

1-1988

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### Recommended Citation

Emily M. De Falla, *Voir Dire for California's Civil Trials: Applying the Williams Standard*, 39 HASTINGS L.J. 517 (1988).  
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# Voir Dire for California's Civil Trials: Applying the *Williams* Standard

by  
EMILY M. DE FALLA\*

Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of the human emotions, the better he is equipped for the subtle selection of his so-called "twelve men, good and true."<sup>1</sup>

Clarence Darrow has been quoted as saying "never forget, almost every case has been won or lost when the jury is sworn."<sup>2</sup> Most experienced trial lawyers agree with him<sup>3</sup> and argue that it is often difficult to get a fair and impartial jury.<sup>4</sup> While the problem of juror prejudice is usually associated with criminal cases, civil litigators have become in-

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1. Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36, reprinted in C. DARROW, VERDICTS OUT OF COURT 313, 315 (1963).

2. Warshaw, *Voir Dire*, TRIAL DIPL. J., Fall 1986, at 2.

3. "There is little disagreement among trial attorneys about the importance of voir dire." *Id.* Clarence Darrow was an avid proponent of voir dire. In 1937, he published an article on jury selection and voir dire, writing that "[s]electing a jury is of the utmost importance." C. DARROW, *supra* note 1, at 315. The article described the rules and techniques he employed, which are strikingly similar to those espoused today by modern jury selection specialists. See *infra* note 5. For example, the following quotation illustrates his belief in the importance of case analysis, voir dire, and the careful evaluation of jurors:

So far as possible, the lawyer should know both sides of the case. If the client is a landlord, a banker, or a manufacturer, or one of that type, then jurors sympathetic to that class will be wanted in the box; a man who looks neat and trim and smug . . . Every knowing lawyer seeks for a jury of the same sort of men as his client; men who will be able to imagine themselves in the same situation and realize what verdict the client wants.

In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man; all of these qualities and experiences have left their effect on ideas, beliefs and fancies that inhabit his mind. Understanding of all this cannot be obtained too bluntly. It usually requires finesse, subtlety and guesswork. Involved in it all is the juror's method of speech, the kind of clothes he wears, the style of haircut, and above all, his business associates, residence and origin.

C. DARROW, *supra* note 1, at 315.

4. The problem of juror prejudice is far from new. One of the first statements about the need for impartial jurors was made by Lord Coke, who said, "He that is of a jury, must be *liber*

creasingly concerned with it.<sup>5</sup> This concern is due in part to changes in the nature of civil litigation itself, changes that increasingly give jurors the opportunity to apply their own perspectives on policy when called upon to render a verdict. Trials are no longer mere fact-finding exercises for jurors—seldom is a jury called upon to determine simply who ran the red light. Today, such routine cases usually settle, leaving those of a more controversial nature to go to trial.<sup>6</sup>

Jurors bring their opinions and attitudes on policy with them into

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*homo*, that is, not only a freeman and not bond, but also one that hath such freedom of mind as he stands indifferent as he stands unsworne." 1 E. COKE UPON LITTLETON \*155a.

5. In recent years a number of firms have formed to assist trial attorneys in combating juror bias. For example, the National Jury Project (NJP) was organized in 1975. NATIONAL JURY PROJECT: SYSTEMATIC TECHNIQUES at vii (2d ed. 1986).

Although much of the legal community quickly accepted the role of jury selection assistants, some feel it is inappropriate to use them. See Pavalon, *Jury Selection Theories*, TRIAL, June 1987, at 29. The recent proliferation of firms and individuals that offer jury selection services, however, demonstrates the increasing importance lawyers place on that portion of the trial.

In 1982, the field had developed sufficiently to warrant the formation of a professional organization. This group, now called the American Society of Trial Consultants, has listed 133 members in its 1986 directory.

See also Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3, 3-4 (1976) (describing the "birth" of "scientific jury selection").

6. Routine cases settle because attorneys can make reasonable predictions about which side is likely to win, and to some extent, what the amount of the verdict will be. This is not true of many cases involving controversial policy issues. Because jurors are likely to have volatile feelings about these, the outcome of these cases is unpredictable, making them harder to settle.

Part of the predictability of routine cases results from modern discovery rules that were designed, in part, to enhance settlement. *Doak v. Superior Court*, 257 Cal. App. 2d 825, 830, 65 Cal. Rptr. 193, 196 (1968). With full disclosure of all the facts, each party can fully evaluate the strength of the opponent's case, and compare it to her own.

The courts have gone still further to encourage settlement. For example, some have set up special settlement panels, made up of neutral parties that are experienced members of the plaintiffs and defense bars, and a judge. These programs are generally referred to as compulsory or mandatory nonbinding arbitration. Readey, *Alternative Dispute Resolution—A Trial Lawyer's Primer*, 53 INS. COUNS. J. 300, 305 (1986). Panelists are selected on the basis of competency, experience, and objectivity. *Id.* at 306. The panel members evaluate a case and tell the litigants what they believe the case is worth, usually in the form of an arbitration award. *Id.* The opinions of these panels are given great weight by practitioners, as they combine perspective from both sides with years of experience. Use of the settlement panels results in a higher percentage of cases settling. *Id.* Much of the success of this type of program is attributable to the panelists' ability to predict what a jury will do with a case. Thus, courts typically utilize these programs in personal injury, property damage, and breach of contract cases. See *id.* at 305. When a case involves controversial policy issues, of course, the panel members are less likely to predict the outcome, and consequently more of those cases go to trial.

Strong economic incentives encourage settlement as well. When the parties can settle for a reasonable sum, both plaintiff and defendant avoid risking a substantial investment in the "all or nothing" result of a trial.

the courtroom, and those attitudes can affect the outcome of a case.<sup>7</sup> Theoretically, jurors make their decisions by resolving disputed versions of the facts. Then, applying the jury instructions that contain the law, they determine what they believe to be the proper verdict. They are not supposed to base their decisions on policy considerations. But jurors naturally rely on their own underlying attitudes and opinions on policy in interpreting the facts of the case, and these policy concerns necessarily affect the outcome.<sup>8</sup>

Two of the best examples of cases in which juror opinions on policy are likely to play an important role are products liability and medical negligence cases. In some products liability cases, most notably asbestos litigation,<sup>9</sup> jurors must decide whether to hold a distributor strictly liable for defects in a product that it neither manufactured nor sold to the ultimate consumer. Making this decision requires the juror to decide whether she<sup>10</sup> agrees with the policy objectives behind strict liability. For some jurors, holding a distributor liable represents an important protection for the injured worker or consumer; they concur with the policy objectives behind strict liability.<sup>11</sup> For others, strict liability represents the grossest form of unfair overreaching on the part of plaintiffs and their attorneys. Either opinion is likely to affect a juror's ultimate decision on a distributor's liability.

In medical negligence cases, a juror must evaluate the alleged negligence of doctors, nurses, or other medical personnel. Some jurors come to the courtroom feeling protective of doctors or concerned about the so-

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7. Clarence Darrow seemed to think that those opinions, or "emotions and instincts" as he called them, are the determinative elements in juror decision-making:

It is not the experience of jurors, neither is it their brain power that is the potent influence in their decisions. A skillful lawyer does not tire himself hunting for learning or intelligence in the box; if he knows much about man and his making, he knows that all beings act from emotions and instincts, and that reason is not a motive factor.

C. DARROW, *supra* note 1, at 316.

8. For an overview of juror attitudes relevant to civil jury trials, see generally NATIONAL JURY PROJECT, *supra* note 5, §§ 10.03(6), 13.02.

Mr. Darrow's view of the role of the jurors' underlying attitudes was that, "[a]ssuming that a juror is not a half-wit, his intellect can always furnish fairly good reasons for following his instincts and emotions." C. DARROW, *supra* note 1, at 316.

9. Asbestos litigation continues to constitute a major part of the trial calendar in many California courts. For example, as of September 11, 1986, in Alameda County there were over 100 asbestos cases with trial dates scheduled, over 100 others that required settlement conferences, and an additional several hundred that had at-issue memoranda filed but were still waiting for settlement conferences and trial dates. *In re Complex Asbestos Litig.*, No. 607734-9, Gen. Order 1.00 (Alameda County Super. Ct. Sept. 11, 1986).

10. This Note will use the female gender as a convention to refer to both genders.

11. For a discussion of the policy objectives behind the rule of strict liability in tort for defective products, see *Ray v. Alad Corp.*, 19 Cal. 3d 22, 30-31, 560 P.2d 3, 8-9, 136 Cal. Rptr. 574, 579-81 (1977).

called medical malpractice insurance crisis, or both.<sup>12</sup> Other jurors come with a history of bad experiences with the medical profession and consciously or unconsciously await the opportunity to extract revenge.

Whether society benefits from subjecting a distributor to strict liability for defective products or a physician to damage awards are but two examples of the many types of civil cases that raise major policy questions and provide opportunities for juror bias to affect a verdict.<sup>13</sup> Trial attorneys must attempt to determine which jurors are biased and remove them from the venire<sup>14</sup> from which a jury will be selected. Voir dire examination and the exercise of cause and peremptory challenges are the procedures for accomplishing this task.<sup>15</sup>

Voir dire is the process of questioning the members of the venire prior to selection of the jurors who will actually decide the case.<sup>16</sup> In

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12. Public opinion on this issue became so polarized that in 1975 the California legislature passed the Medical Injury Compensation Reform Act (MICRA), limiting a plaintiff's recovery for pain and suffering to \$250,000 in medical negligence cases. CAL. CIV. CODE § 3333.2 (West Supp. 1987).

13. Major policy questions also arise regarding other factual and legal issues such as, for example, premises liability, *see generally* *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985), wrongful termination, *see generally* *Tameny v. Atlantic Richfield Co.*, 27 Cal. App. 3d 167, 164 Cal. Rptr. 839 (1980), highway design defect cases, *see generally* *Harland v. State*, 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977), bad faith insurance claims, *see generally* *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), sexual harassment, *see generally* Vermuelen, *Sexual Harassment*, in *WOMEN AND THE LAW* § 308, at 3-30 to 3-31 (C. Lefcourt ed. 1987), and civil rights violations and police misconduct, *see generally* NATIONAL LAWYERS GUILD, *POLICE MISCONDUCT LITIGATION MANUAL* (I.M. Avery & D. Rudovsky eds. 1978). Cases that include punitive damage claims are controversial as well. For a general discussion of excessive punitive damage awards, *see* J. GHIARDI & S. KICHNER, *PUNITIVE DAMAGES LAW & PRACTICE* §§ 18.00-18.10 (1985).

14. The word venire comes from Latin, and means "To come, to appear in court." In modern usage it means the list of jurors summoned to serve as jurors for a particular term. BLACK'S LAW DICTIONARY 1395 (5th ed. 1979).

After the venire has been called into the courtroom the clerk calls the roll. The judge will then introduce the parties, tell the venire something about the case, and excuse any jurors with valid hardship excuses. The names of 12 jurors are then drawn at random and those persons are seated in the jury box. The judge usually asks some preliminary questions before allowing counsel for each party to question the jurors. *See* CALIFORNIA CRIMINAL TRIAL JUDGES' BENCHBOOK 294-95, 314.7-314.9 (West 1986) [hereinafter BENCHBOOK].

15. *See infra* notes 19-21 and accompanying text.

16. Voir dire comes from the French and literally means "[t]o speak the truth." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

Many treatises on trial techniques define the attorney's tasks during voir dire to include establishing rapport, educating jurors, and defusing the opponent's case. *See, e.g.*, J. JAMES, *TRIAL ADVOCACY* 167 (1975) (identifying purposes of voir dire to be "elimination, ingratiating, [and] indoctrination"). Case law is quite clear that the only legitimate legal purpose of voir dire is to gather information about jurors upon which to base challenges. *People v. Williams*, 29 Cal. 3d 392, 408, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981); *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 882-83, 64 Cal. Rptr. 655, 658 (1967).

A third perspective concerning the function of voir dire is that

the distinction between the educational and informational purposes of voir dire is

California the judge generally begins the process by asking some preliminary questions.<sup>17</sup> Next, counsel for the plaintiff and the defense may question the jurors.<sup>18</sup> After the questioning, both sides may exercise challenges. The judge rules upon a challenge for cause, granting it if she finds that the juror has a close relationship to the case or one of the parties, or has a "state of mind . . . evincing enmity against or bias to either party."<sup>19</sup> A successful challenge for cause is almost always based on an overt admission of bias by a potential juror.<sup>20</sup>

During the voir dire process, a party may also exercise a peremptory challenge without providing any reason to the court, opposing counsel,

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drawn far too sharply. In a well conducted voir dire, the tasks of eliciting information and educating are integrated. The educational component of the voir dire is best accomplished through a give-and-take questioning process that encourages the prospective juror to think about the issues she or he will confront in a trial. The stock educational questions used by many lawyers and judges actually do very little to educate. Mechanical repetition of the acceptable phrases allows the prospective jurors to *avoid* thinking about the issues. Education occurs only when jurors are encouraged to reflect on the issues and on their attitudes.

NATIONAL JURY PROJECT, *supra* note 5, § 10.01[1].

17. BENCHMARK, *supra* note 14, suggests that the judge interrogate the prospective jurors individually on their business or occupation, the business or occupation of their spouse, the area of the county in which they live, any prior jury experience (including whether it was civil or criminal, a hung jury, or concerning similar charges to the one at bar), and whether the juror, a relative or close friend has had any legal training or experience, has been involved in any way in charges similar to those brought against the defendant, or has had any law enforcement experience. *Id.* at 295; *see also infra* note 196.

