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Criminal Procedure -- People v. Wheeler: Peremptory Challenge May Not Be Used to Remove Jurors Solely for Group Association

Christopher Whitman Moore

research will increase lay awareness of informed consent problems and stimulate input into their solution, thus helping to bring scientific and legal standards together.

States considering informed consent to research legislation should have a clear idea of the goals they desire and the policies they wish to promote. Combining New York and California's statutory enforcement mechanisms would undoubtedly increase the effectiveness of informed consent legislation in preventing harm and promoting rational decisionmaking. That some subject autonomy is sacrificed to the review committee's power to veto dangerous research is a factor to be considered[85] in gauging the relative strength of society's commitment to scientific progress and to human rights. Legislators in other states are well advised to follow the example of New York and California and enact legislation similarly protective of the experimental subject's rights; finding the best form for such legislation to take, however, is indeed a challenging task.

NANCY M. P. KING

Criminal Procedure—*People v. Wheeler*: Peremptory Challenge May Not Be Used to Remove Jurors Solely for Group Association

Systematic exclusion of blacks from jury lists, grand juries, and petit jury venires has long been constitutionally prohibited.[1] Blacks have continued to be underrepresented on petit juries, however, largely because of the prosecutor's use of the peremptory challenge to remove prospective black jurors in criminal cases in which the defendant is black.[2] Fourteen years ago, addressing itself to a charge of prosecutorial use of the peremptory to exclude blacks, the United

85. The only diminution of autonomy here would of course lie in the loss of the freedom to decide to volunteer for dangerous research, not the freedom to refuse research participation. Although in principle such a loss may be significant, it is likely that only the most extraordinarily altruistic people would find it so.

1. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

2. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 154-56 (1977).

States Supreme Court declared in *Swain v. Alabama*[3] that the peremptory challenge by its nature precluded any judicial inquiry into its exercise in any one case.[4] Although the Supreme Court acknowledged that a prosecutor's systematic use of the peremptory challenge to exclude blacks from petit juries in case after case might constitute a violation of the equal protection clause of the fourteenth amendment,[5] no defendant has met the difficult burden imposed by *Swain* for proving such a violation.[6]

Relieving defendants of the need to demonstrate case-after-case exclusion, the California Supreme Court recently became the first court in the nation to subject the exercise of the peremptory in individual cases to judicial scrutiny. The court held in *People v. Wheeler*[7] that the use of the peremptory to remove jurors in criminal cases[8] solely because of their membership in a cognizable group[9] violates the California constitution's guarantee of a jury drawn from a representative cross-section of the community.[10] Although it significantly restricts the use of a device traditionally considered valuable to both prosecutors and defendants,[11] the decision represents a major step toward the selection of juries that truly represent a cross-section of the community.

In *Wheeler* two black defendants were convicted of the murder of a white victim.[12] Although none of the blacks in the venire was challenged for cause, the prosecutor used his peremptory challenge to strike

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3. 380 U.S. 202 (1965).

4. *Id.* at 221-22.

5. *Id.* at 223-24.

6. *See* People v. Wheeler, 22 Cal. 3d 258, 286, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909 (1978); Annot., 79 A.L.R.3d 14, 22 (1977). *See also* notes 50-66 and accompanying text *infra*.

7. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

8. The court did not decide whether its holding would apply to civil cases. *Id.* at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29.

9. Observing that blacks, the group excluded in *Wheeler*, clearly constitute a cognizable group, the court found it unnecessary to discuss what other groups might also be cognizable for purposes of the representative cross-section rule. *Id.* at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26. The United States Supreme Court has held the following to be cognizable groups that may not systematically be excluded from jury lists, grand juries, or petit jury venires: racial groups, Hernandez v. Texas, 347 U.S. 475, 478 (1954); groups defined by ancestry or national origin, *id.* at 479; women, Taylor v. Louisiana, 419 U.S. 522, 531 (1975); daily wage earners, Thiel v. Southern Pacific Co., 328 U.S. 217, 225 (1946). For thorough discussions of the issue of what constitutes a cognizable group, see J. VAN DYKE, *supra* note 2, at 47-49; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1735-38 (1977).

10. 22 Cal. 3d at 276-77, 538 P.2d at 761-62, 148 Cal. Rptr. at 903.

11. *See* Swain v. Alabama, 380 U.S. at 211-21; Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* STAN. L. REV. 545, 546, 552-55 (1975).

12. 22 Cal. 3d at 262, 583 P.2d at 752, 148 Cal. Rptr. at 893.

each of the seven black veniremen called to the jury box.[13] Defense counsel made two unsuccessful motions for mistrial on the ground that the prosecutor was using his peremptory challenges to prevent the jury from being composed of a fair cross-section of the community.[14] The trial judge offered the prosecutor an opportunity to respond to defense counsel's charge, but did not require him to do so.[15] Following each motion, the prosecutor declined to respond, the trial judge denied the motion for mistrial, and voir dire continued.[16] Since no more blacks were called to the box, the jury that ultimately convicted the defendants was composed solely of whites.[17]

On appeal the California Supreme Court reversed the convictions.[18] Use of the peremptory challenge to remove jurors solely because of their membership in "an identifiable group distinguished on racial, religious, ethnic or similar grounds"[19] is constitutionally impermissible, the court reasoned, because it "frustrates the primary purpose of the representative cross-section requirement."[20] As the court observed, however, a representative jury may nevertheless include jurors who hold a bias "concerning the particular case on trial or the parties or witnesses thereto"—what the court called "specific bias."[21] Because specific biases are as likely to be held by members of one cognizable group as by those of another, the removal of specifically biased jurors via the peremptory challenge will not significantly reduce the representative character of the jury, and is therefore permissible.[22]

13. *Id.* at 263, 583 P.2d at 752, 148 Cal. Rptr. at 893. The record showed that five black veniremen were peremptorily challenged by the prosecutor. Defense counsel filed a declaration with the California Supreme Court, however, indicating that before defense counsel began asking veniremen to state their race for the record, two other blacks were peremptorily challenged by the prosecution. *Id.* at 263, 583 P.2d at 752-54, 148 Cal. Rptr. at 894.

