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Group Bias—As Improper Ground for the Peremptory Challenge in California

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GROUP BIAS—AN IMPROPER GROUND FOR THE PEREMPTORY CHALLENGE IN CALIFORNIA

I. INTRODUCTION

Gertrude Stein will always be remembered for her classic statement that "a rose is a rose is a rose."[1] The California Supreme Court may be remembered for its contrary conclusion in *People v. Wheeler*[2] that a peremptory challenge is not a peremptory challenge when utilized to remove prospective jurors because of group bias.[3] This conclusion is contrary to the rule of the United States Supreme Court in *Swain v. Alabama*[4] and to the rule in the majority of states.[5]

The right to a trial by an impartial jury in criminal cases has long been recognized by both federal[6] and California law.[7] An essential prerequisite to an impartial jury, as delineated by the United States Supreme Court nearly forty years ago in *Smith v. Texas*,[8] is that it be

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1. G. STEIN, *Sacred Emily*, in GEOGRAPHY AND PLAYS 178, 187 (1922).

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

3. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

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

5. *See id.* at 228 (Goldberg, J., dissenting).

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

7. CAL. CONST. art. I, § 16 reads, in pertinent part: "Trial by jury is an inviolate right and shall be secured to all . . . ."

The notion of impartiality is rooted in the common law, "which demanded the strictest impartiality upon the part of each individual juror, [and] which declared that, one and all, should, as between the crown and the defendant, 'stand indifferent as they stand unsworn'." People v. Helm, 152 Cal. 532, 535, 93 P. 99, 101 (1907), *disapproved on other grounds*, People v. Edwards, 163 Cal. 752, 756, 127 P. 58, 59 (1912). This common law requirement of an impartial jury was incorporated in California's jury trial provision.

> The right of trial by jury is fundamental. It is a right which was transmitted to us by the common law and as such is expressly guaranteed by the constitution, and the distinctive quality of that right—its very essence—is that every person put upon trial upon an issue involving his life or his liberty is entitled to have such issue tried by a jury consisting of unbiased and unprejudiced persons.

People v. Bennett, 79 Cal. App. 76, 91, 249 P. 20, 26 (1926). *See also* CAL. PENAL CODE § 1078 (West 1970), wherein the state legislature provided that "[i]t shall be the duty of the trial court to examine the prospective jurors to select a *fair and impartial jury*." (emphasis added).

8. 311 U.S. 128 (1940) (state conviction of black defendant reversed on equal protection grounds after a showing that blacks had been excluded systematically from grand jury service). Speaking for a unanimous court, Justice Black said:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only vio-

drawn from a representative cross section of the community.[9] The California Supreme Court explained the rationale for this rule in *Wheeler*:

> [I]n our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; . . . it is unrealistic to expect jurors to be devoid of opinions, preconceptions or even deep-rooted biases derived from their life experiences in such groups; and hence . . . the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.[10]

California accepted the representative cross section rule many years before it was required to do so by federal constitutional interpretation.[11] However, it was not until the decision in *Wheeler* that the California Supreme Court expressly held that article I, section 16 of the California Constitution guaranteed the right to trial by a jury drawn from a representative cross section of the community.[12]

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lates our Constitution and the laws enacted under it but is at war with our basic concepts of democratic society and a representative government.

Id. at 130 (footnote omitted).

Smith was followed by a series of cases wherein members of an identifiable group were excluded from jury service. In each, the Supreme Court affirmed the representative jury requirement. *See, e.g.*, Glasser v. United States, 315 U.S. 60 (1942) (defendants' contention that nonmembers of League of Women Voters had been excluded from petit juries rejected by the Court due to insufficient proof; however, strong reaffirmation of requirement of a representative jury); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (exclusion of daily wage earners from petit jury service ground for reversal); Ballard v. United States 329 U.S. 187 (1946) (plurality opinion) (conviction reversed due to deliberate exclusion of women from service on grand and petit juries); Peters v. Kiff, 407 U.S. 493 (1972) (state conviction of white defendant overturned upon showing that blacks had been excluded from both grand and petit jury service); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (reversal of conviction of male defendant on ground that women had been excluded from jury service) ("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."). *See also* Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 (1976) in which Congress stated: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section of the community* . . . ." *Id.* § 1861 (emphasis added).

9. *See* note 8 *supra*. *See generally* J. VAN DYKE, JURY SELECTION PROCEDURES 45-83 (1977) [hereinafter cited as VAN DYKE].

10. 22 Cal. 3d at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.

11. The representative cross section rule was not applied to the states as an integral component of the sixth amendment right to an impartial jury incorporated in the fourteenth amendment until Taylor v. Louisiana, 419 U.S. 522 (1975). The Supreme Court in *Taylor* held "that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528.

12. 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. "[W]e . . . hold that in

The guarantee of a representative jury can be threatened at any one of the three stages in the jury selection process: the compilation of the roster of eligible jurors,[13] the excusing of prospective jurors by the court,[14] or the exercise of challenges against veniremen.[15]

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this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Consitution." *Id. See, e.g.*, People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954) (California high court condemned jury selection system that tended to produce venires which were not representative cross sections of the community). In reiterating the necessity of having a representative cross section rule as a requirement for an impartial jury, the court said:

> The American system requires an impartial jury drawn from a cross-section of the entire community and recognition must be given to the fact that eligible jurors are to be found in every stratum of society . . . . Any system or method of jury selection which fails to adhere to these democratic fundamentals, which is not designed to encompass a cross-section of the community or which seeks to favor limited social or economic classes, is not in keeping with the American tradition and will not be condoned by this court.

Id. at 754, 278 P.2d at 18. The lack of specificity in *White* as to whether the court was interpreting the California or Federal Constitution regarding the cross section rule led, in part, to the California Supreme Court's ruling in *Wheeler*. 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900.

