



Jury Selection Work Group: Final Report to the Supreme Court of California

JULY 2022

JURY SELECTION WORK GROUP

Hon. Kathleen E. O’Leary, Chair

Presiding Justice of the Court of Appeal,
Fourth Appellate District, Division Three

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California

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Associate Justice of the Court of Appeal,
Third Appellate District

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Third Appellate District

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Fifth Appellate District

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County of Riverside

Hon. Lauren P. Thomasson

Judge of the Superior Court of California,
County of San Joaquin

Hon. Robert Trentacosta

Judge of the Superior Court of California,
County of San Diego

ADVISORY MEMBERS

Mr. Michael Canzoneri

Supervising Deputy Attorney General
Office of the California Attorney General

Mr. Cliff Gardner

Attorney at Law

Ms. Mary K. McComb

State Public Defender

Ms. Nancy E. O’Malley

Alameda County District Attorney

Mr. José H. Varela (Ret.)

Marin County Public Defender

STAFF

Ms. Kara Portnow (lead)

Supervising Attorney
Criminal Justice Services, Judicial Council

Mr. Alex Bender

Attorney
Criminal Justice Services, Judicial Council

Ms. Sal Lempert

Senior Research Analyst
Criminal Justice Services, Judicial Council

Mr. Michael Giden (liaison)

Managing Attorney
Legal Services, Judicial Council

Mr. Kyle Graham (liaison)

Assistant Chief Supervising Attorney
Supreme Court of California

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I. INTRODUCTION AND EXECUTIVE SUMMARY

Formation of the Work Group and Its Charge

In January 2020, the California Supreme Court announced the formation of the Jury Selection Work Group. Acknowledging the jurisprudence established by *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), the work group's charge, quoting *Batson*, emphasized that "[r]acial discrimination in the selection of jurors harms not only the accused whose life or liberty they are summoned to try," but also "the excluded juror" who is denied an important opportunity to participate in civic life, as well as "the entire community" upon whose confidence the fairness of our justice system depends.

Noting that the legal framework stated in *Batson/Wheeler*¹ has been applied by courts for more than 30 years, as well as recent steps taken by other states to examine and address perceived shortcomings in the practical application of the *Batson/Wheeler* framework, the court created this work group to study how *Batson/Wheeler* operates in practice in California, and whether additional measures are warranted to address impermissible discrimination against cognizable groups during jury selection.

The court's charge included the following key questions:

- In light of the goal of eliminating improper discrimination in jury selection, does a purposeful discrimination standard impose an appropriate burden on litigants who attempt to show that a peremptory challenge was motivated by improper considerations or on advocates called upon to explain the basis for their peremptory challenges? What are the pros and cons of possible alternatives?
- To what extent does unconscious bias affect the jury selection process? Can this unconscious bias be effectively addressed in jury selection, and if so, how?
- Does allowing peremptory challenges based on a prospective juror's negative experiences or views of law enforcement or the justice system result in disproportionate exclusion of jurors of certain backgrounds? Does accepting other facially neutral grounds for peremptory challenges have such an effect? If so, how if at all should these practices be addressed?

¹ These two cases and their progeny prohibit the discriminatory exercise of a peremptory challenge against a prospective juror based on the juror's membership in a cognizable group. Under the *Batson/Wheeler* framework, to adjudicate a party's objection to the exercise of a peremptory challenge, the court conducts a three-step inquiry: first, whether the objecting party has shown facts establishing a prima facie case of purposeful discrimination or group bias; second, whether the party who exercised the peremptory challenge can provide a facially group-neutral justification for the challenge; and third, based on the totality of the facts and circumstances, whether the proponent of the challenge engaged in purposeful discrimination. The third step in this analysis focuses on the subjective credibility of the justification provided, and not whether the justification is objectively reasonable. (See *People v. Hardy* (2018) 5 Cal.5th 56, 76.)

- Do current standards of appellate review of peremptory challenges in California adequately serve the goals of *Batson/Wheeler* jurisprudence?
- Are there other impediments to eliminating impermissible discrimination in jury selection and better ensuring that juries represent a cross-section of their communities? If so, how can these impediments be addressed?
- What kinds of training or guidance would assist advocates and judges in promoting fairness in this area and in making a record that facilitates sound appellate review?
- Should the standard jury instructions that address bias be modified or supplemented to provide more guidance to jurors in addressing bias during the deliberation process?

Because of the unprecedented health emergency caused by the COVID-19 pandemic, the work group's membership was not established until July 2020. During the intervening months, Assembly Bill 3070 (Stats. 2020, ch. 318) was introduced in the California Assembly by then-Assembly Member Shirley N. Weber, PhD. Signed into law by Governor Gavin Newsom in September 2020, this legislation created a new procedural framework for the exercise of peremptory challenges in jury selection. Codified in Code of Civil Procedure section 231.7, and operative for criminal cases on January 1, 2022, and for civil cases on January 1, 2026, the legislation modified the existing *Batson/Wheeler* framework in several important respects, including eliminating the *Batson* prima facie showing requirement; eliminating the need to establish "purposeful discrimination"; setting forth an "objectively reasonable person" standard that takes into account the reality of unconscious bias; designating certain justifications for excluding jurors as historically associated with improper discrimination and therefore presumptively invalid; and requiring a de novo standard of review for appellate courts.

Thus, by the time the work group began to meet regularly, groundbreaking legislation to modify the existing *Batson/Wheeler* framework had already taken shape and addressed some of the key questions outlined in the court's charge to the work group. The group, therefore, focused its efforts on studying issues and factors that affect the makeup of juries beyond the new procedural framework embodied in this legislation.

Before and during the work group's study, other states also formed task forces to investigate how to best eliminate discrimination and ensure a fair cross section in juries in their jurisdictions.²

² For example, in 2018, the State of Washington's Jury Selection Workgroup issued a report recommending the adoption of General Rule 37 to wholly revamp the *Batson* framework for deciding whether peremptory challenges are lawfully exercised, which the Washington Supreme Court subsequently adopted. Also in 2018, the First Judicial District of Pennsylvania's Juror Participation Initiative issued a report detailing strategies to elicit greater citizen participation in the juror selection process. In 2020, the Connecticut Jury Selection Task Force issued a report recommending that the state collect and retain demographic data on prospective jurors and further recommending the adoption of a *Batson* reform statute modeled after the Washington rule and AB 3070. In 2021, the Arizona Task Force on Jury Data Collection, Policies, and Procedures issued a report outlining several recommendations to ensure fairly represented juries from which the Arizona Supreme Court based its rule eliminating peremptory challenges in

The work group acknowledges the important ideas and recommendations that these task forces provided to help enrich the group's consideration and discussion of the similar issues before it. In addition, the group consulted with practitioners and experts in the field, who provided valuable information and ideas.

Separately, in March 2022, the Chief Justice's Ad Hoc Workgroup on Post-Pandemic Initiatives issued an interim report entitled *Improving the Juror Experience*. This report made four recommendations: to secure designated and ongoing state funding for juror pay and to mitigate transportation issues; to allow jurors to complete their juror questionnaires and hardship forms online, before being required to physically appear in court for voir dire; to stagger jury service appearance times with varying panel sizes; and to develop or adopt virtual jury selection platforms that incorporate modules for conducting voir dire. The Jury Selection Work Group applauds these recommendations that seek to reduce potential barriers to juror participation and to leverage technology that improves overall efficiencies in the jury selection process.

Meetings and Task Groups

The work group met 12 times over the course of 22 months. Early on, the group divided into two task groups. One group focused on issues that arise outside the courtroom, including issues related to the summons process and the root causes of poor summons response rates. The other group focused on issues that arise inside the courtroom, after prospective jurors have arrived in response to a summons—such as those relating to voir dire, peremptory challenges, and juror education.

An overarching challenge that both task groups confronted was the absence of demographic data. Because California courts do not collect demographic data on jurors, there is no means to determine when and how jurors from certain groups enter or leave the jury pool. Although the absence of data prevented the work group from forming definitive conclusions, the group was able to rely on anecdotal information to draw reasonable inferences about existing practices and procedures and to identify areas that could benefit from improvement.

Public Comments

In the spring of 2021, the work group solicited public feedback and posed the following questions:

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?

that state. In 2022, the New Jersey Supreme Court's Committee of the Judicial Conference on Jury Selection released several recommendations to expand jury pools and enhance fairness in the selection process, including a proposal to add demographic questions to juror qualification questionnaires. For a survey of *Batson* reform proposals across the country, see www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/.

3. Are there any other ways in which the summons process could be improved?
4. How can courts determine trends and track progress in order to make the jury pool more representative of the community?
5. What do you see as the biggest barriers to jury service? What can be done to resolve each of the barriers you identify?
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, either addressed or not addressed in AB 3070, that should be studied by the work group?

In response to these questions, the work group received 32 comments from a wide range of stakeholders:³ superior court judges, an appellate court justice, a public defender's office, a court clerk, legal advocacy organizations, law professors and social scientists, practicing attorneys, a social worker, and a litigation consulting company.

An appendix to this report contains a summary of these comments. In addition, the report itself references several themes that were raised in the comments and that intersected with the work group's own consideration of the issues before it.

Executive Summary of Findings and Suggestions

The Sixth Amendment to the United States Constitution provides that the accused shall enjoy the right to a speedy and public trial, by an impartial jury drawn from a representative cross section of the community. (U.S. Const., amend. VI; *Taylor v. Louisiana* (1975) 419 U.S. 522, 530–531.) The California Constitution provides, in pertinent part: “Trial by jury is an inviolate right and shall be secured to all” (Cal. Const., art. I, § 16.) Juries composed of people from diverse backgrounds who represent a cross section of the community help to maintain public confidence in the integrity of our justice system. Further, studies have found that diverse juries are more thorough and accurate than all-white juries.⁴ Thus, increasing representation in juries may also improve the quality of juror decisionmaking by ensuring that deliberations involve differing viewpoints that encourage more open and robust dialogue.

