the state's use of peremptories whenever it "reasonably appears" that the state is discriminating. Moreover, if the trial court determines of its own volition that the state is improperly utilizing its challenges, the defendant need not present

85. Stilson v. United States, 250 U.S. 583, 586 (1919).

86. *See* Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) (when a constitutional claim is opposed by a nonconstitutional one, the former must prevail); People v. Payne, 106 Ill. App. 3d 1034, 1039, 436 N.E.2d 1046, 1050 (1982) (a constitutional right must control over a procedural device).

87. People v. Wheeler, 22 Cal. 3d 258, 278, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 904 (1978); People v. Payne, 106 Ill. App. 3d 1034, 1040, 436 N.E.2d 1046, 1050 (1982) (by implication).

88. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *See supra* text accompanying note 51.

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

90. 106 Ill. App. 3d at 1040, 436 N.E.2d at 1050.

91. *Id.*

92. *See supra* text accompanying note 51.

any evidence to rebut the presumption because the burden will have already shifted to the state to establish that it was acting in accordance with the Constitution.[93]

Viewed pragmatically, the *Payne* rationale is well-founded. Courts must have the authority to raise the issue of discrimination so that they may protect the integrity of the judicial process.[94] They cannot permit, nor be perceived to permit, racial discrimination in the courtroom. Although trial judges must not assume the role of defense counsel, courts have an obligation to enforce the Constitution. It would be a dereliction of that obligation if they failed to challenge prosecutorial action which they reasonably believe violates the Constitution. While prosecutors, as officers of the court, should be presumed to have acted in accordance with the Constitution,[95] that presumption must not obscure reality. Judges must recognize that any attorney, given the choice between a neutral juror and one biased in his favor, will invariably strike the former.[96] For this reason, courts should accord prosecutors only a minimal presumption.

It is impossible to formulate a mechanical test to determine when a prosecutor is practicing racial discrimination. Since the determination must ultimately be based on the common sense and sound discretion of the trial judge, *Payne*'s "reasonably appears" test provides the most practicable approach. Undoubtedly, if a prosecutor excludes all or a large number of blacks, the court should view his actions with suspicion. Nonetheless, numbers alone should never be conclusive. Consideration must also

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93. *See supra* text accompanying notes 90-91.

94. *See supra* text accompanying notes 80-81.

95. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 278, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 904 (1978).

96. An oft-cited example of this fact is a book prepared by the Dallas County District Attorney's Office which listed several factors that a prosecutor should consider in selecting jurors:

> III. What to look for in a juror.
>
> A. Attitudes
>
> 1. You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind rather than in degree.
>
> 2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.

VAN DYKE, *supra* note 11, at 152-53 (quoting 65 *The Texas Observer* 9 (May 11, 1973)). Similarly, one commentator noted that if a prosecutor believes that blacks will sympathize with a black defendant, it must reasonably follow that whites would sympathize with the white victim. In such cases, a prosecutor, by peremptorily challenging blacks, "does not eliminate prejudice in exchange for neutrality; he secures a friendly juror in place of a hostile one." The state "is, in fact . . . taking advantage of racial divisions to the detriment of the defendant." Kuhn, *supra* note 13, at 290-91.

be given to the number of whites excluded, the intensity of the *voir dire* examination, and the demeanor of the prospective juror in response to that examination.[97]

While the primary aim is to protect the right to an impartial jury, it is important to note that courts can, by exercising restraint, also preserve the value[98] of the peremptory challenge. If, after considering all the factors, the court can discern any rational basis which would support the prosecutor's challenge, the court should uphold it. Conversely, if the court reasonably suspects that blacks were excluded solely because they were black, it must require the prosecutor to demonstrate otherwise. In this situation, the court should again exercise restraint and sustain the challenge if the prosecutor's evidence raises any reasonable question regarding the prospective juror's impartiality.

Admittedly, the reasonableness test is somewhat vague. That fact, however, is not a valid ground for preventing courts from taking any action to curb prosecutorial impropriety. On the contrary, a mechanical test for determining when a prosecutor is practicing racial discrimination would be impracticable, since each case must be decided on the basis of the peculiar facts and circumstances giving rise to the claim. In this respect, the reasonableness test provides a flexible method of eliminating prosecutorial abuse of the peremptory system.

