Examining Voir Dire In California

Prepared for:
The Administrative Office of the Courts

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Acknowledgements

The origins of this study of jury selection practices in California stem from a long series of discussions by the Blue Ribbon Commission on Jury System Improvement and its successor, the Task Force on Jury System Improvements, on the appropriate relationship between challenges for cause and peremptory challenges. Although the members of those two organizations were never able to arrive at a unanimous consensus on those issues, they recognized that very little about the process of voir dire had been systemically documented and they supported efforts by the Administrative Office of the Courts to conduct research that might inform policy making on this topic. We owe a great debt to their foresight and for the inspiration of their discussions that provided us with the opportunity to undertake this project.

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The process of selecting a jury has always been something of a mystery. Judges, trial lawyers, the lay public, and jurors themselves acknowledge that the prospective jurors who arrive in the courtroom for voir dire have all manner of life experiences and pre-existing attitudes, some of which may be relevant to the trial at hand and others that are inconsequential. The dilemma for judges and lawyers is finding out which questions will prompt jurors to disclose information useful to the task of judging each juror's suitability to sit on the jury. Most experienced judges and trial lawyers have developed their own techniques, questions, and interaction styles that they believe serve them best, but the variations of these techniques are legion and few of them have actually been put to the test of rigorous evaluation.

Related to the issue of how to encourage jurors to disclose case-relevant information is how judges and lawyers should react to that information given their respective roles in the trial. In most jurisdictions, judges are responsible for ensuring that the parties receive a fair trial; this includes verification that all jurors impaneled are qualified to serve, can evaluate the trial testimony, and will apply the governing law fairly and impartially. Judges fulfill this responsibility during voir dire by questioning jurors about their ability to be fair and impartial, listening carefully to their responses, and excusing those individuals whom the judge and lawyers agree would have difficulty serving. The term describing this justification for removal is called a "challenge for cause" and these challenges comprise the first level of screening in the voir dire process.

The second level of jury screening, the exercise of peremptory challenges, is more nuanced. The objective of the trial attorneys is to use peremptory challenges to help mold the composition of the jury by removing prospective jurors they believe might be unfavorable to their side of the case. Unlike challenges for cause, which require a definitive conclusion that the prospective juror is unqualified or cannot serve fairly and impartially, peremptory challenges require no justification at all.[1] The use of peremptory challenges, which permits litigants to participate in the selection of the individuals who will ultimately sit in judgment of the case, is a long-standing tradition in the United States, although the actual number of peremptory challenges available for the litigants' use varies considerably from state to state.[2]

Although the objectives of jury selection differ somewhat between the trial judge and trial attorneys, both must contend with essentially the same two questions: 1) at what point do the life experiences or attitudes of a prospective juror make it unlikely that he or she could serve fairly and impartially? 2) How much confidence must the judge or lawyers have in their assessment of a prospective juror's suitability before deciding to remove or retain that person on the jury panel? Because fairness and impartiality, like beauty, often lies in the eyes of the beholder, definitive answers to these questions continue to evade trial practitioners in California and elsewhere in the United States.

THE LEGAL FRAMEWORK FOR VOIR DIRE IN CALIFORNIA AND ELSEWHERE

Further complicating the discussion of these questions is the fact that the legal framework in which

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[1] In 1986, the U.S. Supreme Court ruled that peremptory challenges exercised for the purpose of racial discrimination violated the Equal Protection Clause of the federal constitution. *See* Batson v. Kentucky, 476 U.S. 79 (1986). Subsequent decisions by the U.S. Supreme Court and by various state courts have extended the reasoning in *Batson* to prohibit the discriminatory use of peremptory challenges on the basis of gender and religion. Nevertheless, the procedures established to verify that lawyers use their peremptory challenges in a non-discriminatory fashion has been widely criticized as unwieldy and ineffective.

[2] *See* G. THOMAS MUNSTERMAN, PAULA L. HANNAFORD, & G. MARC WHITEHEAD, JURY TRIAL INNOVATIONS, App. 4 (1997) (listing the number of peremptory challenges by state and case type).

voir dire takes place varies considerably across jurisdictions. In California, this framework is described in the Trial Jury Management and Selection Act, at Sections 190-237 of the California Code of Civil Procedure. The statute describes the essential purpose of voir dire, methods of questioning by the judge and trial lawyers, the basis for challenges for cause, and the number of peremptory challenges available to the litigants in different types of cases.

Section 223, pertaining to voir dire in criminal trials, provides for an initial examination of prospective jurors by the judge. Thereafter, counsel may question prospective jurors directly, but the court retains broad discretion to limit the amount of time allotted for lawyer-conducted voir dire. The statute is explicit that the only purpose of voir dire is to aid in the exercise of challenges for cause, and interpretative case law emphasizes that voir dire is not properly used for indoctrinating prospective jurors on the lawyers' theories of the case, for questioning about the applicable law, or for exercising peremptory challenges. The statute pertaining to civil voir dire rule is similar, but provides somewhat greater latitude in that this provision explicitly permits lawyers to question jurors for the purpose of exercising peremptory challenges.

Challenges for Cause

Challenges to individual jurors can be made by either party on the following grounds: general disqualification, implied bias, or actual bias.[3] General disqualification refers to statutory qualifications for jury service (citizenship, residency, age, and mental competence).[4] Implied bias refers to a prospective juror's relationship (consanguinity, affinity, fiduciary) to a party; prior service as a grand or petit juror in an action involving a party; an interest in the outcome of the case; or having unqualified opinions or beliefs based on the knowledge of material facts or bias toward a party.[5] Interpretive case law established the requirement that challenges for cause can only be made in the order prescribed in the statute, and that failure to do so results in the waiver of the right to challenge on those grounds.[6] Challenges for cause are exercised before parties exercise their peremptory challenges.[7] If the trial court denies a motion for challenge for cause, the moving party must exhaust all peremptory challenges and renew its objection to the composition of the sworn jury panel in order to reserve the basis for appeal. Failure to do so renders any error in the court's denial of the challenge for cause harmless.[8]

The standard for granting a challenge for cause is whether the views of the prospective juror would "prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath."[9] The California appellate courts give considerable deference to the trial courts with respect to this determination. "The trial court's resolution of … factual matters is binding on the appellate court if supported by substantial evidence. Where equivocal or conflicting responses are elicited …, the trial court's determination as to [the juror's] true state of mind is binding on the appellate court."[10]

Peremptory Challenges

With respect to peremptory challenges, defendants in capital felony cases (those punishable by death or by a term of imprisonment for life) are entitled to 20

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[3] Cal. Civ. Proc. Code § 227 (Deering 2004).

[4] Cal. Civ. Proc. Code § 228 (Deering 2004).

[5] Cal. Civ. Proc. Code § 299 (Deering 2004).

[6] *See* California v. Sampo, 118 P. 957 (Cal. 3d App. 1911).

[7] Cal. Civ. Proc. Code § 226(a) (Deering 2004).

[8] *See* California v. Boyette, 58 P.3d 391 (Cal. 2002); California v. Crittenden, 885 P.2d 887 (Cal. 1994).

[9] *Boyette,* 58 P.3d at 413-14.

[10] *Id*. at 414. *See also* California v. Weaver, 29 P.3d 103, 120 (2001).

peremptory challenges and the prosecution is entitled to an equal number as the defense. In other felony and misdemeanor cases for which the offense charged is punishable with a prison term greater than 90 days, each side is entitled to 10 peremptory challenges. If multiple defendants are tried jointly their challenges are exercised jointly. However, each defendant is entitled to five additional separate peremptory challenges, and the state is entitled to as many additional peremptory challenges as were granted to the defendants.[11]

Defendants charged with offenses punishable by a prison terms of 90 days or less are entitled to six peremptory challenges each. If multiple defendants are jointly tried for offenses punishable by prison terms of 90 days or less, their challenges are exercised jointly and each defendant is entitled to four additional separate peremptory challenges, and the state is entitled to as many additional peremptory challenges as granted to the defendants.[12] Parties in civil cases are entitled to six peremptory challenges each, except in cases involving more than two parties. In those cases, the court divides the parties into two or more sides according to their respective interests at trial and each side is entitled to eight peremptory challenges. The court may grant additional peremptory challenges to each side in a civil case as the interests of justice require.[13] Peremptory challenges may not be used to remove a prospective juror on the basis of an assumption that a juror is biased on account of race, color, religion, sex, national origin, sexual orientation, or similar grounds.[14]

Other States/National Perspective

The California framework for jury selection differs from other states in some significant ways. One of these is the comparatively heavy reliance on statutory provisions to define the legal basis for challenges for cause. Other than juror qualification criteria, most U.S. jurisdictions rely on case law to define criteria for the granting of a challenge for cause, which provides some advantage to judges and lawyers insofar that the cases themselves provide concrete illustrations of the situations in which these criteria should be applied. As a practical matter, however, all U.S. jurisdictions give substantial discretion to trial judges with respect to these decisions.

Other states also differ substantially with respect to the role of peremptory challenges in voir dire and the number of challenges available to the parties. Maryland, for example, is similar to California in that the detection of juror bias or partiality is recognized as the only legitimate purpose of voir dire.[15] Minnesota, in contrast, explicitly recognizes that the eliciting of information which attorneys can use to exercise peremptory challenges is permitted.[16] Although not confirmed empirically, there is some indication that states that recognize examination for the purpose of exercising peremptory challenges permit a wider scope of questioning, and correspondingly longer voir dire time, than states that restrict voir dire examination to challenges for cause.[17] The majority of states permit six or fewer peremptory challenges per side in felony trials, and four or fewer challenges per side in misdemeanor and civil trials.[18] The American Bar Association recommends five peremptory challenges per side in felony trials (ten per side in capital felony trials), and three per side in misdemeanor and civil trials.[19]

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[11] Cal. Civ. Proc. Code § 231(a) (Deering 2004).

[12] Cal. Civ. Proc. Code § 231(b) (Deering 2004).

[13] Cal. Civ. Proc. Code § 231(c) (Deering 2004).

[14] Cal. Civ. Proc. Code § 231.5 (Deering 2004).

[15] Dingle v. Maryland, 759 A.2d 819 (Md. 1999).

[16] Minnesota v. David, 504 N.W.2d 767 (Minn. 1993).

[17] *See* Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures,* 85 Judicature 18, 25 (2001).

[18] *See* Munsterman, *supra* note 2, at App. 4.

[19] American Bar Association, Standards Relating to Juror Use and Management, Standard 9, 76-92 (1993).

Existing Research on Jury Selection

The study of jury decision-making has enjoyed considerable popularity in academia since the publication of *The American Jury,* the groundbreaking social science treatise on jury verdicts in criminal trials published by Harry Kalven and Hans Zeisel in 1966. Most of this research, however, has focused on the factors that influence how trial jurors perceive and evaluate evidence. The jury selection process of jury trials has largely remained a mysterious and little understood process, guided more by personal preferences and local custom than scientific principles. In fact, the only consistent finding from previous studies is that the jury selection processes and procedures are as varied as the judges and attorneys handling the case.

For instance, in one of the few published broad-based empirical investigations on jury selection to date, the National Center for State Courts found that voir dire varies widely in the length of jury selection, who conducts the questioning of prospective jurors, and the frequency and use of peremptory challenges.[20] A study by the New York State Unified Court System also revealed a wide variety of voir dire practices even among courts in the same state.[21] A review of the literature shows a paucity of recent, systematic scientific research on the mechanics of voir dire.

Studies examining challenges for cause show considerable variability across cases and courts. For instance, a 1986 survey of the New Mexico state courts found that one of every 20 prospective jurors were dismissed for cause, but this number varied extensively from one case to another. In addition, there is no published scientific data suggesting that judges and attorneys generally agree on when and how removals for cause should be made.

Mock jury studies also have demonstrated the difficulty of identifying juror bias. Olczak, Kaplan, and Penrod compared trial attorneys' evaluations of mock jurors to those of college students and law students, and found no appreciable difference between the experienced trial attorneys and the students.[22] Similarly, Kerr, Kramer, Caroll, and Alfini asked attorneys to rate jurors' level of bias after viewing videotaped voir dire simulations.[23] Results showed that the attorney-participants in that study were no more likely to identify jurors biased against them than they would due to chance alone.[24]

Part of the difficulty of making these determinations is generating candid disclosures by jurors that can be used to identify potential juror bias. The courtroom setting is unfamiliar for most prospective jurors and tends to inhibit their willingness to disclose personal information, particularly if they do not understand the relevance of the requested information to the trial at hand.[25] Some studies have found that jurors respond more candidly to lawyer-conducted voir dire than to judge-conducted voir dire, ostensibly because jurors are less intimidated by lawyers and are more likely to respond with candid answers rather than socially desirable ones.[26]

Other studies have suggested that the relative inti-

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[20] *See* National Center for State Courts, On Trial: The Length of Civil and Criminal Trials 40-52 (1988).

[21] *See* Judith S. Kaye & E. Leo Milonas, New York State Unified Court System Report on the Civil Voir Dire Study (1995).

[22] *See* Paul V. Olczak, Martin F. Kaplan & Steven Penrod, *Attorneys' Lay Psychology and its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. Soc. Behav. & Personality 431, 440-46 (1991).

[23] *See* Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 Am. U. L. Rev. 665, 671 (1991). The experimenters first exposed "jurors" to varied degrees of simulated pretrial publicity and then asked the jurors questions that would normally be asked during voir dire. *See id.* at 673-74. The study participants were asked to rate the jurors' biases based on their videotaped responses. *See id.* at 677-78.

[24] *See id.* at 688-89.

[25] *See* Hannaford, *supra* note 17, at 23-25.

[26] *See, e.g.,* David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 Ind. L. J. 245, 250-58 (1981); Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges, and Adversarial Advocacy, in* The Trial Process 69, 75-92 (Bruce D. Sales ed.) (1981); Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire,* 11 L. & Human Behav. 131 (1987).

macy of the voir dire setting has an effect on juror candor, with jurors providing more candid information when they are questioned individually rather than as part of the entire panel. Judge Gregory E. Mize (ret.) reported on particularly striking results with this technique while serving on the D.C. Superior Court. In 1999, Judge Mize wrote that nearly 20% of "silent jurors" – that is, prospective jurors who failed to disclose information during voir dire with the entire panel – nevertheless disclosed case-relevant information when given an opportunity to do so in the relative intimacy of individual voir dire.[27]

Peremptory challenges also have been the subject of several studies, especially in the context of race and gender.[28] In one such study, Mary R. Rose investigated the presence of race or gender discrimination in the way that attorneys exercised their peremptory challenges.[29] Results of this study indicated that prosecutors were far more likely to challenge African Americans than were defense attorneys and, in turn, defense attorneys were far more likely to challenge White jurors than were prosecutors.[30] In addition, men were challenged more frequently than women overall.[31] Yet these trends were diminished by the fact that defense attorneys exercised more peremptory challenges than prosecutors.[32] Because defense attorneys were more likely to challenge Whites and men than African Americans and women, several juries in the sample actually overrepresented African Americans and women.[33] In the end, however, most of the juries in this study had racial and gender compositions comparable to the community from which they were drawn.[34]

Rose also studied the effect of peremptory challenges upon excused jurors' perceptions of the legal system by talking with 92 jurors who were excused through this technique.[35] Rose cites critics' beliefs that peremptory challenges leave excused jurors with a dislike of the system that attacked their potential to be fair and unbiased.[36] The results of her study, however, reveal that most of the excused jurors were satisfied with and accepting of their dismissal.[37] This was particularly true of jurors who believed they were excused for their behavior in court or for their prior legal experiences, though it was less true of jurors who believed they were excused for personal characteristics.[38]

Previous research has examined the effect of peremptory challenges on trial outcomes only peripherally. In a groundbreaking study of the use of peremptory challenges in a federal District Court in Chicago, Zeisel and Diamond found that peremptory challenges did not appear to affect the

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[27] Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 36 CT. REV. 10 (Spring 1999).

