People v. Wheeler: California's Answer to Misuse of the Peremptory Challenge

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Comments

PEOPLE V. WHEELER: CALIFORNIA'S ANSWER
TO MISUSE OF THE PEREMPTORY
CHALLENGE*

In People v. Wheeler, the California Supreme Court limited the scope of peremptory challenges. Under the decision, no juror may now be challenged from a jury panel on the basis of his group affiliation. Such exclusions were found to be violative of the representative cross-section requirement for impaneling an impartial jury. This Comment discusses the court's rationale in deciding Wheeler. It then examines (1) whether the holding should be extended to civil litigation, (2) when a "group" becomes legally cognizable, (3) how the burden of proof may be met, and (4) what the role of the trial judge should be when misuse of peremptories is charged.

INTRODUCTION

For hundreds of years, peremptory challenge was considered an absolute privilege. On voir dire, either party could exclude a statutory number of jurors for any reason whatsoever. The motivation for any given challenge was never questioned. Thus an attorney was free to challenge a juror because that juror had a specific bias or merely because that juror belonged to a particular

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group in society.³

On September 28, 1978, the California Supreme Court modified the absolute nature of peremptory challenges. In People v. Wheeler⁴ and People v. Johnson,⁵ the court announced that no California juror may now be challenged because of his group affiliation. The scope of peremptories was reduced to encompass only exclusion for which some evidence or suspicion of specific bias in the juror exists.⁶ The motive behind use of peremptories is now examinable, and that motive cannot be to rid the jury panel of particular racial or other groups.

This Comment focuses on the historical antecedents of Wheeler,⁷ a brief analysis of the opinion itself, and an examination of the issues raised but not addressed by the decision. Of those issues, the most important include application of the holding to civil litigation,⁸ the meaning of “group” for purposes of applying the rule in Wheeler, and the burden of proving misuse of peremptories on voir dire. In the long run, resolution of these issues will determine the breadth of impact Wheeler will have on the jury selection process.

BACKGROUND

In 1964, during a nationwide civil rights movement, the United States Supreme Court heard the now-famous case of Swain v. Alabama.⁹ Robert Swain, a black defendant, had been convicted in Alabama state court of rape and sentenced to death.¹⁰ Swain’s appeal contended that the systematic exclusion of all blacks from his jury violated his rights under the equal protection clause of the fourteenth amendment.¹¹ In support of this contention, he submitted evidence that in his county, an average of six to seven blacks was present on petit jury venires in criminal cases, and yet

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³. Actually, the United States and California Supreme Courts never condoned peremptory challenges made on the basis of group affiliation. However, since the challenging counsel was never required to justify any of his peremptories, he was virtually free to exclude jurors on the basis of group membership.


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

⁶. People v. Wheeler, 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

⁷. Virtually all of the court’s reasoning appears in the Wheeler decision.

⁸. Johnson is a very short opinion in which the court notes the distinguishing facts, then applies the Wheeler rationale to reach the same result. Therefore, all references to Wheeler apply with equal force and relevance to the Johnson opinion.


¹⁰. Id. at 203.

¹¹. Id. at 203, 204.
no black had served on a petit jury in that county for about fourteen years. More specifically, eight blacks appeared on Swain's venire; two were exempt, and the other six were peremptorily struck by the prosecutor.

In its decision, the Supreme Court held that (1) a defendant is not entitled to a jury composed of ethnic minorities proportionate in number to those groups in society; (2) there was no evidence of different standards being applied to prospective white and black jurors; (3) selection of a racially imbalanced jury panel was not equivalent to purposeful racial discrimination; and (4) the peremptory challenge system (which enabled the prosecutor to exclude all blacks) did not deny equal protection. The Court suggested that proof of systematic exclusion of minority group members over a substantial period of time may indicate denial of equal protection but the burden of proof was on the defense, and that burden had not been carried in Swain. Accordingly, the conviction was affirmed.

Prior to Swain, several commentators had argued that use of peremptory challenges to exclude minorities from juries violates the defendant's civil rights. After the decision, many more writers expressed indignation and outrage over the continued abuse of the peremptory challenge and over the High Court's apparent tolerance of that abuse.

12. Id. at 205.
13. Id.
14. Id. at 208.
15. Id. at 209.
16. Id.
17. Id. at 221.
18. Id. at 226, 227. Indeed, one 1975 source reported that in the 10 years following Swain, not one black defendant had successfully met this burden. Annot., 79 A.L.R.3d 14, 24 (1975).
Swain stood without serious challenge, however, until 1975 when the Supreme Court compromised—but did not overrule—that decision in Taylor v. Louisiana. In Taylor, a male defendant appealed his conviction by an all-male jury. Because of local jury selection procedures, no women appeared on Taylor’s venire. Taylor's theory, unlike that of Swain, was that the systematic exclusion of women from jury service violated his sixth amendment rights, specifically, his right to trial by an impartial jury. Taylor contended that because all women had been effectively excluded from jury service, he was not tried by a representative cross-section of the community and, therefore, was denied the right to have his case heard by an impartial jury. The Court concurred with all of Taylor’s contentions and held that “[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.”

Thus, with announcement of Taylor, state courts had to reckon with two apparently conflicting yet distinguishable Supreme Court decisions. In Swain, the Court upheld the exclusion of minority groups from juries if exclusion was effected through peremptory challenge and contested on a fourteenth amendment theory. In Taylor, the Court prohibited exclusion of groups if exclusion was accomplished by unacceptable means of selecting veniremen and contested on a sixth amendment theory. What if the exclusion of groups was effected by peremptory challenge, but contested on a sixth amendment basis? The California Supreme Court answered this hybrid question in 1978.