Demographic Data

As an initial matter, the work group noted that California superior courts do not systematically collect demographic data on jurors. The group concluded that the systematic collection of demographic juror data—in particular, jurors' race, ethnicity, and gender—would be crucial in allowing courts to properly evaluate the extent to which existing jury selection processes pose an

³ The work group received 27 unique comments. However, the actual number of commenters was higher because several advocacy organizations submitted an identical form letter. Additionally, certain comments from academics and judges included multiple signatories.

⁴ Samuel R. Sommers, “Race and the decision making of juries” (2007) 12(2) *Legal and Criminological Psychology* 171.

impediment to a representative jury pool, and at which steps of the process these impediments may occur. The work group noted that other jurisdictions, including the federal courts, already collect demographic data for this purpose.

Logistically, the work group determined that demographic data should be collected when a prospective juror responds to a summons, given that the problem of insufficiently representative juries may be rooted in processes that occur before jurors are formally selected in the courtroom. Posing demographic questions early in the process, and explaining why the questions are being asked, would help allay any concerns that the information might be used improperly by the judge or attorneys during jury selection.

After considering different collection methods, the work group determined that the most efficient way for courts to collect demographic data would be to integrate such data collection into an online juror registration process. The group concluded that collecting demographic data at this stage would allow disparities to be analyzed at all stages of the jury selection process, from registration to peremptory strikes and excusals for cause. Demographic data collection would also offer an opportunity to analyze the efficacy of AB 3070.

Jury Summons Process

The absence of demographic data prevented the work group from forming definitive conclusions about the composition of jury pools and how best to ensure that juries ultimately represent a fair cross section of the community. However, the group acknowledged that poor summons response rates are likely a root cause of the problem of insufficiently representative juries. Accordingly, the group focused on two topics related to the summons process: undeliverable summonses and nonresponse to summonses.

The work group discussed a variety of strategies that could address the problem of undeliverable summonses. For example, it could be beneficial to update and audit source lists and master lists more frequently, or to institute clearer standards on the maintenance of the lists over time to ensure their accuracy. The group noted that the availability of demographic data would allow a fuller analysis of what types of strategies and reforms would be most effective.

In considering the problem of nonresponse to summonses, the work group focused on juror failure-to-appear programming, community outreach, the use of technology, and summons design. The group noted that juror failure-to-appear programming could be used as a tool to help ensure representative jury pools, as long as it is used judiciously. In addition, courts might consider increased engagement with community institutions to educate the public about the court system and the importance of jury service, and to change negative perceptions of jury service. The group discussed how the use of technology, such as text message or email reminders, could increase participation and reduce failures to appear. Lastly, the group discussed ways that courts could redesign their summonses to make them less confusing or intimidating.

Excusals Related to Financial Hardship

The work group recognized that excusals for financial hardship constitute a significant portion of excusals from jury service, and that compensation and job-related concerns are closely linked to family care responsibilities and transportation-related issues. Broadly, the group discussed this issue from the perspectives of juror compensation and juror convenience.

As to juror compensation, the work group initially noted that courts might consider educating the public about how California law already prohibits employers from terminating or otherwise retaliating against employees based on jury service. The group also discussed whether increasing the daily fee paid to jurors, as well as providing transportation and food subsidies for the duration of jury service for those with a demonstrated need, might increase the ability of low-income persons to serve on a jury.

The work group discussed how courts should also strive to make the jury service process more convenient for the public at large. In this vein, the group discussed issues relating to transportation and proximity to the courthouse in geographically large counties, the use of technology to allow prospective jurors to report for service remotely, and the ability of courts to reduce the length of trials where appropriate.

Voir Dire

In light of AB 3070 and its modification of the existing procedural framework for the exercise and adjudication of peremptory challenges, the work group reiterated the need to collect data on peremptory challenge motions to understand whether the new framework is operating as intended.

The work group considered whether the elimination or reduction of peremptory challenges could be desirable, taking note of judges and scholars who have advocated for that result. Ultimately, the group concluded that AB 3070 should be given time to play out and that the subject could be revisited in time, if necessary.

The work group acknowledged that challenges and excusals for cause may also be a source of racial disparities in juries but concluded that this topic was outside the scope of the group's charge.

Juror Education About Implicit Bias

The work group discussed a variety of ways that courts might educate jurors about implicit bias. For example, courts might consider whether a video explaining the concept could be useful to show to jurors at the outset of proceedings. The group also considered whether updating existing jury instructions on bias might be beneficial but noted the lack of scholarship to determine what type of instruction jurors would best respond to.

II. DEMOGRAPHIC DATA

The Jury Selection Work Group was charged with identifying impediments to ensuring that juries represent a cross section of their communities. As a preliminary matter, collecting demographic information is important to properly evaluate the extent to which existing jury processes pose an impediment to a representative jury pool, and at which steps of the process these impediments may occur. Broadly, the work group concluded that systematic collection of juror demographic information would be helpful, and necessary, to answer questions about jury diversity in California and to inform future steps. In particular, demographic data collection would help courts verify that groups are fairly represented in the summons process and determine whether any trends exist in terms of summons response, hardship excusals, and excusals for cause. Demographic data collection would also be instrumental in evaluating the efficacy of Assembly Bill 3070, which aimed to eliminate unfair exclusion of prospective jurors based on cognizable group membership.

Legal Authority for Collection of Demographic Information

California Code of Civil Procedure section 205 provides that a court “may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary . . . to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule.”⁵ Thus, California courts are authorized to elicit demographic information from prospective jurors in order to ensure representative and diverse juries, provided the court has enacted a local rule. However, based on a survey of local rules of court, no local rules currently set forth procedures that specifically allow courts to ask demographic questions of prospective jurors.

As currently written, section 205 does not *require* courts to collect demographic data; nor does it authorize the collection of *statewide* demographic data. To obtain statewide data, a legislative change to section 205 would need to be implemented.

Logistics of Demographic Data Collection

Collection of demographic information as early as possible in the jury selection process would allow courts to capture a fuller picture of demographic trends at each stage of the jury summons process, as well as identify which stages of the process contribute to less representative juries. Because many impediments to jury diversity may occur even before prospective jurors reach the courtroom, demographic information should ideally be collected during the response to the summons, rather than on or after arrival of the prospective juror to the courthouse for jury service. If the jury pool already lacks representation at the point that jurors arrive for jury service, data collection solely at the courthouse would provide little recourse for understanding why the jury pool lacks representation or developing possible solutions to improve representation in the pool.⁶ Collecting data at the stage of the response to the summons would support a more

⁵ Code Civ. Proc., § 205(c).

⁶ The work group considered that supplemental data collection at the courthouse may be useful for jurors who do not complete online registration.

thorough analysis of the different stages of assembling juries. Additionally, posing demographic questions at the outset, without connection to a particular case, would help reassure jurors that their answers would not be used by the judge or the lawyers in the courtroom and, therefore, would have no bearing on their qualification for jury service.

The work group recognized that data collection by courts can sometimes present challenging obstacles, both in terms of workload and in configuring technology systems to capture the data fields. Mindful of these important considerations, the group considered different collection methods and determined that online juror registration provided the best solution.⁷ Collecting responses through an online questionnaire would efficiently integrate demographic data collection with operational functions and avoid the need for clerks to collect or enter this data at a later point. A funding mechanism would need to be identified to implement any data collection processes and incorporate strategies targeted to increase diversity in juror pools. Formal consultation with outside experts in jury composition may be helpful to create an effective process.

Online Juror Registration

Online juror registration could provide an effective avenue for asking jurors to self-identify.⁸ Most courts already maintain an online juror information portal, albeit as an optional feature where prospective jurors can check their status or request deferrals or excusals. Only a handful of courts—specifically, those in Alameda, Glenn, Kern, Monterey, Placer, San Francisco, Santa Clara, Sierra, Trinity, and Tuolumne Counties—have instructions that *require* summoned jurors to register online. Online juror registration offers several benefits, including efficient collection of summons responses for courts and convenience for jurors, with the potential for corresponding boosts to juror yield.⁹ These online systems require prospective jurors to register on receipt of a summons, whether or not they are later required to appear at the courthouse for jury duty. The registration process is often accessed through the court’s website, and generally, these online systems direct prospective jurors to provide certain identifying information and answer preliminary questions about qualifications, hardship, and deferral requests. A best practice is for online registration to be smartphone accessible.¹⁰

⁷ The work group also considered whether zip code information could be useful to understand demographic trends. However, zip code information only tells part of the story and is, therefore, of limited utility.

⁸ Online registration could also provide other benefits that may improve overall juror yield and, by extension, the diversity of jurors who ultimately appear at the courthouse for jury duty. Mandating registration upon receipt of a summons would presumably help increase juror yield by requiring individuals to take immediate action so that the summons is not overlooked or forgotten. Further, an online registration system would enable the use of reminder systems, which have been shown to be effective in reducing failures to appear in other contexts. For example, courts could offer text reminders before and during the reporting period to notify jurors whether, when, and where they need to report.

⁹ The work group is unaware of existing studies of the efficacy of online registration in California.

¹⁰ The work group is cognizant of inequities in access to internet and smartphones and recommends that courts implementing online registration systems maintain alternative options for individuals without internet or smartphone access.

The work group considered two ideas to provide a demographic survey through the online registration process: one would incorporate survey questions directly into the online registration form; the other would utilize a separate link that takes registrants to a new webpage after the registration process is completed. Each option has different advantages and disadvantages, but both would require only minor modifications of existing online juror registration systems or adjustments to new online juror registration systems.¹¹

Questionnaire Content

The work group determined that demographic survey questions should generally be limited to race, ethnicity, and gender. Posing a long list of demographic questions, which might be time-consuming to answer and overly personal, could discourage registrants from responding.¹² Additionally, although the California Supreme Court's charge for this group acknowledges different forms of impermissible discrimination against cognizable groups in jury selection, the charge emphasizes racial discrimination. The group also noted that courts should be required to ask demographic questions but that prospective jurors should be allowed to decline to answer. If prospective jurors are asked about their race, ethnicity, and gender, registrants should be informed that this information is collected to ensure the diversity and representation of all groups in the jury summons process and has no bearing on an individual's qualification for jury service. If the individual chooses to answer the demographic questions, the information would then be stored in the court's jury management system (JMS), which in turn tracks the individual's progress through jury service.