[28] *See, e.g.* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PENN. J. CONST. L. 3 (2001). Newer literature also examines whether peremptory challenges based on jurors' religious beliefs should be prohibited, as well. *See* John H. Mansfield & John H. Watson, Jr., *Peremptory Challenges to Jurors Based Upon or Affecting Religion*, 34 SETON HALL L. REV. 435 (2004).

[29] *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data From One County*, 23 LAW & HUM. BEHAV. 695 (1999).

[30] *See id.* at 698-99.

[31] *See id.* at 699.

[32] *See id.* at 698.

[33] *See id.* at 699.

[34] *See id.*

[35] *See* Mary R. Rose, *A Voir Dire of Voir Dire: Listening to the Jurors' Views Regarding the Peremptory Challenge*, 78 CHICAGO-KENT L. REV. 1061 (2003).

[36] *See id.* at 1064.

[37] *See id.* at 1083-86.

[38] *See id*.

outcome of the majority of trials.[39] However, the attorneys' performance in exercising peremptory challenges in the study varied substantially from one case to another, leading the authors to conclude that the effective use of peremptory challenges did affect the final verdicts in five of the twelve cases studied.[40] This success rate is worth noting, especially when one considers that by far the strongest determinant of jury verdicts is the evidence presented at trial.[41] In another study, Johnson and Haney found that attorneys were only moderately successful in challenging jurors who were biased against their case; but even then, the composition of the carefully selected jury did not significantly differ from a randomly selected jury.[42]

The few existing scientific studies on voir dire often are limited or dated. Most studies are restricted to a single jurisdiction and a handful of trials. Other studies rely on mock juries, which call into question the reliability of findings when applied to actual juries. Furthermore, the research falls short of explaining the key differences in how attorneys and judges conduct voir dire and the effects of such differences upon jury selection.

Jury Reform in California

Against this backdrop of social science literature and variations in voir dire practices nationally, California has over the past decade engaged in sweeping efforts to improve jury system management and trial procedures, including improvements to jury selection practices. In 1996, the Blue Ribbon Commission on Jury System Improvement (hereinafter "Blue Ribbon Commission") agreed that peremptory challenges had a legitimate role in the California justice system, but recommended significant reductions in the number of peremptory challenges in all case types.[43] The justification for this proposal highlighted several factors including respect for jurors' sensibilities, public trust and confidence in the jury system as a fair and effective method of adjudication, efficient use of court resources for jury management and administration, and the maintenance of constitutional objectives that the jury pool reflect a fair cross section of the community and that citizens are not excluded from jury service based on invidious discrimination by parties.[44]

When presented to the Judicial Council of California, the Blue Ribbon Commission proposal met with considerable opposition.[45] As a result, the Judicial Council decided not to sponsor legislation to implement the reductions, but instead passed the recommendations to the Task Force on Jury System Improvements (hereinafter "Task Force") for further study and development.[46] Agreeing that peremptory challenges were still critical to effective jury reform, the Task Force convened a full, one-day meeting in April 2002 to discuss the recommendations in light of any changes in state law, policy, or relevant research since submission of the Blue Ribbon Commission report.[47] Some of those changes included the possibility of increased use of peremptory challenges due to three-strikes legislation, the reintroduction of lawyer questioning in voir dire, the statewide introduction of one-day or one-trial terms of jury service, and heightened emphasis on public

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[39] *See* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491, 507 (1978). To gauge the effectiveness of the attorneys' peremptory challenges, the authors had excused jurors sit in on the trial and then report how they would have voted if picked for the jury. *See id.* at 492.

[40] *See id.* at 507-08.

[41] *See* Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 Law & Hum. Behav. 1, 13-14 (1987).

[42] *See* Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of its Content and Effect*, 18 Law & Hum. Behav. 487, 498 (1994). The Johnson and Haney study employed direct observations of felony voir dire in four trials in Santa Cruz, California, as well as surveys of the prospective jurors in those panels. *See id.* at 491-93.

[43] Report of the Blue Ribbon Commission on Jury System Improvement 62 (May 17, 1996) (Recommendation 4.6) [*hereinafter* Blue Ribbon Commission].

[44] See *id.* at 55-57.

[45] *See* Task Force on Jury System Improvements: Final Report 48 (Apr. 2004).

[46] *See id.*

[47] *See id.* at 48-50.

trust and confidence in the courts, especially on responsible stewardship of court resources.[48]

A significant part of the Task Force discussion involved the complementary relationship between peremptory challenges and challenges for cause, with a general agreement that any reductions in the number of peremptory challenges should be accompanied by a commensurate improvement in judicial commitment to meaningful review of challenges for cause.[49] A divided Task Force ultimately approved a reduction in the number of peremptory challenges in capital felony trials from 20 to 12, in felony trials from ten to six, in misdemeanor trials from ten or six (depending on potential sentence) to three, and in civil trials from six to three. Commensurate reductions were proposed in the number of additional peremptory challenges available in multi-defendant and multiple party civil trials.[50]

Focus of the Present Study

Several Task Force members noted that much of the debate over peremptory challenge use in California was based primarily on anecdotal information that failed to provide a consistent or reliable view of actual practices in the California superior courts. To help inform the debate, the Administrative Office of the Courts contracted with the National Center for State Courts to investigate current usage practices and estimate the potential impact of the proposed reductions in peremptory challenges. Because of the nexus between peremptory challenges and challenges for cause, the study was designed to examine peremptory challenges in the context of the entire voir dire process, including judicial decision making on challenges for cause. This report summarizes the study findings as follows:

- Chapter 2 describes the study methodology and reports on background information about jury panel management, including panel size, that may indirectly affect judicial and lawyer decision-making;

- Chapter 3 provides a summary of peremptory challenge usage in California based on 7,745 jury panels sent in 2002 to courtrooms for voir dire in 14 counties throughout the state. This chapter also estimates the likely impact of Task Force reductions in terms of the proportion of trials affected, the likelihood of differential effects on parties, and potential effects on jury system management (e.g., panel size and corresponding summoning and qualification practices);

- Chapter 4 discusses judicial decision-making with respect to challenges for cause based on courtroom observations from the voir dire in 18 criminal trials in eight counties in February and March 2004; and

- Chapter 5 offers conclusions about the overall effectiveness and efficiency of voir dire practices and proposes recommendations with respect to implementation of the Task Force proposals.

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[48] *See id.* at 50.

[49] *See id.*

[50] *See id.* at 50-51.

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Chapter 2 – Study Methodology

This research project was designed to examine the different procedural and operational components of the jury selection process and how these components interrelate. To conduct this examination, the NCSC considered a number of possible methodologies before settling on two that appeared most likely to provide accurate and objective information with the fewest number of logistical barriers. The first method involved the collection of jury panel data from courts' jury management systems in 14 counties across California. The second method involved direct observation of jury selection procedures in 18 criminal trials in eight urban courts. These two methods were considered complementary to one another in that the first would provide quantitative information about the disposition of prospective jurors assigned to jury panels while the second would provide more qualitative information about the specific factors that result in those dispositions. Both of these methods were supplemented by interviews with judges and jury staff in those courts to provide necessary context for the study findings.

NCSC staff also considered, but ultimately rejected, the extensive use of focus groups, surveys, and reviews of appeal transcripts as possible methods to examine the dynamics of jury selection. In August 2003, three members of the project staff conducted separate focus groups with superior court judges, district attorneys, and public defenders in Contra Costa County, California. Although they found the focus groups to be extraordinarily helpful for articulating the respective objectives and strategies employed by these constituencies in selecting a jury, they ultimately concluded that the focus group discussions failed to provide sufficient detail about the specific reasons for selecting or excusing individuals from jury panels in individual cases. The use of supplemental surveys with judges and attorneys was rejected for the same reason.

NCSC also attempted to obtain transcripts of the voir dire from a sample of felony jury trials appealed to the California Courts of Appeal. This method would have provided a verbatim record of the questions posed to jurors, the jurors' responses to those questions, and the judges' and lawyers' subsequent reactions to jurors' answers. Unfortunately, NCSC quickly discovered that the voir dire portion of the trial is rarely transcribed as part of the appellate record unless some irregularity in jury selection is alleged in the appeal. Even then, only the relevant portion of the voir dire (e.g., examination of a specific juror) is transcribed and identifying information about jurors is redacted from the record to preserve juror confidentiality in accordance with Section 237 of the California Code of Civil Procedure. NCSC staff concluded that the resulting sample of available transcripts would provide only an incomplete picture of jury selection and one that was already skewed by allegations of reversible error in the voir dire process.

Jury Panel Dataset

The Jury Panel Dataset consists of information from 7,745 jury panels sent to courtrooms for voir dire in 14 counties in 2002.[51] See Table 2.1. These counties represent a large portion of the total caseload in the superior courts. For fiscal year 2001-2002, the combined filings for these sites comprised 57.8 percent of the civil filings and 47.5

[51] Due to the timing of requests for data for this study, four of the superior courts (Contra Costa, Marin, Santa Cruz, and Ventura) provided information only on jury panels sent to courtrooms from January 1 through June 30, 2002. The remaining ten court systems provided information for the entire calendar year. The records for those courts are weighted accordingly.

percent of the criminal filings for the entire state. These sites also conducted 6,581 jury trials, accounting for 55.7 percent of the total number of jury trials statewide. The population for these counties is just over half (51%) of the total California population.

Table 2.1: Jury Panel Dataset

Superior Court	# Jury Panels
Contra Costa*	428
El Dorado	50
Fresno	193
Los Angeles	4,774
Marin*	108
Monterey	113
Riverside	497
Sacramento	651
San Joaquin	175
San Luis Obispo	50
Santa Cruz*	104
Shasta	68
Stanislaus	234
Ventura*	300
Total	**7,745**

* Indicates data for January 1-June 30, 2002

The superior courts that were approached to provide data for the Jury Panel Dataset were selected to reflect geographic diversity, variations in population density, and reputations for high quality data management and technical capability in their respective jury systems. The Superior Court of Los Angeles County was specifically included based on these criteria and on the sheer size of the jurisdiction and its caseload. For the 2000-2001 fiscal year, Los Angeles conducted 35.6 percent of all jury trials in the state.

The data, which were extracted from the jury management systems of those courts, identifies the county and the individual courthouse from which the data were drawn, the type of case (capital felony, felony, misdemeanor, civil, other), the anticipated length of trial, the number of prospective jurors included on the panel, and the aggregate dispositions of those jurors (e.g., selected, excused for hardship/stipulation, excused for cause, excused by peremptory challenge, or not reached during voir dire). All cases disposed (e.g., by plea agreement, settlement, dismissal or mistrial) before completion of the voir dire process were excluded from the dataset.

A very small portion of the remaining panels reflects anomalous or inconsistent data (e.g., the number of sworn jurors is considerably lower than the statutorily mandated 12 for jury trials, the number of sworn jurors exceeds the number of jurors sent to the courtroom). Several possibilities may explain these results. Some panels may have been supplemental panels sent to the courtroom to complete jury selection for a particular case. Other results may simply reflect errors in the data recording done in the courtroom or the subsequent data entry process. Records that contain inconsistent results have been excluded from relevant analyses in this report.

To facilitate comparison across the various sites, the NCSC contacted each site and asked them to define the fields used in their reports, and to give examples of when or how each field would be used. For most of the courts, the definitions are standard and usage is uniform. For example, the terms "jurors sent" and "jurors sworn" refers respectively to the number of persons sent to the courtroom for voir dire and the number of persons impaneled on the jury. Variations in usage are noted in the analysis of those fields in this report.

A limited number of sites were able to provide more detailed data, allowing the NCSC to add several more variables. For instance, the data from several courts' systems distinguished between peremptory challenges made by the prosecution or plaintiff and those made by the defense. Los Angeles was able to provide the number of defendants in each case, allowing the NCSC to track this additional variable to account for additional peremptory challenges allowed for multiple defendants.[52]

[52] CAL. CIV. PROC. CODE § 231 (Deering 2004).

Although the focus of this study is on the use of peremptory challenges and challenges for cause in the selection of trial juries in the California superior courts, it is useful to consider these two juror types of juror dispositions in the context of the entire range of possible dispositions for jurors on each jury panel. Obviously, at least 12 jurors are impaneled as trial jurors, and for the vast majority of trials a small number of persons – usually 1 to 2 – are selected as alternate jurors. Others may be excused for hardship, and some prospective jurors are not reached during voir dire – that is, they are not individually questioned. The range of panel sizes in the sample and these alternative dispositions are described below.

Panel Size

The median number of people in jury panels was 46, but the sizes of jury panels varied tremendously according to case type and jurisdiction. See Tables 2.2 and 2.3. The majority of jury panels in the dataset were convened for felony cases (43%), followed by misdemeanor (27%), civil (25%) and capital felony cases (5%). A very small number of panels (less than 1% of the total dataset) indicated fewer than 24 persons, which are most likely supplemental panels and are not included in subsequent analyses. Similarly, a very small proportion of panels were extremely large, ostensibly convened for high profile trials and trials anticipated to be extremely long.[53] Panel size also

Table 2.2: Panel Size, by Case Type

Case Type	n	Median	Mean	75th Percentile	90th Percentile
Capital Felony	821	70	99	110	187
Felony	2,916	49	57	61	85
Misdemeanor	2,077	45	47	55	65
Civil	1,919	39	52	56	85
TOTAL	**7,745**	**46**	**58**	**60**	**90**

Table 2.3: Panel Size, by County

Superior Court	n	Median	Mean	75th Percentile	90th Percentile
San Joaquin	175	71	100	120	203
Marin	108	70	92	80	126
Riverside	497	70	86	91	157
El Dorado	50	66	77	79	122
Shasta	68	60	89	70	138
Ventura	300	56	71	70	110
San Luis Obispo	50	53	60	58	69
Contra Costa	428	52	62	65	81
Fresno	193	50	61	65	97
Sacramento	651	50	64	65	114
Santa Cruz	104	50	53	56	65
Stanislaus	234	50	52	57	70
Monterey	113	45	55	57	71
Los Angeles	4,774	38	50	52	75
TOTAL	**7,745**	**46**	**58**	**60**	**90**

[53] The largest jury panel in the dataset indicated a total of 864 prospective jurors, a capital felony trial in Shasta County involving 5 defendants and anticipated to last 85 days. At the 99th percentile, the panel size was 244 persons.

varied by county, with Los Angeles having the smallest panel sizes and San Joaquin having the largest panel sizes at most levels.[54] These variations in panel size appear to be a local phenomenon, unrelated to the composition of each court's caseload.