23. Id. at 524.
24. Id. Selection of jurors did not prohibit the inclusion of women. However, to be eligible for jury service, a woman had to file a written declaration expressing her desire to serve. Apparently, very few women filed such declarations, and jury venires generally consisted only of men. Id. at 524-25.
25. Id. at 524.
26. Id.
27. Id. at 530. In a decision rendered after Wheeler had been announced, the United States Supreme Court reiterated the Taylor principles in Duren v. Missouri, 99 S. Ct. 664 (1979). In Taylor, women were exempted from jury service unless they requested participation. In Duren, women were summoned for jury service unless they requested exemption. Duren, a male criminal defendant, contended that his right to trial by an impartial jury under the sixth amendment had been denied because women were underrepresented on jury venires in Missouri. Specifically, 54% of the adults in the county were female, yet only 26.7% of those summoned for jury service were women, and only 14.5% on postsummons venires were women. Id. at 667-68. The Court relied on the principles it announced in Taylor to reverse Duren’s conviction.

It is interesting that Justice White wrote all of the landmark opinions on this issue: Swain, Taylor, and Duren.
People v. Wheeler⁰⁸ and People v. Johnson⁰⁹ both involved black defendants accused of committing crimes against white victims. The evidence indicated that the prosecutors in both cases used their peremptory challenges to exclude all blacks from the juries.³⁰ After conviction by all-white juries, on appeal each defendant pointed to the systematic exclusion of all prospective black jurors.³¹ The California court relied on the language in Taylor to reverse both convictions.³² The court stated that although an absolutely impartial jury is an unattainable goal, this goal could most nearly be realized only if juries are composed of a representative cross-section of the community.³³ If prospective jurors could be excluded only because of group affiliation, all efforts to assemble an impartial jury would be compromised.³⁴ The court resolved potential conflicts with the Swain decision by holding that it represented only minimum safeguards and that California under its own constitution may grant more extensive protections to criminal defendants.³⁵

Besides having to reconcile its opinion with Swain, the court was confronted with a state statute which provided that "[a] per-

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²⁸. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Wheeler involved two black defendants accused of robbing and killing a white grocery store owner. During the jury selection process, defense counsel became aware of apparent efforts by the prosecution to exclude all blacks from the jury panel. In view of the applicable California statute protecting peremptory challenges, see text accompanying note 36 infra, the court overruled the defendant's objection and selection of the jury continued. The result was challenge of seven black jurors by the prosecution. Trial by an all-white jury ended in conviction of both defendants.

²⁹. 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978). As in Wheeler, the defendants were black. However, in this case, the prosecution freely admitted to efforts to exclude all blacks from the jury. During pursuit and apprehension of the accused, the term "nigger" and other racial epithets had been used by one or more of the prosecution's chief witnesses. The prosecutor in Johnson reasoned that any black juror would almost certainly experience either conscious or subconscious bias because of the racial slurs which would undoubtedly receive attention in court. As in Wheeler, the court relied on the applicable statute to protect the prosecution's right to challenge for any or no cause; and, as in Wheeler, the result was conviction by an all-white jury.

³⁰. People v. Wheeler, 22 Cal. 3d at 262-65, 583 P.2d at 752-54, 148 Cal. Rptr. at 893-95; People v. Johnson, 22 Cal. 3d at 297-98, 583 P.2d at 774-75, 148 Cal. Rptr. at 915-16.

³¹. People v. Wheeler, 22 Cal. 3d at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893; People v. Johnson, 22 Cal. 3d at 297-98, 583 P.2d at 774, 148 Cal. Rptr. at 915.

³². People v. Wheeler, 22 Cal. 3d at 269-70, 583 P.2d at 756-57, 148 Cal. Rptr. at 898; People v. Johnson, 22 Cal. 3d at 300, 583 P.2d at 775-76, 148 Cal. Rptr. at 917.

³³. See cases cited note 32 supra.

³⁴. Id.

emptory challenge is . . . an objection to a juror for which no reason need be given, but upon which the court must exclude him.\textsuperscript{36} Under \textit{Wheeler} and \textit{Johnson}, this statute was held unconstitutional as applied to peremptory challenges in a criminal trial on the basis of group affiliation.\textsuperscript{37}

**MEANING AND IMPACT OF THE \textit{WHEELER} DECISION**

In \textit{Wheeler}, the California Supreme Court announced an unprecedented principle for jury selection. The opinion exceeded all standards set by the United States Supreme Court.\textsuperscript{38} In addition, a state statute was overturned to the extent it conflicted with the holding in \textit{Wheeler}.\textsuperscript{39} In rendering its landmark decision, the California court stressed four very important factors which dictated the outcome.

First, each juror must be examined individually to separate those who hold specific biases from those who do not.\textsuperscript{40} Preconceived notions of how one will think or behave based on his group affiliation have no place in jury selection. As suspected by the prosecutors in \textit{Wheeler} and \textit{Johnson}, some black jurors may in fact sympathize with black defendants; but other black jurors will be impartial. Categorical exclusion of an entire group frustrates the purpose behind peremptory challenge.\textsuperscript{41}

Second, peremptory challenge is still available after \textit{Wheeler}. It has not been reduced to a “quasi-challenge for cause” as some fear.\textsuperscript{42} Any juror may still be excluded if evidence of some spe-

\begin{footnotesize}
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    \item[36.] CAL. PENAL CODE § 1069 (West 1970) (emphasis added).
    \item[37.] People v. Wheeler, 22 Cal. 3d at 276-78, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.
    \item[38.] The United States Supreme Court has been very active and consistent in mandating that the jury pool (or veniremen) be selected from a representative cross-section of the community. \textit{See}, e.g., Peters v. Kiff, 407 U.S. 493 (1972); Thiel v. Southern Pac. Co., 328 U.S. 217 (1945); Glasser v. United States, 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940). However, with regard to peremptory challenges in particular, the Court has been very protective of the absolute privilege to strike any juror for any reason. \textit{Swain} is still good law on this point.
    \item[39.] 22 Cal. 3d at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28.
    \item[40.] Id. at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.
    \item[41.] Id. at 277-78, 583 P.2d at 762, 148 Cal. Rptr. at 903.
    \item[42.] In her concurring opinion, Chief Justice Bird fears the blurring of challenge for cause with peremptory challenge. She believes the majority has gone
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\end{footnotesize}
specific bias is uncovered on voir dire. The juror's background, responses to questions, or demeanor may reveal a bias; his group affiliation per se will not.

