

Jury Selection Work Group – Public Comments

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Professional Organizations

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California Judges Association
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Community Legal Services in East Palo Alto
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Initiate Justice
Justice Reinvestment
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Law Professors and Social Scientists

Letter from various jury scholars
Professor Joseph Kadane, Carnegie Mellon University
Professor Elisabeth Semel, University of California, Berkeley

Other

Monica Diaz (student paper)

June 4, 2021

Jury Selection Work Group
Hon. Kathleen O’Leary, Chair
350 McAllister Street
San Francisco, CA 94102

Re: Invitation to Comment

Dear Hon. Kathleen O’Leary, Chair, and Members of the Jury Selection Work Group:

The Alameda County Public Defender’s Office represents thousands of people accused of crimes in our county each year, including representing clients at jury trial. We are deeply committed to the Work Group’s stated goals of eliminating discrimination during jury selection and achieving a fair cross-section of the community in juries, both of which are essential to the fair administration of justice. We also appreciate the invitation to comment. Our responses to the questions posed by the Work Group follow.

1. *What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?*

We think there are at least three things that courts can do. The first is that they can demand that both prosecution and defense strictly adhere to the current *Batson/Wheeler* standards. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) The unfortunate truth is that courts have often been reluctant to call attorneys out for exercising race-based challenges and have been slow to recognize the impact of implicit or unconscious bias. Their reticence often manifests itself in ❶ a stingy approach to the prima facie showing of group bias, or ❷ an indifferent effort to separate “bona fide reasons” from “sham excuses” (*People v. Wheeler, supra*, 22 Cal.3d at p. 282.) A more vigorous application of *Batson/Wheeler’s* inquiry would go a long way toward preserving a representative jury.

The second thing that the courts can do is prioritize training on the implementation of Assembly Bill 3070. (Code of Civil Procedure § 231.7.) Trial judges should be ready to implement this valuable tool for insuring a fair and representative jury on January 1, 2022, and should be encouraged to adopt the new law before then.

Finally, jury commissioners should be required to collect demographic data for all people responding to a jury summons. This could easily be accomplished with a single page questionnaire that included – among other things - the prospective juror’s self-description of their race and their zip code. The data should be compiled in a quarterly report submitted to the presiding judge with the goal of determining whether those who show up for jury service are representative of the communities served by the court. In the interest of transparency, the report should be available to the public.

2. How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

We have five ideas:

- ❶ Encourage courts to immediately expand the list of eligible jurors to include tax filers. (See Code of Civil Procedure § 197.) The Work Group should also consider the feasibility of further expanding the jury pool to include utility customers and those receiving public aid. Many other states use these databases to ensure that jury panels are representative of the community.
- ❷ Engage more with churches and other community organizations to encourage and promote juror participation.
- ❸ Launch a campaign, using public forums and public service announcements to raise awareness of the benefits of participatory democracy through jury service.
- ❹ Make travel vouchers [bus passes, BART tickets, etc.] to and from the courthouse available to low-income jurors.
- ❺ Increase the jury service fee. The current rate of \$15.00 a day was set 20 years ago. It is now out of date and results in the disparate treatment of hourly wage earners. (See Code of Civil Procedure § 215(a).) The truth is that most middle and upper class jurors are paid by their employer for jury service. They should not receive any additional compensation. Section 215(b) of the Code of Civil Procedure should be amended to eliminate compensation for *anyone* who is paid by his or her employer, not just those who work in the public sector. Hourly wage earners, on the other hand, often receive no compensation. These jurors, who often come from underrepresented communities, should receive a stipend that better reflects the sacrifice they are making to serve on a jury.

3. Are there any other ways in which the summons process could be improved?

Jury commissioners' offices must have a process whereby they follow up on all summons that do not result in a response or are returned as undeliverable. Economically disadvantaged persons tend to move more frequently making them difficult to locate to deliver a juror summons and are less likely to respond to a summons due to the prohibitive costs associated with jury service.

The creation of a task force that investigates the new addresses of those persons who were unable to be served would yield information that can be used to update master lists. These master lists should be updated with increased frequency so that fewer summons are returned as undeliverable.

Also, because economic hardship is the greatest barrier to jury service for the majority of people in underrepresented communities, establishing a right to a living wage for jury service has the potential to improve the response rate. This right should be clearly communicated in the actual summons, but public service announcements on local radio and television programs, road-side billboards, and flyers in community centers/establishments could also be used to get the word out about this right to a living wage.

4. How can courts determine trends and track progress in order to make the jury pool more representative of the community?

We believe that the key is maintaining accurate demographic information for the jury pool. This includes not only collecting data on those who respond to the jury summons but also keeping track of those who do not. Once that data is analyzed, courts can better assess who is showing up for jury duty and who is not. If the data shows that certain groups are underrepresented, courts should make the data available to other criminal justice stakeholders and solicit their input as to how best to rectify the shortfall. This is the kind of problem that surely benefits from a diversity of viewpoints.

5. What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

Economic hardship and disadvantage represent the greatest barrier to jury service for members of underrepresented communities and establishing a right to a living wage for jurors who lose income by their jury service would likely be the single most effective way to reduce these financial barriers.

The court can also alleviate employers' concerns by reimbursing small business owners for the cost associated with the loss of the employee due to jury service. Imposing financial sanctions on employers who penalize employees for jury service would not only serve as an effective deterrent but would likely also create a larger juror pool.

The lack of transportation is another barrier for the economically disadvantaged, and the court can resolve this barrier by providing shuttle services or travel vouchers for public transportation. Where courthouses are not easily accessible by public transportation, the court should provide shuttle services from the nearest public transportation hub.

Finally, another barrier related to economic hardship is family care. The court needs to identify potential jurors with family care needs well in advance of the service date. This can be done by including a question in the juror summons about the family care needs of any potential juror. With greater lead times, these needs can be identified and arranged for well in advance of the service date. The court can eliminate this barrier altogether by providing on-site childcare or vouchers for drop-in childcare and in-home care.

6. If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

Potential jurors who are self-employed, work as contract/gig workers, work informally or on "under-the-table" jobs, or whose employers simply do not pay for jury service, often cannot afford to serve because they will lose their income and lack the financial resources to absorb that loss. Potential jurors who are unemployed or underemployed may also be concerned that they will miss new job opportunities while serving on a jury.

Paying a "living wage" to all seated jurors and potential jurors who appear for jury selection, with the exception of those whose employers pay for jury service (see response to Question 1, above), would likely be the single most effective way to reduce financial barriers. This "living wage" should be at least \$120.00 per day of service (the equivalent of eight hours per day at \$15.00) and should be assessed and adjusted on an annual basis. It will be important to publicize this change in juror fees widely.

Despite the provisions of California Labor Code section 230, some potential jurors may fear that their employers will fire or otherwise penalize them for taking time off for jury duty. Increasing public awareness and enforcement of this section seems essential and providing prospective jurors with instructions and/or forms for filing a complaint pursuant to section 230(h)(1) may also be useful.

7. Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there Batson/Wheeler-related issues, whether or not addressed in AB 3070, that should be studied by the work group?

Yes. The work group should collect jury selection data from all counties in California and conduct a study to determine the actual impact of AB 3070 and whether courts are effectively implementing AB 3070; to assess the composition of jury panels and juries across the state; and to identify areas of focus for future improvements to the jury selection process. We cannot effectively address bias and discrimination in our jury system without first measuring the problem and identifying the point(s) in the process where disparities arise.

This analysis would require jury commissioners and court officers to collect and maintain a record of demographic data – including race and gender – for all jurors who are summoned, jurors who are assigned to trial panels, jurors who are granted hardship excuses, jurors who are excused for cause, jurors who are excused by peremptory challenge, and jurors who are selected to sit on juries. This data would need to be compared with overall demographic data for each county. Jury commissioners and court officers should also compile and maintain a record of the number of motions brought under Code of Civil Procedure section 237.1 in trial, and the number of these motions that are granted or denied.

While the passage of Assembly Bill No. 3070 is a tremendous step forward, there is much work to be done. We commend the formation of this Work Group and its continued efforts to eliminate discrimination and disparities in jury selection.

Respectfully Submitted,
ALAMEDA COUNTY PUBLIC DEFENDER



Brendon D. Woods
Public Defender



Advocates for the defense for over 45 years!

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4th June 2021

Chief Justice Tani G. Cantil-Sakauye
Jury Selection Work Group
Hon. Kathleen O'Leary, Chair
350 McAllister St.
San Francisco, CA. 94102

RE: Comment to Jury Selection Work Group

The California Attorneys for Criminal Justice (CACJ) thank you for the opportunity to comment on the challenges in providing fair juries which represent a true cross-section of the community for all defendants in California.

We are aware that you have received extensive, detailed, well-sourced comments from other groups or organizations, including Professor Elisabeth Semel from Berkeley Law, the principal author of *Whitewashing the Jury Box* and a co-author of AB 3070, Lois Heaney and the National Jury Project, and a group of jury composition scholars including Professors Jeffrey Abramson and Nina Chernoff. CACJ supports the views expressed in those comments, and commends the source materials cited by those experts for study by the working group.

Rather than duplicate those fine efforts, our comments are developed from CACJ members' extensive experience in jury trials, including what we think are common-sense reforms to lower barriers to jury service, especially for racially diverse and lower income members of the potential jury pool. In that respect our comments are more like those from the California Public Defenders Association (CPDA) submitted by Laura Arnold than like the jury composition experts referenced above.

We see poverty as the most significant barrier to jury service and a fair cross-section in jury pools. There is a well-documented correlation between race and economic success, as median white income exceeds median income for persons of color wherever the issue is studied. Thus to the extent the jury summons and selection process operates to screen out low-income people, it automatically creates under-representation of black and brown jurors as well.

The Working Group should propose measures to directly reduce economic barriers to jury service. The present \$15 per day and \$0.34 mileage one way as compensation is woefully inadequate. Prospective jurors who are employed are generally not compensated for time off work.¹ This means jury service causes a loss of income to those who are employed. The *per diem* barely reimburses the cost of lunch, and would not cover parking or public transportation costs, so each prospective juror is also faced with out-of-pocket expenses in order to serve. No person or family should fear being evicted or going hungry in order to do public service by sitting on a jury. When they do face that fear the most likely response will be to disregard the summons in order to avoid the expense of serving.

¹ Compensation for jury service is almost exclusively provided under union contracts, and few workers outside government service have that benefit.

This aspect of the problem has a common-sense solution: provide enough financial support so that the unemployed and low income employees do not suffer a financial loss for service to the community. A partial solution would be to require employers to provide PTO for jury service after the first day. For the unemployed a *per diem* linked to the minimum wage would encourage more participation. Transportation needs must also be met, for example with vouchers for public transportation and free parking for those who drive, plus reimbursement for travel costs to and from court. Child care must also be considered, as homemakers, the unemployed and low-wage employees with young children will not respond to a summons if they do not have access to safe child care. There should be a *per diem* amount for costs of child care, too.

Payments and reimbursements also need to be provided in a timely fashion. Those living paycheck-to-paycheck need the pay for jury service to be delivered on the same schedule as their pay or they will suffer consequences for late payments on their bills and rent. So warrants need to be delivered within a week of the end of a trial, or for longer trials they need to be delivered bi-weekly as the trial goes on.

Low income individuals are more likely to change jobs and addresses than more affluent persons. They also have lower rates of voter registration and DMV licensing. These demographic realities mean a summons for jury duty sent to low income and minority neighborhoods is more likely to be returned as undeliverable. The same factors reduce representation in the master pool of persons eligible to receive a summons. Several ways to address these issues have been suggested by others, including the use of additional source lists for the master pool that reduce or eliminate the under-representation, more frequent updating of lists to capture changed addresses, and sending a new summons to the same neighborhood to replace those returned as undeliverable.

Voluntary failure to respond to a jury summons is another aspect of the jury composition problem. In some places the return on a summons (*i.e.* the number who appear in court after receiving a summons) is only one in three. Courts have to summon 120 people in order to assure 40 or more will come to court. This almost certainly has a negative effect on the cross-sectional representation of the panels. The poor and persons of color are more likely to have fraught relationships with the police and government agencies, therefore less likely to respond to court to serve.

One way to increase the response rate would be to follow up the initial summons with a second summons to a court date for those who did not appear on the trial date. The court can then inquire as to the reason for non-appearance and encourage attendance in the future. It seems very few courts have done follow-up when summoned jurors fail to appear - very likely most people in the community are aware that you can ignore the summons without consequences. Changing that to a public awareness that you can be brought to court if you blow off the summons could make a significant contribution to the response rate.

CACJ understands that common sense is not always good sense. Jury composition problems can only be understood in detail with sufficient data. If corrective measures are implemented the effects can only be understood by collecting sufficient data. The Working Group should consider and recommend procedures for collecting relevant data to identify areas of under-representation today, and to track the effect of any reform efforts. At a minimum this would seem to require collection of demographic data on prospective jurors.

It is suggested that the current source lists for the master panel tend to under-represent the poor and persons of color. Demographic information for the state population by race and income is readily available. But there is a need for similar information about the composition of each county's master panel. The makeup of petit juries also needs to be established, for example by having jury commissioners collect information on age, gender, gender orientation, racial and ethnic identification and any other relevant factors, and submit it to a statewide database. Over time this would provide the data needed to objectively evaluate the impact of efforts to assure that trial juries truly represent a cross-section of the community.

In Question 7 of the request for comment, the Work Group has asked whether there are any other areas related to Batson/Wheeler, whether or not addressed in AB 3070, that should be studied by the Work Group. Because the Judicial Council is responsible in large part of trainings received by judges throughout the state, CACJ believes that a fruitful area of inquiry for the Work Group is to ensure that the Judicial Council provides timely and insightful trainings on the newly enacted AB 3070.

To ensure that the trainings are most effective, CACJ strongly believes that it would be helpful to reach out to those lawyers involved in the drafting and passage of AB 3070-a CACJ sponsored bill-since those lawyers are most deeply familiar with the terms of the legislation and its legislative history. Members of our organization with deep familiarity with the problems of Batson and Wheeler which AB 3070 attempts to address, and who were directly involved in both the drafting and passage of AB 3070 include Elisabeth Semel, author of the Whitewashing the Jury Box report, Elias Batchelder, the Co-Chair of CACJ's Legislative Committee, and AJ Kutchins, another CACJ attorney with extensive expertise in Batson/Wheeler issues and who was involved in the drafting and passage of this landmark legislation.

Again, thank you for the opportunity to comment on these important issues for jury trials.

Allison Zuvelda

Allison Zuvelda, President
California Attorneys for Criminal Justice

STEPHEN MUNKELT

Stephen A. Munkelt, Executive Director
California Attorneys for Criminal Justice

Invitation to Comment – Jury Service

In June of 2020, under the leadership of Hon. B. Tam Nomoto Schumann, then President of the California Judges Association (CJA), CJA established a Task Force on the Elimination of Bias and Inequality in Our Justice System. The Task Force is tasked with identifying sources of bias and inequality and making recommendations on necessary, and appropriate actions to eradicate them. The Task Force, in responding to the Supreme Court of California's Jury Selection Work Group's Invitation to Comment on jury diversification, relied on the following sources to make suggestions as to how the process of jury service and summons can guard against impermissible discrimination in jury selection and further the goal of ensuring that all juries reflect a fair cross-section of the community:

1. The report of the State of Connecticut Jury Selection Task Force, available at https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.
2. Washington State Jury Commission, Report to the Judicial Administration, available at: http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf.
3. Randall, Woods, and Martin, *Racial Representativeness of Juries : An Analysis of Source List and Administrative Effects on the Jury Pool*, (2008) (a study published in Vol. 29 of the Justice System Journal and partially funded by the State Justice Institute and the Ohio Supreme Court), available at: https://www.ncsc.org/_data/assets/pdf_file/0030/17499/racial-representativeness-of-juries.pdf.
4. American Bar Association's *Principles for Juries and Jury Trials*, (2005), available at: <http://www.amjudges.org/conferences/2010Annual/SpeakerMaterials/44%20-%20Mize%20ABA%20jury%20principles.pdf>
5. Juror Participation Initiative Report, The First Judicial District of Pennsylvania, available at: https://www.courts.phila.gov/pdf/report/FJD_JPIC_Final.pdf

What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

- Increase jury education/outreach efforts to address the importance of jury service.
- Consider higher compensation for juror service and/or make additional incentives a priority. Consider decreasing ancillary costs and barriers to jury service by paying unemployed or part time jurors the prevailing minimum wage and reimbursement for travel and day care (parking, transportation vouchers, etc.).
- Consider further expansions of the juror pool consistent with SB 592's expansion of the jury pool (which starting in 2022, will include all tax payers under the new law, rather than those with DMV-issued identification and registered voters). Consider the efforts that other states have recommended or taken in regard to this issue, including but not limited to eliminating bars on jury service for criminal convictions after a certain period of time without subsequent offenses, increasing the age at which jurors can opt out from 70 to 75, including legal permanent residents, providing interpreters for jurors, etc.

- Consider setting aside enough funds to reimburse jurors who serve on long trials for their lost wages to encourage small business owners and those who would not otherwise be paid while on jury duty to participate and therefore diversify the jury pool.

How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

- Develop educational/outreach opportunities within a system to specifically address non-appearance to jury service. Develop both adult and youth educational campaigns to encourage participation.
- Conduct community outreach, public campaigns and education efforts among the public, businesses and employers; create educational efforts geared towards including diverse communities. Consider involving and seeking feedback from community and non-profit organizations, law firms, religious institutions, and the media.
- Seek community input to identify and remedy impediments that keep community members from responding to and participating in jury service.
- Consider developing a specific action plan to address the identified challenges. Consider consulting with marketing experts to develop appropriate campaigns for both the general public and underrepresented communities.
- Consider how technology could be utilized to increase jury response/communication.

Are there any other ways in which the summons process could be improved?

- Consider adjusting the summons system to increase the statistical likelihood of a representative jury (for e.g. utilize data to adjust to the summons process to reflect response rate, compliance, etc.). Further study and analyze the summons process to determine how barriers like employment, transportation and economic hardship and other factors may adversely impact jury response and/or participation.
- Consider conducting frequent address checks and review of the summons pool to ensure addresses are accurate and updated.

How can courts determine trends and track progress in order to make the jury pool more representative of the community?

- Consider carefully monitoring non-response and undeliverable rates for jury summons, specifically as it relates to participation by diverse communities.

What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify? If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

Jury service may present significant hardship and inconvenience for jurors who lack financial security. Those hardships may be exacerbated by ancillary costs and/or the unavailability of adequate transportation. In 2018, the State of Pennsylvania formed a “Hardship and Inconvenience Workgroup” to address how the state could minimize or eliminate the logistical and practical burdens many in the community face. The Workgroup acknowledged that many instances of hardship “disproportionately affect minority communities and the impact the court’s ability to have jury pools that reflect a fair cross-section of the community.” The workgroup made

the following recommendations for how government, specifically the legislative and judicial branches, could address these issues:

- Increase juror compensation.
- Require employers to pay employees during their jury service and give employers a tax credit for their expenditures.
- Provide economic support for jurors through parking vouchers and transportation discounts and reimbursements.
- Consider the ways in which other jurisdictions, like Arizona, have funded additional juror compensation. Prioritize funding strategies that do not rely on unnecessarily increasing fees for the public.
- Establish a juror fee donation program or provide government funding to create a lengthy trial fund.
- Alleviate child care burdens by sponsoring a child care program or providing discount vouchers to independent programs.
- Collaborate with other community resources to address the needs of potential jurors (e.g. pursue discounts with public transportation entities, parking lot operations, etc.)
- Better inform citizens about scheduling options for those who need accommodation.

The Taskforce should consider whether these recommendations would help address hardships for the general public and underrepresented communities.

Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070 that should be studied by the work group?

In 2020, the State of Connecticut Judicial Branch Jury Selection Task Force presented their final report to Chief Justice Richard A. Robinson of the Connecticut Supreme Court. The report made recommendations for systemic jury reform in Connecticut. One of the task force subcommittees was given the responsibility of assessing Batson/Wheeler issues within the context of using peremptory challenges and the creation of model jury instructions. Specifically, the scope of the subcommittee’s inquiry was described as follows:

The subcommittee will examine how the court can play a role in addressing implicit bias through the use of peremptory challenges and the creation of model jury instructions. In the discussion of peremptory challenges, the subcommittee should consider how their use may contribute to imbedding implicit bias in the jury selection process. Should peremptory challenges be eliminated or at least severely limited? Should jurors instead be “conditionally stricken” and their status revisited at the conclusion of the voir dire process? Through the study of practices in other states, the subcommittee shall give consideration to the feasibility and impact of judges presiding over the civil jury selection process and what impact their presence may have on the use of peremptory challenges.

When it comes to Batson challenges, most judges are loathe to make a finding of purposeful discrimination in concluding that the attorney in question has acted unethically and has willfully violated a potential juror’s constitutional rights. Further, the reputation, and integrity of the attorney may be called into question under the prongs of Batson, resulting in a referral to statewide bar counsel. This subcommittee will study all standards

under Batson and whether the Batson rule should be divorced from the court's requirement to find purposeful discrimination in upholding a Batson challenge.

Further, this subcommittee should examine whether in practice, Batson serves to contribute to the implicit bias and discrimination it seeks to overcome. Further, this subcommittee should examine whether in practice, Batson serves to contribute to the implicit bias and discrimination it seeks to overcome. Does Batson in fact encourage the voir dire process to look the other way and ignore the very issues of race, stereotype and discrimination it is designed to guard against? ...

The subcommittee will examine in detail, the relationship between Batson and implicit bias and make recommendations for sweeping and systemic changes to the jury selection process through a variety of remedies, including the legislative process and statutory revisions. In developing model jury instructions, the subcommittee shall conduct focus groups with stakeholders to be identified, to determine how the model jury instructions can be drafted to educate jurors about implicit bias and how to avoid it in their deliberations.

Ultimately, the subcommittee (unanimously) made a recommendation to replace Connecticut's modified version of the three-step Batson test with a "wholly different methodology." The Jury Selection Workgroup should consider studying the same issues outlined above to determine how to address these issues.

We hope that the Supreme Court of California's Jury Selection Work Group will consider these suggestions; we remain available to assist however we can on these and other issues that address the elimination of bias and inequality in our justice system.



**COMMUNITY
LEGAL SERVICES**
IN EAST PALO ALTO

June 4, 2021

SUPREME COURT JURY SELECTION WORK GROUP
350 McAllister Street
San Francisco, California 94102-3688

Re: Invitation to Comment

Dear Hon. Kathleen O’Leary, Chair:

On behalf of Community Legal Services in East Palo Alto (“CLSEPA”), I am responding to the invitation for public comment. We applaud this Work Group’s mission of eliminating discrimination in jury selection and achieving a fairer cross-section of the community. The idea that litigants can have their cases heard by peers – by the community itself – is a primary source of the justice system’s legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

The Jury Selection Work Group is well placed to help usher in a new era of fairness in California juries. Three new laws that will be implemented over the next few years have the potential to bring California much closer to the “fair cross section of the community” standard adopted by the United States Congress in 1968 with the Jury Selection and Service Act:

- Senate Bill 310, which allowed people with felony convictions to serve on juries
- Senate Bill 592, which expanded the lists that jury commissioners draw from to create jury pools to include a list of state tax filers, and
- Assembly Bill 3070, which created a procedure to eliminate the discriminatory use of peremptory challenges

The success of these reforms will be dependent on how they are implemented in individual courthouses in all fifty-eight California counties. A primary task that is essential to determining the impact of these efforts is to obtain accurate demographic information for juries across the state. Only with this data can a group like this measure whether its efforts are truly moving California juries toward a fair cross-section of the community.

Eliminating formal barriers to jury service is only a part of the effort towards more fair juries. We would also urge this Group to look at practical barriers to jury service. Financial burdens and travel burdens fall particularly hard on communities of color. Policies that require travelling great distances, often via public transportation, or that force people to choose between their jobs or caring for their children and serving on a

jury can be as detrimental as statutory exclusions. We cannot be satisfied with formal fairness but practical unfairness. Jury service must not be only for those who are affluent enough to participate.

CLSEPA is a non-profit legal organization offering free legal services that improve the lives of low-income families throughout the region specializing in immigration, housing, workers' rights, reentry and criminal records dismissal, and consumer protection.

With regard to your individual questions, we would make the following recommendations:

1. What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

As stated above, jury commissioners should collect demographic data for all people responding to a jury summons by having them fill out a single page questionnaire. They should be asked to self-describe their race and to state their zip code. This demographic data should be compiled quarterly, and a report should be submitted to the presiding judge concerning whether the demographics of those showing up for jury service are consistent with the census demographics for the area served by the court.

2. How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

Invite community organizations to meet with court officers to regularly promote juror participation. Hold public forums explaining the benefits of participatory democracy through jury service. Have jury commissioners use nontraditional lists, in addition to ROV, DMV and tax filers, to summon potential jurors to court.

3. Are there any other ways in which the summons process could be improved?

The court should track returned summonses that are marked "undeliverable" and update current addresses as necessary.

4. How can courts determine trends and track progress in order to make the jury pool more representative of the community?

This again highlights the importance of maintaining accurate demographic information for the jury pool. Once that data is analyzed, it may be necessary to increase the number of summonses going to communities with a higher concentration of underrepresented populations.

5. What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

The practical barriers discussed above are major factors that decrease juror participation. Both jurors and their employers should be reimbursed for the cost of jury service, at a minimum of \$15 dollars an hour.

6. If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

The fear of losing a job, losing income, the inability to obtain child or elder care, and transportation costs are the most common financial concerns cited by prospective jurors. Jurors who are unemployed and/or who are not receiving financial benefits while attending jury duty should be reimbursed to obtain a “living wage” for serving as jurors. Sanctions should be imposed on any employer who takes action against an employee for serving on a jury.

7. Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?

Yes, we urge this Work Group to oversee the effective implementation of AB 3070, along with SB 310 and SB 592.

The work of this Group is essential to preserving and enhancing the legitimacy of the jury system. CLSEPA appreciates the opportunity to provide feedback on this important undertaking.

Sincerely,

Katrina Logan

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CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

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Stephen J. Prekoski, 23 Associate
Santa Cruz County

Stephanie Regular, 23
Contra Costa County

Nick Stewart-Oaten, 23
Los Angeles County

Jeremy Thornton, 23
San Diego County

Oscar Bobrow, 22
Solano County

Tracie Olson, 22
Yolo County

Molly O'Neal, 22
Santa Clara County

Bart Sheela, 22
San Diego County

Tamani Taylor, 22
Solano County

Aimee Vierra, 22
Riverside County

Brendon Woods, 22
Alameda County

Chief Justice Tani G. Cantil-Sakauye
Jury Selection Work Group
Hon. Kathleen O'Leary, Chair
350 McAllister Street
San Francisco, CA 94102

Re: Response to Working Group Regarding Jury Selection's Invitation to Comment.