13. CAL. CIV. PROC. CODE § 204(e) (West Supp. 1979). *See also id.* §§ 203-220. For federal cases dealing with the compilation of the master list from which venires are drawn, see cases cited at note 8 *supra*. For some California cases, see People v. Spears, 48 Cal. App. 3d 397, 122 Cal. Rptr. 93 (1975) (petit jury venire); People v. Pinell, 43 Cal. App. 3d 627, 117 Cal. Rptr. 913 (1974) (grand jury venire); People v. Powell, 40 Cal. App. 3d 107, 124-33, 115 Cal. Rptr. 109, 119-25 (1974) (petit jury venire); Adams v. Superior Court, 27 Cal. App. 3d 719, 104 Cal. Rptr. 144 (1972) (petit jury venire); People v. Goodspeed, 22 Cal. App. 3d 690, 699-705, 99 Cal. Rptr. 696, 702-06 (1972) (grand jury venire); *In re* Wells, 20 Cal. App. 3d 640, 649-50, 98 Cal. Rptr. 1, 5-6 (1971) (grand jury venire); People v. Newton, 8 Cal. App. 3d 359, 388-91, 87 Cal. Rptr. 394, 413-15 (1970) (grand and petit jury venires). *See generally* VAN DYKE, *supra* note 9, at 85-109.

14. CAL. CIV. PROC. CODE §§ 198-199 (West Supp. 1979) (juror disqualification due to incompetency); *id.* § 200 (juror excused on ground of undue hardship). Section 200 replaced former CAL. CIV. PROC. CODE § 200 (West 1954). This 1975 change helps to diminish the possibility of abuse of automatic exemptions. However, the power of the court to excuse prospective jurors on the ambiguous grounds of suitability and undue hardship permits a large degree of discretion and, consequently, abuse. *See* VAN DYKE, *supra* note 9, at 111-37.

15. A challenge to an individual juror is either peremptory or for cause. CAL. PENAL CODE § 1067 (West 1970).

A challenge for cause is either "general" or "particular." *Id.* § 1071. A general challenge deals with a juror's competency to serve in any case; a particular challenge concerns actual or implied bias in the matter on trial. *Id.* §§ 1071-1073. Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." *Id.* § 1073. Implied bias, on the other hand, exists when a juror is in one of several enumerated relationships with a party: consanguinity, trust, employment, or involved in a previous legal proceeding concerning the parties or the instant case. *Id.* § 1074.

The second type of challenge, a peremptory challenge, is "an objection to a juror for which no reason need be given, but upon which the Court must exclude him." *Id.* § 1069.

This comment will focus on one aspect of the third stage—the use of the peremptory challenge[16] to exclude members of the venire solely on the basis of "group bias."[17]

II. BACKGROUND

The peremptory challenge has its roots in the Middle Ages[18] and was recognized in the United States as early as 1790.[19] Although the Supreme Court has expressed the view that the peremptory challenge is "essential to the fairness of a trial by jury,"[20] and thus "one of the most important rights secured by the accused,"[21] the Constitution does not require that Congress grant peremptory challenges. During its history, the Supreme Court has articulated inconsistent views concerning the use of the peremptory challenge. In one case, the Court advised that it could utilize its supervisory powers to guard against unreasonable use

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The peremptory challenge permits the prosecution or defense counsel to utilize judgement regarding matters which he senses might be prejudicial to his case, but which do not meet the requirements of a challenge for cause.

The procedure commonly used in the federal courts for exercising peremptory challenges is known as the "struck jury." By this method,

> [t]he size of the panel [when the striking procedure commences] . . . is the sum of the number of jurors to hear the case plus the number of peremptories to be allowed all parties. The parties then proceed to exercise their peremptories, usually alternately or in some similar way which will result in all parties exhausting their challenges at approximately the same time.

A.B.A. STANDARDS, TRIAL BY JURY 77-78 (1968).

In California, challenges are allowed either as the individual jurors are questioned, or after the jury box is filled with twelve prospective jurors. CAL. PENAL CODE § 1088 (West 1970). For the number of peremptory challenges permitted, see *id.* § 1070(b) (West Supp. 1979) (offenses punishable by imprisonment for 90 days or less); CAL. PENAL CODE § 1070(a) (as amended by ch. 98 sec. 2) (1978 Cal. Legis. Serv.) (offenses punishable by death, life imprisonment, and those offenses not included under § 1070(b)); *id.* § 1070.5 (multiple defendants). *See generally* VAN DYKE, *supra* note 9, at 139-75.

16. CAL. PENAL CODE § 1069 (West 1970). *See* note 15 *supra.*

17. For purposes of this comment, "group bias" will be used to mean any cognizable characteristic of a group of persons, including, but not limited to, race, sex, religion, age, economic position, and political affiliation.

18. T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 433 (5th ed. 1956).

19. In 1790, Congress codified the right of a criminal defendant to exercise peremptory challenges. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119. The prosecution's right of peremptory challenge was recognized in the Act of Mar. 3, 1865, ch. 86, § 2, 13 Stat. 500. *See generally* 28 U.S.C. § 1867 (1976). For criminal cases, see FED. R. CRIM. P. 24. For a more detailed account of the development of the peremptory challenge, see Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 92-107 (1962). *See generally* Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 158-59 (1967) [hereinafter cited as *Peremptory Challenge*].