Traditionally, there have been two proper motives for peremptory challenge. The more frequent motive is a suspicion on the part of the examining attorney that the juror will be biased against that attorney, his client, or his case. That suspicion may be provable or unprovable; it may be real or it may be erroneously inferred from the juror's background and demeanor. However, accurate or not, the suspicion must be derived from examining the juror himself; it may not be the product of preconceived notions. The other motive for peremptory challenge stems from damage done by the attorney on voir dire. In his efforts to probe for specific biases, the attorney may alienate the subject juror. Having antagonized that juror, the attorney must excuse that juror as the only remedy for his own offensive questioning. Wheeler upsets neither of these bases for peremptory challenge. The decision is a narrow one and addresses only exclusion on the basis of group affiliation. A challenge that does not go to a person's group membership is still proper under both statutory and case law.

Third, an impartial jury can be drawn only from a representative cross-section of the community. In defining "impartial," the court confesses that "it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases . . . ." Moreover, "in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation

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43. Id. at 274, 583 P.2d at 759-60, 148 Cal. Rptr. at 901.
44. Id. at 275, 583 P.2d at 760, 148 Cal. Rptr. at 901.
45. Id.
46. Id. at 275 n.16, 583 P.2d at 761 n.16, 148 Cal. Rptr. at 902 n.16.
47. The court discusses only exclusion because of group affiliation. Neither the holding nor any of the dicta addressed other misuses of peremptory challenge or further limitations in the future.
49. Id. at 266, 583 P.2d at 754-55, 148 Cal. Rptr. at 896.
50. Id. at 266, 583 P.2d at 755, 148 Cal. Rptr. at 896.
Given these facts, the court reasons that the only practical way to assemble an impartial jury is to have every identifiable segment of society available for jury service. With a representative cross-section of the community will come a representative cross-section of life experiences and biases. The net effects will be a canceling out of these biases on any given jury and overall impartiality.

Whenever jury selection procedures categorically eliminate some group in the community from jury service, the “representative cross-section” goal is frustrated. Whenever this goal is frustrated, an impartial jury (as defined by the United States and California Supreme Courts) becomes impossible. To achieve a representative cross-section, the California court has assumed the duty of remedying procedures that defeat impartiality. Misuse of peremptory challenges is one such impermissible procedure, and Wheeler is a remedial response to that problem.

Fourth, although Wheeler and Johnson both involved allegations that the prosecution was misusing peremptories, the opinions bind criminal defendants as well as the People. It is notable that the court sought no constitutional basis for binding the defendant. The court relied heavily upon the sixth amendment of the United States Constitution and article I, section 16, of the California Constitution in reaching its decision. However, both these provisions guarantee rights to the criminal defendant, not to the People. Concepts of fairness and justice prompted the court to apply its holding to both parties in criminal prosecu-

51. Id.
52. Id.
53. Id. at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.
55. Other procedures which may lead to improper selection of jurors include summons of veniremen and dismissal of jurors who offer excuses and request dismissal. Discriminatory methods of summoning veniremen received extensive treatment by the court in Wheeler. 22 Cal. 3d at 267-71, 583 P.2d at 755-57, 148 Cal. Rptr. at 896-99. Excusing jurors when they so request and when they offer adequate excuses to support those requests has not proved too troublesome. Trial judges historically have not abused their discretion in this area. Id. at 273, 583 P.2d at 759, 148 Cal. Rptr. at 900.
56. Id. at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29. The court held that “[T]he People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism.”
57. Id. at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895.
Despite the soundness of the court's reasoning on each of the principles supporting the decision, \textit{Wheeler} does leave a number of important issues unresolved. The court left open the issue of whether \textit{Wheeler} should be extended to civil litigation. Moreover, although challenge on the basis of group affiliation is now forbidden, the court offers no definition of "group." Presumably, the term means something more than just racial groups. Finally, while the court discusses the burden of proving misuse of peremptories, it gives little attention to the discretionary power of the trial judge. These unresolved issues have already caused much confusion and controversy. Resolution of these issues is necessary for an understanding of the full impact of \textit{Wheeler}. This Comment will predict the judicial resolution of these unanswered questions.

\textbf{EXTENSION OF \textit{WHEELER} TO \textit{CIVIL LITIGATION}}

Generally, it is good judicial policy for a court to rule on no more than is necessary to decide the case at bar. Accordingly, because \textit{Wheeler} was a criminal prosecution, the misuse of peremptories in civil litigation received virtually no attention.