18. The California Penal Code requires the court to permit attorney-conducted voir dire. CAL. PENAL CODE § 1078 (West 1985). In contrast, the federal courts, as well as some state courts such as those in Massachusetts, do not permit attorney-conducted voir dire as a matter of course. FED. R. CIV. P. 47(A); MASS. GEN. LAWS ANN. ch. 234 § 28 (West 1986); Commonwealth v. Pope, 392 Mass. 493, 504, 467 N.E. 2d 117, 125 (1984). In those jurisdictions the judge controls voir dire and often does all of the questioning herself. The Massachusetts rule is very similar to the federal rule which reads, in part, "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination." FED. R. CIV. P. 47(A).

19. CAL. CIV. PROC. CODE § 602 (West Supp. 1987).

20. *See* V. STARR & M. MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 303-04 (1985); *see also* L. BLUE & J. SAGINAW, JURY SELECTION: SCIENCE AND STRATEGY § 2.03 (1986).

In *People v. Wheeler*, the California Supreme Court defined the circumstances under which a challenge for cause is exercised:

A challenge for cause is either "general"—the juror is either legally incompetent to serve in any case—or "particular"—the juror is actually or impliedly biased in the specific matter on trial . . . . Actual bias is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party. . . . Implied bias arises when the juror stands in one of several relationships to a party, such as consanguinity . . . ."

22 Cal. 3d 258, 273-74, 583 P.2d 748, 759, 148 Cal. Rptr. 890, 900-01 (1978).

or the juror.<sup>21</sup> Many good reasons exist for permitting such challenges. In *People v. Wheeler*, the California Supreme Court discussed the purpose of the peremptory challenge and how it differed from the cause challenge.<sup>22</sup> The court described a number of circumstances in which one of the parties might fear bias, but which did not present sufficient bias to sustain a challenge for cause. Examples given by the court included a criminal defendant fearing bias from a juror who had been a victim of crime, or a prosecutor fearing bias from a juror who had a record of prior arrests or who had complained of police harassment in the past.<sup>23</sup> The court also pointed out that even less tangible evidence might bring forth a peremptory challenge; a party may feel mistrust of the juror on the basis of a mere sudden impression, a smile, or a glare.<sup>24</sup>

As a rule, jurors do not admit to actual bias during the voir dire questioning.<sup>25</sup> Therefore, even if they are biased they cannot be removed for cause. The peremptory challenge then becomes the only realistic

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21. CAL. PENAL CODE § 1069 (West 1985). But see *Wheeler*, 22 Cal. 3d at 278, 583 P.2d at 760, 148 Cal. Rptr. at 901 (although no reason for peremptory challenge need be given, there must exist a reason in fact; it may not be based upon a "group bias"). See *infra* notes 119-22 and accompanying text.

If there are only two parties, each is entitled to exercise six peremptory challenges. If there are more than two parties, the court divides the parties into two or more sides according to their respective interests, and each of those sides are entitled to eight peremptory challenges. When there are more than two sides, however, the aggregate number of peremptory challenges of one side may not exceed the aggregate number of peremptory challenges on the other. CAL. CIV. PROC. CODE § 601 (West Supp. 1987).

22. 22 Cal. 3d 258, 275, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 902 (1978).

23. *Id.* at 275, 583 P.2d at 760, 148 Cal. Rptr. at 902.

24. *Id.* at 275, 583 P.2d at 761, 148 Cal. Rptr. at 902. "Blackstone . . . adds another function of the peremptory: to preserve the appearance as well as the substance of impartiality by guaranteeing the defendant will not be tried by anyone whom he intuitively dislikes." *Id.* at 275 n.16, 583 P.2d at 761 n.16, 148 Cal. Rptr. at 902 n.16.

25. The conditions under which jurors are questioned influence them to hide or distort facts, often subconsciously. See S. HAMLIN, WHAT MAKES JURIES LISTEN 37-42 (1985).

The quality of any interview, that is, the amount and reliability of the information gathered, is controlled by the conditions under which the interviewer conducts the interview, the type of information sought, and the interview subject's perception of the interview's end results. A social scientist would characterize typical voir dire conditions as an interview situation aimed at establishing potential jurors' qualifications for a task, with the jurors viewing the interviewer as a person of higher status and authority, and with the interviewer, a judge, and the juror's peers evaluating the juror's responses. NATIONAL JURY PROJECT, *supra* note 5, § 2.03.

In voir dire, as with any interview, the juror's natural reaction to stress, embarrassment, peer pressure, and public exposure will affect her responses to questions. A juror knows that the goal of the interview is either to include the juror as qualified, or exclude the juror as unqualified. This knowledge creates a phenomenon called "evaluation apprehension." *Id.* § 2.03[2]. In addition, most people seek to present themselves in the most positive light possible. In the context of a voir dire examination, fairness and objectivity are the most socially desirable traits for the juror to portray to the judge, lawyers, and the juror's peers. Thus, it is a naturally tendency for jurors to respond during voir dire in ways that make them appear fair and impartial. *Id.*

method that a party has available for removing biased jurors. Unless an attorney has some information about the juror's attitudes and beliefs, she cannot make an intelligent decision regarding whether a juror's bias warrants use of a peremptory challenge.<sup>26</sup> Therefore, if the peremptory challenge is to be a meaningful tool for the trial lawyer, it must be prefaced by a voir dire examination that is sufficiently broad in scope to permit the attorney to discover a juror's bias.<sup>27</sup> For this reason, in the 1981 landmark criminal case of *People v. Williams*,<sup>28</sup> the California Supreme Court expanded the permissible scope of voir dire questioning to include questions designed to elicit information helpful to the intelligent exercise of peremptory challenges.

*Williams* provided a modern analysis of the role of voir dire and its scope in a criminal case. After *Williams*, the question remains whether this same analysis should apply to civil trials. For the past one hundred years courts have used civil and criminal cases interchangeably as precedent when determining rules for jury selection and voir dire.<sup>29</sup> The California Supreme Court has in one case, however, made a distinction.<sup>30</sup> In

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26. The court in *Wheeler* revealed the reasons why attorneys jealously guard their peremptory challenges:

[I]n view of the limited number of such challenges allowed by statute we may confidently disregard the possibility that a party will squander his peremptories by removing jurors, simply because he has the right to do so, for frivolous reasons. In practice, a party will use a peremptory challenge only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased.

*Wheeler*, 22 Cal. 3d at 274-75, 583 P.2d at 760, 148 Cal. Rptr. at 901 (footnote omitted).

27. *People v. Williams*, 29 Cal. 3d 392, 404, 628 P.2d 869, 875, 174 Cal. Rptr. 317, 323 (1981).

28. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981). Justice Mosk wrote the opinion for the five justice majority. He was joined by Justices Tobriner, Newman, Reynoso, and Grodin. Chief Justice Bird wrote a concurrence, and Justice Richardson a dissent.

All the justices agreed with the central holding expanding the right to ask voir dire questions for use in the intelligent exercise of peremptory challenges. *Id.* at 398, 412, 414, 628 P.2d at 871, 880, 881, 174 Cal. Rptr. at 319, 328-29. Chief Justice Bird wrote separately to suggest a different formulation of a standard for the court to use in determining which questions it should permit. *Id.* at 412-14, 628 P.2d at 880-81, 174 Cal. Rptr. at 328-29; see *infra* note 73.

Justice Richardson began his dissent by stating "I have no quarrel with the efforts of my colleagues of the majority as they seek to articulate a broad rule which would permit counsel 'to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges . . .'" *Id.* at 414, 628 P.2d at 881, 174 Cal. Rptr. at 329. He disagreed with the majority over whether the error had been harmless, and whether a reversal was mandated. *Id.* at 415-17, 628 P.2d at 881-83, 174 Cal. Rptr. at 329-31.

29. See *infra* notes 89-103 and accompanying text.

30. In *People v. Wheeler*, the court announced a new rule regarding the use of peremptory challenges by prosecutors in criminal cases, and made clear in a footnote that it was not going to decide whether the rule would apply to defense attorneys or to civil cases:

We do not reach . . . the question of the applicability of this decision to civil cases. Although article I, section 16 of the California Constitution governs such cases as well, most of the state and federal authorities relied on herein invoke the requirement

addition, although few cases specifically limit their holdings to criminal cases, in many instances the basis for a ruling is related predominantly to criminal rights.<sup>31</sup> Thus, precedent for the one cannot automatically be used as precedent for the other.

This Note will argue that, although *Williams* was a criminal case, its holding should be applied to civil cases in California. Civil litigants have the same right to an unbiased jury as do criminal defendants and ample precedent exists for applying criminal decisions on voir dire and related issues to civil cases. Indeed, California courts have traditionally done so.<sup>32</sup>

In section I, this Note will trace the development of California law on the permissible scope of voir dire questions, with particular emphasis on *People v. Williams*.<sup>33</sup> Section II will discuss the legal, policy, and historical reasons for extending the *Williams* rule to civil cases.<sup>34</sup> Finally, in section III this Note will outline common objections to such an extension and explain why such criticism is misplaced.

## I. California's Scope of Voir Dire Questioning

The California courts have always permitted voir dire questions designed to determine whether a juror has an actual or implied bias sufficient for a challenge for cause.<sup>35</sup> From 1912 to 1981, however, the law in California under *People v. Edwards* did not permit questions designed solely to obtain information upon which to base the exercise of a peremptory challenge.<sup>36</sup> In *People v. Williams*, the California Supreme Court described the genesis of and rationale for this rule:

The existing rule in California comes to us from a 1912 case, *People v. Edwards*, in which the court purported to justify its holding with the

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of cross-sectionalism in the context of a criminal trial only. Whether the requirement also applies in a civil setting turns on such considerations as the function of a jury in that setting. Because the issue is not presented in the case at bar, we leave it to another day.

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

31. *Williams* is an example of a case that, although not specifically limiting its holding to criminal cases, based that holding largely on criminal rights. See 29 Cal. 3d at 404, 628 P.2d at 875, 174 Cal. Rptr. at 323 (purpose of peremptory challenge in criminal trials is twofold: to insure that jurors are fair and to avoid jurors whose fairness may be seriously questioned).

32. See *infra* notes 89-103 and accompanying text.

33. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981); see *infra* notes 35-88 and accompanying text.

34. See *infra* notes 89-170 and accompanying text.

35. See, e.g., *People v. Hamilton*, 62 Cal. 377, 381-83 (1882).

36. 163 Cal. 752, 754-55, 127 P. 58, 59 (1912). Counsel also could not use voir dire to educate the jury panel on the particular facts of the case, compel the jurors to commit themselves to vote a particular way, prejudice the jury for or against a party, to argue the case, indoctrinate the jury, or instruct jurors on the law. *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 882, 64 Cal. Rptr. 655, 658 (1967).

following observation: "there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examinations of jurors apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and . . . the supposed privilege of doing this has been greatly abused."<sup>37</sup>

Although designed to limit improper and unnecessarily time-consuming voir dire, the *Edwards* rule did not work.<sup>38</sup> In fact, if it were to be applied with strict logic, it would actually impose no significant limitation on examination<sup>39</sup> because numerous grounds exist for making a challenge for cause. Since neither the court nor the attorney knows how the prospective juror will answer any question, in theory *any* question *could* provide the basis for a challenge for cause. A judge must rule, however, on the propriety of a question before the answer is given. Thus, in reality "the only limitation on the admissibility of a particular question under the *Edwards* rule is the judge's ability or willingness to conceive of a possible response that would reveal legally cognizable bias."<sup>40</sup> Moreover, as long as counsel's questions were material to a challenge for cause, they could be endlessly repetitive or confusing.<sup>41</sup>

As a result of the "unwieldy standard" set forth in *Edwards*, courts developed their own standards—with understandably erratic results.<sup>42</sup> For instance, one court developed an ad hoc balancing test comparing "the likelihood that a particular question would ultimately lead to a challenge for cause with the probability that it would result in a peremptory challenge."<sup>43</sup>

Dissatisfied with what it perceived to be a limited judicial application of the restrictive *Edwards* rule, in 1927 the California legislature passed Penal Code section 1078.<sup>44</sup> The courts interpreted this statute as directing the courts to permit only "reasonable examination of prospective jurors by counsel . . ."<sup>45</sup> Many courts viewed this interpretation as further justification for restricting counsel's right to ask questions for the purpose of uncovering latent prejudice.<sup>46</sup> Often, the result was to reduce voir dire to a "stark little exercise consuming minutes rather than hours

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37. 29 Cal. 3d 392, 399, 628 P.2d 869, 871, 174 Cal. Rptr. 317, 319 (1981) (citations omitted).

38. *Id.* at 399, 628 P.2d at 871, 174 Cal. Rptr. at 319.

39. *Id.*

40. *Id.* at 399, 628 P.2d at 872, 174 Cal. Rptr. at 320.

41. *Id.*

42. *Id.* at 400, 628 P.2d at 872, 174 Cal. Rptr. at 320.

43. *Id.*; see also *People v. Estorga*, 206 Cal. 81, 87, 273 P. 575, 577 (1928) (questions were not so much for the purpose of laying basis for challenge for cause as to pave the way for possible peremptory challenge).

44. CAL. PENAL CODE § 1078 (West 1985); *Williams*, 29 Cal. 3d at 400, 628 P.2d at 872, 174 Cal. Rptr. at 320.

45. *Id.* at 400, 628 P.2d at 872, 174 Cal. Rptr. at 320.