The California Public Defenders Association (CPDA), a statewide organization of approximately 4,000 criminal defense practitioners, in addition to endorsing the comments made by NJP Litigation Consulting and the comments made by Professor Semel and other law professors and social scientists engaged in research of the jury system, respectfully submits the following responses to the questions posed by the Judicial Council working group:

- 1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

Jury commissioners in each county should be required to collect demographic data regarding all who respond to a jury summons from the superior court in their respective counties. We recommend that this be done through a brief questionnaire, asking prospective jurors to self-describe race and zip code of their respective residences. We would suggest that this data be compiled and that quarterly reports be submitted to the presiding judge, for review and a determination as to whether the demographics of those who appear for jury service are consistent with the census demographics for the jurisdiction.

- 2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

We recommend that civic, religious and community leaders be invited to participate in periodic meetings with court officers, so that juror participation in their respective communities can be promoted in a meaningful way. Public forums (by court officers or jury commissioners) should be conducted, so the attributes of participatory democracy through jury service can be promoted in underrepresented communities. Courts should also broaden the scope of their respective summonses for service, to include lists in addition to the CCP required statutory lists of ROV, DMV and tax filers.

- 3) Are there any other ways in which the summons process could be improved?

We recommend that task forces be created in each jurisdiction to track summonses which are returned as "undeliverable" and to attempt to locate the current residential addresses of those summoned. Master lists with current residence information of prospective jurors should be updated quarterly.

- 4) How can courts determine trends and track progress in order to make the jury pool more representative of the community?

If the data, obtained through measures implemented in the answer to question one, indicates that a particular minority population or other protected class is underrepresented in the region, and it is determined that the court's summonses are not reaching those necessary to ensure a representative cross section of the community, jury commissioners should increase the number of summonses issued to those residing in communities with a higher concentration of individuals of that underrepresented minority population and/or protected class.

- 5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

Among the largest barriers to jury service is disparate socio-economic status of members of the community. Additionally, studies have shown that a disproportionate number of prospective jurors who fall within a protected class cannot afford to miss work in order to serve. One solution to this problem would be for the government to reimburse employers, to enable them to operate their businesses in the absence of their employees who are selected for jury service. Further, the compensation for jury service can (and should) be increased, to be consistent, at least, with minimum wage laws.

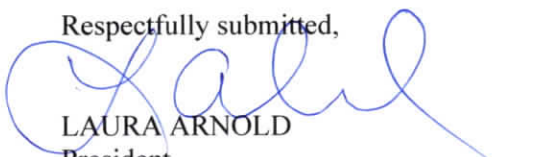
- 6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

In addition to the foregoing, and fear of losing employment due to absence from work related to jury service, many prospective jurors from unrepresented communities cannot afford care for dependent children and adults during the time of their service. Still others lack transportation. If the government were to increase compensation for those called for service, the wealth-disparity among those who serve would not be as prevalent. In addition, consideration should be given to laws which would sanction employers who take any disciplinary or retaliatory action against an employee who is required to miss work to serve on a jury.

- 7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?

Careful attention should be given to ensure that judicial officers have the education and willingness to adhere to and implement the new law. In addition, studies should be conducted, in each jurisdiction, to determine whether the law is actually making a difference as to the composition of juries in the region. The other recommendations stated herein, including collection of demographic information from those summoned and evaluation and action responsive to that data, would be helpful.

Respectfully submitted,



LAURA ARNOLD
President
California Public Defenders Association

Dream Beyond Bars. It Takes CURYJ.

June 4, 2021

SUPREME COURT JURY SELECTION WORK GROUP

350 McAllister Street

San Francisco, California 94102-3688



Re: Invitation to Comment

Dear Hon. Kathleen O’Leary, Chair:

On behalf of Communities United for Restorative Youth Justice (CURYJ), I am responding to the invitation for public comment. We applaud this Work Group’s mission of eliminating discrimination in jury selection and achieving a fairer cross-section of the community. The idea that litigants can have their cases heard by peers – by the community itself – is a primary source of the justice system’s legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

The Jury Selection Work Group is well placed to help usher in a new era of fairness in California juries. Three new laws that will be implemented over the next few years have the potential to bring California much closer to the “fair cross section of the community” standard adopted by the United States Congress in 1968 with the Jury Selection and Service Act:

- Senate Bill 310, which allowed people with felony convictions to serve on juries
- Senate Bill 592, which expanded the lists that jury commissioners draw from to create jury pools to include a list of state tax filers, and
- Assembly Bill 3070, which created a procedure to eliminate the discriminatory use of peremptory challenges

The success of these reforms will be dependent on how they are implemented in individual courthouses in all fifty-eight California counties. A primary task that is essential to determining the impact of these efforts is to obtain accurate demographic information for juries across the state. Only with this data can a group like this measure whether its efforts are truly moving California juries toward a fair cross-section of the community.

Eliminating formal barriers to jury service is only a part of the effort towards more fair juries. We would also urge this Group to look at practical barriers to jury service. Financial burdens and travel burdens fall particularly hard on communities of color. Policies that require travelling great distances, often via public transportation, or that force people to choose between their jobs or caring for their children and serving on a jury can be as detrimental as statutory exclusions. We cannot be satisfied with formal fairness but practical unfairness. Jury service must not be only for those who are affluent enough to participate.

With regard to your individual questions, we would make the following recommendations:

- 1. What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?***

As stated above, jury commissioners should collect demographic data for all people responding to a jury summons by having them fill out a single page questionnaire. They should be asked to self-describe their race and to state their zip code. This demographic data should be compiled quarterly, and a report should be submitted to the presiding judge concerning whether the demographics of those showing up for jury service are consistent with the census demographics for the area served by the court.

2. *How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?*

Invite community organizations to meet with court officers to regularly promote juror participation. Hold public forums explaining the benefits of participatory democracy through jury service. Have jury commissioners use nontraditional lists, in addition to ROV, DMV and tax filers, to summon potential jurors to court.

3. *Are there any other ways in which the summons process could be improved?*

The court should track returned summonses that are marked “undeliverable” and update current addresses as necessary.

4. *How can courts determine trends and track progress in order to make the jury pool more representative of the community?*

This again highlights the importance of maintaining accurate demographic information for the jury pool. Once that data is analyzed, it may be necessary to increase the number of summonses going to communities with a higher concentration of underrepresented populations.

5. *What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?*

The practical barriers discussed above are major factors that decrease juror participation. Both jurors and their employers should be reimbursed for the cost of jury service, at a minimum of \$15 dollars an hour.

6. *If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?*

The fear of losing a job, losing income, the inability to obtain child or elder care, and transportation costs are the most common financial concerns cited by prospective jurors. Jurors who are unemployed and/or who are not receiving financial benefits while attending jury duty should be reimbursed to obtain a “living wage” for serving as jurors. Sanctions should be imposed on any employer who takes action against an employee for serving on a jury.

7. *Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?*

Yes, we urge this Work Group to oversee the effective implementation of AB 3070, along with SB 310 and SB 592.

The work of this Group is essential to preserving and enhancing the legitimacy of the jury system. CURYJ appreciates the opportunity to provide feedback on this very important undertaking.

Sincerely,

John Vasquez

John Vasquez, Policy & Legal Services Manager
Communities United for Restorative Youth Justice (CURYJ)
(916) 678-8084

From: [Stephen Dahm](#)
To: [Portnow, Kara](#)
Subject: Response to Jury Selection Working Group Request for CommentKa
Date: Friday, May 28, 2021 5:59:59 PM

Kara, I have a few thoughts answering some of the Working Group's seven questions:

1. Courts can streamline jury trials and make them shorter. Federal judges sometimes strictly limit time, and state judges could do the same. In tandem with that, pass legislation requiring all employers to pay employees who miss time from work for jury service.
2. Courts have already taken steps on efficiency, e.g. only bringing jurors to courthouse when they will about to be sent to a courtroom. Keep that up and improve it.
3. Can't think of much other than voting rolls, drivers licenses and state-issued IDs.
4. Judges can meet at end of year and report to presiding judge or Judicial Council how diverse the juries were in that year. Judges can fill out a form of some kind at end of every trial.
5. Time and money. Make trials faster, and make employers pay jurors who miss work in order to serve.
6. Time and money.
7. CCP 231.7 (AB 3070) is on the books for now, so the group should try to deal with it if possible. It seems to me that the language in the statute would more properly be part of Standards of Judicial Administration, Titles 3 and 4. If judges are trained to recognize discriminatory peremptories, they could say yes or no to a request for a peremptory, as they do now for challenges for cause. It seems that putting this in the lawyers' hands will make the process much slower, and judges could do a better job.

Thank you.

Steve Dahm
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75 Southgate Avenue
Daly City, CA 94015
(650) 991-5126, ext. 12
sdahm@cwmlaw.com

Assistant: Judith Sampson
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Ext. 10

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From: [Monica J Diaz](#)
To: [Portnow, Kara](#)
Subject: Jury Selection Work Group
Date: Friday, June 4, 2021 4:07:06 PM
Attachments: [JURY DUTY EFFECT ON JURORS-2.pdf](#)

Dear Kara Portnow:

My name is Monica J. Diaz and I recently graduated from Humboldt State University receiving my Master in Social Work. I was required to work on a community Senior Project my last year of my program. For my Senior Project I studied, researched and wrote a report on the effects of jury service.

I am submitting my report to the Jury Selection Work Group with hopes that they will consider the points I submitted in my report.

Thank you for your time and consideration.

Monica J. Diaz, MSW

JURY DUTY: EFFECT ON JURORS

Monica J. Diaz

Humboldt State University

2021

Overview

Civil liberties and human rights are universal to all people and are indispensable to our court system. A court system that exists to carry out justice and ensure that an individual is not deprived of their legal rights. We are all entitled rights and guaranteed freedom; however, there are times that they are not easily seen within our legal system. A system that unfortunately shortfalls on protecting the rights of those serving on jury duty. Jury service is one of the most important civic duties that a citizen can perform. Ordinary citizens that live, have families and work in our communities and choose to support our judicial system by influencing fairness in trials and provide an unbiased viewpoint.

Despite the benefits and sense of pride in fulfilling a civic duty, not every person (potential juror) looks forward to receiving the summons in the mail or are left with a favorable experience. I personally have been summoned for jury services numerous times and in my most recent experience, I was left emotionally unbalanced due to the sensitivity of the case and harsh questions regarding personal private matters. It is through this experience that I established that our local court system is not effectively prepared to ensure that the jury process does not endure traumas to the jurors nor do they work to protect their right to privacy. The lack of consideration of privacy and rights of every individual that reports for jury duty is a form of injustice that favors a system that should be protecting all human rights.

Effects of Jury Duty

Jury trials are a major part of our judicial system and ordinary members of our community are selected to take part as a sworn juror. These are community members

that are expected to put their life responsibilities on hold as they fulfill their civic duty all while not really knowing or understanding how their experience may affect their lives. Research studies have shown that criminal cases of sensitive nature (graphic or disturbing evidence) can cause a traumatic experience leaving a lasting adverse effect on the juror's mental, physical and social well-being. In these cases, jurors can experience psychological trauma from secondhand exposure to traumatic situations, which is also known as vicarious trauma (McQuiston, Hooper and Brasington, 2019). Lengthy and repeated exposure of these traumatic situations can cause traumatic stress which are symptoms similar to those of PTSD symptoms (unwanted flashbacks, depression, anxiety). Symptoms that impair normal daily functioning and make every day life difficult.

Jurors have the right to have their privacy protected and have freedom from mental distress, emotional unbalance or triggered to relive past life traumas. They did not report for jury services to have their life unraveled or put on public display. Some of these issues and possible effects were a concern for the judge in the Jeffrey Dahmer case. He arranged for jurors to be provided counseling services after the trial ended. All 12 jurors, plus two alternates, were offered counseling services with mental health professionals to debrief and discuss their reaction to all the graphic evidence and testimony that they had been exposed to. How is anyone expected to switch gears from one moment viewing and listening to distressful material to the next moment getting back to normal life. Efforts need to be made to ensure that jurors are able to get back to some form of normalcy.

Research Study

I developed an online survey that was sent out to all social work students and social work alumni at Humboldt State University. I used this tool to obtain a baseline understanding and data of current jurors' experiences within my limits. I received 35 survey responses and 38% of the respondents believe that jury service is their civic duty and 24% felt okay participating in jury services. 14% felt that participating in jury services caused discomfort or a personal conflict for them. When asked what services would make their jury service process easier, 71% felt that a prescreening tool informing the juror of potentially sensitive information, would be helpful. 14% would like the option of meeting with the judge to discuss potentially sensitive information. 43% would like to have private questioning in regard to potential personal conflict with the defendant, prosecution or the nature of the case. 19% would like to have a post-trial debriefing with the judge and 38% would like to have a post-trial debriefing with a licensed therapist. 43% would like to have access to follow-up counseling services. Though my total response results were a low count, the results showed individuals having unfavorable experiences with jury services. Results also determined that people would like to see a prescreening tool being used so they could become aware of the nature of the case prior to the start of the jury process. Some would also like to have the opportunity to have a post-trial debriefing and access to counseling services. These results speak to the concern that jurors have for their mental well-being and measures they are willing to take to not jeopardize the quality of their life.

Models to Reduce Juror Stress

There are several intervention models that are being used in several courts across the state of California. An intervention is a tool to prevent jurors from developing

a traumatic experience from serving as a juror in a sensitive case. One of the interventions is used prior to the start of the trial. It is called the Pre-trial Briefing. This briefing is facilitated by the judge where he/she discusses the nature of the case and provides jurors tips on how to handle/process the sensitive material in the case. The second intervention is a Post-trial Debriefing that is conducted after the trial is over (Bornstien et al., 2012). This briefing is facilitated by the judge, a therapist and all the jurors prior to them being dismissed to go home. This debriefing is facilitated to provide an opportunity to discuss any emotions, thoughts, or issues that the juror may be feeling as a result of the sensitivity of the case. The jury debriefing is modeled after a process called trauma or crisis debriefing. This is used when people are affected by natural disasters or traumatic events, such as fires, earthquakes, automobile accidents or violent crimes. This same technique is routinely used with many of our first responders that encounter devastating crises on the job. The important component in these intervention models is ensuring that all judges and court systems across the state of California use these tools to protect the well-being of all community members that are freely practicing their civic duty.

Conclusion

Our families, communities and country have lived and survived some very harrowing experiences. Experiences brought forth through natural disaster, criminal violence, war or personal tragedies. Our county and communities have not healed from one traumatic event, when another hurtful event occurs, adding another layer of unwelcomed distress to an already vulnerable life. Jury service should not be another layer. The experience of serving on a jury should be an experience of learning, pride

and respect for our judicial system. Community citizens are our potential jurors and our potential jurors are an integral part of our judicial system. We do not want them to avoid jury service or have a negative opinion. This leads to a depreciation of our judicial system and a lack of public trust. We need to protect our judicial system by protecting members of our community willing to practice their civic duty.

REFERENCES

Bornstein, B. H., Miller, M. K., Nemeth, R. J., Page, G. L., & Musil, S. (2005). Juror reactions to jury duty: perceptions of the system and potential stressors.

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McQuiston, D. E. Hooper, M. D., & Brasington, A. E. (2019). VICARIOUS TRAUMA IN THE COURTROOM Judicial Perceptions of Juror Distress. *Judges' Journal*, 58(2), 32-36



She led. So can you.

June 4, 2021

SUPREME COURT JURY SELECTION WORK GROUP
350 McAllister Street
San Francisco, California 94102-3688

Re: Invitation to Comment

Dear Hon. Kathleen O’Leary, Chair:

On behalf of the Ella Baker Center for Human Rights, I am responding to the invitation for public comment. We applaud this Work Group’s mission of eliminating discrimination in jury selection and achieving a fairer cross-section of the community. The idea that litigants can have their cases heard by peers – by the community itself – is a primary source of the justice system’s legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

The Jury Selection Work Group is well placed to help usher in a new era of fairness in California juries. Three new laws that will be implemented over the next few years have the potential to bring California much closer to the “fair cross section of the community” standard adopted by the United States Congress in 1968 with the Jury Selection and Service Act:

- Senate Bill 310, which allowed people with felony convictions to serve on juries
- Senate Bill 592, which expanded the lists that jury commissioners draw from to create jury pools to include a list of state tax filers, and
- Assembly Bill 3070, which created a procedure to eliminate the discriminatory use of peremptory challenges

The success of these reforms will be dependent on how they are implemented in individual courthouses in all fifty-eight California counties. A primary task that is essential to determining the impact of these efforts is to obtain accurate demographic information for juries across the state. Only with this data can a group like this measure whether its efforts are truly moving California juries toward a fair cross-section of the community.

Eliminating formal barriers to jury service is only a part of the effort towards more fair juries. We would also urge this Group to look at practical barriers to jury service. Financial burdens and travel burdens fall particularly hard on communities of color. Policies that require travelling great distances, often via public transportation, or that force people to choose between their jobs or caring for their children and serving on a jury can be as detrimental as statutory exclusions. We

cannot be satisfied with formal fairness but practical unfairness. Jury service must not be only for those who are affluent enough to participate.

Signing AB 3070 Governor Newsom said “California’s rich diversity is our greatest asset, and we won’t turn away from this moment to make right the discrimination and disadvantages that Black Californians and people of color still face.” Though implicit and explicit bias pervades our history and our present institutions, by looking at this with open eyes and rejecting it we can root out the toxin of hate from our systems of justice.

With regard to your individual questions, we would make the following recommendations:

1. *What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?*

As stated above, jury commissioners should collect demographic data for all people responding to a jury summons by having them fill out a single page questionnaire. They should be asked to self-describe their race and to state their zip code. This demographic data should be compiled quarterly, and a report should be submitted to the presiding judge concerning whether the demographics of those showing up for jury service are consistent with the census demographics for the area served by the court.

2. *How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?*

Invite community organizations to meet with court officers to regularly promote juror participation. Hold public forums explaining the benefits of participatory democracy through jury service. Have jury commissioners use nontraditional lists, in addition to ROV, DMV and tax filers, to summon potential jurors to court.

3. *Are there any other ways in which the summons process could be improved?*

The court should track returned summonses that are marked “undeliverable” and update current addresses as necessary.

4. *How can courts determine trends and track progress in order to make the jury pool more representative of the community?*

This again highlights the importance of maintaining accurate demographic information for the jury pool. Once that data is analyzed, it may be necessary to increase the number of summonses going to communities with a higher concentration of underrepresented populations.

5. *What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?*

The practical barriers discussed above are major factors that decrease juror participation. Both jurors and their employers should be reimbursed for the cost of jury service, at a minimum of \$15 dollars an hour.

6. *If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?*

The fear of losing a job, losing income, the inability to obtain child or elder care, and transportation costs are the most common financial concerns cited by prospective jurors. Jurors who are unemployed and/or who are not receiving financial benefits while attending jury duty should be reimbursed to obtain a “living wage” for serving as jurors. Sanctions should be imposed on any employer who takes action against an employee for serving on a jury.

7. *Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?*

Yes, we urge this Work Group to oversee the effective implementation of AB 3070, along with SB 310 and SB 592.

The work of this Group is essential to preserving and enhancing the legitimacy of the jury system. The Ella Baker Center for Human Rights appreciates the opportunity to provide feedback on this important undertaking. Please contact me at (510) 250-7298, derick@ellabakercenter.org or our policy consultant Glenn Backes at (916) 202-2538, glennbackes@mac.com with any further questions or concerns.

Sincerely,



Derick Morgan
Policy Associate

From: [Judge George Eskin, Ret.](#)
To: [Portnow, Kara](#)
Subject: Jury Selection Work Group
Date: Wednesday, May 26, 2021 5:08:28 PM

Dear Kara,

I have reviewed the recently revised (2021) Jury Management Bench Handbook. I encourage you to convey to the Jury Selection Work Group the omission of any reference to the constitutional right of privacy which was adopted by the voters of California in November 1972, nearly 50 years ago. "Privacy" is established as an inalienable right in Article I, section 1 of the State Constitution and protects individuals against violations by state and federal government entities as well as violations by other individuals and private companies; it is self-executing and confers a judicial right of action on all Californians, including prospective jurors.

Sadly, although there are a few passing comments about jurors' privacy rights, the Revised Jury Management Bench Book is woefully inadequate in its failure to recognize the inherent tensions between the constitutional right to privacy and the constitutional rights to a fair trial. Hopefully, the Jury Selection Work Group will attempt to address the conflict and provide some guidance for trial court judges that suggests more deference, respect and appreciation for jurors' rights.

Judge George (Ret.)

Response to Jury Selection Work Group Invitation for Public Comment

1. Transmittal of jury service summons should be expanded to **every potential source of citizen participation**, including but not limited to registered voters; licensed drivers; holders of DMV-issued identity cards; high school seniors, and students enrolled in colleges and universities; religious organizations; service clubs; homeowners and neighborhood associations; renters and residents of mobile home parks and retirement facilities, *etc., etc., etc.*
2. The Judicial Council should put an end to the self-imposed isolation of judges and require them to become actively engaged throughout the community, spreading good will and information about the work of the judicial branch and the importance of jury service. Judges should be required to greet every new jury panel in the jury assembly facility, and the Judicial Council should promulgate a script or checklist of topics that must be addressed.
3. The Work Group should examine a typical jury summons from the perspective of a non-lawyer. There is too much information presented in a font too small to read and in a formalistic design that is off-putting. The Judicial Council should hire a graphic designer to make a uniform user-friendly summons, attractive and interesting to read, and recognize some recipients may be unable to read!
- 4.
5. The biggest barrier to jury service is the **attitude** of judges who do not appreciate the sacrifice made by prospective jurors, are indifferent to invasions of personal privacy, assume everyone is prepared to adjust to the idiosyncrasy of court calendar management, present a haughty and arrogant demeanor, and exercise their power by demanding obsequious obedience with arbitrary court orders. I cannot propose a remedy for attitude adjustment, but lessons in **humility**, sorely lacking in too many judges, are essential as well as constant reminders about the importance of their **public service**. The Work Group should recommend mandatory and continuing training of judicial officers accompanied by testing to achieve the goal of an impartial judiciary.
6. Courts should do everything possible to minimize financial hardship, and the most helpful solutions would result in reducing the amount of time jurors are required to spend at the Courthouse and away from their normal activities. Jury trials should be assigned a Court's highest priority and no other commitments should interfere with the progress of a trial. For example, there are judges in courts without master calendar systems who schedule jury trials on three random days during the week, setting aside time for prelims, law & motion calendars, specialty calendars and other matters that interfere with a continuous jury trial; this contributes to inconvenience and additional expense to jurors whose service is extended unnecessarily. Parking of vehicles within proximity of the courthouse must be provided free of charge, and consideration should be given to furnishing food, beverages and snacks as well as child care and transportation for children after schools.

7. The Work Group should conduct an intensive study into the unintended consequences of AB 3070 (Weber) as a result of expanding *Batson/Wheeler* concerns to “perceived membership” in other “cognizable groups” including, “...gender, gender identity, sexual orientation... or religious affiliation.” The Work Group must face the challenge of reconciling the tension between the **constitutional privacy rights** of prospective jurors with the parties’ **rights to a fair trial**. I have the highest regard and utmost respect for Justice William Murray, a member of the Work Group, and I respectfully disagree with his opinion that inquiry of jurors about sensitive personal matters must be avoided; the question should be, “How can the Court conduct a sensitive inquiry that constitutes an invasion of personal privacy?” For example, a defendant prosecuted for a hate crime is entitled to know whether a prospective juror is gay, lesbian, bi-sexual, transgender, or Jewish or has close relationships with other people who are “members of such a cognizable class.” Relying on the speculative “perception” of counsel and the Court is wholly inadequate and an invitation to rampant bias abuse.

The Work Group should undertake a study of the process employed by courts throughout the state commencing with the arrival of prospective jurors at the Courthouse and prescribe “best practices” as well as those practices that should be discouraged. I urge the Work Group to recommend that a determination of hardship and other personal inquiries should occur in private communications at the jury assembly facility. The common practice of having jurors stand and explain their “hardship” justifying an excuse or deferment in open court should be prohibited; a juror, trying to suppress tears, stood at the lectern and explained to the judge that her husband had been suffered a heart attack the previous evening, was hospitalized in the ICU the previous evening, and she hoped to be excused to be with him. It is not uncommon for judges to inquire of prospective jurors in a domestic violence case, “Has anyone been a victim of domestic violence?”, and after a reluctant show of hands, to inquire further. This is humiliating and invasive. A certified public accountant who sought a deferment in March was ridiculed by the judge who suggested in the presence of the other prospective jurors that the claim of “tax season demands” was a ploy to avoid jury service.

All of these grossly unpleasant experiences could be avoided if the Court utilized a system of exploring sensitive issues privately before the jurors arrived in the Courtroom, and inquiries about biases based upon gender, sexual orientation and religion should also be addressed there. **We cannot “eliminate” bias despite the Judicial Council’s having embraced that term, but we can recognize, identify and acknowledge sources of unconscious bias and seek to minimize its prejudicial effect on decision making.**

From: [Steven S. Fleischman](#)
To: [Portnow, Kara](#)
Subject: Public Comment re Jury Selection Work Group
Date: Monday, May 24, 2021 11:04:39 AM

I am writing in response to the Invitation to Comment from the Jury Selection Work Group. My email focuses on question No. 7 regarding AB 3070 and the lack of any demonstrated need to modify how *Batson/Wheeler* issues are handled in civil jury trial.

AB 3070 is based on a June 2020 [study](#) of *Batson/Wheeler* appellate decisions performed by the Berkeley Law Death Penalty Clinic. That study, however, focused exclusively on criminal cases, primarily alleged *Batson/Wheeler* violations by prosecutors. There is no evidence that there is any comparable problem with *Batson/Wheeler* challenges in civil cases. Consider research I did several months ago when AB 3070 was being considered by the Legislature:

1. *Batson v. Kentucky* (1986) 476 U.S. 79, has been cited in 1,407 California appellate decisions (published and unpublished). Of those cases, 1,400 were criminal cases and only 7 were civil cases.
2. *People v. Wheeler* (1978) 22 Cal.3d 258, has been cited in 1,921 California appellate decisions (published and unpublished). Of these cases, 1,900 were criminal cases and only 21 were civil cases.