Confidentiality

Limiting access to individual-level data of the demographic survey responses would be desirable in order to protect jurors' privacy interests and to avoid the perception that race, ethnicity, and gender are being considered during the jury selection process. However, depending on the stage of proceedings, statutory authority and case law about access to judicial records may present an obstacle to placing restrictions on the dissemination of this type of information.¹³ Assuming that access to individual juror demographic responses could be restricted under certain circumstances,

¹¹ Vendors of jury management systems may have configurable functionality to store and retrieve juror demographic information, if collected, alongside other standard administrative information collected on jurors.

¹² Although a long list of demographic questions may dissuade people from answering, courts might also be interested in asking questions about income range and household number to capture information important for understanding hardship excusals.

¹³ See Code Civ. Proc., § 237; *Bellas v. Superior Court of Alameda County* (2000) 85 Cal.App.4th 636, 645 ["the content of juror questionnaires are publicly accessible unless the reason for ordering them sealed outweighs the presumption of open access to records of judicial proceeding, the limitation on access is tailored as narrowly as possible, and the trial court's findings are articulated with enough specificity that a reviewing court can determine whether a confidentiality order was properly entered"]; *id.* at p. 651 ["The First Amendment prohibits the indiscriminant [sic] sealing of [juror] questionnaires. As to venire members who were not sworn as trial jurors, the law currently provides privacy protection from public disclosure of their names only upon a showing of a compelling interest. As to the questionnaires of trial jurors, the court was limited to ensuring that the personal juror identifying information (names, addresses, and telephone numbers, only) was redacted . . ."]; cf. *Alfaro v. Superior Court* (2020) 58 Cal.App.5th 371 [finding no basis to conclude that privacy rights preclude disclosure of names and zip codes on master and qualified jury lists].

it would be important to maintain access to statistical demographic information provided by the responses.

Demographic Data Collection in Federal Courts and in Other States

In contrast to California state courts, federal courts long ago established a system to collect juror demographic information. Under the Jury Selection and Service Act of 1968 (JSSA),¹⁴ the federal courts have been collecting juror demographic information for years through an online registration system.¹⁵ The online federal jury registration process gathers demographic information from jurors in conjunction with a qualification form prescribed by the Administrative Office of the United States Courts. Persons receiving the form are asked, in part, to respond with their age, race, and occupation.¹⁶ Significantly, the JSSA has *required* juror qualification forms to ask about race since 1972.¹⁷ Although prospective jurors are technically required to answer the demographic questions, it appears possible for an individual to register without answering the demographic questions. The JSSA also specifies that “information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual’s qualification for jury service,” and this disclaimer is communicated to prospective jurors on federal juror qualification forms.¹⁸

In addition to the federal courts, some state courts also collect juror demographic information. New York courts collect demographic data from prospective jurors at the courthouse, when they appear for service.¹⁹ Maricopa County, Arizona, recently published a report that analyzes jury data of both criminal and civil trials from 2019.²⁰ The appendix of the report explains how the

¹⁴ See 28 U.S.C. § 1861 et seq.

¹⁵ The National eJuror Program allows prospective federal jurors to respond online to their juror qualification questionnaires. Through the eJuror Program, prospective jurors may update personal information, check when they need to report for jury service, submit a request for an excuse or deferral, and select an alternate time to serve. (See www.uscourts.gov/services-forms/jury-service/national-ejuror-program.)

¹⁶ See 8 U.S.C. § 1869(h).

¹⁷ See Act of Sep. 29, 1972, Pub.L. No. 92-437, 86 Stat. 740 [amending 28 U.S.C. § 1869(h)].

¹⁸ See 8 U.S.C. § 1869(h). As one example, the juror qualification form for the United States District Court of the Southern District of Indiana states the following directly above the race question: “Federal law requires you to indicate your race in order to avoid discrimination in jury selection.” On the back of the form is a fuller explanation: “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 court check and observe the juror 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.” (See www.insd.uscourts.gov/sites/insd/files/JQQ_Website%20Color.pdf.)

¹⁹ See N.Y. Jud. Law § 528 [“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”].

²⁰ Judicial Branch of Ariz., *Racial and Ethnic Representation Through the Jury Selection Process: An Analysis of 2019 Jury Data From the Superior Court of Arizona in Maricopa County* (May 2021),

court collects demographic data by directing jurors, upon receipt of the summons, to respond via an online juror portal, at which time they are asked demographic information.²¹ More recently, in August 2021, the New Jersey Supreme Court directed the Administrative Office of the Courts to begin collecting jurors' demographic information "to better assist . . . courts in preventing potential underrepresentation and irregularities stemming from . . . facially neutral selection procedures," and specified that "[d]isclosure should be voluntary and cover a juror's identified racial identity, ethnicity, and gender categories."²²

The work group did not identify any reasons why California courts should not also collect demographic juror data to better understand how to make jury pools more representative of the community.

Potential Uses for Demographic Data

Demographic data collected at the summons stage could assist courts in a variety of ways. The data could:

- Measure the demographic breakdown of everyone who registers following a summons, which could then be compared to the demographics of the regions represented in the county;
- Identify any disparities in:
 - Requests for disqualifications and types of disqualifications;
 - Requests for excusals based on the various types of legal hardships; and
 - Failures to appear, for those called into court;
- Be used to analyze diversity and representation in the jury pool;
- Measure whether final juries lose diversity compared to the jury pool; and
- Be useful to examine any disparities in peremptory strikes and excusals for cause based on demographic group.

Additional Data Elements Related to AB 3070

Demographic juror information that includes, at minimum, juror self-identification of race, ethnicity, and gender would in part support analysis of the fairness of jury selection under AB 3070.²³

In addition to demographic information on individual jurors, other data points may be useful toward supporting and tracking the goals of AB 3070. For example, AB 3070 added a statute to

<https://napco4courtleaders.org/wp-content/uploads/2021/06/Jury-Representation-Study-Superior-Court-in-Maricopa-County-May-2021.pdf>.

²¹ See *id.*, Appendix A, The Summons Process and the Collection of Racial and Ethnic Data, p. 5.

²² *State v. Dangcil* (2021) 248 N.J. 114, 146 [256 A.3d 1016].

²³ Although Code of Civil Procedure section 231.7 also prohibits the exercise of a peremptory challenge on the basis of a prospective juror's perceived gender identity, sexual orientation, national origin, or religious affiliation, courts may decide to limit demographic data collection solely to race, ethnicity, and gender for the reasons described above.

the Code of Civil Procedure stating that circumstances that the court may consider in making a determination on the impropriety of a peremptory challenge include:

Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

(Code Civ. Proc., § 231.7(d)(3)(G).)

AB 3070, however, provides no mechanism to identify or to track such a history of disproportionate peremptory challenge use or prior violations under *Batson/Wheeler*. To effectuate this section, two additional data points may be useful to collect. First, the court's case management system could add a data field to track how many objections, if any, under either Code of Civil Procedure section 231.7 (in criminal trials beginning on January 1, 2022, and in civil trials beginning on January 1, 2026) or *Batson/Wheeler* (in civil trials through December 31, 2025) were sustained against counsel in a court case. Doing so would allow future counsel to identify a history of prior violations by accessing case records associated with a particular counsel or counsel's office. Second, the jury management system could add a data field to track which counsel was associated with each case. Jury management systems already track the disposition of each juror, to the level of specifying whether the defense or prosecution used a peremptory strike against each juror.²⁴ Adding counsel names to each case would allow the production of reports that show the demographic breakdown (when available) of peremptory strikes for each counsel or counsel's office. Access to this data would make it possible to demonstrate a history of disproportionate use of peremptory challenges as described in the new statute.

III. THE JURY SUMMONS PROCESS

The Jury Selection Work Group discussed the strong likelihood that the problem of insufficiently representative juries begins before a single juror steps foot in the courtroom. Indeed, “[a] jury system that experiences difficulty securing an adequate number of prospective jurors . . . is one that often fails to secure a demographically representative jury pool.”²⁵ Multiple commenters highlighted the jury summons process as an area that could be improved in order to increase the

²⁴ When specified. Sometimes peremptory strikes are recorded without an indication of which party requested the strike. Encouraging the recording of full detail on striking parties in the JMS would help the implementation and evaluation of AB 3070.

²⁵ Paula Hannaford-Agor, *An Overview of Contemporary Jury System Management* (May 2011), p. 1.

representativeness of juries. This issue has also recently become an area of focus for state courts generally.²⁶

In California, jury selection in the superior courts, including the summons process, is governed by the Trial Jury Selection and Management Act.²⁷ Under the act, at least once a year, the jury commissioner in each county is responsible for randomly selecting names of prospective trial jurors from source lists “inclusive of a representative cross section of the population of the area served by the court.”²⁸ The jury commissioner uses these names to create a master list²⁹ for the purpose of mailing questionnaires and summoning prospective jurors to respond or appear for service.³⁰

“Yield” refers to the number or percentage of people who complete service following a jury summons. According to a report prepared by the Office of Court Research,³¹ only 46% of California jurors summoned from July 2018 through June 2019 completed service for state jury duty. About one-third of those who completed service did so in person, and two thirds were told not to report (on call or standby). Undeliverable summonses accounted for 7.7% of those summoned who did not complete service. Meanwhile, 11.1% of those summoned were disqualified,³² 9.3% were excused for hardships,³³ 5% postponed their service, and 20.1% simply failed to appear.