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\item[58.] \textit{Id.} at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29.
\item[59.] \textit{Id.}
\item[60.] \textit{Id.} at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26.
\item[61.] Throughout its discussion of proof, the court provides for the role of the trial judge in making decisions. In the final analysis, the court states that it will "rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." \textit{Id.} at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. However, the court never indicates the degree to which the trial judge will be insulated from appellate review. If reversal in a higher court is a distinct possibility, the judge might prefer to declare a mistrial rather than risk that reversal. \textit{See} note 62 \textit{infra.}
\item[62.] In October, 1978, a San Diego County Superior Court judge declared a mistrial when the prosecutor challenged two blacks, a Mexican-American, and an Asian-American from a jury. The prosecutor claimed he was not trying to rid the jury of all minority group members and that there were specific facts on which he based his peremptory challenges. Two of the excused jurors had nursing backgrounds (and the case involved medical proof), one was "less than candid" on voir dire, and the fourth had two sons who had experienced extensive problems with the youth authorities. The judge reportedly feared a reversal of any conviction on the basis of the \textit{Wheeler} decision if jury selection continued. The incident raised questions of whether \textit{all} minorities constituted one group and whether the judge would be protected from appellate review if he had concurred with the prosecutor's reasons for challenge and allowed the trial to continue. \textit{Los Angeles Times} (San Diego ed.), Oct. 19, 1978, \S\ 2, at 1, col. 1.
\item[63.] \textit{See} 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29.
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However, misuse of peremptories in civil cases will most likely be banned by the court when the appropriate case presents itself. The basis for such extension may be found in the authority relied upon by the court in *Wheeler*. Constitutional law, case law, common law, and statutory provisions were all considered as authority in reaching the decision in *Wheeler*. So too should these authorities be considered in determining whether *Wheeler* should be extended to bind civil litigants.

**Constitutional Basis**

At the heart of *Wheeler* is the constitutional question of whether groups from the community may be excluded from jury service on voir dire. That same constitutional consideration applies to civil litigation. Two factors form the basis for such an extension. First, in *Wheeler*, the California Supreme Court reiterated previous holdings that "trial by jury" means trial by an impartial jury and that "impartial" means selected from a representative cross-section of the community. Second, unlike the United States Constitution, California uses only one constitutional clause to mandate trial by jury in both criminal and civil actions. The clause reads: "Trial by jury is an inviolate right and shall be secured to all . . . ." Thus it is clear that any interpretation of California's trial by jury guarantee would apply with equal force to both criminal and civil litigation. The intent of the framers, by securing jury trial "to all," requires extension of this "impartial" requirement of *Wheeler* "to all." *Wheeler* prescribes the proper role for peremptories in assembling an impartial jury. This role cannot vary according to the nature of the litigation. To allow such variance would be to apply different standards to the same constitutional provision.

**Case Law Authority**

In *Wheeler* the California Supreme Court looked to both its own and United States Supreme Court decisions. Most of the United

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64. Id. at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900.
65. Id. at 265, 583 P.2d at 754, 148 Cal. Rptr. at 895.
66. Id. at 266, 583 P.2d at 754, 148 Cal. Rptr. at 896.
67. The right to a trial by jury in a criminal prosecution is guaranteed by the sixth amendment to the United States Constitution. The right to trial by jury in a civil action is guaranteed by a separate amendment, the seventh.
68. CAL. CONST. art. I, § 16.
69. Id. Besides guaranteeing trial by jury to both civil and criminal litigants, the section delineates jury votes necessary to reach a verdict in a civil case and identifies requirements for waiver of a jury in either criminal or civil cases.
70. 22 Cal. 3d at 274, 583 P.2d at 759-60, 148 Cal. Rptr. at 901.
71. Id. at 267-71, 583 P.2d at 755-57, 148 Cal. Rptr. at 896-99.

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States Supreme Court cases cited in *Wheeler* involved appeals from criminal convictions. However, one case, *Thiel v. Southern Pacific Co.*, involved a civil action and the same “representative cross-section” requirement was found applicable to the selection of civil action juries. In *Thiel* the local jury commissioner used a system of summoning prospective jurors which effectively excluded all daily wage earners. In disapproving this systematic exclusion, the High Court held that “[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.” Although the United States Supreme Court may not be prepared to go as far as California in limiting peremptory challenges, the High Court clearly holds in *Thiel* that both criminal and civil actions are subject to the same protections with respect to jury selection. *Wheeler* refines the nature of jury selection in California: Peremptory challenges cannot be used to frustrate the representative cross-section requirement. *Thiel* indicates that what is proper for one kind of action is proper for the other; thus *Wheeler* should apply with equal force to civil litigation.

**Principles of English Common Law**

The California Supreme Court also looked briefly to English common law for authority in its holding. Common law principles, as noted by the court, “demanded the strictest impartiality” from juries. To achieve this impartiality, a sophisticated process for impaneling juries was developed. This process includes juror qualification statutes, challenges for cause, peremptory challenges for cause, and...
challenges, and strong oaths of impartiality. Significantly, there was little distinction at common law between jury selection for criminal and civil actions. Occasionally, extra protections were afforded the criminal defendant—for example, availability of peremptory challenges—but with time, all these privileges and processes were universally applied. Had the scope of peremptory challenge been altered in criminal trials at common law, no doubt that change eventually would have been reflected in the selection of any kind of jury. Thus, to rely on the English common law for authority is to realize that the same jury selection processes, privileges, and requirements are applicable to both criminal and civil cases.

**Verdicts: Criminal and Civil**

The requirements for verdicts in California also form a basis for extending the rule in *Wheeler* to civil litigation. Those who use peremptories to exclude groups from juries presume group sympathies or biases. In *Johnson*, for instance, the prosecutor feared that black jurors would feel hostility toward his white witnesses and sympathy for the black defendant. If this proposition were true with respect to certain jurors, the effect would be more damaging in a criminal prosecution. California requires a unanimous verdict to convict in criminal cases, but only nine votes for a verdict in civil suits. In a criminal case, one adamant juror, clinging to his group sympathies, can force a hung jury. However, three group-biased jurors could not alter a civil verdict. Therefore, the threat of preconceived group bias leading to an unjust verdict is...
much more prominent in criminal than in civil cases. Because the California court has already banned misuse of peremptories in criminal prosecutions, extension of the rule to civil suits would have substantially less significance. The potential for injustice because of the presence of group-biased jurors is minimal in civil as compared to criminal actions.