This analysis shows that the purported problems with *Batson/Wheeler* challenges in criminal cases has not infected the civil justice system. Indeed, since civil cases are prosecuted and defended by privately-paid counsel, rather than court appointed attorneys, one would expect that they would have greater resources to research and pursue *Batson/Wheeler* challenges, yet the data suggests otherwise (at least as of several months ago).

Given this data, I would therefore ask the Working Group to consider recommending that whatever changes it propose be limited to criminal cases and not to civil cases.

I thank the group for its attention.

Steve

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From: [Laurie Hepler](#)
To: [Portnow, Kara](#)
Subject: Response to Jury Selection Working Group Request for Comment
Date: Monday, May 31, 2021 2:36:44 PM

Good afternoon – I offer the following comments solely for myself, and not on behalf of my firm or anyone else.

1. What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?
2. How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

An idea for both 1-2: When we are firmly beyond the pandemic, consider a docent program whereby courts could train community volunteers to give informative tours of the court in action – scheduling small groups (8-10) to come through and observe 15 minutes each of 2 criminal or civil trials (with basic introduction about each case), hearing a short talk or video by a staff attorney and/or a clerk explaining the court's work *on behalf of all of us*, in terms lay people can understand, answering questions, and framing jury service as a privilege/opportunity in addition to just a "duty." Participants can be reminded at the end that while the tour is over, this is *their court*, and subject to certain protections for juveniles, etc., they are free to watch any trial or other proceedings as long as they like. The more we can familiarize students, Scouts, Lion's Clubs, Senior Friendship Clubs, and EVERYONE with the work of the judicial system, the less people will think of courts solely as a place they go only when trouble (or a summons) forces them to.

3. Are there any other ways in which the summons process could be improved? Incorporate the idea of "the community welcoming and needing your judgment about how a case should come out"—again, so it's not just a commanded duty, but also an opportunity to exercise civic power.
4. How can courts determine trends and track progress in order to make the jury pool more representative of the community? *I do not know this one.*
5. What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify? *The time commitment, which is just an unworkable hardship for many people in hourly jobs or running small businesses. Most trials are too long—I know from having read many transcripts. Within reason, judges should move trials along and not let counsel become repetitive (rare is the situation when the client won's also benefit ...). There must always be a witness ready, with court/counsel housekeeping confined to designated time periods whenever humanly possible. Another idea: If the pandemic produced workable practices for remote conduct of hardship screening, keep them. Anything to make it easier to comply with a summons will help bring more participants into the jury pools.*
6. If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful? *See above.*
7. Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group? *I see that law as well intentioned but jammed through hastily so that the Legislature could feel like it had done something, with utterly unworkable results. I'd sooner see peremptory challenges abolished in California*

than carry on with the mental corn-maze AB 3070 created.



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From: [Yolanda Huang](#)
To: [Portnow, Kara](#)
Subject: Comments
Date: Thursday, June 3, 2021 2:39:47 PM

1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

I just completed a 4 week jury trial in which out of 120 people in the jury pool, only 2 were black, and the DA challenged the only black person to reach the actual jury. The Judge's comments was to disregard AB 3070, and to say that the problem is because black people do not come and report for jury service.

When Black people do not consider the courts as serving their interests, then there is no reason for Black people to report to jury duty. Black communities and communities of color view the criminal justice system is skewed toward convictions and weighed in favor of the prosecution. In my trial, the DA was a white male. The judge was a white male, and attorney for co-defendant was a white male. I was the only person who was not a white male who was a legal professional.

2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

Courts have to be genuine about confronting and rectifying the obvious implicit racism in the court structure and the criminal justice structure. Courts are not inclusive. Too many judges are former prosecutors and they prosecuted and incarcerated people of color.

3) Are there any other ways in which the summons process could be improved?

There is currently no outreach that I know of to communities of color, and particularly to young people in those communities.

4) How can courts determine trends and track progress in order to make the jury pool more representative of the community?

Census data, and economic data are readily available.

5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

Financial, transportation, lack of interest and the failure of our criminal justice system to truly represent the interests and point of view of communities of color.

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there *Batson/Wheeler* related issues, whether or not addressed in AB 3070, that should be studied by the work group?

1) Judges are refusing to implement because AB 3070 is not effective until 2022.

2) Sometimes one challenge may not appear to be racist, but when a pattern appears, it is often too late to raise the issue because the earlier jurors have already been excused. Under these circumstances, it should be mandatory that the defense be provided additional challenges.

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Yolanda Huang, Esq.

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"Building the power of currently incarcerated people, formerly incarcerated people, and their loved ones."

June 4, 2021

SUPREME COURT JURY SELECTION WORK GROUP
350 McAllister Street
San Francisco, California 94102-3688

Re: Invitation to Comment

Dear Hon. Kathleen O'Leary, Chair:

On behalf of the Initiate Justice, I am responding to the invitation for public comment. We applaud this Work Group's mission of eliminating discrimination in jury selection and achieving a fairer cross-section of the community. The idea that litigants can have their cases heard by peers – by the community itself – is a primary source of the justice system's legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

The Jury Selection Work Group is well placed to help usher in a new era of fairness in California juries. Three new laws that will be implemented over the next few years have the potential to bring California much closer to the "fair cross section of the community" standard adopted by the United States Congress in 1968 with the Jury Selection and Service Act:

- Senate Bill 310, which allowed people with felony convictions to serve on juries
- Senate Bill 592, which expanded the lists that jury commissioners draw from to create jury pools to include a list of state tax filers, and
- Assembly Bill 3070, which created a procedure to eliminate the discriminatory use of peremptory challenges

The success of these reforms will be dependent on how they are implemented in individual courthouses in all fifty-eight California counties. A primary task that is essential to determining the impact of these efforts is to obtain accurate demographic information for juries across the state. Only with this data can a group like this measure whether its efforts are truly moving California juries toward a fair cross-section of the community.

Eliminating formal barriers to jury service is only a part of the effort towards more fair juries. We would also urge this Group to look at practical barriers to jury service. Financial burdens and travel burdens fall particularly hard on communities of color. Policies that require travelling great distances, often via public transportation, or that

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force people to choose between their jobs or caring for their children and serving on a jury can be as detrimental as statutory exclusions. We cannot be satisfied with formal fairness but practical unfairness. Jury service must not be only for those who are affluent enough to participate.

With regard to your individual questions, we would make the following recommendations:

1. *What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?*

As stated above, jury commissioners should collect demographic data for all people responding to a jury summons by having them fill out a single page questionnaire. They should be asked to self-describe their race and to state their zip code. This demographic data should be compiled quarterly, and a report should be submitted to the presiding judge concerning whether the demographics of those showing up for jury service are consistent with the census demographics for the area served by the court.

2. *How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?*

Invite community organizations to meet with court officers to regularly promote juror participation. Hold public forums explaining the benefits of participatory democracy through jury service. Have jury commissioners use nontraditional lists, in addition to ROV, DMV and tax filers, to summon potential jurors to court.

3. *Are there any other ways in which the summons process could be improved?*

The court should track returned summonses that are marked “undeliverable” and update current addresses as necessary.

4. *How can courts determine trends and track progress in order to make the jury pool more representative of the community?*

This again highlights the importance of maintaining accurate demographic information for the jury pool. Once that data is analyzed, it may be



necessary to increase the number of summonses going to communities with a higher concentration of underrepresented populations.

5. *at do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?*

The practical barriers discussed above are major factors that decrease juror participation. Both jurors and their employers should be reimbursed for the cost of jury service, at a minimum of \$15 dollars an hour.

6. *If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?*

The fear of losing a job, losing income, the inability to obtain child or elder care, and transportation costs are the most common financial concerns cited by prospective jurors. Jurors who are unemployed and/or who are not receiving financial benefits while attending jury duty should be reimbursed to obtain a “living wage” for serving as jurors. Sanctions should be imposed on any employer who takes action against an employee for serving on a jury.

7. *Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?*

Yes, we urge this Work Group to oversee the effective implementation of AB 3070, along with SB 310 and SB 592.

The work of this Group is essential to preserving and enhancing the legitimacy of the jury system. Initiate Justice appreciates the opportunity to provide feedback on this important undertaking.

Initiate Justice

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Sincerely,

Gregory Fidell

Gregory Fidell
Policy Manager, Initiate Justice
greg@initiatejustice.org

From: [Jones, Stephanie G.](#)
To: [Portnow, Kara](#)
Subject: Comments for Jury Selection working group
Date: Thursday, May 20, 2021 11:33:41 AM

1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

- a. Eliminate bars on service for criminal convictions after a certain period of time offense free
- b. education
- c. higher jury service compensation

2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

Community outreach events where the court educates the public on the importance of diversity in the jury panel

3) Are there any other ways in which the summons process could be improved?

Allow jurors to select the date in which they wish to serve. For example jurors will get a mailer advising them to select the date of their choice by a certain deadline or one will be chosen for them

4) How can courts determine trends and track progress in order to make the jury pool more representative of the community?

- a. track ethnicity, gender ect of individual reporting for service and selected

5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

Employers not paying for jury duty- Require employers to pay for at least 3-5 days of jury service

Childcare- provide a child care stipend

Transportation- provide a transportation stipend

Jurors not understanding the importance of jury service- Education campaign about the importance of jury service and have a diverse group of jurors

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

See number 6

7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?

- a. Track Batson Wheeler objections to determine if particular attorneys have a pattern or practice of systematically excluding members of a certain group.

June 4, 2021

Supreme Court Jury Selection Work Group
350 McAllister Street
San Francisco, California
94102-3688

Dear Members of the Supreme Court Jury Selection Work Group:

We are leading law professors and social scientists actively engaged in jury system research. We have written articles, conducted studies, and consulted with court systems on the process of jury selection. We are writing in response to the Invitation to Comment, specifically in response to the question: “*What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?*”

We have identified five steps courts can take to better ensure that juries represent a fair cross-section of their communities:

- 1. Maintain the diversity of the jury pool by reducing the number of undeliverable summons.** The rate of undeliverable summons is often higher in communities of color. Courts can reduce the number of undeliverable summons by (A) increasing the frequency with which jurors’ addresses are updated, (B) programming the selection system to use addresses from the most frequently updated source list, and (C) requiring addresses to be regularly submitted to the national change-of-address database of the United States Postal Service for correction.
- 2. Maintain the diversity of the jury pool by following-up on people who fail to respond to the jury summons.** The non-response rate to jury summons can diminish the diversity of the jury pool. Courts can (A) reduce the number of non-responses by sending a follow-up notice to potential jurors who fail to respond to the jury summons and (B) reduce the impact of non-responses on diversity by sending a replacement jury summons to the same zip code when a jury summons is returned as undeliverable or is not returned.
- 3. Maintain the diversity of the jury pool by increasing the amount of juror compensation.** The financial burden of jury service can diminish the diversity of the jury pool. Courts can increase jury yield and diversity by increasing the rate of juror pay.
- 4. Monitor the diversity of the jury pool by collecting and reviewing data.** Courts can monitor the diversity of the jury pool only if they (A) collect race and ethnicity data and (B) conduct periodic examinations of racial and ethnic diversity in the jury pool.
- 5. Ensure transparency about jury pool diversity.** Courts can increase transparency regarding the representativeness of the jury system by (A) making explicit the right of litigants to access jury selection records related to jury diversity and (B) specifying which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

Racially and ethnically diverse jury pools are necessary to produce juries selected from a fair cross-section of the community, a right that is guaranteed by the Sixth Amendment of the

Constitution, the California Constitution, and California Code of Civil Procedure at sections 191 and 197. Diverse jury pools also encourage public confidence in the justice system and improve the quality of jury deliberations.

Our recommendations are based on our own jury expertise and scholarship, and best practices identified by the American Bar Association’s *Principles for Juries & Jury Trials* and the National Center for State Courts, a national authority on judicial administration, as well as by reports from the Judicial Council of California and California’s 1996 Blue Ribbon Commission on Jury System Improvement.

RECOMMENDATIONS

1. **Maintain the diversity of the jury pool by reducing the number of undeliverable summons.**

Even if a jurisdiction starts out with a representative pool of potential jurors, the diversity of the jury pool can be diminished by the rate of “undeliverables,” that is, summons that are returned by the United States Postal Service as “undeliverable” because the recipient is no longer at that address. Indeed, “[u]ndeliverable rates are the single largest factor contributing to decreased jury yields.”¹ In California the overall undeliverable rate is 7.8% and in some counties it is much higher.² In San Bernardino County, for example, 28.8% of jury summons were returned as undeliverable in 2014 and in Los Angeles County, undeliverables in 2014 made up 17.9% of jury mailings.³

Importantly, the rate of undeliverable summons is usually higher in communities of color.⁴ The power of undeliverables to reduce jury diversity has been recognized by courts⁵ and jury

¹ National Center for State Courts, Jury Managers' Toolbox: *Best Practices to Decrease Undeliverable Rates*, 1 (2009).

² *2018-2019 Jury Data Report*, Judicial Council of California.

³ *Do Californians Answer the Call to Serve on a Jury? A Report on California Rates of Jury Service Participation*, Citizens Against Lawsuit Abuse (2015) (In 2014 San Bernardino County mailed 928,032 summons and 267,918 were “Returned/Undeliverable,” and Los Angeles County mailed 2,010,439 summons and 361,117 were “Returned/Undeliverable.”).

⁴ National Center for State Courts, Jury Managers’ Toolbox, *A Primer on Fair Cross Section Jurisprudence*, 3 (2010) (“undeliverable . . . and failure-to-appear rates tend to disproportionately decrease minority representation”); *id.* at 5 (“a factor commonly related to underrepresentation of minorities is undeliverable rates, which are strongly correlated with lower socio-economic status and, in turn, correlated with minority status”); Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 4, 5 (adopted by the Judicial Council of the Ninth Circuit, May 2004) (recognizing that “transitory populations” and “the high number of undeliverable questionnaires” “have a negative impact on the extent to which the juror source lists accurately represent populations in the districts.”).

⁵ See, e.g., *Israel v. United States*, 109 A.3d 594, 604 (D.C. 2014) (“The expert reports that were before the court indicated that African Americans were overrepresented among those whose

scholars.⁶ The higher rate of undeliverables to communities of color is likely due to the fact that renters change residences more frequently than homeowners;⁷ and there is racial disparity in homeownership rates.⁸ In California, for example, the homeownership rate for the white population is 68%, but the rate for the African American population is only 41% and for the Latinx population is only 49%.⁹ And nationally, the most recent data shows that “24 percent of renter households had moved in the past year, compared to 6 percent of homeowner

summons were returned to the Juror Office as undeliverable”); *Comm. v. Arriaga*, 781 N.E.2d 1253, 1266 (Mass. 2003) (citing data showing that “a disproportionate number of undeliverable summonses are addressed to inner city locations” where the majority of the state’s Hispanic residents live); *United States v. Barnes*, No. 3:94CR112, 1996 WL 684388, at *5 (D. Conn. June 26, 1996) (“[U]nderrepresentation ... results from the high rate of questionnaires mailed to Hispanic communities which are returned as undeliverable.”); *United States v. Ortiz*, 897 F. Supp. 199, 204 (E.D. Pa. 1995) (“[M]any Hispanics are poor. Like other poor people, they are apt to move more frequently than the more affluent, with their mail not being forwarded to their new address. Secondly, poor people in general have less reliable mail service.”).

⁶ See, e.g., Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. Mich. J. L. Reform 1, 37 (2018) (Assessment of jury challenges in four different states revealed that “the greatest loss of cross-sectional representation in our four jurisdictions occurred during the seemingly innocuous stages of mailing out and returning jury qualification forms”); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 773 (2011) (“Another factor often associated with underrepresentation of minorities is the percentage of juror qualification questionnaires and jury summonses that are undeliverable.”); Samuel R. Sommers, “On the Obstacles to Jury Diversity,” *The Jury Expert*, V. 21, Issue 1, at 3 (American Society for Trial Consultants, January 2009) (“[I]ncreased geographic mobility among racial minorities means that a higher proportion of jury summonses sent to non-White Americans are returned to the court as undeliverable.”); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. Rev. 707, 714 (1993) (“Because minorities are statistically more mobile than whites, a greater percentage of minorities than whites never receive jury questionnaires mailed to outdated addresses.”) (footnotes omitted).

⁷ United States Census Bureau data from 2017 demonstrates that the “mover rate for renters (21.7 percent) was higher than for owners, which was 5.5 percent.” Derick Moore, Senior Communications Specialist, U.S. Census Bureau, *Overall Mover Rate Remains at an All-time Low* (Dec. 21, 2017).

⁸ According to the United States Census Bureau, “[h]omeownership in the US varies significantly by race and ethnicity. In 2019, the homeownership rate among white non-Hispanic Americans was 73.3%, compared to 42.1% among Black Americans.” Homeownership rates show that Black Americans are currently the least likely group to own homes, USA Facts, Source: U.S. Census Bureau, *Housing Vacancies and Homeownership* (July 28, 2020), updated Oct. 16, 2020); see also U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Third Quarter 2020, Release Number: CB20-153, Table 7. Homeownership Rates by Race and Ethnicity of Householder: 2016 to 2020.

⁹ 2019 Homeownership Rates by Race, California Housing Finance Agency.

households.”¹⁰ As a result, residential mobility rates across the country are higher for African American, Latinx, and Asian populations than for whites.¹¹

A decrease in the percentage of undeliverable summons can therefore improve the diversity of the jury pool. As the National Center for State Courts has concluded, “[w]hile it may not be possible to eliminate the undeliverable rate completely, courts can take steps to greatly reduce it.”¹² Specifically, courts can decrease the number of undeliverables by improving the accuracy of the addresses in the jury system by: (A) increasing the frequency with which the jury wheel is refilled; (B) programming the selection system to use addresses from the most up-to-date source list; and (C) requiring that names are regularly submitted to the national change-of-address database to be corrected.

Recommendation A: Reduce the number of undeliverable summons by requiring the Jury Commissioner to update the jury wheel more frequently.

Why this recommendation will help maintain the diversity of the jury pool: Most of the jury summons returned as undeliverable are “returned because the person moved to a new address since the master jury list was last created or updated.”¹³ A court can therefore reduce the number of undeliverables by shortening the length of time between updates of the jury wheel. For example, if a jurisdiction waits four years before updating the jury wheel, it will fail to reach many of the potential jurors who move within that four-year period. In contrast, if a jurisdiction updates the jury wheel every six months, it will miss only those jurors who moved within that six-month window. Reducing the number of “missing because moved” jurors is key because these missing jurors are more likely to be people of color.¹⁴ Updating the jury wheel more frequently allows for the inclusion of more of these potential jurors.

¹⁰ Riordan Frost, *Are Americans Stuck in Place? Declining Residential Mobility in the US*, Joint Center for Housing Studies, Harvard University, at 1 (May 2020); *id.* (“Low-income Americans are more likely to move as well, with 14 percent of people in the bottom income quartile moving between 2017 and 2018, compared to 11 percent of those in the top income quartile.”)

¹¹ Derick Moore, Senior Communications Specialist, U.S. Census Bureau, *Overall Mover Rate Remains at an All-time Low*, (Dec. 21, 2017) (“The highest mover rates by race were the black or African-American alone population, while the lowest were the non-Hispanic white population.”).

¹² National Center for State Courts, Jury Managers' Toolbox: *Best Practices to Decrease Undeliverable Rates*, 1 (2009).

¹³ *Id.* (“In most instances, the qualification questionnaire or summons was returned because the person moved to a new address since the master jury list was last created or updated.”); *see also* National Center for State Courts, Western Regional Office, *A Report to the California Judicial Council on Ways to Improve Trial Jury Selection and Management*, Executive Summary, at 8 (1978) (“The longer one of these [source] lists is used as the basis for generating a master jury list, the more inaccurate the information on the master jury list becomes.”).

¹⁴ Again, this is because renters change residences more frequently than homeowners; and there is racial disparity in homeownership rates. *See* notes 6-11; *see also* Robin E. Schulberg, *Katrina Juries, Fair Cross-Section Claims, and the Legacy of Griggs v. Duke Power Co.*, 53 Loy. L. Rev. 1, 21 (2007) (“African-Americans . . . have a higher mobility rate than whites, a disparity

Accordingly, the American Bar Association's *Principles for Juries & Jury Trials* recommends that jurisdictions update their juror lists "at least annually."¹⁵ The ABA's *Principles* are advisory, but were endorsed by the Conference of Chief Justices, a body composed of the chief justices of each state supreme court.¹⁶ The Conference adopted a formal resolution in 2006 which "[e]ncourages all state courts to implement procedures and practices consistent with the ABA Principles for Juries and Jury Trials."¹⁷

Consistent with the ABA's recommendation, the jury plans for the district courts for the Central and Eastern Districts of California require the jury wheel to be refilled once a year.¹⁸ The National Center for State Courts has further recommended that "[c]ourts that are located in states or metropolitan areas with higher than average migration rates should consider creating or updating their master jury lists even more frequently (e.g., semi-annually or quarterly) if feasible."¹⁹ The National Center for State Courts specifically recommended to the California Judicial Council that "each court, or courts sharing jury operations, with five or more judges utilize a twice-a-year qualifying cycle in order to enhance representativeness of jury selection. All other courts should update master jury lists once a year."²⁰ "Twice-a-year or more frequent" updates will "increase representativeness" of the jury pool.²¹

apparently associated with a higher rate of poverty and a lower rate of home ownership. Therefore, the failure to update addresses will disproportionately impact the rate at which African-Americans will receive jury mailings.").

¹⁵ Am. Bar Ass'n, American Jury Project, *Principles for Juries & Jury Trials*, 51 (2005) (Principle 10(A)(1)).

¹⁶ The roster for the Conference of Chief Justices is available at <http://ccj.ncsc.org>

¹⁷ Conference of Chief Judges, *Resolution 14: In Support of the American Bar Association Principles for Juries and Jury Trials*, adopted as proposed by the Court Management Committee at the 29th Midyear Meeting on January 18, 2006.

¹⁸ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 5 at pg. 4, lines 23-24 (July 15, 2019) ("Each Master Jury Wheel shall be emptied and refilled annually prior to January 1."); United States District Court for the Eastern District of California, *Jury Management Plan*, Section 1.08 (Jan. 25, 2016). ("In accordance with 28 U.S.C. '1863(b)(4), the Clerk is directed to empty and refill the master jury wheels by October 1st each year . . .").

¹⁹ National Center for State Courts, Jury Managers' Toolbox: *Best Practices to Decrease Undeliverable Rates*, 1 (2009).

²⁰ National Center for State Courts, Western Regional Office, *A Report to the California Judicial Council on Ways to Improve Trial Jury Selection and Management*, Executive Summary, at 8 (1978).

²¹ *Id.*; see also Paula Hannaford-Agor [Director of the Center for Jury Studies at the National Center for State Courts], *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761,

Jurisdictions can ensure that the lists are appropriately updated by establishing a rule or statute making explicit how often lists should be updated. In Nebraska, for example, there was originally “no statutory requirement for how often counties should update their jury-pool lists” and some counties had not updated their lists for more than a year.²² “Given the state’s quickly changing demographics, this practice resulted in jury pools that were not representative of the communities that they served.”²³ To remedy this problem, Nebraska enacted a statute in 2003 “requiring all counties within Nebraska to refresh their jury-pool lists annually” with the goal of making “jury pools across the state more representative of their communities.”²⁴ Subsequent interviews with district court clerks revealed that “more than 25% of counties interviewed reported noticing either great or some change in the composition of the jury pool following annual updates.”²⁵ Moreover, the “annual or biannual updates also improved the efficiency of the jury-compilation process by updating resident addresses and removing individuals” who were ineligible because they had moved out of the county or were deceased.”²⁶

Recommendation B: Reduce the number of undeliverable summons by requiring the Jury Commissioner to select addresses from the most up-to-date source list.

Why this recommendation will help maintain the diversity of the jury pool: The addresses for jury summons are obtained from the source lists, and some source lists are updated more frequently than others. A court can reduce the undeliverable rate by requiring the jury selection system to choose addresses from the most frequently updated source lists. For example, residents of California are only required to update their driver’s license every five years, but residents pay personal income tax every year. These factors may mean that the addresses from the tax list are more likely to be accurate than addresses from the California Department of Motor Vehicles. Again, when a court increases the accuracy of addresses, it decreases the number of undeliverable summons that diminish participation of people of color.

The National Center for State Courts accordingly recommends that courts “try to identify which list(s) have the highest undeliverable rate” and select addresses from other lists or “use the most frequently maintained source list as the default option for retaining records.”²⁷ A

782 (2011) (“Frequent renewal of the master jury list is an essential task in contemporary jury system management.”).

²² Neeley, Elizabeth, *Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Jurors*, Univ. of Neb. Public Policy Ctr., Court Review, V.47, No. 4, pp. 96-101, at 97 (2011).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ National Center for State Courts, Jury Managers' Toolbox: *Best Practices to Decrease Undeliverable Rates*, 2 (2009) (For example, the state-level court for Washington, D.C. “found that that the undeliverable rate for records from the D.C. Tax and Revenue list was 14%

court can then establish a requirement that the Jury Commissioner select addresses from that more frequently maintained source list.²⁸

Recommendation C: Reduce the number of undeliverable summons by requiring names to be regularly submitted to the national change-of-address database to be corrected.

Why this recommendation will help maintain the diversity of the jury pool: Inaccurate addresses lead to undeliverable summons, which disproportionately affect communities of color. Courts can help correct juror addresses by submitting the names on the jury list to the National Change-Of-Address (NCOA) database operated by the United States Postal Service.²⁹

The California Standards for Judicial Administration already state that the Jury Commissioner “should” use the NCOA database or comparable method,³⁰ but there is evidence that only about half of California jurisdictions do so. Specifically, the 2003 Task Force on Jury System Improvements reported that in a survey of 55 courts, only 24 were using the NCOA database to update their addresses.³¹ Therefore the encouragement to use the NCOA database should be changed to a requirement.

The NCOA database is effective: the Director of the Center for Jury Studies at the National Center for State Courts stated that “[a]necdotal reports from commercial jury vendors suggest that NCOA address verification returns 10% to 15% of records” from the master jury list

compared to 43% for the master jury list overall.”) (citing Council for Court Excellence, *Improving Juror Response Rates in the District of Columbia: Final Report*, 48 (March 2006)); *id.* (“Another option is to request the administrative agency to include a “record updated” field in the dataset that indicates the most recent date of any changes made to the record” and the court can then “retain the record with the most recently updated information.”).