The work group considered that these data on jury summons response rates tell only part of the story, absent any demographic data concerning the jurors in question—thus underscoring that the

²⁶ The National Center for State Courts has announced a project, funded by the State Justice Institute, to learn about “how to create and maintain inclusive, representative, and accurate jury lists, and . . . to develop best practices for state courts. (National Center for State Courts, “Are all of the right people making it into your jury pools?” @ the Center, www.ncsc.org/newsroom/at-the-center/2021/are-all-of-the-right-people-making-it-into-your-jury-pools, accessed June 9, 2022.)

²⁷ Code Civ. Proc., §§ 197–240.

²⁸ *Id.*, §§ 197(a), 198(b).

²⁹ The use of the word *master* as an adjective has drawn criticism in various contexts for being outdated and offensive. (See, e.g., www.cbsnews.com/news/realtors-master-bedroom-bathroom-terminology/; www.zdnet.com/article/github-to-replace-master-with-alternative-term-to-avoid-slavery-references/.) We use the term *master list* only to avoid confusion, given that the statute in question uses that term.

³⁰ Code Civ. Proc., § 198(c).

³¹ Judicial Council of Cal., *2018–2019 Jury Data Report*. Although the current fiscal year (FY) 2019–20 report is available at www.courts.ca.gov/24354.htm, the work group referred to an earlier report given the onset of the COVID-19 pandemic and its impact on jury service statistics. Earlier reports can be accessed by request.

³² Of those disqualified from jury service, 41% were not U.S. citizens, 27% were not residents of California or the county in question, 22.5% had insufficient knowledge of the English language, 5.8% had a felony conviction, 2.7% were not domiciliaries of California, and less than 1% were disqualified for other reasons (such as not being at least 18 years old, being the subject of conservatorship, or currently serving as grand or trial juror).

³³ Code of Civil Procedure section 204 states: “An eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council.” California Rules of Court, rule 2.1008(d), lists seven undue hardship grounds.

collection of demographic data at all stages is key to understanding the ultimate makeup of juries and to determining how to maximize efforts to achieve more representative juries. At the same time, operating under the assumption that higher summons response rates will likely lead to more demographically representative jury pools, the work group initially focused on two areas: undeliverable summonses and nonresponse to summonses.

Undeliverable Summonses

Nationally, between about 8% to 20% of the population moves to a new address in any given year;³⁴ and as noted above, in California in FY 2018–19, 7.7% of juror summonses were returned as undeliverable. Whether jury-related mailings are forwarded to a person’s new address depends on whether the person has filed a change-of-address form with the post office; and even if so, the post office only forwards mail for a period of 12 months after the form is filed.

As noted by multiple commenters, low-income individuals are more likely to change addresses than individuals who earn higher wages. Indeed, renters move more often than homeowners, and white Americans own homes at higher rates than communities of color.³⁵ In turn, the rate of undeliverable summonses in communities of color is likely higher.³⁶ The work group considered several ways that the problem of undeliverable summonses might be addressed.

Number of Source Lists

Until January 1, 2022, only two source lists—the list of registered voters and the Department of Motor Vehicles (DMV) list of licensed drivers and identification cardholders residing within the area served by the court—were “considered inclusive of a representative cross section of the population” of the area served by the court.³⁷ However, beginning on January 1, 2022, in

³⁴ See U.S. Census Bureau, *CPS Historical Geographic Mobility/Migration Graphs*, www.census.gov/library/visualizations/time-series/demo/historic.html (accessed Jan. 12, 2022).

³⁵ “For homeownership rates by race and ethnicity of the householder, the third quarter 2021 homeownership rate for non-Hispanic White Alone householders reporting a single race was highest at 74.0 percent. The rate for Asian, Native Hawaiian and Pacific Islander Alone (ANHPI) householders was 60.2 percent, and the rate for Black Alone householders was lowest at 44.0 percent.” See U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, Third Quarter 2021* (Release Number: CB21-166), www.census.gov/housing/hvs/files/currenthvspress.pdf (accessed Jan. 12, 2022).

³⁶ See Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021), p. 27, <https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf> [“people with low income levels, who are more likely to move frequently, have a higher rate of undeliverable summonses than middle or high income people. Black people and people of color, who are disproportionately burdened by poverty, are more likely than white prospective jurors to be excluded because of this practice”]; Nina W. Chernoff, “Black to the Future: The State Action Doctrine and the White Jury” (2019) 58 *Washburn Law Journal* 103, 121, <https://ssrn.com/abstract=3385624> [“There is evidence that African-Americans and Latinos are more likely to be affected by undeliverable summons, because of correlations between race and income levels. People with lower income levels move more frequently, which means their addresses in the jury system files are more likely out of date—which in turn means a higher proportion of undeliverable summons”].

³⁷ Code Civ. Proc., § 197(b)(1).

addition to the list of registered voters and the DMV list, a third list is “considered inclusive of a representative cross section”: the list of resident state tax filers.³⁸

Overall, to the extent that addresses associated with state tax filings may be more frequently updated and thus more reliable than addresses associated with voter registration and driver’s licenses, the work group considered the statutory addition of the list of resident state tax filers to be a positive development that could ultimately contribute to more representative jury pools. Absent demographic data on jurors, however, the group noted that assessing the real-world impact of using the list of resident state tax filers, or any additional lists, as a source would be difficult.

Frequency of Source List Updates

The act states the frequency at which certain source lists must be furnished to the jury commissioner of each county. The DMV must compile lists of holders of a driver’s license or identification card semiannually, subject to conditions determined by the director of the DMV and consistent with any rules that may be adopted by the Judicial Council.³⁹ The Franchise Tax Board must furnish lists of resident tax filers annually by November 1 each year, in consultation with the Judicial Council.⁴⁰ No authority appears to specify how often the list of registered voters must be furnished to jury commissioners.

The work group noted that, in 2003, the Judicial Council’s Task Force on Jury System Improvements issued a report and indicated that “[t]o increase yield and avoid duplication, the [Administrative Office of the Courts] will work with the DMV and the Secretary of State on ways to improve the quality of the source lists issued to the courts.”⁴¹ Yet despite these action items, no rules of court pertaining to DMV source lists have been adopted as contemplated under Code of Civil Procedure section 197, and no authority appears to specify how often the list of registered voters must be furnished to jury commissioners.

The work group noted that the availability of demographic data on jurors would enable a fuller analysis of whether the DMV and Franchise Tax Board furnishing source lists to jury commissioners more frequently than twice a year and once a year, respectively, would be beneficial; whether authority should specify how often the list of registered voters must be furnished to jury commissioners; and with respect to all three source lists, whether authority should standardize the desired formatting and data points of the lists to be provided to jury commissioners.

³⁸ *Id.*, § 197(b)(2). In addition to these three lists, sources may also include customer mailing lists, telephone directories, utility company lists, and other lists. (§ 197(a).)

³⁹ *Id.*, § 197(c). To date, no such rules have been adopted.

⁴⁰ *Id.*, § 197(d).

⁴¹ Judicial Council of California, *Task Force on Jury System Improvements: Final Report* (Apr. 15, 2003, rev. Apr. 2004), www.courts.ca.gov/documents/tfjsi_final.pdf.

Frequency of Master List Creation

As noted, the act provides that the jury commissioner of each county must, “at least once in each 12-month period, randomly select names of prospective jurors from the source list or lists, to create a master list.”⁴² The master list is then used by the jury commissioner for the purpose of mailing questionnaires and summoning qualified jurors to respond or appear for service.⁴³

The work group understands that the frequency of master list creation varies from court to court and year to year, depending on trial needs. Demographic data on jurors would shed light on whether it would be beneficial for jury commissioners to create a master list more frequently than once a year and, if so, whether there should be a uniform, statewide standard that increases the frequency of master list creation. Because the DMV is mandated to compile its lists semiannually, the work group considered that mandating that each jury commissioner create a master list semiannually rather than annually might be reasonable.

Maintenance of Source and Master Lists

Jury commissioners are also responsible for merging and purging their county’s lists. Under the act, source lists must be “substantially purged of duplicate names” to be considered inclusive of a representative cross section of the population.⁴⁴ Additionally, jury commissioners must remove persons with valid permanent medical excuse requests from the rolls of potential jurors as soon as practicable.⁴⁵ Jury commissioners are also advised to use the National Change of Address System or other comparable means to update source lists and create as accurate a master list as reasonably practical.⁴⁶

The work group discussed the possibility that more law or guidance on the maintenance of source and master lists could be desirable. As noted by one commenter, the act’s requirement that source lists be “substantially purged of duplicate names” is arguably vague. Additionally, jury commissioners are merely advised (rather than required), in the form of a standard of judicial administration (rather than a rule of court or statute), to use the National Change of Address System to update source lists.⁴⁷ The work group also noted that no authority appears to govern how jury commissioners should reconcile conflicting addresses for the same individual between source lists. The availability of demographic data on jurors would help inform whether the existing authorities and guidance on updating lists are sufficient.

⁴² Code Civ. Proc., § 198(b).

⁴³ *Id.*, § 198(c).

⁴⁴ *Id.*, § 197(b).

⁴⁵ Cal. Rules of Court, rule 2.1009(d)(2).

⁴⁶ Cal. Stds. Jud. Admin., std. 10.31.

⁴⁷ The work group noted that the National Change of Address System itself only captures the names and addresses of individuals who have submitted a change of address order to the U.S. Postal Service. (See <https://postalpro.usps.com/mailling-and-shipping-services/NCOALink>.)

Auditing of Source and Master Lists

Generally, courts use a jury management system to automate the creation of a master list and to randomly select individuals for jury summons. The work group understands that the maintenance of source and master lists as described above is often outsourced to a JMS vendor as part of the master list creation and random selection process. Although a variety of private JMS vendors exist, a majority of California courts use Jury Systems Incorporated (JSI).⁴⁸

The work group discussed whether courts should be required to audit their summons process to uncover or prevent errors in the process, as well as ensure that summonses are being distributed as expected across geographical areas. Demographic data on jurors would help determine the need for such audits and inform whether a one-time or recurring audit would be more appropriate.