Indeed, there is no apparent reason for confining Wheeler to criminal prosecutions. In addition to constitutional considerations, case law, and common law principles, the California Supreme Court relied on concepts of fairness and justice. The court found “essential functions served by the requirement of cross-sectionalism.”92 Such “essential functions” are no less important to a plaintiff or defendant in a civil suit than they are to the prosecution or defense in a criminal case. Use of peremptories to exclude groups from jury service is intolerable in either kind of action.

DEFINITION OF “GROUP”

Quite aside from the extension of Wheeler is the issue of to whom it will be applied. The court recognizes that “group” is a nebulous term, but declines to offer any definition or guidance for applying it.93 Having found “no doubt” that black jurors constitute a cognizable group, the court found “no occasion to explore the point further” in the context of Wheeler.94 Thus it is left to the trial courts to determine just how broadly the term “group” should be applied. There are a number of available guidelines to aid in making this determination.

Because the challenged jurors in both Wheeler and Johnson were black, notions of “suspect classifications”95 and “discrete and insular minorities”96 are immediately suggested. The groups

92. People v. Wheeler, 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 905 n.29.
93. Id. at 280 n.26, 583 P.2d at 764 n.26, 148 Cal. Rptr. at 905 n.26.
94. Id.
95. Korematsu v. United States, 323 U.S. 214 (1944). In writing for the majority in Korematsu, Justice Black stated, “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [T]he courts must subject them to the most rigid scrutiny.” Id. at 216. Since Korematsu, the number of groups identified as “suspect classifications” has expanded. See notes 98, 99, 100 infra.
96. While “suspect classifications” grew out of equal protection cases such as Korematsu, “discrete and insular minorities” is a term that had its origins in a due
that fall into these categories include those based on race, ethnicity, alienage, and possibly gender and seem likely subjects for misuse of peremptory challenges. The origin of these suspect classifications, however, is quite different from the constitutional basis of *Wheeler*. Suspect classifications were developed to activate strict standards of judicial review under the equal protection clause of the fourteenth amendment. *Wheeler*, on the other hand, was decided under article I, section 16 of the California Constitution and the sixth amendment of the United States Constitution. Moreover, in *Wheeler*, the issue is the rights of the litigants, not those of the jurors who may be peremptorily struck. Applying suspect classification principles to the jurors would confuse the real parties in interest in *Wheeler*. Therefore, although suspect classifications could provide a definition of "group," they have no real relevance in *Wheeler*.

Case law provides a second guide for defining "group." Throughout much of this century, the United States Supreme Court and other federal courts have ruled on juror qualification and exemption statutes. Certain state laws have rendered various segments of society either incompetent to serve on juries or immune to otherwise mandatory jury service laws. Occasionally, aggrieved litigants have appealed trial court decisions on the theory that their cases were not heard by a representative cross-section of the community because of local juror exemption statutes. In reviewing these appeals, the United States Supreme Court and other federal courts have invariably considered three essential factors. First, the courts determine whether the excluded group is "substantial" and thereby represents a visible segment of soci-

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100. A majority of the United States Supreme Court failed to hold discrimination on the basis of sex to be subject to strict scrutiny in *Frontiero* v. Richardson, 411 U.S. 677 (1973), although four justices joined in holding that sex should be a suspect classification. Subsequent decisions have held that gender is not a suspect classification. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).
102. 22 Cal. 3d at 265-66, 583 P.2d at 754, 148 Cal. Rptr. at 895.
103. See cases cited note 38 supra.
The second consideration is whether the alleged group is "identifiable" and distinguishable from other members and/or groups in the community. Finally, the courts determine whether the group members possess a perspective that exists as a function of the group membership. If the answers to all these questions are affirmative, then a "legally cognizable group" exists and local statutes that exempt or disqualify such groups from jury service are unconstitutional as violative of the representative cross-section requirement.

Under the United States Supreme Court’s test, blacks already constitute a legally cognizable group. Black Americans represent a substantial part of society, they are identifiable, and they possess a common perspective and experience that result from being black in American society. Other cognizable groups have been found in areas of occupation, age, ethnicity, and gender. Conversely, such seemingly distinct groups as the poor and the young have failed to satisfy the Supreme Court’s test. Exemption or disqualification of these groups from jury service has been held constitutional and does not violate the representative cross-section requirement under the test.

105. See cases cited note 104 supra.
106. Id.
107. "Legally cognizable group" is used here as a term of art. It refers to groups found to satisfy the three-part test.
110. United States v. Butera, 420 F.2d 564 (1st Cir. 1970) (people between the ages of 21 and 34 years). It should be noted, however, that Butera is apparently the only case finding a legally cognizable group based on age.
115. The federal courts have been very unpredictable with respect to finding legally cognizable groups. For example, the Fifth Circuit refused to acknowledge Cuban-Americans in Florida as such a group. United States v. Gooding, 473 F.2d 425, 429 (5th Cir. 1973).
Although the legally cognizable group test is helpful, the United States Supreme Court’s findings are too restrictive to provide absolute guidance in California. The California Supreme Court was equally concerned with the existence of a given group and the motive for challenging members of that group. Exclusive reliance upon previous United States Supreme Court decisions to ascertain whether a group is legally cognizable could seriously compromise Wheeler. Poor people, for instance, apparently do not constitute a cognizable group under the United States Supreme Court test. Yet if a party to litigation uses peremptory challenges to blatantly strike all poor people, that party should not be allowed to hide behind a United States Supreme Court decision to validate those challenges. Striking poor people from the jury because they are poor contravenes Wheeler. The objecting counsel should be allowed to offer proof that poor people form a substantial and identifiable group possessing distinctive perspectives and experiences in the prospective juror’s community. Whenever necessary, the testimony of local sociologists and other experts may be used to support the claim. Under no circumstances, however, should a party be precluded from an opportunity to prove the existence of a cognizable group if an improper motive for challenging that group can also be shown.