20. Lewis v. United States, 146 U.S. 370, 376 (1892).

21. Pointer v. United States, 151 U.S. 396, 408 (1894).

of the peremptory challenge;[22] in a later decision, the Court noted that it could not control a party's use of this challenge.[23]

III. SUPREME COURT VIEW: *SWAIN V. ALABAMA*

The most recent position taken by the Supreme Court was announced in *Swain v. Alabama*.[24] That case held that the peremptory striking of black prospective jurors did not constitute a denial of due process.[25] The petitioner established that the prosecutor had used his peremptory challenges to exclude all six blacks on the jury panel.[26] Petitioner further established that no black person, in a period of more than fifteen years, had served on either a criminal or civil petit jury in Talladega County, Alabama. This occurred even though over twenty-five percent of the qualified jurors in the county were black, and between ten and fifteen percent of all veniremen were black.[27] The Court rejected the petitioner's claim that the prosecution's actions violated the equal protection clause of the fourteenth amendment, because "[t]o 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."[28] The Court stated that the peremptory challenge is often used "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[29]

In response to the petitioner's showing that no black had ever served on a civil or criminal petit jury, the Supreme Court acknowledged:

22. Sawyer v. United States, 202 U.S. 150, 165 (1906) ("The exercise of this right [of peremptory challenge] is under the supervision of the court.").

23. Swain v. Alabama, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised . . . without being subject to the court's control.").

24. *Id.* at 220.

25. The petitioner in *Swain* asserted three separate claims, none of which was accepted by the Court. First, he claimed discrimination in the selection of the venire. *Id.* at 205-09. Second, he claimed that the selection of the venire was prejudicial because of the prosecutor's use of peremptory challenges against eligible black veniremen. *Id.* at 209-22. And third, the petitioner alleged that the fact that no blacks had served on a jury for a period of 15 years was evidence of discriminatory use of the peremptory challenge. *Id.* at 222-24.

26. *Id.* at 210 & n.6.

27. *Id.* at 205.

28. *Id.* at 221-22. Because the peremptory challenge "is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another', " the Court believed that to subject a challenge of this type to examination would destroy its essence. *Id.* at 220, 222 (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)).

29. *Id.* at 220.

> [W]hen a prosecutor in a county, *in case after case*, . . . is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that *no* Negroes *ever* serve on petit juries, the Fourteenth Amendment claim takes on added significance.[30]

Justice Goldberg in dissent[31] was highly critical of the majority's position in *Swain*, as were many commentators.[32] Justice Goldberg believed that a showing that no black had ever served on a petit jury presented a prima facie case of deliberate discrimination sufficient to require rebuttal by the state.[33] He further urged acceptance of the principle expressed many years previously that "a State cannot systematically exclude persons from juries solely because of their race or color."[34]

Justice Goldberg sharply criticized the Court's imposition of a severe burden of proof in *Swain*. Instead of the majority's requirement of total state-produced exclusion of blacks,[35] he urged that the test should

30. *Id.* at 223 (emphasis added). Accompanying the Court's acknowledgement is "[t]he presumption in any particular case . . . that the prosecutor is using the State's challenges to obtain a fair and impartial jury." *Id.* at 222. This presumption is very difficult to rebut and has been sharply criticized by at least one legal scholar. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 286-87 (1968) [hereinafter cited as Kuhn]. Kuhn comments:

> The Supreme Court's view seems to suppose that when a prosecutor trying a Negro removes Negro veniremen to get white ones, his objective is to remove possible prejudice in order to substitute probable impartiality, and that the natural effect of removing all Negroes by peremptory challenge is to produce a fair, albeit white, jury. To state the point is sufficient to refute it.

Id. Many defendants since *Swain* have objected to the use of peremptory challenges to exclude groups, thereby resulting in the selection of an all white jury. However, the Court's systematic exclusion rule, *i.e.*, the requirement that one show the removal of a particular group of jurors *in case after case*, has proven to be an insurmountable obstacle for most petitioners. *See* Annot., 79 A.L.R.3d 14 (1977). The primary reasons that the *Swain* systematic exclusion test is so difficult to satisfy are: (1) a *mere absence* of blacks or other groups from juries does not establish systematic exclusion, 380 U.S. at 205-09; (2) the prosecution is presumed to be using the peremptory challenges to obtain a fair jury in any given case, *id.* at 222; and (3) the Court never fully explained the elements of systematic exclusion other than to note that it *might* exist when "no Negroes ever sit on petit juries" as a result of the prosecutor's exercise of his peremptory challenges, *id.* at 223.

31. 380 U.S. at 228-47 (Goldberg, J., dissenting) (Justice Goldberg's dissent was joined by Chief Justice Warren and Justice Douglas).

32. *See, e.g.*, Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and His Peerless Jury*, 4 HOUS. L. REV. 448 (1966); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 135-39 (1965); Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966) [hereinafter cited as *Constitutional Blueprint*]; Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965).

33. 380 U.S. at 238 (Goldberg, J., dissenting).

34. *Id.* at 228 (Goldberg, J., dissenting) (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

35. In *Swain*, the Court found the petitioner's collected data to be insufficient because it

be whether the state participated in exclusion to some significant degree.[36] To require that a defendant present evidence of the conduct and motives of a prosecutor in earlier trials extending over an indeterminable period of time is to ask that the defendant do that which he most likely cannot.[37]

Lower courts attempting to apply *Swain* have offered interesting suggestions as to how a defendant might satisfy his burden of proof on the issue of systematic exclusion of a particular group. One court,[38] in dictum, suggested that a defendant might be able to meet the burden of proof even if he failed to show that the peremptory challenge was used to exclude group members 100% of the time.[39] A system whereby the defendant could check the court docket for the names of defendants and their attorneys, determine the race of the various defendants, and learn the final composition of the trial jury and manner in which each side exercised its peremptory challenges might aid the defendant in meeting his burden.[40]

Thus far, the most effective method available to defendants attempting to prove discrimination in federal court is the statistical decision theory. This method permits one to calculate the mathematical probability that a discrepancy between the number of eligible jurors of a particular group and their representation at each step of the jury selection process is caused by chance.[41] The Supreme Court has acknowledged the efficacy of statistical decision theory in the context of exclusion of blacks from both grand and petit juries during the early

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did not show, "with any acceptable degree of clarity, . . . when, how often, and under what circumstances the prosecutor *alone* ha[d] been responsible for striking those Negroes who have appeared on petit jury panels." 380 U.S. at 224 (emphasis added). "[T]he defendant must . . . show the *prosecutor's systematic use* of peremptory challenges against Negroes over a period of time." *Id.* at 227 (emphasis added). Some legal scholars speculate:

> The reason for the need to have an overwhelming statistical case, or other proof of purposeful discrimination in this [peremptory] challenge may relate to the Court's belief that the practice of peremptory challenge helps to insure truly fair trials and this practice therefore ought not to be overturned by a judicial decision without clear and convincing proof.