Replacement Summonses

Some work group members questioned whether a random process is always optimal for maximizing diversity. If certain zip codes show a lower rate of return, then correcting for such underrepresentation could be achieved by sending out replacement summonses to those zip codes. Similarly, some jurisdictions have adopted methods to resample from the same zip code when a specific summons is undeliverable.⁴⁹ The use of geographic oversampling to increase representation in jury pools may be subject to legal challenge, but the issue appears not to have been widely litigated.⁵⁰

Nonresponse to Summonses

As noted above, in FY 2018–19, 20.1% of jurors summoned in California failed to appear.⁵¹ For individuals who failed to respond to a jury summons, follow-up practices varied among California courts. Forty-three out of 55 responding courts reported following up on persons who failed to appear for service. Forty-one of these courts sent a second notice; 18 courts used an order to show cause; 12 courts imposed fines; and 4 courts employed other methods.⁵² In discussing the problem of nonresponse to summonses, the work group focused on juror failure-to-appear programming, community outreach, the use of technology, and the summons design.

⁴⁸ Currently, 51 California courts use JSI; the remaining courts use Agile Jury (Alameda and Humboldt), Clearview (Orange), Courthouse Technologies (Placer), or court-specific custom systems (Alpine, Los Angeles, and San Bernardino).

⁴⁹ A number of federal trial courts already send replacement summonses to the zip codes of undeliverable or nonresponsive jurors. See, e.g., Judicial Council of the Third Circuit, *Plan for the Random Selection of Grand and Petit Jurors in the United States District Court for the Eastern District of Pennsylvania* (July 18, 2017), p. 5 [in instances when a juror qualification form is returned as undeliverable or no response is received, “the Clerk may randomly draw a replacement name from the master jury wheel from the same zip code”], www.paed.uscourts.gov/documents/jury/Jury%20Plan.pdf.

⁵⁰ Connecticut Office of Legislative Research: *Jury Pools and Fair Cross Section Requirement* (Nov. 2, 2020), www.cga.ct.gov/2020/rpt/pdf/2020-R-0299.pdf; see also *People v. Currie* (2001) 87 Cal.App.4th 225, 236–237.

⁵¹ Judicial Council of Cal., *2018–2019 Jury Data Report*, www.courts.ca.gov/24354.htm.

⁵² *Ibid.*

Juror Failure-to-Appear Programming

The work group surmised that demographic data on jurors would be needed to adequately assess the impact of juror failures to appear (FTAs) on the representativeness of jury pools. However, the work group agreed that FTAs remain a pervasive problem and that reducing FTAs would likely help ensure that jury pools reflect a cross section of the population.⁵³

The work group discussed the extent of the courts' obligation to prevent or reduce FTAs. Under section 209 of the California Civil Code of Procedure, courts may, but are not required to, impose sanctions for contempt or reasonable monetary sanctions for jurors who are summoned and fail to attend as directed. In addition, under the California Rules of Court, rule 2.1008(a) provides: "Jury service, unless excused by law, is a responsibility of citizenship. *The court and its staff must employ all necessary and appropriate means to ensure that citizens fulfill this important civic responsibility* (emphasis added)."⁵⁴ Courts that do not take any meaningful action in response to juror FTAs may not be living up to the directive of this rule.

In 2009, the Judicial Council published a juror FTA toolkit.⁵⁵ The toolkit was intended to help courts develop a legally sound and efficient process for addressing juror FTAs. It details how courts can use Code of Civil Procedure section 209 as the basis for creating juror FTA programs. In brief, the toolkit presents two alternatives drawn primarily from the then-current FTA programs of the Superior Courts of San Joaquin and Los Angeles Counties. Under both models, summoned jurors are given multiple opportunities to respond to the summons and complete jury service without imposition of a fine or issuance of an order to show cause.

The work group noted that use of the Judicial Council's juror FTA toolkit may assist courts in developing or further refining juror FTA programming. At the same time, the group remained cognizant of the fact that juror FTA programs may exacerbate negative perceptions of the justice system as a whole, depending on the particulars of the programming and the ultimate consequences of failing to appear—particularly for those communities that already associate the courthouse with negative experiences endured by themselves or loved ones. To the extent that courts use juror FTA programs, courts should take great care in ensuring that their programs employ only "necessary and appropriate" means of enforcing jury summons and, in the process,

⁵³ See Paula Hannaford-Agor, "Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded" (2011) 59 *Drake L. Rev.* 761, 774 ["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"]; National Center for State Courts, *Jury Managers' Toolbox: A Primer on Fair Cross Section Jurisprudence* (2010), p. 3 ["failure-to-appear rates tend to disproportionately decrease minority representation due to socio-economic factors such as mobility rates, criminal records, and financial hardship for lower-income individuals"].

⁵⁴ The American Bar Association's *Principles for Juries and Jury Trials*, principle 10(D)(2), similarly recognizes follow-up on FTAs as a duty of courts, stating: "Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to a summons."

⁵⁵ Judicial Council of Cal., *Failure to Appear Toolkit: Increasing Jury Service Participation* (2009), www.courts.ca.gov/documents/fta_booklet.pdf.

explain to those prospective jurors who fail to appear why jury service is so important—including the necessity of creating a diverse and representative pool of potential jurors.⁵⁶

Community Outreach

Apart from juror FTA programming, which is reactive in nature, the work group discussed how courts should not lose sight of more preventative avenues for reducing FTA instances. As noted, for many people, and particularly for communities of color, the courthouse may be bound up with negative and traumatic experiences. Some may also view jury service as a waste of time because they believe they will not be chosen. And others may think that serving as a juror requires knowledge about the law that they do not possess. Courts can play a key role in helping to lessen these types of negative associations and misplaced beliefs, and more direct engagement with the community, especially in areas that have relatively lower yield, could help to change these negative beliefs and attitudes around jury service and ultimately result in more representative juries.

Commenters submitted a range of suggestions for increasing community engagement. Multiple commenters suggested increasing engagement with community organizations, law firms, religious institutions, and media outlets and holding public forums to encourage and promote jury service. Some commenters stressed the importance of working with schools and youth organizations to instill a sense of civic duty for jury service early in life. One commenter suggested that courts educate the public on the work of the judicial system via informational tours.

Use of Technology for Registration and Reminders

Courts often mail out jury summonses several weeks in advance of the proposed dates for service. Advance notice is important to provide individuals with enough time to plan for potential disruption to their work or personal responsibilities. However, mailing jury summonses far in advance also likely results in a lower yield, particularly if no system is in place to remind prospective jurors of their date of service.

The work group considered that sending reminder notifications close to the actual reporting date might help ensure a higher yield. Such reminder notifications could be sent via text message or email—and, presumably, with relative ease through an online registration system, as described above. Reminder emails and text messages are increasingly common across many sectors, including medical appointments. Many courts have also implemented reminder notifications for court dates, which has been shown to reduce FTAs.⁵⁷ It stands to reason that reminder

⁵⁶ As noted in the toolkit, “While incarceration is included as an alternative punishment under Code of Civil Procedure section 209(a), it is strongly discouraged. The Superior Court of San Joaquin County has never incarcerated a delinquent juror for failing to appear for jury duty. . . . [¶] . . . [S]ending delinquent jurors to jail has not been field-tested by the Superior Court of San Joaquin County or any other California superior court and is not recommended as a method of punishment.” (*Id.* at p. 5.)

⁵⁷ See Brice Cooke, et al., *Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court* (Univ. of Chicago Crim Lab, Jan. 2018), www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf.

notifications would be equally effective for jury service, and many automated services are already set up to work smoothly with court systems. The group recommends that courts use text reminders as a best practice.

Jury Summons Design

Although the Judicial Council has developed a model juror summons,⁵⁸ each superior court develops and designs its own summons.⁵⁹ One commenter noted that a typical summons contains too much information that is presented in too formalistic a manner. The work group discussed whether summonses that are confusing or off-putting can depress response rates. If so, redesigning the summons could potentially result in a larger yield, particularly if integrated with a broader switch to online registration or a text message reminder system.⁶⁰

The California model jury summons informs recipients that they have been summoned to appear for jury service and highlights that failure to respond can result in a fine or jail term. The details of how to report for duty, however, are not standardized and are left for each superior court to describe. Under California Rules of Court, rule 2.1002, each court is required to implement a juror management program under which a person may fulfill jury service by serving “one day on call” or serving “no more than five court days on telephone standby.”⁶¹ The general statement on the model summons indicating that the juror has been “summoned to appear” may therefore be misleading if local instructions instead specify that jurors may call in or check online to determine whether they actually need to appear in court for service.

The model summons also includes brief information about California’s one-day or one-trial program and statutory prohibition against employer retaliation. The bulk of the model summons is a response form to be filled out only if the juror is requesting a postponement or an excuse or is not qualified for service. The response form contains check boxes for postponement or excusal reasons and has space for jurors to fill in relevant details about their reason for the request.

By contrast, the federal jury summons is standardized and designed to be used in conjunction with the national eJuror online juror registration platform.⁶² The federal summons describes the importance of jury duty and explains the on-call system in plain and reassuring language. The federal summons also lays out clear steps for what the juror is required to do to register, check whether their presence is required during the on-call period, and report to the court if necessary. Jurors are directed to register via a website within 10 days and are given alternatives if they do

⁵⁸ See Summons for Jury Service, www.courts.ca.gov/documents/Model_Juror_Summons.pdf.

⁵⁹ See Judicial Council of Cal., Model Juror Summons Project, www.courts.ca.gov/3929.htm.

⁶⁰ In the context of tickets issued to people for low-level offenses in New York, one study found that failure-to-appear rates were significantly reduced after courts (1) redesigned the summons form to make the most relevant information stand out, and (2) instituted a text message reminder system. (See www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf.)

⁶¹ See Cal. Rules of Court, rule 2.1002(c).