Sworn

Under California law, juries for all case types consist of 12 people. The Jury Panel Dataset confirms that this number is observed in actual practice. Nearly 97 percent of the jury panels in the dataset reported 12 people sworn as jurors. The majority of the remaining 3 percent reported either 11 jurors sworn (1.3%) or 13 jurors sworn (1.1%). The former could be the result of a stipulation by the attorneys to a smaller jury[55] and the latter likely reflects the combination of jurors and alternates sworn and recorded in the same data field.[56] The vast majority of cases (87%) reported 2 or fewer alternates sworn. On average, 29 percent of the jury panel was sworn as jurors or alternates. The individuals remaining were excused pursuant to hardship, a challenge for cause, or a peremptory challenge, or were not questioned during the voir dire.

Hardship/Stipulation

In the vast majority of cases, a small proportion of jurors – generally less than 5 percent – were excused for hardship or by stipulation of the attorneys. See Table 2.4. Again, there is a great deal of variation by site, with El Dorado County recording the highest average proportion of panels excused for hardship (20.3%) and Ventura County recording the lowest (1.6%). Some of this variation results from operational differences. For example, a number of the courts reported that they routinely prescreen jurors for hardship in the jury assembly room before the panels are finalized and sent to courtrooms.[57] Predictably, the proportion of the panel excused by the judge for hardship is lower in these sites. Another factor related to the proportion of the panel excused for hardship was the anticipated trial length.[58] In longer trials, a larger proportion of prospective jurors were excused for hardship.

Table 2.4: Percent of Panel Excused for Hardship

Superior Court	n	Average # of Jurors	%	Mean Trial Length (Days)
El Dorado	50	21	20.3	6
Marin	108	28	18.6	8
Riverside	497	17	15.8	9
San Luis Obispo	50	11	14.6	8
Sacramento	651	9	10.5	12
Shasta	68	18	10.0	7
San Joaquin	175	11	8.4	6
Los Angeles	4,774	5	8.1	6
Fresno	193	5	5.1	10
Stanislaus	234	3	4.9	4
Contra Costa	428	2	3.3	4
Santa Cruz	104	2	2.6	6
Monterey	113	2	1.7	5
Ventura	300	1	1.6	7
TOTAL	**7,745**	**7**	**8.2**	**7**

[54] Stanislaus County had the smallest panel size (70 persons) at the 90th percentile compared to Los Angeles with 75 persons at the 90th percentile.

[55] CAL. CIV. PROC. CODE § 220 (Deering 2004).

[56] This was the practice in Ventura County, and likely in other courts as well.

[57] Some courts in California also delegate discretion to the jury manager to excuse people from jury service for hardship based on written requests before the person reports for jury service, which also reduces the number of people excused from jury panels. *See also* Increasing the Jury Pool: Fiscal Impact of an Employer Tax Credit (August 2004).

[58] Pearson's r = 0.321, $p<.001$.

Not Reached

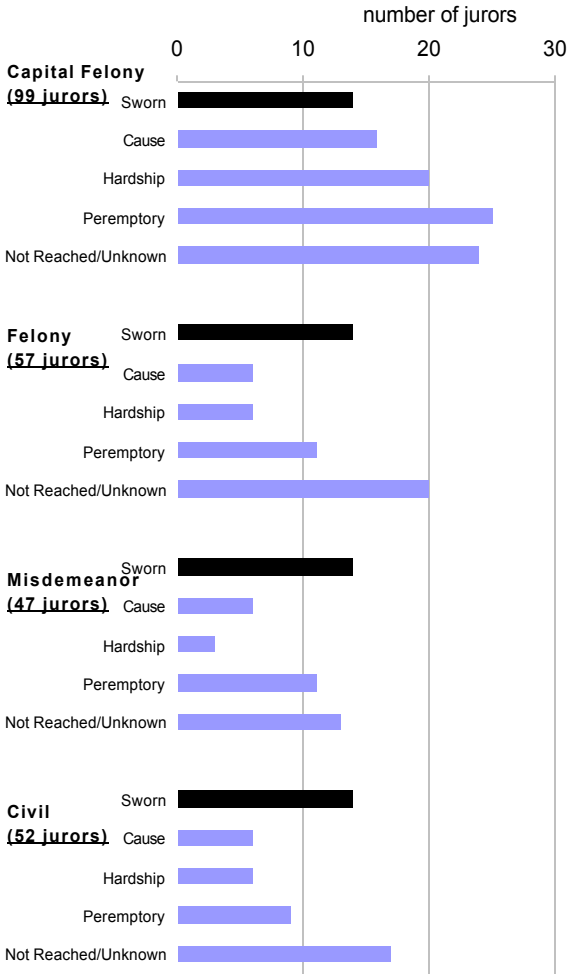
On average, 15 prospective jurors were "not reached" on each panel – that is, the jury for that case was impaneled and sworn without these prospective jurors ever being questioned. This accounts for approximately 1 in 4 jurors sent to the courtroom for voir dire overall. The variation among sites was less dramatic than for other types of juror dispositions. Los Angeles had the lowest proportion of jurors not reached (23.1%), ostensibly due to its comparatively smaller panel sizes. San Luis Obispo had the highest rate at 39.4 percent.

Table 2.5: Jurors Not Reached During Voir Dire

County	n	Average # of Jurors	% of Panel
San Luis Obispo	50	23	39.4
Stanislaus	234	20	38.2
Monterey	113	20	37.5
El Dorado	50	27	37.3
Marin	108	30	36.5
Santa Cruz	104	18	34.4
Fresno	193	19	33.6
Shasta	68	23	31.8
Contra Costa	428	19	31.1
Sacramento	651	18	28.1
San Joaquin	175	27	27.8
Ventura	300	17	26.2
Riverside	497	20	25.9
Los Angeles	4,774	12	23.1
TOTAL	**7,745**	**15**	**25.9**

Case type was also a significant factor, again likely due to its relationship to panel size. Capital felony panels, for example, had the largest proportion of prospective jurors not reached as well as the largest panel sizes. This pattern is likely the result of courts over-estimating the number of people likely to be excused for hardship or for cause in longer trials and trials involving more complex or controversial subject matter as well as lawyers under-utilizing their allotted peremptory challenges.[59]

Figure 2.1: Average Panel Size and Challenge Results



[59] *See infra* at "Overall Patterns of Peremptory Challenge Usage," 19-21.

Voir Dire Observation Dataset

Although the Jury Panel Dataset is useful for examining the variation in juror dispositions, it does not provide much insight into the cause of that variation. To conduct that examination, a second dataset was constructed from observations by NCSC and AOC staff of the jury selection process in 16 felony and 2 misdemeanor trials in eight large, urban locations in California. These observations took place in one-week intervals in each site in February and March 2004. See Table 2.6. To maximize the potential number of voir dires observed, the sites were selected primarily on the basis of volume of felony jury trials conducted each year. As a result, the cases included in the dataset were not chosen randomly, but rather reflect a sample of convenience based on the criminal jury trials taking place in those jurisdictions during the data collection period.

Table 2.6: Voir Dire Observations Dataset

County	# Cases Observed	# Jurors Observed	Observation Dates
Los Angeles	3	95	Feb. 9-11, 2004
Riverside	4	215	Feb. 23-26, 2004
Sacramento	3	64	Feb. 23-26, 2004
San Diego	2	67	Mar. 1-4, 2004
Contra Costa	1	28	Mar. 15-18, 2004
Santa Clara	3	146	Mar. 15-18, 2004
San Francisco	1	53	Mar. 15-19, 2004
Kern	1	36	Mar. 22-25, 2004
TOTAL	**15**	**609**	

To collect these data, project staff first developed coding forms on which to record notes about the case and about each juror questioned during voir dire. See Appendices A and B for the Case and Individual Coding Forms. The first coding form was designed to capture information about the case such as the case name, docket number, identity of the judge and attorneys,[60] defendant name and pertinent demographic information, the charges filed against the defendant, and the anticipated length of the trial. This form also recorded information about the size of panel sent for voir dire, the number of jurors not questioned, the dates during which the observations took place, and details about the methods used for jury selection (e.g., use of written questionnaire, amount of time allotted for attorney questioning). Observers also recorded their subjective impressions about the relative restrictiveness or leniency of the trial judge in excusing jurors for hardship or for cause. For each case, observers drafted a narrative description of the case to be used in interpreting the observation dataset.

The 18 cases that were ultimately observed and included in the sample are not necessarily representative according to the statistical definition of that term, but they do reflect the diversity of felony cases tried to juries in the California superior courts. All of the cases involved charges against a single defendant, and all of the defendants were male, the majority from racial/ethnic minority groups[61] and under the age of 30. The general types of charges included homicide (3), property theft (3), assault/battery (5), child molestation (3), and drug charges (4). The majority of cases (10) involved four or fewer criminal charges, although one case involved a total of 22 separate criminal charges.[62]

The individual voir dire form was designed to capture demographic information about each juror questioned during voir dire as well as the nature of questions posed to each juror, the juror's responses to those questions including the juror's self-assessment of his/her ability to be fair and impartial given their response, and the ultimate disposition of each juror (selected as juror, selected as alternate, excused for hardship, excused for cause, excused for peremptory challenge, questioned/not selected). The form includes codes to indicate if the juror was examined

[60] Identities of judges and attorneys are not disclosed in this report to preserve confidentiality.

[61] Four of the defendants were Black, three were Asian, and eight were Hispanic.

[62] The top charge in this case was a violation of California Penal Code § 245c (assault with a deadly weapon, not a firearm, against a peace officer).

privately (e.g., sidebar, in camera) and, from the perspective of a neutral observer, the possibility of juror bias sufficient to justify the removal of that juror for cause. Observers also indicated if the judge or one of the attorneys moved to excuse the juror for cause and the decision on that motion (granted or denied).

The individual voir dire form includes 20 categories of questions that are typically posed to jurors. The first six questions, which dealt with time or financial conflicts and with personal knowledge about the case or personal relationships with the parties, were asked in every case. The remaining 14 categories were used as a guide for topics likely to be covered during voir dire. These questions, which were posed to jurors in some form in the vast majority of trials, focused on juror attitudes, life experiences, and opinions that might be relevant to their ability to serve fairly and impartially. As part of the data entry process, each observer also indicated up to two categories of questions most relevant to the question of a particular person's suitability as a juror on that case.

In each site, observers attempted to follow a jury panel from its initial organization in the jury assembly room through the completion of voir dire. Cases were selected for observation based on case type with non-capital felony cases preferred to provide the greatest possible similarity in types of questions likely to be posed to jurors. Misdemeanor cases were observed if non-capital felony trials were unavailable during the observation period. The observers found that many judges bifurcate the voir dire process, screening for time and financial hardship before examining the remaining jurors for their ability to serve fairly and impartially. Because the time/financial hardship screening averaged approximately a half-day, observers often were able to schedule their observations after the time/hardship screening was complete, using the observation period to focus on substantive factors related to the selection or removal of jurors. The resulting dataset includes only those jurors whose examination was observed directly.

The Voir Dire Observation Dataset consists of a total of 704 observations of jurors for the 18 cases. On average, observers recorded information on 39 jurors per case, ranging from 15 to 108 per case depending on the relative difficulty in selecting 12 individuals to serve as jurors and the amount of voir dire that was actually observed. The distribution of individual juror dispositions is fairly consistent with the distribution found in the Jury Panel Dataset. Approximately 30 percent of the observed jurors were sworn as jurors or alternates in their respective cases. Twenty-two percent (22%) of the observed jurors were excused for hardship; 16 percent were excused for cause; 28 percent were removed by peremptory challenge; and the 3 percent remaining jurors were questioned, but not selected for jury service.[63] This distribution, of course, does not include jurors who are sent to the courtroom, but not questioned, or jurors who were questioned before or after the period of observation in those cases.

Other Sources of Information

To guide the analysis of these datasets and to interpret the findings, NCSC also relied on other sources of information including a review of the legal context (statutes, rules, case law) in which voir dire takes place in the California superior courts, interviews with key court personnel and direct observations of routine court procedures to identify important operational differences in each site, and consideration of community demographics and their effects on the resulting jury pools. The following sections of this report concentrate on the primary focus of this study: the actual use of peremptory challenges by attorneys and the factors related to the removal of prospective jurors for cause.

[63] All of the judges in these trials used the "strike-and-replace" method of voir dire, or some variation on that method, with questions posed to randomly selected groups of six to 18 people. *See* "General Practices in Jury Selection," *infra*, at 25-28. It was a common occurrence to have several individuals from these groups questioned, but not excused by a challenge for cause or peremptory challenge before the jury was formally selected and sworn.

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Chapter 3 – Patterns of Peremptory Challenge Usage

In examining how lawyers use their allocations of peremptory challenges in jury selection, and the potential effects of adopting the Blue Ribbon Commission's and Task Force's recommendations to reduce allocations of peremptory challenges, it is important to keep in mind the existing statutory framework for prescribing the usage and intent of peremptory challenges. Table 3.1 describes the current allocation of peremptory challenges authorized under California law[64] and the allocation recommended by the Blue Ribbon Commission and Task Force. As a practical matter, however, the jury management systems of the courts that participated in this portion of the study employ the more familiar designations of "capital felony," "felony," and "misdemeanor" to describe each case in the dataset – designations that do not reliably indicate the maximum number of peremptory challenges that were available to parties at trial under the current rules of procedure.

Misdemeanor offenses, for example, can be punished by prison terms up to a year, so trials designated as misdemeanor cases in the dataset could warrant a maximum of six peremptory challenges per side (for misdemeanor offenses where the maximum term is imprisonment of less than 90 days), or ten peremptory challenges per side (for misdemeanor offenses with a maximum term of greater than 90 days to one year), depending on the specific charges and circumstances of the cases. Similarly, in some panels in the dataset, which were originally identified as non-felony trials, the total number of peremptory challenges exercised exceeded 20, indicating that case was actually tried as a capital felony (potential life imprisonment).[65]

A secondary issue related to data interpretation was the fact that the jury management systems do not consistently indicate the existence of multiple

Table 3.1: Current Peremptory Challenges and Proposed Reductions

California Code of Civil Procedure 231			Proposed Reductions		
	Maximum Number of Peremptory Challenges per Party	**Additional Challenges for Multiple Parties**		**Maximum Number of Peremptory Challenges per Party**	**Additional Challenges for Multiple Parties**
Criminal trials involving offenses punishable by death or by life imprisonment	20	5	Criminal trials involving offenses punishable by death or by life imprisonment	12	3
Criminal trials involving offenses punishable by a prison term 90 or more days	10	5	Felony	6	3
Criminal trials involving offenses punishable by a prison term less than 90 days	6	4	Misdemeanor	3	2
Civil trials	6	8 per side, or more as justice requires	Civil	3	more as justice requires

[64] Cal. Civ. Proc. Code § 231 (Deering 2004).