14. *Id.* at 263-65, 583 P.2d at 753-54, 148 Cal. Rptr. at 894-95.

15. *Id.*

16. *Id.*

17. *Id.* at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895.

18. *Id.* at 280, 583 P.2d at 766, 148 Cal. Rptr. at 905.

19. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. When bias is presumed because of the juror's membership in such a group it is defined as "group bias." *Id.*

20. *Id.* The court stated that the peremptory challenging of *all* members of the group frustrates the cross-section requirement. *Id.* Nevertheless, use of the peremptory to remove less than all of the members of the group from the venire solely because of their group membership is also unconstitutional. A party can establish a prima facie case of illegal use of the peremptory by showing, *inter alia*, "that his opponent has struck *most* or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905 (emphasis added).

21. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

22. *Id.*

In order to protect the representative character of juries, while respecting the legitimate purposes of the peremptory challenge and the integrity of the attorneys who exercise it, the *Wheeler* court adopted a procedure under which a party is required to justify his challenges only if his opponent can make out a prima facie case of impermissible use of the peremptory.[23] A prima facie case is established by showing a "strong likelihood" that the allegedly offending party is using his peremptory challenges to remove members of a cognizable group solely because of their association with the group.[24] Once a party has made a prima facie case, the allegedly offending party has the burden of showing that his peremptory challenges were used only to remove jurors with specific biases.[25] Finding that defendants had made a prima facie case of the prosecutor's impermissible use of the peremptory, and that the prosecutor had failed to rebut that showing, the court granted defendants a new trial.[26]

The notion that juries should be drawn from a representative cross-section of the community first received the endorsement of the United States Supreme Court in *Smith v. Texas*.[27] Justice Black's opinion for the Court declared: "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."[28] He did not, however, link the idea of representativeness to the sixth amendment right to jury trial. Justice Black instead based the reversal of defendant's conviction on the more traditional theory that systematic exclusion of blacks from grand juries and petit jury venires denied black defendants their four-

23. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. Until such a prima facie case is established, the party is presumed to be exercising his peremptory challenges in a constitutionally permissible manner. *Id.*

24. *Id.*

25. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 907.

26. *Id.* at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907. Chief Justice Bird filed a concurring opinion in which she agreed that "the state's use of peremptory challenges to remove jurors on the sole ground of race violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." *Id.* at 287, 583 P.2d at 769, 148 Cal. Rptr. at 910. Apparently referring to the procedure set forth by the majority for implementing the cross-section requirement, Chief Justice Bird said that she did not concur "in the dicta in the majority opinion which suggest other restrictions on the use of peremptory challenges." *Id.*

In a dissenting opinion in which Justice Clark joined, Justice Richardson attacked the majority's limitation on the exercise of the peremptory challenge as unsupported in theory and unworkable in practice. *Id.* at 288, 583 P.2d at 769, 148 Cal. Rptr. at 910 (dissenting opinion).

27. 311 U.S. 128 (1940); *see* People v. Wheeler, 22 Cal. 3d at 267, 583 P.2d at 755, 148 Cal. Rptr. at 896.

28. 311 U.S. at 130.

teenth amendment right of equal protection of the laws.[29] In three cases following *Smith v. Texas*, the Supreme Court continued to assert the importance of jury representativeness.[30] These cases, however, were not decided on *any* constitutional basis, but rather on the Court's supervisory power over the administration of justice in the federal courts.[31]

The representative cross-section requirement moved slightly closer to constitutional status in *Peters v. Kiff*.[32] Justice Marshall's plurality opinion, in which two other justices joined, claimed that the Court had already recognized the representative cross-section requirement as an element of the sixth amendment right to jury trial.[33] Indeed, the Court

29. *Id.* at 130-32; *see* Daughtrey, *Cross Sectionalism in Jury Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 19 (1975).

The United States Supreme Court first invoked the equal protection clause to prohibit a state's intentional exclusion of blacks from jury service in Strauder v. West Virginia, 100 U.S. 303 (1880). Recognizing the difficulty of proving intentional discrimination, the Court in *Norris v. Alabama*, 294 U.S. 587, 598 (1935), developed a rule under which black defendants could make out a prima facie case of illegal exclusion by showing that, despite the presence of qualified blacks in the community, no blacks had been called for jury service for a considerable length of time. Once the defendant had established a prima facie case, the burden shifted to the state to make a sufficient showing that it had employed nondiscriminatory selection practices—a burden that, the Court declared, could not be met merely by a jury official's testimony that he had not considered race in choosing names for the jury roll. *Id.* In subsequent cases, *e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967), the Court modified the "prima facie rule" or "rule of exclusion" by eliminating the requirement of total exclusion. Instead, the Court allowed defendants to make out a prima facie case of illegal discrimination by showing that members of a cognizable group had been substantially excluded from jury lists and venires, and that the state's jury selection system provided an opportunity for officials to discriminate against the group. *See* J. VAN DYKE, *supra* note 2, at 53-62.

30. Ballard v. United States, 329 U.S. 187, 193-95 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Glasser v. United States, 315 U.S. 60, 86 (1942).

