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Use of Peremptory Challenges to Excuse Prospective Jurors because of Group Bias is Violation of Right to Trial by Jury Guaranteed by California Constitution.

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CASE NOTES

CRIMINAL PROCEDURE — Juries — Use of Peremptory Challenges To Excuse Prospective Jurors Because of Group Bias Is Violation of Right to Trial by Jury Guaranteed by California Constitution

People v. Wheeler,
583 P.2d 748, 148 Cal. Rptr. 890 (1978).

During *voir dire* in a California trial in which James M. Wheeler and Robert Willis were convicted of murder, the prosecutor used his peremptory challenges to strike every black from the jury. Both defendants were black and there were several blacks in the venire. The murder victim was white, and all jurors ultimately selected were white. The defense attorney moved for a mistrial on the ground that the prosecutor was using peremptory challenges systematically to excuse all blacks from the jury with the result that the defendants were being denied a trial by a fair cross section of the community. The overruling of the motion for mistrial was based on the premise that peremptories may be used without stating any reasons for their use.[1] The defendants appealed to the California Supreme Court. Held — *Reversed.* Use of peremptory challenges to excuse prospective jurors on the basis of group bias is a violation of the right to trial by jury drawn from a representative cross section of the community as guaranteed by the California Constitution.[2]

The right to a trial by an impartial jury in all criminal prosecutions is guaranteed by the sixth amendment to the United States Constitution.[3] The concept originated at common law[4] and has been recognized by the United States Supreme Court as a fundamental right.[5] The Supreme Court, however, first dealt with jury selection as a constitutional issue in

1. A companion case to *Wheeler* is People v. Johnson, 583 P.2d 774, 148 Cal. Rptr. 915 (1978). The facts are similar to those in *Wheeler;* the prosecutor in *Johnson,* however, admitted that he was using his peremptory challenges to exclude blacks from the jury because of the probability that some of the state's witnesses would show a prejudice against black people. Defendant's motion for mistrial was overruled. *Id.* at 775, 148 Cal. Rptr. at 915.

2. People v. Wheeler, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978).

3. The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. The California Constitution has a similar provision. *See* CAL. CONST. art. I, § 16.

4. *See* Swain v. Alabama, 380 U.S. 202, 214 (1965).

5. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1967)(sixth amendment right to jury trial is fundamental to American scheme of justice).

terms of the fourteenth amendment rather than the sixth.[6] In 1879 the Court held a statute that excluded blacks from jury panels was a violation of the defendant's right to equal protection.[7]

Much later, the Supreme Court began to develop the concept of a right to trial by a jury drawn from a representative cross section of the community.[8] Several cases followed in which the Court reaffirmed the proposition that a representative jury panel was a right guaranteed by the fourteenth amendment and held that it was necessary to the democratic ideals of trial by jury.[9] The sixth amendment had never qualified in state courts as a basis for the rule requiring a jury drawn from a cross section of the community until 1968 when the Supreme Court first extended the sixth amendment jury trial provision to the states.[10] This enabled the Supreme Court in the recent case of *Taylor v. Louisiana*[11] to hold that the right to trial by jury selected from a representative cross section of the community is a sixth amendment right.[12] The Court applied both the sixth and fourteenth amendments in *Taylor*.[13]

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6. *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1897)(systematic exclusion of blacks from jury panel held unconstitutional); Daughtrey, *Cross-Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 2 (1975); 3 FORDHAM URB. L.J. 733, 736 (1975). The fourteenth amendment of the United States Constitution provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

7. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

8. *See* Smith v. Texas, 311 U.S. 128, 130 (1940); Daughtrey, *Cross-Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 3 (1975).

9. *See* Peters v. Kiff, 407 U.S. 493, 499 (1972)(blacks excluded from jury service); Ballard v. United States, 329 U.S. 187, 193 (1946)(women excluded from jury service); Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946)(daily wage earners excluded from jury service); Glasser v. United States, 315 U.S. 60, 85-86 (1942)(female non-members of League of Women Voters excluded from jury service).

10. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

11. 419 U.S. 522 (1975).

12. *See id.* at 525; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1725 (1977); 7 CONN. L. REV. 508, 508 (1975); 3 FORDHAM URB. L.J. 733, 744 (1975). The Supreme Court has held that the jury venire must be representative; no right exists, however, that requires the petit jury to be representative of a cross section of the community. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975); Apodaca v. Oregon, 406 U.S. 404, 412-13 (1971).

13. *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975). Under the fourteenth amendment application, intentional exclusion was shown by proving that blacks never served on juries and that opportunity for discrimination existed. *See* Avery v. Georgia, 345 U.S. 559, 562 (1953); Norris v. Alabama, 294 U.S. 587, 591-93 (1935). These showings could be rebutted, however, by attributing the underrepresentation to non-discriminatory factors such as the use of tax lists to obtain names of potential jurors. *See* Brown v. Allen, 344 U.S. 443, 474 (1952); 7 CONN. L. REV. 508, 511-12 (1975). The sixth amendment test set forth by *Taylor* imposes an easier burden. That the jury was not selected from a representative cross section of the community is sufficiently proven by showing systematic exclusion of a group. *See* Taylor v. Louisiana, 419 U.S. 522, 533-34 (1975); 7 CONN. L. REV. 508, 508 (1975).

A valuable privilege relating to jury selection that has been a source of conflict with the exclusion of blacks from juries is the peremptory challenge.[14] The peremptory challenge originated at common law as a right available only to defendants.[15] This right was recognized by the first Congress of the United States[16] and was later made available to the prosecution.[17] Although the right to use a peremptory is not guaranteed by the Constitution,[18] it has been recognized by the United States Supreme Court as essential to the American judicial system.[19]

A peremptory challenge traditionally has been defined as one that may be exercised for any reason.[20] It allows the attorney to use his judgment to excuse jurors who cannot be challenged for cause[21] but who may nevertheless be biased.[22] The availability of peremptory challenges to both parties

14. *See* Swain v. Alabama, 380 U.S. 202, 209-10 (1965); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L.J. 1715, 1715 (1977); 39 MISS. L.J. 157, 158 (1967). A peremptory challenge is a challenge to a prospective juror that may be exercised by an attorney without stating a reason. *See* Pointer v. United States, 151 U.S. 396, 403 (1894); Ross v. State, 157 Tex. Crim. 371, 373-74, 246 S.W.2d 884, 885 (1952); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process,* 18 ST. LOUIS U. L.J. 662, 664 (1974); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L.J. 1715, 1715 (1977).

15. *See* Swain v. Alabama, 380 U.S. 202, 212-13 (1965); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict With the Equal Protection Clause,* 46 U. CIN. L. REV. 554, 558 (1977).

16. *See* Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119 (1861)(current version at 28 U.S.C. § 1870 (1970)); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict With the Equal Protection Clause,* 46 U. CIN. L. REV. 554, 558 (1977); Comment, *Swain v. Alabama, A Constitutional Blueprint for the Perpetuation of the All-White Jury,* 52 VA. L. REV. 1157, 1171 (1966).

17. *See* Act of Mar. 3, 1865, ch. 86, § 2, 13 Stat. 500 (1866)(current version at 28 U.S.C. § 1870 (1970)); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict With the Equal Protection Clause,* 46 U. CIN. L. REV. 554, 558 (1977); Comment, *Swain v. Alabama, A Constitutional Blueprint for the Perpetuation of the All-White Jury,* 52 VA. L. REV. 1157, 1172 (1966).

18. *See* Stilson v. United States, 250 U.S. 583, 586 (1919); 39 MISS. L.J. 157, 158 (1967).

