

RACIAL BIAS IN CALIFORNIA JURY SELECTION

MI KIM

(MI@SDAP.ORG)



WE ARE VERY GRATEFUL TO PROFESSOR SEMEL & THE
BERKELEY LAW DEATH PENALTY CLINIC.

Semel et al., Guess Who's Coming to Jury Duty? How the Failure to
Collect Juror Demographic Data Contributes to Whitewashing the
Jury Box, Berkeley Law Death Penalty Clinic (February 2024)

Semel et al., Whitewashing the Jury Box: How California
Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors
(2020)

In Limine Motion for Questionnaire on Juror Demographic
Information



In *Batson*, Justice Marshall identified “unconscious racism,” that we more often refer to as “implicit bias” today, as the cause of most discriminatory strikes. (*Batson v. Kentucky* (1986) 476 U.S. 79, 106-107 (Marshall, J., concurring).)

Batson requires proof of purposeful discrimination & does not address implicit bias. Section 231.7 does.

PARTICIPANTS IN CALIFORNIA JURY SELECTION

“[E]xclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color.” (A.B. 3070 § 1, subd. (b).)

	Adult Population (2023)	Jurors	Prisoners (2023)	Lawyers (2023)	Prosecutors (2015)	Trial Judges (2024)
Black	6%	?	28%	3%	5.8%	9.5%
Latine	38%	?	46%	6%	9%	12.7%
White	37%	?	20%	65%	70%	57.6%
Asian	16%	?	6% “Other”	14%	12%	11.2%
Multi- racial	2%	?	6% “Other”	8%	3% “Other”	5.2%

THE LACK OF JUROR DEMOGRAPHIC DATA

CCP 205(c) permits additional jury questionnaires “as may be deemed relevant and necessary . . . to ascertain whether a fair cross section of the population is represented. . . if such procedures are established by local court rule”

- Superior courts do not systematically collect juror demographic data
- No local rules establish procedures “specifically allowing courts to ask for demographic questions of prospective jurors”
- Federal courts have collected juror demographic data on race since 1972

AB 1899 (2023-2024 Reg. Sess.) amended CCP 205 but did not change subd.(c)

THE LACK OF JUROR DEMOGRAPHIC DATA

Impedes or forecloses Section 231.7 relief

To obtain relief:

1. Parties must have juror demographic information before jury selection
2. Record must disclose race & ethnicity of trial judge, counsel, complaining witnesses & other witnesses.



THE LACK OF JUROR DEMOGRAPHIC DATA

Impedes Appellate Review of Section 231.7 Challenges

1. *Renders record incomplete for state appellate review & denies defendant due process.**
2. *Renders record incomplete for review in federal habeas proceedings.*

231.7 objection = objection under CA & U.S. Constitutions (subd. (d)(1))

Federal courts employ *Batson*

Habeas standard of review



THE LACK OF JUROR DEMOGRAPHIC DATA

Impedes the Representative Cross Section Guarantee

We cannot:

- Verify that cross-sections of communities are represented in summons process
- Identify trends in summons responses and excusals (for hardship and for cause)*
- Evaluate efficacy of Section 231.7.
- Verify if rulings on Section 231.7 objections are fair.* *



THE LACK OF JUROR DEMOGRAPHIC DATA

Defeats Section 231.7's Purpose



Without juror self-identification, parties and courts must resort to speculating about jurors' race or ethnicity based on racial or ethnic stereotypes.

- Section 231.7's purpose is to "eliminat[e] the use of group stereotypes and discrimination, whether based on conscious or unconscious bias" in exercise of peremptory strikes (A.B. 3070, § 1(c).)

Studies show mismatch between racial classifications and self-identification.*

THE LACK OF JUROR DEMOGRAPHIC DATA

Perpetuates Harms

“[E]xclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color” (AB 3070 § 1, subd. (b).)

A juror “excluded from jury service because of race suffers a profound personal humiliation heightened by its public character.” (Powers v. Ohio (1991) 499 U.S. 400, 413-414.)