PEREMPTORY CHALLENGES IN ILLINOIS: THE AFTERMATH OF *PAYNE*

The *Payne* decision marked the first time that an Illinois court restricted the state's use of its peremptories.[99] Previously, the Illinois appellate courts had steadfastly refused to inquire into the reasonableness of a prosecutor's challenges.[100] In both

97. In *Wheeler*, the California Supreme Court articulated a number of factors which are relevant in determining whether a prosecutor is practicing racial discrimination. For example, a defendant may show: (1) that the prosecutor struck all or a disproportionate number of black jurors; (2) that the only distinguishing characteristic was their race; and (3) that the prosecutor failed to conduct a meaningful *voir dire* examination. People v. Wheeler, 22 Cal. 3d 258, 280-81, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905 (1978).

98. *See supra* note 20 and accompanying text.

99. The same court that decided *Payne* subsequently reaffirmed its position. People v. Gilliard, No. 81-913 (Ill. App. Feb. 16, 1983); People v. Gosberry, 109 Ill. App. 3d 674, 440 N.E.2d 954 (1982).

100. *See, e.g.*, People v. Mims, 103 Ill. App. 3d 673, 431 N.E.2d 1126 (1981) (followed *Swain*); People v. Lavinder, 102 Ill. App. 3d 662, 430 N.E.2d 243 (1981) (*Swain* affords adequate protection); People v. Allen, 96 Ill. App. 3d 871, 422 N.E.2d 100 (1981) (followed *Swain*); People v. Fleming, 91 Ill. App. 3d 99, 413 N.E.2d 1330 (1980) (defendant failed to prove systematic exclusion); People v. Attaway, 41 Ill. App. 3d 837, 354 N.E.2d 448 (1976) (defendant did not show purposeful discrimination); People v. Thornhill, 31 Ill. App. 3d

People v. Fleming[101] and *People v. Allen*,[102] the courts declined to adopt the position taken by the California Supreme Court[103] in *Wheeler*.[104] Both courts criticized the *Wheeler* test as "vague and uncertain" and reasoned that the peremptory challenge would no longer be peremptory if a prosecutor's motives were subject to judicial scrutiny.[105] Unfortunately, this preoccupation with the impact of judicial review on the peremptory system has continued and has resulted in disagreement among the appellate districts.[106] In *People v. Teague*,[107] the court rejected the *Payne* rationale despite the fact that the state exercised all ten of its peremptories against blacks. The court noted that adherence to *Payne* would essentially destroy the function of the peremptory challenge.[108] Likewise, in *People v. Newsome*,[109] the court refused to adopt *Payne* and instead followed *Swain*'s systematic exclusion test.[110] The court observed that the peremp-

779, 333 N.E.2d 8 (1975) (court has no authority to restrict state's peremptories).

101. 91 Ill. App. 3d 99, 413 N.E.2d 1330 (1980).

102. 96 Ill. App. 3d 871, 422 N.E.2d 100 (1981).

103. *See supra* text accompanying notes 46-51.

104. In a number of cases, the court found it unnecessary to decide whether to adopt the *Wheeler* test because the defendant failed to preserve a record of the *voir dire* proceedings. *See, e.g.*, People v. Belton, 105 Ill. App. 3d 10, 433 N.E.2d 1119 (1982) (record did not show that excluded prospective jurors were black); People v. Vaughn, 100 Ill. App. 3d 1082, 427 N.E.2d 840 (1981) (court will not speculate as to prosecutor's motives); People v. Bracey, 93 Ill. App. 3d 864, 417 N.E.2d 1029 (1981) (defendant must preserve a complete record of *voir dire*; discrimination cannot be proved by numbers alone).

105. People v. Allen, 96 Ill. App. 3d 871, 878, 422 N.E.2d 100, 105-06 (1981); People v. Fleming, 91 Ill. App. 3d 99, 105, 413 N.E.2d 1330, 1334 (1980). Both courts also rejected the argument—subsequently accepted by the *Payne* court—that the state's exclusion of blacks violates the defendant's sixth amendment right to an impartial jury. Their reasoning, however, was superficial. In *Fleming*, the court merely concluded that it was not necessary to limit the use of peremptory challenges in order to insure jury impartiality. 91 Ill. App. 3d at 106, 413 N.E.2d at 1335. In *Allen*, the court cited *Fleming* and simply stated: "We . . . reject defendant's contention that the State's exercise of its peremptory challenges violated defendant's right to an impartial jury guaranteed by the sixth amendment. . . ." 96 Ill. App. 3d at 878, 422 N.E.2d at 106.

