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# PEOPLE V. WILLIAMS: EXPANSION OF THE PERMISSIBLE SCOPE OF VOIR DIRE IN THE CALIFORNIA COURTS

## I. INTRODUCTION

Voir dire is the face to face courtroom examination of prospective jurors for the purpose of ascertaining their ability and competency to decide a particular controversy.<sup>1</sup> The vital role performed by voir dire in the process of impaneling a fair and impartial jury is reflected in the attitude of many experienced litigators that cases are won or lost on the basis of this examination.<sup>2</sup>

In theory, voir dire functions as a method by which counsel and the court may elicit sufficient information from prospective jurors to ensure that the jury is composed of qualified individuals who are competent to determine the factual issues presented without bias, prejudice, or partiality. Ultimately, voir dire functions to explore the "subtle nuances of conscience"<sup>3</sup> to determine as precisely as possible a prospective juror's state of mind regarding the case and the parties. Thus, the formal purpose of voir dire is to develop a basis for a challenge for cause.<sup>4</sup>

In practice, the information gleaned from voir dire examination serves not only to illuminate any actual or conscious biases which a prospective juror may harbor, but also functions either to reinforce or

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1. Voir dire literally means "to speak the truth." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979). In practice, voir dire has come to denote the pretrial procedure in which prospective jurors are questioned by counsel in the presence of the court. *Id.*

2. See Title, *Voir Dire Examination of Jurors in Criminal Cases*, 43 STATE B. J. 70, 71 (1968) [hereinafter cited as Title]. But see Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528-29 (1978) [hereinafter cited as Zeisel & Diamond]. Although Zeisel and Diamond concede that there are some cases in which the outcome is seriously affected, if not determined, by the voir dire examination, *id.* at 518-19, overall, the experiments that they conducted in twelve criminal trials in federal district court suggested that voir dire did not function effectively to provide attorneys with sufficient information to detect the presence of prejudiced jurors. *Id.* at 528-29; see also Broeder, *Voir Dire Examination: An Empirical Study*, 38 S. CALIF. L. REV. 503 (1965) [hereinafter cited as Broeder]. After conducting a study involving twenty-three consecutively tried federal district court jury trials, Broeder concluded that voir dire was "grossly ineffective as a screening mechanism . . . [and was] utilized much more effectively as a forum for indoctrination than as a means of sifting out potentially unfavorable jurors." *Id.* at 528.

3. Crawford v. Bounds, 395 F.2d 297, 312 (4th Cir. 1968).

4. United States v. Bount, 479 F.2d 650, 651 (6th Cir. 1973); see Title, *supra* note 2, at 71.

dispel counsel's intuitive judgments regarding any suspected hidden prejudices that the veniremen may have, whether favorable or unfavorable to the parties.<sup>5</sup> The extent to which counsel is entitled to use voir dire examination to elicit information from prospective jurors *solely* for the purpose of detecting these subtle or hidden biases, and thus to form a basis for the intelligent exercise of *peremptory challenges*,<sup>6</sup> was the issue recently presented to the California Supreme Court in *People v. Williams*.<sup>7</sup> In *Williams*, the court held that counsel must be afforded the opportunity during voir dire to make reasonable inquiries of prospective jurors to assist in the effective use of their peremptory challenges.<sup>8</sup>

In adopting the new standard, the *Williams* court overturned a longstanding rule, established in 1912 in *People v. Edwards*,<sup>9</sup> that prevented counsel from using voir dire examination for the express purpose of developing insights for the exercise of peremptory challenges.<sup>10</sup> An examination of the history of the *Edwards* rule, however, reveals that despite the California Supreme Court's periodic reaffirmation of *Edwards*,<sup>11</sup> the lower courts have frequently ignored its prohibitions and permitted counsel to conduct voir dire examination that violated not only the letter, but the spirit, of the *Edwards* rule.<sup>12</sup>

This note will explore the role played by the peremptory challenge in securing a fair and impartial jury. It will trace the mercurial history of the peremptory challenge in California and the divergent judicial attitudes concerning the permissible scope of voir dire examination conducted solely with a view to the exercise of a peremptory challenge.

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5. *Photostat Corp. v. Ball*, 338 F.2d 783, 786 (10th Cir. 1964).

6. A peremptory challenge is a right which may be exercised by either party. CAL. PENAL CODE § 1069 (West 1970). It is defined as "an objection to a juror for which no reason need be given, but upon which the Court must exclude him." *Id.*; see *infra* notes 16-26 and accompanying text.

7. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981).

8. *Id.* at 398, 628 P.2d at 871, 174 Cal. Rptr. at 319.

9. 163 Cal. 752, 127 P. 58 (1912).

10. *Id.* at 755-56, 127 P. at 59.

11. "It is now well settled in this state that a juror may not be examined on *voir dire* solely for the purpose of laying a foundation for the exercise of a peremptory challenge." *People v. Ferlin*, 203 Cal. 587, 598, 265 P. 230, 235 (1928); see also *People v. Rigney*, 55 Cal. 2d 236, 244, 359 P.2d 23, 27, 10 Cal. Rptr. 625, 629 (1961); *People v. Estorga*, 206 Cal. 81, 87, 273 P. 575, 576 (1928).

12. 1959 *Institute for California Judges - Panel Discussion, Part II: Selecting the Jury*, 47 CALIF. L. REV. 872, 873 (1959) [hereinafter cited as *Selecting the Jury*]. As part of his participation in a panel discussion on the process of selecting the jury, Joseph Ball, former President of the State Bar of California, openly acknowledged that courts throughout California have customarily ignored the *Edwards* rule; see *infra* notes 62-68 and accompanying text.

This note concludes that *Williams* will not achieve the supreme court's objective of imposing a uniform practice among trial courts with respect to the permissible scope of such voir dire examination, but will in practice perpetuate the problem of inconsistency.

## II. HISTORICAL BACKGROUND

A criminal defendant's right to an impartial jury is guaranteed by the sixth amendment to the United States Constitution.<sup>13</sup> The text of the amendment, however, offers no insight into how the process of selecting a jury with the requisite degree of impartiality is to be accomplished.<sup>14</sup> Instead, the courts—and later the legislatures—developed procedural safeguards to protect this constitutional right in the form of two types of challenges to prospective jurors: challenges for cause and peremptory challenges.<sup>15</sup>

### A. Challenges for Cause

Challenges for cause allow the court to eliminate from the venire those jurors who are unable to fulfill the sixth amendment's mandate of impartiality because of either actual prejudice or prejudice implied from the juror's relationship to the case or the parties.<sup>16</sup> Challenges for

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13. "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 sixth amendment's right of jury trial was not held applicable to the states until *Duncan v. Louisiana*, 391 U.S. 145 (1968). Even before *Duncan* was decided, however, the due process clause of the fourteenth amendment required that where states granted the accused the right to a jury trial, this included the right to be tried by an impartial jury. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord the accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

14. *Photostat Corp. v. Ball*, 338 F.2d 783, 785 (10th Cir. 1964).

15. *Id.* "The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury." *Lewis v. United States*, 146 U.S. 370, 376 (1892); *Hayes v. Missouri*, 120 U.S. 68, 70 (1886). In *Hayes*, the Court recognized that the number of peremptory challenges permitted is within the sound discretion of the state legislature, the "power of the legislature . . . to prescribe the number of peremptory challenges . . . [being] limited only by the necessity of having an impartial jury." *Id.* at 71; see also *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("[T]rial by an impartial jury is all that is secured [by the Constitution]. The number of challenges is left to be regulated by the common law or by enactments of Congress."). See generally *Swain v. Alabama*, 380 U.S. 202, 212-19 (1965).

16. See generally Title, *supra* note 2, at 71-74. For all practical purposes, the rules governing voir dire in civil and criminal cases in California are identical; civil cases frequently cite criminal cases as precedent when resolving issues concerning voir dire examinations. See, e.g., *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 882, 64 Cal. Rptr. 655, 658 (1967). The only significant difference between the nature of voir dire in civil and criminal trials is the number of peremptory challenges granted the litigants. Compare CAL.

cause for actual bias will be sustained by the court when a prospective juror is determined to harbor an attitude or state of mind with respect to the case or the litigants that would prevent that juror from acting with the requisite impartiality.<sup>17</sup> Because the court must rely primarily on the prospective juror's own evaluation regarding his or her state of mind<sup>18</sup> in assessing the existence of actual bias, challenges for cause for actual bias must "necessarily rest on less precise and [less] objective criteria."<sup>19</sup>

Conversely, challenges for cause for implied bias are usually based on specifically enumerated statutory grounds.<sup>20</sup> For those prospective jurors who fall into one of these defined categories, "the law conclu-

CIV. PROC. CODE § 601 (West Supp. 1981) (each litigant in a civil action involving only two parties is granted six peremptory challenges) with CAL. PENAL CODE § 1070 (West Supp. 1981) (both defendant and state are granted twenty-six peremptory challenges when offense charged is punishable with death or life imprisonment; in all other criminal trials defendant and state each receive ten peremptory challenges, except where offense charged is punishable with a maximum term of imprisonment of 90 days or less, in which case defendant and state are each entitled to six peremptory challenges). See generally CAL. CIV. PROC. CODE §§ 601-602 (West Supp. 1981); CAL. PENAL CODE §§ 1070-1070.5 (West Supp. 1981); CAL. SUP. CT. R. 228 (following the text of CAL. PENAL CODE § 1078 (West Supp. 1981) for application in both civil and criminal trials).