⁶² United States Courts, National eJuror Program, www.uscourts.gov/services-forms/jury-service/national-ejuror-program.

not have internet access. The online registration process gives jurors an opportunity to request postponement or excusal from service.

Some elements of the federal jury summons design could potentially help California courts achieve a higher yield. First, the friendly tone and emphasis on the importance of jury duty in the federal summons may appeal more to potential jurors than the succinct declaration of requirement and threat of jail present in California’s model summons. Second, the clear description of the on-call system in the federal summons may help reassure jurors about what service entails as compared to the conflicting messaging between the California model summons language and court-specific descriptions of service protocols. Finally, the federal system’s requirement that all individuals summoned fill out a registration form within 10 days may decrease the probability that a juror loses or forgets the summons, and may act as a psychological “foot in the door”⁶³ to encourage juror participation by shifting the emphasis toward actions a juror can immediately participate in rather than mere contemplation of a laundry list of possible excuses.

Some counties, both within and outside of California, have moved to a postcard jury summons to streamline delivery of pertinent information.⁶⁴ A postcard jury summons may be an effective means of summoning jurors because the limited space on a postcard forces courts to communicate relevant information succinctly without overwhelming jurors and because the relevant information can be seen without the need to open an envelope. Because of space constraints, postcards are generally implemented in conjunction with a website where jurors can go to register, request an excusal, or read further information about jury service.

IV. EXCUSALS RELATED TO FINANCIAL HARDSHIP

As noted above, in California in FY 2018–19, 9.3% of summoned jurors were excused for hardship. Of those excused for hardship, 41.6% were excused for physical or mental disability or impairment, 25.3% were excused for an obligation to provide care to another, 17.3% were excused for financial hardship, 10.3% were excused for other hardships, 3.5% were excused for having fulfilled a jury service obligation during the previous 12 months,⁶⁵ and 1.8% were excused for no transportation/excessive travel time.⁶⁶

⁶³ See Nicolas Guéguen, “Foot-in-the-door technique and computer-mediated communication” (2002) 18(1) *Computers in Human Behavior* 11-15, [https://doi.org/10.1016/S0747-5632\(01\)00033-4](https://doi.org/10.1016/S0747-5632(01)00033-4).

⁶⁴ See e.g., the jury summonses from the Superior Courts of Orange and San Francisco Counties, the Superior Court in Maricopa County, and the Middlesex County Superior Court: www.occourts.org/directory/jury-services/serving-as-juror/jury-summons.html; <https://sfsuperiorcourt.org/sites/default/files/images/Postcard%20Poster%2008.16.21.pdf>; <https://superiorcourt.maricopa.gov/jury/postcard/>; <https://juryduty.majury.gov/ojcweb/Content/images/PostCardSummons.jpg>.

⁶⁵ This reason is technically an exemption, not a hardship. However, the Jury Data Report, which is the source of these numbers, categorizes this reason as a hardship.

⁶⁶ Judicial Council of Cal., 2018–2019 *Jury Data Report*, www.courts.ca.gov/24354.htm.

The Jury Selection Work Group homed in on financial hardship as a key barrier to the formation of representative juries. Financial hardships can arise in many forms, and the group considered that compensation and job-related concerns appear to be closely linked to family care responsibilities and transportation-related issues. Together, these hardships permeate multiple stages of the jury selection process, affecting not only whether people respond to the initial summons, but also whether they later seek to be excused during voir dire. The work group considered a variety of measures that could potentially ameliorate financial obstacles that prevent people from serving on juries. Broadly, the group focused on these issues from the perspectives of juror compensation and juror convenience.

Juror Compensation

Currently, with the exception of government employees who receive regular compensation and benefits while performing jury service, jurors in California are paid a fee of \$15 per day for each day's attendance as a juror after the first day and are reimbursed at a rate of \$0.34 per mile for each mile after the first day.⁶⁷ The daily juror fee has not been increased since 2000, and the juror mileage reimbursement amount has not been increased since 2003.⁶⁸

Although employers must provide time off for employees who are summoned to jury duty, California law does not require private employers to pay employees who serve on a jury. As a result, persons selected for jury service may face the reality of having to forfeit days or weeks of their salary, depending on the length of the trial. Though demographic data would shed light on the pervasiveness of the problem, the work group thought it self-evident that low-income individuals who cannot afford to forfeit their regular pay would be less likely to respond to a jury summons or serve on a jury.

As an initial matter, the work group discussed the common misperception among jurors that their employer can fire them if they take time off for jury service. This belief seems to persist even though Labor Code section 230 prohibits employers from terminating or otherwise retaliating against employees based on jury service, and some (mostly larger) employers even voluntarily provide compensation during jury service, albeit for a certain number of days.⁶⁹ The group discussed how courts might be able to counter these concerns by, for example, educating jurors about job protections, and by maintaining a list of employers in the area who provide compensation for jury service, along with information about the number of days covered.

⁶⁷ Code Civ. Proc., § 215. By way of comparison, circa 1870, jurors in California received \$2 per day for attendance and \$0.25 per mile traveled. (Stats. 1869–1870, ch. 144, p. 176, § 28.) Stating the obvious, the work group observed that the daily juror fee and the daily mileage reimbursement have not kept up with the pace of inflation.

⁶⁸ See Stats. 2000, ch. 127; Stats. 2002, ch. 144.

⁶⁹ See Lab. Code, § 230 [prohibiting an employer from discharging or in any manner discriminating against an employee for taking time off to serve on a jury, provided reasonable notice is given]; see also Ed. Code, §§ 44037, 87036 [prohibiting a school district from discriminating against any employee because of jury service; also mandating leaves of absence and providing for compensation for those called to serve].

The work group discussed whether increasing the daily fee paid to jurors might increase the ability of low-income persons to serve on a jury. As pointed out by multiple commenters, federal jurors are paid \$50 per day and, after serving 10 days on a trial, \$60 per day;⁷⁰ and a majority of states pay jurors more than California does, with some states' payments comparable to the federal rate.⁷¹ Multiple commenters suggested that the daily fee be increased to at least \$120 per day for those uncompensated by their employer for jury service, to match the state minimum wage of \$15 per hour. Other commenters suggested that all employers be required to pay employees who take time off for jury service. The group also discussed whether courts could provide transportation or food subsidies for the duration of jury service for people with a demonstrated need. Along these lines, various commenters suggested that family care obligations could be addressed via onsite childcare or vouchers for drop-in or in-home childcare, and transportation-related barriers could be addressed via shuttle services or vouchers. The group considered that instituting a pilot program to study whether such measures would actually reduce hardship excusals and contribute to more representative juries might be desirable.

Over the course of the work group's discussions, the Legislature passed and the Governor signed into law Assembly Bill 1452 (Stats. 2021, ch. 717), which added section 240 to the Code of Civil Procedure. Under this enactment, from January 1, 2022, to December 31, 2023, the Superior Court of San Francisco is authorized to conduct a pilot program "to analyze and determine whether paying certain low-income trial jurors an increased fee for service as a trial juror in a criminal case promotes a more economically and racially diverse trial jury panel that more accurately reflects the demographics of the community."⁷² Specifically, in criminal cases, if a juror's income over the past year is less than 80% of the San Francisco Bay Area median income and the juror is not compensated by their employer for jury service, is self-employed, or is unemployed, the juror is paid \$100 per day.⁷³

Notably, this pilot program includes provisions for demographic data collection to allow "a thorough analysis of whether paying certain low-income trial jurors an increased fee for service as a trial juror in a criminal case promotes a more economically and racially diverse trial jury panel that more accurately reflects the demographics of the community."⁷⁴ The demographic data to be collected include the race, ethnicity, and the income level of jurors who receive the \$100-per-day payment.⁷⁵ A third-party entity then prepares a report that analyzes the data and

⁷⁰ See United States Courts, Juror Pay, www.uscourts.gov/services-forms/jury-service/juror-pay.

⁷¹ See Jury Duty 101, Jury Duty Compensation Rates by State, www.juryduty101.com/juror-pay-by-state.

⁷² Code Civ. Proc., § 240(a), (h).

⁷³ *Id.*, § 240(b)(2).

⁷⁴ *Id.*, § 240(f).

⁷⁵ *Ibid.*

whether the pilot program achieved its goal of promoting a diverse jury panel that more accurately reflects the community.⁷⁶

The work group agreed with the San Francisco pilot program’s overall objective of promoting more representative juries, as well as its emphasis on demographic data collection. The group considered that comparable pilot programs in other counties could shed additional light on the extent to which regional cost-of-living differences play a role in who has the financial means to complete jury service. With appropriate legislative funding and in consultation with subject-matter experts, pilot programs with data collection methods could be designed that could be implemented in various courts.

Juror Convenience

The work group discussed how a narrow focus on juror compensation alone may not be enough to address jurors’ inability to serve based on financial hardship. Inefficiencies in the jury selection process may result in jurors spending hours or even days reporting for jury duty, only to be dismissed; and once selected, trials may last for a week or more. Though “jury service is an obligation of citizenship,”⁷⁷ the work group discussed ways in which the jury selection process could be streamlined for the benefit of prospective jurors and the justice system as a whole. The group agreed that making the selection process more efficient could change negative perceptions of the process, maximize participation, and ultimately result in more representative juries.

Transportation

Limited public transit options and distance from the courthouse—especially in geographically large counties where courthouses may be located far from where some jurors reside—can translate into long travel times for jurors. The work group discussed the commonsense notion that summoning jurors to closer courthouse locations would likely result in greater yield and more diverse juries. A survey of local rules of court indicates that some courts have taken such geographical considerations into account by enacting local rules that provide for prospective jurors to be summoned to courthouses closer to where they reside.⁷⁸ The availability of demographic data on jurors would help inform whether this issue should continue to be addressed on a local level or whether statewide rules or oversight would be more effective.