J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 530 (1978).

36. 380 U.S. at 235 n.2 (Goldberg, J., dissenting).

37. "[T]he new burden of proof with which the *Swain* opinion saddles the defendant, although only sketchily articulated, seems an impossible one for any single individual to carry." *Constitutional Blueprint*, *supra* note 32, at 1160. *See also* authorities cited at note 30 *supra*.

38. United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971).

39. *Id.* at 1217 (dictum).

40. *Id.* at 1218 n.26 (dictum).

41. *See* Finkelstein, *The Application of Statistical Decision Theory to Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966) [hereinafter cited as Finkelstein]; THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE 14-16 (D. Kairys ed. 1975).

stages of the jury selection process,[42] and a number of lower courts[43] have followed its lead. To date, no court has applied this test to a claim of systematic exclusion caused by the use of the peremptory challenge.[44]

IV. CALIFORNIA SUPREME COURT INTERPRETATION: *PEOPLE V. WHEELER*

A. Factual Basis

The problem of the exclusion of blacks from a jury through the use of the peremptory challenge arose recently in California in *Wheeler*. The defendant, a black man, was convicted of first degree murder. During voir dire, the prosecutor used peremptory challenges against each of the seven black prospective jurors among the venire. The prosecutor asked no questions of some of the black jurors before exercising a peremptory challenge against them.[45] After the prosecution's decision to challenge peremptorily the fifth black prospective juror, the defense attorney moved for a mistrial "so we can try and get a fair cross section of the community."[46] The trial court denied the motion.[47] After the two remaining blacks on the panel were excused from the jury, a second motion for mistrial was made on the grounds that

> there are seven Negroes that have been kicked off the jury by [the prosecutor] . . . . It is apparent that it is a policy of the district attorney's office not to permit any Negroes on this jury. Some of them have been kicked [off] without . . . [the prosecutor's] even questioning them. . . . [T]hese defendants cannot get a trial by their peers.[48]

Again, the motion for a mistrial was denied by the trial judge, who ruled that "attorneys have a right to select the jury and use all the peremptions available to them without stating their reasons."[49] As a result of the challenges by the prosecutor, all twelve members of the jury and the two alternate jurors were white.[50]

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42. Whitus v. Georgia, 385 U.S. 545, 552 (1967). For a discussion of the stages of the jury selection process, see notes 13-15 *supra* and accompanying text.

43. *See, e.g.*, Gibson v. Blair, 467 F.2d 842, 844 n.1 (5th Cir. 1972); Smith v. Yeager, 465 F.2d 272, 278 n.16 (3d Cir. 1972); Witcher v. Peyton, 405 F.2d 725, 726 n.3 (4th Cir. 1969); Goins v. Allgood, 391 F.2d 692, 699 n.6 (5th Cir. 1968), *cert. denied*, 409 U.S. 1076 (1972).

44. *See* People v. Wheeler, 22 Cal. 3d at 279, 583 P.2d at 763, 148 Cal. Rptr. at 904.

45. *Id.* at 265, 583 P.2d at 753, 148 Cal. Rptr. at 895.

46. *Id.* at 264, 583 P.2d at 753, 148 Cal. Rptr. at 894.

47. *Id.*

48. *Id.* at 265, 583 P.2d at 753-54, 148 Cal. Rptr. at 895.

49. *Id.*

50. *Id.*

B. The Court's Reasoning

In *Wheeler*, the California Supreme Court considered for the first time[51] whether a prosecutor's use of peremptory challenges which exclude prospective jurors on the sole ground of group association is violative of the representative cross section rule. In order to resolve the important problem posed by *Wheeler*, the court first examined the fundamental right of a defendant to be tried by a jury representative of the community.[52] By explicitly making the cross section rule a guarantee of the California Constitution,[53] the court set the stage for a decision which insulates defendants in California state proceedings from the heavy burden of proving systematic exclusion as required by *Swain*.[54]

In determining the appropriate uses of the peremptory challenge, the court examined the relationship between the challenge stage and other periods in the jury selection process. The court aptly noted:

> Until this point in the process [*i.e.*, the challenge stage] the goal of an impartial jury is pursued by insuring that the master list be a representative cross-section of the community and that the venire and the proposed trial jury be drawn therefrom by wholly random means. But precisely because it is both all-inclusive and random, the process cannot consistently screen out those prospective jurors who bring to the courtroom a bias concerning the particular case on trial or the parties or witnesses thereto.[55]

By reviewing the purposes of the challenges, the court ascertained that their scope was "to remove jurors who are believed to entertain a

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51. *Id.* at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893. Writing for the dissent, Justice Richardson disagreed with the majority's assertion that the issue in *Wheeler* was one of first impression. *Id.* at 290, 583 P.2d at 770, 148 Cal. Rptr. at 912 (Richardson, J., dissenting). He claimed that the case of People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970), concerned the constitutionality of the prosecution's use of the peremptory challenge, thereby rendering the majority's claim of first impression inaccurate. In *Floyd*, however, a death penalty case, the evidence failed to establish that any juror had been peremptorily challenged solely because of his scruples against the death penalty. *Id.* at 728, 464 P.2d at 86, 83 Cal. Rptr at 630. Thus, the *Wheeler* case is distinguishable.