17. In California, a venireman will be excused for cause for actual bias if it is shown that there exists "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." CAL. PENAL CODE § 1073 (West 1970).

18. In California:

[N]o person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statement in public journals, circulars, or other literature, or common notoriety; *provided*, it appear to the court, upon, his declaration, under oath . . . that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matter to be submitted to him.

*Id.* § 1076; see *People v. Duncan*, 53 Cal. 2d 803, 815, 350 P.2d 103, 109-10, 3 Cal. Rptr. 351, 357-58 (1960). The *Duncan* court held that a juror will be considered competent to hear a case if, notwithstanding the existence of extensive pretrial publicity or widespread public rumor, the juror convinces the court that he or she will be able to act impartially and fairly.

19. Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1499 n.29 (1975) [hereinafter cited as *Minimum Standards*]. Because of the very general terms in which CAL. PENAL CODE § 1073 (West 1970) is stated, case law must be consulted to determine whether a particular state of mind will be considered sufficient to sustain a challenge for cause for actual bias.

20. CAL. PENAL CODE § 1074 (West Supp. 1981) provides:

A. challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, conservator and conservatee, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by

sively presumes bias or partiality."<sup>21</sup>

The system of challenges for cause developed at common law before the courts appreciated the important role that *unconscious* bias can exert in skewing jury deliberations.<sup>22</sup> It is understandable, therefore, that challenges for cause based on either conscious or statutorily defined biases have traditionally been considered the primary means for eliminating prejudiced jurors from the venire. The importance ascribed to these challenges is illustrated by the fact that, historically, they have been kept within the court's control and have been potentially unlimited in number.<sup>23</sup> However, the extent to which hidden prejudices influence jury deliberations is becoming increasingly recognized as a result of new insights acquired through the application of social science techniques to test theories concerning the effects of individual and group biases. Recognition of the vital function performed by the peremptory challenge in securing an impartial jury requires a reexamination of the importance assigned the function performed by this challenge.<sup>24</sup>

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the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.

5. Having served on a trial jury which has tried another person for the offense charged.

6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

21. *Photostat v. Ball*, 338 F.2d 783, 785 (10th Cir. 1964).

22. One commentator observed:

[At common law] no account [was] paid . . . to complexities, experiences and environment as tending to cloud or clarify attitude of mind. Today, due largely to the rise of scientific psychology, criminology and sociology, we readily concede that these things do exert themselves powerfully upon the standards of fairness in all men, no matter how conscientious they may be.

Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 GEO. L. J. 438, 447 (1928) [hereinafter cited as Moore].

23. See *Minimum Standards*, *supra* note 19, at 1498-99.

24. *Id.* But see Zeisel & Diamond, *supra* note 2, at 528-29 (authors found that in most cases voir dire examination was singularly ineffective as a method of detecting potential juror bias, and that most attorneys peremptorily excused as many jurors who were biased in their favor as were biased against their cause).

### B. *The Peremptory Challenge*

Traditionally, a peremptory challenge is considered an "arbitrary and capricious right"<sup>25</sup> afforded to the criminal defendant to challenge a specified number of prospective jurors, without assignment of any reason as to why the veniremen are unqualified to serve on the jury.<sup>26</sup> This right has existed in felony prosecutions from the inception of the common law.<sup>27</sup> For example, in all trials of capital felonies the defendant was granted thirty-five peremptory challenges, and the prosecution was permitted to challenge an unlimited number of veniremen without assigning any cause.<sup>28</sup> While the right of peremptory challenge remains the law in England today, the actual use of peremptory challenges in that country is extremely rare.<sup>29</sup>

In contrast, the practice of permitting peremptory challenges in felony prosecutions in the United States has expanded and flourished

25. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis v. United States*, 146 U.S. 370, 378 (1892).

26. In *Swain v. Alabama*, 380 U.S. 202, 220 (1965), the United States Supreme Court recognized that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *But see* *People v. Wheeler*, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978), where the California Supreme Court, basing its decision on independent state grounds, held that peremptory challenges could not be used in an arbitrary manner to remove prospective jurors solely on the ground of group bias. Group bias was found to exist "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds . . . and peremptorily strikes all such persons for that reason alone." *Id.* at 276, 583 P.2d at 762, 148 Cal. Rptr. at 902. The court determined that this does not imply "that it is an objection for which no reason need exist." *Id.* at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901 (construing CAL. PENAL CODE § 1069 (West 1970)).

27. *See* *Moore*, *supra* note 20, at 444-45.

28. *Swain v. Alabama*, 380 U.S. 202, 212-13 (1965).

29. One commentator has noted that, in the selection of the English juries, the challenge by counsel of a prospective juror is almost as rare as the challenge of a judge in the United States. *Moore*, *supra* note 22, at 453 n.53. *Moore* suggests one reason for the divergence of the American and English systems of jury selection might be found in the greater homogeneity of the English population. This is contrasted with the conditions existing in the United States during the development of our jury system, where prospective jurors were drawn from a cross-section of a more heterogeneous society. According to *Moore*, these differing social conditions, together with the "fundamental confidence in the English juror's fairmindedness vitalized by his oath," make the method of jury selection which is deemed appropriate and practical in England to be totally unfeasible for this country. *Id.*

*Howard* suggests that the difference results from the greater control exercised by English courts over pretrial publicity. "[O]ne of the salient reasons why both court and counsel have confidence in the impartiality and integrity of trial jurors is the authority the courts exercise in preventing the newspapers from prejudging a pending case." P. HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 363 (1931) (citing *Lawson & Keedy, Criminal Procedure in England*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 595, 748 (1910)).

from its common law origin. Today, peremptories are "freely used and relied upon."<sup>30</sup> The United States Supreme Court has acknowledged that voir dire examination in American trials has become "extensive and probing, operating as a predicate for the exercise of peremptories."<sup>31</sup> Although the Constitution does not require that Congress or the states grant litigants the privilege of peremptory challenges,<sup>32</sup> the long history and widespread use of peremptory challenges confirm that the "peremptory challenge is a necessary part of trial by jury."<sup>33</sup>

### 1. The role of the peremptory challenge

Blackstone viewed the peremptory challenge as a reflection of the "tenderness and humanity for which our English laws are justly famous."<sup>34</sup> He ascribed to it two essential functions: (1) it ensures that the defendant will have a good opinion of the jury which tries him by eliminating from the venire those jurors whom the defendant, without any assignment of reason or cause, instinctively dislikes;<sup>35</sup> and (2) it eliminates from the venire those jurors who may have resented counsel's probing voir dire examination, or who were offended by any insinuation that they could not act with the requisite impartiality, but against whom counsel has insufficient proof to sustain a challenge for cause.<sup>36</sup>

While the ostensible objective of voir dire is the selection of a fair

30. *Swain v. Alabama*, 380 U.S. 202, 218 (1965).

31. *Id.* at 219.

32. *See Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress [or the states] to grant peremptory challenges . . ."). *But see Babcock, Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 555-57 (1975) [hereinafter cited as *Babcock*]. *Babcock* presents an historical analysis of the constitutional necessity for peremptory challenges. *Babcock* points out that, in its original draft, the sixth amendment expressly provided for the right to challenge prospective jurors. *Id.* at 555 n.37.

33. *Swain v. Alabama*, 380 U.S. 202, 219 (1965). The peremptory challenge is "'one of the most important of the rights secured to the accused.'" *Id.* (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

34. 4 W. BLACKSTONE, COMMENTARIES \*353 [hereinafter cited as 4 W. BLACKSTONE].