²⁸ For example, the jury plan for the District of Connecticut directs that “[w]henver practicable, the entry from the list of licensed motor vehicle operators is to be retained and the entry from the list of registered voters is to be removed.” *Third Restated Plan of the United States District Court for the District of Connecticut for Random Selection of Grand and Petit Jurors*, at 5 (2013).

²⁹ *Failure to Appear Toolkit: Increasing Jury Service Participation*, Judicial Council of California, Administrative Office of the Courts, at 1 (2009) (“Strategies to facilitate juror participation include. . . Maintaining an up-to-date master list that is carefully purged of duplicate names and that has undergone national change-of-address processing . . .”).

³⁰ Standards for Judicial Administration, Standard 10.31. Master jury list (“The jury commissioner should use the National Change of Address System or other comparable means to update jury source lists and create as accurate a master jury list as reasonably practical.”).

³¹ *Task Force on Jury System Improvements*, Judicial Council of California, Administrative Office of the Courts, at 9 (2003).

with an updated or corrected address.³² “In light of these findings,” the Ninth Circuit Jury Trial Improvement Committee recommended “that courts have the people constructing the master jury wheel run the names through the National Change of Address System. . . .”³³ This was one of the recommendations of the California’s Blue Ribbon Commission on Jury System Improvement,³⁴ and other commissions charged with improving jury yield and racial representation in the jury pool have likewise recommended the use of the NCOA database.³⁵

Employing the NCOA database is cost-efficient. Indeed, the National Center for State Courts has concluded that “[i]n almost every instance, the savings in printing and postage costs greatly exceed the cost of the NCOA update.”³⁶ The process of correcting addresses through the NCOA database is also fast and safe. “Typically, NCOA vendors can process and return update lists electronically 24 to 48 hours after receipt” and “after completing the NCOA updates, the vendor is required by its licensing agreement with the U.S. Postal Service to destroy all copies of the mailing list it received from the customer.”³⁷

Finally, as discussed in Recommendation 2(B) below, courts can reduce the impact of undeliverables on the diversity of the jury pool by sending a replacement summons to a new person in the same zip code whenever a summons is returned as undeliverable.

³² Paula Hannaford-Agor, “Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds,” *Jury News*, 25 Ct. Management., No. 3, at 66 (2010).

³³ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 5 (adopted by the Judicial Council of the Ninth Circuit, May 2004).

³⁴ J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 Hastings L. J. 1433, 1438 (1996) (“The Judicial Council should adopt a Standard of Judicial Administration recommending use of the National Change of Address system to update juror source lists.”).

³⁵ See, e.g., *Report of the Connecticut Supreme Court’s Jury Selection Task Force to Chief Justice Richard A. Robinson*, at 9 (December 31, 2020) (recommending “an automated process that is coupled with the NCOA system to identify when an address is undeliverable before a summons is mailed.”); Washington State Jury Commission, *Report to the Board for Judicial Administration*, at ix (2000), (Recommendation 4: “The combined list should be processed through a National Change of Address program in order to obtain updated address information before mailing.”).

³⁶ Paula Hannaford-Agor, “Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds,” *Jury News*, 25 Ct. Management., No. 3, at 66 (2010); see also Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 5 (adopted by the Judicial Council of the Ninth Circuit, May 2004) (“The cost of using NCOA is usually only a few hundred dollars, a cost that can quickly be recouped by reducing the number of undeliverable questionnaires.”).

³⁷ Paula Hannaford-Agor, “Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds,” *Jury News*, 25 Ct. Management., No. 3, at 66 (2010).

2. Maintain the diversity of the jury pool by following-up on people who fail to respond to the jury summons.

The diversity of the jury pool can also be diminished by “non-responders:” potential jurors who receive a jury summons but fail to respond to it. There is evidence that the non-response rate is higher in African Americans and Latinx communities.³⁸ This is due to correlations between race and economic status; when income is controlled for, the response rate for African Americans and Latinos is the same as whites.³⁹ Moreover, the California Judicial Council reports that “many delinquent jurors who initially fail to appear for jury service ultimately make good jurors.”⁴⁰

³⁸ See *Israel v. United States*, 109 A.3d 594, 604 (D.C. 2014) (“The expert reports that were before the court indicated that African Americans were overrepresented . . . among those who failed to respond to a summons for an unknown reason.”); *United States v. Murphy*, No. 94 CR 794, 1996 WL 341444, at *1 (N.D. Ill. June 18, 1996) (“African-Americans from economically poor zip codes had a substantially lower response rate (60%) to the questionnaires than whites from relatively wealthy zip codes (92%).”); *United States v. Reyes*, 934 F. Supp. 553, 562 (S.D.N.Y. 1996) (evidence showed that “blacks and Hispanics constitute a substantially higher percentage of the group of people who did not return questionnaires than of the group of people who did”); *Com. v. Fryar*, 680 N.E.2d 901, 907 (Mass. 1997) (“[T]he representation of Blacks and Hispanics in the jury pool was adversely affected because the communities with the highest percentage of Blacks and Hispanics have the highest nonresponse rate.”); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 775 (2011) (finding “disproportionately high nonresponse rates for predominantly African-American neighborhoods in Wayne County, Michigan”); Judge William Caprathé (ret.) et al., *Assessing and Achieving Jury Pool Representativeness*, at 19, *The Judges' Journal*, Am. Bar Ass’n, V. 55, No. 2 (Spring 2016) (“Nonresponse and FTA rates contribute to underrepresentation of minorities in the jury pool.”).

³⁹ Judge William Caprathé (ret.) et al., *Assessing and Achieving Jury Pool Representativeness*, at 19, *The Judges' Journal*, Am. Bar Ass’n, V. 55, No. 2 (Spring 2016) (“In 1998, the American Judicature Society found that when socioeconomic factors were considered, race and ethnicity were not significant predictors of juror nonresponse and FTA. However, due to the strong correlation between socioeconomic and minority status, minority representation in the jury pool is impacted by the reduced appearance of lower-socioeconomic-status individuals.”); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 774 (2011) (“Failure-to-appear rates are likewise highly correlated with socioeconomic status. . . . Because race, ethnicity, and socioeconomic status are so highly correlated, the effect on the jury pool is that disproportionately fewer minorities serve as jurors.”); Ronald Randall, James A. Woods, & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 Just. Sys. J. 71, 81 (2008) (Toledo, Ohio study found that “the distribution among whites, blacks, and Hispanics who ignore summonses is similar to their distribution in the general population”).

⁴⁰ *Failure to Appear Toolkit: Increasing Jury Service Participation*, Judicial Council of California, Administrative Office of the Courts, at 1 (2009).

By decreasing the percentage of non-responses, a court can improve the diversity of the jury pool. There are at least two steps courts can take to decrease the number and impact of non-responses: courts can reduce (A) the number of non-responders by requiring that a follow-up notice be sent to potential jurors who fail to respond to the jury summons; and (B) the impact of non-responses on the diversity of the pool by sending a replacement jury summons to a new person in the same zip code when a jury summons is returned as undeliverable or is not returned.

Recommendation A: Require a follow-up notice to be sent to potential jurors who fail to respond to the jury summons.

Why this recommendation will help maintain the diversity of the jury pool: Non-responses tend to diminish the diversity of the jury pool and sending a follow-up notice can dramatically reduce non-response rates.

Research by the National Center for State Courts has shown that courts that send a follow-up notice have an ultimate non-response rate that is 34% to 46% lower than courts that do not send a reminder.⁴¹ In a pilot program run by the Los Angeles County Superior Court, for example, 41% of summonsed jurors failed to appear for jury service when the court sent only a single summons.⁴² But when the court sent a follow-up, the failure to appear rate dropped to just 2.7%.⁴³ Other jurisdictions have enjoyed similar results.⁴⁴ The National Center for State Courts has concluded that “non-response and failure-to-appear rates” are some of the “components of jury yield that offer the most potential for effective control” by the court.⁴⁵

⁴¹ Paula Hannaford-Agor, *An Overview of Contemporary Jury System Management*, National Center for State Courts, Center for Jury Studies, 6 (May 2011); Mize, Honorable Gregory (ret.), Mize, Honorable Gregory (ret.), Paula Hannaford-Agor, and Nicole Waters, *The State-of-the-States Survey of Jury Improvement Efforts: Compendium Report*, at 22, Tbl. 16., National Center for State Courts (April 2007).

⁴² Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 785 (2011) (citing Los Angeles County, California 2003 Summons Sanction Program (on file with author); see also *Jury Sanctions: 2008 Report to the Legislature*, Judicial Council of California, Administrative Office of the Courts, at 8 (2009) (In Los Angeles, “an additional 137,445 jurors responded to various notices of delinquency (representing an additional 10% gain in jurors over those responding to the initial summons)”)).

⁴³ *Id.*

⁴⁴ See, e.g., *Improving Juror Response Rates in the District of Columbia: Final Report*, Council for Court Excellence., Mar. 2006, at 17 (follow-up in Kings County, New York reduced non-response rate from 55% to 24%); Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 784–85 (2011) (follow up in Eau Claire, Wisconsin reduced non-response rate from 11% to 1%).

⁴⁵ Paula Hannaford-Agor, *An Overview of Contemporary Jury System Management*, National Center for State Courts, Center for Jury Studies, 5 (May 2011); see also *Failure to Appear Toolkit: Increasing Jury Service Participation*, Judicial Council of California, Administrative

For this reason the Ninth Circuit Jury Trial Improvement Committee recommended that federal courts in California “issue a second summons to non-responding citizens.”⁴⁶ The Committee recognized that “[r]esearch has found that the most effective way to increase response rates is to send a follow up mailing to non-respondents.”⁴⁷ Moreover, following up on non-responders can be a low-cost initiative.⁴⁸

Specifically, there is evidence that sending a follow-up notice that provides information about the sanctions permitted by California Code of Civil Procedure section 209 can improve the summons response rate. The California Judicial Council has concluded that programs that notify non-responders about sanctions under section 209 “promote compliance with the jury system.”⁴⁹ For example, the 2006 sanctions-notification program in Los Angeles Superior Court resulted in an “additional 10% gain in jurors over those responding to the initial summons.”⁵⁰ The Judicial Council has also produced a Failure to Appear Toolkit that could be adopted by all California courts.⁵¹ Yet a 2008 report by the Judicial Council of California showed that less than half of California’s superior courts use that or any similar program to follow up on nonresponses.⁵² To reduce the impact of non-responses on the diversity of the

Office of the Courts, at 1 (2009) (“Research indicates that jurisdictions that effectively use follow-up procedures to contact delinquent jurors and compel them to serve have increased summons response rates”); Judge William Caprath (ret.) et al., *Assessing and Achieving Jury Pool Representativeness*, at 3, *The Judges' Journal*, Am. Bar Ass’n, V. 55, No. 2 (Spring 2016) (Describing the “refusal to answer summonses” as a factor that “may be affected by jury pool management.”).

⁴⁶ Ninth Circuit Jury Trial Improvement Committee, *First Report on Goals and Recommendations* at 7 (adopted by the Judicial Council of the Ninth Circuit, May 2004).

⁴⁷ *Id.*

⁴⁸ For example, California’s Riverside County increased jury participation by sending reminder postcards and concluded that they could expect one additional prospective juror to arrive at the courthouse for every ten postcards mailed. Bowler, S., Esterling, K. & Holmes, D., *GOTJ: Get Out the Juror*, 36 *Pol. Behav.* 515 (2014). The court found it could expend as little as about two or three dollars per additional juror. *Id.*

⁴⁹ *Jury Sanctions: 2008 Report to the Legislature*, Judicial Council of California, Administrative Office of the Courts, at 12 (2009).

⁵⁰ *Id.* at 7.

⁵¹ *Failure to Appear Toolkit: Increasing Jury Service Participation*, Judicial Council of California, Administrative Office of the Courts, at 1 (2009).

⁵² *Jury Sanctions: 2008 Report to the Legislature*, Judicial Council of California, Administrative Office of the Courts, at 3 (2009) “[O]f California’s 58 superior courts . . . [o]nly one court, the Superior Court of Los Angeles County, reported that it employs the CCP§ 209(b) sanctions program;” “Twenty-seven courts reported using a notice procedure or program to follow up with jurors who fail to appear on the initial juror summons;” “Twenty-three courts do not use a failure to appear (FTA) program;” and “[a]s of December 15, 2008, eight courts had not responded to

jury pool, courts should be required to follow-up on non-responders pursuant to the Failure to Appear Toolkit.⁵³

A follow-up notice can also provide additional detail on requesting a deferral or an excuse for economic hardship. Providing more information about how to defer or be excused from jury service would be responsive to the evidence that “summons nonrespondents often do not know how to go about rescheduling jury service,” and that non-responders “are less likely than are respondents to believe that jurors can defer their service.”⁵⁴

Recommendation B: Require a replacement jury summons to be sent to a new person in the same zip code when a jury summons is returned as undeliverable or is not returned.

Why this recommendation will help maintain the diversity of the jury pool: Both non-responses and undeliverable summons diminish the diversity of the jury pool,⁵⁵ but courts can reduce the impact on diversity by sending replacement summons. Specifically, courts can require that when (i) a summons is returned as undeliverable or (ii) a potential juror fails to respond to a summons, a replacement summons must be sent to another person in that same zip code. Because of the relative homogeneity of zip codes by race and income, sending a replacement summons to the same zip code increases the chances of maintaining diversity.⁵⁶

the survey request. . . [it] is assumed that these courts do not employ a program based on CCP, § 209(b).”).

⁵³ Section 209(b) of the California Code of Civil Procedure permits courts to send a second summons, but prohibits mailing the second summons until 90 days after the first summons was sent. This language should be changed to permit jury offices to send the second notice as soon as practicable. *See e.g., New York State Unified Court System, Best Practices for Jury System Operations*, Principle 9(a) (April 2009) (“Jurors who do not respond to a summons are sent a follow-up mailing (letter or summons) *no later than* 12 weeks after the initial summons was mailed.”) (emphasis added).

⁵⁴ Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses, and What Courts Can Do About It*, 82 *Judicature* 156, 156-57 (1999).

⁵⁵ *See* notes 4-6, 38 & 39.

⁵⁶ It would be even more effective to send a replacement summons to the same census tract, as census tracts are more homogeneous than zip codes. *See Jury Representativeness: A Demographic Study of Juror Qualification and Summoning In Monroe County, New York*, Conducted by the Office of Court Research for Chief Administrative Judge Ann Pfau (Aug 25, 2011) (considering whether “census areas that are smaller than [zip codes] can be targeted to improve representativeness” after recognizing that although “undeliverable and non-response rates are higher in communities with higher percentages of blacks” these communities “also have a substantial white population. Thus, efforts to compensate for increased rates of non-deliverable or non-responding addressees by targeting these zip codes . . . may inadvertently increase the percentage of whites in the jury pool.”).

At least 18 federal trial courts send replacement summons to the same zip code of the “missing juror.”⁵⁷ For example, the jury plan for the United States District Court for the Northern District of California specifies that: “For each juror summons and qualification form returned to the court as ‘undeliverable’ and those to which no timely response has been received, the Clerk will randomly draw the name of another person residing in the same zip code and mail a new juror summons and qualification notice to that person.”⁵⁸ Similarly, a 2020 Report of the Connecticut Supreme Court’s Jury Selection Task Force recommended that undeliverable summons be “replaced with a deliverable address from the same zip-code,”⁵⁹ and there is now legislation pending that would make that recommendation law.⁶⁰

⁵⁷ Twelve federal district courts send a supplemental mailing either when the original mailing is returned as undeliverable or when there is no response. See United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part VIII (Aug. 7, 2017); United States District Court, Northern District of Illinois, *Plan for Random Selection of Jurors*, Part 7(b) and (c) (Jan. 8, 2020); *Plan for the Random Selection of Grand and Petit Jurors in the United States District Court for the Eastern District of Pennsylvania*, at 5 (July 18, 2017); United States District Court for the Eastern District of Washington, *Plan for the Random Selection of Grand and Petit Jurors*, Part 3.02(b) (Jan. 1, 2017); *Jury Selection Plan of the United States District Court for the Southern District of Georgia, for the Random Selection of Grand and Petit Jurors*, at 5 (Dec. 12, 2016); United States District Court for the Southern District of Indiana, *Plan for the Random Selection of Grand and Petit Jurors*, Part 11 (C) & (D) (Feb. 17, 2017); Kansas District Court Rule 38.1(g)(2), Random Selection of Grand and Petit Jurors; United States District Court, Middle District of Louisiana, *Jury Plan*, Part 8 (Feb. 2015); United States District Court for the District of Maine, *Plan for the Random Selection of Grand and Petit Jurors for Service in the District of Maine*, Part V(D) (June 20, 2020); *Plan of the United States District Court for the Western District of Pennsylvania for the Random Selection of Grand and Petit Jurors*, Section 9 (Mar. 2, 2020); United States District Court for the District of Rhode Island, *Jury Selection Plan*, Part II(B)(3) (July 10, 2019); United States District Court for the Western District of Virginia, *2021 Jury Selection Plan*, Section 3.01 (Jan. 15, 2021)

An additional six federal district courts send a supplemental mailing when the original mailing is returned as undeliverable. See United States District Court for the District of Connecticut, *Jury Plan*, Part VIII (June 26, 2020); United States District Court, Northern District of Iowa, *Jury Selection Plan*, Part 6(e) (Jan. 26, 2017); United States District Court for the District of Massachusetts, *Plan for Random Selection of Jurors*, Part 8(a) (Nov. 1, 2015); United States District Court, Eastern District of Michigan, *Juror Selection Plan*, Part k(1) (Mar. 18, 2013); United States District Court for the Western District of Missouri, *Jury Selection Plan*, at 4 (Mar. 15, 2019); *Juror Selection Plan*, Eastern District of Oklahoma, at 3 (Mar. 3, 2020).

⁵⁸ United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part VIII (Aug. 7, 2017).

⁵⁹ *Report of the Connecticut Supreme Court’s Jury Selection Task Force to Chief Justice Richard A. Robinson*, at 8 (Dec. 31, 2020).

⁶⁰ Bill 2021HB-06548-R000577-FC.docx (last updated May 20, 2021) available at <https://search.cga.state.ct.us/r/basic/> would add the following text: “On and after July 1, 2022, and until June 30, 2023, for each jury summons the Jury Administrator finds to be undeliverable,

As explained by one judge in a jurisdiction that sends replacements summons: “[b]y resending questionnaires to individuals located in the same zip code, as opposed to the same county, the court hopes to maintain geographic proportionality and representation.”⁶¹

3. Maintain the diversity of the jury pool by increasing the amount of juror compensation.

Recommendation: Increase the amount of juror compensation from \$15/day to an amount that will make it financially feasible for low-income Californians to serve as jurors.

Why this recommendation will help maintain the diversity of the jury pool: The financial hardships imposed by jury service have the power to affect the diversity of the jury pool because race and ethnicity in the United States correlate with income levels. For example, data from 2014 shows that in Los Angeles and Orange counties, the “median household net worth” for U.S.-born whites was \$355,000, as compared to \$46,000 for Latinx households and just \$4,000 for U.S.-born Blacks.⁶² These income differentials by race and ethnicity mean that requests for financial hardship excuses from jury service can diminish the diversity of the jury pool.

Jurisdictions that can increase juror pay will have a better jury yield⁶³ and a more representative pool.⁶⁴ Indeed, the National Center for State Courts recognizes the “relationship between the amount of juror fees . . . and minority representation in the jury

the Jury Administrator shall cause an additional randomly generated jury summons to be sent to a juror having a zip code that is the same as to which the undeliverable summons was sent. ”

⁶¹ Hon. Juan R. Sanchez, *A Plan of Our Own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity*, 91 Temp. L. Rev. Online 1, 18 (2019) (footnote omitted).

⁶² Esi Hutchful, California Budget & Policy Center, *The Racial Wealth Gap: What California Can Do About a Long-Standing Obstacle to Shared Prosperity* (Dec. 2018).

⁶³ Paula L. Hannaford-Agor, The National Center for State Courts, “The Laborer is Worthy of His Hire and Jurors are Worthy of Their Juror Fees,” Jury News, V. 21, Issue 2, at 38 (“there is no question that the amount of juror compensation is strongly related to jury yield”).

⁶⁴ See, e.g., Paula L. Hannaford-Agor, The National Center for State Courts, *Increasing the Jury Pool: The Impact of the Employer Tax Credit*, at 13 (Aug. 2004) (Concluding in California study: “The loss of earned income for citizens serving as trial jurors is a major cause of financial hardship that interferes with broad citizen participation in the jury system. For courts, this presents significant issues both in terms of the diversity of the jury pool and the administrative efficiency of the jury system.”); Shari Seidman Diamond & Mary R. Rose, *Real Juries*, 1 Ann. Rev. L. & Soc. Sci. 255, 258 (2005) (“The paltry compensation provided to jurors contributes to the underrepresentation of low-income people of any racial/ethnic group.”).

pool”⁶⁵ For example, El Paso, Texas increased juror pay from \$6 to \$40 a day and public participation in jury service jumped from 22% to 46% within one year.⁶⁶ Eventually the participation rate climbed to 60%.⁶⁷ New York also changed its participation rate by addressing the financial burden of jury service. The state “increased juror pay, from \$7.50 a day to \$40” and “required larger businesses to pay their employees for their jury service.”⁶⁸ As a result of these and other changes, New York’s “participation rate jumped from 12 percent to 39 percent.”⁶⁹ The ABA’s *Principles for Juries & Jury Trials* accordingly assert that “[p]ersons called for jury service should be paid a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care.”⁷⁰

At least 31 states pay more than the \$15 provided in California.⁷¹ For example, Connecticut and Colorado pay jurors \$45/day, Nevada and New York each pay jurors \$40/day, and Oregon and Pennsylvania pay jurors \$25/day.⁷² When California residents are summoned for federal jury service they are paid \$50/day.⁷³

Notably, in 2003 the Judicial Council of California’s Task Force on Jury System Improvements recommended that the state “raise juror pay toward a level that shows adequate respect for jurors’ efforts and time away from their regular duties (at least the \$40 per diem currently in effect in the federal courts), along with mileage reimbursement for their trips home as well as to the courthouse.”⁷⁴ That recommendation has not been implemented in the 18 years since the report was issued, and the value of the \$15 daily payment has only

⁶⁵ Mize, Honorable Gregory (ret.), Paula Hannaford-Agor, and Nicole Waters, *The State-of-the-States Survey of Jury Improvement Efforts: Compendium Report*, Executive Summary, at 4, National Center for State Courts (April 2007).

⁶⁶ C. Walters, Michael D. Marin, & Mark Curriden, *Jury of our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 350 (2005) (citing Mark Curriden, “Extra Money Helps El Paso Lure More Prospective Jurors,” *Dallas Morning News*, Oct. 24, 2000, at A.

⁶⁷ *Id.*

⁶⁸ Rob Walters et al., *Are We Getting a Jury of Our Peers?*, 68 Tex. B.J. 144, 146 (2005).

⁶⁹ *Id.*

⁷⁰ Am. Bar Ass’n, American Jury Project, *Principles for Juries & Jury Trials*, Principle 2(F)(1) (2005).

⁷¹ Paula L. Hannaford-Agor, The National Center for State Courts, “The Laborer is Worthy of His Hire and Jurors are Worthy of Their Juror Fees,” *Jury News*, V. 21, Issue 2, at 38.

⁷² National Center for State Courts, Center for Jury Studies, *How Are Trial Jurors Compensated?*

⁷³ United States Courts, Jury Service, *Juror Pay* (“Jurors also are reimbursed for reasonable transportation expenses and parking fees. Jurors also receive a subsistence allowance covering their meals and lodging if they are required to stay overnight.”).

⁷⁴ *Task Force on Jury System Improvements*, Judicial Council of California, Administrative Office of the Courts, at 4 (2003).

grown more inadequate: it is now worth less than one hour of work at the state minimum wage.⁷⁵

4. Monitor the diversity of the jury pool by collecting and reviewing data.

The only way a jurisdiction can ensure that it is protecting the right to a jury selected from a fair cross-section of the community is to collect and review reliable data about the representativeness of the jury pool. For this reason, the American Bar Association’s *Principles for Juries & Jury Trials* assert that a “court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.”⁷⁶ Mr. Alan Carlson, then-Chief Executive Officer at the Superior Court of Orange County, similarly recognized the importance of collecting juror demographic data when he “stated that he would rather know if he has a problem than not know.”⁷⁷

Consistent with the ABA’s *Principles for Juries & Jury Trials*, federal law requires all district courts to collect race and ethnicity information on the jury summons/questionnaire mailed to potential jurors.⁷⁸ Federal law also “require[s] district courts upon the refilling of jury wheels to make a random sample of returned questionnaires to determine whether the jury wheels comply with the provisions of the Jury Act,” including the requirement that jury pools are selected from a fair cross-section of the community.⁷⁹

A number of states likewise require the collection and analysis of race and ethnicity data “in order to evaluate . . . the representativeness of the jury pool.”⁸⁰ Some states that have not

⁷⁵ California Minimum Wage Order MW-2021 (current minimum wage is \$14/hour, which will rise to \$15/hour for employers of 26 or more employees on Jan. 1, 2022, and for all employers on Jan. 1, 2023).

⁷⁶ Am. Bar Ass’n, American Jury Project, *Principles for Juries & Jury Trials*, 51 (2005) (Principle 10(A)(3)).

⁷⁷ Rosa Holdeman, Manager of Court Technology Services, Superior Court of California, County of Orange Santa Ana, California, *Hispanic Representation in Jury Panels of the Superior Court of California, County of Orange is Unknown*, at 12, Institute for Court Management Court Executive Development Program Phase III Project (May 2009); *id.* at 11 (citing “the importance of gathering and tracking the necessary demographic information during all phases of jury service”).

⁷⁸ 28 U.S.C. § 1869(h).

⁷⁹ *Report of the Proceedings of the Judicial Conference of the United States*, at 114 (1982); *see also* 28 U.S.C. § 1863(a) (“Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify.”).