31. In *Thiel*, 328 U.S. 217, 225 (1946), and *Ballard*, 329 U.S. 187, 193 (1946), the Court expressly invoked its supervisory powers to reverse the judgment below. In *Glasser*, 315 U.S. 60, 87 (1942), the Court rejected defendants' attack on the jury selection system because defendants failed to make a sufficient showing that, as they alleged, the only women allowed to sit on juries in the district were members of the League of Women Voters. Nevertheless, the Court implied that had the allegations been more strongly supported, it would have reversed the convictions for failure to comport with the representative cross-section requirement. *Id.* at 86. Although the opinion did not identify the source (the Constitution or supervisory powers) on which it would have relied had it reversed the convictions, presumably it would have relied on its supervisory powers since the case was a federal prosecution. *See* Daughtrey, *supra* note 29, at 20-23.

In Fay v. New York, 332 U.S. 261 (1947) the Court made it clear that a jury drawn from a representative cross-section of the community was not at that time guaranteed by the Constitution. The Court upheld New York's "special jury" system, under which some cases were tried by jurors drawn from a special panel on which women, laborers, craftsmen and service employees were grossly underrepresented. *Id.* at 276-79, 290. The cases requiring representative panels on venires, the Court said, were distinguishable because they relied on the Court's supervisory powers over the federal courts. *Id.* at 287.

32. 407 U.S. 493 (1972).

33. *Id.* at 500.

had observed two years earlier in *Williams v. Florida*[34] that the size of a jury should be large enough "to provide a fair possibility for obtaining a representative cross-section of the community."[35] Since the issue in *Williams* was not the constitutional basis for the representative cross-section rule, however, but whether the sixth amendment right to trial by jury required a jury of twelve, the quoted statement is arguably dictum. Thus, Justice Marshall's statement in *Peters* that *Williams* had already incorporated the cross-section requirement into the sixth amendment is questionable. Furthermore, *Peters* itself did not require consideration of the cross-section rule's relationship to the sixth amendment because the defendant in *Peters* was tried prior to the Court's holding in *Duncan v. Louisiana*[36] that the sixth amendment right to jury trial was applicable to the states.[37]

In *Taylor v. Louisiana*,[38] the Supreme Court finally held that the fair cross-section requirement is a fundamental element of the sixth amendment right to jury trial.[39] Because the right to jury trial had previously been held to be incorporated by the fourteenth amendment,[40] the Court in *Taylor* held that the cross-section requirement, too, was applicable to the states.[41] The *Taylor* Court was careful to note, however, that it was not requiring that the petit jury itself be a fair cross-section of the community, but that the "wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude

34. 399 U.S. 78 (1970).

35. *Id.* at 100.

36. 391 U.S. 145, 147-49 (1968).

37. 407 U.S. at 496.

38. 419 U.S. 522 (1975).

39. *Id.* at 530. Although defendant in *Taylor* was male, the Court held that he could challenge the substantial exclusion of women from jury panels in Louisiana. *Id.* at 526. In so holding, the *Taylor* Court followed the reasoning of Justice Marshall's plurality opinion in Peters v. Kiff, 407 U.S. 493 (1972). Prior to *Peters*, some state courts had held that only those defendants who were members of the excluded group or class could raise the claim that systematic exclusion of the group violated the defendant's right to equal protection or due process. *E.g*, State v. Lea, 228 La. 724, 84 So. 2d 169 (1955); Alexander v. State, 160 Tex. Crim. 460, 274 S.W.2d 81, *cert. denied*, 348 U.S. 872 (1954); *see also* Daughtrey, *supra* note 29 at 14-15, 27 n.107; Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 920 n.12 (1965). Nevertheless, Justice Marshall's plurality opinion in *Peters* declared that defendant, who was white, could challenge a jury selection system that excluded blacks, without having to show actual prejudice. 407 U.S. at 504. The arbitrary exclusion of any race from jury service denies any defendant due process, Justice Marshall said, because a jury from which any discernible class has been excluded both gives the appearance of bias and increases the likelihood of actual bias. *Id.* at 503-04.

40. Duncan v. Louisiana, 391 U.S. 145 (1968).

41. 419 U.S. at 537-38.

distinctive groups in the community and thereby fail to be reasonably representative thereof."[42] This carefully limited holding implied that the Court did not intend the cross-section requirement to be extended to require judicial supervision of the peremptory challenge.[43]

The right of each litigant, in both civil and criminal cases, to "challenge" prospective jurors who the litigant thinks are biased against him is a well-established element of the jury system.[44] Challenges "for cause" may be exercised in unlimited numbers, but to be successful in removing a juror the challenging party must satisfy the trial judge that the challenged juror has a bias that falls within one of several statutorily defined categories.[45] Generally, the ground for a challenge for cause is either an "implied" or an "actual" bias.[46] The former is a bias that is implied by the existence of a relationship—such as kinship, trust, employment, or participation in prior judicial proceedings involving a party to the present case—between the prospective juror and a party. Actual bias, a much broader category, is a state of mind that would prevent a juror from making an impartial decision.[47] The peremptory challenges, unlike challenges for cause, have historically been exercised without any explanation or justification[48] and are limited in number by statute.[49]

In *Swain v. Alabama*[50] the Supreme Court considered the conflict between the peremptory challenge and the cases prohibiting systematic exclusion of blacks from jury service. Defendant Swain, a black man, alleged that the prosecution had denied him equal protection of the law[51] by peremptorily striking all six blacks in the venire from which

42. *Id.* at 538.

43. *See* People v. Wheeler, 22 Cal. 3d at 291, 583 P.2d at 771, 148 Cal. Rptr. at 912 (1978) (dissenting opinion).

44. Swain v. Alabama, 380 U.S. 202, 212-17 (1965); *see* Babcock, *supra* note 11, at 549-58.

45. J. VAN DYKE, *supra* note 2, at 139-140.

46. People v. Wheeler, 22 Cal. 3d at 273-74, 583 P.2d at 759, 148 Cal. Rptr. at 901 (1978); J. VAN DYKE, *supra* note 2, at 141-43.

47. CAL. PENAL CODE § 1073 (West 1970) defines actual bias as "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."

48. *See* Swain v. Alabama, 380 U.S. at 220.