106. Illinois has five appellate districts. The first district, which is located in Cook County, is comprised of five divisions. Considerable disagreement can arise among the different districts and divisions over the same issue because a decision by one court has no binding effect on another division or district. Garcia v. Hynes & Howes Real Estate, Inc., 29 Ill. App. 3d 479, 481, 331 N.E.2d 634, 636 (1975). The disagreement which can arise is illustrated by the recent case of People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982), in which the court repudiated the *Payne* holding. *See infra* text accompanying notes 107-08.

107. 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1982).

108. *Id.* at 897, 439 N.E.2d at 1070.

109. 110 Ill. App. 3d 1043, 443 N.E.2d 634 (1982).

110. *Id.* at 1050, 443 N.E.2d at 638.

tory system would be significantly altered if the challenge were subject to judicial control.[111] Interestingly, the *Teague* and *Newsome* opinions lacked the in depth reasoning exhibited in *Payne*. Neither court considered the objectives of the cross-section requirement. Instead, by focusing attention on the impact of judicial review on the peremptory system, the courts clearly elevated a procedural device over the constitutional rights of the defendant. Moreover, the decisions seriously undermine judicial integrity. It must be remembered "that the appearance of justice in a criminal trial is as important as justice in fact."[112] Yet, under *Teague* and *Newsome*, the inescapable result is that Illinois prosecutors, no matter how blatant their conduct, can practice racial discrimination in the courtroom so long as their conduct does not constitute an impermissible pattern of systematic exclusion under *Swain*.

This absurdity is largely attributable to the position of the Illinois Supreme Court. In 1959 the court stated:

> The right of the peremptory challenge is a substantial one which should not be abridged or denied. It may, by its very nature, be exercised or not exercised according to the judgment, will or caprice of the party entitled thereto, and he is not required to assign any reason therefore.[113]

In subsequent decisions, the Illinois Supreme Court adhered to this principle. In *People v. Butler*,[114] the court applied *Swain*'s systematic exclusion test and held that a prosecutor's use of peremptories was not subject to constitutional attack.[115] Similarly, in *People v. King*,[116] the most recent supreme court case to deal with the issue of prosecutorial discrimination,[117] the court

111. *Id.* at 1055-56, 443 N.E.2d at 642.

112. People v. Gilliard, No. 81-913, slip op. at 13 (Ill. App. Feb. 16, 1983).

113. People v. Harris, 17 Ill. 2d 446, 451, 161 N.E.2d 809, 811-12 (1959), *cert. denied*, 362 U.S. 928 (1960).

114. 46 Ill. 2d 162, 263 N.E.2d 89 (1970).

115. *Id.* at 165, 263 N.E.2d at 91. *See also* People v. Powell, 53 Ill. 2d 465, 478, 292 N.E.2d 409, 417 (1973) (fact that 5 blacks were struck was insufficient to establish *prima facie* case of purposeful discrimination).

116. 54 Ill. 2d 291, 296 N.E.2d 731 (1973).

117. The issue came before the court in 1981 in People v. Gaines, 88 Ill. 2d 342, 430 N.E.2d 1046 (1981), wherein the defendant argued that the court should reject *Swain* and overturn its earlier holdings. The court found it unnecessary to decide the issue because the defendant did not object until all the jurors were sworn. In addition, the court observed that the defendant failed to preserve a record of the *voir dire*. *Id.* at 358-59, 430 N.E.2d at 1054.