⁸⁰ Minn. State Gen. Practice R. 803(b)(1) (“The jury commissioner shall collect and analyze information regarding the performance of the jury system on a regular basis in order to evaluate: . . . the inclusiveness of the jury source list and the representativeness of the jury pool”); *see also* Mass. Gen. Laws ch. 234A, § 79 (2014) (“On or before the first day of April of each year, the jury commissioner shall issue an annual report for the previous calendar year.... The report shall

collected such data in the past have recently recognized the need to do so. For example, a 2020 report by the Connecticut Supreme Court’s Jury Selection Task Force concluded: “A crucial step to ensuring fair trials with diverse jury members is to begin collecting data on who is called for jury duty and selected to serve on a jury. Data is the foundation to any efforts to ensure diverse representation on juries – it is impossible to ascertain whether there is a problem with jury composition or the extent of the problem without robust data collection.”⁸¹ There is now legislation pending in Connecticut that would add questions about “race and ethnicity” to the questionnaire mailed to potential jurors.⁸²

Similarly, a 2019 report from Washington’s Minority and Justice Commission Jury Diversity Task Force “unanimously agreed on the importance of collecting jury demographic data and recommend[ed] the permanent statewide implementation of a system to collect juror demographics.”⁸³ There is now legislation pending in Washington to allocate funding for “an

contain demographic and financial data and data on juror management and jurors’ satisfaction with the jury system.”); Jury Plan for the Superior Court of the District of Columbia, Section 9 (Nov. 9, 2013) (“juror qualification form . . . shall require the juror to provide or confirm the following information: name, sex, age, race, address, social security number, occupation, citizenship, previous service as a juror and such other information as the Clerk deems appropriate to determine whether the recipient is qualified for jury service”); Neb. Sup. Ct. Rule § 6-1002 (establishing that Nebraska Juror Qualification Form “required by statute” must ask jurors to report race and ethnicity and explaining that the “information is requested to assist in ensuring that all people are represented on juries”); Tex. Gov. Code § Sec. 62.0132 (“The [juror] questionnaire must require a person to provide biographical and demographic information that is relevant to service as a jury member, including the person’s . . . race”); Utah Code Ann. § 78B-1-106(2) (LexisNexis 2012) (“The Judicial Council shall by rule provide for the biannual review of the master jury list to evaluate the master jury list’s inclusiveness of the adult population.”); W. Va. Code Ann. § 52-1-16 (West 2002) (“The clerk shall make an annual report no later than March 1 of each year to the Supreme Court of Appeals setting forth the following information: Whether the clerk employed a jury box or jury wheel for the year reported, and the age, race and gender of each person for whom a juror qualification form has been received.”).

⁸¹ Report of the Connecticut Supreme Court’s Jury Selection Task Force to Chief Justice Richard A. Robinson, at 3 (Dec. 31, 2020).

⁸² 2021HB-06548-R000577-FC.docx, AN ACT CONCERNING THE RECOMMENDATIONS OF THE JURY SELECTION TASK FORCE (“The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror’s name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so.”).

⁸³ Washington Minority and Justice Commission Jury Diversity Task Force 2019 Interim Report, at 6.

electronic demographic survey” that will “collect data on each juror's race, ethnicity, age, sex, employment status, educational attainment, and income.”⁸⁴

This data can be evaluated internally by the court,⁸⁵ reported to the state legislature,⁸⁶ and/or can be made publicly available to encourage accountability and public confidence.⁸⁷ For example, New York collects and posts this data in an online report.⁸⁸ The report provides simple charts and graphs that illustrate the representation of distinctive groups in the jury pool, as compared to the community. The Washington task force also hoped that making data publicly available would

⁸⁴ SUBSTITUTE HOUSE BILL 1094 (pp. 6-7), Washington State Legislature: Bill Information.

⁸⁵ *See, e.g.*, Utah Code Ann. § 78B-1-106(2) (LexisNexis 2012) (“The Judicial Council shall by rule provide for the biannual review of the master jury list to evaluate the master jury list's inclusiveness of the adult population.”)

⁸⁶ *See, e.g.*, N.Y. Judiciary Law § 528 (McKinney Supp. 2015) (“The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals.”); W. Va. Code Ann. § 52-1-16 (West 2002) (“The clerk shall make an annual report no later than March 1 of each year to the Supreme Court of Appeals setting forth the following information: Whether the clerk employed a jury box or jury wheel for the year reported, and the age, race and gender of each person for whom a juror qualification form has been received. The Supreme Court of Appeals shall provide this information to the President of the Senate and the Speaker of the House of Delegates on an annual basis, no later than April 1 of each year.”).

⁸⁷ *See, e.g.*, Mass. Gen. Laws ch. 234A, § 79 (2014) (“On or before the first day of April of each year, the jury commissioner shall issue an annual report for the previous calendar year.... The report shall contain demographic and financial data and data on juror management and jurors’ satisfaction with the jury system The report shall be a public document.”). For an example of a report see *Annual Report on the State of the Massachusetts Court System* (Fiscal year 2019); *see also* W. Va. Code Ann. § 52-1-16 (West 2002) (“The clerk shall make an annual report . . . setting forth the following information . . . the age, race and gender of each person for whom a juror qualification form has been received”); *Juror Qualification Report 2020*, Supreme Court of Appeals of West Virginia, Administrative Office (March 30, 2021) (includes tables listing juror race and ethnicity by county).

The pending Washington legislation would also make the jury report public, as the proposed language is: “The administrative office of the courts shall provide this demographic data in a report to the governor and the appropriate committees of the legislature, and publish a copy of the report on a publicly available internet address by June 30, 2023.” SUBSTITUTE HOUSE BILL 1094, Washington State Legislature: Bill Information.

⁸⁸ Lawrence K. Marks, Chief Administrative Judge of the State of New York, *9th annual report Pursuant to Section 528 of the Judiciary Law* (2019).

constitute “transparency [that] may increase minority juror participation due to a renewed belief that the justice system is fair.”⁸⁹

Best practices thus require courts to (A) collect race and ethnicity data and (B) conduct periodic examinations of racial and ethnic diversity in the jury pool.

Recommendation A: Collect race and ethnicity data on the juror summons form.

The best way to collect race and ethnicity data is to borrow the model of the federal system and incorporate demographic questions into the juror summons. The federal jury summons includes the following two questions:

9. Are you *Hispanic or Latino*?

Yes No

10. Race

Fill in the circle completely which best describes your race – (see note on reverse side). To assist in ensuring that all people are represented on juries, please indicate which of the following applies to you. Nothing disclosed will affect your selection for jury service.

Black/African American

Asian

American Indian/Alaskan Native

White

Native Hawaiian/Pacific Islander

Other (specify) _____

The note on the reverse side of the form explains:

Federal law requires you as a prospective juror to indicate your race. This answer is required solely to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service. By answering this question you help the federal government check and observe the selection process so that discrimination cannot occur. In this way, the federal court can fulfill the policy of the United States, which is to provide jurors who are randomly selected from a fair cross section of the community.

The federal form is the best model because (i) the data is self-reported, which represents best practices in demographic data collection;⁹⁰ (ii) it ensures that the jury data will be collected in the same manner used by the United States Census Bureau, which will allow a jurisdiction to conduct “apples to apples” comparisons between the jury pool and the community; (iii) the questions separate race from ethnicity, as does the Census, so useful data can be collected about

⁸⁹ Washington Minority and Justice Commission Jury Diversity Task Force 2019 Interim Report, at 6.

⁹⁰ Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, Federal Register, Vol. 62, No. 210, at 58782 (Oct. 1997) (When “collecting data on race and ethnicity . . . respondent self-identification should be facilitated to the greatest extent possible”).

both important categories;⁹¹ and (iv) the form explains why the data is being collected. A final value of the federal model is that California residents are already familiar with these questions, as they answer them when they are summoned for federal jury service.

Recommendation B: Require periodic examinations of racial and ethnic diversity in the jury pool.

The value of collecting data is that it allows courts to evaluate to what extent they are assembling representative jury pools and to analyze at what point, if any, racial or ethnic disparities are appearing. Data must therefore be collected from the beginning of the jury selection process, as only then can courts determine which remedies to prioritize and “whether and to what extent each proposed change affects minority juror participation.”⁹²

For example, if a court sees a racial disparity at the initial stage when a master jury list is created from the combined source lists, then it would be appropriate to add an additional source list.⁹³ In contrast, if the initial pool of jurors is representative, and disparity is introduced at the stage when summons are sent out and returned as undeliverable or not returned, the remedy would be to change the follow-up procedures.⁹⁴ And if the disparity is introduced through the exercise of peremptory challenges, that would suggest that changes are needed to the exercise or review of those strikes.⁹⁵ As the 2020 Connecticut Task Force concluded, “the data collected will not only

⁹¹ Office of Management and Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, Federal Register, Vol. 62, No. 210, at 58786 (Oct. 1997) (“The two question format should be used in all cases involving self-identification” and “When the two question format is used, the Hispanic origin question should precede the race question.”).

⁹² Washington Minority and Justice Commission Jury Diversity Task Force 2019 Interim Report, at 6.

⁹³ See, e.g., Paula L. Hannaford-Agor, Director, Center for Jury Studies & G. Thomas Munsterman, Director Emeritus, Center for Jury Studies, Daniel J. Hall, Vice President, National Center for State Courts, *Third Judicial Circuit of Michigan Jury System Assessment: Final Report* (August 2, 2006) (Study showed that the source list “of licensed drivers and state identification card holders . . . is one of the sources of under-representation of African-Americans in the jury pool, accounting for an estimated 4.9% of the total disparity” in the jurisdiction.).

⁹⁴ See, e.g., Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. Mich. J. L. Reform 1, 37 (2018) (Study showed that “the greatest loss of cross-sectional representation in our four jurisdictions occurred during the seemingly innocuous stages of mailing out and returning jury qualification forms”).

⁹⁵ Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, at v, Berkeley Law Death Penalty Clinic (June 2020) (finding that “[m]any decades after *Wheeler* and *Batson* were decided, California prosecutors’ use of peremptory challenges to exclude African Americans and Latinx citizens from juries is still pervasive); *id.* at ix-xi (recommending “significant changes to the *Batson* procedure”); Assembly Bill 3070, 2019-2020 Leg., Reg. Sess., (approved by Governor, Sept. 30, 2020, ch. 318) (to be codified at Cal. Civ. Proc. Code § 231.7); *id.* § 1(b) (finding that

provide the Judicial Branch with comprehensive data to look at and address through the continued development of best practices but the data will meaningfully demonstrate Batson challenges by data-driven pattern rather than just anecdotally.”⁹⁶

The federal system again provides a useful model. The Administrative Office of the United States Courts has issued a form entitled “Report on the Operation of the Jury Selection Plan.” This form is known as an “AO-12” and requires trial courts to compare data about the representation of racial and ethnic groups in the jury pool with Census Data about the population of those groups in the community. It is designed to assist federal courts with “determining whether their jury wheels comply with the randomness and nondiscrimination provisions” of the federal jury selection statute and in “comparing statistical samplings of jury wheels against general population data.”⁹⁷ Federal courts are required to complete the form whenever the jury wheel is refilled, and when the court amended its rules “for the selection, qualification, excuse, or exemption of jurors, such as to affect the qualified jury wheel.”⁹⁸

In California, the demographic information and comparisons could be incorporated into the Judicial Council’s Jury Data Report.⁹⁹

5. Ensure transparency about jury pool diversity.

California litigants have a statutory right to challenge the jury panel on the grounds that it was “not drawn from a jury pool representative of a cross section of the population of the area served by the court.”¹⁰⁰ Defendants in criminal cases also have the right to raise a constitutional

“peremptory challenges are frequently used in criminal cases to exclude potential jurors based on their race [or] ethnicity . . . , and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color”); *id.* (finding that “the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination”; Cal. Civ. Proc. Code § 231.7 (codifying sweeping changes in the *Batson-Wheeler* formula).

⁹⁶ Report of the Connecticut Supreme Court’s Jury Selection Task Force to Chief Justice Richard A. Robinson, at 5 (Dec. 31, 2020).

⁹⁷ Form AO-12, Jury Representativeness Statistics, Data Collection Instructions (Rev. 11/14).

⁹⁸ *Id.*

⁹⁹ “The Jury Data Report works to standardize, collect, and analyze fundamental measures of jury operations in the trial courts and to provide this information to court administrators, the public, legislators, and the Judicial Council. By gathering consistent and timely data for each court, the Jury Data Report supports the ongoing evaluation and improvement of the jury management system at both the local and state levels.” Jury Data Report Fact Sheet, California Judicial Council (April 2020).

¹⁰⁰ Judicial Council of California, Administrative Office of the Courts, Bench Handbook: Jury Management, Part X(B) (2013); *see also* Cal. Code Civ. Proc. § 225 (challenges “that may be taken by any party to the action” include “A challenge to the trial jury panel for cause.”).

challenge to the representativeness of the jury pool.¹⁰¹ These rights are meaningless, however, unless litigants have the right to inspect jury selection records.

Recommendation A: Make explicit the right of criminal defendants to access jury selection records when considering a challenge to the composition of the jury pool.

As the United States Supreme Court explained, “without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.”¹⁰² The Supreme Court thus held that where the purpose of a federal statute was to guarantee juries selected from a fair cross section of the community, “an unqualified right to inspection” to jury selection records “is required . . . by the statute’s overall purpose.”¹⁰³

Some of the highest state courts have similarly held that access to jury records is required by the fair cross-section right, even when there is no statutory entitlement.¹⁰⁴ A number of states have also enacted statutes that explicitly state the defendant’s right to access jury selection records when considering a challenge to the representativeness of the jury pool.¹⁰⁵

¹⁰¹ *People v. Jackson*, 920 P.2d 1254, 1267-68 (1996) (“It is uncontroverted that in California, the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16 of the California Constitution.”) (internal quotations, citations, and modifications omitted).

¹⁰² *Test v. United States*, 420 U.S. 28, 30 (1975).

¹⁰³ *Id.* (citing 28 U.S.C. § 1861). The Court held that the right of inspection was required “not only” by the text of the applicable federal statute, but also by the fair cross-section purpose. *Id.*

¹⁰⁴ *State v. Plain*, 898 N.W.2d 801, 828 (Iowa 2017) (“Like the courts in Missouri, Nevada, and New Jersey, we conclude the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case.”); *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014) (“[T]his court is bound by Supreme Court precedent, and... a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community.”); *Gause v. United States*, 6 A.3d 1247, 1257 (D.C. 2010) (en banc) (despite absence of statutory entitlement “litigant preparing a possible motion challenging the jury selection process may inspect certain materials . . . without a threshold showing that there is reason to believe such discovery will ultimately substantiate a statutory or constitutional violation); *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980) (“The court is bound, however, by the United States Supreme Court’s determination of a state court defendant’s constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community.”); see also *State v. Ciba-Geigy Corp.*, 573 A.2d 944, 946 (N.J. Super. Ct. App. Div. 1990) (affirming defendants’ claim to right to information based “upon both federal and state constitutional precepts”).

¹⁰⁵ Del. Code Ann. Tit. 10 § 4513(b) (2015); Haw. Rev. Stat. §612-23(d) (2015); Idaho Code § 2-213(4) (2015); Ind. Code. § 33-28-5-21(e) (2015); Ky. Rev. Stat. Ann. § 29A.110; Md. Code Ann. Cts. & Jud. Proc. § 8-409 (2015); Neb. Rev. Stat. Ann. § 25-1637(4); N. D. Cent. Code Ann. § 27-09.1-12 (West 2015); 42 Pa. Cons. Stat. Ann. § 4526(d) (West 2016).

To protect the right to access jury selection records (without which the fair cross-section right is meaningless), California should add language to the relevant statute or rule that makes clear that when a party is considering a motion to challenge the composition of the jury pool, that litigant has the right to access data and records about the creation of the jury pool.

Recommendation B: Specify which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

California law currently requires the Jury Commissioner to “maintain records regarding selection, qualification, and assignment of prospective jurors.”¹⁰⁶ Adding language that specifically identifies which records should be maintained and preserved will better protect the fair cross-section rights of litigants.

An example of specific language describing jury selection records can be found in the jury plan for the United States District Court for the Central District of California. That jury plan identifies a number of “Juror Selection Records” that may be inspected, reproduced, and copied by a party preparing a motion challenging the composition of the jury pool, including:

- “Non-Court personnel shall be given detailed instructions regarding any work they are asked to perform, and shall be required to certify that all work performed has been completed pursuant to those instructions. The instructions provided, and the certifications returned upon completion, will be considered ‘Juror Selection Records,’”¹⁰⁷
- “The Source Data, the Clerk’s written requests for the Source Data, and the declarations from each agency providing Source Data will be considered ‘Juror Selection Records,’”¹⁰⁸
- “The Merged Source Lists, the list of names placed in the Master Jury Wheels, and any Orders of the Chief Judge directing that a Master Jury Wheel be supplemented with additional names shall be considered ‘Juror Selection Records,’”¹⁰⁹
- “The Clerk shall maintain a record of the following: the names of persons sent a Summons; whether the Summons was returned as undeliverable; whether each prospective juror submitted or returned a Questionnaire; whether each Questionnaire submitted was completed; whether any Questionnaires were returned to prospective jurors for additional information; whether each prospective juror was postponed, disqualified, exempted, or excused; whether each prospective juror was directed to report during the on-call period; and whether each prospective juror reported as directed. This record, and the following documents, will be considered Juror Selection Records: the affidavits of service completed pursuant to 28 U.S.C. § 1866(b); any Summons returned

¹⁰⁶ Cal. Code Civ. Pro. § 207(a); *id.* at (c) (“such records shall be preserved for at least three years after the list used in their selection is prepared”).

¹⁰⁷ *The Plan of the United States District Court, Central District of California, for the Random Selection of Grand and Petit Jurors*, General Order No. 19-07, Part 3, pg. 2, lines 16-21 (July 15, 2019).

¹⁰⁸ *Id.* at Part 4, pg. 3, lines 14-17.

¹⁰⁹ *Id.* at Part 5, pg. 5, lines 2-5.

as undeliverable, with its original envelope; and all submitted or returned Questionnaires.”¹¹⁰

- “The Clerk shall maintain records, which will be considered Juror Selection Records, noting whether each person directed to appear on a particular day is Present and Available to serve as directed, and if not, why: nondeliverable Summons, failure to respond to the Summons, postponement, disqualification, exemption, or excuse. Any orders to show cause issued to persons who fail to respond to a Summons will also be considered Juror Selection Records.”¹¹¹
- “[A] record of whether each juror selected for a petit jury panel was excused, disqualified, exempted, excluded, or selected to serve as a juror or alternate juror.”¹¹²

Finally, California courts can protect diversity by ensuring that the source lists used to create the jury pool are representative,¹¹³ ensuring that duplicate names are accurately removed,¹¹⁴ and providing guidance for jury personnel making discretionary decisions.¹¹⁵

¹¹⁰ *Id.* at Part 6, pg. 7, lines 8-18.

¹¹¹ *Id.* at Part 7, pg. 8, lines 4-9.

¹¹² *Id.* at Part 7, pg. 10, lines 6-8. The plan also designed as “Juror Selection Records” a record of “all prospective jurors who are deemed to have completed service pursuant to this paragraph.” *Id.* at lines 16-17.

¹¹³ The “choice of source lists is an important policy decision for state courts insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool.” Paula Hannaford-Agor, and Nicole Waters, *The State-of-the-States Survey of Jury Improvement Efforts: Compendium Report*, at 13., National Center for State Courts (April 2007). California has taken the important step of adding the resident state tax filers, but there is statutory authority to add more lists and this should be done if other lists would contribute new names. Cal. Code. Civ. Pro. § 197(a) (“Sources may include, in addition to other lists, customer mailing lists, telephone directories, or utility company lists.”).

¹¹⁴ Current statutory language requires that the source lists be “substantially purged of duplicate names,” Cal. Code. Civ. Pro. § 197(b), but this requirement could be improved with more specific requirements for implementation and quality assurance. *See, e.g.*, National Center for State Courts, *Jury Managers’ Toolbox: Best Practices for Duplicate Removal* (2009) (“recommend[ing] several best practices for duplicate removal techniques”).

¹¹⁵ Any opportunity for discretion creates a window for differential treatment. Courts can limit the variability of discretionary decisions by providing detailed guidelines for those decisions. *See, e.g.*, Implementing New York’s Civil Voir Dire Law and Rules, Appendix D: *Guidelines for Assessing Potential Jurors’ Ability to Understand and Communicate in the English Language*, (guidelines for jury staff charged with implementing statutory requirement that jurors are “able to understand and communicate in the English language.”).

In conclusion, to better ensure that juries represent a cross-section of their communities, courts can:

1. Reduce the number of undeliverable summons by:

- (A) increasing the frequency with which jurors' addresses are updated;
- (B) using addresses from the most frequently updated source list; and
- (C) submitting addresses to the national change-of-address database.

2. Reduce the number of non-responses and their impact by:

- (A) sending a follow-up notice to potential jurors who fail to respond to the jury summons; and
- (B) sending a replacement jury summons to the same zip code when a jury summons is returned as undeliverable or is not returned.

3. Increase the amount of juror compensation.

4. Monitor the diversity of the jury pool by:

- (A) collecting race and ethnicity data; and
- (B) conducting periodic examinations of racial and ethnic diversity in the jury pool.

5. Ensure transparency about jury pool diversity by:

- (A) making explicit the right of litigants to access jury selection records related to jury diversity; and
- (B) specifying which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

These steps will complement the best practices for ensuring jury diversity that California has already implemented,¹¹⁶ and will help courts ensure that California cases are decided by juries that reflect the diversity of their communities.

We would like to express our gratitude to the Supreme Court Jury Selection Work Group for the opportunity to share our recommendations. We are available to provide any additional information or feedback that might be helpful.

Sincerely,

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Selected jury-related publications:

¹¹⁶ For example, California already uses the best practices of summoning jurors through a one-step system, limiting the exclusion of people with felony convictions, and employing a one-day or one-trial standard for jury service.

- WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY, Harvard University Press (2000)
- *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. Mich. J. L. Reform 1 (2018)
- *Four Models of Jury Democracy*, 90 Chi.-Kent L. Rev. 861 (2015)
- *Second-Order Diversity Revisited* [Symposium: *The Civil Jury as a Political Institution*], 55 William & Mary L. Rev. 739 (2014).
- *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases* (with Rose, Mary R.) 2011 Mich. St. L. Rev. 911 (2011).
- *Two Ideals of Jury Deliberation*, 1998 U. Chi. Legal F. 125 (1998)

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Selected jury-related publications:

- *Black to the Future: The State Action Doctrine and the White Jury*, 58 Washburn L. J. 103 (Winter 2019)
- *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719 (July 2016)
- *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing it With Equal Protection*, 64 Hastings L. J. 141 (Dec. 2012)
- *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, with Dr. Joseph B. Kadane, 33 Just. Sys. J. 47 (2012); adapted for and reprinted in JURYWORK: SYSTEMATIC TECHNIQUES § 5:40 (2013-2014 ed.)

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Selected jury-related publications:

- *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges* (with J. Salerno), 81 Louisiana L. Rev. 120 (2020).
- JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE (with Sanja Kutnjak Ivković, N.S. Marder, and V.P. Hans eds.,) Cambridge University Press, forthcoming)
- *The Contemporary American Jury* (with Rose, M.R.), 14 Annual Review of Law and Social Science 239-258 (2018).
- “Coping with Modern Challenges and Anticipating the Future of Criminal Jury Trials,” in Cynthia Najdowski & Margaret Stevenson (eds.) CRIMINAL JURIES IN THE 21ST CENTURY: PSYCHOLOGICAL SCIENCE AND THE LAW, Oxford Press, 297-315 (2018)
- *Juries and Viewpoint Representation* (with Rose, M.R., C.G. Ellison, & A.V. Krebs), 35 Justice Quarterly 114-138 (2017).
- *Increasing Jury Representativeness* (with Caprathe, Hon. William (Ret.), Paula Hannaford-Agor, Stephanie M. Loquvam), 55 Judges’ Journal 16-20 (2016).
- *Selected to Serve: An Analysis of Lifetime Jury Participation* (with Rose, M.R. & M. Musick), 9 J. Empirical Legal Studies 33-55 (2012).

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Selected jury-related publications:

- *Measuring A Fair Cross-Section of Jury Composition: A Case Study of the Southern District of New York* (with A. Gelman, D.E. Epstein, and J. Ellias). Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, April 4, 2008
- *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, (with Catherine M. Grosso, Michael Laurence, David C. Baldus, George W. Woodworth & Richard Newell) 66 UCLA L. Rev. 1394 (December, 2019).
- *New Frameworks for Racial Equality in the Criminal Law*, (with M. Bakhshi,.) 39 Colum. Hum. Rts. L. Rev. 1 (2007).

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Selected jury-related publications:

- WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION (NYU Press 2013).
- *The Big Data Jury*, 91 Notre Dame L. Rev. 935 (2016).
- *The Jury As Constitutional Identity*, 47 U.C. Davis L. Rev. 1105 (2014).
- *Jury Instructions As Constitutional Education*, 84 U. Colo. L. Rev. 233 (2013).

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University of Central Florida

Selected jury-related publications:

- *A jury of whose peers?: The impact of selection procedures on racial composition and the prevalence of majority-white juries*, Journal of Crime and Justice, 39(1), 75-87 (2016).
- Research project with the Ninth Judicial Circuit Public Defender's Office, *Study on the Race of Potential and Actual Jurors: Minority Attrition in Pre-Trial Stages of Jury Selection* (2013-2015).

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University of Dayton School of Law

Selected jury-related publications:

- *Deterring Juror Misconduct in a Connected World: A Comparative Analysis*, 90 Chicago Kent Law Review 981 (2015).
- *Google, Gadgets, and Guilt: The Digital Age's Effect on Juries*, 83 University of Colorado Law Review 409 (2012).

- *Applying the Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA Law Review Discourse 28 (2011).
- *Resurrecting the Grand Jury's Shield: The Grand Jury Legal Advisor*, 98 Journal of Criminal Law and Criminology 1171 (2008).

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 Temple University

Selected jury-related publications:

- Jury Composition Challenges, a chapter of JURYWORK: SYSTEMATIC TECHNIQUES (author and editor on editions from 1983 through 2018).
- *Juror Selection: The Law, A Mathematical Method of Analysis and a Case Study*, 10 Amer. Crim. L Rev. (1972).
- *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal. L. Rev. 776 (1977) (with Joseph Kadane & John Lehoczky).
- THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE, A MANUAL FOR LAWYERS, LEGAL WORKERS AND SOCIAL SCIENTISTS (National Jury Project, 1975) (editor and co-author).

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Selected jury-related publications:

- THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS (Cambridge University Press, forthcoming).
- JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE (with Sanja Kutnjak Ivković, Shari Seidman Diamond, and Valerie P. Hans eds.) Cambridge University Press, forthcoming).
- THE JURY PROCESS (Foundation Press 2005).
- *Introduction to Juries and Lay Participation: American Perspectives and Global Trends* (with Valerie Hans), 90 Chicago-Kent Law Review 789 (2015).
- *Jury Reform: The Impossible Dream?*, 5 Tennessee Journal of Law and Policy 149 (2009).
- *Introduction to the Jury at a Crossroad: The American Experience*, 78 Chicago-Kent Law Review 909 (2003).
- *Juries, Justice & Multiculturalism*, 75 Southern California Law Review 659 (2002).