52. 22 Cal. 3d at 266-72, 583 P.2d at 754-58, 148 Cal. Rptr. at 896-99. *See* notes 8, 11, 12 *supra* and accompanying text.

53. 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. *See* note 12 *supra* and accompanying text.

54. *See* note 30 *supra*.

55. 22 Cal. 3d at 274, 583 P.2d at 759-60, 148 Cal. Rptr. at 901. Specific bias is not to be used interchangeably with actual bias. Specific bias is a term encompassing the range of feelings, from those derived from personal experiences to those resulting from general exposure to pretrial publicity. *Id.*, 583 P.2d at 760, 148 Cal. Rptr. at 901. Actual bias, on the other hand, is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice." CAL. PENAL CODE § 1073 (West 1970).

specific bias, and no others."[56] The court also clarified the language of California Penal Code section 1069,[57] interpreting it to mean that, although a reason need not be publicly stated when a peremptory challenge is used, some justification for the use of this challenge must nonetheless exist.[58] To support its view, the majority indicated that, with only a limited number of peremptory challenges allowed, "a party will use a peremptory challenge only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased."[59]

Cognizant of the broad spectrum of evidence giving rise to an inference of juror partiality, the California Supreme Court attempted to illustrate those types of bias upon which a peremptory challenge may properly be based.[60] Prior arrests, complaints of police harassment, or clothing and grooming styles may create in the prosecutor a feeling that a juror is biased against his side. Similarly, defense counsel may fear prejudice in a juror who has been, or knows someone who has been, the victim of a crime or who has relatives on the police force. The California high court acknowledged that evidence even less tangible than that mentioned could result in the use of a peremptory challenge,[61] such as, the "unaccountable prejudices [resulting from] the bare looks and gestures of another."[62]

The court concluded:

> All of these reasons, nevertheless, share a common element: they seek to eliminate a specific bias . . .—a bias relating to the particular case on trial or the parties or witnesses thereto . . . . [T]hey are essentially neutral with respect to the various groups represented on the venire: the characteristics on which they focus cut across many segments of our society. . . . It follows that peremptory challenges predicated on such reasons do not significantly skew the population mix of the venire in one direction or another; rather, they promote the impartiality of the jury without destroying its representativeness.
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> By contrast, when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished

56. 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

57. By statute, the definition of a peremptory challenge is "an objection to a juror for which no reason need be given, but upon which the Court must exclude him." CAL. PENAL CODE § 1069 (West 1970).

58. 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

59. *Id.* at 275, 583 P.2d at 760, 148 Cal. Rptr. at 901.

60. *Id.*, 583 P.2d at 760, 148 Cal. Rptr. at 902.

61. *Id.*

62. *Id.*, 583 P.2d at 760-61, 148 Cal. Rptr. at 902 (citing 4 W. BLACKSTONE, COMMENTARIES *353).

> on racial, religious, ethnic or similar grounds—. . . [known as] "group bias"—and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross section requirement.[63]

It is when the peremptory challenge is used to exclude prospective jurors on the sole ground of group bias that the cross section rule is not met.[64] This holding parts company with the position articulated by the United States Supreme Court in *Swain*. Unlike *Swain*, which requires a showing of systematic exclusion of group members over a period of time, *Wheeler* provides a remedy to the first defendant who falls victim to discrimination caused by the use of the peremptory challenge. Owing to the modification of the burden of proof in California, defendants have been relieved of the requirement of tracing the use of the peremptory challenge in previous trials, hoping to find a pattern of abuse that would substantiate their claims of discrimination.[65] Not only is this abandoned method prohibitive in terms of cost and time for most defendants,[66] but the data necessary to prove past abuse of the peremptory challenge is unavailable.[67]

C. *The Test*

The *Wheeler* court began with a presumption that a party exercising

63. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. The representative cross section requirement was set forth in Smith v. Texas, 311 U.S. 128 (1940). *See also* note 8 *supra*.

64. 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The holding in *Wheeler* does not change the rule that no litigant is entitled to specific, proportional representation on his particular jury. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 59 (1961); People v. White, 43 Cal. 2d 740, 749, 278 P.2d 9, 15 (1954); People v. Hines, 12 Cal. 2d 535, 539, 86 P.2d 92, 93-94 (1939).

65. 22 Cal. 3d at 287, 583 P.2d at 768, 148 Cal. Rptr. at 910.

66. A defendant attempting to trace the use of the peremptory challenge in earlier cases must explore the records of an indeterminable number of previous trials and would, consequently, incur large discovery expenses. Defendants of limited means (most of the population) could not afford to pay investigators to accumulate the necessary information. *Id.* at 285, 583 P.2d at 767, 148 Cal. Rptr. at 909. Furthermore, even if such information could be gathered in a cost efficient manner, "few if any trial judges would be willing to interrupt the proceedings . . . by a continuance of unpredictable length to permit the necessary investigation." *Id.* at 286, 583 P.2d at 767-68, 141 Cal. Rptr. at 909. The reluctance of judges to halt the proceedings stems from the fact that the appearance of abuse of a peremptory challenge is not evident until the jury selection process is well under way. *Id.*

67. The biggest obstacle to defendants trying to prove abuse of the peremptory challenge over time is the absence of evidence listing the names and races of all prospective jurors, not to mention those peremptorily challenged. *See* People v. Jones, 25 Cal. App. 3d 776, 782 n.5, 102 Cal. Rptr. 277, 281 n.5 (1972) (acknowledgement of difficulty encountered in proving case of discrimination from composition of venire because officials "do not keep records based on race").

a peremptory challenge in a criminal action is doing so on a constitutionally permissible ground.[68] The presumption, however, may be rebutted if a three-pronged test is satisfied. First, the complaining party must present a complete record of the circumstances surrounding the removal of jurors from the venire.[69] This step is necessary in order to preserve the evidence regarding the use of peremptories for judicial review. Second, the petitioner must show that those persons excused are members of a cognizable group.[70] And third, the party must show a "strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias."[71]

The above test was adopted rather than the statistical decision theory urged by the defendant;[72] the dissent considered it to be "so vague as to constitute no standard at all."[73] It is, however, the inexact nature of the "strong likelihood" test that gives the court the discretion needed to find abuse of the peremptory challenge. Such flexibility is not present with statistical methods. Similarly, the test permits the court to find a lack of abuse of the peremptory challenge even when it is confronted with statistical data pointing to its misuse.