49. Statutes generally authorize different numbers of peremptories for civil and criminal cases, and for different types of criminal offenses. *See, e.g.*, 28 U.S.C. § 1870 (1976); FED. R. CRIM. P. 24(b); CAL. CIV. PROC. CODE § 601 (West Supp. 1979); CAL. PENAL CODE §§ 1070, 1070.5 (West Supp. 1979).

50. 380 U.S. 202 (1965).

51. At the time *Swain* was decided the sixth amendment right to jury trial had not yet been held applicable to the states, as it later was in Duncan v. Louisiana, 391 U.S. 145 (1968). Nor had the Court held, as it later did in Taylor v. Louisiana, 419 U.S. 522 (1975), that the representative

his jury was drawn.[52] The Court reaffirmed the value of the unrestricted exercise of the peremptory challenge and observed that "race, religion, nationality, [and] occupation" were all reasons for which the peremptory has traditionally and properly been exercised.[53] In holding that a prosecutor's use of the peremptory in a particular case to strike jurors for racial reasons is not a violation of the equal protection clause, the Court reasoned that

> [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. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.[54]

While he refused to subject individual peremptory challenges to constitutional evaluation, Justice White implied in his majority opinion[55] that a prosecutor's long-continued, systematic use of the peremptory to exclude blacks from petit juries would constitute a violation of the fourteenth amendment.[56] The opinion imposed a heavy burden of proof, however, on the defendant who would seek to demonstrate such discriminatory use of the peremptory. The Court indicated that it would require a showing of total exclusion,[57] "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," in order to establish a fourteenth amendment violation.[58] Furthermore, the Court stated that merely

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cross-section requirement was an essential element of the sixth amendment. Defendant in *Swain*, therefore, sought to analogize the prosecutor's discriminatory use of the peremptory to the established principle that systematic exclusion of blacks from jury lists, grand juries, and petit jury venires is a violation of the equal protection clause.

52. 380 U.S. at 209-10. Defendant also unsuccessfully attacked the selection of the grand jury that indicted him and the petit jury venire from which his jury was drawn as purposefully racially discriminatory. *Id.* at 205-09.

53. *Id.* at 220-22.

54. *Id.* at 221-22.

55. A majority of the Court joined in all of Justice White's opinion except that part in which he implied that the prosecutor's long-continued systematic use of the peremptory to exclude blacks from the petit jury, if proven, would violate the equal protection clause. Justice Harlan, while concurring in the rest of the Court's opinion, "emphasized [his] understanding" that the Court did not decide whether such conduct on the part of a prosecutor would be unconstitutional. *Id.* at 228 (concurring opinion). Because the three dissenting justices believed that defendant in *Swain* had established a prima facie case of denial of equal protection, *id.* at 231-32 (dissenting opinion), however, it is clear that a majority of the Court believed, at least in theory, that systematic discriminatory use of the peremptory would violate the equal protection clause.

56. *See id.* at 221-22.

57. *But see* United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971) (interpreting *Swain not* to mean "that the attack on the Government's use of its challenges must fail if the impermissible use is not exercised one hundred percent of the time").

58. 380 U.S. at 223.

showing that blacks were on venires but not seated on juries would not be sufficient; the defendant must also prove that the prosecutor alone was responsible for the exclusion of blacks.[59] Indeed, although at the time of the case in 1965 not a single black had served on a jury in Talladega County since 1950,[60] the Court rejected defendant Swain's claim of systematic prosecutorial exclusion of blacks. There were other potential causes, the Court said, for the absence of blacks on juries, such as the desires of some defense attorneys to keep blacks off juries.[61] In addition, there was "no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances in cases previous to this one the prosecutor used his strikes to remove Negroes."[62] Accordingly, the majority held that defendant Swain had failed to meet his burden of proof.[63]

The *Swain* burden of proving systematic, exclusionary use of the peremptory by the prosecution is clearly a heavy one. The individual defendant is not likely to have in his possession information concerning the prosecutor's peremptory challenges in past cases.[64] Furthermore, court officials do not commonly keep records of the racial identity of jurors, or of prospective jurors peremptorily challenged by the prosecution.[65] Not surprisingly, therefore, every defendant who has raised a claim of the prosecutor's systematic, exclusionary use of the peremptory has ultimately been unable to meet the burden of proof imposed by *Swain*.[66]

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59. *Id.* at 224-27.

60. *Id.* at 205.

61. *Id.* at 224-27.

62. *Id.* at 226.

63. *Id.* In a dissenting opinion in which Chief Justice Warren and Justice Douglas joined, Justice Goldberg argued that by showing that no black had served on a jury for many years in a county with a 26% black population, defendant Swain had made out a prima facie case of violation of the equal protection clause. *Id.* at 232 (dissenting opinion). Justice Goldberg saw no reason for concluding, as the majority did, that the prima facie rule developed in cases involving exclusions from jury lists and venires, *see* note 29 *supra*, should not be applied to cases of exclusion from actual jury service. 380 U.S. at 239 (dissenting opinion). The dissenters, in other words, objected to the extraordinarily heavy burden of proof imposed by the majority on defendants who would seek to make out a case of systematic unconstitutional use of the peremptory. Not even the dissenters, however, believed that the exercise of the peremptory in individual cases should be subject to constitutional standards. *Id.* at 245; *see* Note, *Fair Jury Selection Procedures*, 75 YALE L.J., 322, 325 (1965).

64. *See* People v. Wheeler, 22 Cal. 3d at 285-86, 583 P.2d at 767, 148 Cal. Rptr. at 909 (1978).

65. *Id.* at 286 & n.34, 583 P.2d at 768 & n.34, 148 Cal. Rptr. at 909 & n.34.