Mary Rose, Ph.D.

Associate Professor of Sociology
 University of Texas at Austin

Selected jury-related publications:

- *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts* (with Raul S. Casarez, and Carmen Gutierrez), *Journal of Empirical Legal Studies* 15: 378 – 405 (2018).
- *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases* (with Jeffrey Abramson) 2011 *Mich. St. L. Rev.* 911 (2011).
- *Selected to Serve: An Analysis of Lifetime Jury Participation* (with Shari Seidman Diamond and Marc A. Musick), *Journal of Empirical Legal Studies*, 9: 33 – 55 (2012).
- *Juries and Judges in the Public's Mind: Race, Ethnicity, and Jury Experience* (with Christopher E. Ellison, and Shari Seidman Diamond), *Judicature* 93: 194 – 200 (2010).
- *Access to Juries: Some Puzzles Regarding Race and Jury Participation*, In: R. Sandefur (Ed.) *ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW, AND DEVIANCE* 12: 114 – 144 (2009).

Suja A. Thomas

Peer and Sarah Pedersen Professor of Law
University of Illinois College of Law

Selected jury-related publications:

- *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (Cambridge Univ. Press 2016).
- *The Limits of History: The English Fire Courts, Congress, the Seventh Amendment Civil Jury Trial*, *Chicago Law Review Online*. 83, p. 281-295 (2018).
- *Foreword: Originalism and the Jury*, 71 *Ohio St. L. J.* 883 (2010).
- *The Missing Branch of the Jury*, 77 *Ohio St. L.J.* 1261 (2016).
- *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 *Wm. & Mary L. Rev.* 1195 (2014).

From: [Justice Reinvestment](#)
To: [Portnow, Kara](#)
Subject: Invitation to Comment on Jury Selection Work Group
Date: Friday, June 4, 2021 1:59:44 PM

Dear Hon. Kathleen O’Leary, Chair:

On behalf of the Justice Reinvestment Coalition of Alameda County, I am responding to the invitation for public comment. We applaud this Work Group’s mission of eliminating discrimination in jury selection and achieving a fairer cross-section of the community. The idea that litigants can have their cases heard by peers – by the community itself – is a primary source of the justice system’s legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

The Jury Selection Work Group is well placed to help usher in a new era of fairness in California juries. Three new laws that will be implemented over the next few years have the potential to bring California much closer to the “fair cross section of the community” standard adopted by the United States Congress in 1968 with the Jury Selection and Service Act:

- Senate Bill 310, which allowed people with felony convictions to serve on juries
- Senate Bill 592, which expanded the lists that jury commissioners draw from to create jury pools to include a list of state tax filers, and
- Assembly Bill 3070, which created a procedure to eliminate the discriminatory use of peremptory challenges

The success of these reforms will be dependent on how they are implemented in individual courthouses in all fifty-eight California counties. A primary task that is essential to determining the impact of these efforts is to obtain accurate demographic information for juries across the state. Only with this data can a group like this measure whether its efforts are truly moving California juries toward a fair cross-section of the community.

Eliminating formal barriers to jury service is only a part of the effort towards more fair juries. We would also urge this Group to look at practical barriers to jury service. Financial burdens and travel burdens fall particularly hard on communities of color. Policies that require travelling great distances, often via public transportation, or that force people to choose between their jobs or caring for their children and serving on a jury can be as detrimental as statutory exclusions. We cannot be satisfied with formal fairness but practical unfairness. Jury service must not be only for those who are affluent enough to participate.

With regard to your individual questions, we would make the following

recommendations:

1. ***What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?***

As stated above, jury commissioners should collect demographic data for all people responding to a jury summons by having them fill out a single page questionnaire. They should be asked to self-describe their race and to state their zip code. This demographic data should be compiled quarterly, and a report should be submitted to the presiding judge concerning whether the demographics of those showing up for jury service are consistent with the census demographics for the area served by the court.

2. ***How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?***

Invite community organizations to meet with court officers to regularly promote juror participation. Hold public forums explaining the benefits of participatory democracy through jury service. Have jury commissioners use nontraditional lists, in addition to ROV, DMV and tax filers, to summon potential jurors to court.

3. ***Are there any other ways in which the summons process could be improved?***

The court should track returned summonses that are marked “undeliverable” and update current addresses as necessary.

4. ***How can courts determine trends and track progress in order to make the jury pool more representative of the community?***

This again highlights the importance of maintaining accurate demographic information for the jury pool. Once that data is analyzed, it may be necessary to increase the number of summonses going to communities with a higher concentration of underrepresented populations.

5. ***What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?***

The practical barriers discussed above are major factors that decrease juror participation. Both jurors and their employers should be reimbursed for the cost of jury service, at a minimum of \$15 dollars an hour.

6. *If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?*

The fear of losing a job, losing income, the inability to obtain child or elder care, and transportation costs are the most common financial concerns cited by prospective jurors. Jurors who are unemployed and/or who are not receiving financial benefits while attending jury duty should be reimbursed to obtain a “living wage” for serving as jurors. Sanctions should be imposed on any employer who takes action against an employee for serving on a jury.

7. *Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?*

Yes, we urge this Work Group to oversee the effective implementation of AB 3070, along with SB 310 and SB 592.

The work of this Group is essential to preserving and enhancing the legitimacy of the jury system. The Justice Reinvestment Coalition of Alameda County appreciates the opportunity to provide feedback on this important undertaking.

Sincerely,

Somdeng Danny Thongsee

Pronoun: He/Him/His

Campaigner/Coordinator

Justice Reinvestment Coalition of Alameda County

Email: jrcofac@gmail.com

Office: 510-893-1377 Ext.1377

Carnegie Mellon University

Statistics & Data Science

Joseph B. Kadane
Department of Statistics
Leonard J. Savage University
Professor
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Porter Hall 219C
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kadane@stat.cmu.edu

May 27, 2021

TO: California Supreme Court Jury Selection Working Group
FROM: Joseph B. Kadane

Dear Working Group,

I take it that the legal value at issue in your inquiry is the right of all parties in civil and criminal cases to have a jury system free of bias, particularly racially, sexually, and culturally.

The most important suggestion I can make is to collect the requisite data. Without data, the system and the public cannot know of the extent of possible bias. Without data, even your working group cannot know whether the reforms you may propose are needed, and if adopted, whether they had the hoped-for effect.

The federal jury system uses the juror qualification questionnaire to collect demographic data on its jury venires. The federal law stipulates (28 USC at 1869(h)) that the federal questionnaire requires name, address, age, race, occupation etc. Furthermore, the federal system (28 USC at 1864) requires when there is "an omission, ambiguity or error in the form, the clerk or commission shall return the form with instructions...to return the form...within ten days." Thus, the federal system requires the disclosure of demographic information, without exception.

The California system to collect such information needs to respect people's privacy and not expose them to perceived risk, even if there's no reality to the perception. A way to collect demographic information on people available to be jurors would be to do it anonymously at the courthouse. Such a questionnaire could ask for sex, race and ethnicity, etc. (I would suggest using Census Bureau categorizations) but not name. Thus the potential jurors could give the information without it being tied to it personally.

I'm guessing that the principal worry about doing this is whether it would be acceptable to jurors. That's an empirical question. I suggest doing experiments in a few courtrooms to find out. There are well-established social science practitioners who could help devise a questionnaire and do a pilot study to assess its acceptability.

It is my understanding that California uses the voters list and drivers lists as sources, and will soon add tax files. Although I was an early advocate for the use of multiple lists¹ I must also concede

¹Kadane, J.B. and Lehoczky, J. (1976). "Random Juror Selection from Multiple lists," *Operations Research*, (March - April), 24: 207-19, Kairys, D., Kadane, J.B. and Lehoczky, J. (1977) "Jury Representativeness: A Mandate for Multiple Source Lists," *California Law Review*, 65: 776-827. Reprinted in the record of a hearing before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, U.S. Senate, September 28, 1977

that adding more lists does not always result in a jury system with less bias.

Until we have the data, whether there is a demographic imbalance in California, and if so, the nature and extent of the imbalance, is anyone's guess. Consequently, improvements in the source lists, the method of eliminating duplicates, and, whether there are problems in the process of excuses, disqualifications and challenges for cause have to depend on the data that are currently unavailable.

Your working group can set the stage for improvements to the jury system by moving forward on data collection.

Sincerely,

A handwritten signature in blue ink that reads "JB Kadane". The signature is fluid and cursive, with the initials "JB" being particularly prominent.

Joseph B. Kadane
*Leonard J. Savage University Professor
Statistics and Social Sciences, Emeritus*

From: [Curtis Karnow](#)
To: [Portnow, Kara](#)
Subject: Working Group
Date: Wednesday, May 5, 2021 1:31:52 PM

From Curtis Karnow
(SF Superior Court)

1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

Low income people, a group disproportionately represented by communities of color, cannot afford to serve on juries. That's a blunt fact that must be addressed. The way to address it is to pay a reasonable sum for jury service: that means \$20+ an hour. We also need child care services for jurors.

There's a larger issue, which is that lower income people, and communities of color, do not feel enfranchised and are not sure that the legal system is their system. This is very serious (I am assembling notes on this) but is beyond the scope of this Working Group.

5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

Employers must be encouraged to pay while their employees are in jury service. A few days of pay is pointlessly insufficient—jury selection alone can take days. Large companies are often involved in suits and use court services –but they can be notoriously stingy in allowing for jury service for the employees. Even law firms frequently give very few days to employees. Thus, we should work with chambers of commerce, the Bar, PR efforts; other ways we can reach the business community should be evaluated. Perhaps businesses can secure some sort of tax relief for the salaries they pay during jury service.

The judicial branch should be concerned with public transportation to courthouse. Locations for new courthouses should consider this. Where the transportation system is clumsy or nonexistent, the branch should communicate with the other branches, including at the local level, in securing such transportation services.

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

See answer to #1.

7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?

AB 3070 is likely to have very serious issues as it is implemented. In any event, peremptory challenges should be eliminated, for reasons cited by others, including Justice Marshall. It is unreasonable to expect that implicit bias can be eliminated by AB 3070 or other modification to the way peremptory challenges are handled. [The fear of the bar that without peremptory challenges attorneys will be unable to get rid of jurors who appear biased against their clients can be addressed by making cause challenges easier.] I understand that it may be a problem getting this through the legislature at this time, but the first decision of the working group should be whether we should so do; the political issues as to how to implement should be set aside for the moment.

From: [Jo Ann Kingston](#)
To: [Portnow, Kara](#)
Subject: jury selection
Date: Thursday, July 1, 2021 2:28:26 PM

In Alameda County, the venire panels are not equally distributed between North County and South County. Obviously, people who live in North County would not like to commute the distance to South County, but it creates a misdistribution between the two parts of the county.

Hold employers feet to the fire about paying for paid jury service.

On bias about distrust of police officers, make that an implied bias objection where the prosecutor would have to explain why they are exercising the peremptory based on the race of the juror.

Sent from [Mail](#) for Windows 10

From: [Yahairah Aristy](#)
To: [Portnow, Kara](#)
Cc: [Laura Handzel](#)
Subject: Lawyers Club of San Diego Public Comment - Jury Selection Work Group
Date: Wednesday, June 2, 2021 9:45:07 AM
Attachments: [JSWGITC - LCSD 6-2-2021.pdf](#)

Dear Ms. Portnow,

I hope this email finds you well and it is nice to e-meet you. [Lawyers Club of San Diego](#) was established in 1972 with a mission to advance the status of women in the law and society. We are a feminist organization comprised of over 1,000 members who are judges, lawyers, law students, other legal professionals and nonlegal professionals. Our core values are to demand equality for women, lead on inclusivity and diversity, inspire and mentor feminists, defend reproductive freedoms, advocate against gender-based violence and create value through enriching programs.

In light of our mission and core values we seized the opportunity to review the Jury Selection Workgroup Questions for Public Comment and attached is our input.

Please feel free to reach out to me with any questions or if you need further information.

Thank you again for the opportunity. We look forward to seeing the end result.

Sincerely,
Yahairah Aristy
President
[Lawyers Club of San Diego](#)

1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

- Expand sources for juror summons (e.g., FTB filers, Covered California)
- Consider financial impact to eliminate barriers to increase jurors from a cross-section of communities:
 - Provide free daycare for jurors
 - Provide confidential pumping station for nursing mothers
 - Provide a jury service round trip shuttle service from various communities
 - Create different duration jury pools so jurors can self-select what works best with their lives (short term jurors (1-3 days); medium (3-5 days), long (5-7 days) and extra-long (7 days)
 - Advocate for legislation that mandates employers to provide paid jury service or county paid payment for jury service
 - Advocate for tax incentives for employers who do not pay their employees, but who serve jury duty. This tax credit will be based on the total days' employees serve on jury duty and balancing employer size. The idea is to encourage employers to promote service and help mitigate the impact on the employer when the employee is serving.

2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

- Community events that educate public regarding jury service
- Use bar associations, community advocates, cultural centers, communities of faith, etc., to educate and increase participation of citizens in jury service
- Work with schools and children's organizations such as Girl Scouts of America and Boy Scouts of America to create juror badge to create a sense of civic duty for jury service early in childhood

3) Are there any other ways in which the summons process could be improved?

- Develop an effective cross-checking address tool with all accessible databases
- Update records with any returned summons

4) How can courts determine trends and track progress in order to make the jury pool more representative of the community?

- Educate jurors regarding the need for collection of racial, ethnic, gender, and gender identity data, and then collect the data to compare with demographics at the state and county level.

5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

- Financial Reasons: Solutions with the following:
 - Provide free daycare for jurors
 - Provide confidential pumping station for nursing mothers
 - Provide a jury service round trip shuttle service from various communities
 - Create different duration jury pools so jurors can self-select what works best with their lives (short term jurors (1-3 days); medium (3-5 days), long (5-7 days) and extra-long (7 days)
 - Advocate for legislation that mandates employers to provide paid jury service or county paid payment for jury service
 - Advocate for tax incentives for employers who do not pay their employees, but who serve jury duty. This tax credit will be based on the total days' employees serve on jury duty and balancing employer size. The idea is to encourage employers to promote service and help mitigate the impact on the employer when the employee is serving.
- Apathy and distrust in the system: Solution is to create a sense of duty by doing the following:
 - Community events that educate public regarding jury service

- Using bar associations, community advocates, cultural centers, communities of faith to educate and increase participation
- Work with the Girl Scouts of America and Boy Scouts of America to create juror badge
- Create a Mock Trial program for K-12 students
- Create a campaign similar to donation drive, voting (I donated, I voted, etc.) – I served.

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

- Consider financial impact
 - Provide free daycare for jurors
 - Provide confidential pumping station for nursing mothers
 - Provide a jury service round trip shuttle service from various communities
 - Create different duration jury pools so jurors can self-select what works best with their lives (short term jurors (1-3 days); medium (3-5 days), long (5-7 days) and extra-long (7 days)
 - Advocate for legislation that mandates employers to provide paid jury service or county paid payment for jury service
 - Advocate for tax incentives for employers who do not pay their employees, but who serve jury duty. This tax credit will be based on the total days' employees serve on jury duty and balancing employer size. The idea is to encourage employers to promote service and help mitigate the impact on the employer when the employee is serving.

7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there *Batson/Wheeler* related issues, whether or not addressed in AB 3070, that should be studied by the work group?

- Include AB 3070 legislative findings in juror orientation
- Develop auditing process to track judicial decisions on challenges raised.
- Ensure AB 3070 training is included in the judicial college and at least once a year for all sitting judges

From: [Edward Leonard](#)
To: [Portnow, Kara](#)
Subject: Improving Jury Panels in Civil matters
Date: Monday, May 24, 2021 1:54:08 PM
Attachments: [image001.png](#)

Ms. Portnow:

Having selected almost 200 juries over the years, the most frustrating thing to me is how easily business owners get out of jury duty. The sole and only excuses should be a prepaid vacation or a scheduled surgery. Beyond that, the jurors must serve. As for those jurors who claim they cannot be fair, tell them that they must serve on a jury and will be asked to come back daily to serve.

The length of jury trials encourages some outrageous excuse making. We need time constraints on cases and judges who are intolerant of excuse making on speed at trial. A three week jury trial on a civil matter should be rare not the norm. Along those lines, full time courts are good. Having trial more than 4.5 hours per day would help too. Jurors never understand the 90 minute lunch break. I know it's a union deal, but the jurors do not. Hence they see wasted time and will do or say anything to escape the Court.

AB3070 is mis-aimed at peremptory challenges. We just do not have enough of these to make a difference. The problem is not with the lawyers. It is with the jurors making excuses and the Court wanting to make friends rather than jurors.

A different thing to do would be to have the clerks time clear the prospective jurors. If the next two weeks do not work, what two weeks do? Pin them down.

Call me with any questions and thank you for looking into this. Do not make it worse than it already is.



Edward Leonard
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From: [Maas III, Earl](#)
To: [Portnow, Kara](#)
Subject: Comments for the working group
Date: Thursday, May 6, 2021 2:31:52 PM

- 1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do? In almost 17 years as a judge, and over 15 before that as a trial lawyer, I believe this is the primary issue, not bias once jurors get in the courtroom. We generally start with underrepresentation before a single question is asked. To me, our enforcement is too lax. It is commonly known that there is no consequence for either failing to appear, or claiming hardship once present. If we enforce summons publicly, we will have a greater turnout and therefore, more diversity. It is unreasonable to suggest that lawyers (or judges) are biased because of underrepresentation of any particular group, if the panel is underrepresented before a single juror is excused.
- 2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities? Without the will to enforce the summons, there is little you can do. Education about the fairness and need for these communities to participate would be helpful, but if a juror then responds to voir dire suggesting presence is due to intent to make sure the underrepresented community does not get hurt by the other communities, that juror is likely to be challenged.
- 3) Are there any other ways in which the summons process could be improved? The most common excuses I hear are that 1) my employer will not pay me; or, 2) my teachers will fail me. Creating mechanism to neutralize this would increase turnout.
- 4) How can courts determine trends and track progress in order to make the jury pool more representative of the community? I don't know. With more and more individuals identifying as representing multiple groups, the ability to categorize becomes harder. This seems like an issue for an academic. However, it would be unfortunate if this desire to "track" used the limited funds which are available. The same underrepresented groups are also denied court access because of the lack of clerks available to assist them.
- 5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify? The biggest barrier I see is unwillingness to serve. This is not something that gets any media exposure, but is, based upon juror questioning, the #1 reason we have a 20 percent (or less) response rate to summons. Potential jurors know there is no consequence to failing to appear, or know that a couple well placed comments will get them off any jury they may get called for.
- 6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful? For those who show up, not being paid for their time here, or for more than 1 day, is the primary excuse.
- 7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there *Batson/Wheeler* related issues, whether or not addressed in AB 3070, that should be studied by the work group? I can only address the issue as it relates to civil. I have not seen the publicized and traditional claims of bias (Defendants challenging minorities). Indeed, I have seen more bias by lawyers against those who appear to show the same demographics of their clients, rather than the opposite, but more media reported, events. This used to surprise me, but no longer does. Because I have never received a *Batson* challenge to such actions, I can not say why the lawyers chose those

potential jurors to challenge. I only notice because I try to keep track of any potential race related challenges during voir dire in anticipate of potential Batson challenges.



NJP
LITIGATION
CONSULTING

June 1, 2021

Supreme Court Jury Selection Work Group
350 McAllister Street
San Francisco, California 94102-3688
Via Email to: Kara.Portnow@jud.ca.gov

Dear Members of the Supreme Court Jury Selection Work Group:

Thank you for inviting comments as you study “whether modifications or additional measures are needed to guard against impressionable discrimination in jury selection.”

I would like to address the question posed in the Supreme Court memo, “Are there other impediments to eliminating impermissible discrimination in jury selection and better ensuring that juries represent a cross section of their communities?”

By way of introduction, NJP Litigation Consulting, also known as the National Jury Project, was established in 1975 to study aspects of the American jury system and to work to maintain and strengthen that system. The NJP provides consultative and educational services to attorneys and social science professionals in criminal and civil litigation in federal and state courts throughout the United States. NJP has assisted attorneys in jury selection in thousands of civil and criminal cases. The NJP authored the text *Jurywork: Systematic Techniques*, which was first published in 1979, 2d edition 1983; and has been updated regularly, including the most recent edition, 2020-21.

The process of jury selection is like an inverted triangle or funnel. At present, California jury service requires eligible jurors to be U.S. citizens, 18 years of age and older, resident in their counties, and either registered to vote or hold a California driver’s license or state issued identification card. In January 2022, we will add the list of tax filers to the source lists.

California Code of Civil procedure section 203 specifies who is not eligible for jury service. Among those individuals are people who do not possess sufficient knowledge of English, are incarcerated, or are currently under state supervision, including parole or probation.

The two, and soon to be three, source lists must be merged and duplicates (and triplicates) eliminated, a process often referred to as “merge and purge.” The problem, of course, is that more financially affluent people, who move infrequently will appear on all three lists. These lists may never reach poor or younger California residents who are eligible to serve.

Recommendation 1: The language of Code of Civil Procedure section 197(b)(1) requires that the merger of source lists shall be “substantially purged of duplicate names.” This standard, however, is troublingly vague. NJP recommends that an audit be conducted to measure whether the “merge and purge” is effective, and whether the resulting lists represent a fair cross-section of eligible California residents and do not in fact continue to over-represent certain groups and underrepresent others.

Several other source lists might better reach these underrepresented communities, including those used in other states such as public assistance roles and utility bill account holders. Contacting jury eligible residents is complicated by residential mobility, which is greatest among younger and less affluent people. Residential mobility is higher among renters than homeowners. The economic impact of the pandemic has caused a significant increase in residential transience as residents have lost their homes, moved in with family members or friends, consolidated into fewer households, or become homeless.

Ninety-three percent of California residents now have cell phones, which strongly suggests that prospective jurors might also be reached by acquiring the billing addresses of cell phone holders or by text message. The National Center for State Courts recommends that source lists reach 85% or more of the jury-eligible population.

Recommendation 2: There should be an audit to ascertain the rate of non-deliverable jury summons by zip code and census tract followed by remedial steps, including sending replacements summons to other residents within the most impacted census tracts, which are likely to be the less affluent areas with higher numbers of people of color. This is a form of stratified sampling.

Recommendation 3: The initial juror questionnaire that is sent with the summons to prospective jurors in all counties should contain demographic questions such as age, race/ethnicity, gender, occupation and education as it does in some counties and the results should be tabulated with any disparities reported. These questionnaires should then follow the jurors who appear for jury service so that demographic information is available to the court and parties for the purpose of facilitating rulings on cause and peremptory challenges when race/ethnicity or gender are at issue as well as ensuring that appellate court have the demographic information, which is necessary to properly review claims related to those challenges.

There is good reason to examine what happens at the next points of reduction, that is, who responds to jury notices and appears in court and what hardships are granted to postpone or excuse prospective people from jury service.

Recommendation 4: There should be an audit of the excusals and postponements granted prior to court appearance, and again, of those who respond and appear for jury service.

Jury pools have long been impacted by economic hardship and the lack of available and affordable childcare. This has become a more severe problem in the jury pools assembled in the aftermath of the pandemic.

However, even before the pandemic, financial hardship profoundly skewed jury pools, especially in cases lasting more than a few days, and we can expect this to continue. As courts have started to resume trials, it is our experience that far greater numbers of people are requesting hardship excusal or postponement of their jury service, and courts have been understandably accommodating. The reasons are usually economic, e.g., jury service is not paid for by their employers and people cannot make ends meet with another interruption in their paychecks; some who are just returning to work or full-time schedules, having sustained economic hardship during the pandemic, cannot sustain another interruption in their paychecks; and others lack childcare or have COVID 19 health concerns for themselves or household members. As the data has shown, the individuals hardest hit by the pandemic have been people with the least economic means, most often people of color.

Even absent the pandemic, in general, whites have far more wealth and economic security than do people of color. This is the result of centuries of discrimination in employment, housing, education and public policies that have benefitted whites at the expense of all others. The pandemic compounded these profound financial inequities.

Recommendation 5: As noted above, the financial burden of jury service has long been the greatest barrier to securing juries that represent a true cross-section of the community. In a state with a very high cost of living, it is impossible for people without sources of income other than their wages or without substantial savings to sustain themselves on the meager \$15 a day jury fee the California courts provide.

California would go a long way toward reducing barriers to service by increasing jury fees to \$120/day consistent with the minimum wage of \$15 per hour for an 8-hour day. Other innovations, such as court days that run from 8:30 to 1:00 p.m., would also permit more people to serve and still work part-time. The latter innovation, while helpful, often does not meet the needs of workers who lack flexibility in their employment schedules and cannot afford reduced hours of employment.

Recommendation 6: The courts should allow non-English speaking citizens who are otherwise qualified to serve on juries. California requires jurors to “possess sufficient knowledge of the English language,” a standard which is vague at best. Our state has the highest share of non-English speaking citizens in the nation. Reportedly nearly 45% of Californians five years and older do not speak English at home. In the diverse state of New Mexico, persons who otherwise meet the criteria for juror’s eligibility but lack sufficient English language knowledge may serve, and interpreters are available to jurors. The New Mexico Constitution, which was adopted in 1911, guarantees all citizens the right to participate on juries. Edward L. Chavez Former Chief Justice of the New Mexico Supreme Court, described the success of this program in an article appropriately titled *New Mexico’s Success with Non-English-Speaking Jurors*, published in the Journal of Court Innovation.

Recommendation 7: Taking the lead from Washington state’s adoption of General Rule 37 in 2018, last year, the California legislature passed AB 3070, championed by now-Secretary of State Dr. Shirley Weber. AB 3070 prescribes a new procedure to eliminate the exercise of discriminatory peremptory challenges, which the *Batson* inquiry with its purposeful discrimination standard failed to accomplish.

Justice Thurgood Marshall predicted that the *Batson* remedy would fail because lawyers would readily assert facially neutral reasons, creating a difficult burden for judges who must assess the credibility of these reasons. A recent study of peremptory challenges in our state, [Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors](#), demonstrated that all too often the reasons prosecutors give for striking Black jurors penalize them for the experience of being Black in America today, for example, a juror who distrusts law enforcement, who believes there is racial profiling, whose relatives or friends may have criminal records, or is unemployed or less educated. *See also, People v. Triplett*, 48 Cal. App. 5th 655, 688-93 (2020) (Liu, J., with Cuéllar, J., dissenting from the denial of review).