19. *See* Frazier v. United States, 335 U.S. 497, 505 (1940); Pointer v. United States, 151 U.S. 396, 408 (1894); Lewis v. United States, 146 U.S. 370, 376 (1892); Hayes v. Missouri, 120 U.S. 68, 72 (1887); 39 MISS. L.J. 157, 160 (1967).

20. *See, e.g.,* Davis v. United States, 374 F.2d 1, 5 (5th Cir. 1967); People v. Harris, 161 N.E.2d 809, 811-12 (Ill. 1959), *cert. denied,* 362 U.S. 928 (1960); Ross v. State, 157 Tex. Crim. 371, 373-74, 246 S.W.2d 884, 885 (1952); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process,* 18 ST. LOUIS U. L.J. 662, 664 (1974); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L.J. 1715, 1715 (1977).

21. A challenge for cause, if exercised, must be on a specific and legally recognizable basis of partiality. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965); TEX. CODE CRIM. PRO. ANN. art. 35.16 (Vernon Supp. 1978-1979); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process,* 18 ST. LOUIS U. L.J. 662, 664 (1974).

22. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965); Lewis v. United States, 146 U.S.

aids in eliminating extremes of bias against both parties and in obtaining impartial juries.[23]

The leading Supreme Court case concerning the conflict between the representative cross section rule and the use of peremptory challenges is *Swain v. Alabama.*[24] The black defendant in *Swain* was convicted of rape by an all-white jury. All blacks on the venire had been excused by the prosecutor's use of peremptory challenges. The Supreme Court recognized that there can be no purposeful racial discrimination in selection of the venire,[25] but that the fourteenth amendment equal protection clause[26] does not preclude the prosecution from excluding all blacks from the petit jury in any one case.[27] The Court in *Swain* did indicate, however, that a prosecutor who, by way of peremptory challenge, systematically excuses black jurors in many cases over a long period of time so that no blacks ever serve on juries may be violating the defendants' constitutional rights.[28] The standard set forth in *Swain* for questioning the prosecution's use of peremptory challenges has been the subject of criticism because of the great burden the standard places on the defendant.[29]

370, 376 (1892); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L.J. 1715, 1718 (1977).

23. *See* Swain v. Alabama, 380 U.S. 202, 218 (1965); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process,* 18 ST. LOUIS U. L.J. 662, 664 (1974); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L.J. 1715, 1718 (1977).

24. 380 U.S. 202 (1965).

25. *See id.* at 208-09.

26. *Swain* was decided before Taylor v. Louisiana, 419 U.S. 522 (1975); therefore, the fourteenth amendment was used as a basis for the decision, rather than the sixth amendment. See text accompanying notes 9-13 *supra.*

27. *See* Swain v. Alabama, 380 U.S. 202, 222 (1965).

28. The majority in *Swain* stated:

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

Id. at 223.

29. *See id.* at 246 (Goldberg, J., dissenting); United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971); Labat v. Bennet, 365 F.2d 698, 712 (5th Cir. 1966); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict With the Equal Protection Clause,* 46 U. CIN. L. REV. 554, 560 (1977); 8 CUM. L. REV. 307, 315 (1977); 39 MISS. L.J. 157, 164 (1967). Challenges to the use of peremptories under the *Swain* standard have not been successful. *See* United States v. Nelson, 529 F.2d 40, 42 (8th Cir.)(defendant failed to provide sufficient statistics to overcome burden of proof), *cert. denied,* 426 U.S. 922 (1976); United States v. Carter, 528 F.2d 844, 848-49 (8th Cir. 1975)(defendant failed to show government conduct established systematic exclusion), *cert. denied,* 425 U.S. 961 (1976); People v. Allums, 121 Cal. Rptr. 62, 68 (Ct. App.)(no showing of systematic exclusion over period of time), *cert. denied,* 423 U.S. 934