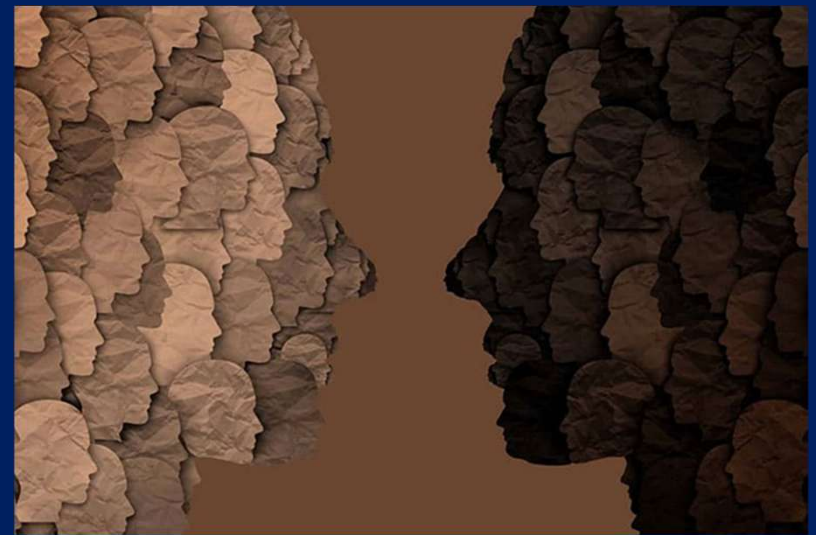
Community is harmed by “perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system.” (J.E.B. v. Alabama ex. rel. T.B. (1994) 511 U.S. 127, 140.)



IMPLICIT BIAS

2.5 million Implicit Association Test (IAT) & self-reported surveys (2000-2006) show:

- 68% of participants have anti-Black implicit bias
- 74.5% of participants have pro-White implicit bias
- But only 54% admit to having pro-White preference.*



IMPLICIT BIAS & PROSECUTORS

The prosecutor's "seat-of-the-pants instincts" about a juror, on which they often rely in exercising peremptory strikes, may "be just another term for racial prejudice." (Batson, 476 U.S. at 106 (Marshall, J., concurring).)

"When in doubt, Kick 'em Out (don't let your intellect get in the way of your instincts)" – Ventura County.

The Inquisitive Prosecutor's Guide, Santa Clara County District Attorney's Office (2016)



IMPLICIT BIAS & TRIAL JUDGES

IMPLICIT BIAS

WHAT WE DON'T THINK WE THINK



“A judge’s own conscious or unconscious racism may lead him to accept [prosecutor’s] explanation as well supported.” (*Batson*, at p. 106 (Marshall, J., concurring).)

US Sentencing Commission found that most judges consider themselves unbiased.

But....

IMPLICIT BIAS

From Batson to Section 231.7

Whitewashing the Jury Box. Study of 683 Court of Appeal *Batson* decisions from 2006 to 2018. 98% involved prosecutor's removal of jurors:

71.6% = Black jurors removed

3.5% = Asian jurors

28% = Latine jurors removed

0.5% = White jurors

Most reasons for strikes are now presumptively invalid under Section 231.7.

Courts of Appeal found *Batson* error in 18 cases (2.6%) & remanded 3 cases (.4%)

CSC (1989 to 2019) found three *Batson* errors in 142 *Batson* claims (2.1%).

IMPLICIT BIAS

From Batson to Section 231.7

Section 231.7's purpose = eliminate use of “stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.” (AB 3070, § 1(c).)

Subd. (d)(1): The court need not find purposeful discrimination to sustain the objection

Subd. (d)(2)(C): “unconscious bias” includes implicit and institutional biases



IMPLICIT BIAS & JURORS

Jurors are unable to self-diagnose bias.

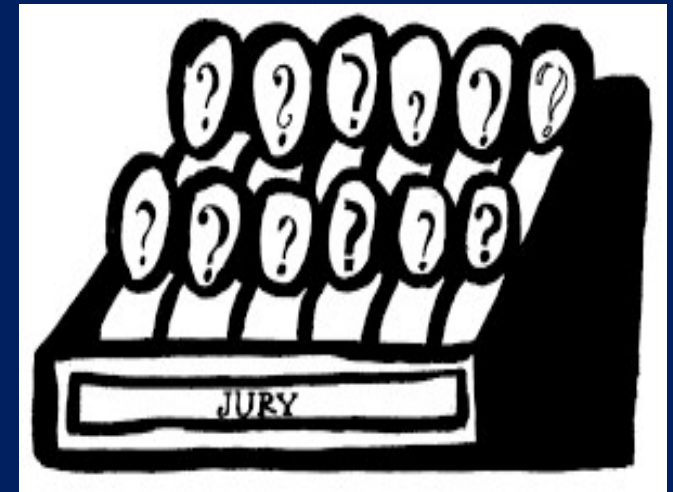
- Unconscious nature of Implicit bias.
- Social Desirability Bias.
- Bias Blind Spot.