[65] For analysis purposes, these cases were recoded as capital felony trials.

criminal defendants or multiple parties in civil cases,[66] for which California law provides additional peremptory challenges to each of the parties.[67] Because California law specifies that the allocation of peremptory challenges for civil cases with more than two parties is based on "[the parties'] interests at trial" and grants additional challenges "as the interests of justice require," this missing information impeded NCSC staff's ability to accurately calculate the statutory maximums.[68]

As a result of these data interpretation issues, the dataset includes a number of cases in which the total number of peremptory challenges exercised by the parties exceeds the maximum number of challenges permitted for the designated type of case. Table 3.2 reports the number of cases, by case type, for which the total number of peremptory challenges exercised exceeded the maximum number permitted under California law for criminal defendants or parties in civil cases. Overall, civil cases are most affected, with approximately 17 percent of the cases in the database indicating a total number of peremptory challenges beyond the statutory maximum. Just under four percent of the misdemeanor cases exceeded the statutory limits, and many of these likely are due to ambiguous case type designations. Relatively few capital and non-capital felony cases (less than 2%) exceeded the maximums once the number of defendants was taken into account.

Table 3.2: Cases in Database Exceeding Statutory

Case Type	Number of Cases Exceeding Maximums	%	Total Cases
Capital Felony	15	1.8	821
Felony	16	0.5	2,916
Misdemeanor	78	3.8	2,077
Civil	325	16.9	1,919
Total	**434**	**5.6**	**7,733**

There are three possible explanations for the upward departure in peremptory challenges for any given trial in the dataset. Some of these cases undoubtedly reflect the inconsistency between routinely-used case designations (capital felony, felony, misdemeanor) and the distinctions between potential prison sentences indicated by existing California law. Other cases may involve multiple criminal defendants or multiple parties in civil cases that were not immediately apparent in the data provided by the courts. The departure from maximum peremptory challenges in civil cases is likely due to a combination of multiple parties and agreements for increased numbers of peremptories made by the attorneys and the judge prior to jury selection, but not recorded in the jury management database. Finally, data entry errors (e.g., incorrect case designation, incorrect number of total peremptory challenges exercised) cannot be excluded as a possible explanation for cases that appear to exceed the maximum number of peremptory challenges available to the parties. For purposes of data analysis, these errant cases as well as cases that were positively determined to involve multiple parties have been excluded from calculations due to their potential for skewing the results concerning the number of peremptory challenges actually exercised.

[66] The jury management systems in some, but not all, of the participating courts include a field to indicate multiple defendants or parties. In some cases it was possible to determine the existence of multiple defendants or parties by the case name. While these indicators were generally helpful for identifying multiple party cases, they could not definitively exclude the possibility of multiple defendants in cases that lacked those indicators.

[67] In the panel database, 141 (4.8%) non-capital felony, 33 (1.6%) misdemeanor, and 78 (9.5%) capital felony panels involved multiple defendants.

[68] Forty-eight (2.5%) civil jury panels were identified with multiple parties in the database.

Overall Patterns of Peremptory Challenge Usage

All of the courts that supplied data for this study were able to provide information about the total number of jurors in each panel that were removed by peremptory challenge, and ten of the fourteen courts were able to provide a breakdown of peremptory challenges exercised by party.[69] In examining the breakdown of total peremptory challenges exercised, it becomes immediately apparent that, on average, California lawyers across all types of criminal cases exercise only slightly more than half of the total peremptory challenges allotted to them. See Table 3.3. In capital felony trials, for example, the median number of peremptory challenges used was 23 out of a possible 40 allowed – meaning that in half of the capital felony trials, prosecutors and defense attorneys together exercised 23 or fewer peremptory challenges during jury selection. The median for both felony and misdemeanor trials was 11 peremptory challenges total out of a possible 20.

Even cases at the upper range of peremptory challenge usage do not entirely exhaust the maximum number of peremptory challenges. At the 90th percentile, lawyers exercised a total of only 34 peremptory challenges in capital felony trials and a total of only 17 peremptory challenges in felony and misdemeanor trials. Lawyers in civil cases tend to exercise peremptory challenges somewhat more frequently, on average using two-thirds of the 12 peremptory challenges available to the plaintiff and defendant combined. Fewer than 10 percent of civil litigants exhaust all of the peremptory challenges available to them.

There were, however, some observable differences in peremptory challenge usage by party. See Figure 3.1. In non-capital felony and misdemeanor trials, defense lawyers on average exercised slightly more peremptory challenges compared to prosecutors, and this trend continued throughout the upper ranges of peremptory challenge usage. However, at the 90th percentile, the usage by prosecution and defense was comparable and near the maximum allowed by California law. In capital

Table 3.3: Peremptory Challenge Usage by Case Type

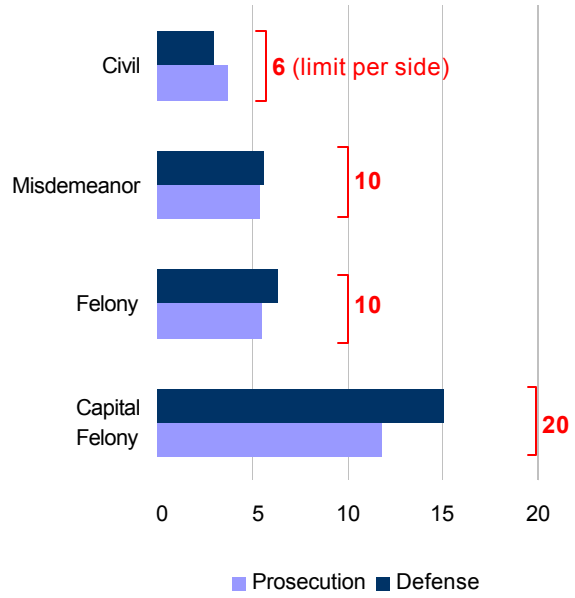
Case Type	Maximum Allowed Total	Mean	Median	75th Percentile	90th Percentile	Total Cases
Capital Felony	**40**	23.6	23	28	34	710
Felony	**20**	11.1	11	15	17	2,470
Misdemeanor	**20**	10.7	11	15	17	1,837
Civil	**12**	7.2	8	10	11	1,303

Note: Multiple defendants and cases exceeding statutory maximums are excluded.

[69] The courts that could differentiate peremptory challenges by party were Contra Costa, El Dorado, Fresno, Marin, Monterey, Riverside, Sacramento, San Luis Obispo, Santa Cruz, and Shasta. Although 71% of the court systems provided these data, Los Angeles, the largest court system, was unable to provide a breakdown. Therefore, cases from these ten court systems comprise approximately 27% of the entire dataset.

felony trials, defense lawyers on average exercised three peremptory challenges more than prosecutors (15 compared to 12); again this ratio persisted at higher percentiles of peremptory challenge usage. In civil trials, this pattern was reversed; defense lawyers tended to exercise fewer peremptory challenges on average than plaintiffs' lawyers. Presumably criminal defense and civil plaintiff counsel perceive greater bias against their clients in the jury pool than prosecutors or civil defense lawyers, prompting them to expend more of their allotted peremptory challenges.

Figure 3.1: Average Number of Peremptory Challenge Usage by Party



Local legal culture appears to have a significant effect on how often lawyers use their peremptory challenges. Table 3.4 provides a breakdown of the median peremptory challenge usage for each case type by court.[70] Attorneys in Contra Costa consistently exercise the most peremptory challenges across all case types, followed closely by Sacramento. In contrast, lawyers in Monterey exercised the fewest across all case types. In Santa Cruz, criminal lawyers rank as exercising high numbers of peremptory challenges in non-capital felony and misdemeanor panels, yet civil lawyers exercised the fewest. In

Table 3.4: Median Number of Total Peremptory Challenges Exercised

Superior Court	Felony	Misdemeanor	Capital Felony	Civil
Contra Costa	14	13	–	8
Sacramento	13	12	26	8
Marin	13	10	–	7
Santa Cruz	13	13	–	5
El Dorado	12	9	–	8
Shasta	11	9	–	--
Los Angeles	11	11	23	8
Riverside	11	11	27	7
Ventura	10	8	21	8
San Joaquin	10	11	19	8
Stanislaus	10	11	26	7
Fresno	10	11	22	6
Monterey	9	8	–	6
San Luis Obispo	--	10	–	6
Maximum Allowed	**20**	**20**	**40**	**12**

Note: If counties had fewer than 10 cases in a given case type, median values were excluded from the table. Cases with multiple defendants/parties and those exceeding the statutory maximums are excluded.

[70] The relative frequency with which lawyers exercise peremptory challenges (measured by county median) is significantly correlated across counties for non-capital felony and misdemeanor trials ($r = 0.59$, $p = 0.027$), and for non-capital felony and civil ($r = 0.54$, $p = 0.048$) but does not significantly correlate with usage in capital felony or between misdemeanor and civil.

capital felony panels, lawyers in Riverside and Sacramento ranked as the top two counties for peremptory challenge usage.

Effect of Reductions per Task Force Recommendations

Using information on existing peremptory challenge usage patterns, it is possible to calculate the effect of the Blue Ribbon Commission recommendations for peremptory challenge reductions proposed anew by the Task Force on Jury System Improvements. In Table 3.5 we see that a reduction in the number of peremptory challenges allowed would have the greatest impact on misdemeanor trials, where prosecution and criminal defense lawyers exercised more than six challenges (the maximum proposed) in nearly 85 percent of all misdemeanor jury panels. In some ways, the number of trials affected is not surprising given the dramatic decrease in peremptory challenges – from ten to three per side – under the proposed reductions.[71] Interestingly, prosecutors and defense attorneys would experience the new limits equally with regard to the percentage of misdemeanor panels affected and the number of peremptory challenges lost by each side as a result of the proposal reductions. Based on existing peremptory challenge usage, the proportion of prosecutors and criminal defense counsel who routinely exceeded the proposed maximums would each experience a loss of approximately one-third of the peremptory challenges previously available to them.

Lawyers would also experience a significant change in approximately 70 percent of the civil cases. Under the proposed reductions, plaintiff and defense counsel would lose an average of two peremptory challenges each per panel – again approximately one-third of the peremptory challenges previously available – although due to the difference in current usage patterns, plaintiffs' lawyers would experience these reductions in 75 percent of the panels compared to 58 percent of the panels for civil defense lawyers.

The effects of the Task Force recommendations on capital and non-capital felony trials would be felt in slightly less than one-half of all jury selection panels. Again, however, there is a differential

Table 3.5: Effect of Reducing the Maximum Number of Peremptory Challenges Allocated to Parties

Case Type	% of Trials Affected	% of Parties Affected*		Mean Number of Peremptory Challenges Affected**	
		P	D	P	D
Misdemeanor	84.6	83.2	82.6	3.2	3.6
Civil	70.2	74.8	57.8	1.6	1.8
Capital Felony	49.6	50.3	81.9	2.7	4.2
Felony	47.8	47.4	61.7	1.7	2.4

* Based on courts providing a breakdown of peremptory challenges by party.
** Reflects the average loss of peremptory challenges for those cases exceeding the proposed maximums.
Note: P=Prosecution/Plaintiff; D=Defense.

[71] Under the proposal, peremptory challenges would be reduced by 40% in capital felony and non-capital felony cases, by 50% in civil cases, and by 70% in misdemeanor cases. The effect in misdemeanor trials involving offenses punishable by less than 90-day imprisonment would be only 50%. *See supra* at Figure 3.1.

impact on prosecution and criminal defense lawyers. Prosecutors on average would be affected in approximately half of all capital felony and non-capital felony trials, losing two peremptory challenges, and three peremptory challenges, in each respectively (17 percent and 14 percent of the peremptory challenges currently available). Criminal defense counsel would experience a larger impact, losing on average two peremptory challenges in 62 percent of the felony panels, and four peremptory challenges in 82 percent of capital felony panels (21 percent and 24 percent of the peremptory challenges currently available).

A reduction in the number of peremptory challenges could also affect jury management practices, mainly by permitting courts to reduce panel sizes. Table 3.6 estimates the number of prospective jurors that would no longer be needed based on the number of trials conducted annually in the Superior Courts of California[72] and the expected reduction in panel size (the number of peremptory challenges under current statute minus the number proposed by the Task Force). Statewide, the proposed reduction in the number of peremptory challenges would decrease the demand for prospective jurors sent to courtrooms for voir dire by more than 110,000 people per year (approximately 13 percent of all prospective jurors who report to the courthouse for jury service).[73]

Of course, a reduction in peremptory challenges may affect other aspects of the jury selection process, not just panel sizes. One possible consequence of reducing the number of peremptory challenges is that it may prompt lawyers to make more motions to excuse jurors for cause to compensate for the loss of discretionary challenges, and some portion of these motions would probably be granted.[74] In terms of the net effect on panel size, however, greater numbers of jurors removed for cause will more likely be absorbed by the existing portion of the panel that is "not reached" during voir dire, which is more than sufficient to accommodate this need.[75] Table 3.7 illustrates this possibility in the context of a typical capital felony trial. The average capital felony panel currently consists of 70 prospective jurors, of which 5 are excused for hardship and 5 or for cause, 14 are sworn as jurors or alternates, and a minimum of 6 are not questioned during voir dire.[76] If the panel size were reduced to 54 as a result of peremptory challenge reductions, and the number of jurors re-

Table 3.6: Potential Effects of Reduction in Maximum Number of Peremptory Challenges on Panel Size

Case Type	Median Panel Size	Proposed Reduction per Panel	Total Reduction in Jurors
Capital Felony	70	16	10,736
Misdemeanor	49	14	42,574
Felony	45	8	41,008
Civil	39	6	16,074
ALL CASE TYPES			**110,392**

Table 3.7: Potential Effects of Reduced Panel Sizes on Juror Dispositions, Capital Felony

	Current	After Reduction
Panel Size	70	54
Jurors/Alternates	14	14
Hardship	5	5
For Cause	5	10
Peremptory Challenges Available	40*	24
Extra Jurors (Not Reached)	6	1

*Median of 23 peremptory challenges actually used.

[72] 2004 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 1993-1994 THROUGH 2002-2003, at 55 tbl.3 (2004).

[73] The reduction in the number of people summoned for jury service will also affect administrative costs for the courts as well as direct and opportunity costs borne by jurors, their employers, and their families. *See* PAULA L. HANNAFORD-AGOR, INCREASING THE JURY POOL: FISCAL IMPACT ON AN EMPLOYER TAX CREDIT (2004).

[74] *See infra* at 25.

[75] *See*, *supra*, at 13.

[76] Note that lawyers currently exercise a median of 23 peremptory challenges of the 40 allotted to them in capital felony trials, leaving as many as 23 prospective jurors not reached on each panel.

moved for cause doubled (due to increased motions by attorneys), there would still be a sufficient number of prospective jurors on the panel to accommodate all available peremptory challenges, and still leave at least one juror not reached.

