

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.

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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 stroke at the end.

Elisabeth Semel

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