After this article went to press, the Illinois Supreme Court decided People v. Davis, No. 54276 (Ill. Feb. 18, 1983) (Simon, J., dissenting). Although the record in *Davis* lacked any evidence of prosecutorial discrimination, and the court, therefore, could have disposed of the issue on this ground alone, the court instead chose to reject the defendant's claim on the basis that he failed to establish systematic exclusion as required by *Swain*. *Id.* at

reaffirmed the *Swain* test.[118]

A number of appellate courts have cited these cases as authority for the proposition that a court may not subject a prosecutor's motives to scrutiny.[119] Indeed, in *Newsome*, the court stated that because of the Illinois Supreme Court's holdings, it lacked the authority to adopt a contrary position.[120] Such reliance is misplaced. As noted in *Payne*, the Illinois Supreme Court cases were decided before the *Taylor* Court made the representative cross-section standard an integral part of the sixth amendment. On this basis, the *Payne* court correctly concluded that the Illinois Supreme Court decisions were inapplicable.[121] Since the Illinois Supreme Court has granted the state leave to appeal the *Payne* decision,[122] the disagreement which exists between the appellate courts will soon be resolved. It is hoped that the court will recognize that the peremptory system is being abused[123] and that the sixth amendment, as applied by *Payne*, provides a valid means to eliminate those abuses.

5-6. In terms of the *Payne* holding, it is significant that the majority did not mention either *Payne* or the sixth amendment. Rather, the court stated that "[o]nly a systematic and purposeful exclusion of blacks from the jury, 'in case after case,' raises a question under the fourteenth amendment." *Id.* at 5. Thus, it would appear that *Payne* is still good law. However, later in the opinion the court stated that peremptory challenges " 'are totally subjective and not subject to scrutiny or examination.' " *Id.* at 6 (quoting Commonwealth v. Henderson, 497 Pa. 23, 29-30, 438 A.2d 951, 954 (1981)). This language, combined with the fact that the court has continued to cite *Swain* with approval indicates that the supreme court may overrule *Payne*. All that can be said at present is that *Davis* will likely do little to end the disagreement which currently exists between the appellate courts.

118. 54 Ill. 2d at 298, 296 N.E.2d at 735. *See also* People v. Powell, 53 Ill. 2d 465, 292 N.E.2d 409 (1973) (fact that five blacks were struck was insufficient to establish *prima facie* case of purposeful discrimination).

119. *See, e.g.*, People v. Newsome, 110 Ill. App. 3d 1043, 1052, 443 N.E.2d 634, 639 (1982); People v. Mims, 103 Ill. App. 3d 673, 677, 431 N.E.2d 1126, 1129 (1981); People v. Lavinder, 102 Ill. App. 3d 662, 667, 430 N.E.2d 243, 246 (1981); People v. Allen, 96 Ill. App. 3d 871, 876, 422 N.E.2d 100, 104 (1981).

120. 110 Ill. App. 3d 1043, 1052, 443 N.E.2d 634, 639 (1982).

121. People v. Payne, 106 Ill. App. 3d 1034, 1043-44, 436 N.E.2d 1046, 1053 (1982).

122. People v. Payne, 1982 Ill. Adv. Sh. 24, Dec. 15, 1982, — N.E.2d —.

123. *See, e.g.*, People v. Gilliard, No. 81-913 (Ill. App. Feb. 16, 1983) (noting that "it is an open secret that prosecutors in Chicago and elsewhere" exclude blacks in cases involving black defendants); People v. Gosberry, 109 Ill. App. 3d 674, 440 N.E.2d 954 (1982) (state exercised seven peremptories, all against blacks; comparison of backgrounds of persons who became jurors with backgrounds of those challenged revealed that only distinguishing characteristic of those excluded was race); People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982) (state contended excluded blacks were distinguishable because they were unmarried, yet state permitted unmarried nonblack jurors to be seated).

CONCLUSION

Courts must act to control the discriminatory use of peremptory challenges. If jury venires are constitutionally selected to represent the diverse perspectives of the community, there is no valid reason why the courts should permit prosecutors to arbitrarily destroy that diversity through the use of peremptory challenges. The potential injury to the black defendant, the black community, and the judicial system as a whole clearly justifies subjecting the challenge to some form of judicial scrutiny. Courts must recognize that racial discrimination has no place in our judicial system. In this regard, it is worth noting the words of Justice Murphy in *Thiel v. Southern Pacific Co.*[124]:

> Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[125]

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124. 328 U.S. 217 (1946).
125. *Id.* at 220.