35. *Id.* "In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'" *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

36. 4 W. BLACKSTONE, *supra* note 34, at 353; Broeder, *supra* note 2, at 526-27. Broeder found that jurors uniformly disliked lengthy voir dire examinations and expressed irritation at those lawyers who conducted them. When the question "Can you be fair and impartial?" was addressed to the prospective jury as a whole, prospective jurors apparently felt no resentment. However, when questioned individually as to their ability to act impartially, jurors often felt that their integrity was being questioned, and Broeder implies that in at least one particular case this may have affected the verdict.



and impartial jury, the litigants are striving to attain through voir dire quite a different objective. In reality, each adversary is attempting to use his or her quota of peremptory challenges to eliminate from the venire those prospective jurors who are biased favorably toward the opposing side, and to retain as many veniremen as possible who are biased in the litigant's favor. Through the interaction of these opposing forces, ideally, there should emerge an impartial jury composed of men and women indifferent to either litigant's cause.<sup>37</sup> Thus, the peremptory challenge functions to "eliminate extremes of partiality on both sides,"<sup>38</sup> and, at least in those situations where the venire is initially representative of a cross section of the community, to secure as impartial a jury as practicable under the circumstances.<sup>39</sup>

## 2. History of the peremptory challenge in California

A party's right to use voir dire solely to form a basis for the exercise of peremptory challenges has had a long and mercurial history in the California courts. The California Supreme Court first addressed this issue in 1863, in *Watson v. Whitney*,<sup>40</sup> stating:

It is not necessary to determine whether affirmative answers to these questions, or any one of them, would have formed a proper ground for a challenge for cause. Each party has a right to put questions to a juror, to show, not only that there exists [sic] proper grounds for a challenge for cause, but to

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37. See generally *Babcock*, *supra* note 32, at 549-52.

38. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

39. In *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), the California Supreme Court held that, while no litigant is entitled to trial by a "jury that proportionately represents every group in the community . . .," *id.* at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903, the California Constitution secures to each litigant the right to be tried by a "jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." *Id.* (construing CAL. CONST. art. 1, § 16); see *Peters v. Kiff*, 407 U.S. 493, 503 (1972) ("[w]hen 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."); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (the process of jury selection must "provide a fair possibility for obtaining a representative cross-section of the community."). *Babcock* has observed that:

The ideal of an impartial jury as seen in the "cross section of the community" cases is much more that people should be different from each other than individually "indifferent." But if the "cross section" ideal presupposes that absolute indifference will not be achieved, then implicit in the goal of having a variety of people on the jury is the idea that "impartial" jurors are ones who would at least be willing to be persuaded and influenced by the life experiences of others.

*Babcock*, *supra* note 32, at 552.

40. 23 Cal. 375 (1863).

elicit facts to enable the party to decide whether or not he will make a peremptory challenge . . . .<sup>41</sup>

Seventeen years later, in *People v. Car Soy*,<sup>42</sup> the court, following the *Watson* rule, again permitted voir dire examination to be used for the purpose of establishing grounds for peremptory challenges. Determining that the reasoning of *Watson* applied to the circumstances in *Car Soy*, the court in that case upheld questioning which the trial court had excluded.<sup>43</sup>

Only two years after *Car Soy* was decided, however, the supreme court dramatically reversed its policy regarding the permissible extent of voir dire. In *People v. Hamilton*,<sup>44</sup> a prospective juror stated during voir dire examination that he had formed a "qualified opinion"<sup>45</sup> about the case. Defense counsel then inquired, "[f]rom the opinion you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?"<sup>46</sup> The trial court sustained an objection to the question.<sup>47</sup>

The California Supreme Court upheld the trial court's ruling. The court determined that, while such a question might properly have been asked to show actual bias, the defendant had not been challenged for cause, and "[i]t has never been declared, in any case *where such declaration was necessary to the decision*, that a person summoned as a juror may be questioned for the mere purpose of ascertaining whether . . . to challenge him peremptorily."<sup>48</sup> The court then expressly disapproved the contrary language in *Watson*, labeling it "clearly *dictum*."<sup>49</sup>

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41. *Id.* at 379. *Watson* involved an action for forcible entry and detainer. The defendant in that case was a squatter on land owned by the plaintiff. The trial court denied defense counsel permission to ask the prospective jurors: (1) whether they had been exposed to any conversations concerning the rights of the parties involved in this case, and if so, whether they had formed or expressed an opinion concerning those rights; (2) whether they had any prejudices or biases against squatters; or (3) whether they had ever served as a juror on a similar case. *Id.*

42. 57 Cal. 102 (1880).

43. *Id.* at 103. In *Car Soy*, the defendant, who was Chinese, was on trial for robbery. The questions that the court determined had been erroneously excluded were: "1. Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man? . . . ' 2. If the defendant, a Chinaman, should be sworn as a witness in his own behalf, would you give his testimony the same credit that you would give to the story told by a white person, under the same circumstances?' " *Id.*

44. 62 Cal. 377 (1882).

45. *Id.* at 379.

46. *Id.*

47. *Id.*

48. *Id.* at 382-83 (emphasis added).

49. *Id.* at 382. The *Hamilton* court found that both of the excluded questions in *Car Soy*, if answered affirmatively, would have indicated the necessity of a challenge for cause.

The new standard announced in *Hamilton* afforded counsel the benefit of all information acquired from voir dire examination conducted to determine the existence of actual or implied bias, but did not permit counsel to "embark [on] a general exploration for the sole purpose of satisfying himself whether it [would] be safe to be tried by a juror against whom no legal objections [could] be urged."<sup>50</sup> The court reasoned that after exhausting voir dire examination for the purpose of determining the existence of any actual or implied bias, counsel should have sufficient information on which to exercise the right of peremptory challenge.<sup>51</sup>

The rule announced in *Hamilton* was explicit and straightforward: counsel could not, under any circumstances, use voir dire examination solely for the purpose of establishing grounds for the exercise of peremptory challenges. As unequivocally as the *Hamilton* rule was stated, it could reasonably have been assumed that the matter had been settled. However, this was not the end, but merely the beginning, of the court's struggle to define the parameters of litigants' rights during voir dire.

In 1907, the supreme court inexplicably chose to ignore the rule of *Hamilton*, and again revived the rule of *Watson* and *Car Soy* in *People v. Helm*.<sup>52</sup> In *Helm*, the defendant, who was on trial for murder, was also the suspect in several other violent crimes which had occurred in the community, and which had aroused great public sentiment and indignation. One of the other crimes of which the defendant was suspected was the murder of an individual named Jackson.<sup>53</sup> During voir dire examination, in a situation very similar to that in *Hamilton*, a prospective juror conceded that he had formed an opinion concerning the guilt or innocence of the defendant in connection with the Jackson murder case. The trial court would not permit defense counsel to ask the juror if, believing the defendant guilty of the Jackson murder, the juror had not already formed an opinion concerning the defendant's

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The court determined that the language concerning peremptory challenges in *Watson* was dictum because one of the questions, asking whether or not the juror had formed or expressed an opinion regarding the case, might have elicited an answer that would have sustained a challenge for cause. See *supra* notes 41 & 43.

50. 62 Cal. at 383; *accord* *People v. Plyler*, 126 Cal. 379, 381, 58 P. 904, 904 (1899); *People v. Brittan*, 118 Cal. 409, 412, 50 P. 664, 666 (1897); *People v. Trask*, 7 Cal. App. 103, 105, 93 P. 891, 892 (1907).

51. 62 Cal. at 382. "The law gives [counsel] the advantage of any knowledge which he may . . . acquire [during voir dire], but does not afford him an opportunity to examine a juror for the avowed object of determining whether he will challenge him peremptorily." *Id.*

52. 152 Cal. 532, 93 P. 99 (1907).

53. *Id.* at 534, 93 P. at 100.

guilt in the case at bar.<sup>54</sup> The supreme court held that the question should have been permitted, not only because it would have been useful to counsel in determining whether to challenge the juror for cause for actual bias, but also because it was a "legitimate inquiry for the purpose of determining whether a peremptory challenge should be interposed."<sup>55</sup>

This divergence of opinion finally forced the court, in 1912, to acknowledge the existence of a conflict in the law concerning counsel's right to use voir dire examination for any purpose other than to develop a basis for exercising a challenge for cause. In *People v. Edwards*,<sup>56</sup> the court once again attempted to clarify the correct rule to be applied, determining that the confusion which had arisen from these conflicting opinions had resulted in:

an increasing tendency [on the part of trial courts] to prolong . . . proceedings inordinately by allowing counsel on either side to indulge in tedious examinations of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and the . . . *supposed privilege* of doing this has been greatly abused.<sup>57</sup>

The *Edwards* court reasoned that no valid objective was served by permitting counsel this purported privilege. Instead, the court held that the areas of voir dire inquiry that were permissible to develop challenges for cause were so broad that counsel had more than sufficient opportunity to gather information to test the feasibility of exercising peremptory challenges.<sup>58</sup>

*Edwards* reaffirmed the *Hamilton* court's ruling that the questions posed in *Watson* and *Car Soy* were permissible only because they had the potential to elicit information that might lead to a challenge for cause.<sup>59</sup> Any remarks concerning the availability of voir dire to establish grounds for peremptory challenges were again held to be dictum.<sup>60</sup> *Helm* was similarly dismissed. The court determined that the question at issue there could properly have been asked to ascertain actual bias, and the court's digression concerning peremptory challenges was un-

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54. *Id.* at 546, 93 P. at 105.