In *People v. Wheeler* the California Supreme Court rejected the *Swain* standard and adopted a more protective one.[30] Beginning its analysis by discussing the history of jury selection, the court cited several United States Supreme Court cases expressing the view that the selection of a jury from a representative cross section is essential.[31] In discussion of peremptory challenges, the court distinguished challenges based on "specific bias"[32] and those based on "group bias."[33] Challenges based on "group bias" were held to be in violation of the California Constitution because they frustrate the main purpose of the representative cross section rule — obtaining impartiality through interaction of the various beliefs jurors bring from their group backgrounds.[34] The California court reconciled its conclusion with the traditional definition of peremptory challenges by stating that although no reason need be given to exercise the challenge, nevertheless, a reason must exist.[35] Because the number of available peremptory challenges is limited, the court expressed confidence that peremptory challenges are never exercised without some reason.[36] If the reason for exercising the challenge is based on group bias, however, use of the challenge is not constitutionally permissible.[37] The dissenting opinion in *Wheeler* criticized the majority for its "rather startling conclusion" that a reason must

(1975); State v. Reed, 324 So. 2d 373, 376-77 (La. 1975)(defendant failed to sustain burden of proof); State v. Brookins, 468 S.W.2d 42, 46 (Mo. 1971)(defendant failed to show reason why *Swain* burden should not be followed). *See generally* Annot., 79 A.L.R.3d 53-73 (1977).

30. 583 P.2d 748, 767-68, 148 Cal. Rptr. 890, 908-10 (1978). The California Supreme Court was not bound by the *Swain* standard because a state court is required to follow United States Supreme Court cases "only when they provide no less protection than is guaranteed by California law." *See id.* at 767, 148 Cal. Rptr. at 908; *cf.* Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1975)(state may extend right to jury trial to all types of offenses although Supreme Court has not extended such right). The *Wheeler* standard is set out by the California Court as follows: The attorney challenging the use of peremptories must make a prima facie case of discrimination to the satisfaction of the court. If a prima facie showing is made, the burden shifts to the other party to show the peremptories were not founded on group bias alone. If the court is satisfied that an abuse of peremptories exists, the entire venire must be excused and a new one drawn. *See* People v. Wheeler, 538 P.2d 748, 754-55, 148 Cal. Rptr. 890, 905-06 (1978).

31. *See* People v. Wheeler, 538 P.2d 748, 754-57, 148 Cal. Rptr. 890, 895-98 (1978). Among the cases the court discussed were Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972); Ballard v. United States, 329 U.S. 187 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940).

32. "Specific bias" was defined as bias relating to the particular case, parties, or witnesses. *See* People v. Wheeler, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 902 (1978).

33. "Group bias" refers to a prejudice presumably shared by members of a particular racial, religious or ethnic group by virtue of membership in that group. *See id.* at 761, 148 Cal. Rptr. at 902.

34. *See id.* at 761-62, 148 Cal. Rptr. at 903.

35. *See id.* at 760, 148 Cal. Rptr. at 901.

36. *See id.* at 760, 148 Cal. Rptr. at 901.

37. *See id.* at 761-62, 148 Cal. Rptr. at 903.

exist before a peremptory challenge may be exercised.[38] It argued that the traditional definition of a peremptory challenge cannot be so radically changed without regard to its traditional use as accepted by the courts and as prescribed by statutes and procedural rules.[39]

The test adopted by the California court was chosen over the *Swain* test not only because it provides more protection for California residents,[40] but also because of the impracticality of the *Swain* approach.[41] The California court pointed out that a challenge to the use of peremptories based on group bias under the *Swain* standard was nearly impossible to sustain.[42] The difficulty in funding an investigation into past abuses, the time used in questioning the use of peremptory challenges, and the general unavailability of records all make the *Swain* burden virtually impossible to overcome.[43] The dissent argued that the majority should have accepted the *Swain* standard, which recognized the importance of the traditional use of a peremptory challenge, instead of relying on the line of cases that established the representative cross section rule.[44] Those cases referred to a representative venire, whereas *Swain* and *Wheeler* were concerned with the use of peremptories to exclude racial groups from the petit jury.[45] The majority was criticized for its failure to distinguish the representative venire and the representative petit jury.[46] The dissent concluded that the majority failed to recognized that the true rule as established in *Taylor* is that the jury venire must be representative while the petit jury must be impartial.[47]

Additionally, the dissenting opinion criticized the majority's test as too vague and impractical to be effectively applied.[48] The party whose use of peremptories is questioned could easily declare that his challenges were based on some acceptable ground rather than racial grounds.[49] The dissent

38. *See id.* at 769, 148 Cal. Rptr. at 910(Richardson, J., dissenting).