From these analyses it is clear that, in the vast majority of cases, California attorneys do not currently avail themselves of all of the peremptory challenges allocated to them. In criminal cases, the median number of peremptory challenges exercised is closer to half of the maximum number available. Even in civil cases, where usage tends to be higher, lawyers still exercise only two-thirds of the peremptory challenges available. Based on the consistency of variation patterns among counties, much of the peremptory challenge usage appears to be driven by local legal culture.

The effects of reducing the number of peremptory challenges to the levels recommended by the Blue Ribbon Commission and proposed again in 2003 by the Task Force would be felt across all case types, but differentially by the parties due to the varying patterns of usage by prosecutors and defense counsel, and by plaintiff and civil defense lawyers, respectively. The largest overall effect would occur in misdemeanor trials rather than in capital and non-capital felony trials where the stakes are comparatively higher. The explanation for the dramatic impact in misdemeanor trials is not that lawyers rely more heavily on peremptory challenges, but rather that the 70 percent reduction from ten to three challenges per side is more acute than the reductions for other types of trials, so misdemeanor panels are affected by the recommended reductions in greater proportion than other panels.

As was noted by the Task Force, however, the exercise of peremptory challenges is not an isolated activity, but rather takes place within the context of the entire voir dire. Thus, the issue of the relationship between peremptory challenges and challenges for cause is an important consideration that deserves greater attention. In Chapter 4, therefore, we turn our focus from how often lawyers exercise their peremptory challenges to the criteria that judges use to decide whether to remove prospective jurors for cause.

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Chapter 4 – Judicial and Attorney Questions and Decision-Making in Jury Selection

The previous chapter had a quantitative focus on peremptory challenge usage, but did not examine how lawyers exercise those challenges in the context of the questioning that takes place during voir dire and each judge's decisions to excuse prospective jurors for hardship or for cause. This chapter attempts to address those issues by examining the dispositions of 704 prospective jurors from 18 criminal trials conducted in 8 superior courts whose voir dire was observed by NCSC and AOC staff in February and March 2004.

This focus was motivated, in part, from the debate among members of the Task Force on Jury System Improvements on the interplay between judicial decisions on challenges for cause and lawyers' decisions on peremptory challenges. In that debate, those favoring a reduction in the number of peremptory challenges characterized them as wasteful, disrespectful and discriminatory toward jurors, and a significant factor in the atrophy of criteria for challenges for cause. Those opposed to a reduction in peremptory challenges viewed them as protection against inadequate voir dire, suspected but undisclosed juror bias, and necessary for the removal of jurors when judicial criteria for challenges for cause are too strictly applied. Not surprisingly, judges and court administrators tended to line up on the side of the debate favoring reductions in peremptory challenges while trial lawyers tended to oppose reductions.

The methodology employed in these analyses was designed to pay careful attention to the types of questions posed by judges and lawyers to prospective jurors, the types of responses those questions generate from prospective jurors, and the judges' and lawyers' subsequent decisions to retain or excuse jurors from the panel. The specific analyses discussed in this chapter focus on:

- General practices in jury selection observed in the 18 trials;
- The pattern of juror dispositions (e.g., excused for hardship, excused for cause, removed by peremptory challenge, impaneled as juror or alternate) with respect to juror responses to questions;
- A closer examination of certain categories of questions that are routinely posed to jurors;
- Characteristics and dispositions of jurors who are not excused for cause; and
- Specific factors associated with judicial, prosecution, and defense counsel decision-making.

General Practices in Jury Selection

Given the variability in voir dire practices across the country, perhaps the most striking characteristic of jury selection practices in the cases observed in this study was their remarkable similarity. As a general rule, all of the trials followed the same basic procedures. At the beginning of the voir dire, after the jury panel had entered the courtroom, the judge introduced himself or herself, welcomed the prospective jurors to the courtroom, acknowledged that jury service is often inconvenient but stressed its importance in the American justice system, and expressed gratitude to the panelists for contributing their time and attention. In all but one case observed,[77] the judges then described the expected length of the trial and screened the entire panel for time conflicts and financial hardship. Typically this was done by

[77] One of the cases was expected to be a comparatively short trial – only two to three days – so this judge conducted time and financial hardship screening simultaneously with the substantive voir dire.

requesting jurors to stand or come to the front of the courtroom and explain the nature of their conflict or hardship. Most of these judges decided on hardship requests immediately after listening to each juror, and the majority – 12 of the 18 judges – appeared fairly lenient with respect to granting juror requests to be excused.

For the substantive portion of the voir dire, all of the judges used some variation on the "strike-and-replace" method. The most common procedure involved bringing an initial group of 18 prospective jurors, selected randomly from the panel, and seating 12 in the jury box and 6 in chairs immediately in front of the jury box. The judge would begin the questioning, followed by a limited period of attorney voir dire.

After this questioning was complete, the judge ruled on motions by the attorneys for challenges for cause or, as was the case the vast majority of the time, initiated the removal by requesting that the prosecution and defense counsel stipulate to the removal of a juror for cause. This was, perhaps, one of the most surprising findings from the observations. Observers recorded a total of 108 instances in which the judge, prosecutor, or defense counsel requested removal of a juror for cause or disqualification. Two of these instances involved removal for medical hardship rather than bias and six involved disqualification due to insufficient English fluency or, in one case, a question about U.S. citizenship. Of the remaining 100 instances, the judge initiated the request for removal 89 times (89%) compared to motions by the prosecution (1 time) and motions by the defense counsel (10 times). Six of the defense counsel motions were granted, but the prosecutor's motion was denied.

Given the tenor of debate among Task Force members about the alleged atrophy of judicial criteria for cause and the necessity of peremptory challenges to remove biased jurors, one would expect to see more vigorous efforts by the attorneys for removal for cause than was evident during these trials, although perhaps the large numbers of peremptory challenges available to the parties reduces their incentive to engage in these arguments. But the rate at which judges granted the few attorney-initiated motions that were made is inconsistent with the view that judges do not give sufficient consideration to the merits.

Jurors who were excused for cause would be replaced by the next numbered juror seated in front of the jury box. After the judge ruled on all challenges for cause, the lawyers alternately exercised their peremptory challenges (beginning with the prosecution) on jurors seated in the jury box. After the last juror in front of the jury box had either been seated in the jury box or excused, another panel of six was randomly called to sit in front of the jury box and the questioning began again. Motions to remove a prospective juror for cause could only be directed to the newly seated jurors, but peremptory challenges could be exercised against any juror seated in the jury box, even if the attorneys had refrained from striking him or her earlier in the voir dire.[78] This process continued until either the lawyers had exhausted all of their peremptory challenges or were satisfied with the composition of the jury. The jury could be sworn at this time. There was then a second, much abbreviated round of questions by the judge and the lawyers using the same methods to select one to three alternate jurors.

With respect to the actual questions posed to jurors by judges, it is important to recognize that during the voir dire, judges are often attempting to pursue multiple objectives simultaneously. The primary objective, described in Section 223 of the Code of

[78] This procedure, commonly referred to as "striking back," is not universally permitted in other courts around the country that employ the "strike and replace" method of jury selection.

Civil Procedure, is to "aid in the exercise of challenges for cause" – that is, to determine whether any prospective juror is disqualified or harbors implied or actual biases that would prevent him or her from serving fairly and impartially.[79] Ideally, this objective is pursued in the most efficient and effective manner possible. In addition to this overriding objective, however, many judges feel that is important to pose "softball" questions, simply to help jurors feel more at ease while talking in an environment in which most people are unfamiliar. Examples of these types of questions are "Have you ever received a traffic ticket that you felt was unfair?" Finally, some questions – particularly those concerning knowledge about and support for basic legal principles (e.g., presumption of innocence, burden of proof) – were asked, in part, as a vehicle for educating all jurors on the panel about the role of the jury in the justice system.

Most of the judges used some form of voir dire template (e.g., large sign in the courtroom, a paper questionnaire or laminated sheet) to guide the questioning process. None of the judges observed in this study used case-specific written questionnaires, but instead instructed prospective jurors to answer each question orally in open court. The basic questions posed to jurors typically included the juror's area of residence, marital status, occupation (self and spouse/partner, if applicable), number and ages of minor children, and occupations of adult children. More infrequently, judges also inquired of jurors' education and military service. All of the judges evinced concern for juror privacy. Juror names were generally only used for roll call purposes, and in the beginning of more substantive voir dire, the judges generally informed the jurors that they could request a private discussion in chambers or at sidebar if they did not wish to reveal information before the entire panel.

As for the questions posed by judges, most fell within a handful of categories:

- Relationship to the parties, lawyers, or potential witnesses;
- Personal knowledge of the facts of the case or familiarity with the location of the alleged crime;
- Personal experience with respect to the criminal offenses charged in the indictment;
- Personal experience with or relationship to law enforcement or the legal profession;
- Personal experience with or relationship to persons victimized by crime;
- Personal experience with or relationship to persons charged with crimes;
- Prior jury or court experience; and
- Willingness to follow jury instructions as directed by the trial judge.

Usually, although not always, an affirmative response from any juror would be followed by a question as to the juror's ability to be fair and impartial given the affirmative response.

After the judge completed his or her questioning, the lawyers were given a brief period (typically 10 to 15 minutes each) in which to question the jurors.[80] Until relatively recently, however, judges were not required to permit lawyers to question prospective jurors directly in criminal cases and

[79] CAL. CIV. PROC. CODE § 229 (Deering 2004).

[80] In the world of trial advocacy, volumes have been written about the objectives of voir dire from the lawyers' perspective, but generally they distill down to the following six: (1) to support a motion for a challenge for cause; (2) to exercise peremptory challenges; (3) to educate the jury; (4) to develop rapport with jurors; (5) to neutralize negative and build on positive juror attitudes, opinions, and beliefs; and (6) to obtain commitments. *See, e.g.,* ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS & TECHNIQUES (1991).

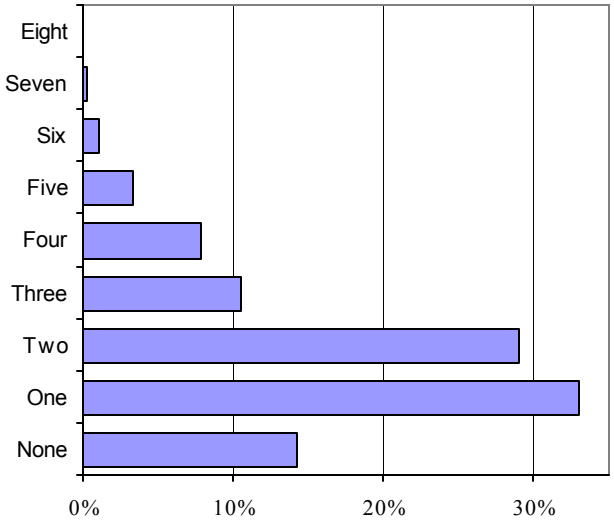
most granted permission only sparingly, if at all. The statute, which was amended in 2000 to permit limited attorney voir dire in criminal trials, grants discretion to the trial judge as to the scope and amount of time permitted for attorney questions.[81]

With respect to the cases observed in this study, the lawyers' questions tended to focus on the same objectives described as the judges – identification of bias, rapport-building, and juror education. Typically those questions sought clarification or elaboration on juror answers given in response to judge questioning or introduced case-related issues that were likely to arise during trial (e.g., witness characteristics), the latter of which provided opportunities to give jurors a more complete understanding of the nuances of the case than might be immediately apparent from the direct language of the indictment. Most of the lawyers also used their voir dire time to educate jurors on key legal principles. Prosecutors, for example, often focused on the definition of "reasonable doubt," the distinction between direct and circumstantial evidence, and the quantity of evidence needed to establish a fact. Defense counsel, in contrast, concentrated on issues related to the presumption of innocence, the burden of proof, and defendants' Fifth Amendment rights.

Patterns of Juror Reponses to Questions

As illustrated by the coding sheet (Appendix B), the questions posed to prospective jurors by the judges and lawyers fell into 20 categories. Because most judges conducted time and hardship screening before beginning substantive questioning of the panel, jurors who were excused for hardship, which accounted for 22 percent of the panel, did not have the opportunity to respond to most questions. Perhaps the most remarkable feature of substantive questioning is how infrequently prospective jurors actually have a response to questions in any of the 20 categories. See Figure 4.1. Other than providing basic demographic information, nearly 15 percent of prospective jurors had no affirmative responses to the judges' or lawyers' questions. Over three-fourths of the prospective jurors responded substantively to only two or fewer categories of questions and even the most loquacious juror had substantive responses in only eight categories of questions.

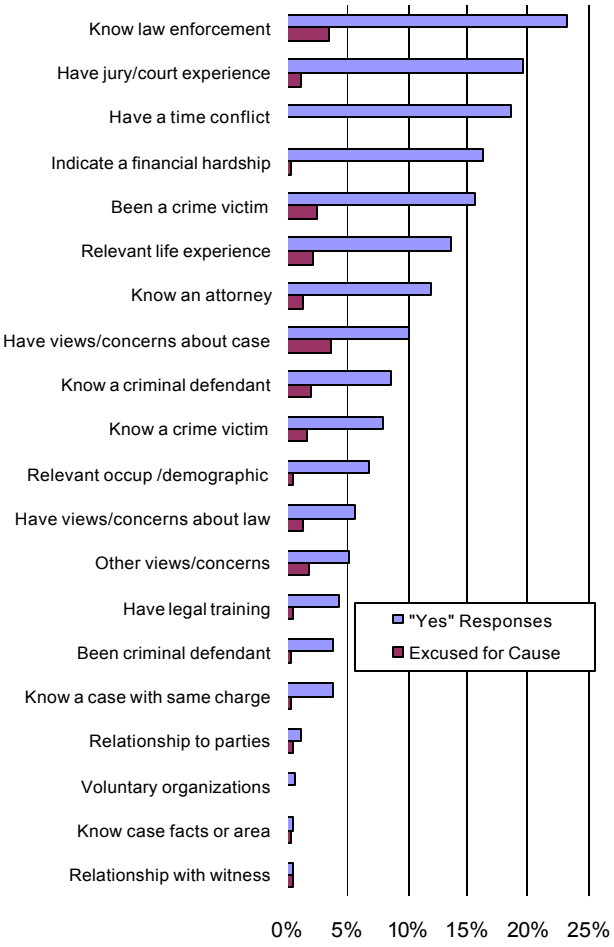
Figure 4.1: Number of Juror Responses to Voir Dire Questions



It is clear, however, that some categories of questions elicit considerably more responses from jurors than others. See Figure 4.2. For example, questions concerning prospective jurors' personal experience with or relationships to people in law enforcement generated the most responses from jurors, with nearly one of every four jurors responding affirmatively to these questions. Other categories of questions that ranked high in terms of juror responses were questions related to previous jury or court experience, time conflicts or financial hardship, and criminal victimization. In contrast, very few jurors reported actual knowledge about the cases or relationships to the parties or witnesses, responses that are statutorily identified as potential areas of implied bias.[82]

[81] Cal. Civ. Proc. Code § 223 (Deering 2004).
[82] Cal. Civ. Proc. Code § 229 (Deering 2004).