55. *Id.*

56. 163 Cal. 752, 127 P. 58 (1912).

57. *Id.* at 753, 127 P. at 58 (emphasis added).

58. *Id.* at 755, 127 P. at 59.

59. *Id.*

60. *Id.*

necessary to the decision.<sup>61</sup>

In reaffirming *Hamilton*, the *Edwards* court appeared to dispel any lingering doubts concerning the permissible scope of voir dire examination. Many of the court's decisions following *Edwards* were equally as adamant in rejecting the contention that voir dire could be used for any function other than as a method to discover facts which would constitute grounds for a challenge for cause.<sup>62</sup> However, underlying dissension continued to emerge periodically, eroding the foundations of the *Edwards* rule.<sup>63</sup> This is well illustrated by two court of appeal decisions which ignored *Edwards* entirely.

In *Walker v. Greenberger*,<sup>64</sup> the court of appeal held that the trial court had erred in not permitting plaintiff's counsel, when questioning prospective jurors concerning their qualifications, to ask the jurors' occupations. The court stated that "the question was a reasonable one to aid plaintiff in determining whether to exercise a peremptory challenge."<sup>65</sup> This was not an isolated occurrence. Several years later, the court of appeal in *People v. Boorman*<sup>66</sup> held that the trial court had erred by its refusal to permit defendant's counsel to ask prospective jurors whether they were employed as deputy sheriffs. The record showed that deputies of the sheriff's office had investigated the alleged crime, and the complaint had been filed by a deputy sheriff. The court omitted any reference to *Edwards*, and instead, expressly declared *Walker* to state the "correct rule."<sup>67</sup>

The question posed to the prospective jurors in *Boorman* could arguably have been upheld as one tending to elicit information which might constitute a challenge for cause; thus, any statement made by the court concerning peremptory challenges could be labeled dictum. This

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61. *Id.* at 756, 127 P. at 60.

62. *See supra* note 11.

63. The lower courts' perennial disregard for the *Edwards* rule prompted Judge Title, in 1961, to note:

[There is an] apparent diversity existing in California practice today between what many attorneys and trial judges consider to be the law as compared to the actual state of the law as enunciated in many of our appellate decisions. It appears quite obvious that while the statutory law as well as a large body of case law exists in California on the subject of what constitutes permissible voir dire examination, the first impression of one examining the cases in some detail is that the practices followed by counsel and trial judges in the trial court do not always coincide with the pronouncement of the appellate courts.

Title, *supra* note 2, at 70.

64. 63 Cal. App. 2d 457, 147 P.2d 105 (1944).

65. *Id.* at 464, 147 P.2d at 109.

66. 142 Cal. App. 2d 85, 297 P.2d 741 (1956).

67. *Id.* at 90, 297 P.2d at 745.

result would then be analogous to the *Edwards* court's determination, where the language concerning peremptory challenges in *Watson*, *Car Soy*, and *Helm* was labeled dicta.

However, the question of whether the *Walker* and *Boorman* courts were technically correct in assuming that the excluded questions might tend to elicit responses that would indicate the necessity of exercising a peremptory challenge, rather than a challenge for cause, is unimportant. The significance of *Walker* and *Boorman* stems from their reflection of the unsettled state of the law and the divergence that existed between the law as it was stated in *Edwards* and the law as it was actually being applied in the lower courts. With the appellate courts so openly ignoring *Edwards*, what the trial courts were doing is speculative.<sup>68</sup>

The supreme court was not unaware of the continuing conflict.<sup>69</sup> Despite some lower courts' strict adherence to the *Edwards* rule,<sup>70</sup> the supreme court finally acknowledged that neither party "should suffer an improper restriction upon a reasonable *voir dire* examination of prospective jurors or a frustration of an intelligent exercise of peremptory challenges."<sup>71</sup> Against this background of conflicting opinions emerged the *Williams* decision.

### III. FACTS OF THE CASE

In 1978, the defendant, Jimmie Ray Williams, was arrested in connection with the shooting death of his "drinking companion," Travis King.<sup>72</sup> The events leading up to the fatal shooting had begun earlier

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68. As part of his participation in a panel discussion on the subject of jury selection, Justice Stanley Mosk, then California Attorney General, made the following observation about the *Edwards* rule:

I think the custom throughout California is not in accord with this strict rule. The courts in two more recent cases have said that it is proper to question either for a challenge for cause or as a basis for peremptory challenge. It is my belief that throughout California the courts have followed the liberal rule of the *Walker* and *Boorman* cases.

*Selecting the Jury*, *supra* note 12, at 873.

69. *See* *People v. Crowe*, 8 Cal. 3d 815, 821 & n.2, 506 P.2d 193, 197 & n.2, 106 Cal. Rptr. 369, 373 & n.2 (1973).

70. *See, e.g.*, *People v. Soltero*, 81 Cal. App. 3d 423, 428, 146 Cal. Rptr. 457, 460, *cert. denied*, 439 U.S. 933 (1978); *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 882, 64 Cal. Rptr. 655, 658 (1967); *People v. Deriso*, 222 Cal. App. 2d 478, 486-87, 35 Cal. Rptr. 134, 139 (1963); *People v. Canales*, 12 Cal. App. 2d 215, 219, 55 P.2d 289, 291 (1936); *People v. Riordan*, 79 Cal. App. 488, 495-96, 250 P. 190, 193 (1926); *People v. Ecton*, 29 Cal. App. 478, 479, 156 P. 996, 996-97 (1916).

71. *People v. Terry*, 61 Cal. 2d 137, 147, 390 P.2d 381, 388, 37 Cal. Rptr. 605, 612, *cert. denied*, 379 U.S. 866 (1964).

72. 29 Cal. 3d 392, 397, 628 P.2d 869, 870, 174 Cal. Rptr. 317, 318 (1981).

in the evening when Williams and King, both apparently intoxicated, were arrested following their participation in a fight on a freeway ramp.<sup>73</sup> The two were subsequently released from jail that same evening, and Williams went home. King, however, did not go home. Instead, he went to Williams' home to retrieve his car.<sup>74</sup> Once there, King spoke with Williams' son, informing him that he wished to speak to Williams.<sup>75</sup> King followed the son to the bedroom where Williams had been sleeping with his one-year old grandson. When informed by his son that King wished to see him, Williams responded that he was "asleep" and did not want to talk to anyone.<sup>76</sup> King pounded on the door, shouted obscenities, and demanded that Williams come out of the room and fight him.<sup>77</sup> The door was opened and in the resulting altercation between Williams and King, King was fatally shot.<sup>78</sup>

Williams was charged with murder. The principal issue at trial was whether Williams had acted reasonably in defense of himself, his grandson, and his home when he shot King.<sup>79</sup> The jury acquitted Williams of murder but found him guilty of voluntary manslaughter.<sup>80</sup>

The controversy in this case arose during voir dire examination. The trial court initially questioned the veniremen as a group, asking them if they could follow the court's instructions on the law to be applied in that case, regardless of any personal opinions or feelings they might have about what the law was or should be.<sup>81</sup> All the prospective jurors affirmatively answered that they could follow the court's instructions.<sup>82</sup> The trial court then inquired of the members of the panel whether they could accept the propositions that the prosecutor must prove the defendant's guilt beyond a reasonable doubt and that the defendant is presumed to be innocent.<sup>83</sup> None of the veniremen expressed any difficulty accepting those propositions.<sup>84</sup>

The court then permitted counsel, pursuant to section 1078 of the California Penal Code, to question the prospective jurors individu-

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 397-98, 628 P.2d at 870, 174 Cal. Rptr. at 318.