When the court finds that the three-pronged test has been met and, consequently, that a prima facie case of group discrimination by the peremptory challenge has been made, then the burden of proof shifts to the other party to demonstrate that the peremptory challenges were

68. 22 Cal. 3d at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904. This is the same presumption as exists in *Swain*. *See* note 30 *supra*.

69. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. In *Wheeler*, the defense preserved the prosecution's use of the peremptory challenges for the record by asking black prospective jurors for an acknowledgement of his or her race. *Id.* at 263, 583 P.2d at 752, 148 Cal. Rptr. at 894. To one prospective juror, defense counsel remarked on voir dire: "My client is black, obviously you are black, too." The juror replied: "Yes, I am." *Id.* at 263 n.1, 583 P.2d at 753 n.1, 148 Cal. Rptr. at 894 n.1.

70. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. *See* note 17 *supra*.

71. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. Demonstration that the excluded jurors possess only one common characteristic—group membership—would tend to support a showing that peremptory challenges were used for the reason of group association. In addition, failure to ask questions of these jurors, or to ask only a few questions on voir dire, would strengthen a claim of improper use of peremptory challenge.

72. Although the defendants originally selected a different mathematical method to compute the probability that blacks were randomly excused, they adopted the statistical method when an amicus curiae revealed that it produced results more favorable than those obtained by the defendants. 22 Cal. 3d at 278-79 & n.21, 583 P.2d at 763 & n.21, 148 Cal. Rptr. at 904 & n.21. The court's decision not to employ statistical decision theory lies in part on its reliance upon one expert's comment that it is nearly impossible for this method to show that, when a group member is struck from a petit jury, it is because of membership in the group. *Id.* at 279, 583 P.2d at 763, 148 Cal. Rptr. at 905. *See also* Finkelstein, *supra* note 41, at 352.

73. 22 Cal. 3d at 293, 583 P.2d at 772, 148 Cal. Rptr. at 914 (Richardson, J., dissenting).

based on some legitimate reason, namely one other than group bias.[74] The requirement that the litigant exercising his right of peremptory challenge must substantiate its use once prima facie abuse has been shown modifies, to a limited extent, the statutory definition of a peremptory challenge.[75] Henceforth, counsel must remember that the language in California Penal Code section 1069, that "no reason need be given,"[76] does not mean what it says; rather, a peremptory challenge is "an objection to a juror for which no reason need be given" if, and only if, a prima facie case of abuse of this right is *not* shown, "but upon which the Court must exclude him."[77] Such an addition is necessary when its absence would deny a defendant his fundamental right to a fair and impartial jury.[78]

The party to whom the burden of proof shifts may discharge his burden of proof in a manner equally as imprecise as the one used by the petitioner to establish the prima facie case of discrimination. The court articulated the "totality of the circumstances test"[79] and further stated that "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination."[80]

Unsatisfactory justification of *any* questioned peremptory challenge will result in the dismissal of jurors already selected and the quashing of the remaining venire;[81] satisfactory responses will result in the resumption of the jury selection process.

Relying on the California Constitution, the supreme court found that the defendant had successfully established a prima facie showing of prosecutorial use of the peremptory challenge against black jurors solely on the ground of group bias. Because the trial court incorrectly ruled that the prosecutor was not required to respond to this allegation,

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

75. *Id.* at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28.

76. *See* note 57 *supra.*

77. Author's interpretation of "new" CAL. PENAL CODE § 1069 (West 1970).

78. Because the right of peremptory challenge is not constitutionally guaranteed but, rather, is statutorily granted, the peremptory challenge must be modified to ensure that constitutional requirements are satisfied. 22 Cal. 3d at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (constitutional claim must prevail when opposed by a nonconstitutional one).

79. 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. The court announced that the "totality of the circumstances test" is relevant if the party charged with abusing the peremptory challenge can show that minority and majority group members were challenged on the same or similar grounds on voir dire. *Id.*

80. *Id.*

81. *Id.*

the supreme court reversed the lower court decision.[82]

Justice Richardson, in his dissent, reasserted the traditional position set forth in *Swain* that "in the appropriate circumstances the race as well as religion, sex, nationality, occupation, or affiliation of prospective jurors are trial-related considerations which may constitute proper reasons for the exercise of the peremptory challenge."[83] He suggested "that what the majority propose[d] as a simple straightforward test will, in fact, become all too frequently a time consuming inquiry leading the court, counsel, and litigants into procedural quicksand and a quagmire of questionable efficacy."[84] Although Justice Richardson stated that "[t]he majority's rules place the court in a difficult, indeed precarious position,"[85] it is his dissent that advocated preservation of the methodology and unworkable burden of proof established in *Swain*.[86]

D. People v. Johnson: *Further Clarification of the California View*

The California Supreme Court applied the rules developed in *Wheeler* to *People v. Johnson*,[87] a case handed down at the same time as the *Wheeler* decision. As in *Wheeler*, the prosecuting attorney in *Johnson* used his peremptory challenges against all of the black prospective jurors.[88] However, unlike the situation in *Wheeler*, defendant

82. *Id.* at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907.

83. *Id.* at 289, 583 P.2d at 770, 148 Cal. Rptr. at 911 (Richardson, J., dissenting).