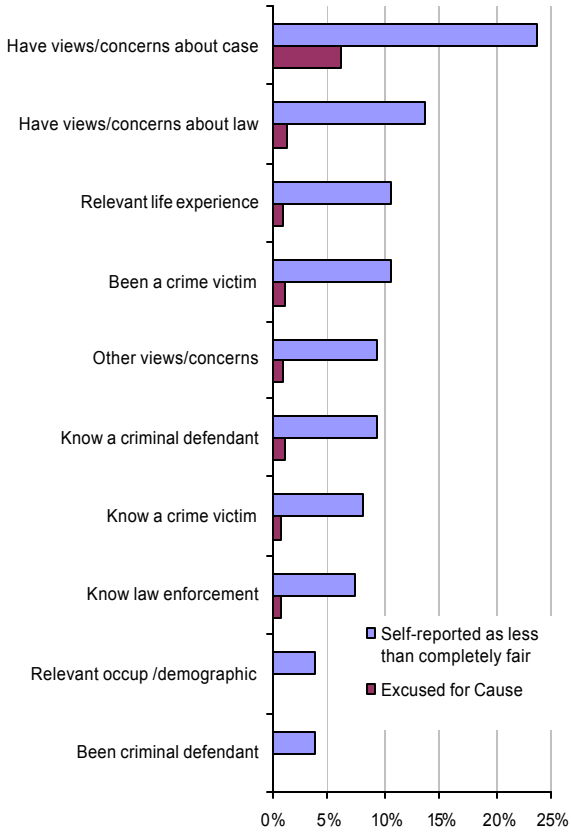
Figure 4.2: Questions Asked of 704 Jurors



Based on the proportion of jurors who are subsequently excused for cause, we find that not all categories of questions are equally likely to identify implied or actual bias in prospective jurors. For example, although relatively few jurors responded to questions dealing with actual knowledge of the case or relationships with parties or witnesses, those that did were highly likely to be excused for cause. In fact, all three of the jurors who reported some relationship to a potential witness, and two of the three jurors who reported some knowledge about the case facts or the location where the crime allegedly occurred, were excused for cause. In contrast, only eight of 138 jurors (5.8%) who reported previous jury or court experience were excused for cause.

Jurors who responded to voir dire questions were generally asked whether anything about their experience would make it difficult for them to serve fairly and impartially in that trial. To code these follow-up responses, observers ranked jurors' self-assessments on a scale of 1 to 5, with 1 indicating that the juror could not serve fairly and impartially and 5 indicating that the juror could serve fairly and impartially. For each juror, the observers indicated up to two categories of questions that were most relevant to the issue of the juror's ability to be fair and the juror's self-assessment on that issue. In Figure 4.3 we find that judges appear to react differently to jurors' self-assessment

Figure 4.3: Self-Reported Fairness and Excusal for Cause



about fairness and impartially depending on the category of question and response.

In their responses to voir dire questions, 177 prospective jurors indicated less than complete confidence in their ability to be fair and impartial. Of those doing so, however, only half were ultimately removed for cause. Approximately three-quarters of those who expressed doubts based on their personal relationship to another criminal defendant were removed for cause compared to just over one-third of jurors who expressed doubts based on their views or concerns about the law.

It is somewhat instructive how the rankings for these categories change depending on the focus (e.g., frequency of juror responses, frequency of jurors removed for cause, frequency of low juror assessments of fairness). See Table 4.1. For example, fewer than 11 percent of jurors expressed views or concerns about the case during voir dire (the 8th ranked category in overall responses). But over one-third of those jurors were excused for cause, raising the category rank to fourth (just after the categories concerning statutory criteria defining implied bias). In contrast, relationships with people in law enforcement was the category that generated the most responses from jurors – nearly one in four jurors reported that they know someone who works in law enforcement. Yet only 15 percent of those who reported knowing someone in law enforcement were excused for cause, ranking the category 11th out of a possible 20 overall. Because some types of questions tend to elicit responses that are more likely to result in removal for cause, they warrant a closer look for discernible patterns.

Table 4.1: Rankings of Juror Responses and Removed For Cause

	"Yes" Responses		Removed for Cause	
	%	Rank	%	Rank
Know law enforcement	23.2	1	15.3	11
Have jury/court experience	19.6	2	5.8	17
Have a time conflict	18.5	3	0.8	19
Indicate a financial hardship	16.2	4	1.8	18
Been a crime victim	16.1	5	16.8	9
Relevant life experience	13.6	6	16.7	10
Know an attorney	12.1	7	10.6	13
Have views/concerns about case	10.5	8	33.8	4
Know a criminal defendant	9.2	9	24.6	6
Know a crime victim	8.0	10	19.6	7
Have views/concerns about law	7.4	11	19.2	8
Relevant occup /demographic	6.8	12	8.3	14
Other views/concerns	5.3	13	29.7	5
Have legal training	4.4	14	12.9	12
Been criminal defendant	3.8	15	7.4	15
Know a case with same charge	3.8	16	7.4	16
Relationship to parties	1.1	17	37.5	3
Voluntary organizations	0.6	18	0.0	20
Relationship with witness	0.4	19	100.0	1
Know case facts or area	0.4	20	66.7	2

A Closer Look at Selected Categories of Questions

Some questions were posed to prospective jurors in all of the trials observed in the study, which suggests that judges and lawyers believe them to be useful for discerning the existence or absence of potential bias in jurors. In every case observed, for example, the trial judge or lawyers asked jurors whether they had ever been the victim of a crime or had known anyone who was the victim of a crime, whether they had ever been charged with a crime or had known anyone charged with the crime, whether they had any views or concerns about the case, and whether they had any views or concerns about following the law. Each of these questions generated fairly large numbers of responses from prospective jurors, but had differing results in terms of the proportion of jurors removed for cause. What aspects of jurors' responses prompt judges to excuse the juror for cause?

To examine this question, NCSC staff reviewed the observation notes concerning each juror's responses in each category and compared the responses that resulted in the juror's excusal for cause to responses that did not result in the juror's removal. NCSC staff paid particularly close attention to both the situational components of the jurors' responses and the juror's own self-assessment of fairness. These comparisons provide a basis for drawing tentative conclusions about the criteria that judges currently use in evaluating the fitness of each juror to serve fairly and impartially.

Jurors who have been Victims of Crime

Of the 704 jurors[83] who were observed during voir dire, 110 (16%) indicated that they had been victims of crime. Eighteen (18) jurors were subsequently excused for cause, nine of whom the observers believed were removed as a result of their answers to questions about their experiences as victims of crime. A closer examination of the exact responses given by those jurors indicated that only 18 of the 110 jurors who reported previous victimization (16%) had experience with the same offense charged against the defendant. See Table 4.2. An additional 25 prospective jurors (23%) reported a similar crime as the offense charged against the defendant. The majority of jurors reported crimes that were either unrelated to the case at trial or unspecified during the observation period.

Table 4.2: Jurors' Experiences as Crime Victims and Disposition

	Excused Because Status as Victim		Not Excused for Cause	
Crime Type	**n**	**%**	**n**	**%**
Same Crime	8	44.4	10	55.6
Similar Crime	0	0.0	25	100.0
Unrelated Crime	1	1.5	66	98.5
Total	**9**	**8.2**	**101**	**91.8**

As Table 4.2 illustrates, half of the jurors who reported experience with the same offense charged against the defendant were removed for cause, the vast majority (8 out of 9) ostensibly as a result of these experiences. Jurors whose experiences were with crimes only similar or unrelated to the offenses charged at trial were much less likely to be removed for cause. The nature of the crime also appears to be related to judges' decisions about whether to remove jurors for cause. When a juror's experience involves violent crime, which was the case for 13 jurors, the trial judge excused the juror nearly two-thirds of the time; but for the five jurors whose experience involved property crimes, only one juror was excused for cause and then for a reason other than his or her previous victimization.

To what extent do judges base their decisions of removal on the jurors' own assessments about their ability to serve fairly and impartially? At least in the category of previous victimization, this appears to be a fairly strong basis for the judge's decision. See Table 4.3. The observers identified previous

[83] Twenty-two percent of these jurors (155) were excused for hardship, most of them during time/hardship screening before the beginning of substantive questioning. It is likely that many of these would have also answered questions about victimizations in the affirmative.

victimization as a potential source of juror bias for 38 jurors, but only 10 jurors expressed doubts about their ability to be fair. All of the jurors who definitively indicated that they could not be fair were removed for cause, and one of the two jurors who reported that it was unlikely that they could be fair. Of the five jurors who were unsure or expressed some hesitancy in their response, only one was removed for cause.

Table 4.3: Jurors' Experience as Crime Victim and Self-Assessed Fairness

	Fairness Rating		Excused for Cause	
	n	%	n	%
Not fair	6	10.3	6	100.0
Unlikely fair	4	6.9	3	75.0
Unsure	1	1.7	0	0.0
Likely fair (hesitancy)	5	8.6	0	0.0
Fair	40	69.0	1	2.5
Not Asked	2	3.4	0	0.0
Total	**58**	**100.0**		

Jurors with Relationships to Criminal Defendants

Sixty-one of the 704 jurors (9%) reported that they knew someone who been accused of a crime. Fourteen jurors were subsequently removed for cause, more than two-thirds of whom the observers believed were removed as a result of these relationships. Again, a close examination of juror responses reveals a great deal of nuance in judicial decision-making in this category of questions and responses. See Table 4.4. Of the 19 jurors who reported knowing someone charged with the same offense as the defendant, five were removed for cause. Two of eight jurors who report knowing someone charged with a similar offense were removed for cause, but only one was thought to be removed specifically for that reason. Thirty-four jurors knew someone charged with a crime unrelated to the offenses charged against the defendant, but only one in five were ultimately removed for cause and only one in ten as a result of their response to this question.

Table 4.4: Relationship to Another Defendant, by Similarity of Offense

	Excused Because of Relationship		Not Excused for Cause due to Relationship	
Crime Type	**n**	**%**	**n**	**%**
Same Offense	5	26.3	14	73.7
Similar Offense	1	12.5	7	87.5
Unrelated Offense	1	5.6	17	94.4
Unknown Offense	3	18.8	13	81.3
Total	**10**	**16.4**	**51**	**83.6**

The relationship of the juror to another defendant is an additional consideration in detecting bias. It would be expected that when a juror has a relationship with someone who was a defendant in another case, the closer the relationship, the more likely the juror would be affected by the experience. Thus, it follows that the closer the relationship, the more likely a juror would be excused for cause. Instead, the removal rate is similar, regardless of the closeness of the relationship; jurors who knew a defendant, whether within their immediate family or extended family, were both equally unlikely to be excused for cause (20%). See Table 4.5. It is possible that a more pronounced effect would be observed in a larger sample of observations.

Table 4.5: Jurors' Relationship to Another Defendant, by Type of Relationship

	Excused Because of Relationship		Not Excused for Cause due to Relationship	
Degree of Relationship	**n**	**%**	**n**	**%**
Immediate Family	3	12.0	22	88.0
Extended Family	5	20.0	20	80.0
Friend/Acquaintance	2	18.2	9	81.8
Total	**10**	**16.4**	**51**	**83.6**

Within this category of questioning, judges seem to place even greater weight on jurors' self-assessments about fairness than in other categories. Sixty-one jurors reported knowing someone accused of a crime, and the responses for over half of them suggested this category as a potential source of bias. Indeed, almost 20 percent of these jurors (11), expressed reservations about their ability to be fair and impartial,[84] and judges removed all but two of them for cause.

Juror Views and Concerns about the Case

For observation purposes, the category "juror views and concerns about the case" served as something of a catchall to record jurors' responses to case-specific questions posed by the judge or lawyers. Sometimes these questions related to jurors' views, experiences or attitudes concerning witness or defendant characteristics such as occupation, demographics, or criminal history. In other cases, questions were framed more as open-ended invitations from the judge or lawyers for jurors to express any concerns they might have about the basic case facts. Seventy-one (10%) jurors responded to questions in this category. Over one-third of these jurors were subsequently removed for cause, approximately one-fifth ostensibly as a result of responses in this category.

Perhaps because of the diffused nature of this category of questions, attempts to categorize juror responses reveal less coherence than the two categories previously examined. See Table 4.6. Of the 14 jurors excused for cause as a result of their responses, however, 11 of these responses involved either very strong beliefs about the nature of the crimes alleged at trial (e.g., drug use, child sexual abuse, gun violence) or a significant personal experience related to the crime (family or close friends killed or deeply affected by drug abuse in drug cases; occupational friendships with police in police assault case).[85]

Table 4.6: Jurors' Views and Concerns About the Case

	Excused Because of Views		Not Excused for Cause due to Views about Case	
	#	%	#	%
Strong Beliefs	6	35.3	11	64.7
Personal Experience	5	26.3	14	73.7
Emotional Response	1	16.7	5	83.3
Unwilling to follow law	0	0.0	8	100.0
Statutory disqualification	0	0.0	2	100.0
General views	0	0.0	7	100.0
Witness credibility	0	0.0	8	100.0
Unknown (sidebar)	2	50.0	2	50.0
Total	**14**	**19.7**	**57**	**80.3**

Yet, many of the jurors who were not excused for cause expressed identical views or concerns that resulted in jurors being removed for cause in other trials. For example, seven jurors reported strong views about guns; two were removed for cause (one for a different, but related, reason), but five remained on the jury panel. Similarly, eleven jurors reported strong views or personal experiences about drug abuse and/or prosecution of drug crimes. A juror whose best friend was killed by a drug overdose and a juror whose daughter was addicted to drugs were both removed for cause, but another juror whose husband died of substance abuse and who stated unequivocally that all drugs and alcohol should be illegal was left on the jury panel.

Despite the difficulty in categorizing jurors' views and concerns about the case, jurors' self-assessments about fairness continue to appear as strong factors in judges' decisions on removal for cause.

[84] Nine of the 11 definitively stated their inability to be fair or said that they were unlikely to be fair, which may explain the comparatively high rate of removal for cause.

[85] The remaining two responses were delivered at sidebar and could not be recorded by the observers.

See Table 4.7. Observers identified their views or concerns about the case as a source of bias for more than one-half (37) of the 71 jurors in this category, all but six of which expressed doubts about their ability to be fair and impartial. All of the jurors who said definitively that they could not be fair were removed for cause, but only one-half who stated they were unlikely or unsure that they could be fair were removed by a challenge for cause.

Table 4.7: Jurors' Views About the Case Facts and Self-Assessed Fairness

	Fairness Rating		Excused for Cause	
	n	%	n	%
Not fair	9	24.3	9	100.0
Unlikely fair	11	29.7	7	63.6
Unsure	6	16.2	2	33.3
Likely fair (hesitancy)	5	13.5	0	0.0
Fair	5	13.5	0	0.0
Unrated	1	2.7	0	0.0
Total	**37**	**100.0**	**18**	**48.6**

Juror Views and Concerns about the Law

When voir dire questioning turned to jurors understanding and willingness to comply with the law as provided by the trial judge, 6 percent of prospective jurors (40) expressed some views or concerns about the law. Some, for example, said that they would want to hear testimony from the defendant and would have trouble evaluating other evidence introduced at trial without it. Others seemed puzzled and concerned about accepting uncorroborated testimony, in particular from certain types of witnesses (e.g., children, gang members). Ultimately, one of every four of these jurors were removed for cause, and four (10%) as a result of their responses to this category of questions. See Table 4.8.