66. *See* J. VAN DYKE, *supra* note 2, at 151; Annot., 79 A.L.R.3d 14, 22 (1977). The district court in United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976), held that defendant therein had established a prima facie case of systematic, impermissible use of the peremptory challenge by the U.S. Attorney's Office for the District of Connecticut. The United States Court of Appeals for the Second Circuit, however, vacated the district court's order. United States v. Newman, 549

The California Supreme Court's decision in *People v. Wheeler* is a reaction to prosecutorial abuse of the peremptory challenge. The ultimate objective of the peremptory challenge system, of course, is the selection of an impartial jury.[67] Each party peremptorily challenges those jurors whom he perceives as most strongly biased against him, in the hope that the challenged juror will be replaced by another juror who is either favorably disposed or neutral towards him.[68] The theory behind the system is that the parties will remove the "extremes" of partiality on either side, leaving behind a jury that is more or less neutral or impartial.[69] The theory breaks down, however, where the group composition of the community makes it impossible for one party to "cancel out" the effect of the other party's peremptory challenges. If, for example, the community is divided into a white majority and a black minority, the party who regards whites as sympathetic to his side may have enough peremptory challenges to exclude all blacks from the jury.[70] The party who would prefer a jury that includes blacks, however, may be unable to secure a single black juror because the number of whites in the venire is greater than the number of available peremptory challenges.[71] It was just this situation that allowed the prosecutors in *Swain* and *Wheeler* to ensure that the black defendant in each case would be tried by an all-white jury and thus render the cross-section requirement meaningless.

Responding to the reality of exclusionary use of the peremptory, the court in *Wheeler* sought to give substance to the representative cross-section requirement. Accomplishment of that goal, however, required the court to redefine the peremptory challenge. Indeed, the court's definition of the peremptory's purpose and scope predetermined the holding in *Wheeler*. Precisely because of the properly representative nature of the master list and the random method by which a venire is drawn from that list, the venire may include "jurors who bring to the courtroom a bias concerning the particular case on trial or the parties or witnesses thereto—we may call this 'specific bias'—derived, for example, from personal experience or from general exposure to pretrial

F.2d 240 (2d Cir. 1977). For discussions of *Robinson* and *Newman*, see Note, 8 CUM. L. REV. 307 (1977); Recent Development, 41 ALB. L. REV. 623 (1977).

67. *See* notes 92-96 and accompanying text *infra*.

68. *See* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CALIF. L. REV. 235, 287 (1968).

69. *Id.*

70. *Id.*

71. *See id.*

publicity."[72] It is these jurors, *and these jurors alone*, the court said, whom challenges, *both peremptory and for cause*, are designed to remove.[73] The court acknowledged that the peremptory challenge serves the additional functions traditionally ascribed to it—removal of a juror whose bias cannot be sufficiently proved to form the basis of a challenge for cause, protection of the challenge for cause and the questioning that precedes it, and promotion of the appearance of impartiality.[74] Nevertheless, explained the court, the scope of the peremptory, like that of the challenge for cause, must be limited to the removal of jurors who have a specific bias.[75] To permit the removal of a juror solely because of his presumed "group bias," the court reasoned, is to reduce unnecessarily the representative nature of the jury.[76] With one or more of the community's groups thus underrepresented, the jury becomes "dominated by the conscious or unconscious prejudices of the majority,"[77] and falls far short of achieving the overall impartiality that the representative cross-section rule is designed to produce.

According to the *Wheeler* court, the peremptory challenge can and must be required to conform to the representative cross-section rule because the latter is a constitutional right, and the former merely a statutory privilege guaranteed by neither the federal nor the California constitution.[78] In so concluding, the court echoed the many critics of *Swain v. Alabama* who have pointed out that, in refusing to subject the exercise of the peremptory in individual cases to the standards of the equal protection clause, the Supreme Court mistakenly elevated a statutory privilege above a constitutional right.[79]

Some authority exists, however, for the proposition that the peremptory challenge should be regarded as an element of the sixth

72. 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

73. *Id.*

74. *Id.* at 275 n.16, 583 P.2d at 761 n.16, 148 Cal. Rptr. at 902 n.16; *see* notes 93-97 and accompanying text *infra*.

75. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

76. *Id.*

77. *Id.*

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

79. *See, e.g.*, Kuhn, *supra* note 68, at 287-88; Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1431 (1969). Justice Goldberg, dissenting in *Swain*, pointed out that if the Court were forced to choose between the defendant's rights under the equal protection clause and the exercise of the peremptory challenge, "the Constitution compels a choice of the former." 380 U.S. at 244 (dissenting opinion). It was not necessary to make such a choice in *Swain*, Justice Goldberg said, because defendant had made out a prima facie case of the prosecutor's *long-continued, systematic* use of the peremptory to exclude blacks from petit juries. Accordingly there was no need to consider his claim of unconstitutional use of the peremptory in his own individual case. *Id.* at 232, 244-45 (dissenting opinion); *see* note 63 *supra*.

amendment right to jury trial. The Supreme Court in *Pointer v. United States*[80] recognized the peremptory as "one of the most important rights secured to the accused."[81] Also, the respect with which the *Swain* majority treated the peremptory challenge in the face of constitutional attack can be regarded as an implicit recognition of the peremptory's constitutional status.[82] Nevertheless, the Supreme Court has not overruled its declaration in *Stilson v. United States*[83] that the Constitution does not guarantee the right to exercise peremptory challenges,[84] and even the majority in *Swain* acknowledged that the peremptory, while important and well established, is not guaranteed by the Constitution.[85] Thus, the California Supreme Court was well within established precedent when it declared that in a conflict between the peremptory challenge and the constitutional right to a jury drawn from a representative cross-section of the community, the latter must prevail. On the other hand, while the Court in *Swain* recognized that a prosecutor's long-continued, systematic use of the peremptory would be a violation of the equal protection clause, it imposed on defendants "an effectively insurmountable burden of proving such a violation."[86] Similarly, the *Taylor* decision recognized the constitutional basis of the representative cross-section rule, but limited its application to jury lists and venires, thereby permitting parties to destroy the representative character of the jury via the peremptory challenge.[87] The novelty of the *Wheeler* decision, therefore, lies in its providing the defendant with a meaningful opportunity to prevent his opponent from exercising the peremptory unconstitutionally, regardless of the prosecutor's practice in prior trials.