84. *Id.* at 293, 583 P.2d at 772, 148 Cal. Rptr. at 913 (Richardson, J., dissenting).

85. *Id.* at 294, 583 P.2d at 773, 148 Cal. Rptr. at 914 (Richardson, J., dissenting).

86. *Id.* at 289-90, 295, 583 P.2d at 770, 773, 148 Cal. Rptr. at 911, 915 (Richardson, J., dissenting).

87. 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978).

88. *Id.* at 297, 583 P.2d at 774, 148 Cal. Rptr. at 915. More recently, in People v. Allen, 23 Cal. 3d 286, 590 P.2d 30, 152 Cal. Rptr. 454 (1979), the California high court applied the rules established in *Wheeler* in order to reverse the convictions of two black men accused of murdering a white man. In *Allen*, the defendants were able to show: (1) that the district attorney had used peremptory challenges against each black person on the jury; (2) that the excused jurors included both men and women who, absent their race, possessed characteristics which the prosecutor probably would have found desirable; (3) that some prospective black jurors had been excused after only very minimal voir dire; and (4) that the defendants belonged to a group whose members had been excluded, whereas the victim was a member of the group to which all the remaining jurors belonged.

These findings enabled the court to conclude that the *Wheeler* test, discussed in notes 68-81 *supra* and accompanying text, had been satisfied and that the defendants had established a prima facie case of prosecutorial misuse of the peremptory challenge. Because the prosecutor did not demonstrate that he had exercised his peremptory challenges on grounds that were "reasonably relevant to the particular case on trial or its parties or witnesses," 23 Cal. 3d at 294, 590 P.2d at 35, 152 Cal. Rptr. at 459 (quoting *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906), the court concluded that the defendants' constitutional rights to a fair trial by jury had been violated.

Although *Allen* is a case favorable to defendants and stands for the proposition that the

Johnson was not required to prove the third element of the test established in *Wheeler*—that there was a strong likelihood that the prosecution was deliberately removing all blacks from the jury solely because of their race. This requirement was dispensed with because the prosecutor, during voir dire, admitted his intention to use a peremptory challenge "on any black juror . . . called to sit in this case."[89] The prosecutor volunteered, as an explanation for his intended use of the peremptories, that some witnesses had made racially prejudicial remarks which might be disclosed to the jury, thereby preventing objectivity on the part of any black jurors. Because the prosecutor believed that "there was no way to voir dire . . . with one hundred percent accuracy [to] identify a black person who could objectively sit on a jury,"[90] he decided to excuse every black juror that he could.

The court felt that the prosecutor should have carried out the voir dire as thoroughly as possible in order to determine which of the black veniremen could view the racially offensive testimony in an objective manner,[91] even though such a procedure might result in no black person being retained on the jury. It was not the resulting all white jury to which the court objected in *Johnson*; rather it was the methodology used to achieve this end. The court stated that the use of the peremptory challenge to exclude group members by stereotypical decision making is a "technique that should be anathema in our courts."[92]

V. BEYOND THE CRIMINAL CASE: APPLICATION OF *WHEELER* TO CIVIL MATTERS

Both *Wheeler* and *Johnson* were criminal cases, and the majority in *Wheeler* was careful to note that it did not address the question of the applicability of the *Wheeler* decision to civil cases.[93] It is a common

right to a jury drawn from a representative cross section of the community is of paramount importance, it can best be characterized as a reiteration of *Wheeler* rather than as an extension of its holding.

89. 22 Cal. 3d at 298, 583 P.2d at 775, 148 Cal. Rptr. at 916.

90. *Id.* at 299, 583 P.2d at 775, 148 Cal. Rptr. at 916.

91. *Id.*, 583 P.2d at 775, 148 Cal. Rptr. at 917.

92. *Id.*

93. *Id.* at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906-07 n.29. Although not raised by the facts in *Wheeler* or *Johnson*, the California Supreme Court briefly addressed the interesting question of how it would react if confronted with a case in which defense counsel peremptorily challenged certain jurors merely because they were members of an identifiable group. In dictum, the court commented: "[T]he People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism." *Id.* (dictum). This language

practice for trial attorneys in civil matters to use the peremptory challenge to excuse prospective jurors because of their race, sex, religion, occupation, or other personal attributes.[94]

The court in *Wheeler* did comment that "[w]hether the [cross section] requirement also applies in a civil setting turns on such considerations as the function of a jury in that setting."[95] Although cross section problems heretofore have been encountered most frequently in the setting of a criminal trial,[96] article I, section 16 of the California Constitution,[97] which mandates that juries be drawn from a representative cross section of the community, applies equally to criminal and civil actions.[98]

As the right to a jury trial encompasses the right to a fair and impartial jury,[99] it seems reasonable to suggest that judicial interpretation implementing this fundamental right be extended to civil matters. The limitation imposed on the peremptory challenge by the representative cross section rule, making group bias an unacceptable reason for exercise of the peremptory challenge, is workable within the framework of a civil case. Although the *Wheeler* test[100] could be used in civil matters, it may be difficult for one claiming abuse to satisfy the third criterion—that there is a strong likelihood that those being challenged are being excused because of their group association. This difficulty might arise when a party, cognizant of the fact that a unanimous jury is not required in civil actions,[101] decides to keep a group member on the jury in an attempt to avoid being challenged on the ground of violating the representative cross section rule. When unanimity among jurors is not required, the relative impact that each juror has on the verdict diminishes, and room for abuse increases.[102]

Courts need to be wary of schemes designed to thwart the goal of a fair jury in all cases. As the court recognized in *Wheeler*, trial judges

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strongly suggests that, just as the prosecutor is precluded from using peremptory challenges for "group bias reasons," so too will defense counsel be subject to this limitation.

94. *See id.* at 289, 583 P.2d at 770, 148 Cal. Rptr. at 911 (Richardson, J., dissenting).