Table 4.8: Jurors' Views About the Law

	Excused Because of Views		Not Excused for Cause due to Views about Law	
	n	%	n	%
Presumption of Innocence	1	8.3	11	91.7
Fifth Amendment	2	25.0	6	75.0
Witness Credibility			8	100.0
General Views			5	100.0
Substance of Law	1	25.0	3	75.0
Sufficiency of Evidence			3	100.0
Total	**4**	**10.0**	**36**	**90.0**

Prospective jurors who responded to this category of questions tended to have concerns about six different aspects of law. Two of these involve constitutional principles of due process, such as the presumption of innocence for criminal defendants and the Fifth Amendment rights of defendants not to testify at trial. Other jurors raised questions about witness credibility and the quantum of evidence needed to establish any particular fact. A small handful of jurors questioned the legitimacy of the substantive law.[86] Finally, some jurors expressed a fairly diffused mistrust of the criminal justice system in general. Overall, the vast majority of jurors who expressed views or concerns about the law were not removed for cause. Jurors who expressed reservations about basic due process principles appeared somewhat more likely to be excused than those expressing concern about other aspects of the law.

These concerns formed the basis for the observers' designation of a potential source of bias in approximately half of the jurors responding to these questions. Of those, one in five indicated that they would have difficulty serving fairly and impartially. See Table 4.9. All of the jurors who definitively said they could not be fair or who said they were unlikely to be fair were ultimately removed for cause.

[86] All of these prospective jurors were questioned in the context of drug charges.

Table 4.9: Jurors' Views About the Law and Self-Assessed Fairness

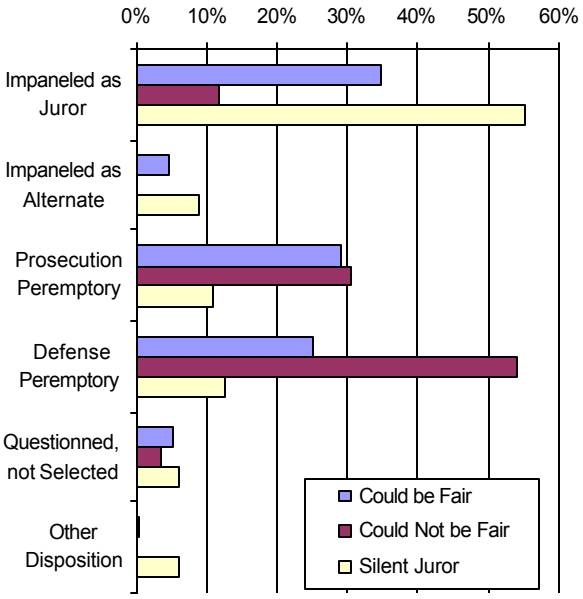
	Fairness Rating		Excused for Cause	
	n	%	n	%
Not fair	1	5.0	1	100.0
Unlikely fair	3	15.0	3	100.0
Unsure	3	15.0	1	33.3
Likely fair	3	15.0	0	0.0
Fair	4	20.0	0	0.0
Unrated	6	30.0	0	0.0
Total	**20**	**100.0**	**5**	**25.0**

Based on this closer examination of selected categories, some basic similarities and trends become apparent. From a purely objective standpoint, when prospective jurors disclose a personal experience in response to voir dire questions, judges appear to give greater weight to experiences that closely resemble issues likely to arise at trial and are more likely to excuse those jurors for cause. Curiously, judges did not demonstrate a tendency to give similar weight to close family relationships or close friendships when evaluating the potential biasing effects on prospective jurors, although this may have been the result of the small sample size. Prospective jurors' self-assessments did play a significant role in judicial decision-making; all things being equal, the more firmly that prospective jurors indicate doubts about their inability to serve fairly and impartially, the more likely judges are to remove those jurors for cause.

WHAT HAPPENS TO JURORS WHO ARE NOT REMOVED FOR CAUSE?

Judges, of course, are not the only people reacting to juror disclosures during voir dire. Lawyers also make decisions about how to exercise their peremptory challenges based on the information provided by jurors. By all appearances, lawyers also take jurors' self-assessments seriously when making these decisions. Figure 4.4 indicates the disposition of prospective jurors who were not previously excused for hardship or for cause while controlling for the jurors' self-assessments about their ability to be fair and impartial.[87]

Figure 4.4: Disposition of Jurors Based on Self-Assessed Fairness



Of particular note, nearly half of all jurors did not indicate their ability to be fair one way or the other.[88] Predictably, jurors who explicitly expressed doubts about their ability to be fair were the least likely to be impaneled (12%). In contrast, 40% of prospective jurors who explicitly said that they could be fair were ultimately impaneled as trial jurors or alternates, and 64% of jurors who did not indicate fairness at all were impaneled. This tendency to believe that silence is golden, or at least presumptively fair and impartial, may deserve some closer scrutiny, as we discuss later in this chapter.

[87] Totals indicate whether jurors expressed doubts about their ability to be fair and impartial on any issue addressed during voir dire.

[88] In some instances, no follow-up was done after the juror's disclosure; in other instances, the juror's ability to be fair and impartial may have been self-evident.

The prosecution and defense attorneys demonstrate some interesting patterns with respect to peremptory challenge usage in response to jurors' disclosures about fairness. For example, the prosecution and defense counsel exercise peremptory challenges equally as often against jurors who say they can be fair and against jurors who give no indication about their ability to be fair. But defense attorneys struck nearly twice as many jurors who indicated that they might not be fair as did prosecutors. Prosecutors, in contrast, appear to strike jurors regardless of whether the jurors say they can be fair or not. One possibility for this difference may be that prospective jurors who express reservations about their ability to be fair are more likely to reveal biases against the defendant than against the prosecution.

Another perspective on the process of jury selection is that of the neutral observer. As part of the coding process during voir dire observations, NCSC and AOC staff made note of juror responses that prompted the observers to question the ability of the juror to be fair and impartial. See Table 4.10. Forty-five of these, a larger-than-expected number, survived removal for cause. In one of these instances, a female juror in a child molestation case reported that she had a young child and she expressed her belief that the defendant was likely to be guilty. She was also worried that the defense would try to discredit a child witness in the case. Eventually, she was excused by a defense peremptory challenge. In another case involving a defendant charged with murder with presumed gang involvement, a young (approximately 20-year-old) female juror said she did not think she could be fair in this case because close family members, both of whom had gang involvement, had been convicted of crimes. She also mentioned that she was intimidated by other jurors and was not sure she would express her opinion about the case, but would likely defer to others.

Of these 45 "questionable" jurors, four were the subject of motions for challenges for cause by the defense counsel, all of which were denied. Eventually, all but two were dismissed from jury service, most by peremptory challenge. Some might argue that these examples provide evidence of the basic soundness of existing voir dire practices in California, especially the need for a sufficient number of peremptory challenges to permit lawyers to remove individuals of debatable ability to serve fairly, when the trial judge declines to remove that person for cause.

JUDGE AND LAWYER DECISION-MAKING IN CONTEXT – PUTTING IT ALL TOGETHER

Thus far this chapter has examined judges' and lawyers' decisions to remove or retain jurors in isolation, one category at a time. In the context of actual jury selection, however, judges and lawyers are reacting to each juror's responses to multiple questions, some of which may indicate that the juror would be capable of serving quite well and others that may indicate the opposite. To put all of these factors in context, NCSC staff developed three models – one to illustrate judicial decision-making about chal-

Table 4.10: Ultimate Disposition of Jurors Based on Observer- and Self-Assessed Fairness

Observer Said. . .	Juror Might Not Be Fair					
Juror Said. . .	Could be Fair		Could Not be Fair		Silent Juror	
	n	%	n	%	n	%
Empanelled as Juror	1	7.1	1	3.4	0	0.0
Prosecution Peremptory	5	35.7	10	34.5	0	0.0
Defense Peremptory	7	50.0	18	62.1	0	0.0
Questionned, not Selected	1	7.1	0	0.0	2	100.0
Total	**14**	**100.0**	**29**	**100.0**	**2**	**100.0**

lenges for cause and two models to illustrate lawyer decision-making about the exercise of peremptory challenges by the prosecution and defense counsel, respectively.[89] All three models provide the marginal probabilities that a juror will be removed from the panel, by the judge for cause or by a lawyer by peremptory challenge, given an explicit response to one of the 20 categories of questions posed during voir dire.[90] See Table 4.11.

For example, in the column labeled "Excused for Cause," a juror who indicates that he or she knows someone who has been a victim of crime has a value of negative 4% – that is, a juror who knows a victim of crime is 4% *less likely* to be excused for cause than a juror who does not know a victim of crime.[91] Values marked with an asterisk (*) indicate that the effect is statistically significant within a logistic regression model.[92]

Table 4.11: Marginal Probabilities for Questions Asked During Voir Dire

	Excused for Cause	Prosecution Peremptory Challenge	Defense Peremptory Challenge
	%	%	%
Know case facts or area	20	--	--
Know law enforcement	6	- 13*	21*
Know a defendant	5	6	- 1
Relevant life experience	4	8	7
Has legal training	4	3	- 9
Other views/concerns	4	- 4	2
Know a crime victim	- 4	- 13	4
Views/concerns about case	- 9	1	16
Been a crime victim	- 10	- 3	- 1
Relevant occupation/demographic	- 14	- 6	14
Been a defendant	- 16	41*	- 28*
Know attorney	- 17	13	- 14
Have jury/court experience	- 29*	- 7	4
Views/concerns about law	- 36*	6	- 2
Know a case with same charge	- 39	5	- 1
Juror says, can be fair	- 71*	2	- 21*

* = Juror responses to these questions were statistically significant at the alpha = .05 level in a logisitic regression model predicting juror excusal for each model. Note: The subsequent marginal probabilities indicate the probability that a juror will be excused due to an affirmative response to each voir dire question as compared to a juror who responds in the negative, assuming all other responses were "no".

[89] To reflect the reality of judges and lawyers decisions, the Removal for Cause model excludes only those jurors who were excused for hardship. The Peremptory Challenge models, in contrast, exclude all jurors excused for hardship and all jurors removed for cause.

[90] Logistic regression analyses were run for each model. In four of the categories, there were too few affirmative responses, which necessitated removal of these categories from the models. Subsequent computations of the predicted marginal probabilities are shown in Table 4.15. For the purpose of this analysis, the marginal change in probability (x=0 to x=1) describes the increased probability for each model for an affirmative response (x=1) as compared to a negative response (x=0) to the respective questions during voir dire. The model assumes a negative response for all other questions, to isolate each response individually.

[91] The sign before each value indicates whether the marginal change probability of removal is more likely (positive sign) or less likely (negative sign).

[92] The logistic regression models were tested at $\alpha = .05$.

From the Removal for Cause model, it is clear that the juror's self-assessment about fairness is the strongest factor in judicial decision-making in challenges for cause. Jurors who say that they can be fair are 71 percent less likely to be removed for cause than jurors who indicate doubts about their ability to be fair or who fail to indicate fairness altogether. The strength of this factor suggests that judges place fairly heavy reliance on juror candor during voir dire and tend to take juror statements about fairness at face value.

Two additional factors showed statistically significant effects in this model, both of which are somewhat puzzling. The first of these is that jurors who expressed views or concerns about the law were 36 percent *less likely* to be removed for cause than jurors who did not respond to questions of this type. This result is counter-intuitive and presents a curious scenario in which judges retain jurors who may have difficulty following the law. How could this possibly occur?

One possible explanation is that this category of questioning, and thus the responses that those questions generate from jurors, may be more prone to serving multiple objectives, including educating prospective jurors about basic legal principles, than other types of questions posed by judges and lawyers. Thus, the decreased likelihood of removal for cause may indicate that juror responses actually reflect understanding or agreement with applicable legal principles rather than potential juror bias.

A second possibility is that judicial dialogue with jurors about their views and concerns about the law often involves some degree of rehabilitation. That is, a juror's comment about wanting to hear the defendant's testimony would often be followed by statement or question by the judge that "if I tell you that the law says you cannot hold it against the defendant if he doesn't testify, you will be able to follow the law, right?" to which the juror almost invariably replies "yes, judge." The decreased likelihood of removal for cause may therefore reflect judicial confidence in these rehabilitation efforts or judicial confidence in jurors' ability to disregard their own preconceptions about legal principles and adhere to the judicial instructions on the law. A final possibility is that some judges may discount juror responses along this line of questioning due to a perception of juror unwillingness to serve.

The second puzzling result in this model is that jurors who report having previous jury or court experience are 29 percent less likely to be excused for cause than jurors who do not report previous jury experience. Simply stated as such, previous jury experience seems a curious basis for making a determination about a juror's fitness to serve fairly and impartially, notwithstanding pervasive beliefs in some circles about the beneficial characteristics of "seasoned jurors."[93] It may be that a lack of previous jury experience reflects a combination of other disqualifications from previous trials. Thus, jurors who have survived previous screening procedures are more likely to survive again.

Compared to the magnitude of marginal probabilities in the judicial model for challenges for cause, the prosecution and defense counsel models for peremptory challenges seem less dramatic. Nevertheless, the direction of the values appears to track more consistently with conventional wisdom about the preferences of prosecutors and criminal defense counsel, particularly for those factors that were statistically significant. For example, in the prosecution model, two factors were statistically significant: jurors' personal experience as a criminal defendant and jurors' relationships with people in law enforcement. Prosecutors were 41 percent more likely to exercise peremptory challenges against jurors who reported that they had been accused of a

[93] *See, e.g.,* Ronald Dillehay & Michael Nietzel, *Juror Experience and Jury Verdicts*, 9 L. & HUMAN BEHAV. 179 (1985) (finding that juries that include more jurors with prior jury experience were less likely to hang); Bob Van Voris, *Voir dire tip: Pick former juror*, NAT'L. L. J., Nov. 1, 1999, at A1 (concluding that former jurors are less likely to be prejudiced and more likely to be fair).

crime in the past and were 13 percent less likely to exercise peremptory challenges against jurors who knew someone in law enforcement.

In the defense counsel model, three categories of questions were statistically significant. Coincidently, two of these were the same as the prosecution model, albeit in the opposite direction. Defense counsel were 28 percent less likely to exercise peremptory challenges against jurors who reported being accused of a crime and were 21 percent more likely to exercise peremptory challenges against jurors who knew someone in law enforcement. The third factor was jurors' self-assessments about their ability to be fair. Defense counsel were 21 percent less likely to exercise peremptory challenges against jurors who expressly stated that they could be fair and impartial. Curiously, this third factor was not significant in the prosecution model, although this may again reflect a general predisposition in the jury pool to harbor more biases against the defense than against the prosecution.