84. *Id.* at 398, 628 P.2d at 870, 174 Cal. Rptr. at 318.

ally.<sup>85</sup> Defense counsel attempted to ask several questions which were rejected by the court. One juror was asked whether, if instructed by the court to apply a "reasonable person" standard of conduct, she could hypothetically conceive of a "reasonable and prudent" person.<sup>86</sup> The court sustained the prosecutor's objection to the question.<sup>87</sup> The court also sustained an objection to defense counsel's request that a prospective juror relate to him "a brief idea of your feeling about the right of a person to defend himself in his own home."<sup>88</sup>

The court did allow defense counsel to question the prospective jurors about whether they could follow the court's instructions on the issue of self-defense even if they disagreed with the law.<sup>89</sup> The court denied, however, counsel's request to ask the veniremen whether they would willingly follow an instruction which required them to accept the proposition that a person has a right to use necessary force to resist an aggressor and that he or she has no duty to retreat.<sup>90</sup>

The sole issue on appeal was whether defense counsel had been unnecessarily restricted in his attempt to ask the excluded questions, either because the questions might have provided counsel with sufficient information to justify a challenge for cause, "and were therefore properly within the scope of the existing voir dire standard,"<sup>91</sup> or because they might have facilitated the "intelligent exercise of peremptory challenges and . . . therefore [should] have been allowed despite California precedent to the contrary."<sup>92</sup>

The California Supreme Court, in reversing the trial court and vacating the appellate court decisions, held that the standard which had existed in California since the *Edwards* decision in 1912 was "unnecessarily restrictive."<sup>93</sup> The court instead adopted the rule governing voir dire existing in the majority of jurisdictions,<sup>94</sup> which permits counsel to

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85. *Id.*; CAL. PENAL CODE § 1078 (West Supp. 1981) provides in pertinent part: "[The trial court] shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel." Section 1078 was amended in 1974 after the court's decision in *People v. Crowe*, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973), which held that § 1078, as it then read, permitted the trial court, at its discretion, to bar counsel from directly questioning prospective jurors during voir dire examination. *Id.* at 824, 506 P.2d at 199, 106 Cal. Rptr. at 375.

86. 29 Cal. 3d at 398, 628 P.2d at 870-71, 174 Cal. Rptr. at 319.

87. *Id.* at 398, 628 P.2d at 781, 174 Cal. Rptr. at 319.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g., United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979); *United*



“make reasonable inquiries to assist in the intelligent exercise of peremptory challenges.”<sup>95</sup> The court further held that prospective jurors may be questioned about their willingness to apply a specific doctrine of law if that doctrine is likely to be applied at trial, subject, of course, to reasonable limitations and the discretion of the trial judge.<sup>96</sup>

#### IV. ANALYSIS

In *Williams*, the court criticized the *Edwards* rule<sup>97</sup> on the ground that it created an arbitrary standard which was “difficult to apply, erratic in achievement of its desired end, and insensitive to the constitutional mandate that the defendant be tried before a fair and impartial jury.”<sup>98</sup>

The supreme court’s goal in establishing the *Edwards* rule had been to end the indiscriminate and time-consuming voir dire examination which it believed was becoming standard practice in the trial courts.<sup>99</sup> The conflicting decisions which existed prior to *Edwards* concerning the permissible scope of voir dire<sup>100</sup> may have “led [some] trial courts to give counsel great latitude [during voir dire], rather than risk prejudicial error by confining the examination to reasonable limits.”<sup>101</sup>

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*States v. Jackson*, 542 F.2d 403, 413 (7th Cir. 1976); *United States v. Segal*, 534 F.2d 578, 581 (3d Cir. 1976); *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973); *United States v. Robinson*, 475 F.2d 376, 380-81 (D.C. Cir. 1973); *United States v. Dellinger*, 472 F.2d 340, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Cook v. United States*, 379 F.2d 966, 971 (5th Cir. 1967); *United States v. Napoleone*, 349 F.2d 350, 353-54 (3d Cir. 1965); *Photostat Corp. v. Ball*, 338 F.2d 783, 786 (10th Cir. 1964); *Lamb v. State*, 241 Ga. 10, 12, 243 S.E.2d 59, 61 (1978); *Johnson v. State*, 399 N.E.2d 360, 363 (Ind. 1980); *Gossett v. Commonwealth*, 426 S.W.2d 485, 487 (Ky. 1968); *People v. Harrell*, 398 Mich. 384, 388, 247 N.W.2d 829, 830 (1976); *Oden v. State*, 166 Neb. 729, 731, 90 N.W.2d 356, 358 (1958); *State v. Anderson*, 30 Ohio St. 2d 66, 71-72, 59 Ohio Op. 2d 85, 88-89, 282 N.E.2d 568, 571 (1972).

95. 29 Cal. 3d at 398, 628 P.2d at 871, 174 Cal. Rptr. at 319.

96. *Id.*

97. *See supra* text accompanying notes 56-58.

98. *Id.* at 399, 628 P.2d at 871, 174 Cal. Rptr. at 319. The court recognized the potential for conflict existing between its decision in *People v. Wheeler*, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978), which ruled unconstitutional the use of peremptory challenges to eliminate prospective jurors from the venire on the basis of group bias alone, *see supra* note 26, and the restrictions placed on voir dire by the *Edwards* rule. Unless counsel are allowed to probe beneath the surface to uncover these actual, albeit hidden, biases, they will be forced in many instances to exercise their peremptory challenges on the superficial basis found unconstitutional in *Wheeler*. *People v. Williams*, 29 Cal. 3d at 404-05, 628 P.2d at 875, 174 Cal. Rptr. at 323.

99. 163 Cal. at 753, 127 P. at 58.

100. *See supra* notes 40-56 and accompanying text.

101. 163 Cal. at 753, 127 P. at 58. Title noted that even after *Edwards* expressly criticized the trial courts for affording counsel too much latitude during voir dire rather than risk prejudicial error, it was still advantageous for the trial courts to resolve any doubts they

The court sought to curb this potential for abuse by restricting the questioning of prospective jurors to only those areas that "tend to prove some fact material to a challenge for cause."<sup>102</sup>

In theory, the *Edwards* rule appeared to the court to be a reasonable, workable standard, which would expedite voir dire, and which the trial courts could execute more easily than the conflicting rules they had been subject to in the past.<sup>103</sup> The court, however, did not foresee the practical problems which such a strict rule would engender, and which would eventually be reflected not only in the refusal of many lower courts to give effect to the rule,<sup>104</sup> but also in the supreme court's own occasionally ambivalent attitude toward *Edwards*.<sup>105</sup>

#### A. *The Williams Court Rejects the Edwards Rule*

The *Williams* court probed beneath the surface of *Edwards* to expose the fallacy of the rationale underlying the rule. The court reasoned that, even when strictly applied, the *Edwards* rule would permit the trial court to sustain any question asked during voir dire that could conceivably lead to a response that would reveal a "legally cognizable bias."<sup>106</sup> Thus, in practice, the only constraint on voir dire afforded by this precept was that which the trial court in its discretion might impose.<sup>107</sup>

Trial courts, confronted with such a vague and "unwieldy standard,"<sup>108</sup> had been encouraged out of necessity to develop their own guidelines to implement the *Edwards* rule.<sup>109</sup> This broad discretion reposed in the trial courts had resulted in the adoption by some courts of

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might have about the validity of a question under the *Edwards* rule in favor of allowing the question. This strategy was recommended in light of the continuing tendency on the part of the appellate courts to affirm those decisions which violated the *Edwards* rule on the rationale that the disputed question might possibly have led to a challenge for cause. Conversely, especially in close cases, the exclusion of a question because of strict adherence to *Edwards* was more likely to be ruled error; accordingly, any doubt that the appellate court might entertain was usually resolved in favor of permitting the question. Title, *supra* note 2, at 78-79.

102. 163 Cal. at 755, 127 P. at 59.

103. *Id.* at 756, 127 P. at 59.

104. See *supra* notes 63-68 and accompanying text.

105. See *supra* notes 69-71 and accompanying text.

106. 29 Cal. 3d at 399, 628 P.2d at 872, 174 Cal. Rptr. at 320.

107. *Id.* The *Williams* court further reasoned that "*Edwards* imposed no limit on the form of the questioning; as long as the questions were material to a challenge for cause, they could be as endlessly repetitive or confusing as counsel cared to make them, subject only to the limits of the court's patience." *Id.*

108. *Id.* at 400, 628 P.2d at 372, 174 Cal. Rptr. at 320.