95. *Id.* at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906-07 n.29.

96. *Id.*

97. *Id. See* CAL. CONST. art. I, § 16. *See* note 12 *supra* and accompanying text.

98. 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906-07 n.29.

99. *See* notes 6 & 7 *supra* and accompanying text.

100. *See* notes 68-81 *supra* and accompanying text.

101. CAL. CONST. art. I, § 16 reads in relevant part: "Trial by jury is an inviolate right . . . , but in a civil cause *three-fourths of the jury may render a verdict.*" (emphasis added).

102. *See* VAN DYKE, *supra* note 9, at 213. ("In upholding the constitutionality [of the] . . . less-than-unanimous verdicts, the Supreme Court has opened the way for a radical change in our system of justice. . . . The ability of juries to reflect minority viewpoints . . . will be erased in many cases where unanimity is not required.").

> "are in a good position to make . . . determinations [whether peremptory challenges are being misused] . . . on the basis of their knowledge of local conditions and of local prosecutors." They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience.[103]

The court voiced confidence in the ability of judges to distinguish true claims of discrimination from those claimed for purposes of harassment or delay.[104] These judicial attributes of discernment and comprehension are equally applicable to civil cases.

VI. NEW HOPE FOR FEDERAL DEFENDANTS

Although *Swain* expresses the United States Supreme Court's view regarding the exercise of the peremptory challenge, litigants in federal proceedings[105] may be able to utilize the ruling of the California Supreme Court in *Wheeler* to prove abuse in the exercise of the peremptory challenge. They could use the rationale of the California court's decision to urge, as commentators have,[106] that the time has come for reevaluation of the principles expressed in *Swain*.

Alternatively, petitioners could argue that Supreme Court cases decided subsequently to *Swain* applying statistical decision theory to the data of only *one* case have implicitly overruled *Swain's* requirement of *systematic exclusion*.[107] Recently, the Supreme Court used statistical data to show discrimination in employment practices and noted that it had "repeatedly approved the use of statistical proof . . . to establish a prima facie case of racial discrimination in jury selection cases."[108] Because the United States Supreme Court has given increasing weight to statistical evidence in the recent past,[109] counsel reasonably could con-

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103. 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906 (quoting Kuhn, *supra* note 30, at 295).

104. *Id.*

105. Assuming that the California Supreme Court extends the rule established in *Wheeler* to civil matters, litigants in federal civil proceedings might be able to argue that state law should be applied pursuant to Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

106. *See* cases cited note 109 *infra*.

107. *See, e.g.*, Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974); 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 (1977); *Peremptory Challenge*, *supra* note 19.

108. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

109. For cases using mathematical probability to reveal racial discrimination in jury selection, see Castenada v. Partida, 430 U.S. 482 (1977); Alexander v. Louisiana, 405 U.S. 625

tend that such methods are not only adequate to demonstrate abuse in the exercise of the peremptory challenge but also preferred by the Court in its desire to be free from the *Swain* systematic exclusion requirement.

VII. CONCLUSION

Even if the dissent in *Wheeler* is correct in its assertion that the peremptory challenge has undergone a substantial change,[110] counsel retains considerable latitude in its exercise. It is only when a peremptory challenge is grounded solely on group bias that it belies the statutory definition that "no reason need be given."

Jurors should be challenged as individuals and excused if counsel believes that a prospective juror is not impartial. Requiring an attor-

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(1972); Sims v. Georgia, 389 U.S. 404 (1967) (per curiam); Jones v. Georgia, 389 U.S. 24 (1967) (per curiam); Whitus v. Georgia, 385 U.S. 545 (1967).

At least one defendant in federal court has been successful in securing a new trial even though she was unable to prove systematic exclusion of blacks from trial juries within the meaning of *Swain*. In that case, United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974), the defendant alleged that the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869, had not been complied with in the selection of the jury panel. In support of this contention, the defendant accumulated detailed statistical information from each case involving a black defendant for the two years preceding her trial. Although the statistical data revealed that blacks, as compared to non-blacks, were underrepresented on the lists from which jury panels were drawn, the court determined that the particular jury panel delivering the indictment in the *McDaniels* case did not suffer from underrepresentation of black persons. This representative quality, however, had been eliminated by the prosecutor's use of his peremptory challenges. He used these challenges to excuse six black persons, thereby creating a jury composed of eleven white persons and one black individual.

The use of the peremptory challenges in *McDaniels*, together with statistical data (showing that nearly one-half of all possible peremptory challenges available, and two-thirds of those challenges actually used during the two year period examined had been exercised against black persons), convinced the court to grant a new trial "in the interest of justice" pursuant to rule 33 of the Federal Rules of Criminal Procedure. Although rule 33 is to be used with great caution, United States v. Costello, 255 F.2d 876 (2d Cir. 1958), it was found to be the appropriate remedy under the facts of *McDaniels* and may be helpful for future defendants.

The Jury Selection and Service Act provides that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862 (1976). The *McDaniels* court recognized that this Act "deals only with the method of selecting the jury venire, and is not concerned directly or indirectly with the challenging process." 379 F. Supp. at 1249. However, this court also acknowledged that "[p]eremptory challenges bar jurors from service just as effectively as any other method." *Id.* Perhaps a similar argument could be made in those states that do not follow rules similar to those expressed in *Wheeler*. Resolution of this question will depend on courts' application of the Erie doctrine. *See* note 105 *supra*.

110. 22 Cal. 3d at 288-95, 583 P.2d at 769-73, 148 Cal. Rptr. at 910-15 (Richardson, J., dissenting). *See* notes 83-85 *supra* and accompanying text.

ney who has peremptorily challenged a disproportionate number of "group members" to come forward with nongroup reasons for the use of his challenges is a small price to pay to ensure the integrity of the jury process.

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