Because it subjects peremptory challenges in individual cases to judicial scrutiny, the *Wheeler* decision is clearly in conflict with *Swain v. Alabama*. Rather than distinguishing *Swain*,[88] however, the Califor-

80. 151 U.S. 396 (1894).

81. *Id.* at 408.

82. Babcock, *supra* note 11, at 556.

83. 250 U.S. 583 (1919).

84. *Id.* at 586.

85. 380 U.S. at 219. The California Constitution also has been held not to guarantee the right to challenge peremptorily. People v. King, 240 Cal. App. 2d 389, 49 Cal. Rptr. 562 (1966).

86. See text accompanying notes 57-66 *supra*.

87. *See* text accompanying notes 42 & 43 *supra*.

88. The California court could have distinguished *Swain* because that case did not address the same issue as that presented in *Wheeler*. Since the cross-section requirement had not yet been recognized as an element of the sixth amendment right to jury trial, and since the latter had not yet been held applicable to the states, Swain based his challenge on the equal protection clause. 380 U.S. at 203-04. When the Supreme Court finally declared in *Taylor v. Louisiana* that the sixth

nia Supreme Court chose to rely on its interpretation of its own state constitution. Accordingly, the court declared that the California Constitution's guarantee of jury trial[89] incorporates the right to a jury drawn from a representative cross-section of the community.[90] Because the decision in *Wheeler* rested on the California Constitution and provided a greater degree of constitutional protection than the Supreme Court's holding in *Swain*, the latter decision was not binding on the California court.[91]

Although the decision in *Wheeler* will undoubtedly curb some of the existing abuse of the peremptory challenge by prosecutors, it may inhibit some of the peremptory's useful functions as well. It should be noted that under the procedure adopted in *Wheeler* not only prosecutors, but also defendants, are prohibited from peremptorily challenging jurors solely on the basis of group association.[92] Thus, what in some cases has been a useful tool for the defendant may no longer be available to him.

The potential effect of the *Wheeler* decision on defendants' exercise of the peremptory can best be analyzed by considering the ability of the peremptory challenge to serve its historical purposes in accordance with the new procedure. Theoretically, the peremptory challenge promotes its ultimate objective of jury impartiality in several ways. First, it protects the strength of the challenge for cause by allowing the removal of a juror who has been offended by the questions asked by an attorney in an unsuccessful challenge for cause.[93] Presumably the

amendment included the cross-section requirement, it carefully limited the latter's application to jury pools or lists and venires. 419 U.S. at 538. Recognizing *Taylor*'s implied approval of *Swain*, and recalling *Swain*'s strong commitment to the unrestricted exercise of the peremptory, the California Supreme Court assumed that were the United States Supreme Court presented with the facts of *Wheeler*, it would not find that the sixth amendment had been violated. 22 Cal. 3d at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908.

89. "Trial by jury is an inviolate right and shall be secured to all . . . ." CAL. CONST. art. I, § 16.

90. In finding the cross-section requirement to be an element of the California Constitution's provision for jury trial, the court relied on People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954). In *White* the California Supreme Court declared that "[t]he American system requires an impartial jury drawn from a cross section of the entire community," *id.* at 754, 278 P.2d at 18, but did not cite any particular provision of either the federal or the California Constitution as the source of the requirement. The *Wheeler* court, therefore, made "explicit what was implicit in *White*," by holding that the California Constitution guarantees the right to a jury drawn from a representative cross-section of the community. 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900.

91. 22 Cal. 3d at 785-87, 583 P.2d at 767-68, 148 Cal. Rptr. at 909-10.

92. *Id.* at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29. "[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." *Id.*

93. *Id.* at 275 n.16, 583 P.2d at 761 n.16, 148 Cal. Rptr. at 902 n.16; Babcock, *supra* note 11, at 554-55.

Wheeler court would consider any hostility produced in a juror by a party's vigorous voir dire examination to be a "specific bias" for which the peremptory challenge could be legitimately exercised because such hostility would certainly be "a bias concerning the particular case on trial or the parties or witnesses thereto."[94]

Second, the peremptory has traditionally allowed a party to remove a juror whom he suspects of having a bias against him, but whose bias cannot be sufficiently well established to form the basis of a challenge for cause.[95] The defendant accused of rape, for example, might wish to challenge some or all of the women called to the box. If these women have said on voir dire that they would be impartial the judge would almost certainly refuse to grant a challenge for cause.[96] Yet, some of these jurors may in fact be strongly biased against the defendant. The *Wheeler* decision, contrary to conventional practice, would clearly prohibit the defendant from peremptorily challenging these female jurors solely on the basis of their sex, despite the statistical likelihood that some of them are indeed biased against the defendant.

The procedure adopted by the *Wheeler* court also curtails the ability of the peremptory to perform its third function—promotion of the appearance of impartiality. It has traditionally been argued that the peremptory challenge serves this function by giving the civil litigant or the criminal defendant the unrestricted opportunity to exclude some of the prospective jurors whom he perceives as biased against him or whom he simply does not like.[97] By prohibiting him from exercising the peremptory to remove jurors because of their group associations, however, the *Wheeler* decision severely limits the defendant's primary tool for influencing the composition of the jury.

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94. 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

95. *See id.* at 275, 583 P.2d at 761, 148 Cal. Rptr. at 902; J. VAN DYKE, *supra* note 2, at 146; Babcock, *supra* note 11, at 554.