39. *See id.* at 769, 148 Cal. Rptr. at 910(Richardson, J., dissenting). The dissent stated that the *Wheeler* rule has found "no judicial acceptance anywhere." *See id.* at 770, 148 Cal. Rptr. at 911(Richardson, J., dissenting).

40. *See id.* at 767, 148 Cal. Rptr. at 908-09.

41. *See id.* at 767-68, 148 Cal. Rptr. at 909.

42. *See id.* at 768, 148 Cal. Rptr. at 909. The court pointed out that no attempt has yet been successful in meeting the *Swain* burden of proof. *Id.* at 768, 148 Cal. Rptr. at 909; *see* United States v. Nelson, 529 F.2d 40, 42 (8th Cir.), *cert. denied,* 426 U.S. 922 (1976); United States v. Carter, 528 F.2d 844, 848-49 (8th Cir. 1975), *cert. denied,* 425 U.S. 961 (1976); United States v. Pollard, 483 F.2d 929, 930 (8th Cir. 1973), *cert. denied,* 414 U.S. 1137 (1974); State v. Reed, 324 So. 2d 373, 376-77 (La. 1975); State v. Brookins, 468 S.W.2d 42, 46 (Mo. 1971). *See generally* Annot., 79 A.L.R.3d 14, 24 (1977).

43. *See* People v. Wheeler, 583 P.2d 748, 767-68, 148 Cal. Rptr. 890, 908-09 (1978).

44. *See id.* at 769-71, 148 Cal. Rptr. at 911-12(Richardson, J., dissenting).

45. *See id.* at 771, 148 Cal. Rptr. at 912(Richardson, J., dissenting).

46. *See id.* at 771, 148 Cal. Rptr. at 913(Richardson, J., dissenting).

47. *See id.* at 771, 148 Cal. Rptr. at 912(Richardson, J., dissenting).

48. *See id.* at 772, 148 Cal. Rptr. at 914(Richardson, J., dissenting).

49. *See id.* at 772, 148 Cal. Rptr. at 914(Richardson, J., dissenting).

contended that the use of the *Wheeler* standard would require a constant monitoring of the composition of the venire in anticipation of challenges to the use of peremptories.[50]

The *Wheeler* court failed to explain satisfactorily how its holding can be reconciled with the traditional concept of the peremptory challenge.[51] No basis was offered for the conclusion that a reason, although not required to be stated, must exist when a peremptory challenge is exercised.[52] By making the peremptory challenge a qualified privilege, the California court opened the way for the eventual demise of the challenge as it is used today.[53] As the *Swain* majority pointed out, subjecting the challenge in a particular case to constitutional standards "would entail a radical change in the nature and operation of the challenge."[54]

The use of the peremptory challenge is premised on the theory that it aids in obtaining impartial juries.[55] The *Wheeler* majority, however, argued that its rule limiting the use of peremptories is to ensure impartial juries.[56] This argument conflicts with the *Swain* opinion which indicates that unless the peremptory challenge is allowed to be exercised freely, it will fail in its purpose.[57] The court in *Wheeler* indicated that the unqualified use of the peremptory challenge must yield to the right of the defendant to a jury that is as near an approximation of a representative cross section as the random draw permits.[58] It follows, therefore, that the rule set forth in

50. *See id.* at 772-73, 148 Cal. Rptr. at 914(Richardson, J., dissenting). The dissent gave examples of the need under the majority's test to monitor constantly the composition of the venire. One example given of a group allegedly being excluded is the poor in a white-collar crime prosecution. A wealth comparison must be available to determine if members of the supposedly excluded group had been subjected to more difficult or lenghty *voir dire* questioning. *See id.* at 773, 148 Cal. Rptr. at 914(Richardson, J., dissenting).