AB 3070 is a new and essential tool which must be tried and evaluated. The information from Washington, while largely anecdotal, is that GR 37 achieving its intended objective. This is promising news for AB 3070. The new statute needs to be implemented and studied by experienced, independent jury scholars.

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In sum, there is an enormous need for the systematic collection of data in order to ascertain the degree of underrepresentation, the points or bottlenecks where it is occurring, and to test the effectiveness of proposed remedies. Robust, independent studies are needed. Qualified, independent social scientists have sufficient expertise to collect the necessary data in ways that protect juror privacy when appropriate. Without data, we can neither "follow the science" nor make "evidence-based" decisions. Public confidence in the integrity of our judicial system requires nothing less.

Thank you for the opportunity to address your committee. NJP would be happy to provide additional information or assistance that might help you in this effort.

Sincerely,



Lois Heaney

June 3, 2021

The Honorable Kathleen E. O’Leary, Chair, and Members
California Supreme Court Jury Selection Work Group
350 McAllister Street
San Francisco, California 94102-3688
Via email to Kara Portnoy, kara.portnow@jud.ca.gov

Re: Request for Public Comment

Dear Justice O’Leary and Jury Selection Work Group Members:

I write in response to the Jury Selection Work Group’s request for public comment. I have been a member of the Berkeley Law faculty since 2001. I am the founding director of its Death Penalty Clinic, which I currently co-direct.

I have been engaged in litigating and analyzing jury selection issues for close to three decades. A copy of my CV is available on my Berkeley Law [faculty page](#). It does not, however, reflect my contributions to litigation in criminal and capital jury selection matters, including amicus curiae briefs in support of the appellant or petitioner in cases such as *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *People v. Lenix*, 44 Cal. 4th 602 (2008); and *(George) Williams v. California*, 571 U.S. 1197 (2014).

I am the lead author of the 2020 report *Whitewashing the Jury Box* with which the Work Group is familiar.¹ I participated in drafting Assembly Bill 3070 (AB 3070), the subject of Question 7, and was involved in the legislative process that culminated in the bill’s passage.²

Here, I address my comments to Question 7, and offer three recommendations:

¹ Elisabeth Semel et al., Berkeley L. Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020).

² *A. 3070*, 2019-2020 Leg., Reg. Sess. (approved by Governor, Sept. 30, 2020, ch. 318) (codified at Cal. Civ. Proc. Code § 231.7).



Recommendation 1: There should be an independent, empirical study of the effectiveness of AB 3070.

Question 7 begins with the observation that the provisions of AB 3070 “appear to directly answer many of the key questions outlined in the Jury Selection Work Group’s charge.” I concur that the California Legislature’s findings offer conclusions about the failure of the *Batson-Wheeler* procedure to eliminate discriminatory peremptory challenges, and that new Code of Civil Procedure section 231.7 prescribes a radically different formula.³ However, the findings and the statutory remedy reflect, in significant part, the extensive empirical research and legal analysis presented in *Whitewashing the Jury Box*, the first study of its kind in California. The Work Group therefore would be well-served to look to the report in assessing whether AB 3070 is achieving its objective.⁴

As you know, in 2018, the Washington Supreme Court adopted General Rule 37 (GR 37), becoming the first state to dismantle the *Batson* jury selection regime.⁵ The California legislation is modeled on GR 37, but goes further in several respects.⁶ Anecdotal evidence from Washington indicates that “the rule has served a critical role in judicial education in eliminating racial bias,”⁷ and suggests that attorneys and judges are adhering to GR 37, which has led to a decline in prosecutors’ use of peremptory challenges to disproportionately strike Black jurors as

³ See *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 280-82 (1978).

⁴ *Whitewashing the Jury Box* was informed by Washington Supreme Court General Rule 37, the report of the Washington Supreme Court’s “workgroup,” and numerous social science studies of peremptory challenges in other states and the federal courts. See e.g., Wash. Ct. R. General Applicability, [General R. 37](#); [Proposed New GR 37—Jury Selection Workgroup Final Report](#) (2018); Elisabeth Semel et al., *supra* note 1, at 82-84 nn.1-2.

⁵ See GR 37; [Proposed New GR 37—Jury Selection Workgroup Final Report](#), *supra* note 4.

⁶ E.g., compare GR 37(a) (applying the rule to the “unfair exclusion of potential jurors based on race or ethnicity), with Cal. Civ. Proc. Code § 231.7(a) (applying the statute to prospective jurors based on “race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups”); compare GR 37(g)(i)-(v), with Cal. Civ. Proc. Code § 231.7(d)(3)(A)-(G) (listing additional circumstances the trial court “should consider” in determining whether the peremptory challenge is justified); compare GR 37(h)(i-vii) (listing “presumptively invalid” reasons), with Cal. Civ. Proc. Code § 231.7(e)(1)-(13) (listing “presumptively invalid” reasons).

⁷ Letter from Chief Justice Steven González & Justice Mary Yu, Washington Supreme Court, to Lila Silverstein, Washington Appellate Project (May 20, 2020) (on file with the office of former Assembly member Dr. Shirley Weber and with the author).

well as a decrease in their reliance on reasons that are “presumptively invalid” under the rule.⁸ Although still few in number, the opinions issued to date indicate that the judiciary has had no difficulty applying the de novo standard of review.⁹

The news from Washington is encouraging for California. However, independent research by jury selection scholars is the appropriate and reliable method for assessing whether the provisions of section 231.7 become “an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.”¹⁰ Consistent with the findings and recommendations of the California Legislature and *Whitewashing the Jury Box*, the study should focus on determining whether the new procedure ends, or at least significantly reduces, the disproportionate removal of “African Americans, Latinos, and other people of color” from the jury.¹¹

The study should be empirically rigorous and conducted independent of the judicial, legislative, and executive branches. Considerations essential to a meaningful outcome include the following:

1. The researchers must be able to identify specific study periods before and after the implementation of AB 3070 to compare jury selection data.
2. The study period post-January 1, 2022 will have to account for the time necessary for courts to understand and properly implement AB 3070 and for the data to accrue.
3. The researchers will need to assess how much of the data should come from cases at the trial level and how much should come from cases at the appellate level.
4. Determining the length of the study periods will also depend on how frequently juries are selected in the counties that are the subjects of the study. In that regard, to draw

⁸ See GR 37(h).

⁹ See e.g., *State v. Listoe*, 475 P.3d 534, 542 (Wash. Ct. App. 2020) (finding error under GR 37 and holding that an “objective observer aware of implicit bias could view race or ethnicity as a factor” in the prosecution’s strike of “the only Black member of the venire”); *State v. Omar*, 460 P.3d. 225, 229 (Wash. Ct. App. 2020) (applying GR 37 to affirm the prosecution’s objection to the defense strike of an Asian juror where defense counsel’s reasons “were vague and unsubstantiated” and “might mask conscious or unconscious bias” such that “an objective observer could view race as a factor in the challenge”).

¹⁰ A. 3070, sec. 1(a).

¹¹ *Id.*; see also Elisabeth Semel et al., *supra* note 1, at 13 (concluding that “prosecutors across California use peremptory strikes to disproportionately remove African-American and Latinx citizens”).

meaningful conclusions about the effects of AB 3070 on California jury selection, the researchers should have the flexibility to conduct a multi-county study so that the sample size is sufficiently large as well as demographically and geographically diverse.

Recommendation 2: Data should be collected on prospective jurors’ race, ethnicity, and gender in an initial questionnaire to jurors who are summoned, which should be available during jury selection and on appeal.

We undertook *Whitewashing the Jury Box* in part because there were no data on the exercise of peremptory challenges in California trials. Our research quickly revealed the lack of readily available, reliable demographic information on who is called for jury duty, who is excused (for whatever reason), and who serves.

Last December, the Connecticut Supreme Court’s Jury Selection Task Force issued a report, which concluded:

A crucial step to ensuring fair trials with diverse jury members is to begin collecting data on who is called for jury duty and selected to serve on a jury. Data is the foundation to any efforts to ensure diverse representation on juries – it is impossible to ascertain whether there is a problem with jury composition or the extent of the problem without robust data collection.¹²

The same observation applies to jury selection. Counsel and judges should not be guessing about a juror’s racial or ethnic identity when the information can be obtained through a questionnaire that accompanies the jury summons.¹³ When jurors appear in response to a

¹² *Report of the Connecticut Supreme Court’s Jury Selection Task Force to Chief Justice Richard A. Robinson* 3 (2020); see also H.R. 6548, sec. 4(c), 2021 G.A., Reg. Sess. (Conn. 2021) (“The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror’s name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so.”).

¹³ See Letter from Jeffrey Abrahamson et al. (law professors and social scientists), to the California Supreme Court Jury Work Group, at Recommendation 4 (June 4, 2021) (on file with the Jury Selection Work Group); see also Elizabeth Neeley, *Addressing Nonsystematic Factors*

summons, the completed questionnaires should follow them as they are assigned to a courtroom for jury selection and should become part of the appellate record. This straightforward process obviates the need for speculation about jurors' racial or ethnic identities or for the court to single out individual jurors to ask how they identify themselves.¹⁴ It will also improve the reliability of counsel's arguments and courts' rulings under AB 3070.

Recommendation 3: AB 3070 should be applied retroactively.

Whitewashing the Jury Box documents decades of failure of the *Batson/Wheeler* framework and its enforcement by California courts.¹⁵ The legislature's findings with regard to AB 3070 tracked the report's findings and recommendations.¹⁶ The California Legislature recognized that "peremptory challenges are frequently used in criminal cases to exclude potential jurors based on their race [or] ethnicity . . . , and that exclusion from jury service has

Contributing to the Underrepresentation of Minorities as Jurors, 47 Ct. Rev. 96, 97 (2011) (explaining that "the [Nebraska] qualification form collects data on the race and ethnicity of the potential juror" and "[t]he information gleaned from the uniform juror qualification form allows researchers to examine each stage of the jury-compilation process, from the compilation of the initial pool to the final impaneled jury, to determine whether and why the composition of the jury pools may or may not be reflective of the diversity of Nebraska's counties").

¹⁴ See, e.g., *People v. Parker*, 2 Cal. 5th 1184, 1212 (2017) (finding no *Batson-Wheeler* error and stating that the defendant's contention that the prosecutor struck the only two Black jurors in the pool was "a fact neither conceded nor confirmed at trial"); *People v. Manibusan*, 58 Cal. 4th 40, 80 (2013) (finding no *Batson-Wheeler* error in part because "the record does not disclose how many other Hispanics were in the jury pool"); *People v. Long*, 189 Cal. App. 4th 826, 839-40 (2010) (where the defendant objected to the strike of three prospective jurors with "Vietnamese names" and described them as "apparently Vietnamese," the trial court assumed, without any inquiry of the jurors, that they were Vietnamese, although the prosecutor argued that one of the three individuals was "Cambodian, not Vietnamese"); *People v. Davis*, 46 Cal. 4th 539, 584 (2009) (holding that notwithstanding well-established precedent that jurors with a Spanish surname are "Hispanic" for *Batson-Wheeler* purposes, where defense counsel acquiesced in the prosecutor's assertion that the three struck jurors were "Caucasian with a possible Hispanic surname," it "weakens any inference of group bias than can be drawn from" the prosecutor's peremptory challenges).

¹⁵ See, e.g., Elisabeth Semel, et al., *supra* note 1, at 13-27 (presenting empirical findings); *id.* at 29-65 (discussing the influence of implicit bias, prosecutor training, and the California Supreme Court's resistance to enforcing *Batson* in perpetuating the exercise of discriminatory peremptory challenges).

¹⁶ See A. 3070, sec. 1(a)-(c); Elisabeth Semel et al., *supra* note 1, at v-xi.

disproportionately harmed African Americans, Latinos, and other people of color.”¹⁷ In particular, the legislature acknowledged that “the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination.”¹⁸

A pressing question for the Work Group is how our reviewing courts should consider the hundreds of *Batson-Wheeler* claims in criminal cases that were tried before January 1, 2022.¹⁹ The first question is whether the California Supreme Court will hold that the new statute is retroactive.²⁰ However, retroactivity is not the only remedy for the harms done by decades of discrimination. A judicial remedy cannot likely be fashioned for the thousands of people of color who were wrongfully excluded from juries and the thousands of defendants whose cases were tried by juries tainted by race discrimination over the years before and after *Batson-Wheeler*.²¹ At the very least, given the legislative findings underpinning AB 3070, a judicial remedy is owed and can be delivered to defendants whose cases are now on appeal or will have been tried before January 1 and subsequently appealed.

The Work Group should recommend that the California Supreme Court follow the Washington Supreme Court’s lead. In 2013, in *State v. Saintcalle*, the Washington Supreme Court acknowledged deficiencies in the *Batson* inquiry, particularly with respect to the “strict ‘purposeful discrimination’” requirement, and foreshadowed the adoption of “a new, more robust framework,” which became GR 37.²² Two years later, in *City of Seattle v. Erickson*, the court amended its *Batson* analysis to “ensure a robust equal protection guaranty,” and adopted a “bright line” rule that “the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury.”²³ In 2018, in *State v. Jefferson*, the court held that although GR 37 could not be applied retroactively to *Batson* challenges made prior to the effective date of the rule,²⁴ it would act

¹⁷ A. 3070, sec. 1(b).

¹⁸ *Id.*

¹⁹ See Cal. Civ. Proc. Code § 237.1(i) (providing that the statute “applies in all jury trials in which jury selection begins on or after January 1, 2022”); *id.* § 237.1(k) & (n) (exempting civil trials from the statute until January 1, 2026).

²⁰ See *People v. Triplett*, 48 Cal. App. 5th 655, 684 (2020) (Liu, J., dissenting from the denial of review) (observing that “it is not clear that [AB 3070] would affect cases already tried”).

²¹ See generally Elisabeth Semel et al., *supra* note 1; *id.* at 82-84 nn.1-2 (listing judicial opinions, reports, and scholarship critical of the *Batson* inquiry).

²² 309 P.3d 326, 338-39 (Wash. 2013) (quoting *Batson*, 476 U.S. at 98).

²³ 398 P.3d 1124, 1131 (Wash. 2017).

²⁴ 429 P.3d 467, 479 (Wash. 2018).

under the authorities identified in *Saintcalle* and *Erickson*: (1) state courts’ “wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult policy problems”;²⁵ (2) the court’s “inherent authority to adopt . . . procedures to further the administration of justice”;²⁶ and (3) the “greater protection afforded under [Washington’s] state jury trial right.”²⁷ The court announced:

[O]ur current *Batson* standard fails to adequately address the pervasive problem of race discrimination in jury selection. Based on the history of inadequate protections against race discrimination under the current standard and our own authority to strengthen those protections, we hold that step three of the *Batson* standard must change: at step three, trial courts must ask if an objective observer could view race as a factor in the use of the peremptory challenge.²⁸

The Work Group should recommend that, consistent with the authorities relied upon by the Washington Supreme Court as well as California Constitution article I, section 16, our state’s independent fair cross-section guarantee,²⁹ review of *Batson-Wheeler* issues in criminal cases tried before January 1, 2022, should be conducted under the provisions of AB 3070. Last year, Justice Liu, who has repeatedly criticized the California Supreme Court’s *Batson-Wheeler* jurisprudence³⁰ and called for reform of the framework,³¹ offered a window into the California

²⁵ *Id.* at 476 (quoting *Saintcalle*, 309 P.3d at 51) (internal citation omitted).

²⁶ *Id.* at 476.

²⁷ *Saintcalle*, 309 P.3d at 337 (citing *State v. Hicks*, 181 P.3d 831 (Wash. 2008)).

²⁸ *Jefferson*, 429 P.3d at 481.

²⁹ See *People v. Wheeler*, 22 Cal. 3d at 276-77 (holding that “the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution”).

³⁰ See, e.g., *People v. Rhoades*, 8 Cal. 5th 393, 457-58 (2019) (Liu, J., dissenting) (observing that [i]t has been “more than 30 years since this court has found *Batson* error involving the peremptory strike of a black juror,” and notwithstanding *Johnson v. California*’s rejection of our state’s “strong likelihood” standard, “[n]ot once [in the 42 cases tried before *Johnson* and decided post-*Johnson*] did this court find a prima facie case of discrimination” (citing *Johnson v. California*, 545 U.S. 162 (2005)); *People v. Hardy*, 5 Cal. 5th 56, 119 (2018) (asserting that the majority’s insistence that the comparator jurors “exactly match[]” the struck jurors “leave[s] *Batson* inoperable; potential jurors are not products of a set of cookie cutters”) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 247, n.6 (2005)); *People v. Scott*, 61 Cal. 4th 363, 409, 414 (2015) (Liu, J., concurring) (observing that “[t]oday’s opinion puts this court at odds with the majority of state high courts and federal circuit courts that have considered [when step one is moot],” and

Supreme Court’s power to initiate these changes:

As it stands, our case law rewards parties who excuse minority jurors based on ostensibly race-neutral justifications that mirror the racial fault lines in society. This approach is not dictated by high court precedent, and it is untenable if our justice system is to garner the trust of all groups in our communities and to provide equal justice under law.³²

Alternatively, the Work Group should recommend that the California Legislature pass and the governor sign into law a statute making AB 3070 retroactive to criminal cases tried before the bill’s implementation date. In considering the two options, I urge that this body be guided by the Washington Supreme Court’s acknowledgement in *Jefferson* that “[t]he current *Batson* test must be modified in order to prevent discrimination in jury selection.”³³

declaring that “[u]nder today’s decision, when a prosecutor has stated a facially neutral reason that nonetheless reveals discrimination . . . , the *Batson* violation will evade appellate review so long as the trial court did not err in its first-stage ruling”); *People v. Mai*, 57 Cal. 4th 986, 1066-67 (2013), *as modified on denial of reh’g* (Oct. 2, 2013) (Liu, J., concurring) (writing that “habits of unwarranted deference, speculative inference, and overreliance on gap-filling presumptions have been entrenched in our *Batson* jurisprudence for some time now”); *People v. Harris*, 57 Cal. 4th 804, 864 (2013) (Liu, J., concurring) (expressing concern that “this court has improperly elevated the standard for establishing a prima facie case beyond the showing that the high court has deemed sufficient to trigger a prosecutor’s obligation to state the actual reasons for the strike”); *see also*, Elisabeth Semel, et al., *supra* note 1, at 52-65 (discussing the California Supreme Court’s *Batson-Wheeler* opinions and Justice Liu’s recurring disapproval of the majority’s view).

³¹ *See e.g.*, *Rhoades*, 8 Cal. 5th 393 at 458 (Liu, J., dissenting) (declaring that “it is past time for a course correction”); *Harris*, 57 Cal. 4th at 880 (Liu, J., concurring) (“[T]he fact that our jurisprudence appears quite entrenched only heightens the need for a course correction by higher authority.”).

³² *Triplett*, 48 Cal. App. 5th at 692 (Liu, J., dissenting from the denial of review and asserting, “[D]isparate impact should be given appropriate weight in determining whether the prosecutor acted with forbidden intent”) (quoting, *Hernandez v. New York*, 500 U.S. 352, 362 (1991) (Stevens, J., dissenting)); *see also Rhoades*, 8 Cal. 5th at 469-70 (Liu, J., dissenting) (suggesting that one option is for “this court, the California Judicial Council, or the California Legislature to follow the lead of several state high courts that have essentially eliminated *Batson*’s first step,” and advocating that “[t]his approach would serve the important goals of promoting transparency, creating a record for appellate review, and ensuring public confidence in our justice. . . .”).

³³ *Jefferson*, 429 P.3d at 479.

California Supreme Court Jury Selection Work Group
Re: Request for Public Comment
June 3, 2021
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Thank you for the opportunity to provide these comments. I would be pleased to answer questions from members of the Work Group.

Sincerely,

A handwritten signature in blue ink that reads "Elisabeth Semel". The signature is written in a cursive style with a long horizontal flourish at the end.

Elisabeth Semel

ES:ol

From: [Roger C. Chan](#)
To: [Portnow, Kara](#)
Cc: [Feng, Samuel K](#); [Massullo Anne-Christine](#); [Ross Jeffrey S.](#)
Subject: Comment to Jury Selection Work Group from the San Francisco Superior Court
Date: Friday, June 4, 2021 4:17:57 PM

June 4, 2021

Supreme Court Jury Selection Working Group
via email to Kara Portnow, kara.portnow@jud.ca.gov

Re: Jury Selection Work Group: Questions for Public Comment

Dear Jury Selection Working Group:

These comments are submitted on behalf of the San Francisco Superior Court.

1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

Legislative changes and additional funding are needed to increase jury duty pay. The courts are limited in what we can do absent action by the legislative and executive branches. For example, Code of Civil Procedure § 215 might be amended to explicitly permit counties to provide supplemental jury duty pay or other innovations.

Employers, as consumers of the courts, should be encouraged to pay their employees during jury service. This will require different approaches for large and small businesses.

Consideration should also be given to further expanding the source lists for the jury pool, similar to SB 592 that added all state tax filers to the jury rolls.

It is also important for us to acknowledge that the decline in the San Francisco Black population is an impediment to their representation on juries in San Francisco. We recognize that this results from policy considerations outside the control of the Judiciary and this Work Group.

2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

Judicial Council resources are needed for public outreach and education in all counties.

Use of online tools for jury reporting and selection will also increase summons response rates. The system that San Francisco Superior Court implemented in July 2020 in response to the pandemic is described in response to Question 4 below. It has minimized the in-court time for jury selection and has been welcomed by those jurors who have participated in the process.

Obtaining email addresses—along with the U.S. mail address—for prospective jurors would facilitate the court's communication with prospective jurors. Authority for this would require clarification by the Judicial Council or new legislation. Consideration should be given to maintaining juror privacy and for secure storage of confidential electronic information, and

providing the requisite resources to do so.

Effective public outreach also requires a communications strategy by the courts. Consideration should be given to a statewide public education effort to explain the importance of jury service. This could include both encouraging all employers to pay for jury service and explaining to prospective jurors the role of the jury. If the courts implement some of the recommendations in this letter, the public service announcements could also advertise the courts' efforts to accommodate jurors by allowing remote check in to avoid unnecessary trips to the courthouse.

In addition, each court should have a communications representative who could address the needs and unique circumstances of that county. State funding for this role is essential to its success.

3) Are there any other ways in which the summons process could be improved?

Clear jury reporting requirements available on each court's website are essential. The San Francisco remote jury selection program has demonstrated that the antiquated use of mail, telephone communication and in-person appearance for preliminary procedures is an impediment to jury service. The jury summons should be revised to explain clearly that the prospective juror can use the internet to minimize the time and effort needed to respond for jury service.

The model jury summons form includes the admonition that "Failure to respond to this summons will subject you to a fine, a jail term, or both." The efficacy of this admonition should be studied to see if the threat of a fine or jail term increases or discourages response rates, especially in underrepresented communities who may already distrust the court system. If the penalties do not increase response rates, the penalty statutes might be changed and the admonition removed from the summons.

4) How can courts determine trends and track progress in order to make the jury pool more representative of the community?

To determine trends and track progress, the courts need reliable data. There are three barriers to individual superior courts collecting and analyzing data to determine trends and track progress. First, the courts need authorization from the Judicial Council or through legislation to gather demographic data on the race and ethnicity of prospective jurors. Second, if the court is allowed to collect this demographic data, the individual courts will need guidance on the best practices, or a standardized approach, for questioning prospective jurors. Third, data collection and analysis of the composition of juries obviously requires staff and funding resources that are not currently available.

Although each county's demographic data is available from the Department of Finance, this overall data is not as valuable as more specific data of the jury pool. If data analysis resources are made available, the court can target outreach based on the response rates from specific zip codes, which might include drilling down to specific barriers such as inadequate transportation.

5) *What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?*

The first barrier is a misunderstanding of the burdens and benefits of jury service. Rumors persist of jurors being summoned to waiting rooms for hours or even days in advance of being called. Whether or not this occurred previously, it has not been true in San Francisco for years. In San Francisco, our experience is that jurors who serve are overwhelmingly positive about their experience. The complaints focus on the process for obtaining a continuance or hardship and to *voir dire*.

Valuable lessons learned about using technology effectively to streamline jury selection during the COVID-19 emergency should be applied post-pandemic.

The San Francisco Superior Court developed procedures to allow prospective jurors to report for jury service remotely:

1. When a prospective juror is summoned for jury service at 4:30 p.m. the evening before the report date, the prospective juror can report using the court's website. The prospective juror provides an email address and telephone number which the court will maintain in confidence but will use to communicate with the prospective juror.
2. If the prospective juror requests a hardship, he/she/they do so on-line. The trial judge can begin reviewing and granting the hardship requests as soon as they are submitted. If the hardship is approved, the prospective juror receives an email from the court advising that the jury service requirement has been satisfied.
3. If the prospective juror does not request a hardship—in most cases—the prospective juror receives an email from the court which contains a link to a case-specific questionnaire, which the prospective juror completes and submits on-line. In addition to the general and case-specific questions, there are questions directed at the prospective juror's ability to serve during the pandemic and any related concerns.
4. The prospective juror is advised of the date to report for in-person *voir dire* and jury selection.
5. The prospective jurors are required to complete the questionnaire by 5:00 p.m. on the report date.
6. The jury office creates a randomized list of all prospective jurors who completed the questionnaire. The questionnaires are organized using the random order and sent to the trial judge as a PDF with the random number assigned to the prospective juror on her/his/their questionnaire.
7. The judge and lawyers review the questionnaires and stipulate to eliminate those prospective jurors as to whom a cause challenge would lie. Court and counsel also identify and agree to excuse those prospective jurors who have COVID-related concerns.
8. Prospective jurors who are excused are notified by email that they have completed their jury service.
9. Those prospective jurors who will report for *voir dire* receive an email informing them of the day, time, and location to report for jury selection.

This process significantly reduced the amount of time needed for jury selection and has been applauded by appreciative jurors. Prospective jurors and court users are increasingly comfortable with and expect more online services. The San Francisco system was developed to address the pandemic. The current system allows us to summon jurors for only one case each day, which has created delays and burdened the staff. We are working with a vendor to develop a system which can accommodate multiple trials daily. Developing software for a statewide electronic jury management system is essential. Efficiencies may be achieved through a statewide advanced solution. Without a statewide approach, each court must work with its own vendors and these vendors in turn will “reinvent the wheel” to build new solutions such as the remote questionnaire process.