46. *Id.* at 401, 628 P.2d at 872, 174 Cal. Rptr. at 320.

and often eliciting no verbal responses at all."<sup>47</sup>

These practices reflected some courts' opinion that actual bias meant a bias that the juror was aware of and willing to express. Thus, if a juror were willing to swear that she would judge the case solely on the evidence adduced during the trial, these courts would take her at her word, no matter what her actual predisposition.<sup>48</sup>

Then in 1980, Jimmie Ray Williams was convicted of voluntary manslaughter, and his appeal presented an opportunity to challenge the *Edwards* rule.<sup>49</sup> Williams had been drinking one evening with a friend, Travis King, when the two men became involved in a fight on a freeway ramp. Both were arrested. After King was released from jail he went to Williams' house to retrieve his car. When he arrived, King told Williams' son that he wished to speak to Williams, and followed the son to the bedroom where Williams lay sleeping with his one year old grandson. Williams told his son that he did not wish to be disturbed, whereupon King pounded on the door, shouted obscenities and demanded that Williams come out and fight. Williams opened the door and in the ensuing fight King was fatally shot.<sup>50</sup>

Williams was charged with murder. The central issue at trial was whether Williams had acted reasonably in defense of himself, his home, and his small grandson. He was acquitted of murder, but convicted of voluntary manslaughter.<sup>51</sup>

#### A. The Voir Dire Process in *Williams*

The *Williams* voir dire began in typical fashion. The judge asked the jurors, en masse, if they would follow the court's instructions on the law, regardless of whether they agreed with them. The jurors responded, en masse, that they would. The trial court also asked the jurors as a group whether any of them had any quarrel with the proposition that the prosecution must prove the defendant guilty beyond a reasonable doubt, and that the defendant is presumed innocent until proven guilty. None of the jurors responded in the affirmative.<sup>52</sup>

Counsel then questioned the jurors individually. The court precluded defense counsel from asking one juror if she could conceive of a "hypothetical, reasonable, and prudent man," or asking another juror to give him "a brief idea of your feeling about the right of a person to de-

47. *Id.* at 401, 628 P.2d at 873, 174 Cal. Rptr. at 321 (quoting Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 549 (1975)).

48. *Williams*, 29 Cal. 3d at 401, 628 P.2d at 873, 174 Cal. Rptr. at 321 (citing Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1495 (1975) (authored by Jay M. Spears)).

49. *People v. Williams*, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981).

50. *Id.* at 397, 628 P.2d at 870, 174 Cal. Rptr. at 318.

51. *Id.*

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

fend himself in his own home.”<sup>53</sup>

Defense counsel then attempted a different line of questioning. He sought permission to ask whether the jurors willingly would follow an instruction that a person has a right to resist an aggressor by using necessary force, and has no duty to retreat. The court also declined to permit that question. The court, however, did allow counsel to ask generally whether the members of the panel would follow self-defense instructions even if they disagreed with the law. Two jurors expressed uncertainty and confusion in answering this question. One juror replied that he “could not truthfully answer,” and that he did not “know for sure.”<sup>54</sup> The other asked for an example. Even with such apparent juror confusion, the trial court judge refused to permit counsel to ask the questions he had requested earlier.<sup>55</sup>

On appeal, the defendant challenged the *Edwards* rule prohibiting attorneys from conducting voir dire as a means of uncovering reasons for peremptory challenges. The California Supreme Court overruled *Edwards* and, in so doing, adopted the standard that had been adopted long before by both the federal courts and a majority of state jurisdictions.<sup>56</sup>

[C]ounsel should at least be allowed to inquire into “matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.” In addition, if a particular juror has given the court some reason to suspect he harbors such feelings, even though the general population does not, further questioning would be appropriate.<sup>57</sup>

The court divided its ruling into three main parts. The bulk of the opinion addressed the major issue, whether the court should permit a voir dire question when its sole purpose is to uncover the basis for a peremptory challenge.<sup>58</sup> The next portion of the opinion discussed the trial court’s discretion to contain voir dire within reasonable limits,<sup>59</sup> and the final section of the opinion applied the new standard to voir dire questions concerning a juror’s ability to apply specific doctrines of law.<sup>60</sup>

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53. *Id.* at 398, 628 P.2d at 870-71, 174 Cal. Rptr. at 319.

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

55. *Id.*

56. Justice Mosk, writing for the majority, pointed out that the decision was an idea whose time had come: “Like a moss-covered oak, the doctrine has seemed sturdy because of its venerable age, but we have only to examine its shallow roots and hollow substance to realize that it is precariously poised, ready to topple at the first challenging blow.” *Id.* at 397, 628 P.2d at 870, 174 Cal. Rptr. at 318; see also *infra* note 69 and accompanying text.

57. *Williams*, 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325 (citation omitted).

58. *Id.* at 398-407, 628 P.2d at 871-77, 174 Cal. Rptr. at 319-25.

59. *Id.* at 408-09, 628 P.2d at 877-78, 174 Cal. Rptr. at 325-26.

60. *Id.* at 409-12, 628 P.2d at 878-80, 174 Cal. Rptr. at 326-28.

## B. The Peremptory Challenge Issue: Striking Down the *Edwards* Rule

The sole issue raised on appeal was the trial court's refusal to permit the excluded questions. The defendant argued, despite precedent to the contrary, that the trial court should have permitted them because they either would have provided a basis for a challenge for cause, or could have assisted counsel in intelligently exercising a peremptory challenge. The California Supreme Court ruled:

We hold that the existing standard is unnecessarily restrictive and arbitrarily applied, and adopt the rule prevailing in most other jurisdictions that counsel may make reasonable inquiries to assist in the intelligent exercise of peremptory challenges. We further hold that a question about a prospective juror's willingness to apply a specific doctrine of law if so instructed should be permitted if the doctrine is likely to be applied at trial . . . .<sup>61</sup>

In explaining its ruling, the court examined the history and development of the law regarding voir dire in California.<sup>62</sup> It found that the *Edwards* rule had created a restrictive and wooden approach to voir dire, insupportable in light of the "unassailable truth that direct and general inquiries about juror bias cannot be expected to uncover all forms of partiality."<sup>63</sup>

After giving a detailed and insightful analysis of the purpose of voir dire and peremptory challenges, the court laid to rest the myth that general questions about a juror's ability to be fair are sufficient to elicit adequate information about juror bias. First, the court pointed out that bias often deceives its host by distorting not only her views of the world around her, but of herself.<sup>64</sup> While a juror may be answering in good faith when she responds in the affirmative to a general question about her ability to be fair, further questioning may reveal bias of which she is unaware or believes she can overcome. Even if a juror is aware that she holds a certain bias or has knowledge of certain facts that might make it difficult for her to be impartial, a general question about her ability to be fair may not bring them to mind.<sup>65</sup>

The court then discussed the conditions under which voir dire is

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

62. *See supra* notes 36-47 and accompanying text.

63. *Williams*, 29 Cal. 3d at 401, 628 P.2d at 873, 174 Cal. Rptr. at 321.

64. In a footnote, the court pointed out that some authorities even suggest that the accuracy of a person's estimation of her own fairmindedness is likely to be inversely proportional to the depth of her actual prejudices. *Williams*, 29 Cal. 3d at 402 n.2, 628 P.2d at 873 n.2, 174 Cal. Rptr. at 321 n.2 (citing A. FRIENDLY & J. GOLDFARB, CRIME AND PUBLICITY 103 (1967)).

65. *Id.* at 402 & n.3, 628 P.2d at 873 & n.3, 174 Cal. Rptr. at 321 & n.3.

The court also attacked the practice of limiting the use of open-ended questions. *Id.* at 402-03 & n.4, 628 P.2d at 877 & n.4, 174 Cal. Rptr. at 322 & n.4. An open-ended question is one that does not suggest an answer to the respondent. Generally, it cannot be answered yes or no, but requires the respondent to answer in at least a sentence, if not a longer narrative.

conducted and its effect on prospective jurors. It noted that "little psychological insight is needed to realize that the setting in which voir dire is conducted creates additional pressures for the venireman to answer questions as he believes the judge would have him answer, or in conformity with the answers of the preceding panelists."<sup>66</sup> These practical reasons led the court to abolish the *Edwards* rule.

The court also set forth policy reasons for striking down the *Edwards* rule. It stressed that public support for a system of justice depends not only on its ability to do justice, but also on its ability to project to the parties and the public the "unimpeachable image of fairness."<sup>67</sup> The peremptory challenge has long been a "fixative for preserving that image."<sup>68</sup> Moreover, peremptory challenges provide little benefit if counsel must exercise them unaided by relevant information. The court found that because the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury, questions aimed at eliciting information relevant to its exercise fall within the bounds of "reasonable inquiry," and therefore counsel may properly ask those questions.<sup>69</sup>

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Open-ended voir dire questions often begin with phrases such as "Tell me about . . ." or "What do you think about . . . ?"

A close-ended question is one that suggests its answer to the respondent. In the voir dire setting, the classic example of a close-ended question is "Will you follow the law as the judge gives it to you?" Such a question suggests to the respondent that the correct answer is yes. For most people, telling the judge they would refuse to follow her instructions would be unthinkable. That tendency is exaggerated in a situation when, as in *Williams*, the jurors have no idea what the instructions might be and therefore have no reason to suspect they would be disinclined to follow them. See *id.* at 402-03, 628 P.2d at 874, 174 Cal. Rptr. at 322; see also Hanley, *Voir Dire: The View From the Jury Box*, 12 LITIGATION, Summer 1986, at 22 (reporting on juror frustration at being asked whether they would be fair regarding a case about which they knew nothing).

66. *Williams*, 29 Cal. 3d at 403, 628 P.2d at 874, 174 Cal. Rptr. at 322; see also *supra* note 25.

67. *Williams*, 29 Cal. 3d at 404, 628 P.2d at 874, 174 Cal. Rptr. at 322.

68. *Id.* at 404, 628 P.2d at 874-75, 174 Cal. Rptr. at 322-23.

69. *Id.* at 405, 628 P.2d at 875, 174 Cal. Rptr. at 323.

The court had several additional reasons for adopting the new rule. First, it was necessary to effectuate the policies enunciated in *People v. Wheeler*. See *infra* note 155 and accompanying text. Second, the federal courts, and most other state courts agreed with the proposition that reasonable latitude is necessary in voir dire to allow proper exercise of the peremptory challenge. *Williams*, 29 Cal. 3d at 405-07, 628 P.2d at 875-76, 174 Cal. Rptr. at 323-24. Third, the "compelling wisdom of the majority rule" and the difficulty encountered in applying *Edwards* had led some California appellate courts to suggest abandoning it altogether, thereby creating a legitimate conflict in the law. Finally, the court recognized that, in reality, many courts allow a broad range of questions even when purporting to apply the *Edwards* rule, thus implicitly acknowledging the legitimacy of voir dire conducted for the purpose of the intelligent exercise of peremptory challenges. See *id.* at 407, 628 P.2d at 876-77, 174 Cal. Rptr. at 324-25.

### C. Defining the New Standard

The *Williams* court recognized that trial courts must have broad discretion to contain voir dire within reasonable limits, but made clear that "expedition should not be pursued at the cost of the quality of justice."<sup>70</sup> In providing guidance on how to balance these competing objectives, the court developed a two-prong test. If the trial court finds that either prong is met, it should permit counsel to ask the questions in dispute. For the first prong, the *Williams* court adopted the rule from the United States Circuit Court case, *United States v. Robinson*,<sup>71</sup> that "counsel should at least be allowed to inquire into 'matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact.'" <sup>72</sup> The second prong of the test allows further questioning when a particular juror gives some indication that she might harbor some bias, even though the general population might not have such a bias.<sup>73</sup>

Anticipating the objections and fear that the new rule would herald a return to the "inordinately extensive and unfocused questioning that prompted the adoption of the *Edwards* rule," the court explicitly left intact the "considerable discretion of the trial court to contain voir dire within reasonable limits."<sup>74</sup> The court made clear that if the trial court must choose between the prohibition of unreasonable conduct to ex-

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70. *Id.* at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325 (quoting *United States v. Blount*, 479 F.2d 650, 652 (6th Cir. 1973)).

71. 475 F.2d 376 (D.C. Cir. 1973).

72. *Williams*, 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325 (quoting *Robinson*, 475 F.2d at 381).

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

In her concurrence, Chief Justice Bird criticized the standard adopted by the majority as "more difficult to apply than its predecessor." *Id.* at 412, 628 P.2d at 880, 174 Cal. Rptr. at 328 (Bird, C.J., concurring). Her concern was twofold. First, she pointed out that judicial interpretation of the phrase "matters concerning which either the local community or the population at large is known to harbor strong feelings" could differ widely and lead to unpredictable results. *Id.* at 412-13, 628 P.2d at 880, 174 Cal. Rptr. at 328. Furthermore, in her opinion, a trial judge's gut-level feelings about the possibility of bias in a community are not a proper standard for determining whether or not a court will permit a particular question at voir dire. *Id.* at 414, 628 P.2d at 881, 174 Cal. Rptr. at 329.

Second and more importantly, she argued that voir dire should not be limited to "commonly known" prejudices. *Id.* She saw no reason why a defendant should bear the risk that one of her jurors may harbor doubts about a crucial legal principle merely because most community members might not harbor such doubts. Therefore, in Chief Justice Bird's opinion, a court should permit voir dire into all significant legal and factual aspects of a case.

She suggested that the trial court could employ a standard similar to California Evidence Code section 352 in exercising its discretion on whether or not it should permit a certain question. *Id.* at 412-14, 628 P.2d at 881, 174 Cal. Rptr. at 328-29 (Bird, C.J., concurring); see CAL. EVID. CODE § 352 (West 1976).