109. *Id.*

what was essentially an "ad hoc balancing test,"<sup>110</sup> which permitted counsel to ask a particular question during voir dire if the probability that the question would lead to a challenge for cause outweighed the probability that the question would form the basis for a peremptory challenge.<sup>111</sup> Those courts that preferred to interpret the *Edwards* rule narrowly could exclude any question where the probability that it would lead to a peremptory challenge was the more predictable result.<sup>112</sup> This was done, although, as was pointed out by the *Williams* court, strict adherence to *Edwards* would allow any question to be asked during voir dire if there was a possibility, however remote, that it could form a basis for a challenge for cause, regardless of whether the more probable result would be to elicit facts that would indicate the advisability of exercising a peremptory challenge.<sup>113</sup>

In contrast, some trial courts, preferring to exercise the broad discretion afforded them under the *Edwards* rule, would permit any question to be asked during voir dire that could conceivably lead to a challenge for cause.<sup>114</sup> This diversity of practice in the lower courts led

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110. *Id.*

111. *Id.*

112. *Id.* In *People v. Canales*, 12 Cal. App. 2d 215, 55 P.2d 289 (1936), the defendant, a gold miner, was charged with possession of a deadly weapon during the course of a miner's strike in the community. The court refused to allow defense counsel to question prospective jurors about any prejudices they might harbor regarding the strike, finding such inquiry to be an "exploration for the purpose of arriving at a decision as to whether a peremptory challenge should be exercised." *Id.* at 219, 55 P.2d at 291.

While the court was undoubtedly correct in assuming that such a question had the potential to elicit facts that would indicate to counsel whether to exercise a peremptory challenge, an examination into the prospective juror's attitudes concerning the strike, which continued during the trial, unquestionably had the potential to uncover any actual bias toward the defendant which might have existed among the members of the venire. Such questioning could have been sustained under the rationale of *Edwards*, see *infra* note 114 and accompanying text, as possibly leading to a challenge for cause, even though this was not the more probable result of this examination. The court in *Canales*, however, preferred to construe the *Edwards* rationale narrowly and restricted questioning to only those areas that would most likely result in a challenge for cause. 12 Cal. App. 2d at 219, 55 P.2d at 291.

A very restrictive interpretation of *Edwards* was also followed in *People v. Estorga*, 206 Cal. 81, 83, 273 P. 575, 576 (1928), where the trial court refused to permit defense counsel, in a rape prosecution, to ask prospective jurors whether they were married, had children, or whether any member of their family had ever been a victim of rape. The supreme court upheld such a restriction on the ground that it "was not so much for the purpose of laying the basis of challenges for cause as to pave the way for possible peremptory challenges . . ." *Id.* at 87, 273 P. at 577. *Estorga* illustrates, again, the philosophy pervading many trial court decisions that *Edwards* could be interpreted to limit voir dire examination to only those areas that presented the greatest potential for establishing bases for challenges for cause.

113. 29 Cal. 3d at 399, 628 P.2d at 871-72, 174 Cal. Rptr. at 319-20.

114. See *supra* note 101.

to the arbitrary and erratic results criticized in *Williams*,<sup>115</sup> where ultimately, "the substance of the questions which . . . [were] permitted by the trial court . . . depend[ed] upon the particular philosophy of the trial judge, as well as all of the facts and circumstances of the case before the court."<sup>116</sup>

### B. *The Intended Goal of Williams*

The *Williams* court was highly critical of the attitude it found pervading many lower court opinions that the process of securing an impartial jury required only that the venire be purged of those potential jurors who harbored conscious bias.<sup>117</sup> The belief that actual bias was synonymous with consciously held bias was one of the most dangerous and unwarranted assumptions engendered by the *Edwards* rule and was one which was eagerly perpetuated by those courts that preferred to facilitate voir dire by restricting its scope to the narrowest limits legally permissible.<sup>118</sup>

Unconsciously held bias is by definition difficult to detect. "Moreover, little psychological insight is needed to realize that the setting in which voir dire is conducted creates additional pressures for the venireman to answer questions as he believes the judge would have him answer, or in conformity with the answers of the preceding panelists."<sup>119</sup>

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115. 29 Cal. 3d at 399, 628 P.2d at 871, 174 Cal. Rptr. at 319.

116. Title, *supra* note 2, at 74.

117. 29 Cal. 3d at 401, 628 P.2d at 873, 174 Cal. Rptr. at 321.

118. *Id.* The court declared that one of the most unfortunate consequences of the restriction on voir dire mandated by *Edwards* was counsel's increasing tendency to engage in extensive pretrial screenings and surveys to establish some basis for the use of peremptory challenges. *Id.* at 405, 628 P.2d at 875, 174 Cal. Rptr. at 323. The court objected to such pretrial techniques not only because they tended to exacerbate the problems confronted by the trial courts in *Wheeler*, but also because they tended to create the impression that the ability to exercise peremptory challenges is effectively dependent upon the relative affluence of the litigants. See *supra* note 26 for a discussion of *Wheeler*. See generally Note, *The Constitutional Need for Discovery of Pre-voir Dire Juror Studies*, 49 S. CAL. L. REV. 597, 600-01 nn.19-28 (1976) (citing various examples of social science studies and references that attorneys may consult to confirm intuitive impressions they might entertain regarding a prospective juror's potential to render a favorable verdict, based on such characteristics as the juror's race, sex, education, religion, income, and other social or economic traits).

119. 29 Cal. 3d at 403, 628 P.2d at 874, 174 Cal. Rptr. at 322; see Broeder, *supra* note 2, at 510-15. As a result of his studies of federal district court procedures, Broeder concluded that jurors often give misleading answers and at times intentionally deceive counsel during voir dire. In the course of his experiment, Broeder frequently found that prospective jurors simply remained silent when asked about any possible connection they might have with the litigants or counsel involved in the case.

One case, in particular, illustrates the type of deception encountered by counsel during a voir dire examination. While voir dire was being conducted in a larceny prosecution, one prospective juror, Mrs. Edwards, was questioned about any possible association she might

The court emphasized the necessity for permitting more expansive voir dire to discover these "subtle manifestations of bias."<sup>120</sup> The court believed that preventing counsel from inquiring into those areas that have the potential to uncover actual, albeit hidden, prejudices would be a denial of the finite effectiveness of questions aimed solely at uncovering only the more obvious, legally recognized biases.<sup>121</sup> While jurors are presumed to respond in good faith during voir dire,<sup>122</sup> and their assurances that they will be able to act with the requisite impartiality will ordinarily insulate them from a challenge for cause,<sup>123</sup> the court believed that this should not preclude further, reasonable questioning that might uncover bias of which the juror is either "unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome."<sup>124</sup>

### C. *The Potential Effect of Williams on Voir Dire Examination in California*

The court acknowledged that the rule announced in *Williams* will leave intact the broad discretion afforded trial courts to conduct voir dire.<sup>125</sup> The court warned, however, that caution should be exercised by both counsel and the courts so that the "extensive and unfocused questioning"<sup>126</sup> which precipitated the adoption of the *Edwards* rule should not again become the standard. Close scrutiny of the *Williams* ration-

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have had with the defense counsel. In fact, Mrs. Edwards was well acquainted with defense counsel as a result of their mutual participation in political campaigns and her having been entertained as a guest in his home. During questioning, however, Mrs. Edwards misleadingly admitted to only a casual friendship with defense counsel and asserted that such a relationship would not influence her decision. Mrs. Edwards subsequently ignored her earlier assurances that this "casual" relationship would not affect her decision, and during deliberation, one of her chief arguments for acquittal was based on the assumption that because defense counsel was an honest man, he would not be representing the defendant unless the defendant were innocent. *Id.* at 511. This is but one of numerous examples cited by Broeder which support his contention that voir dire is generally ineffective as a mechanism for screening out biased jurors. *Id.* at 521. The California Supreme Court has also acknowledged the unwillingness of biased jurors to confess openly their prejudices during voir dire examination and the failure of questions that require only a right or wrong answer to elicit pertinent information necessary to detect such biases. *See People v. Crowe*, 8 Cal. 3d 815, 831 n.31, 506 P.2d 193, 204 n.31, 106 Cal. Rptr. 369, 380 n.31 (1973).

120. 29 Cal. 3d at 403, 628 P.2d at 874, 174 Cal. Rptr. at 322.

121. *Id.*

122. *See People v. Preston*, 9 Cal. 3d 308, 313, 508 P.2d 300, 303, 107 Cal. Rptr. 300, 303 (1973). *But see supra* text accompanying note 119.

123. *See supra* note 18 and accompanying text.

124. 29 Cal. 3d at 402, 628 P.2d at 873, 174 Cal. Rptr. at 321.

125. *Id.* at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.