To be sure, application of a pervasive definition of “group” will cause much controversy—perhaps even outrage—in the legal profession. A whole body of research and thought has developed to pinpoint biases connected with group affiliation. Moreover, the practitioner develops personal notions of group biases and sympathies through his own courtroom experiences. Armed with such research and personal experience, the trial attorney can

116. Although the California Supreme Court in Wheeler looked to United States Supreme Court decisions to examine the importance of the representative cross-section requirement, the California court did not rely on the High Court to find a definition for “group.” In deciding Wheeler, the California court certainly never intended to require that the existence of a “group” be found by the federal courts before that group came within the purview of the holding in Wheeler.


118. Apparently, some attorneys have developed the philosophy that an impartial jury will result from a selection process which causes both parties to the action to be satisfied with the panel. The argument suggests that each party is empowered to whittle away at the jury by use of challenges until only those jurors mutually acceptable to both sides remain. However, this concept of an “impartial jury” cannot be squared with the Supreme Court’s requirement of a representative cross-section. Moreover, such a system can result in situations analogous to Swain.

make educated guesses about a given juror's biases. By classifying that juror according to his group membership, the attorney can apply the "odds" that the juror will be either friendly or hostile and challenge accordingly. Thus, to the practitioner, Wheeler may defy reason and experience. If certain groups have been shown to possess certain biases, it might be asked, why not allow the exclusions of those groups from jury service?

The answer to the practitioner's objection, of course, rests in the purpose behind the peremptory challenge. To assemble a representative cross-section of the community, no "substantial and identifiable" segment can be arbitrarily eliminated. Not every black juror will be sympathetic to black defendants. Nor will every military person believe that "if a man is arrested, he is probably guilty" as suggested by one study. Voir dire provides the opportunity to determine whether a particular black or a particular military person holds those or other specific biases. The results of research and personal experience continue to be of value to the practitioner because they alert the attorney that a given juror may possess certain biases. However, until some evidence of bias in a specific juror is raised on voir dire, challenge because of group affiliation cannot be allowed. Peremptory challenges serve the practitioner when there is not enough demonstrable evidence to challenge for cause. However, it is essential that some evidence exist, and that evidence cannot be based on preconceived notions of group behavior.

Naturally, as the identity and existence of a given group be-

120. As an example of how certain biases seem to trail certain groups, one source advises criminal defendants to avoid retired police officers, military men, and their respective wives. "They have adhered to a strict line of conduct throughout their lives... [and] believe if a man is arrested, he is probably guilty." Conversely, salesmen, actors, artists, and writers are highly desirable to the criminal defendant. "They have enjoyed wide and varied experiences, have witnessed the good and bad in people and are prone to forgive an indiscretion in another." F. BAILEY & H. ROTHBLATT, FUNDAMENTALS OF CRIMINAL ADVOCACY § 337 (1974). A second such study revealed that white male Protestants between 40 and 49 years of age who are college graduates and professionals make the most unbiased jurors. EDUCATION SYSTEMS AND PUBLICATIONS, BIASES AND PREJUDICES AMONG JURORS 20 (1970). The numbers of such studies are inexhaustible. Moreover, the results of each are reasonably consistent with the others. See, e.g., authorities cited note 119 supra.


122. People v. Wheeler, 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901.

123. Id.
come more obscure (for example, it is more difficult to recognize
groups based on education or occupation than on race or sex),
proof becomes more difficult. However, there must be some re-
course for the aggrieved party when his opponent flagrantly mis-
uses peremptory challenge to exclude all members of a given
group from jury service. A remedy—specifically, the one outlined
in Wheeler—must be available.

**Misuse of Peremptory Challenges: Satisfying the Burden of Proof**

The last important issue raised by Wheeler is proof of group ex-
clusion and the role of the trial judge in evaluating that proof.
The California Supreme Court goes to some length in outlining
procedural guidelines for satisfying the burden of proof. Unques-
tionably, the resulting test is inexact, yet the standard is work-
able. The sound discretion of the trial judge is at its heart.

According to Wheeler, when misuse of peremptories is sus-
ppected, a timely objection should be raised.124 Out of the jury's
hearing, the party alleging misuse points to the record to show
the probability of challenge because of group association rather
than specific bias.125 If the alleging party makes a prima facie
case for misuse, the burden shifts to the other party to "satisfy
the court that . . . such peremptories . . . were reasonably rele-
vant to the particular case on trial or its parties or its wit-
nesses."126 It then becomes the duty of the trial judge either to
overrule the objection or to declare a mistrial.127

Without question, the efficacy of this remedy turns on the
sound discretion of the court.128 The judge must be vested with
the power to evaluate verbal responses, demeanors, facial expres-
sions, voice inflections, and more in rendering his decision.129
While the trial record may be of value in proving specific bias in a
juror, almost as often as not the real source of suspicion will be
the juror's demeanor.130 By remaining aware of behavior and atti-

124. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. In his dissent, Justice Richardson predicts that the test will prove time-
consuming and lead "to procedural quicksand and a quagmire." Moreover, he pos-
tulates, the prosecutor will be free to claim "some unprovable suspicion of sympa-
thy for the defendant" as the basis of exclusion of a juror, and thereby escape the
standard altogether. *Id.* at 283, 583 P.2d at 772, 148 Cal. Rptr. at 913-14. Certainly,
Justice Richardson will be proved correct if the trial judge pays attention only to

914
tudes, the judge will be in a position to rule on allegations of exclusion of groups from service.