74. *Williams*, 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325.

pediate voir dire and the rights of the party to ask probing questions in order to exercise voir dire intelligently, the latter must prevail.<sup>75</sup>

The *Williams* court reaffirmed that the purpose of voir dire was not to educate the jury panel to the particular facts of case, compel the jurors to commit themselves to vote a particular way, prejudice the jury for or against a party, argue the case, nor indoctrinate or instruct the jury on the law. Yet a court should not exclude a question that counsel fairly phrases and legitimately aims at obtaining information essential for the intelligent exercise of a peremptory challenge merely because it also tends to accomplish one of the goals recited above. The court referred to such a situation as an "unavoidable consequence" of the voir dire examination.<sup>76</sup>

#### D. Questions on Specific Doctrines of Law

The third issue<sup>77</sup> addressed by the *Williams* court was whether counsel may ask venirepersons if they are willing to apply specific doctrines of law, if so instructed. The court held this practice permissible and directed the trial court to evaluate these questions in the same manner that it evaluates other voir dire questions. Thus, the trial court should permit specific doctrines of law when, judging from the nature of the case, the trial court judge believes that the doctrine is likely to be relevant at trial.<sup>78</sup>

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75. The court reasoned: "Under this standard, trial courts need not and should not permit the inordinately extensive and unfocused questioning that prompted the *Edwards* rule. Nonetheless, 'expedition should not be pursued at the cost of the quality of justice.'" *Id.* at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325 (citations omitted).

76. *Id.* at 408-09, 628 P.2d at 877-78, 174 Cal. Rptr. at 325-26.

77. For a general description of the issues discussed by the *Williams* court, see *supra* notes 58-60 and accompanying text.

78. *Williams*, 29 Cal. 3d at 410, 628 P.2d at 879, 174 Cal. Rptr. at 327. The court dismissed a number of arguments made by the Attorney General concerning why courts should not permit questions on specific doctrines of law. The first argument made by the Attorney General was the independent rule that counsel should not test jurors on their knowledge of law. Since the questions in *Williams* did not require any preexisting knowledge of legal doctrines, but only elicited prospective jurors' opinions about them, they did not run afoul of the rule. *Id.* at 409-10, 628 P.2d at 878, 174 Cal. Rptr. at 326.

Second, the Attorney General argued that since the jurors had expressed a general willingness to apply those doctrines of law the court might give to them, to permit more specific questioning would amount to an admission that the jurors would "falsify their answers in order to be empaneled." *Id.* at 410, 628 P.2d at 878, 174 Cal. Rptr. at 326. Such an admission would be contrary to the presumption of veracity to which their answers were entitled. The court responded to that argument in two ways. It pointed again to the problem of subtle or unconscious bias, of which a juror might not be aware. This lack of awareness would make it impossible for a juror to reveal her bias in response to a general "will you follow the law" question. Secondly, an average venireperson has a limited fund of knowledge from which to make an accurate evaluation of such a broad question. An affirmative response to a "will you follow the law" question may be accurate in that she is generally willing to follow the court's

Furthermore, the court held that refusal by the trial court to permit a question regarding a doctrine of law could be reversible error. A higher court should reverse, however, only if it finds the doctrine to be actually relevant to the case, and the excluded question substantially likely to expose strong attitudes antithetical to the defendant's cause.<sup>79</sup>

After defining the reversible error standard, the court then considered the three questions that defense counsel had requested and the trial court refused to permit. Applying the new standard, the court determined that, while all three were arguably relevant and could properly have been permitted, only one was erroneously and prejudicially excluded.<sup>80</sup> The court found that the first question, regarding a juror's ability to imagine a hypothetical reasonable and prudent man, would have little potential for exposing prejudice or reluctance by a juror to apply the law.<sup>81</sup> The second question dealt with the right to defend oneself in one's home. Of all the aspects of self-defense law, the court reasoned, this principle was the least likely to meet with opposition. Therefore it did not meet the standard the court had established for reversible error.<sup>82</sup> Nor was it compelled under the second prong of the new standard,<sup>83</sup> because the particular juror to whom the question would have been addressed expressed no reservations about applying the law of self-defense in response to previous questions. Thus, the court had no reason to suspect the individual juror might quarrel with this generally accepted tenet of self-defense law.<sup>84</sup>

The trial court's refusal to permit counsel to ask the third question, which concerned the use of force when an avenue of retreat remained open, mandated a reversal, however.<sup>85</sup> California law does not require

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direction. Faced for the first time with an instruction that is repugnant, however, that juror might hesitate to apply it. *Id.*; see *supra* note 25.

79. *Williams*, 29 Cal. 3d at 410, 628 P.2d at 879, 174 Cal. Rptr. at 327.

80. *Id.*

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

82. See *supra* note 79 and accompanying text.

83. See *supra* note 73 and accompanying text.

84. *Williams*, 29 Cal. 3d at 411, 628 P.2d at 879, 174 Cal. Rptr. at 327.

85. The court failed to discuss a standard for reversible error when the question did *not* pertain to a doctrine of law. Although some judges and attorneys interpret this omission to mean that *only* questions regarding doctrines of law can provide the basis for a reversal, no language in the opinion supports that position. Those who advocate that position point to the following language:

Although in many contexts a procedure depriving defendant of the right to secure an impartial jury necessarily dictates reversal, that standard should not apply if the potential for bias relates only to a particular doctrine of law. When antipathy to a legal rule is the issue, its potential effect is limited by the significance of the rule to the case's outcome.

*Id.* at 412, 628 P.2d at 879-80, 174 Cal. Rptr. at 327-28 (citations omitted).

If read carefully, however, that language merely states that not *all* relevant questions on doctrines of law that are disallowed will mandate a reversal. It is describing a situation in

the reasonable person to retreat before using force. The court described this rule as "controversial," reasoning that a real possibility exists that the average juror might disagree with it. To support this conclusion, the court noted that the law regarding the duty to retreat under these circumstances varies substantially throughout the country.<sup>86</sup> Since the verdict in the *Williams* case was likely to turn on the question of whether the defendant killed in justifiable self-defense, a juror who believed that a person must take an avenue of retreat prior to the use of deadly force would find it difficult to judge the defendant's conduct objectively under California law. If defense counsel knew that a juror held such an opinion, she would probably exercise a peremptory challenge against that juror.<sup>87</sup> Therefore, the court held that because this question had a substantial likelihood of uncovering juror bias, the trial court had abused its discretion in refusing counsel permission to ask it.<sup>88</sup>

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which the error would be harmless. The phrase "only to a particular doctrine of law" in this context means "only to a particular doctrine of law when that doctrine of law is not one which is relevant."

There is a better explanation of the *Williams* court's failure to discuss reversible error in the context of non-doctrine of law issues. The court probably believed that none of the non-doctrine of law questions required reversal, and it limited its decision to that which it was required to decide. In accordance with this view, at least one court of appeal case has reversed a conviction on a non-doctrine of law issue, relying on *Williams*. See *People v. Wells*, 149 Cal. App. 3d 721, 725-27, 197 Cal. Rptr. 163, 166-68 (1983) (involving questions going to racial prejudice).

In the absence of additional discussion concerning what is reversible error for non-doctrine of law issues, it is logical to apply an identical standard to such questions as that established for doctrine of law questions:

[I]n general a reasonable question . . . should be permitted when from the nature of the case the judge is satisfied that [it] is likely to be relevant at trial. Reversal will be required, however, only if [it] is actually relevant, and the excluded question is found substantially likely to expose strong attitudes antithetical to [the party's] cause.

*Williams*, 29 Cal. 3d at 410, 628 P.2d at 879, 174 Cal. Rptr. at 327 (citations omitted).

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

The second prong of the standard also would have required that a trial court permit this question. During the course of the voir dire the trial court should have recognized that certain jurors expressed some doubt about their willingness to apply self-defense principles with which they disagreed. *Id.* at 411, 628 P.2d at 879, 174 Cal. Rptr. at 327.

87. *Id.* (quoting *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973)).

88. *Id.* at 412, 628 P.2d at 879, 174 Cal. Rptr. at 327.

The court also discussed what might constitute harmless error. It stated that it would not mandate reversal if "the potential for bias related *only* to a particular doctrine of law." *Id.* at 412, 628 P.2d at 879-80, 174 Cal. Rptr. at 327-28 (emphasis added). Whether it should be considered reversible error depends on how significant the rule is to the outcome of the case. If the rule is irrelevant to the outcome, in light of the evidence, failure to permit counsel to examine the juror on the doctrine of law is harmless. It is also harmless error if the rule is irrelevant as a matter of law, or if no reasonable, impartial juror would apply the rule, if the jury's verdict indicates that it applied the rule in favor of defendant. *Id.*

### E. Significance of *Williams*

The *Williams* court made five significant points regarding voir dire in criminal cases. First, *Williams* reiterated and emphasized that the peremptory challenge is a critical safeguard of the constitutional right to a fair trial before an impartial jury. Second, the court held that courts should permit counsel to ask questions directed towards the intelligent exercise of those challenges. Third, it approved counsel's use of probing, open-ended questions in place of the traditional general, conclusory, close-ended questions. Fourth, since this type of questioning is so important, trial courts should permit counsel to ask these questions, even if this practice results in ancillary undesirable effects, such as slowing down the trial process or indoctrinating the jury. Finally, the court held that in some circumstances, the failure of a trial court to permit adequate questioning will be reversible error. The California Supreme Court in *Williams* signalled a change in policy regarding voir dire questions in criminal cases, allowing more liberal voir dire for the purpose of achieving a fair trial through the intelligent exercise of peremptory challenges.

## II. *Williams* Should Be Applied to Civil Cases

### A. Criminal Case Precedent Applies to Civil Cases On Jury Selection Issues

Historically, California courts have used criminal and civil precedent interchangeably in cases involving jury selection issues.<sup>89</sup> The courts have made little, if any, distinction between the two.<sup>90</sup> This interchange is logical because with few exceptions, the function and role of the jury is identical in both.

Juror misconduct cases are a good example of the interchangeable use of civil and criminal precedent. Civil courts have used criminal precedent for defining when a juror has committed misconduct,<sup>91</sup> for holding that a juror's concealment of bias during voir dire constitutes misconduct,<sup>92</sup> and for finding that a juror's receipt or communication of information that is not evidence in the case to other jurors is also jury

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89. See *infra* notes 90-103 and accompanying text.

90. The courts are not alone in failing to make any distinction. In the notes of decisions following the statutes that govern the impanelling of jurors in civil cases numerous citations are made to criminal cases. See CAL. CIV. PROC. CODE §§ 600-605 (West 1976 & West Supp. 1987).

91. *People ex rel. Dep't Pub. Works v. Curtis*, 255 Cal. App. 2d 378, 390, 63 Cal. Rptr. 138, 146 (1967) (citing *People v. Wong Loug*, 159 Cal. 520, 523, 114 P. 829, 830 (1911)).

92. *Curtis*, 255 Cal. App. 2d at 388, 63 Cal. Rptr. at 144 (citing *People v. Galloway*, 202 Cal. 81, 92, 259 P. 332, 336 (1927)); *Shipley v. Permanente Hosp.*, 127 Cal. App. 2d 417, 422, 274 P.2d 53, 56 (1954) (citing *Galloway*, 202 Cal. at 92, 259 P. at 336, and *Clark v. United States*, 289 U.S. 1, 14 (1932)), *rev'd on other grounds sub nom. People v. Hutchinson*, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969).

misconduct.<sup>93</sup>

The practice of using civil and criminal precedent interchangeably is also common in decisions on evidentiary questions related to juror misconduct. For example, civil courts have followed criminal precedent in deciding when a party may use a juror's affidavit to impeach a verdict,<sup>94</sup> when a court will presume juror bias to be prejudicial,<sup>95</sup> when the opposing party may rebut that presumption of prejudice,<sup>96</sup> when jurors are competent witnesses to prove objective facts to impeach a verdict,<sup>97</sup> and when declarations on such issues are admissible.<sup>98</sup>

Decisions concerning the most fundamental issues of jury selection have followed the same pattern. Courts deciding appeals in civil cases use criminal precedent to define the purpose and function of voir dire,<sup>99</sup> to establish that a trial before unbiased and unprejudiced jurors is an inseparable and inalienable part of the constitutional right to a trial by jury,<sup>100</sup> and to find that it is error for a trial court to interfere with the

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93. *Ballard v. Uribe*, 41 Cal. 3d 564, 590, 715 P.2d. 624, 641, 224 Cal. Rptr. 664, 681 (1986) (Bird, C.J., concurring and dissenting) (citing *People v. Lessard*, 58 Cal. 2d 447, 454, 375 P.2d 46, 49, 25 Cal. Rptr. 78, 81 (1962)); *Smith v. Covell*, 100 Cal. App. 3d 947, 952, 161 Cal. Rptr. 377, 380 (1980) (citing *Lessard*, 58 Cal. 2d at 454, 375 P.2d at 49, 25 Cal. Rptr. at 81).

94. *Andrews v. County of Orange*, 130 Cal. App. 3d 944, 953, 182 Cal. Rptr. 176, 181 (1982) (citing *People v. Hutchinson*, 71 Cal. 2d 342, 349-50, 455 P.2d 132, 136-37, 78 Cal. Rptr. 196, 200-01 (1969)); *Curtis*, 255 Cal. App. 2d at 389, 63 Cal. Rptr. at 145 (citing *People v. Gidney*, 10 Cal. 2d 138, 146, 73 P.2d 1186, 1191 (1937)).

95. *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 416-17, 650 P.2d 1171, 1189, 185 Cal. Rptr. 654, 672 (1982) (citing *People v. Honeycutt*, 20 Cal. 3d 150, 156 n.3, 570 P.2d 1050, 1053 n.3, 141 Cal. Rptr. 698, 701 n.3 (1977)) ("No principled distinction can be drawn between civil and criminal cases for purposes of the presumption of prejudice arising from juror misconduct."), *cert. dismissed*, 459 U.S. 1190 (1983).