96. Judges are reluctant to grant a challenge for cause for an alleged bias on the part of a juror who declares that he or she can judge the case impartially. Babcock, *supra* note 11, at 550.

97. *See* 22 Cal. 3d at 275 n.16, 583 P.2d at 761 n.16, 148 Cal. Rptr. at 902 n.16; Babcock, *supra* note 11, at 552. Professor Babcock has observed that the peremptory also serves as a mask for what might be conceived of as insulting generalizations if the reasons for exercising peremptories were openly expressed and recognized as grounds for a challenge for cause.

> Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which people are judged as individuals and in which each is held responsible and open to compromise. . . . Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.

Id. at 553-54 (footnotes omitted).

In exchange for elimination of the unrestricted exercise of the peremptory, however, California defendants have received an assurance that most future juries will be more representative than those in the past. From the defendant's point of view, of course, the new procedure is more or less advantageous than the conventional system of peremptory challenges depending on whether the defendant is one whom the conventional system disfavored or favored. The *Wheeler* procedure is clearly an improvement over the conventional system from the perspective of the defendant who is a member of, or thinks his side of the case is favored by, a cognizable group that is sufficiently small to allow the prosecution peremptorily to challenge all or most of the veniremen who are members of that group. This situation is illustrated by the *Wheeler* case itself, in which the defendant was black, the victim white, and the number of peremptories available to the prosecution large enough to allow him to exclude all the blacks in the venire. The conventional system of peremptory challenges works to the defendant's advantage, however, when the defendant is white, the victim black and the number of blacks in the venire small enough to permit their complete or substantial exclusion by the defendant. Similarly, in communities where women are significantly underrepresented on jury venires, the male defendant accused of rape may have enough peremptory challenges to ensure that women are even more underrepresented on his jury. To these defendants, a system that grants them unrestricted exercise of the peremptory is clearly more favorable than one that offers them a greater likelihood of a representative jury. It must be remembered, however, that a defendant only has the constitutional right to have his case heard by a jury that is "fair and impartial" and not by one that is likely to be biased in his favor.

As the first case to impose constitutional requirements on the exercise of the peremptory challenge in individual cases, the *Wheeler* opinion, not surprisingly, left unresolved a number of questions concerning the implementation of its holding. A significant remaining issue is what constitutes a "cognizable group." One of the elements of a prima facie case of impermissible use of the peremptory, the court said, is a showing that the allegedly offending party has excluded members of "a cognizable group within the meaning of the representative cross-section rule."[98] Because the *Wheeler* court expressly declined to establish standards for determining what constitutes a cognizable group,[99] the ques-

98. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 705.

99. *Id.* at 250 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26.

tion is likely to be a source of confusion. Earlier cases, of course, have recognized certain groups—defined, for example, by race, sex or national origin—that cannot constitutionally be systematically excluded from jury lists, grand juries, or petit jury venires.[100] Most of these decisions, however, have been confined to the particular facts presented by each case.[101] The California court's reservation of judgment on this issue indicates that it too plans to engage in a case-by-case determination of what constitutes a cognizable group.[102]

Also left unanswered by the California court is the question whether the *Wheeler* decision prohibits a party from using the peremptory challenge for any reason related to the challenged juror's group association, or whether the peremptory might permissibly be used to remove a particular juror whose answers on voir dire, though not sufficiently indicative of bias to warrant a challenge for cause, suggest that he or she does indeed hold the bias associated with the group. Could the accused in a rape case, for instance, peremptorily challenge a female juror who, though she asserts she will be impartial, reveals on voir dire some evidence, other than simply her sex, of a bias against male rape defendants? The question is important because of the reluctance of judges to grant a challenge for cause for racial, sexual, or similar prejudice if the challenged juror denies having such a prejudice.[103] The juror, of course, may be strongly biased, but embarrassed to admit being so. Attorneys, therefore, sometimes use sophisticated questions to learn about a juror's true prejudices in order to have some basis for exercising peremptory challenges.[104] If the *Wheeler* decision allows a party to exercise the peremptory challenge against a juror who on voir dire reveals some evidence of racial, sexual, or similar bias, the decision may be less revolutionary than it otherwise appears.

The question of how severely the *Wheeler* decision limits the peremptory challenge turns on the court's definitions of "specific bias" and "group bias." A specific bias is one "concerning the particular case on trial or the parties or witnesses thereto."[105] A defendant might perceive a specific bias in a juror, the court explained, because the juror was

100. *See* note 9 *supra*.

101. Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1735 (1977).

102. For an argument that *Wheeler* expands the class of cognizable groups, see Meyer, *Discriminatory Use of Peremptory Challenges: The Wheeler Decision*, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, FORUM, March-April, 1979, at 11, 13.

103. *See* Babcock, *supra* note 11, at 550.

104. J. VAN DYKE, *supra* note 2, at 141.

105. 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

once the victim of a crime, or simply because he has glared at the defendant in the courtroom.[106] A prosecutor might suspect a specific bias because the juror has long hair or because he has a record of prior arrests.[107] As the court pointed out, these are all biases that cut across the lines of cognizable groups defined by race, sex, or similar characteristics.[108] Use of the peremptory to eliminate such biases is both permissible and necessary because it "promote[s] the impartiality of the jury without destroying its representativeness."[109] The particular female juror's bias against rape defendants, however, does not cut across group lines. Indeed, this juror has manifested on voir dire only the bias that the defense attorney might presume all women to have. Thus, one could argue that *Wheeler* and the representative cross-section rule require that this juror not be removed via the peremptory challenge.