51. *See id.* at 769, 148 Cal. Rptr. at 910-11(Richardson, J., dissenting). The California Penal Code defines peremptory challenge as "an objection to a juror for which no reason need be given, but upon which the court must exclude him." CAL. PENAL CODE § 1069 (Deering 1971); *accord,* TEX. CODE CRIM. PRO. ANN. art. 35.14 (Vernon 1966).

52. *See* People v. Wheeler, 583 P.2d 748, 769-70, 148 Cal. Rptr. 890, 910-11 (1978)(Richardson, J., dissenting).

53. The *Swain* case indicates that a qualification on the use of peremptories "would establish a rule wholly at odds with the peremptory challenge system as we know it." Swain v. Alabama, 380 U.S. 202, 222 (1965).

54. *Id.* at 221-22. The *Swain* majority noted that if peremptories are allowed to be contested, they "would no longer be peremptory." *Id.* at 221-22.

55. *See id.* at 218; Lewis v. United States, 146 U.S. 370, 376 (1892); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L.J. 1715, 1718 (1977).

56. *See* People v. Wheeler, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 908 (1978).

57. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965); Lewis v. United States, 146 U.S. 370, 378 (1892). The unlimited use of peremptories allows the attorney an opportunity to ask questions in order to challenge for cause with the knowledge that he may still exercise a peremptory to excuse the juror who has become hostile after being unsuccessfully challenged for cause. *See* Swain v. Alabama, 380 U.S. 202, 219-20 (1965).

58. *See* People v. Wheeler, 583 P.2d 748, 762, 148 Cal. Rptr. 890, 903 (1978).

Wheeler placing limits on the use of peremptories may hinder the selection of impartial juries rather than promote them.

Another weakness of the *Wheeler* decision is that the majority inadequately distinguished those Supreme Court cases it cited as controlling with the *Swain* case.[59] The defendant in *Wheeler* was not claiming that he was denied the right to trial by jury drawn from a representative venire.[60] Rather, he was objecting to the use of peremptory challenges to exclude blacks from the petit jury.[61] The representative cross section rule does not extend so far that it requires petit juries to mirror the various groups of the populaton.[62] Even though a venire may be representative of the community, once the names for a particular panel are randomly drawn, there can be no guarantee that those people are truly representative of the community.[63] Thus, no matter how peremptories are used, a representative petit jury could not result.[64] By basing its opinion on the Supreme Court cases holding that the representative cross section rule applies to the selection of the jury venire, the California court has based its opinion on rather questionable reasoning and an inapposite analysis of previous decisions.[65]

Another potential problem with *Wheeler* is that the standard set forth

59. *See id.* at 769-71, 148 Cal. Rptr. at 911-13(Richardson, J., dissenting). The court relied on cases in which the Supreme Court has held that a defendant has a right to a trial by jury drawn from a cross section of the community. Those cases referred to exclusion of certain groups from the venire, whereas *Swain* referred to the use of peremptory challenges to exclude racial groups from the petit jury. *Compare* Swain v. Alabama, 380 U.S. 202, 209 (1965)(blacks excluded from petit jury through prosecutor's use of peremptory challenges) *with* Taylor v. Louisiana, 419 U.S. 522, 524 (1975)(women excluded from venire) *and* Peters v. Kiff, 407 U.S. 493, 494 (1972)(blacks excluded from venire) *and* Ballard v. United States, 329 U.S. 187, 190 (1946)(women excluded from venire) *and* Thiel v. Southern Pac. Co., 328 U.S. 217, 219 (1946)(daily wage earners excluded from venire) *and* Glasser v. United States, 315 U.S. 60, 64-65 (1942)(female non-members of League of Women Voters excluded from venire) *and* Smith v. Texas, 311 U.S. 128, 129 (1940)(blacks excluded from grand jury).