96. *Id.* at 417, 650 P.2d at 1189, 185 Cal. Rptr. at 672 (citing *People v. Phillips*, 122 Cal. App. 3d 69, 81, 175 Cal. Rptr. 703, 710 (1981)).

97. *See Uribe*, 41 Cal. 3d at 576, 715 P.2d at 630-31, 224 Cal. Rptr. at 671. In his concurrence, Justice Mosk cites *People v. Hutchinson*, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969), for this proposition. He includes, *inter alia*, three criminal cases as examples: *In re Stankewitz*, 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1985) (juror instructing other jurors on the law); *People v. Valles*, 24 Cal. 3d 121, 593 P.2d 240, 154 Cal. Rptr. 543 (1979) (allowing an alternate juror to sit with the 12 deliberating jurors); *People v. Honeycutt*, 20 Cal. 3d 150, 570 P.2d 1050, 141 Cal. Rptr. 698 (1977) (the foreman of the jury consulting an outside attorney).

98. *Uribe*, 41 Cal. 3d. at 596, 715 P.2d at 645, 224 Cal. Rptr. at 685 (Bird, C.J., dissenting) (citing, *inter alia*, *In re Stankewitz*, 40 Cal. 3d at 397, 708 P.2d at 1262, 220 Cal. Rptr. at 384; *People v. Pierce*, 24 Cal. 3d 199, 208 n.4, 595 P.2d 91, 95 n.4, 155 Cal. Rptr. 657, 661 n.4 (1979); *People v. Gidney*, 10 Cal. 2d 138, 146, 73 P.2d 1186, 1191 (1937)).

99. In *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (1967), a civil case often quoted for its statement of the purpose of voir dire, the court relied only on criminal cases as well as a criminal statute for its ruling.

100. *Tapia v. Barker*, 160 Cal. App. 3d 761, 765, 206 Cal. Rptr. 803, 805 (1984) (citing *People v. Wheeler*, 22 Cal. 3d 258, 265, 583 P.2d 748, 754, 148 Cal. Rptr. 890, 895 (1978)); *Andrews v. County of Orange*, 130 Cal. App. 3d 944, 953, 182 Cal. Rptr. 176, 180 (1982)

exercise of peremptory challenges.<sup>101</sup>

*Hasson v. Ford Motor Co.*,<sup>102</sup> a civil case involving allegations of juror misconduct, provides a good example of the interchangeable use of civil and criminal precedent. The plaintiffs in *Hasson* were a college student and his father. The young man suffered injury when the brakes on his automobile failed as he was driving down a hill. The young man sued, relying in part on a strict products liability theory. After a lengthy trial, the jury returned a judgment of more than eleven million dollars. Ford moved for a new trial on numerous grounds, among them juror misconduct. In its opinion, the California Supreme Court analyzed a variety of types of potential juror misconduct, including the jurors' failure to fulfill their duty of attentiveness. In rejecting Ford's contention that the jurors' conduct constituted reversible error, the court noted that appellate courts have consistently refused to reverse judgments due to jurors sleeping through portions of the trial. To illustrate its point, the court cited a total of nine cases from five jurisdictions in which appellate courts failed to overturn verdicts in cases in which jurors were literally sleeping on the job. Five of them—more than half—were criminal cases. The *Hasson* court also discussed cases relating to juror intoxication, citing four cases, *all* of them criminal. In discussing cases that rejected allegations of misconduct based upon the apparently inattentive demeanor of jurors during trial proceedings, it mentioned two criminal cases and one civil case.<sup>103</sup>

Following the courts' use of civil cases using civil and criminal precedent interchangeably, the rule enunciated in *Williams* should extend to civil cases. No case, however, expressly holds that criminal precedent on jury selection applies to civil cases. Significantly, in the one California Supreme Court case in which the issue has been mentioned, the court seemed to imply the opposite.<sup>104</sup> In *People v. Wheeler*, a case involving

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(citing *People v. Hughes*, 57 Cal. 2d 89, 95, 367 P.2d 33, 36, 17 Cal. Rptr. 617, 620 (1961), and *People v. Galloway*, 202 Cal. 81, 92, 259 P. 332, 336 (1927)); *Deward v. Clough*, 245 Cal. App. 2d 439, 444, 54 Cal. Rptr. 68, 72 (1966) (citing *Hughes*, 57 Cal. 2d at 95, 367 P.2d at 36, 17 Cal. Rptr. at 620); *Church v. Capital Freight Lines*, 141 Cal. App. 2d 246, 248, 296 P.2d 563, 564 (1956) (citing *Galloway*, 202 Cal. at 92, 259 P. at 336); *Shipley v. Permanente Hosp.*, 127 Cal. App. 2d 417, 424, 274 P.2d 53, 57 (1954) (citing *Galloway*, 202 Cal. at 92, 259 P. at 336), *rev'd on other grounds sub nom. People v. Hutchinson*, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969); *see also Uribe*, 41 Cal. 3d at 589, 715 P.2d at 640, 224 Cal. Rptr. at 680 (Bird, C.J., concurring and dissenting).

101. *Buckley v. Chadwick*, 45 Cal. 2d 183, 202-03, 288 P.2d 12, 23-24 (1955) (citing *People v. Estorga*, 206 Cal. 81, 87, 273 P. 575, 577 (1928), and *People v. Hickman*, 204 Cal. 470, 481, 268 P. 909, 914 (1928)).

102. 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982), *cert. dismissed*, 459 U.S. 1190 (1983).

103. *Id.* at 412, 650 P.2d at 1186, 185 Cal. Rptr. at 669.

104. *People v. Wheeler*, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906 n.29 (1978). The issue was indirectly addressed when it emerged by implication in a concurrence written by Justice Mosk in *Ballard v. Uribe*, 41 Cal. 3d 564, 575-78, 715 P.2d 624,

peremptory challenges that appeared to be based on racial bias, the California Supreme Court suggested that under some circumstances the Court would make an independent evaluation of whether a right developed in a criminal case would extend to a civil litigant.<sup>105</sup> The *Wheeler* court acknowledged, but did not reach the issue:

We do not reach, however, the question of the applicability of this decision to civil cases. Although article I, section 16, of the California Constitution governs such cases as well, most of the state and federal authorities relied on herein invoke the requirement of cross-sectionalism in the context of a criminal trial only. Whether the requirement also applies in a civil setting turns on such considerations as the function of the jury in that setting. Because the issue is not presented in the case at bar, we leave it to another day.<sup>106</sup>

Taken on its face, this footnote in *Wheeler* would appear to signal a change from the general practice of applying civil and criminal precedent interchangeably. That would be an incorrect reading, however, for several reasons. First, because that issue was not before the court, the footnote was dictum. Second, it is unlikely that the court intended to abandon its longstanding practice of applying criminal precedent to civil cases on jury issues through dictum in a footnote. The question remains then, why mention that issue at all? One explanation may be traceable to the impact of the *Wheeler* decision itself. At the time of the decision, the opinion constituted a radical departure from precedent. With the California Supreme Court already under attack in 1978 for its perceived liberal treatment of criminal defendants,<sup>107</sup> it may not have wanted to break additional new ground, particularly when unnecessary to the decision.

If, in fact, the footnote in *Wheeler* was only an attempt to limit the holding of a controversial case, then there has been no change in the

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630-32, 224 Cal. Rptr. 664, 670-72 (1982). In a separate opinion in the *Uribe* case, Chief Justice Bird criticized Justice Mosk's view while addressing the question of the standard for determination of what constitutes prejudicial misconduct sufficient to trigger the presumption of prejudice. She chided Justice Mosk:

Apparently, Justice Mosk would require a much stronger showing to establish prejudicial misconduct in civil cases than he has found to be sufficient in criminal cases. If this result is intended, surely an explanation is required. Until now, the rule has been firmly established that the presumption of prejudice arising from jury misconduct is equally applicable in criminal and civil cases.

*Id.* at 597, 715 P.2d at 646, 224 Cal. Rptr. at 686 (citation omitted).

105. 22 Cal. 3d 258, 263, 583 P.2d 748, 752, 148 Cal. Rptr. 890, 893 (1978).

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

107. Chief Justice Bird and the entire court were under attack from the time that her nomination was announced by then Governor Jerry Brown. "Since 1977 Rose Bird has come to symbolize the liberal judge, living proof of the New Right's contention that judges are primarily the defenders of criminals, not of all citizens." B. MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS* 3 (1983). For another description of Bird's first confirmation election and the subsequent unprecedented investigation into the inner workings of the California Supreme Court, see P. STOLZ, *JUDGING JUDGES* (1981).

practice of using criminal and civil precedent interchangeably, and the rule enunciated in *Williams* should apply to civil cases. Even if the dicta in the *Wheeler* footnote is a signal of a new practice eliminating the *automatic* extension of *Williams* to civil cases, independent legal and policy reasons justify applying the *Williams* standard to civil cases. Next, the Note focuses on one of those legal reasons—civil litigants' right to receive the same fair jury trial that criminal defendants receive.

## B. Civil Litigants have the Same Right to a Fair Jury as do Criminal Defendants

### (1) *Holley v. J. & S. Sweeping Co.: Civil Litigants Have a Right to a Jury Made Up of a Fair Cross-Section of the Community*

In *People v. Wheeler*,<sup>108</sup> a criminal case, the court considered whether the defendants, two black men, were denied their right to a fair trial by an impartial jury selected from a fair cross-section of the community.<sup>109</sup> In that case, although a number of black venirepersons were summoned and questioned on voir dire, the prosecutor proceeded to strike each and every black from the jury by the use of his peremptory challenges. The court reversed the conviction, holding that the use of peremptory challenges to remove prospective jurors solely on the basis of group bias "violates the right to a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution."<sup>110</sup>

Justice Mosk wrote the opinion for the court.<sup>111</sup> He began his discussion by restating the basic principle contained in the California Constitution, that "[t]rial by jury is an inviolate right and shall be secured to all . . . ."<sup>112</sup> That constitutional right included the defendant's right to a verdict rendered by impartial and unprejudiced jurors.<sup>113</sup> Justice Mosk explained that this principle derived from the common-law rule demanding the strictest impartiality on the part of each individual juror, and that this principle was fully embodied in the constitutional jury trial provision.<sup>114</sup> He then explained that an essential prerequisite to an impartial jury is that it be drawn from a representative cross-section of the community.<sup>115</sup>

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108. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

109. *Id.* at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893.

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

111. He was joined by Justices Tobriner, Manuel, and Newman. Chief Justice Bird wrote a separate concurring opinion. *Id.* at 287, 583 P.2d at 768-69, 148 Cal. Rptr. at 910. Justice Richardson wrote a separate dissenting opinion in which Justice Clark joined. *Id.* at 295, 583 P.2d at 773, 148 Cal. Rptr. at 915.

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

113. *Id.*

114. *Id.* at 266, 583 P.2d at 754, 148 Cal. Rptr. at 895.

115. He explained why:

After discussing four decades of federal cases that developed the cross-sectionalism rule, Justice Mosk turned to California law. He pointed out that although California had adopted such a rule in criminal cases as early as 1954,<sup>116</sup> it remained unclear which constitution, state or federal, served as the basis for the rule. Determined to avoid a similar lack of clarity in *Wheeler*, the court explicitly stated that it was relying on both the sixth amendment to the federal Constitution, and article I, section 16, of the California Constitution.<sup>117</sup>

Discrimination might take place at any one of three stages in the procedure for selecting a jury.<sup>118</sup> The *Wheeler* court was concerned with the third stage—the point at which challenges are exercised against individual jurors. After describing the two types of challenges,<sup>119</sup> Justice Mosk described their purposes and explained that the scope of both types of challenges are a function of these purposes. Parties should exercise challenges to remove only those jurors who the party believes entertain a “specific bias,” and no others.<sup>120</sup> In the case of peremptory challenges,

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

*Id.* at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896.

116. *Id.* at 266-70, 583 P.2d at 754-57, 148 Cal. Rptr. at 896-99.

117. *Id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-90.

The seventh amendment to the United States Constitution contains the provision regarding federal civil jury trials. U.S. CONST. amend. VII.

118. See *infra* note 144 and accompanying text.

119. *Wheeler*, 22 Cal. 3d at 273-74, 583 P.2d at 759, 148 Cal. Rptr. at 900-01; see *supra* notes 20-21 and accompanying text.

120. Justice Mosk stated:

The purpose of the challenge stage of jury selection is apparent from these statutory provisions and the constitutional considerations discussed above. Until this point in the process the goal of an impartial jury is pursued by insuring that the master list be a representative cross-section of the community and that the venire and the proposed trial jury be drawn therefrom by wholly random means. But precisely because it is both all-inclusive and random, the process cannot consistently screen out those prospective jurors who bring to the courtroom a bias concerning the particular case on trial or the parties or witnesses thereto—we may call this “specific bias”—derived, for example, from personal experience or from general exposure to pretrial publicity. Yet such persons must evidently be excused from the jury insofar as possible if the goal of impartiality is to be achieved. The law therefore presumes that each party will use his challenges to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire.