Use of Technology

Over the course of the COVID-19 pandemic, courts in California and other jurisdictions have streamlined the jury selection process through the use of technology. For example, the Superior Court of San Francisco developed procedures to allow prospective jurors to report for jury service remotely. Under these procedures, prospective jurors communicate with the court through the court’s website and via email; hardship requests and juror questionnaires are

⁷⁶ *Id.*, § 240(g).

⁷⁷ *Id.*, § 191.

⁷⁸ See, e.g., the Superior Court of El Dorado County, Local Rules, rule 3.00.01; the Superior Court of Orange County, Local Rules, rule 361; the Superior Court of San Bernardino County, Local Rules, rule 133.

submitted and reviewed remotely, and prospective jurors are excused via email; and only the remaining prospective jurors are required to travel to the courthouse for voir dire. Broadly, the work group agreed with the goal of minimizing the number of days prospective jurors need to be physically present in the courthouse.

Length of Trials

Jury trials anticipated to last more than a few days can reduce the number of prospective jurors who, because of financial hardship or responsibilities, are unable to commit the time required for a lengthy trial. The work group agreed that courts should consider reducing the length of trials where feasible and appropriate.⁷⁹ The group also discussed how courts might investigate whether administrative or logistical solutions can play a role in reducing trial lengths. For example, courts could consider the feasibility of dedicating specific courtrooms for trials to maximize jurors' time spent at the courthouse. In addition, the work group emphasized that no changes should be implemented that would in any way impinge on a defendant's constitutional rights.

V. VOIR DIRE

AB 3070 Education and Implementation

Judicial and attorney education about AB 3070 is critical for the successful implementation of the new statutory framework for addressing the discriminatory exercise of peremptory challenges. The Judicial Council's Center for Judicial Education and Research, as well as individual courts and bar associations, is anticipated to provide such education and training.

Collection of *Batson/Wheeler*-Related Data

The Jury Selection Work Group identified data collection regarding motions made under *Batson/Wheeler* or Code of Civil Procedure section 231.7 as an important issue. To date, studies of peremptory challenge motions in California have focused on a subset of cases on appeal, where the trial courts denied *Batson/Wheeler* challenges.⁸⁰ Less information seems to be available about other cases, such as those for which no party made a *Batson/Wheeler* motion or the trial court granted such a motion. A broader understanding of the frequency of these motions and how often they are sustained or denied at the trial court level would help to contextualize the extent of impermissible discrimination during jury selection.

JMS already collect detailed information about what happens to each potential juror, including whether they were excused for hardship, struck for cause, struck peremptorily, questioned but not selected, or seated. These data usually include which party struck the juror in the case of a peremptory strike, the defense or the prosecution; however, this information is not uniformly recorded. To create accurate records for assessing progress in debiasing juror selection or for

⁷⁹ See *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22 ["it is clearly within the power of the court to impose time limits before the trial commences"].

⁸⁰ See, e.g., Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), pp. 13–27, www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf.

evidence under Code of Civil Procedure section 231.7(d)(3)(G) of disproportionate use of peremptory challenges by counsel and/or counsel's office, it is important that all courts specify in the JMS records the party responsible for each peremptory challenge, as well as the race, ethnicity, and gender of the jurors. Furthermore, the latter part of Code of Civil Procedure section 231.7(d)(3)(G) creates a need for information on violations of the statute by parties in order to establish a history of prior violations. To meet this need, fields could be added to the preexisting JMS juror tracking system to record whether a particular strike was subject to a challenge under Code of Civil Procedure section 231.5 or 231.7 and whether that challenge was sustained.

Elimination or Reduction of Peremptory Challenges

Judges across the country have increasingly suggested the elimination of peremptory challenges as the remedy for bias in jury selection.⁸¹ In *People v. Bryant* (2019) 40 Cal.App.5th 525, 548, Justice Humes highlighted this idea in his concurring opinion, by quoting from Justice Marshall's concurring opinion in *Batson*: “‘The 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.’” (*Batson, supra*, 476 U.S. at pp. 102–103).” Significant scholarship also urges the same result.⁸²

⁸¹ See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231, 266–67 [conc. opn. of Breyer, J.]; *Rice v. Collins* (2006) 546 U.S. 333, 342 [conc. opn. of Breyer and Souter, JJ.]; *State v. Veal* (Iowa 2019) 930 N.W.2d 319, 340 [conc. & dis. opn. of Wiggins, J.] [“it is time to abolish peremptory challenges in Iowa” because “[a]s Justice Marshall pointed out . . . ‘[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant.’ . . . In the majority of the cases, the reasons given by prosecutors in response to a *Batson* challenge appear to be pretextual”]; and *Spencer v. State* (Md. Ct. Ap. 2016) 450 Md. 530, 596 [dis. opn. of McDonald, J.] [“A better solution, in my view, would be to eliminate peremptory challenges altogether”]. See also *Commonwealth v. Fernandes* (2021) 487 Mass. 770 [170 N.E.3d 286, 298 n.6] [“peremptory challenges themselves are not essential to the constitutional guarantee of a fair trial by an impartial jury, and some have advocated for their outright elimination”]; *State v. Jefferson* (2018) 192 Wn.2d 225, 240 [“Looking back over the last 50 years, it is clear that *Batson* has failed to eliminate race discrimination in jury selection. . . . [T]here is a growing body of evidence showing that *Batson* has done very little to make juries more diverse or to prevent prosecutors from exercising race-based challenges”].

⁸² See, e.g., Brian Gallini, Samantha Klausen, and Eden Vasquez, “Report of the Willamette University College of Law Racial Justice Task Force on the Use of Peremptory Challenges During Criminal Jury Selection in Oregon” (2021) 57(2) *Willamette L.Rev.* 85; Karen M. Bray, Comment, “Reaching the Final Chapter in the Story of Peremptory Challenges” 40 *UCLA L.Rev.* (1992) 517, 554–564; James J. Gobert, *The Peremptory Challenge—An Obituary* (1989) *Crim.L.Rev.* 528, 530–33; Jason Hochberg, *Peremptory Challenge: An American Relic Like the Model-T Ford and the \$2 Bill, Its Time Has Passed* (1996) 10 *WTR Crim. Just.* 10; Keith A. Ward, Comment, “‘The Only Thing in the Middle of the Road Is a Dead Skunk and a Yellow Stripe’ Peremptory Challenges—Take ‘em or Leave ‘em” (1995) 26 *Tex.Tech L.Rev.* 1361, 1387–1392; Barbara L. Horwitz, Comment, “The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?” (1993) 61(4) *U.Cin.L.Rev.* 1391, 1427–1439; Albert W. Alschuler, “The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts,” *The Unconstitutionality of the Peremptory Challenge: Is It Bedtime for Batson?* (1996) 56 *U.Chi.L.Rev.* 153, 199–211.

Recognizing the importance of this issue, other states have begun to act. The Arizona Supreme Court recently eliminated peremptory challenges,⁸³ and New York has a pending bill to do the same in criminal cases.⁸⁴ By contrast, Washington and Connecticut both declined to take this step. The Washington Jury Selection Workgroup concluded that “[e]liminating peremptory challenges is not the preferred way to address juror discrimination.”⁸⁵ Likewise, the Connecticut Jury Selection Task Force rejected this idea because (1) it would require amending the state constitution, (2) peremptory challenges fulfill important goals, (3) the bar and bench would likely oppose such a move, and (4) such a measure might have only a marginal impact on reducing implicit bias in jury selection.⁸⁶

The work group noted that advocates in favor of retaining peremptory challenges argue that elimination would not lead to fairer juries because jurors who exhibit bias are not always excused for cause.⁸⁷ As a result, previous attempts in the California Legislature to limit peremptory challenges have met with strong opposition.⁸⁸ Most recently, Senate Bill 212 (2021–2022 Reg. Sess.), which sought to eliminate peremptory challenges in criminal cases, did not pass out of committee. Likewise, Senate Bill 1133 (2019–2020 Reg. Sess.), which tried to extend a sunset provision that reduced the number of peremptory challenges in misdemeanor trials, failed to gain traction.

The work group also considered whether reducing the number of peremptory challenges would be beneficial and a possibly more viable alternative to elimination. A few commenters specifically recommended curtailing the number of peremptory challenges as a way to reduce bias during jury selection and to increase efficiency in the jury selection process. Fewer peremptory challenges would arguably still allow parties to strike prospective jurors about whom

⁸³ In Arizona, peremptory challenges are provided by rule of court, not by statute: www.azcourts.gov/Portals/20/2021%20Rules/R-21-0020%20Final%20Rules%20Order.pdf?ver=2021-08-31-105653-157.

⁸⁴ NY State Senate, Sen. Bill [S6066](#).

⁸⁵ See State of Washington Courts, *Proposed New GR 37—Jury Selection Workgroup Final Report* (Feb. 2018), p. 3. The report further stated: “Workgroup members discussed the idea of eliminating peremptory challenges and concluded that they are still useful as long as they are not based on the race or ethnicity of potential jurors. One member commented that the removal of peremptory challenges would force appellate courts to examine the challenges for cause, which could lead to an inconsistent or possibly unwanted outcome.” (*Ibid.*)

⁸⁶ State of Conn. Judicial Branch, *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson* (Dec. 31, 2020), at pp. 30–32, https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.

⁸⁷ See, e.g., California Innocence Coalition’s opposition to SB 212, Senate Committee on Public Safety Report (Apr. 20, 2021), pp. 6–7.

⁸⁸ According to the Senate Committee on Public Safety Report for SB 212, five previous legislative attempts to limit peremptory challenges have failed: SB 794 (2013–2014 Reg. Sess.); AB 1557 (2007–2008 Reg. Sess.); AB 886 (1997–1998 Reg. Sess.); AB 2003 (1995–1996 Reg. Sess.); AB 2060 (1995–1996 Reg. Sess.).

they have legitimate case-specific concerns, without providing the opportunity to strike prospective jurors for mere “gut” feelings resulting from unconscious bias.⁸⁹

Ultimately, the work group decided to highlight this important issue but not to propose any changes at this time. The Legislature, in enacting AB 3070, opted to change the *Batson/Wheeler* framework instead of eliminating or reducing peremptory challenges. Thus, the group agreed to defer further discussion of this issue to allow time for the impact of this legislation to be realized.