Despite some language in the opinion suggesting that a party may not use the peremptory challenge to remove jurors who individually manifest a bias associated with their group, the more reasonable interpretation is that *Wheeler* forbids the exercise of the peremptory only when it is based on a mere *presumption* of group bias. The court defined "group bias" as a bias presumed to be held by certain jurors "merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds."[110] The sin in exercising a peremptory challenge because of group bias apparently lies in the act of *presuming* the bias to exist.[111] This interpretation is supported by some of the court's language in *People v. Johnson*,[112] a companion case to *Wheeler*. In that case the prosecutor admitted his intention to challenge peremptorily as many blacks as possible on the ground of their race because he believed they would be offended by the appearance of the word "nigger" in some of the prosecution witnesses' statements.[113] The California Supreme Court, relying on *Wheeler*, condemned the prosecutor's conduct as "decision-making by racial

106. *Id.* at 275, 583 P.2d at 760-61, 148 Cal. Rptr. at 902.

107. *Id.* at 275, 583 P.2d at 760, 148 Cal. Rptr. at 902. Persons with long hair or those with records of prior arrests also constitute groups, the representation of which the cross-section rule would seem to encourage. By suggesting that jurors with such characteristics could be peremptorily challenged for specific bias, however, the *Wheeler* court indicated that persons with long hair or records of arrest do not constitute *cognizable* groups.

108. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

109. *Id.*

110. *Id.*

111. *See* Meyer, *supra* note 102, at 11.

112. 22 Cal. 3d 296, 538 P.2d 774, 148 Cal. Rptr. 915 (1978).

113. *Id.* at 300, 583 P.2d at 776, 148 Cal. Rptr. at 917.

stereotype, a technique that should be anathema in our courts."[114] The proper procedure, the court said, would have been for the prosecutor to determine through questions on voir dire which individual black jurors would be offended by the witness's language and therefore biased against the prosecution.[115] If the evil lies in presuming bias merely from group association, it would seem that the defendant accused of rape, for example, could use the peremptory challenge to remove a female juror whose answers on voir dire somehow manifest a bias against male defendants.

Under *Wheeler* a party need not justify any of his peremptory challenges, of course, unless his opponent has rebutted the presumption that the party is exercising his peremptories in a constitutional manner.[116] Thus, in the hypothetical rape case under discussion, the defendant would be required to explain his peremptory challenges only after the prosecution had established a prima facie case of the defendant's use of the peremptory to exclude women solely because of their sex. Once a prima facie case has been established, however, the allegedly offending party must demonstrate that his peremptory challenges were not based on group association alone.[117] Only then would the allegedly offending party attempt to show that a challenged juror had revealed through his or her answers on voir dire some indication, other than the juror's group membership, of a bias associated with the group.

Once the prosecution has established a prima facie case of the rape defendant's illegal use of the peremptory, the defendant, even if he is able to elicit on voir dire some indication that a particular female juror is biased against defendants in rape cases, must still demonstrate to the judge's satisfaction that the indicia of this particular juror's bias against rape defendants are sufficiently strong to rise to the level of a specific bias, rather than a group bias presumed merely on the basis of the juror's sex. While this showing "need not rise to the level of a challenge for cause,"[118] it is in effect a second-level challenge for cause. To justify his peremptorily challenging this female juror, the defendant accused of rape need not elicit an admission of prejudice from the juror (the practical standard for a challenge for cause), but he must "prove," through the juror's answers on voir dire, that this particular juror's bias

114. *Id.* at 299, 583 P.2d at 775, 148 Cal. Rptr. at 917.
115. *Id.*
116. 22 Cal. 3d at 278-81, 583 P.2d at 762-64, 148 Cal. Rptr. at 904-06.
117. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.
118. *Id.* at 281-82, 583 P.2d at 765, 148 Cal. Rptr. at 906.

against rape defendants is indicated by something more than her membership in the class of women.

Another source of uncertainty created by *Wheeler* is the relationship between the *Wheeler* procedure and the traditionally limited scope of voir dire in the California courts. The California courts have held that questions asked on voir dire must be those that might establish one of the statutorily enumerated grounds for challenges for cause.[119] With voir dire so restricted, a party might not be able to engage in the sort of questioning necessary to establish the specific bias that a juror may have. Such a limited range of questions would certainly make it difficult for a party to elicit an indication of racial, sexual, or similar prejudice from a juror who refuses to admit having such a bias. *Wheeler* itself, however, may represent a liberalization of California's traditionally limited voir dire.[120] Although the court did not expressly reject the earlier cases restricting voir dire, the procedure established in *Wheeler* calls for questions that go beyond those that could establish statutory grounds for a challenge for cause.[121] The party seeking to rebut a prima facie case of impermissible use of the peremptory must be able to ask more than whether the juror will be able, in view of his racial, sexual, or similar background, to render an impartial verdict. In order to establish a juror's specific bias the allegedly offending party must be able to ask questions about the juror's attitudes and experiences.[122] Similar questions may also be helpful in establishing a prima facie case.[123] Because of the importance of expanded voir dire under the *Wheeler* procedure, the relationship between that procedure and the earlier cases restricting voir dire will probably be the subject of future litigation in the California courts.

Although it leaves unanswered a number of questions about the scope of the limitations it places on the peremptory challenge, the decision in *Wheeler* will undoubtedly increase the representative character of juries in most California criminal cases. Increased representative-

119. People v. Crowe, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973); People v. Soltero, 81 Cal. App. 3d 423, 146 Cal. Rptr. 457 (1978).

120. Meyer, *supra* note 102, at 22-23.

121. *See id.* at 23.

122. *Id.*

123. If, for example, the prosecutor asks a black venireman about his attitudes toward the police in hopes of establishing a specific bias on which to predicate his subsequent peremptory challenging of that juror, defense counsel may wish to put similar questions to white veniremen to determine whether any of those not challenged by the prosecutor actually have views toward the police similar to that expressed by the challenged black juror. An affirmative answer would suggest that the prosecutor was not exercising his peremptory challenges for reasons of specific bias. *Id.*