Technology offers promising solutions, but the courts require more resources to implement electronic solutions.

Other possible solutions all require additional funding, including making childcare available at the courthouse, using text messaging reminders for jury service, and ensuring that the source lists for jury pools include current addresses of prospective jurors.

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

The current statutory fee for jurors of \$15 per day (\$2.14/hour if in trial session from 9:00 a.m. to 4:00 p.m.) is simply inadequate. Availability and costs of transportation and parking are also common financial barriers.

We recommend a statewide survey of the public to hear their voices about the barriers to jury service, what should be changed, and what is adequate jury duty pay to allow prospective jurors to not suffer a hardship. This survey might be conducted through local community organizations to maximize responses. The results of the survey should guide the Governor and Legislature in budget decisions to support jury service participation.

7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?

We hope the Work Group will gather and share statewide data from the trial courts to understand the effectiveness of AB 3070.

While not addressed in AB 3070, we also recommend that the Work Group study other aspects of jury selection such as whether there is discriminatory conduct in the hardship process.

Mandatory CJER-sponsored statewide training on AB 3070 would also be of assistance.

We appreciate the opportunity to provide our input and look forward to the important work of this group. Please contact Judge Roger Chan at [REDACTED] with any questions.

Respectfully,

Hon. Samuel Feng
Presiding Judge

Hon. Roger Chan
Judge of the Superior Court
Member, SF Superior Court Jury Diversification Subcommittee



701 Lenzen Ave. San José, CA. 95126 • info@siliconvalleydebug.org • 408.971.4965

June 3, 2021

SUPREME COURT JURY SELECTION WORK GROUP
350 McAllister Street
San Francisco, California 94102-3688

Re: Invitation to Comment

Dear Hon. Kathleen O’Leary, Chair:

On behalf of Silicon Valley De-Bug I am responding to the invitation for public comment. We applaud this Work Group’s mission of eliminating discrimination in jury selection and achieving a fairer cross-section of the community. The idea that litigants can have their cases heard by peers – by the community itself – is a primary source of the justice system’s legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

The Jury Selection Work Group is well placed to help usher in a new era of fairness in California juries. Three new laws that will be implemented over the next few years have the potential to bring California much closer to the “fair cross section of the community” standard adopted by the United States Congress in 1968 with the Jury Selection and Service Act:

- Senate Bill 310, which allowed people with felony convictions to serve on juries
- Senate Bill 592, which expanded the lists that jury commissioners draw from to create jury pools to include a list of state tax filers, and
- Assembly Bill 3070, which created a procedure to eliminate the discriminatory use of peremptory challenges

The success of these reforms will be dependent on how they are implemented in individual courthouses in all fifty-eight California counties. A primary task that is essential to determining the impact of these efforts is to obtain accurate demographic information for juries across the state. Only with this data can a group like this measure whether its efforts are truly moving California juries toward a fair cross-section of the community. Eliminating formal barriers to jury service is only a part of the effort towards more fair juries. We would also urge this Group to look at practical barriers to jury service. Financial burdens and travel burdens fall particularly hard on communities of color. Policies that require travelling great distances, often via public transportation, or that force people to choose between their jobs or caring for their children and serving on a jury can be as detrimental as statutory exclusions. We cannot be satisfied with formal fairness but practical unfairness. Jury service must not be only for those who are affluent enough to participate.

Ensuring fairer juries will also allow a more honest pretrial experience – and even get to the trial stage. For many people we know through our work, their decision to take a plea deal or got to trial is not based on their innocence or guilt, but rather whether they feel

they will have a fair jury if they go to trial. Consequently, jury integrity is the key determinant for the entirety of the promise of due process.

With regard to your individual questions, we would make the following recommendations:

1. *What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?*

As stated above, jury commissioners should collect demographic data for all people responding to a jury summons by having them fill out a single page questionnaire. They should be asked to self-describe their race and to state their zip code. This demographic data should be compiled quarterly, and a report should be submitted to the presiding judge concerning whether the demographics of those showing up for jury service are consistent with the census demographics for the area served by the court.

2. *How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?*

Invite community organizations to meet with court officers to regularly promote juror participation. Hold public forums explaining the benefits of participatory democracy through jury service. Have jury commissioners use nontraditional lists, in addition to ROV, DMV and tax filers, to summon potential jurors to court.

3. *Are there any other ways in which the summons process could be improved?*

The court should track returned summonses that are marked “undeliverable” and update current addresses as necessary.

4. *How can courts determine trends and track progress in order to make the jury pool more representative of the community?*

This again highlights the importance of maintaining accurate demographic information for the jury pool. Once that data is analyzed, it may be necessary to increase the number of summonses going to communities with a higher concentration of underrepresented populations.

5. *What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?*

The practical barriers discussed above are major factors that decrease juror participation. Both jurors and their employers should be reimbursed for the cost of jury service, at a minimum of \$15 dollars an hour.

6. *If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?*

The fear of losing a job, losing income, the inability to obtain child or elder care, and transportation costs are the most common financial concerns cited by prospective jurors. Jurors who are unemployed and/or who are not receiving financial benefits while attending jury duty should be reimbursed to obtain a “living wage” for serving as jurors. Sanctions should be imposed on any employer who takes action against an employee for serving on a jury.

7. *Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group’s charge. Are there Batson/Wheeler related issues, whether or not addressed in AB 3070, that should be studied by the work group?*

Yes, we urge this Work Group to oversee the effective implementation of AB 3070, along with SB 310 and SB 592.

The work of this Group is essential to preserving and enhancing the legitimacy of the jury system. We at Silicon Valley De-Bug appreciate the opportunity to provide feedback on this important undertaking.

Sincerely,

Raj Jayadev
Silicon Valley De-Bug, Executive Director

The Law Office of Richard L. Spix
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Lake Forest, CA 9630
Tel 949.328.9441 Fax 949.328.9490

May 20, 2021

Supreme Court Jury Selection Working Group
350 McAllister Street, San Francisco, California 94102-3688
kara.portnow@jud.ca.gov

Request for Comment

Group Members:

I am an attorney in Orange County and have had hundreds of jury trials in my career. I have observed that:

a. Even an objective and evenly administered hardship exemption system has a disproportionate impact on persons of color being excluded from juries. Minorities are over-represented in the lower income population, have larger family sizes and larger households. This means that outreach in those communities will encounter “shrinkage” and inhibited presence in the jury pool due to the economic realities.

b. On the other hand, industries/sectors with an employment benefit that pays the juror their regular salary during service are over-represented in the jury pool. I refer to the West Justice Center’s petite venires as “defense contractor” panels (Boeing, Northrop, McDonald Douglas are nearby) because I would routinely have multiple employees of the defense industry in the jury box. I would regularly have to voir dire them to make sure they would not be a voting block or engage in any rivalry during deliberations. This over-representation by the defense industry is both relatively immune to a hardship exemption **and** under-representing persons of color in the private sector employee pool.

PROPOSAL

Mitigation of these disparate results requires careful examination of the current system. I would propose a modification of the juror pay scale that would pay at least \$75.00 per diem to those without the employment benefit of full pay. This would save the county some money on the defense contractor pay and shift that money to form a magnet for low income persons to participate. It would reduce the number of hardship claims from the low income community.

This proposal would substantially increase the cost to jury fees to litigants. This would be an additional burden on the sacred right to a jury trial that must be addressed at the same time. I have been involved in processing thousands of fee waiver applications and have observed the following:

a. Judicial hostility to fee waivers tends to increase as the amount of fees waived increases. I have not had a box 3 waiver granted in my experience (earning more than 125% but can't afford fees). Without adjustment, the increased access to jury panels by minorities would be offset by the working poor suffering restricted access by not having the money to pay the per diems.

b. Even the present per diems can routinely be \$1500.00 for a modest jury trial. This amount is often out of the reach of the working poor who are already paying 50% of their income for housing.

PROPOSAL

Maximum incomes for fee waivers would be relaxed to allow for the working poor to reasonably exercise their rights to a jury trial.

Sincerely,

Richard L. Spix
Attorney at Law



ALISON M. TUCHER
ASSOCIATE JUSTICE

STATE OF CALIFORNIA
Court of Appeal
FIRST APPELLATE DISTRICT
DIVISION FOUR
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4712



May 17, 2021

Dear Jury Selection Work Group,

I applaud your efforts to tackle the difficult questions of how we can eliminate discrimination in jury selection and empanel juries that better represent a cross-section of the community. I write to address the first and fifth questions enumerated in your request for comment: What can be done to better ensure that juries represent a cross-section of their communities? What are the biggest barriers to jury service, and how can we resolve them?

I think the biggest barrier to jury service is the common view that responding to a summons is a big, unaffordable waste of time: You'll sit around, maybe answer some questions, but never actually hear and decide a case, and in the meantime lose an entire day of your life for nothing. In these circumstances and given the pressures of daily life, many figure it's easier to ignore the summons. Selecting a jury for a trial in Alameda County a few years ago, I had an irate citizen complain he was responding to the *eighth* jury summons he'd received in eight years. This was not unusual because our superior court issued almost as many summonses annually as it had citizens on the jury roll. Only the most conscientious responded each time they were called.

I recommend two reforms that would require legislation but would substantially improve jury service. First, I would like to see California curtail, perhaps even eliminate, peremptory challenges. Second, I would like to see the state pay jurors minimum wage for every hour we require them to be in the courthouse.

On eliminating peremptories, Justice Thurgood Marshall famously observed that the only way to "end the racial discrimination that peremptories inject into the jury-selection process" is "to ban them entirely from the criminal justice system." (*Batson v. Kentucky* (1986) 476 U.S. 79, 102–103, 107 [Marshall, J. concurring].) Senate Judiciary Chairman Tom Umberg (D-Santa Ana), a former federal prosecutor, has a bill pending to do just that. I encourage the Work Group to study and consider supporting

Senator Umberg's bill, SB 212. Eliminating peremptory challenges in criminal trials would prevent attorneys from striking qualified jurors from the venire for reasons of implicit, structural, or disguised bias. The result would be an empaneled jury that more closely resembles the racial make-up of the venire from which it is drawn. Eliminating peremptories would also be more respectful of jurors' time. It would end the practice of attorneys sending home citizens who had devoted a day to performing their civic duty and been found qualified to serve, only to be released without explanation. Courts could halve the numbers of jurors summoned for criminal trials, since they would need to qualify only 12 jurors plus alternates for each trial, rather than this number *plus up to 20 more* to be struck on peremptory challenges. If Umberg's bill seems too radical a departure from current practice, a compromise that cut the number of peremptories to two or three per side would be a step in the right direction. Umberg's bill also could be broadened to address jury selection in civil, as well as criminal, trials.

As for paying jurors better, I recognize that jury service is both a privilege and a responsibility of citizenship, but I see no reason to compel citizens to serve without compensating them for their time. Soldiers drafted into the U.S. Army got paid. Landowners forced to cede a portion of their property for a public purpose get fair market value in return. Those who respond to a jury summons, whether required to serve for a day or for a month, deserve no less. Our current practice of paying *nothing* for the first day of service and only \$15 for each subsequent day protects the public fisc at the expense of equity for those who are called. In a world where many do not have a benevolent employer paying them to spend time in the courthouse, nor a bank account that cushions the blow of foregone earnings, the financial hardship of jury service breeds resentment toward the judicial system and prompts large segments of the jury pool to opt out. In some of our communities, more than half of jury summonses are simply ignored. And many who make their living in the gig economy have a compelling excuse of financial hardship if they do take the trouble to respond to the summons. Having large segments of our population either ignore the jury summons or be excused for financial hardship has troubling implications for the right of criminal defendants to be judged by a jury of their peers.

There are models for paying jurors better, albeit none as generous as the standard I urge. In federal court, jurors are paid \$50 a day, plus transportation and parking expenses, and \$60 a day after ten days of trial. (<https://www.uscourts.gov/services-forms/jury-service/juror-pay>) Jurors in state courts in Colorado, Arkansas, South Dakota, Georgia, Massachusetts, and Connecticut receive similar amounts. (See

pay-by-state.) Under my proposal, jurors would make about twice as much as in these jurisdictions (\$15 x 7 hours = \$105), though still less than many potential members of the venire earn by skipping out on their jury obligations. Paying jurors would make it possible for a larger cross-section of the public to serve, and would send a message louder than any judge's welcoming speech that the judicial system values jurors' time.

You will note that there is potential synergy between these two proposals, and with other ideas for improving jury service. For example, if we eliminate or curtail the use of peremptory challenges, then fewer jurors will be summoned and it will be more affordable to pay minimum wage to those who are called. If paying for jury service prompts a broader cross-section of the community to respond to the summons, then eliminating peremptory challenges will increase the chances that these new recruits, when they make it into the jury box, will end up staying to serve on the jury. And if the Jury Selection Work Group pursues proposals to expand the pool of potential jurors by better outreach to underrepresented communities, these efforts, too, will dovetail nicely with reforms that make responding to a jury summons more affordable and rewarding.

Your work is so important. Good luck with it.

Sincerely,

/s/

Alison Tucher

Request for Public Comment

Consistent with its charge, the Jury Selection Work Group has been studying and continues to study different areas and issues that may impact representativeness in juries. As part of this endeavor, the work group now seeks comment from the public, the courts, and justice partner stakeholders on the following topics.

1) What can be done to better ensure that juries represent a cross-section of their communities? In particular, what can courts do?

Outreach to those communities the importance of having a jury of their peers and how they can make a difference in the judicial system. Work with Urban League, Black Lives Matter, other minority justice related organizations. Push that there is the 1 day, not selected done with Jury Service for next 18 months. Raise the Jury Service Payment, mileage and include Public Transit Payment with the summons to get to the Court, as of now Public Transit Payment is given only after jury service 1 day and continual service in my court. If Public Transportation is used by a handicap person, who has the abilities to serve, needs transportation other than a regular bus or light rail, such as “Para Transit” type Public Transit pay the costs for the juror.

2) How can courts improve engagement with underrepresented communities to increase summons response rates in those communities?

Outreach to those communities the importance of having a jury of their peers and how they can make a difference in the judicial system. Work with Urban League, Black Lives Matter, religious organizations and other minority justice related organizations. Push that there is the 1 day, not selected done with Jury Service for next 18 months. Raise the Jury Service Payment, mileage and include, Public Transit Payment with the summons to get to the Court, as of now Public Transit Payment is given only after jury service 1 day and continual service in my Court. If Public Transportation is used by a handicap person, who has the abilities to serve, needs transportation other than a regular bus or light rail, such as “Para Transit” type Public Transit pay the costs for the juror.

3) Are there any other ways in which the summons process could be improved?

Include in the summons, as to how important it is to have a jury of their peers, from their communities, to facilitate the judicial system. Push that there is the 1 day, not selected done with Jury Service for next 18 months. Included Public Transit Payment with the summons to get to the Court, as of now Public Transit Payment is given only after jury service 1 day and continual service in my Court. If Public Transportation is used by a handicap person, who has the abilities to serve, needs transportation other than a regular bus or light rail, such as “Para Transit” type Public Transit pay the costs for the juror.

4) How can courts determine trends and track progress in order to make the jury pool more representative of the community?

Outreach with minority justice advocate organizations, School Districts, Urban League, Black Live Matter, religious organizations.

5) What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?

Biggest barrier's I believe are: Employer does not pay full wages ,Child Care costs; Transportation; not understanding the process; not wanting to judge others (religious reasons); scared of government involvement in their lives.

Employer not paying full wage: Pass legislation that mandates employer's to pay full wages to employees on jury duty, and employees no longer receive juror payment, just like government employees.

Child Care: Have child care for jurors, close to court or/at the court, like court's do for other person's attending court hearings.

Transportation: Include Public Transportation payment with the summons to get to jury service, make arrangements and Para Transit (handicap persons) Public Transit Agency and make payment to and from court.

Not understanding the process: Push for high schools to include a robust section on jury service, who, what, where and why. To hopefully, encourage the future adult jurors to participate in jury service.

Not wanting to judge others (religious reasons): Outreach to local religious leaders, find out what their take is on jury service and see what can be worked out to help these people participate in jury service.

Scared of government involvement in their lives: Outreach to local leadership organizations to help communities understand their role in jury service, that it is not about getting the government involved in their personal lives.

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be the most helpful?

Employer not paying full wage: Pass legislation that mandates employer's to pay full wages to employees on jury duty, and employees no longer receive juror payment, just like government employees.

Child Care: Have child care for jurors, close to court or/at the court, like court's do for other person's attending court hearings.

Transportation: Include Public Transportation payment with the summons to get to jury service, make arrangements and Para Transit (handicap persons) Public Transit Agency and make payment to and from court.

7) Last year, Assembly Bill 3070 (AB 3070) was signed into law and its provisions appear to directly address many of the key questions outlined in the Jury Selection Work Group's charge. Are there *Batson/Wheeler* related issues, whether or not addressed in AB 3070 that should be studied by the work group?

Not that I can think of at this time.

From: [Jim Weakley](#)
To: [Portnow, Kara](#)
Subject: AB-3070 Juries: peremptory challenges
Date: Thursday, May 27, 2021 5:51:52 PM

I am expressing my concern about the changes to the use of peremptory challenges in civil trials. Our law firm represents governmental entities and employees, including law enforcement officers, in civil litigation. To preclude as valid reasons for using a peremptory challenge a potential juror's expression of distrust of or having a negative experience with law enforcement, expressing a belief that law enforcement engages in racial profiling, or having a close relationship with people who have been stopped, arrested, or convicted of a crime substantially risks the right of the defendant law enforcement officer of a fair and impartial jury. In addition, precluding the use of peremptory challenges based upon dress, attire, or personal appearance would prevent challenging potential jurors who come to court wearing anti-police wording on clothing, or displaying tattoos of violent gangs, again depriving the defendant law enforcement officer of a fair and impartial jury.

While we are all opposed to the unfair exclusion of potential jurors based upon race, ethnicity, etc., there needs to be an equal concern about the parties' right to a fair and impartial jury. Creating a presumption of invalidity places too great of a burden on the party using the peremptory challenge, potentially eroding public confidence in our jury system.

Thank you

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From: [Weber, Joan](#)
To: [Portnow, Kara](#)
Subject: Supreme Court Jury Selection Work Group Public Comment
Date: Thursday, June 3, 2021 2:40:01 PM

Dear Ms. Portnow:

I have a few comments regarding the Jury Selection Work Group's task. By way of background, I have been a trial judge in California for 31 years handling mostly criminal cases. I have taught for CJER on jury selection issues, particularly as they relate to death penalty litigation. I have long believed that California trial judges were not treating Batson challenges competently. Judges were not engaging in the cross-comparative analysis mandated by case law. I have also believed that one of the biggest concerns in California jury selection is the extraordinary number of peremptory challenges provided under California law in criminal cases. With those preliminary remarks, these are my comments:

2) How can courts improve engagement with underrepresented communities? Counties should set up forums in underrepresented communities which include judges, prosecutors and defense counsel to discuss the critical importance of minority representation on the jury.

6) If economic hardships are a barrier, which financial reasons impact prospective jurors the most and what solutions would be helpful? The biggest financial hardships for jurors are employers not paying for jury duty and jurors in large urban courts having to pay exorbitant fees to park. Laws should be passed to mandate that employers allow employees to be paid for at least 5 days of jury duty. If the employer cannot pay for employees to do jury duty, a fund should be set up to reimburse employers who apply for compensation.

Also jurors should not have to pay for parking to do jury duty. Counties should receive funding to reimburse jurors for parking. In my courthouse, San Diego Central court, jurors frequently have to pay \$25 to \$30 per day to do jury duty. Blue collar workers (which are disproportionately minorities) cannot pay that amount to do jury duty so they simply don't show up.

7) Are there Batson/Wheeler related issues not addressed by AB 3070 that should be studied by the work group? Most definitely. The elephant in the room on Batson issues in California is that there are way too many peremptory challenges in all criminal case types. Thurgood Marshall wrote in Batson that the courts can never remedy the exclusion of racial minorities without doing away with peremptory challenges because there is no realistic way to police how lawyers use peremptory challenges. Shirley Weber's bill, Assembly bill 3070, goes too far in the opposite direction by allowing jurors with legitimate, strongly held biases against law enforcement from being excused by way of peremptory challenges. I realize the California bar would never agree to the elimination of all peremptory challenges in criminal cases, but this working group should look into the issue of dramatically reducing them across the board. When a prosecutor has 20 peremptory challenges in a case, inevitably minority jurors are excluded at a larger rate than nonminority jurors. If the prosecutor had fewer peremptory challenges I am convinced that minorities would be better represented on the jury. Moreover when jurors come in to do jury duty and see 20 or 30 jurors excused from the panel by way of peremptory challenges that undermines juror confidence in the entire process. The typical juror has no understanding of why that many jurors would not be acceptable to hear the

case.

Senator Tom Umberg proposed a bill this year, Senate Bill 212, to eliminate peremptory challenges in all criminal cases. The bill did not get out of committee, most likely because it was mandating the elimination of all peremptory challenges. I urge the working group to consider this idea of reducing peremptory challenges in earnest. If accomplished I am convinced that California would see a larger representation of minority jurors in our courtrooms going forward.

Thank you for allowing me to comment on this important topic. The working group should feel free to contact me with any additional questions.

My chambers number is [REDACTED]

Judge Joan P. Weber
San Diego Superior Court

From: [Weber, Joan](#)
To: [Portnow, Kara](#)
Subject: Supreme Court Jury Selection Work Group
Date: Thursday, June 3, 2021 2:56:17 PM
Attachments: [DailyJournal.pdf](#)

Ms. Portnow-

I just sent you an email regarding the Working Group and I reference in the email Senator Umberg's bill, SB 212. I should have attached the excellent article he recently wrote on the topic of peremptory challenges which echoes many of the concerns I raise in the email. Could you please include this article with my comments I just sent to you?

Thank you.

Judge Joan P. Weber
San Diego Superior Court

ETHICS

Law Practice,
Ethics/Professional Responsibility,
Civil Rights
Mar. 22, 2021

[Bookmark](#)

To end racial discrimination in jury selection, abolish peremptory challenges

Study after study after study shows that peremptory challenges are used to discriminate against people of color, Batson notwithstanding.

THOMAS UMBERG

Senator, California State Senate

MICHELE ELLSON

Student, UC Hastings College of the Law

In issuing its landmark 1986 decision in *Batson v. Kentucky*, the U.S. Supreme Court sought to eliminate racial bias in jury selection by providing parties the right to object to opposing parties' peremptory challenges. But, as Justice Thurgood Marshall famously observed in his concurring opinion in the case, "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."

A great deal of evidence has accumulated in the intervening years to prove the late Justice Marshall right: Study after study after study shows that peremptory challenges are used to discriminate against people of color, *Batson* notwithstanding. As many have acknowledged, the *Batson* court's efforts (and those of the California Supreme Court in its own prequel to *Batson*, the Wheeler decision) to eliminate racial bias in jury selection failed. With Americans' faith in our institutions fading fast, attempting to solve this problem with half-measures will not do. That's why I introduced Senate Bill 212, which

eliminates peremptory challenges for criminal trials.

Some states, California among them, have sought to reduce bias in jury selection by requiring the party making a peremptory challenge to prove it wasn't based on bias rather than the party that objects, and by listing reasons for such challenges that are presumptively invalid. While these efforts are laudable, it's unclear whether they will be effective against a jury selection tool whose sole reason for existence is to allow parties to remove prospective jurors based on their biases. Washington Supreme Court Chief Justice Steven C. González, in his call to abolish peremptory challenges in a 2013 concurrence in *State v. Saintcalle* -- the case that led Washington to change its own peremptory rules -- noted that while many peremptory challenges are based on generalizations or racial stereotypes, "there is no accurate and reliable way to identify which peremptory challenges are based on race and which are not."

Chief Justice González's exhaustively researched concurrence included a quote from a prosecutor who said that "any attorney worth his salt can make up something to get over a *Batson* challenge. And, literally, [prosecutors] do make it up." As Justice Stephen Breyer noted in his concurring opinion in *Miller-El v. Dretke*, a 2005 Supreme Court case that he said reinforced Justice Marshall's concerns about peremptory challenges, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." The Berkeley Law Death Penalty Clinic underscored this point in its seminal 2020 report, "Whitewashing the Jury Box," in which it noted that "[p]rosecutors are instructed to strike jurors based on their 'gut reactions' to jurors' facial expressions, body language, clothing, and hairstyle, and to rely on lengthy stock lists of court-approved 'race neutral' reasons to explain their challenges."

Eliminating peremptory challenges is admittedly an unpopular proposition with some who think that their intuition and biases benefit their clients or cause, even though evidence shows they are ineffective, provide little if any benefit, and in fact harm our justice system. One study demonstrated the ineffectiveness of peremptory challenges: Defense attorneys who participated in a mock trial would have done just as well had they exercised their peremptory challenges based on the flip of a coin; prosecutors did only marginally better. *State v. Saintcalle*, 178 Wash.2d 34, 104 (2013) (González, J., concurring). Furthermore, attorneys still have access to dismissals for cause if the defense or prosecution believes a person cannot be impartial in a case, and courts should be encouraged to grant challenges for cause liberally. Each side has unlimited for-cause challenges.

As Chief Justice González noted in his *Saintcalle* concurrence, our jury selection system is intended to secure an impartial jury -- which the Sixth Amendment requires. Courts have interpreted this to mean that a jury should contain a fair cross-section of the community in which it sits. In practice, however, litigants attempt to use peremptory challenges to shape juries to their advantage. When we excuse potential jurors without a valid reason, we undermine their faith in our legal system. "Every time a prospective juror is peremptorily challenged we are telling that prospective juror that the foundation of this system is not evidence, but rather rumor, innuendo, and prejudice," Colorado District Court Judge Morris B. Hoffman wrote in a law review article arguing for the abolition of peremptory challenges. "I

cannot count the number of times I have seen prospective jurors flash me a look of betrayal when, after they have passed through the gauntlet of challenges for cause, they have been excused peremptorily because of their educational level or their occupation or the kind of car they drive. Is it any wonder that these people leave our courtrooms thinking that the whole trial process is just as trivial and flawed as jury selection?"

England invented peremptory challenges to provide defendants with a counterweight to the extraordinary power of the Crown. In contrast, here in America, peremptory challenges have largely been used as a tool to discriminate, particularly against people of color. England abolished peremptory challenges in 1989 despite hundreds of years of history because they could not guarantee an impartial jury despite the time and treasure they consumed and because attorneys there determined that such challenges were improper. California should similarly make a break from its own disgraceful history.