*Id.* at 274-75, 583 P.2d at 759-60, 148 Cal. Rptr. at 901.

although no basis for the challenge must be given, a basis must *exist*. Those bases may range from "the obviously serious to the apparently trivial, from the virtually certain to the highly speculative."<sup>121</sup> When a party presumes that jurors are biased merely because they are members of a group distinguished on racial, religious, ethnic, or similar grounds,<sup>122</sup> and peremptorily challenges all such jurors for that reason alone, she "not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement."<sup>123</sup> For this reason, the court held that the use of peremptory challenges to remove prospective jurors solely on the ground of racial group bias violates the constitutional right to a jury drawn from a representative cross-section of the community.<sup>124</sup>

Justice Mosk next turned to the difficult question of devising a test and supplying a remedy for this constitutional violation. He stated the presumption that any party exercising a peremptory challenge is doing so for a legitimate and constitutionally permissible reason. Such a presumption must be rebuttable, however, if the "foregoing constitutional right is not to be nullified . . . ."<sup>125</sup> The court then established a two-stage inquiry to determine whether a party has rebutted the presumption. In so doing, it chose a traditional procedure. First, if a party believes her opponent is using her peremptory challenges to strike jurors based on group bias alone, she must make a timely objection, and establish a satisfactory *prima facie* case of discrimination. To do so, she must compile as complete a record as possible, and establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Second, she must show a strong likelihood that the opposing party is challenging those jurors because of their membership in that group and not for any other reason.<sup>126</sup>

If and when the trial court finds that a *prima facie* case has been made, the burden shifts to the other party to show that she did not base her peremptory challenges on group bias alone.<sup>127</sup> Obviously, this burden requires that counsel reveal to the court and opposing counsel the reason for a peremptory challenge. Even under these carefully circumscribed conditions, this holding represented a radical departure from pre-

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121. *Id.* at 274-75, 583 P.2d at 760, 148 Cal. Rptr. at 901-02.

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

123. *Id.*

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

125. *Id.* at 278, 583 P.2d at 763, 148 Cal. Rptr. at 904.

126. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

127. *Id.* at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. If the court finds that the offending party has not sustained his burden of justification, the presumption of validity is rebutted and the court must dismiss the venire and summon a new one. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

cedent,<sup>128</sup> as well as an apparent violation of California Penal Code section 1069.<sup>129</sup> Nevertheless, the court found this result to be mandated by the constitutional imperative guaranteeing the defendant a fair trial.<sup>130</sup> The importance of the right is underscored by the court's holding that an error of this type is prejudicial per se and a conviction by a jury selected through means of group bias must be reversed.<sup>131</sup>

The *Wheeler* court expressly declined to decide whether the decision applied to civil cases.<sup>132</sup> In his dissent, Justice Richardson glumly predicted that the question would soon be decided in the affirmative:

[A]lthough the majority limits application of the new principles to criminal cases and leaves "to another day" a determination of whether the new rules apply to civil cases, the "functions" of a jury, which the majority treats as controlling, seem remarkably similar in civil and criminal cases, leading me to conclude that, given the issue in a civil context, the majority will reach the same result.<sup>133</sup>

*Holley v. J. & S. Sweeping Co.*<sup>134</sup> presented exactly that issue to the California Court of Appeal in 1983. Lawrence Holley, a black man, brought a negligence action against respondents. His case was tried before an all-white jury, and resulted in a nine to three verdict in favor of the defense. The defendants had exercised peremptory challenges against three of the four black jurors called into the jury box.<sup>135</sup> The issue on appeal was whether the exercise of peremptory challenges in civil pro-

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128. See *id.* at 283-85, 583 P.2d at 766-67, 148 Cal. Rptr. at 907-08; see also Swain v. Alabama, 380 U.S. 202, 212-21 (1965). Since *Wheeler* was decided, many jurisdictions have adopted a similar rule. See, e.g., Commonwealth v. Soares, 377 Mass. 461, 489-91, 387 N.E. 2d 499, 516-18, cert. denied, 444 U.S. 881 (1979). The United States Supreme Court adopted a similar rule based on the equal protection clause of the fourteenth amendment rather than sixth amendment grounds in Batson v. Kentucky, 106 S. Ct. 1712 (1986). See generally Note, Batson v. Kentucky: The New and Improved Peremptory Challenge, 38 HASTINGS L.J. 1195 (1987) (authored by Cynthia Richers-Rowland).

129. See CAL. PENAL CODE § 1069 (West 1985); see also *supra* note 21 and accompanying text.

130. In a footnote the *Wheeler* court put it this way:

At this point the statutory provision that "no reason need be given" for a peremptory challenge must give way to the constitutional imperative: the statute is not invalid on its face, but in these limited circumstances it would be invalid as applied if it were to insulate from inquiry a presumptive denial of the right to an impartial jury.

*Wheeler*, 22 Cal. 3d at 281 n.28, 583 P.2d at 765 n.28, 148 Cal. Rptr. at 906 n.28 (citation omitted).

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

132. *Id.* at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906-07 n.29; see *supra* note 106-07 and accompanying text.

133. *Wheeler*, 22 Cal. 3d at 288, 583 P.2d at 769, 148 Cal. Rptr. at 911 (Richardson, J., dissenting).

134. 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983).

135. The fourth juror was excused by the court for cause. *Holley*, 143 Cal. App. 3d at 590, 192 Cal. Rptr. at 75.

ceedings was subject to scrutiny under the constitutional standard enunciated in *People v. Wheeler*.

Recognizing that different interests are at stake in criminal and civil trials, and that different standards of proof apply, the *Holley* court nonetheless found that "juries in both types of proceedings perform the same important function of ultimate fact finders under the same state constitutional guarantee."<sup>136</sup> The court observed that since the primary purpose of the *Wheeler* decision was to achieve overall impartiality, failing to extend the *Wheeler* rule to civil cases would permit two evils. First, it would frustrate the fair cross-section rule. Second, it "would conceivably sanction the indiscriminate use of peremptory challenges based upon group bias alone thus seriously eroding the constitutional guarantee extended equally to civil litigants."<sup>137</sup>

The *Holley* court made an observation central to the question of application of *Williams* to civil cases. In discussing an early United States Supreme Court case on the cross-section rule, *Thiel v. Southern Pacific*,<sup>138</sup> the court stated that the United States Supreme Court had implicitly rejected any conceptual distinction between civil and criminal cases in the jury selection process, quoting the following language: "The 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."<sup>139</sup> The *Wheeler* court's endorsement of the views expressed in *Thiel* permitted the *Holley* court to interpret "express endorsement to mean that the systematic exclusion of jurors at any stage of the process in either criminal or civil proceedings solely on the basis of group bias is constitutionally impermissible."<sup>140</sup>

## (2) Applying the *Holley Analysis* to *Williams*

*Holley* extended a criminal procedure from *Wheeler* designed to protect the constitutional right to an impartial jury to civil cases when it afforded civil litigants the protection of the fair cross-section rule. The court has extended *Wheeler* to civil cases because in both the criminal and civil contexts, the jury plays a crucial role as ultimate fact finder. This extension makes the concern for the right to a fair jury identical in both civil and criminal cases. The California Supreme Court likewise should therefore extend *Williams* to civil cases. As with the procedure at issue in *Wheeler*, the *Williams* rule establishing the right to ask voir dire questions guarantees the constitutional right to an impartial jury.<sup>141</sup> In

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136. *Id.* at 592, 192 Cal. Rptr. at 77.

137. *Id.*

138. 328 U.S. 217 (1946).

139. *Holley*, 143 Cal. App. 3d at 592, 192 Cal. Rptr. at 77 (emphasis added).

140. *Id.* at 592-93, 192 Cal. Rptr. at 77. The court went on to find, as did the *Wheeler* court, that such was a per se error. *Id.* at 594, 192 Cal. Rptr. at 78.

141. See *supra* note 27-28 and accompanying text.

*Wheeler*, the California Supreme Court suggested the analysis to follow in determining whether a jury selection procedure that had been first established in a criminal case should be extended to civil litigants as well: "Whether the requirement also applies in a civil setting turns on such considerations as the function of the jury in that setting."<sup>142</sup> An examination of the function of the jury in a civil setting, therefore, is necessary to make that determination.

Concern for a fair trial before an impartial jury prompted both the *Williams* and the *Wheeler* decisions. Both courts were looking at the third stage of the jury selection process that takes place in court.<sup>143</sup> That stage consists of two parts. The first is the voir dire, or questioning portion. The second is the challenge portion. *Wheeler* addressed the second part in its attempt to assure that the exercise of challenges did not result in a less than impartial jury. The *Williams* decision involved the first part of the in-court selection stage: the juror questioning and information-eliciting process, upon which counsel based their challenges. *Wheeler* and *Williams* were both an effort on the part of the California Supreme Court to assure that the right to a fair jury was not imperiled at the in-court stage.

Applying the *Williams* decision to civil cases would be consistent with the principle that a civil litigant is constitutionally entitled to a fair trial.<sup>144</sup> Historically, the right to a trial by jury has included the right to a fair trial by an impartial jury. As early as 1899 the California Supreme Court made this clear in a civil case, *Lombardi v. California Street Railway*,<sup>145</sup> when it stated:

The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution. Upon this proposition all the authorities agree. As was said by Sir Edward Coke in discussing the right of trial by jury, under the head of *propter affectum*: "For all which the rule of law is that he must stand indifferent as he stands unsworn."<sup>146</sup>

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142. *Wheeler*, 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.298, 148 Cal. Rptr. at 906-07 n.29.

143. The first stage is the initial compilation of the master list of eligible jurors. Should that list fail to be representative, the process is constitutionally defective. *Id.* at 272, 583 P.2d at 759, 148 Cal. Rptr. at 900. A large portion of the litigation on cross-sectionalism in California and in the federal courts have concentrated on this stage of the process. *Id.* at 272 n.10, 583 P.2d at 759 n.10, 148 Cal. Rptr. at 900 n.10.

The second stage is the point at which prospective jurors are disqualified or excused by judges or court personnel. Since this step is discretionary, potential for abuse exists and can upset the demographic balance of the venire in essential respects. *Id.* at 273, 583 P.2d at 759, 148 Cal. Rptr. at 900.

144. The California Constitution, article I, section 16 does not differentiate between civil and criminal cases. It states: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."

145. 124 Cal. 311, 57 P. 66 (1899).

146. *Id.* at 317, 57 P. at 68 (citation omitted).

Half a century later, the court reiterated that position in *Shipley v. Permanente Hospital*.<sup>147</sup> Since that time, modern courts have continued to express the fundamental aspect of that guarantee.<sup>148</sup> In *Deward v. Clough*,<sup>149</sup> a California Court of Appeal emphasized that the right to a trial by jury is jurisdictional. In 1971, in *Clemens v. Regents of University of California*, a medical negligence case in which one of the jurors intentionally concealed the fact that he was a dentist, another court of appeal repeated that sentiment, stating that: "The guarantee is to 12 impartial jurors."<sup>150</sup> Later that same year the California Supreme Court strengthened this position in *Weathers v. Kaiser Foundation Hospital*.<sup>151</sup> In *Weathers*, the court quoted approvingly from *Lombardi*, reiterating once again that the constitutional right to a trial by jury included the right to unbiased and unprejudiced jurors.<sup>152</sup>

In recent years the California Courts of Appeal have continued to

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147. 127 Cal. App. 2d 417, 424, 274 P.2d 53, 57 (1954), *rev'd on other grounds sub nom.* *People v. Hutchinson*, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969); *see also* *People ex rel. Dep't Pub. Works v. Curtis*, 255 Cal. App. 2d 378, 391, 63 Cal. Rptr. 138, 146 (1967) (jury prejudiced because of a juror's disclosure of information received outside of court).

148. In many of the cases in which the court has addressed this issue the party has alleged juror misconduct in the form of concealing bias during voir dire. *See* *Tapia v. Barker*, 160 Cal. App. 3d 761, 766, 206 Cal. Rptr. 803, 805 (1984); *Smith v. Covell*, 100 Cal. App. 3d 947, 954-55, 161 Cal. Rptr. 377, 381 (1980); *Clemens v. Regents of University of California*, 20 Cal. App. 3d 356, 362, 97 Cal. Rptr. 589, 593 (1971); *Shipley*, 127 Cal. App. 2d at 424-25, 274 P.2d at 58; *Curtis*, 255 Cal. App. 2d at 391-92, 63 Cal. Rptr. at 146-47; *see also* *Church v. Capital Freight Lines*, 141 Cal. App. 2d 246, 248, 296 P.2d 563, 564 (1956) (right to a trial by jury includes right to mentally competent jurors). *But cf.* *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 408, 650 P.2d 1171, 1183, 185 Cal. Rptr. 654, 666 (1982) (failure of one juror to reveal that he had been a defendant in several lawsuits brought by large corporate creditors and failure of another to reveal that his son had died of brain damage sustained in an automobile accident constituted insufficient proof of concealed bias), *cert. dismissed*, 459 U.S. 1190 (1983).

149. 245 Cal. App. 2d 439, 444, 54 Cal. Rptr. 68, 72 (1966).

150. *Clemens*, 20 Cal. App. 3d at 360, 97 Cal. Rptr. at 592 (emphasis in original).

151. 5 Cal. 3d 98, 485 P.2d 1132, 95 Cal. Rptr. 516 (1971).

152. *Id.* at 110, 485 P.2d at 1140, 95 Cal. Rptr. at 524. Nine years later the court of appeal again stressed that "[t]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury . . ." *Smith v. Covell*, 100 Cal. App. 3d 947, 955, 161 Cal. Rptr. 377, 382 (quoting *Lombardi v. California St. Ry.*, 124 Cal. 311, 317, 57 P. 66, 68 (1899), and *Clemens*, 20 Cal. App. 3d at 360, 97 Cal. Rptr. at 592.) *Smith* was followed two years later by *Andrews v. County of Orange*, 130 Cal. App. 3d 944, 182 Cal. Rptr. 176 (1982). "The right to unbiased and unprejudiced jurors is an 'inseparable and inalienable part' of the right to jury trial . . . The guarantee is to the right to 12 impartial jurors." *Id.* at 953, 182 Cal. Rptr. at 180 (citations omitted).