60. *See* People v. Wheeler, 583 P.2d 748, 759, 148 Cal. Rptr. 890, 900 (1978).

61. *See id.* at 754, 148 Cal. Rptr. at 895.

62. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975); Swain v. Alabama, 380 U.S. 202, 208 (1965).

63. *See* People v. Wheeler, 583 P.2d 748, 771, 148 Cal. Rptr. 890, 912 (1978)(Richardson, J., dissenting). The Supreme Court has held that although the venire must be representative, there is no requirement that the petit jury must be of any particular composition. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1974).

64. *See* People v. Wheeler, 583 P.2d 748, 771, 148 Cal. Rptr. 890, 912 (1978)(Richardson, J., dissenting).

65. *See id.* at 771, 148 Cal. Rptr. at 913(Richardson, J., dissenting); *cf.* Taylor v. Louisiana, 419 U.S. 522, 524 (1975)(women excluded from venire); Peters v. Kiff, 407 U.S. 493, 494 (1972)(blacks excluded from venire); Ballard v. United States, 329 U.S. 187, 190 (1946)(women excluded from venire); Thiel v. Southern Pac. Co., 328 U.S. 217, 219 (1946)(daily wage earners excluded from venire); Glasser v. United States, 315 U.S. 60, 64-65 (1942)(female non-members of League of Women Voters excluded from venire); Smith v. Texas, 311 U.S. 128, 129 (1940)(blacks excluded from grand jury).

may prove to be impractical in application.[66] The standard places a very difficult burden on the court to determine whether an attorney is using his peremptories to exclude certain groups.[67] The *Wheeler* majority expressed confidence in the trial judge's ability to determine whether alleged abuses of peremptory challenges are truly abuses.[68] It is not difficult, however, to conceive of a situation in which an attorney wishing to exclude all blacks from the petit jury and in anticipation of a challenge to his use of peremptories will conduct *voir dire* in a way that will convince the court that he is acting properly.[69] Under the *Wheeler* test, an attorney can simply conduct his questioning in a manner that appears acceptable to the court. When his use of peremptories is challenged, he need only state non-racial considerations or social background as a reason for exercising his peremptories.[70] This situation, except in particularly obvious cases, places the court in the difficult position of determining the sincerity of the attorney.[71]

Although the *Wheeler* court held that peremptory challenges may not be exercised on the basis of "group bias,"[72] the majority failed to adequately define the term "group." In its definition, the court recognized "racial, religious, ethnic, or similar grounds" as those constituting "group bias."[73] Although courts in previous cases have recognized various groups excluded from the grand jury and jury venire,[74] no definite guidelines have

66. *See* People v. Wheeler, 583 P.2d 748, 771, 148 Cal. Rptr. 890, 913 (1978)(Richardson, J., dissenting).

67. *See id.* at 772-73, 148 Cal. Rptr. at 914(Richardson, J., dissenting); *cf.* United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971). The Fifth Circuit noted the difficulty of sustaining the *Swain* burden of proof because of the inability to produce sufficient evidence of abuses of the use of the peremptory challenge. As a result, the court held that the prosecutor could not be questioned concerning his mental processes in exercising peremptory challenges. *See id.* at 1216-17.

68. *See* People v. Wheeler, 583 P.2d 748, 764-65, 148 Cal. Rptr. 890, 906 (1978).

69. *See id.* at 772-73, 148 Cal. Rptr. at 914(Richardson, J., dissenting); *cf.* United States v. Nelson, 529 F.2d 40, 42 (8th Cir.), *cert. denied*, 426 U.S. 922 (1976). In a challenge to the use of peremptories under *Swain*, the prosecutor simply stated, "I assure the court that I do not strike people from the jury because they are black." *See id.* at 42. The prosecutor made this statement after striking all three blacks on the panel in a case with a black defendant. *See id.* at 42.