In practical application, the exclusion of one black from jury service will probably raise no allegations of misuse of peremptories. If such an allegation is made, the judge will certainly give the accused attorney the benefit of the doubt, even if the judge detected no reason for exclusion himself. However, as one challenge becomes three or five or seven, the attorney alleging misuse acquires a stronger basis for making his prima facie case. The judge's observations become critical. The alleging attorney will offer evidence that members of a substantial and identifiable group are being challenged for no reason other than their group affiliation. It will be the duty of the trial judge to weigh this evidence to decide whether a prima facie case has been made.  

In rebutting an accusation of misuse, the attorney accused of misusing peremptories may rely on facts in the record to defend his challenges. He may argue that information obtained on voir dire indicates the possible existence of specific biases in the challenged jurors. In the alternative, the accused attorney may refer the judge to some "bare look or gesture" shown by certain jurors which gave rise to suspicions of bias. Such "bare looks and gestures," of course, would not appear on the record, yet they are just as valid a basis for challenge as any demonstrable facts which do appear on the record.  

In weighing the contentions of each attorney, the judge may have noted the same disqualifying or legitimately undesirable factors in the jurors' backgrounds, whether those factors appear in the record or in the jurors' demeanors. If so, then the judge will properly overrule the alleging party's objection. Alternatively, the judge may see some limited merit to the challenges, but choose only to warn the accused party that suspicions of misuse are

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131. It is during the prima facie showing of misuse of peremptories that a good record is made. In the context of alleging misuse, all arguments concerning the existence of a group and the exclusion of that group will be recorded. Having heard the arguments from both sides, the judge will have the benefit of this record to support the soundness of his final ruling.

132. "Bare looks and gestures" which suggest the existence of a specific bias will support a properly used peremptory challenge. People v. Wheeler, 22 Cal. 3d at 275, 583 P.2d at 760-61, 148 Cal. Rptr. at 902.

133. Id.
growing and that future challenges to subject group members must be on solid bases. Finally, the judge may agree with the alleging party, rule that there exists no basis for the challenges, and declare a mistrial. The judge's advantages of presence and immediacy are central to his evaluation of these allegations and rebuttals.134

The judge in this role must be protected from judicial review unless an abuse of discretion is extreme. Threatened by reversal, the judge will always have his eye on how the trial record will look to the appellate courts. "Bare looks and gestures" of the excused jurors will receive less weight than they should when the trial judge renders his decision. He will know that the higher courts have only the trial transcript on appeal. Therefore, the appellate courts should encourage the trial judge to consider all available factors when misuse of peremptories is charged. This policy can follow the trial judge reciting for the record the basis for his rulings and the appellate courts overruling only clear abuses of judicial discretion in making those rulings.

This involvement of the trial judge in jury selection is hardly novel and should be welcomed. Broad discretionary powers are already vested in the judge with respect to challenge for cause. By extending these powers to peremptory challenge—and narrowing them substantially to relate only to group exclusion—the judge merely serves as a check on selection procedures.135 Thus what used to be a given attorney's unmitigated license to shape the jury without proper motive has become a workable procedure much more in keeping with the basic tenets of the judicial system.136

CONCLUSION

In the final analysis, Wheeler simply restates and refines basic common law and constitutional tenets: The triers of fact should be selected at random from a representative cross-section of the community. An attorney's privilege—to exclude jurors for any or no reason—cannot defeat such a basic principle of the judicial system. Of course, the nature of peremptory challenges makes proof of their misuse difficult. Judges may struggle with many intangible factors in ruling on an objection. However, the ultimate test of Wheeler lies in noting the nature of voir dire both before and after the decision.

134. Id. at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.
135. Id.
136. Id. at 277-78, 583 P.2d at 762, 148 Cal. Rptr. at 903.
Prior to *Wheeler*, peremptory challenges did not cause any delay during jury selections. Each party had an absolute right to challenge without explaining that challenge.\(^{137}\) The judge's duty consisted of little more than thanking and excusing the juror. However, despite its procedural simplicity, the system allowed parties to use statistical or intuitive insight to predict the behavior of entire groups and exclude those groups on that basis. Challenges on the basis of such "insight" are repugnant to impartiality and result in gross injustices.\(^{138}\)

Now, under *Wheeler*, the California Supreme Court has taken the step necessary to minimize such injustices. The jury commissioner's summons for veniremen, challenges for cause, peremptory challenges, and final impanelment are all subject to review. At no point may the representative cross-section rule be compromised. No doubt trial judges will err on occasion in ruling on whether peremptories are being misused. However, the consequences of such errors are relatively insignificant in view of the benefits derived from the *Wheeler* decision. If a judge fails to recognize misuse, the aggrieved party will be no worse off than he would have been prior to *Wheeler*. If the judge incorrectly sustains an objection and declares a mistrial, voir dire simply begins again with a new pool of jurors. A day or more of voir dire will be lost; and in an era of crowded court calendars, such a result is undesirable. However, the benefits of providing the most impartial jury possible seem to carry much more force and urgency than the inconvenience of short delay.

Through *Wheeler*, the California Supreme Court has taken the initiative in limiting the scope of peremptory challenges. The common law privilege had evolved into an absolute right to handpick juries. *Wheeler* returns the privilege to its proper role by requiring the existence of a specific bias before a juror may be challenged. All that remains is for the court to extend the holding to civil litigation, maintain the broad tests for "group," and give notice to other appellate courts that the rulings of trial judges should be sustained when those trial judges have ruled on "Wheeler" objections. By doing so, the court will succeed in granting all litigants the right to have their cases heard by a representative cross-section of the community.