That same year the California Supreme Court had the opportunity to address the issue in a major products liability and personal injury case. *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982), *cert. dismissed*, 459 U.S. 1190 (1983). In *Hasson*, the plaintiffs argued that the presumption of prejudice attaching to juror misconduct should not apply in civil cases. The California Supreme Court soundly rejected such reasoning: "It is true that the presumption developed in criminal cases. But regardless of the rule's origin, civil litigants, like criminal defendants, have a constitutionally protected right to the complete con-

jealously guard that constitutional right.<sup>153</sup>

(3) *Applying Wheeler/Holley Policy Concerns*

Extending *Williams* to civil cases is also necessary to effectuate the *Wheeler* and *Holley* policy of avoiding the discriminatory use of peremptory challenges. As the *Williams* court put it:

[L]argely because they have been deprived of a reasonable opportunity to gather helpful information, counsel have often resorted of necessity to means of jury selection that are reprehensible and in some cases of dubious constitutionality. Thus in *People v. Wheeler*, we held that jurors are not to be peremptorily challenged on the basis of group bias alone. But unless counsel is given a significant opportunity to probe under the surface to determine the potential juror's individual attitudes, he may be relegated to a Catch-22 alternative of making his decision on the superficial basis we held impermissible in *Wheeler*, or making it on no basis at all.<sup>154</sup>

Simple logic requires that *Williams* be extended to civil cases. Since *Wheeler* applies to civil cases, preventing attorneys from challenging jurors on the basis of group bias alone, and since *Williams* is necessary to properly apply *Wheeler*, *Williams* must apply to civil cases as well.

C. *Williams* Should Be Extended to Civil Cases to Avoid Juror Misconduct and Unnecessary Reversals

Juror bias is present in civil litigation, just as it is in criminal cases. Without adequate voir dire it is impossible for counsel to expose juror bias,<sup>155</sup> and it becomes more likely a juror will serve on a jury when counsel should have challenged her. These problems can result in grave consequences. One of the most serious, of course, is the reversal of the judgment and the retrial of the case before an impartial jury.<sup>156</sup>

A juror's concealment of a bias, belief, or state of mind that prevents her from following the court's instructions and acting in an impartial manner constitutes misconduct in civil cases.<sup>157</sup> When the substantial rights of a party are affected because of misconduct or irregularity in the proceedings of the jury, California Code of Civil Procedure section 657

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sideration of their case by an impartial panel of jurors." *Id.* at 416, 650 P.2d at 1189, 185 Cal. Rptr. at 672 (citations omitted).

153. See *Tapia v. Barker*, 160 Cal. App. 3d 761, 765, 206 Cal. Rptr. 803, 805 (1984).

154. *People v. Williams*, 29 Cal. 3d 392, 404-05, 628 P.2d 869, 875, 174 Cal. Rptr. 317, 323 (1981) (citations omitted).

155. See *supra* note 63-69 and accompanying text.

156. The cases in which this has occurred are plentiful. See *supra* note 149.

157. *Weathers v. Kaiser Found. Hosps.*, 5 Cal. 3d 98, 106-10, 485 P.2d 1132, 1337-40, 95 Cal. Rptr. 516, 521-24 (1971); *Tapia v. Barker*, 160 Cal. App. 3d 761, 765, 206 Cal. Rptr. 803, 805 (1984); *Smith v. Covell*, 100 Cal. App. 3d 947, 953, 161 Cal. Rptr. 377, 381 (1980); *People ex rel. Dep't Pub. Works v. Curtis*, 255 Cal. App. 2d 378, 388-92, 63 Cal. Rptr. 138, 144-47 (1968).

requires that the reviewing court grant a new trial.<sup>158</sup> Although not all concealment of bias during voir dire results from the court's restriction of permissible voir dire questions, at least one court has remarked that a more probing voir dire might eliminate the waste of time and judicial resources necessitated by a reversal. During voir dire in the medical negligence case of *Clemens v. Regents of University of California*,<sup>159</sup> a juror was asked about the nature of his employment. He responded "[W]ell, I do ranching and I have an office, investment planning."<sup>160</sup> He failed to reveal that he was really a dentist. Subsequently, when counsel asked if he had any bias or prejudice against malpractice litigation, the juror answered in the negative. He also stated he knew of no reason why he could not be fair and impartial. Counsel failed to ask him about any relationships he might have with members of the medical profession, either personally or professionally, although such a question was obvious since as an investment planner he likely would have had medical professionals as clients. As it turned out, this juror was extremely biased against malpractice litigation, and for that reason acted as a strong advocate for the defense during deliberations.<sup>161</sup>

The court of appeal reversed the trial court's denial of motion for a new trial based, *inter alia*, on the juror's misconduct in concealing his profession during voir dire. The court of appeal stated, "[w]e cannot help but feel that a more intensive *voir dire* examination by the court or counsel on the subjects of occupation, bias, prejudice and prejudgment

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158. CAL. CIV. PROC. CODE. § 657 (West 1976). The United States Supreme Court recently held in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), that the failure of a juror to disclose information during voir dire would not result in a new trial unless the information was such that it rises to the level of a cause challenge.

159. 20 Cal. App. 3d 356, 97 Cal. Rptr. 589 (1971).

160. *Id.* at 362, 97 Cal. Rptr. at 593.

161. *Id.* at 364, 97 Cal. Rptr. at 595. From the record it seemed clear that this juror wished to conceal his medical profession in order to remain on the jury. *Id.* at 363, 97 Cal. Rptr. at 593-94. It is not clear, therefore, whether the juror would have been truthful even if the attorney had asked additional questions. Although clearly biased, he stated in response to the questioning of plaintiff's counsel that he had no bias or prejudice against malpractice litigation. *Id.* at 362, 97 Cal. Rptr. at 593. Had appropriate open-ended questions been asked, however, they very likely would have revealed information that would have alerted perceptive counsel to potential problems. For example, counsel could have asked "What are your feelings about medical malpractice cases?" and "Do you know any doctors or other medical professionals?" If the answer to the latter question had been yes, as it should have been, counsel could have followed up with, "Describe who they are generally, under what circumstances you've come to know them (e.g., socially, professionally, etc.), how often you see them, whether you've discussed malpractice suits with any of them, etc." Other questions might have included, "Have you or anyone you know ever been involved in a lawsuit of any type?" and "Some people feel that people in our society are just too quick to sue doctors, what do you think about that?"

Of course, under a strict application of the *Edwards* rule a court could prohibit most, if not all, of those questions. See *supra* notes 36-48 and accompanying text.

might have avoided these unfortunate consequences."<sup>162</sup>

Another recent example of juror misconduct emphasizes the courts' commitment to reversing judgments rendered by less than neutral jurors. These reversals emphasize the need to apply the more thorough voir dire process of *Williams* to civil trials. In *Tapia v. Barker*,<sup>163</sup> the plaintiff was born and raised in Mexico. He brought a negligence action after suffering serious injuries in an automobile collision. The jury found him fifty percent negligent and awarded him only minimal damages of \$12,706.46.<sup>164</sup> The court of appeal found the verdict to be tainted by juror misconduct and reversed, ordering a new trial.

From language in the opinion, it appears that the voir dire questions covered the relevant issues, but were conclusory and close-ended.<sup>165</sup> During deliberations several jurors made disparaging remarks about Mr. Tapia's background and Mexican citizenship, and about Mexican men in general. The jurors also made other comments that indicated that some believed a low verdict would help keep insurance costs down.<sup>166</sup> While there were at least three other types of juror misconduct,<sup>167</sup> the court stated that "the most destructive misconduct was the insidious discussion of race."<sup>168</sup> The juror misconduct resulted in an unfair trial, necessitating a reversal of the entire judgment.<sup>169</sup>

Obviously, it would be a vain hope to expect that with the expansion of voir dire in civil cases incidents such as those in *Clemens* and *Tapia*

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162. *Clemens*, 20 Cal. App. 3d at 367, 97 Cal. Rptr. at 589. Among the unfortunate consequences the court noted was that the trial consumed 33 actual trial days, the transcript was over 3,400 pages long, and the appellate review took four years. Due to this reversal it was necessary to retry the case, and another appeal was possible as well. *Id.* at 367, 97 Cal. Rptr. at 596.

163. 160 Cal. App. 3d 761, 206 Cal. Rptr. 803 (1984).

164. *Id.* at 763, 206 Cal. Rptr. at 803-04.

165. The court stated:

During voir dire prospective jurors were explicitly asked whether any of them felt that pain and suffering were so intangible that he or she would be reluctant to award damages, or held "any belief that prevents you from awarding damages for pain and suffering, if liability for them is established." They were also informed of plaintiff's Mexican background and asked if it would affect their ability to be fair and impartial. None of them responded affirmatively to either question. The jurors were specifically instructed that they must follow the law, must base their decision only on the evidence and not be influenced by, *inter alia*, prejudice.

*Id.* at 764, 206 Cal. Rptr. at 804.

166. *Id.* at 764, 206 Cal. Rptr. at 804.

167. These types of juror misconduct includes the following: consideration of collateral sources of income, discussions regarding the likelihood of high verdicts leading to high insurance rates, and a juror's improper communication of information (regarding her own accident) from a source outside the evidence in the case. *Id.* at 766, 206 Cal. Rptr. at 805-06.

Some, if not all, of this information could have been obtained from jurors with a properly probing voir dire.

168. *Id.* at 766, 206 Cal. Rptr. at 806.

169. *Id.* at 767, 206 Cal. Rptr. at 806.

would cease to occur. Some jurors will always conceal their bias, as any trial attorney who has ever made an honest effort to elicit information from jurors on voir dire will attest.<sup>170</sup> When counsel is permitted the opportunity to ask meaningful questions on issues central to the outcome of the case, however, the likelihood that she will remove genuinely prejudiced jurors—those likely to engage in serious misconduct—is greatly enhanced.

### III. Policy Reasons for Refusing to Extend the *Williams* Rule

Commentators and judges have criticized the *Williams* rule, particularly for permitting extensive and time-consuming voir dire.<sup>171</sup> These criticisms would also apply to civil cases if the court extended the *Williams* rule to them. In addition, those opposed to applying this rule to civil cases are also likely to argue that if the court permits a wider range of voir dire, parties are likely to appeal, and courts will be more likely to reverse, resulting in a waste of judicial resources.<sup>172</sup> A realistic assessment of this argument requires an examination of the way in which criminal defendants have used the *Williams* decision to seek appellate relief, and the reaction of the courts in applying the *Williams* decision.

Since the June 1, 1981 decision was rendered, only nineteen reported California decisions have cited *Williams*.<sup>173</sup> Of those, seven were Cali-

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170. See *supra* note 25 and accompanying text.

171. See Duncan, *Opinion: Putting a Cap on Voir Dire*, 7 CAL. LAW. 14 (1987) (arguing that *Williams* causes delay in the trial of criminal cases, and is unnecessary because it adds no meaningful safeguards to the process of selecting a fair and impartial jury); see also Note, *The California Supreme Court Permits Voir Dire to Be Conducted to Uncover a Basis for Peremptory Challenges*, 4 WHITTIER L. REV. 169, 188-89 (1984) (authored by J. Epstein) (arguing that "much of the improvements in the judicial process which this decision sought to achieve will be lost").

172. In addition, some commentators argue that permitting additional voir dire would further delay the resolution of already lengthy trials. For a discussion of this problem, see Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 922 (1971).

173. See *People v. Balderas*, 41 Cal. 3d 144, 171-84, 711 P.2d 480, 500-19, 222 Cal. Rptr. 184, 196-205 (1985); *People v. Fuentes*, 40 Cal. 3d 629, 633, 710 P.2d 240, 244, 221 Cal. Rptr. 440, 440 (1985); *People v. Armendarez*, 37 Cal. 3d 573, 583, 693 P.2d 243, 249, 209 Cal. Rptr. 664, 670 (1984); *People v. Turner*, 37 Cal. 3d 302, 313, 690 P.2d 669, 676, 208 Cal. Rptr. 196, 203 (1984); *People v. Fields*, 35 Cal. 3d 329, 347, 673 P.2d 680, 698, 197 Cal. Rptr. 803, 822 (1983), *cert. denied*, 469 U.S. 892 (1984); *People v. Easley*, 34 Cal. 3d 858, 877, 671 P.2d 813, 832, 196 Cal. Rptr. 309, 328 (1983) (Richardson, J., dissenting); *People v. Murtishaw*, 29 Cal. 3d 733, 761, 631 P.2d 446, 465, 175 Cal. Rptr. 738, 757 (1981), *cert. denied*, 455 U.S. 922 (1982); *People v. Blackwell*, 191 Cal. App. 3d 925, 929, 931, 236 Cal. Rptr. 803, 805, 807 (1987); *People v. Kronemyer*, 189 Cal. App. 3d 314, 335-37, 234 Cal. Rptr. 442, 455 (1987); *People v. Meza*, 188 Cal. App. 3d 1631, 1641, 234 Cal. Rptr. 235, 239 (1987); *People v. Pagel*, 186 Cal. App. 3d Supp. 1, 7, 232 Cal. Rptr. 104, 107 (1986), *cert. denied*, 107 S. Ct. 1953 (1987); *People v. Kelly*, 185 Cal. App. 3d 118, 125, 229 Cal. Rptr. 584, 588 (1986); *People v. Helton*, 162 Cal. App. 3d 1141, 1145, 209 Cal. Rptr. 128, 130 (1984); *People v. Diaz*, 152 Cal. App. 3d 926, 932, 200 Cal. Rptr. 77, 80-81 (1984); *Pantos v. Superior Court*, 151 Cal. App. 3d

fornia Supreme Court cases. The Supreme Court was required to review all seven of these cases, as they were death penalty automatic appeals.<sup>174</sup> Thus, the Supreme Court has not yet chosen to take a case based on an alleged *Williams* error.