70. *See* People v. Wheeler, 583 P.2d 748, 772, 148 Cal. Rptr. 890, 914 (1978)(Richardson, J., dissenting).

71. *See id.* at 772, 773, 148 Cal. Rptr. at 913, 914(Richardson, J., dissenting).

72. *See id.* at 761, 148 Cal. Rptr. at 902.

73. *See id.* at 761, 148 Cal. Rptr. at 902.

74. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 523 (1975)(women excluded from venire); Peters v. Kiff, 407 U.S. 493, 497 (1972)(blacks excluded from venire); Thiel v. Southern Pac. Co., 328 U.S. 217, 219 (1946)(daily wage earners excluded from venire); United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970)(persons aged 21 to 34 excluded from jury panel); Simmons v. State, 182 So. 2d 442, 444 (Fla. 1966)(common laborers excluded from jury list); State v. Plenty Horse, 184 N.W.2d 654, 655 (S.D. 1971)(American Indians excluded from jury list); Juarez v. State, 102 Tex. Crim. 297, 303, 277 S.W. 1091, 1093 (1925)(Roman Catholics excluded from grand jury).

been set forth.[75] The Supreme Court in *Taylor* condemned excluding "identifiable segments playing major roles in the community" in striking down a statute that excluded women from jury service.[76] The *Taylor* opinion further recognized that fair cross section standards may differ from time to time and from place to place, leaving the courts with much flexibility in determining their own community standards.[77] Therefore, difficulties may arise in applying the *Wheeler* standard in the absence of guidelines from the California Supreme Court regarding what constitutes a "group" and which party has the burden of proving that the excluded jurors belong to an identifiable "group."[78]

Although in *Wheeler* the defense was complaining of the prosecution's use of peremptories, the rule may also be applicable to the defendant's alleged misuse of peremptories.[79] The majority, in setting out its test for challenging peremptories, refers to the "party" who is believed to be abusing the use of peremptories rather than to the prosecutor.[80] This language indicates a possible intention that the test be applicable to both defense and prosecution; however, the court failed to address the issue specifically. Because of the holding in *Wheeler*, the California court will eventually be confronted with the prosecution challenging the defendant's use of peremptories based on group bias.[81] Because the right to trial by impartial jury is a right guaranteed to the defendant, the California court may have to find some basis other than the state constitution for allowing the prosecution to question the defendant's use of peremptories. The California court may find support in the Supreme Court cases that have recognized the government's right to a fair jury,[82] and that have held that the public interest justifies the right of the government to a fair trial.[83] Therefore, it

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

76. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1974).

77. *See id.* at 537.

78. *See* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1735-38 (1977). *Taylor* suggests that the demography of each community and perceptions of its citizens should determine the identification of various groups. *See id.* at 1736.

79. The dissent in *Wheeler* indicates that the majority's holding applies to both prosecution and defense in criminal cases. *See* People v. Wheeler, 583 P.2d 748, 769, 148 Cal. Rptr. 890, 911 (1978)(Richardson, J., dissenting).

80. *See id.* at 764-65, 148 Cal. Rptr. at 905-06.

81. A situation may arise in which the defendant is white and the victim is black. In that case, the defense attorney may use his peremptories to excuse all blacks from the petit jury. The prosecutor could then accuse the defense attorney of group bias in his use of the challenges.

82. *See* Singer v. United States, 380 U.S. 24, 36 (1964); Hayes v. Missouri, 120 U.S. 64, 70 (1886). The right of the government to exercise peremptory challenges is evidence that the government has an interest in fair trials. *See* Singer v. United States, 380 U.S. 24, 36 (1964).

83. *See* Wade v. Hunter, 336 U.S. 684, 689 (1949); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); Mares v. United States, 383 F.2d 805,