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138. *Swain* probably represents the best example of such injustices.
In May 1979 the California Supreme Court dealt a severe blow to Wheeler principles when it decided Rubio v. Superior Court.\textsuperscript{139} Rubio contended that he had been denied a representative cross-section of the community on his jury venire because ex-felons and resident aliens were statutorily excluded.\textsuperscript{140} In a four-to-three decision, the court refused to designate ex-felons and resident aliens legally cognizable groups and found that exclusion of these groups was permissible.\textsuperscript{141}

In reaching its conclusion, the court held that a group could not be excluded if (1) its members possessed a particular perspective which they acquired \textit{because} of their membership in the group and if (2) that perspective cannot be represented by others in the community.\textsuperscript{142} The majority concluded that ex-felons and resident aliens did possess perspectives tied to group membership but that those perspectives could be represented adequately by others. The perspective of ex-felons could be represented by other individuals who had been deprived of their freedom by the state—for example, those convicted of misdemeanors, youthful offenders, and those previously confined in mental institutions.\textsuperscript{143} The perspective of resident aliens could be represented by naturalized citizens because all naturalized citizens were resident aliens at one time.\textsuperscript{144} Therefore, in the view of the majority, the statutory exclusion of ex-felons and resident aliens did not eliminate the perspectives of these groups from juries. Rather, the statutes simply limit those who are competent to represent those perspectives on juries.\textsuperscript{145}

In dissent, Justice Tobriner provides a cogent discussion of how Rubio defeats many of the representative cross-section principles. First, he notes that no other cognizable group had ever been subjected to a supposition that others might adequately represent that group's perspective. In Hernandez v. Texas,\textsuperscript{146} for instance, it was never an issue whether the perspective of Chicanos could be represented by other minority groups. Exclusion of Chicanos in itself was enough to violate the representative cross-section

\begin{itemize}
\item \textsuperscript{139} 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).
\item \textsuperscript{140}  See \textit{CAL. CIV. PROC. CODE} §§ 198, 199 (West 1954).
\item \textsuperscript{141} Interestingly, Justice Mosk authored both the Wheeler and the Rubio opinions.
\item \textsuperscript{142} 24 Cal. 3d at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737.
\item \textsuperscript{143}  Id. at 99-100, 593 P.2d at 599, 154 Cal. Rptr. at 738.
\item \textsuperscript{144}  Id. at 100, 593 P.2d at 600, 154 Cal. Rptr. at 738-39.
\item \textsuperscript{145} The court also rejected allegations that the subject statutes violated the equal protection clauses of the United States and California Constitutions.
\item \textsuperscript{146} 347 U.S. 475 (1954).
\end{itemize}
Tobriner also takes issue with the notion that one group can represent the perspectives of another if the first group had once held a status similar to that of the second (excluded) group. Tobriner notes that many businessmen were once wage earners, yet the Court in Thiel held that wage earners could not be excluded from jury service. Tobriner's point may be further strengthened by considering the effect of the majority's holding on other groups. Under the majority's reasoning, young people could be excluded from jury service because older people were once young. Similarly, those without a college education could be excluded because college graduates can remember when they did not have a degree; and nonparents could be excluded because parents can remember when they did not have children.

Another of Tobriner's objections focuses on the suppression of community perspectives on juries. A fair cross-section of the community, he says, reflects the relative proportions of group perspective as they exist in the community. By excluding certain groups from jury service, significant perspectives in the community will be underrepresented on juries except to the extent that others may represent those perspectives. Although the majority in Rubio may not eliminate the representation of certain group perspectives on juries, it radically suppresses such perspectives as they exist in the community; and suppression is but one step removed from elimination.

Finally, Tobriner points out the basic inconsistency between the Rubio decision and the principles that were the basis of Wheeler. In Rubio, the majority feared that ex-felons and resident aliens would make undesirable jurors as a whole. Ex-felons might resent the very system that convicted them, and resident aliens may not feel urgency for a just verdict. However, such group-based assumptions are inconsistent with Wheeler. The court in Wheeler held that group stereotypes could not be used to support exclusion of an individual from jury service. Each juror

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147. Rubio v. Superior Court, 24 Cal. 3d at 106, 593 P.2d at 603-04, 154 Cal. Rptr. at 742-43.
149. Rubio v. Superior Court, 24 Cal. 3d at 106-07, 593 P.2d at 604, 154 Cal. Rptr. at 743.
150. Id. at 109, 593 P.2d at 605, 154 Cal. Rptr. at 744.
151. Id. at 101, 593 P.2d at 600, 154 Cal. Rptr. at 739.
must be examined individually to determine whether suspicions of group bias are in fact applicable to that juror. Not all black jurors are sympathetic to black defendants. Similarly, not all ex-felons resent the judicial system, nor do all resident aliens feel apathy toward just verdicts. *Rubio* stands to compromise the strong *Wheeler* principle that an individual cannot be judged by his group affiliation. Judgment should be reserved for examination on voir dire.

In the final analysis, the courts are not competent to judge whether one group can adequately represent the perspective of another.\footnote{Id. at 109, 593 P.2d at 605, 154 Cal. Rptr. at 744.} Even if they were able to make such a determination, they should not. Before any individual or group may be excluded from jury service, the state should be required to show a compelling state interest to support the exclusion. This “compelling state interest” should prove to the satisfaction of the court that a particular exclusion is more important to state interests and judicial fairness than maintenance of sixth amendment protections and the representative cross-section rule in its purest form. Hence, the exclusion of minors, those deemed mentally incompetent, and those unable to speak English may be justified on this ground,\footnote{See Cal. Civ. Proc. Code § 198 (West 1954).} although people in these categories most certainly comprise legally cognizable groups. However, such was not the approach in *Rubio*. Ex-felons and resident aliens were not ruled incompetent; they were found excludable simply because others might be competent to represent their perspectives. Such a result cannot be squared with *Wheeler* or the meaning of the representative cross-section rule.

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