126. *Id.*

ale compels the conclusion that the court intends reasonableness to be the criterion for evaluating the propriety of voir dire examination.<sup>127</sup>

The central issue posed in *Williams*, which was never adequately answered by the court, was: Within the parameters of this reasonableness standard, how extensive must examination of prospective jurors be to ensure an intelligent basis for exercising peremptory challenges? The majority conceded that it will be impossible to determine "a priori the proper balance to be struck by the trial courts in each case."<sup>128</sup> However, the court recommended the guidelines set forth by the District of Columbia Circuit in *United States v. Robinson*.<sup>129</sup> These guidelines provide that counsel should be allowed to investigate "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact."<sup>130</sup> Additionally, the *Williams* court held that "if a particular juror has given the court some reason to suspect he harbors such feelings, even though the general population does not, further questioning would be appropriate."<sup>131</sup>

### 1. Application of the new rule

The standard that the court adopted in *Williams* offers little practical guidance for trial courts to rely upon when they must decide whether a proposed question might conceivably lead to the exercise of a peremptory challenge. The court found that all the questions that had been excluded during voir dire in *Williams* were arguably permissible under the *Robinson* test,<sup>132</sup> although only the question relating to the prospective jurors' feelings about the retreat rule was considered to have been erroneously and prejudicially excluded.<sup>133</sup> The supreme

127. *Id.*

128. *Id.*

129. 475 F.2d 376 (D.C. Cir. 1973).

130. 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325 (quoting *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973)).

131. 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.

132. *Id.* at 410-11, 628 P.2d at 879, 174 Cal. Rptr. at 327.

133. The court found the retreat rule sufficiently controversial to warrant inquiry into possible reservations the jurors might have about applying it at trial. Its controversial nature was evidenced by the divergence of opinion existing in other jurisdictions regarding an individual's duty to exhaust all reasonable avenues of retreat before using force in self-defense. The court held that prospective jurors may be questioned about their willingness to apply specific doctrines of law when it appears from the nature of the case that such a doctrine will become relevant during the course of the trial. *Id.*

The court emphasized, however, that this decision should not be interpreted by counsel as sanctioning examination of prospective jurors concerning their knowledge of the law, but

court recognized that, under the considerable discretion which trial courts will be afforded when following the *Robinson* rule, one court could reasonably have permitted all the questions that were excluded during voir dire in *Williams*, while a more restrictive court might have excluded all of the questions except the one relating to the retreat rule and still have remained within the constraints of *Robinson*.<sup>134</sup> The court's criticism of the *Edwards* rule, that it leads to different standards depending upon the particular philosophy of the trial court,<sup>135</sup> appears to apply with equal force to the *Williams* rule.

In her concurring opinion, Chief Justice Bird criticized the lack of guidelines offered trial courts under the *Williams* rule and the unpredictable results which necessarily will flow from its application.<sup>136</sup> The chief justice cited the majority's application of the *Robinson* guidelines to determine which of the proposed questions in *Williams* had been erroneously excluded as a perfect illustration of the problem underlying the rule.<sup>137</sup> As adopted by the majority, the *Robinson* rule would allow trial courts to exclude a question that attempted to explore a venireman's feelings concerning a person's right to use self-defense in the home because such a "generally accepted tenet"<sup>138</sup> is unlikely to evoke any controversy. However, the question of a person's right to use force in self-defense despite the existence of a possibility for retreat was determined by the majority to be sufficiently controversial to warrant inquiry into jurors' attitudes and possible reservations about applying such a doctrine.<sup>139</sup> Chief Justice Bird stated:

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only as permission to ascertain juror attitudes toward relevant legal doctrines and their willingness to apply these doctrines at trial. *Id.* at 410, 628 P.2d at 879, 174 Cal. Rptr. at 327. The court held that such examination was necessary in light of the ineffectiveness of general, broad based questions to uncover possible unconscious or subtle hesitation to apply specific, controversial rules of law:

[I]t is untenable to conclude that the veniremen's general declaration of willingness to obey the judge is tantamount to an oath that he would not hesitate to apply any conceivable instruction, no matter how repugnant to him. Hence the answer is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias against particular doctrines.

*Id.* (footnote omitted).

134. *Id.*

135. *Id.* at 399-400, 628 P.2d at 872, 174 Cal. Rptr. at 320.

136. *Id.* at 412-13, 628 P.2d at 880, 174 Cal. Rptr. at 328 (Bird, C.J., concurring). Chief Justice Bird predicted that the new rule would prove in practice to be as difficult to apply systematically and consistently as the earlier *Edwards* rule and would perpetuate the diverse voir dire procedures already employed by trial courts according to individual custom. *Id.* at 413, 628 P.2d at 880, 174 Cal. Rptr. at 328.

137. *Id.*

138. *Id.* at 411, 628 P.2d at 879, 174 Cal. Rptr. at 327.

139. *Id.*

The distinction drawn between these two lines of questioning is ephemeral at best. The right to use deadly force against an intruder, even in the home, is certainly controversial in our society. Some people would probably find it even more controversial than the no-retreat rule. The majority's ability to draw a neat line between these two questions is more a comment on the justices' personal views of the two issues than a reflection of an objective difference in community attitudes.<sup>140</sup>

Such a standard will always tend to produce erratic results because trial courts will always differ in their evaluations of what issues will have sufficient controversial or emotional impact in the community to justify counsel's investigation during voir dire.<sup>141</sup>

## 2. Potential problems arising under the *Williams* rule

The *Williams* court encouraged trial courts to seek guidance from *Robinson* to effectuate this new ruling.<sup>142</sup> In adopting the *Robinson* standard, however, the court inexplicably failed to apply the entire test as it was set forth by the *Robinson* court.

*Robinson*, like *Williams*, involved a trial court's refusal to permit defense counsel to question prospective jurors during voir dire on the

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140. *Id.* at 413, 628 P.2d at 880, 174 Cal. Rptr. at 328. In criticizing the *Robinson* standard as inherently unworkable because of the broad discretion afforded trial judges to ascertain community attitudes and prejudices, Chief Justice Bird suggested instead that trial courts adopt guidelines similar to those found in Evidence Code § 352. Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *Id.* at 414 n.2, 628 P.2d at 881 n.2, 174 Cal. Rptr. at 329 n.2 (quoting CAL. EVID. CODE § 352 (West 1966)). Such a standard, the Chief Justice suggested, will permit trial courts to conduct voir dire more effectively because it will entail no more than "weighing the relevance of questions against their potential to create confusion or waste time," *id.* at 414, 628 P.2d at 881, 174 Cal. Rptr. at 329, and the courts are already experienced and qualified to make such judgments. *Id.*

141. *Id.* at 413, 628 P.2d at 880-81, 174 Cal. Rptr. at 328-29. Trial courts have traditionally been afforded considerable discretion in determining the qualifications of veniremen to serve on the jury, and the *Williams* court acknowledged that its decision will leave this broad discretion intact. *Id.* at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325. A trial court's finding that a prospective juror is acceptable will not be disturbed on appeal unless it is clear that as a matter of law the juror was biased or prejudiced. *People v. Carter*, 56 Cal. 2d 549, 574, 364 P.2d 477, 492, 15 Cal. Rptr. 645, 660 (1961); *People v. Riordan*, 79 Cal. App. 488, 496, 250 P. 190, 194 (1926). See generally Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 355 n.32 (1960) ("As a practical matter, a defendant seeking appellate relief must show that the trial was in fact unfair, not merely that the trial judge abused his discretion . . ."); *Minimum Standards*, *supra* note 17, at 1509-10.

142. *Id.* at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.



issue of self-defense. Specifically, counsel attempted to ask whether any members of the venire felt that self-defense does not justify the willful taking of human life,<sup>143</sup> and whether any felt that he or she would be unable to follow the court's instructions on self-defense because of his or her personal views on the subject.<sup>144</sup> The *Robinson* court held that when there is a reasonable basis for believing that bias exists:

and there is consequent need for a searching voir dire examination, in situations where, for example, the case carries racial overtones, or involves other matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.<sup>[145]</sup> . . . [T]he trial court must take it into account and govern the *voir dire* accordingly. Still other forms of bias and distorting influence have become evident, through experience with juries, and have come to be recognized as a proper subject for the *voir dire*.<sup>146</sup>

This was the formulation of the test as adopted by the *Williams* court. This was not, however, the complete statement of the rule as articulated in *Robinson*. In addition to the language quoted above, the *Robinson* court went on to hold:

When the matter sought to be explored on *voir dire* does not relate to one of those recognized classes, it is incumbent upon the proponent to lay a foundation for his question by showing that it is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp.<sup>147</sup>

*Robinson* thus required that, in the absence of a determination by the trial court that the issue sought to be explored on voir dire was one that was commonly known to arouse strong feelings in the community or in the population at large, or that because of long experience with juries

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143. 475 F.2d at 380 n.7.