The Cause Challenge

Justice Goodwin H. Liu, of the California Supreme Court, has highlighted the “significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors, which may result in juries with higher levels of implicit bias.”⁹⁰

The work group acknowledged that the *cause* challenge may be an important issue that affects the demographic composition of juries. However, the group’s charge was to study issues related to peremptory challenges, specifically how “*Batson/Wheeler* operates in practice in California and whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection.”⁹¹ Mindful of this focus, the work group decided to defer this issue for future consideration, especially if demographic data of jurors can be collected to provide a better understanding of how different groups proceed through jury selection.

VI. JUROR EDUCATION ABOUT IMPLICIT BIAS

Juror Video

The Jury Selection Work Group is not aware of any California courts that show videos specifically dedicated to implicit bias education for jurors. However, at least one federal court shows jurors an 11-minute video in which a judge and two attorneys explain the difference between conscious and unconscious bias and how jurors can prevent unconscious bias from affecting their decisionmaking.⁹² The New York State Unified Court System’s Office for Justice Initiatives, in collaboration with the Perception Institute, recently produced a video focused on

⁸⁹ In January 2020, the Judicial Council of California issued a report that reviewed the impact of Senate Bill 843 (Stats. 2016, ch. 33). This legislation temporarily reduced the number of peremptory challenges authorized in criminal misdemeanor cases, from January 1, 2017, through January 1, 2021. The report found that practitioners on average did not use all the peremptory challenges available, even when the maximum number was decreased. (See Judicial Council of Cal., *Peremptory Challenges in Misdemeanor Cases* (2020), www.courts.ca.gov/documents/lr-2020-peremptory-challenges-ccp23_1.pdf.)

⁹⁰ *People v. Suarez* (2020) 10 Cal.5th 116, 194 [conc. opn. of Liu, J.]. See also Thomas Ward Frampton, “For Cause: Rethinking Racial Exclusion and the American Jury” (2020) 118(5) *Mich. Law Rev.* 785, <https://repository.law.umich.edu/mlr/vol118/iss5/3>.

⁹¹ Supreme Court of Cal., news release on creation of the California Jury Selection Work Group, January 29, 2020, <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-11/SupCt20200129.pdf>.

⁹² Fed. Dist. Court for the Western Dist. of Wash., *Unconscious Bias Juror Video*, www.wawd.uscourts.gov/jury/unconscious-bias.

implicit bias and now shown to all jurors in that state.⁹³ The Connecticut Jury Selection Task Force recommended the creation of a video explaining implicit bias, to be shown to jurors at a sufficiently early stage so that the topic can be addressed in voir dire,⁹⁴ and Connecticut has now produced a video based on this recommendation.⁹⁵ Oregon and Harris County, Texas, also have jury orientation videos on implicit bias.⁹⁶ The work group concluded that a video explaining implicit bias could be useful for educating jurors on the subject.

Jury Instructions

The Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM) already incorporate admonitions about implicit bias. CACI No. 113⁹⁷ and CALCRIM Nos. 101 and 200⁹⁸ tell jurors not to let bias influence their assessment of the evidence or their decision. These instructions also inform jurors that they may be unaware of their assumptions, biases, or stereotypes of other people.

The work group considered the possibility that the existing jury instructions, especially in the absence of a video that explains implicit bias, may not go far enough in giving jurors tools to recognize their implicit biases and that more robust instructions might be helpful in mitigating implicit bias during jury deliberations. The Connecticut Jury Selection Task Force arrived at a similar conclusion and recommended that its state's implicit bias jury instructions be revised to

⁹³ N.Y. State Unified Court System, Office for Justice Initiatives, *Jury Service and Implicit Bias* (Aug. 24, 2021), www.youtube.com/watch?v=eqtv6gCxtg.

⁹⁴ See *Report of the Jury Selection Task Force*, *supra*, at p. 41.

⁹⁵ Conn. Judicial Branch, *Unconscious Bias: Jury Video* (Dec. 3, 2021), www.youtube.com/watch?v=3QO8KFYxLek&t=178s&ab_channel=CTJudicialBranch.

⁹⁶ [Judicial Department, State of Oregon, Oregon Implicit Bias Training](http://www.youtube.com/watch?v=BA-z4mS_Evg) (Nov. 30, 2020), www.youtube.com/watch?v=BA-z4mS_Evg; Harris County District Clerk, Texas, *A Message to Jurors: Unconscious Bias* (Aug. 6, 2019), www.youtube.com/watch?v=UcR5VWnZfI&ab_channel=HarrisCountyDistrictClerk.

⁹⁷ Judicial Council of Cal., CACI No. 113: “Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. [¶] Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions. [¶] As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against parties or witnesses because of their disability, gender, gender identity, gender expression, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status [, or [insert any other impermissible form of bias]].”

⁹⁸ Judicial Council of Cal., CALCRIM Nos. 101, 200: “You must not let bias, sympathy, prejudice, or public opinion influence your assessment of the evidence or your decision. Many people have assumptions and biases about or stereotypes of other people and may be unaware of them. You must not be biased in favor of or against any party, witness, attorney, defendant[s], or alleged victim because of his or her disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, [or] age (./) [or socioeconomic status] (./) [or <insert any other impermissible form of bias>.]”

(1) explain implicit bias and its effects, (2) motivate jurors to avoid it, (3) offer specific techniques for debiasing, and (4) be written in clear, plain English.⁹⁹

Implicit bias jury instructions in California may be helpful. However, there is an absence of scholarship to determine what type of instruction jurors would best respond to.¹⁰⁰ The work group recommends that additional study be undertaken by an appropriate group to determine whether a more detailed instruction should be used in California. Implicit bias is a complex psychological phenomenon, and although addressing its influence among jurors is desirable, studies suggest that some attempts to ameliorate implicit bias can have unintended backlash that may do more harm than good.¹⁰¹ For example, encouraging insight into one's biases and bolstering motivation to control prejudice may be helpful in reducing the influence of implicit bias on behavior, but people asserting their own objectivity may ironically increase prejudice.¹⁰² Interventions that attempt to help people recognize and resist their own biases run the danger of evoking a defensive response that can cause people to counterproductively assert their own objectivity. Therefore, further study is needed to determine how best to approach the issue of minimizing implicit bias through jury instructions. Experts in behavioral psychology may be of particular use to ascertain the effects of any potential improved jury instructions in test studies before implementation in courts.

Moreover, the context of juror deliberation may already have some inherent features that inhibit the influence of bias on decisionmaking. Stereotypes and biases tend to affect judgment the most in spontaneous behaviors rather than in deliberative ones.¹⁰³ The extended and purposeful process of jury deliberation makes it more likely that decisions will be influenced by jurors' explicit beliefs rather than implicit biases. Stereotypes and biases are also relied on most when other individuating information is unavailable.¹⁰⁴ When deliberating, jurors consider the

⁹⁹ See *Report of the Jury Selection Task Force*, *supra*, at pp. 34–41.

¹⁰⁰ Jennifer K. Elek and Paula Hannaford-Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction* (Nat. Center for State Courts, Apr. 2014).

¹⁰¹ See, e.g., Jennifer K. Elek and Paula Hannaford-Agor, "First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making" (Univ. of Nebraska, 2013) 49 *Court Review* 190, 193; Kari Edwards and Tamara S. Bryan, "Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information" (Aug. 1, 1997) 23(8) *Personality and Social Psychology Bulletin* 849; Joel D. Lieberman and Jamie Arndt, "Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence," 6(3) *Psychology, Public Policy, and Law* 677 (2000).

¹⁰² Calvin K. Lai, Kelly M. Hoffman, and Brian A. Nosek, "Reducing Implicit Prejudice" (2013) 7(5) *Social and Personality Psychology Compass* 315, www.ccsme.org/wp-content/uploads/2017/05/Reducing-Implicit-Prejudice.pdf.

¹⁰³ John F. Dovidio et al., "On the Nature of Prejudice: Automatic and Controlled Processes" (1997) 33(5) *Journal of experimental social psychology* 510; Andrew M. Rivers et al., "On the Roles of Stereotype Activation and Application in Diminishing Implicit Bias" (2020) 46(3) *Personality and Social Psychology Bulletin* 349–364.

¹⁰⁴ Ziva Kunda and Steven J. Spencer, "When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application" (2003) 129(4) *Psychological Bulletin* 522.

evidence presented, which is specific information that may make reliance on stereotypes and implicit biases less likely.¹⁰⁵ The exacting nature of jury instructions may serve as useful objective criteria that can reduce the influence of bias, though jury instructions that include references to using “common sense” or other subjective terms may be less than ideal.

VII. CONCLUSION

A fair jury is fundamental to the administration of justice and a critical constitutional right. Achieving a fair jury begins with assembling a representative cross section of the community—one that reflects local community standards, beliefs, and ideals. In assessing the underlying processes that affect the composition of juries, the work group encountered difficult and challenging issues. These issues cannot be resolved with one simple solution but, instead, by exploring and addressing a variety of factors.

The goal of the work group was to report back to the Supreme Court with proposals on how discrimination during jury selection could be eliminated and a more representative cross section of the community in juries could be achieved. The group focused on determining the root causes of demographically unrepresentative juries. The members concluded that various steps in the jury process—from the initial summons to courtroom selection—may result in a sworn jury that does not sufficiently represent the community at large.

Despite significant efforts to obtain relevant and reliable data, the work group met with little success because California courts do not currently collect the necessary data in an accessible manner. Accordingly, the work group strongly recommends that systems of data collection be implemented. Most of the group’s proposals are necessarily based on the collective experience of its members, the significant anecdotal information gathered, theoretical knowledge, and the limited data collected.

¹⁰⁵ Lai, “Reducing implicit prejudice,” *supra* (see § VI, n. 103).