Only five reported California cases—three from the courts of appeal and two from the supreme court—have actually considered whether a conviction should be reversed for failure to permit counsel to ask questions under the *Williams* rule.<sup>175</sup> In only one case, *People v. Wells*, a court of appeal case and the first case decided on this issue after the *Williams* decision, did the court reverse a conviction.<sup>176</sup>

The *Wells* opinion notwithstanding, the California Courts of Appeal have evidenced a marked reluctance to reverse convictions on the basis of a *Williams* error. There is no reason to believe that they would be more willing to reverse such a judgment in civil cases. In the first of the only two reported appellate decisions to consider the issue since *Wells*, the court did not come close to finding that the trial court abused its discretion. That case, *People v. Helton*, was a three and one half page opinion, devoting less than a page to the voir dire issue.<sup>177</sup> Although the court appeared to both misread and misapply *Williams*,<sup>178</sup> its confusion was neither the result of an unclear standard nor of an attempt to develop a judicial interpretation of the rule to stem a flood of frivolous appeals.

In the second post-*Wells* case to consider a *Williams* issue, *People v.*

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258, 264, 198 Cal. Rptr. 489, 493 (1984); *People v. Wells*, 149 Cal. App. 3d 721, 725, 726, 197 Cal. Rptr. 163, 166, 167 (1983); *People v. Cooks*, 141 Cal. App. 3d 224, 300, 190 Cal. Rptr. 211, 266 (1983), *cert. denied sub nom.* *Green v. California*, 464 U.S. 1046 (1984); *People v. Alvarado*, 133 Cal. App. 3d 1003, 1015 n.5, 184 Cal. Rptr. 483, 488 n.5 (1982); *People v. Randel*, 130 Cal. App. 3d 286, 293, 181 Cal. Rptr. 745, 750 (1982).

174. *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985); *People v. Fuentes*, 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985); *People v. Armendarez*, 37 Cal. 3d 573, 693 P.2d 243, 209 Cal. Rptr. 667 (1984); *People v. Turner*, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984); *People v. Fields*, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983); *People v. Easley*, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983); *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981).

Of the remaining cases, one was a civil complaint for declaratory relief to obtain access to juror lists. *Pantos v. City and County of San Francisco*, 151 Cal. App. 3d 258, 261, 198 Cal. Rptr. 489, 493 (1984).

175. *Balderas*, 41 Cal. 3d at 183-84, 711 P.2d at 500-01, 222 Cal. Rptr. at 204-05 (1985); *Fuentes*, 40 Cal. 3d at 638-39, 710 P.2d at 244, 221 Cal. Rptr. at 444; *Kronemyer*, 189 Cal. App. 3d at 335-36, 234 Cal. Rptr. at 452; *Helton*, 162 Cal. App. 3d at 1145, 209 Cal. Rptr. at 130; *Wells*, 149 Cal. App. 3d at 725-26, 197 Cal. Rptr. at 166-67.

176. 149 Cal. App. 3d at 727, 197 Cal. Rptr. at 168.

177. 162 Cal. App. 3d 1141, 209 Cal. Rptr. 128 (1984).

178. The court appeared to believe that part of the trial court's discretion under *Williams* is to bar questioning if it has the effect of educating jurors. *Id.* at 1145, 209 Cal. Rptr. at 130. If educating is the only purpose, that reading of *Williams* is correct. When education, however, is only ancillary to another proper purpose, *Williams* dictates that it is to be permitted. See *supra* note 76 and accompanying text.

*Kronemyer*,<sup>179</sup> the court of appeal went to some lengths to explain why the voir dire questions attempted by the defense squarely met the *Williams* requirement, yet it refused to reverse because of the trial court's failure to permit these questions. It specifically found that the trial court had erred in refusing to allow defense counsel to ask a prospective juror whether she could imagine that a competent but lonely, elderly client might voluntarily make a substantial gift to her attorney.<sup>180</sup> According to the court, the inquiry was "directly relevant to the defense"<sup>181</sup> and within the category of prejudices "which either the local community or the population at large is commonly known to harbor . . . that may . . . significantly skew deliberations in fact."<sup>182</sup> It even found "the scope of the inquiry to be *exceptionally* relevant."<sup>183</sup> But because the trial court had not entirely foreclosed the defense inquiry into the relevant area and because the defense voir dire had been cursory, the court of appeal found no prejudice.<sup>184</sup>

In neither of the two California Supreme Court opinions considering the issue did the court reverse the conviction on the basis of *Williams* error. *People v. Fuentes*<sup>185</sup> held that counsel had been unreasonably restricted in his right to ask questions on the "intent to kill" instruction that jurors had to apply in death penalty cases.<sup>186</sup> As the special circumstances<sup>187</sup> finding had to be reversed on other grounds, however, the court did not reach the question of whether the exclusion of the proposed voir dire question would have provided an independent ground for reversal.<sup>188</sup>

In *People v. Balderas*,<sup>189</sup> the only other case in which the supreme court looked at the issue of what questions should be permitted under

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179. 189 Cal. App. 3d 314, 234 Cal. Rptr. 442 (1987).

180. *Id.* at 336, 234 Cal. Rptr. at 455.

181. *Id.* at 336, 234 Cal. Rptr. at 456.

182. *Id.* at 337, 234 Cal. Rptr. at 456.

183. *Id.* (emphasis added).

184. *Id.*

185. 40 Cal. 3d 629, 710 P.2d 240, 221 Cal. Rptr. 440 (1985).

186. *Id.* at 638-39 & n.5, 710 P.2d at 244 & n.5, 221 Cal. Rptr. at 444 & n.5.

187. "Special circumstances" is the term used to denote the criteria that must be met to escalate an ordinary murder conviction into a death penalty case. In a potential death penalty case the jury first deliberates on the question of whether the defendant is guilty. If all twelve vote guilty, deliberations continue and address the question of whether the special circumstances allegation is true or not true. If it is found to be true then the jury returns to the courtroom for the penalty phase of the trial. CAL. PENAL. CODE §§ 190-190.2. (West Supp. 1987).

188. *Fuentes*, 40 Cal. 3d at 639, 710 P.2d at 244, 221 Cal. Rptr. at 444.

189. 41 Cal. 3d 144, 187, 711 P.2d 480, 504, 222 Cal. Rptr. 184, 207 (1985). *Balderas'* trial was held six months prior to the decision in *Williams*, which only applied to trials conducted after it was filed. *Id.* at 183, 711 P.2d at 500-01, 222 Cal. Rptr. at 204. The court used the *Williams* rationale, however, because "its reasoning logically extends to the issue presented here." *Id.*

*Williams*, the court sustained the trial court's application of the *Williams* rule and refused to reverse a conviction.<sup>190</sup> The two questions that the defendant claimed were prejudicially excluded were on circumstantial evidence and diminished capacity. The court first held that limiting questions on circumstantial evidence would not be an abuse of discretion because the average juror would probably not disagree with the court's instructions. It did find, however, that the lower court would have erred had it restricted questioning on the doctrine of diminished capacity.<sup>191</sup> Because the trial court did not impose such a limitation, the supreme court declined to find the court's restriction on voir dire improper or prejudicial.<sup>192</sup>

From this review, it is obvious that judicial resources are not being drained as feared by critics, either in deciding cases appealed on *Williams* grounds or in retrying cases reversed for *Williams* error.<sup>193</sup>

The real complaints about the *Williams* rule come from those judges and attorneys who feel that the voir dire process is cumbersome and abused by counsel.<sup>194</sup> Undoubtedly, voir dire can be a tedious and time consuming process. To some extent litigants, courts, and jurors simply must put up with the process to obtain an impartial jury. Of course, abuses should be limited where possible. The solution, however, is not to limit the scope of legitimate voir dire, because its scope is not the source of the abuse.<sup>195</sup>

I believe that the abuse or misuse of the voir dire process stems from two main sources: lack of attorney training, and lack of adequate preparation. Lack of training can result in unfocused and excessively lengthy voir dire. It is my experience that most attorneys find it difficult to conduct an adequate voir dire examination. As a result, they fall back on tactics condemned since the days of the *Edwards* rule—educating the jurors, defusing the opposition's case, and getting the jurors to make

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190. *Id.* at 187, 711 P.2d at 504, 222 Cal. Rptr. at 207. The Supreme Court also took this opportunity to restate the *Williams* standard regarding questioning on specific doctrines of law: "[Q]uestioning need be allowed only on a doctrine both material to the trial and controversial." *Id.* at 184, 711 P.2d at 502, 222 Cal. Rptr. at 205.

191. *Id.* at 184, 711 P.2d at 502, 222 Cal. Rptr. at 205-06.

192. *Id.* at 187, 188, 711 P.2d at 503-04, 222 Cal. Rptr. at 207.

193. This may or may not signify a problem with the decision. Critics of the *Williams* decision may argue that the standard is so nebulous that it has not been a useful tool for courts and counsel and for that reason there are few *Williams* issues that reach the appellate courts. See *supra* note 73 and accompanying text; see also Note, *supra* note 172.

The lack of many appellate decisions on *Williams* issues may only signify that courts and counsel are still in the process of developing their practice utilizing the new rule. In the final analysis, it is the trial courts and counsel who must participate in the day to day implementation of the rules under which voir dire will be conducted.

194. See Duncan, *supra* note 172.

195. Blame for lack of information about jurors can not all be laid at the feet of the trial courts. Often it is the failure of counsel to properly utilize the latitude provided by the courts that results in the lack of information about juror attitudes. See Hanley, *supra* note 65.

commitments. One real solution is to train attorneys to conduct voir dire so that their questions are insightful, well phrased, and sensitively asked. Attorneys then could elicit information much more efficiently and rapidly.<sup>196</sup>

Voir dire does not have to be excessively lengthy to be effective. Voir dire becomes lengthy when it is misused: when attorneys use the time not to listen to jurors, but to talk at them, impress them, or get them to make commitments.<sup>197</sup>

Voir dire becomes vague and unfocused when an attorney, although trying to use the process for its intended purpose, does not adequately prepare, so that her questions fail to elicit the information needed. The attorney can avoid the problem if she carefully analyzes the elements of her case, and isolates those issues that are likely to be controversial or have the potential for engendering juror bias.<sup>198</sup> Such analysis will provide the foundation for developing open-ended voir dire questions and the basis for the attorney's response to questions by the judge concerning the relevance of various questions under the *Williams* test. Then, when a dispute arises during the voir dire over whether a question should be permitted, counsel will be prepared to explain its relevance to the court

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196. Compare the amount of time it takes to ask questions in the style of the game "Twenty Questions": Is your husband employed?; What company does he work for?; What type of work does he do for them?; How long has he been there?; Does he supervise other workers? with the following approach, described by Hanley:

"Folks," Judge Grady had said in a pleasant, quiet voice, "instead of me or the lawyers asking you a bunch of questions . . . why don't you just stand up and tell us about yourself, what you do for a living, what your spouse does. Tell us about your family and how you like to spend your time. Tell us what interests you." . . . [E]ach juror stood and unself-consciously gave the lawyers a startlingly effective picture of himself. No list of subjects was used, and the order of the subjects they selected was as illuminating as the substance of their statements.

Hanley, *supra* note 65, at 22.

The latter, open-ended questions, will usually elicit more information than the previous five. If they do not, the attorney can ask follow-up questions have to cover the areas missed. Such open-ended questions have other advantages as well. Their use conveys to the juror the message that the attorney wants the juror to talk. This results in the juror being more forthcoming in subsequent answers, which may eliminate the need to ask some questions, saving still more time. In addition, the attorney is talking less when she uses open-ended questions and is listening to the juror more. Finally, because the juror is being encouraged to speak in a more narrative fashion, the attorney has an opportunity to learn something about the juror's use of language and syntax, speech patterns, and personality—all of which are important in evaluating the juror's individual role within the jury.

When voir dire is conducted in a sensitive open-ended fashion the juror comes away feeling respected, knowing that the lawyer was listening to her, and not just being manipulative. The attorney feels less frustrated, as she has learned some useful information upon which to base challenges. The court can feel comfortable knowing that counsel is utilizing the process for the purpose for which it was intended, and others listening are less bored because the juror volunteers interesting, personalized information.

197. See *supra* notes 195-96.

198. See NATIONAL JURY PROJECT, *supra* note 5, §§ 9.01-03.

and the court can make an informed decision on whether to permit it. Under these conditions the court most likely will permit reasonable questions, and controversy will be kept to a minimum. Most importantly, trials can proceed efficiently and fairly.

### Conclusion

In our system of justice, the right to a fair jury trial is perhaps the most fundamental protection provided by the federal and state constitutions. The right to exercise a peremptory challenge is essential to enforcement of that protection in both civil and criminal trials. For counsel to intelligently utilize the peremptory challenge, broad voir dire is necessary. The court should not require counsel to resort to circumventing the existing rules, engaging in guessing games, or descending to the type of discriminatory practices condemned in *Wheeler* to exercise this important right. Indeed, in *Williams* the California Supreme Court acknowledged the need for broad voir dire to protect the constitutional right of criminal defendants to a fair and impartial jury. The rule of *People v. Williams* should extend to civil cases, because such a rule is necessary to effectuate the civil litigant's right to a fair and impartial jury.