144. *Id.*

145. *Id.* at 381 (footnotes omitted). The court cited the following examples as illustrative of matters so commonly known to engender prejudice as to require no special showing by counsel: wagering, the use of intoxicants, a witness who intends to testify that he lied to another, and religious minorities. *Id.* at n.9.

146. *Id.* at 381 (footnotes omitted). As an example of a distorting influence which has been recognized empirically as a proper area for voir dire examination, the court cited the disproportionate weight often assigned by jurors to the testimony of police officers. *Id.*

147. *Id.*

was empirically recognized as having the potential for exposing biases or distorting influences, counsel must lay some foundation for the proposed question to ensure that the court could reasonably conclude that an actual potential for prejudice existed.

In applying this test, the *Robinson* court found that the issue of self-defense did not fall into one of those recognized categories that are commonly known to have the potential for influencing or substantially skewing jury deliberations.<sup>148</sup> Because the defendants failed to show, either at the time the proposed questions were submitted to the trial judge or later before the appellate court, facts in support of their contention that a claim of self-defense was likely to encounter bias in the community from which the veniremen were to be drawn, the court refused to reverse their convictions. The court reasoned that, in the absence of such a showing, there had been no prejudice to the rights of the accused.<sup>149</sup>

In contrast to the *Robinson* court's requirement that counsel present some basis for believing that a proposed question had the potential to elicit an actual and likely source of bias,<sup>150</sup> the *Williams* court, in adopting *Robinson*, emphasized the trial court's discretion to determine not only whether the proposed voir dire tended to probe some area known to evoke strong sentiments within the community or the population at large, but also whether a particular prospective juror might harbor such prejudice, even though generally others would not.<sup>151</sup> The *Williams* court inexplicably excluded any requirement that counsel lay some foundation for a proposed area of questioning when the subject

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148. *Id.* at n.10.

149. *Id.* at 381. In *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir.), *cert. denied*, 414 U.S. 1007 (1973), the court of appeals, in applying the *Robinson* test, determined that the trial court had not erred when it refused to permit defense counsel to ask prospective jurors whether they:

believed that an inference of guilt should be drawn from the fact that Peterson had been indicted; whether any felt that in the instance of a fatality, "someone ha[s] to pay for" the taking of life; and whether any [of them] had an innate fear of firearms that might cause him to view with apprehension a person who possessed or used one.

*Id.* at 1226. The court held that none of the questions related to areas which were empirically known to arouse strong feelings in the community, and because the defendant had made no effort to lay a foundation for these questions by showing that they had the potential to uncover actual bias, the court perceived no prejudice to the rights of the accused. *Id.* at 1228; *see Ham v. South Carolina*, 409 U.S. 524, 533 (1973) (Marshall, J., concurring in part and dissenting in part) ("where the claimed prejudice is of a novel character, the judge might require a preliminary showing of relevance or of possible prejudice before allowing the questions.").

150. 475 F.2d at 381.

151. 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.

matter involved did not fall within a class judicially recognized as a source of potential bias.

The variance with which these guidelines can be applied is well illustrated by the divergent approaches taken by the *Williams* and *Robinson* courts in adapting this same rule to remarkably similar cases. In *Robinson*, the court held that the self-defense question<sup>152</sup> could not be explored on voir dire in the absence of some presentation by counsel that would support the inference that the proposed questions had the potential for exposing actual bias. Instead, the court went so far as to observe that "the pioneering social research into the ethos and behavior of jurors shows that, in many situations, the typical jury take [sic] a rather charitable view toward a plea of self-defense, tending to interpret the evidence adduced in a manner distinctly favorable to the accused."<sup>153</sup>

In contrast, the *Williams* court held that, while a question which generally encompasses the issue of self-defense was not likely to uncover strong sentiment,<sup>154</sup> a question relating specifically to the no-re-treat rule would present a real possibility of detecting bias because of the "controversial"<sup>155</sup> nature of the doctrine. This was *purely* an *arbitrary* judicial determination; the court imposed no burden on counsel to show that such a doctrine was likely to encounter strong resistance in the community or general population.<sup>156</sup>

While the proposed questions in *Williams* and *Robinson* were not identical, the issues involved in both cases were sufficiently analogous to illustrate the contrasting approaches which can be taken by different courts in implementing the same rule. This can only foreshadow what will occur when trial courts attempt to give content to this new standard.

Those courts that prefer to give a more restrictive reading to the latitude afforded counsel during voir dire could interpret the apparent intent of *Williams* narrowly, permitting inquiry into only those areas that the court determines are commonly known to arouse strong feel-

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152. 475 F.2d at 380 n.7. Specifically, defense counsel wished to ask whether any member of the venire felt that self-defense did not justify the taking of a human life, and whether they would be able to follow the court's instructions on self-defense despite their personal views on the subject. See *supra* notes 143-44 and accompanying text.

153. *Id.* at 381 n.10.

154. 29 Cal. 3d at 411, 628 P.2d at 879, 174 Cal. Rptr. at 327.

155. *Id.*

156. The *Robinson* court also had its own predilections about what subjects would prove so controversial as to require no independent showing of potential to arouse strong public sentiment. See *supra* notes 145-48 and accompanying text.

ings within the community or general population.<sup>157</sup> Other courts, construing *Williams* more broadly, might follow the supreme court's recommendation to seek guidance from the *Robinson* decision<sup>158</sup> and adopt that test in its entirety to implement the *Williams* rule. The emphasis in *Robinson* on reliance on such outside sources as sociological research studies,<sup>159</sup> to be used by counsel as a foundation for proposed voir dire examination, seems to invite more extensive and, perhaps, time consuming<sup>160</sup> voir dire than would be found in those courts that construe *Williams* more narrowly.

## V. CONCLUSION

The peremptory challenge plays a vital role in safeguarding a party's constitutional right to trial by a fair and impartial jury. The peremptory challenge can serve this purpose, however, only when counsel is afforded sufficient latitude during voir dire to elicit the information necessary to ensure that it will be exercised intelligently. In *People v. Williams*,<sup>161</sup> the California Supreme Court expressly recognized the essential role played by the peremptory challenge in securing a criminal defendant this constitutional right and the necessity of integrating it with a sufficiently probing voir dire of prospective jurors to assure that its potential is effectively realized.

In adopting this new rule, which permits counsel to use voir dire for the express purpose of establishing grounds for the exercise of peremptory challenges, the court has been forced to acknowledge the failure of long-standing precedent to secure a workable, pragmatic standard which trial courts could administer uniformly. *Williams*, however, will not necessarily effect a radical change in the way voir dire examination is conducted in most trial courts. The potential effect

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157. 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.

158. *Id.*

159. See *supra* note 153 and accompanying text.

160. There are inherent limitations to the scope of voir dire examination. The *Williams* court believed that the potential for abuse is slim because attorneys want to avoid offending or alienating the jury by prolonging voir dire inordinately. *Id.* at 409 n.13, 628 P.2d at 878 n.13, 174 Cal. Rptr. at 326 n.13; see *supra* note 36; Broeder, *supra* note 2, at 515. In his study, Broeder found that a "psychological time limit" existed for voir dire examination that was instinctively observed by attorneys; excess voir dire was regarded as having the potential not only to alienate the jury, but also to irritate the judge.

Voir dire is frequently ineffective simply because counsel cannot readily perceive what biases the veniremen might actually harbor which would justify further inquiry. Conversely, some prejudices may be so apparent to the attorney that a searching voir dire will not even be necessary to justify the exercise of peremptory challenge. *Minimum Standards*, *supra* note 19, at 1522 n.119.

161. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981).

of *Williams* is perhaps best summarized by Justice Richardson in his dissenting opinion, when he stated:

I have no quarrel with the efforts of my colleagues of the majority as they seek to articulate a broad rule which would permit counsel "to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges" . . . and to preserve considerable discretion of "the trial court to contain voir dire within reasonable limits." Similarly, I agree with my colleague of the concurrence who points to the lack of specificity of the proposed new standard and the broad generality of the analysis and test advanced in extended fashion by the majority. I take no issue with my colleague's efforts in this direction because it is my belief and observation that this is exactly what trial courts in the area of voir dire examination have been doing for years.<sup>162</sup>

While the standard for conducting voir dire remains that of reasonableness, it is a standard that permits a multitude of interpretations. The California courts have demonstrated that they are not averse to developing their own guidelines when the California Supreme Court's rules are found to be impracticable. The broad strokes with which the *Williams* rule was drawn will only perpetuate the divergent voir dire practices which currently exist in California courts.

*Debra K. Buteyn*

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162. 29 Cal. 3d at 414-15, 628 P.2d at 881, 174 Cal. Rptr. at 329 (Richardson, J., dissenting on other grounds) (citations omitted).