IMPARTIAL JURY MUST BE DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

“[T]he only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.” (People v. Wheeler (1978) 22 Cal. 3d 258, 266-267.)

AB 1981 (2021-2022 Reg. Sess.). Authorized 2-year pilot program to ensure collection of juror demographic data (incl. race & ethnicity) in six county courts. Funding reversed in May.



RACIALLY DIVERSE JURIES

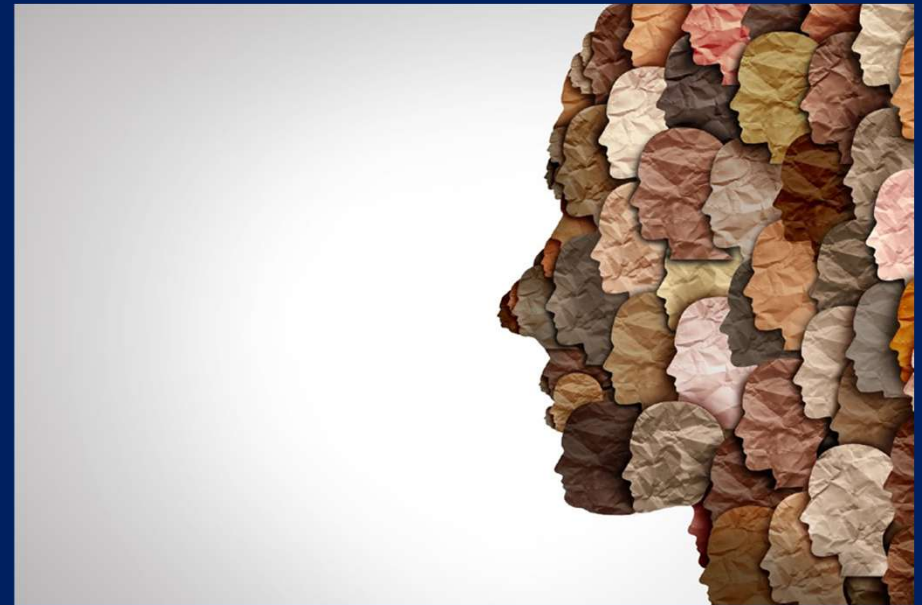
Increase quality & fairness of deliberations

More thorough & accurate than all-White juries

- Deliberate longer
- Fewer inaccurate statements

White jurors in diverse juries

- Less likely to convict Black Ds
- More likely to guard against racial prejudice



Kesser v. Cambra (9th Cir. 2006) 465 F.3d 351 case study on comparative juror analysis

All White jury in murder trial. DA struck 3 Native American & 1 Asian female jurors.

DA's Reasons for striking only Native American on regular panel:

- darker skinned female & worked for tribe
- Tribe employees are “resistive” and “suspicious”
- “emotional and misty” when discussing child’s molestation
- “molesting is okay in certain [N]ative American cultures”
- “there are a whole bunch of people that violate our laws”
- juror had “a dysfunctional family” “living situation”
- “pretentious” and “self-important”
- “unstable, fairly weak”



Case Study: Kesser v. Cambra (9th Cir. 2006) 465 F.3d 351

case study on comparative juror analysis

(Justice Reinhardt opinion) Held: Racial animus is “clear” & reasons based on “blatant racial and cultural stereotypes.” CA courts “unreasonably accepted his nonracial motives as genuine” by failing to conduct comparative analysis. (p. 357.)

- RT of voir dire & juror questionnaires “clearly and convincingly” refuted prosecutor’s nonracial reasons. (p. 360.)
- “Side-by-Side” comparison of prosecutor’s reasons with seated jurors’ background and responses revealed his “purposeful and plainly racial motives” (pp. 361-362.)
- Reasons showed the need for comparative juror analysis (p. 368.)



Tips & Strategies for Appellate Practitioners

Does the record disclose demographic information about all jurors (prospective, removed [hardship, cause, peremptory], seated), complaining witnesses, other witnesses, parties, judges?

Was the demographic information made available before jury selection?

If not, did defense counsel request juror demographic information?



Tips & Strategies for Appellate Practitioners

Did the trial court preclude defense counsel from making a record on any of their objections?

Did the race, etc. of any of the parties or witnesses “bear on the facts of the case to be tried”?

Did trial court educate jurors about implicit bias (jurors watch video? discussion or jury instruction?)



Tips & Strategies for Appellate Practitioners

Did prosecutor engage in illegal discrimination?

Other thoughts. . . .

Please share Professor Semel's motion with trial counsel!





THANK YOU.

MI KIM (MI@SDAP.ORG)