Some Tentative Conclusions

The small sample on which these analyses are based necessarily limits the certainty of conclusions that one can make from these findings. Nevertheless, the overall picture of jury selection in California that emerges is a relatively favorable one. Judicial decisions on challenges for cause appear to be strongly related to jurors' self-assessments of fairness and, to a somewhat lesser extent, to reasonable inferences about the likelihood that jurors will be fair and impartial given the relevance of their personal experiences and relationships. The frequency with which judges initiate the removal of jurors for cause, and the comparative infrequency with which lawyers move to excuse jurors for cause, at least superficially suggests that the majority of jurors who are unsuited to serve in those cases are successfully identified and removed.

Second, the questions posed by judges and lawyers are, for the most part, quite closely related to the factual and legal issues likely to arise at trial. There is some evidence of reliance on marginal questions – that is, questions that generate large numbers of responses from jurors (and consequently consume a great deal of time), but only rarely lead to information likely to result in removal for cause – but those questions may have some utility in terms of increasing the comfort level of jurors for answering questions in a public setting.

Two of the findings from these analyses, however, raise some potential concerns. The first is the extent to which "silent jurors" – that is, jurors who reveal comparatively little information in response to most of the categories of questions typically posed during voir dire – are ultimately impaneled as trial jurors or alternates. In a 1999 article, Judge Gregory E. Mize (ret.) wrote about his experience with using individual voir dire to inquire more fully into the suitability of these silent jurors.[94] He found that when given the opportunity to reveal information in a more private setting, 20 percent of silent jurors had relevant information to impart, and 43 percent of these (8% of all silent jurors) were ultimately removed for cause. If the same holds true of California jury panels, judges and lawyers may inadvertently be impaneling jurors who secretly harbor biases that make them unsuitable to serve in trials at nearly twice the rate even of jurors who disclose relevant information, but expressly state their ability to serve fairly and impartially.

The second area of concern involves the number of jurors who are not removed for cause whose fairness and impartiality is questionable either from the juror's own perspective or from the perspective of a neutral observer. Certainly, one possibility is a genuine difference in perception;

[94] Mize, *supra* note 27.

judges and lawyers may both have greater confidence in those jurors than the jurors themselves or those observing them. The fact that in all 18 trials the attorneys failed to exhaust their peremptory challenges lends credence to this possibility. An alternative explanation may be that the criteria for removal for cause is overly strict, leaving 11 percent of jurors on the panel even though a neutral observer questioned their ability to be fair and impartial and 58 percent of those (6% overall or approximately 1 in 20) survived removal for cause even when the jurors themselves indicated doubts about their suitability to serve. Most, but not all, were eventually removed by peremptory challenge or were otherwise excused from service rather than impaneled as a trial juror or alternate. But the fact that they remained on the panel at all raises the issue of public perceptions of fairness.

Chapter 5 – Conclusions and Recommendations

It is perhaps not terribly surprising that jury selection remains one of the least documented procedures in trial practice given the tremendous complexity involved. Not only must judges and lawyers take into account a number of variables unique to that trial (e.g., the composition of the jury panel selected, the nuances of the case that may suggest areas of potential juror bias), but they are also engaged in an interactive and interdependent process in which their respective actions and decisions affect subsequent actions and decisions. To further complicate matters, this interaction involves not only the judge and lawyers, but also the jurors individually and collectively, making judicial and lawyer decisions contingent on candid and complete disclosures by jurors as well. Given the great number of variables with which the trial participants have to contend, there may be some truth to the contention that jury selection is as much art as science.

The impetus for this study came about as a result of a highly controversial recommendation of the Blue Ribbon Commission on Jury System Improvement, and proposed again by the Task Force on Jury System Improvements to reduce the number of peremptory challenges in jury trials, a recommendation that was motivated by a number of laudable objectives including:

- the efficient use of court resources, including jurors' time and attention;
- the need to protect the due process rights of litigants;
- the desire to minimize opportunities for discriminatory or disrespectful exercise of peremptory challenges;
- the necessity to preserve public trust and confidence in jury trials as a fair and impartial method of adjudication; and
- the placement of primary responsibility on trial judges to remove jurors who are unable to serve fairly and impartially, rather than relying on peremptory challenges exercised by lawyers.

Part of this debate was also shaped by the recognition that California ranks consistently high among states in terms of the number of peremptory challenges allocated to parties in all case types.[95]

Because jury selection is such a complex process, however, it would be highly inappropriate to consider the effect of reductions in peremptory challenges in isolation from the effects of reducing challenges on other aspects of voir dire, especially judicial decision-making on challenges for cause. Therefore, this study was designed to consider the likely effects of the proposal to reduce peremptory challenges in the context of the entire jury selection process as well as independently.

Major Conclusions from the Study

The good news is that, by all outward appearances, jury selection practices in California are reasonably effective (albeit not particularly efficient) at identifying and removing jurors who would be incapable of serving fairly and impartially. From observations of the voir dire in 18 criminal trials in eight courts across the state, the study documented that judges initiate the vast majority of challenges for cause, typically by requesting a stipulation from the trial attorneys after judicial questioning of the juror is com-

> Judges initiate most challenges for cause. Lawyers rarely enter motions to remove jurors, but more than half are granted when made.

[95] *See* Munsterman, et. al., *supra* note 2, at App. 4.

plete. Lawyers only rarely entered a motion to remove a juror for cause, but more than half of those motions were granted when they were made, suggesting that trial judges take lawyers' concerns about juror bias seriously and give due consideration to the merits of those motions.

Likely Effects of Proposed Reduction in Peremptory Challenges

As further evidence that judicial screening for juror bias is reasonably effective, lawyers on average used only half of the peremptory challenges available to them. This finding is inconsistent with the assertion that lawyers are forced to use peremptory challenges to compensate for inadequate voir dire or for judicial removal criteria that are too restrictive. A reduction in the number of peremptory challenges as recommended by the Task Force would likely be felt in approximately half of all felony and capital felony trials, 70 percent of civil trials, and 84 percent of misdemeanor trials, although the average loss of peremptory challenges by each side would be moderate (three or fewer in most cases). Those reductions would provide courts with an opportunity to reduce panel sizes by a considerable margin, which in turn would reduce the number of Californians told to report for jury service by more than 110,000 per year.

> Lawyers generally use only half of the peremptory challenges available to them.

> The proposed reduction in peremptory challenges would reduce the number of Californians needed for jury service by more than 100,000 per year.

The study was designed primarily to examine two things: the frequency of peremptory challenge usage by lawyers and the criteria employed by judges when making decisions on removal for cause. As such, it did not attempt to speculate on the myriad of reasons that lawyers might exercise peremptory challenges the way they did. By examining the frequency with which jurors respond to certain categories of questions, however, some common – and largely predictable – themes emerge. Prosecutors, for example, tended to remove jurors who reported being accused of crimes and to retain jurors who reported relationships with people in law enforcement. Defense counsel demonstrated opposite patterns of peremptory challenge usage, but also reacted to juror self-assessments of fairness by excusing jurors who indicated they would have difficulty being fair and impartial. The fact that these two categories of questions – personal experience as a defendant and relationships with law enforcement – were significantly related to lawyer decisions on peremptory challenges suggests some use of stereotypes about these characteristics as a proxy for potential juror bias that may or may not actually exist.

A somewhat larger-than-expected number of jurors suspected of bias by neutral observers survived removal for cause, but the vast majority of those were removed by peremptory challenge. Insofar that the lawyers failed to exhaust their peremptory challenges in any of the trials observed, the small fraction of these jurors who were ultimately impaneled must have been viewed as satisfactory to the lawyers, the observers' concerns notwithstanding.

Judicial Decision Criteria on Challenges for Cause

Turning to judicial decisions on removal for cause, the voir dire observations seem to support the existence of fairly rational decision-making criteria that,

> The criteria with which judges decide whether to remove jurors for cause is largely unarticulated, but appears rational and widely accepted.

based on similarities across courts, are widely accepted by the California trial bench. The fact that these criteria are largely unarticulated either in positive law or in judicial training materials does not undermine the conclusion of a broad consensus on the appropriate approach for considering removal for cause. The decisions documented in this study suggest that two sets of criteria are applied – one based on objective criteria and one based on the jurors' subjective assessments about their ability to be fair and impartial.

Objective Criteria

The objective criteria focus on three factors, the first based on the explicit direction of the statute that removal for cause can be based on general disqualification from jury service (e.g., citizenship, residency, age, mental competence)[96] or implied bias based on the prospective juror's relationship (consanguinity or affinity) to a party.[97] Prospective jurors matching these criteria are relatively infrequent, but when they appear in the panel they are typically recognized and removed immediately. The second criterion involves the nature of jurors' life experiences and its relevance to the factual or legal issues likely to arise at trial. Jurors with personal experience with the offenses charged against a defendant, or personal knowledge about the case or the location where the crime allegedly occurred were significantly more likely to be removed for cause than jurors with less relevant experiences. Similarly, the third criterion involved the salience of jurors' relevant life experiences or relationships. Case-relevant knowledge or incidents that jurors had experienced themselves were more likely to result in removal for cause than knowledge or incidents experienced by family members or acquaintances.

> Objective criteria focus on statutory requirements, the nature and relevance of jurors' life experiences to issues likely to arise at trial, and the salience of those experiences to jurors. Judges also rely heavily of jurors' self-assessments about their ability to serve fairly.

Subjective Criteria

Although these objective criteria played a major role in judges' decisions, jurors' self-assessments about fairness also had an effect with respect to certain categories of questions. As a general proposition, judges tended to give more weight to juror assessments about fairness as the objective criteria became more attenuated. To some degree, this may reflect the logical desire of judges to rely on additional cues when the relevance of juror knowledge or experience is questionable. Juror assessments were not an optimal predictor, however, which suggests that judges may question the motivations that lie behind lower juror assessments as attempts to avoid jury service rather than genuine inability to serve.

Areas of Concern

The study did reveal some areas of potential concern, however. One area was the larger than expected number of jurors whom observers identified as having questionable suitability for trial but who nonetheless survived removal for cause. There are a number of possible reasons that these individuals remained on the panel after the screening process. In some

> Areas of potential concern involve jurors of questionable suitability who survive removal for cause, judicial and lawyer use of juror silence or ambiguity as a proxy for fairness, and the overall efficiency of jury selection.

[96] Cal. Civil Proc. Code § 228 (Deering 2004).
[97] Cal. Civil Proc. Code § 229 (Deering 2004).

instances, the judicial criteria for removal may have been excessively restrictive, at least compared to the criteria deemed appropriate by the observers, thus permitting individuals who were likely to be unsuitable to continue on the panel. This was particularly troubling when these instances involved jurors' views and concerns about the law, the category in which judges seemed to place the most confidence in jurors' ability to set aside preexisting beliefs about the law. A second possibility is that some judges place undue reliance on juror assertions of fairness in instances where more objective criteria suggest that the juror would have difficulty serving fairly and impartially. The last possibility is simply judicial discounting of juror responses based on suspicions about the juror's motives to avoid jury service.

Regardless of the precise reasons for their survival, the fact that the vast majority of these individuals were subsequently excused by peremptory challenge and the fact that they were not screened out earlier in the jury selection process provides support for allegations that some judges set the threshold for removal for cause at inappropriately high levels. To the extent that the perceptions of neutral observers would be shared by other non-interested individuals in these jurisdictions, the number of questionable jurors who survive challenges for cause has the potential to undermine public confidence in the fairness of the jury system.

Silent Jurors and Ambiguity

Another area of concern relates to certain similarities between the California voir dire process and problematic issues identified in other studies of jury selection. The first is the comparatively high rate of impaneling "silent jurors" – that is, jurors who reveal little or no personal information other than the basic demographic and occupation information routinely disclosed by all jurors. As Judge Mize found in his experiment with individual voir dire, the majority of these jurors have no relevant information to impart.[98] When given the opportunity to disclose information in a more private setting, however, a small but significant handful of jurors revealed case-relevant information, and nearly half were ultimately removed for cause. Judge Mize's findings suggest that judges may need to probe these jurors more intensively for undisclosed bias, and that lawyers may need to be more cautious in their assumptions that "silence is golden."

The second involves judicial treatment of ambiguous or ambivalent responses by jurors on the question of their ability to be fair. Noted jury scholars Diamond and Rose conducted an experimental study in which they varied the degree of certainty with which jurors in a series of hypothetical scenarios indicated their ability to be fair.[99] In most of these scenarios, they found that actual judges, prosecutors, defense counsel, and jury-eligible citizens, all of whom participated in the study, rated the hypothetical jurors' ability to be fair differently depending on the degree of confidence expressed by the juror. They also found that the study participants differed in their assessments about whether the average trial judge would remove the hypothetical juror for cause.

The Diamond and Rose study poses implications for California jury selection procedures, particularly with respect to prospective jurors who express hesitancy, ambivalence or, for that matter, complete confidence in their ability to be fair and impartial. It is likely that trial judges in California respond to these subtle cues in a similar fashion – perhaps ascribing greater potential for bias where it doesn't exist or ascribing lesser potential where it does exist. In these circumstances, judges may find that greater reliance on objective criteria to make decisions about removal provides a stronger foundation than jurors' subjective assessments.

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[98] Mize, *supra* note 27.

[99] Mary R. Rose & Shari S. Diamond, *Assessing Juror Bias From Multiple Angles: Judges, Attorneys and Jurors* (unpublished manuscript on file with the authors).

Efficiency of Jury Selection Process

In terms of the overall efficiency of the jury selection process, the questions posed to jurors could be tailored to elicit information that is relevant to the factual and legal issues likely to arise at trial. General questions about prior victimization, for example, generated substantial disclosures from jurors about home burglaries and auto thefts that were not germane to the offense alleged (e.g., gang homicide, drug manufacture, child molestation). A complete description of the offenses followed by a targeted question such as "have you or someone you known been the victim of [this crime]?" would undoubtedly generate fewer responses from jurors, and thus take less time, but would provide more relevant information about the jurors' abilities to be fair in those types of cases. The question "do you have any other experience as a victim of crime that would affect your ability to be fair in this case?" could be posed to jurors as a follow-up, if the judge and lawyers feel it necessary.

Recommendations

1. Implement the proposed reductions in peremptory challenges.

Based on these findings, the Task Force proposal to implement the Blue Ribbon Commission recommendation to reduce the number of peremptory challenges appears well-founded, provided that California trial judges continue their commitment to effective screening of prospective jurors to identify and remove jurors who would have difficulty serving fairly and impartially. Some lawyers in some counties would experience the reduction in terms of their actual practice concerning peremptory challenges, but the effects would be moderate at best. Trials involving higher stakes – felony and capital felony – are significantly less affected than misdemeanor and civil trials. It is difficult to imagine that a reduction in the number of peremptory challenges would result in a decrease in public trust and confidence. Indeed, if it had any effect at all, it is more likely that news of the reduction in peremptory challenges would minimize public perceptions that adversarial tactics are routinely used to manipulate the composition of jury panels.

> Reducing peremptory challenges would reduce direct and administrative costs for the courts, reduce disruptions to the lives of people reporting for jury service, enhance public confidence in the jury system, and have only a modest effect on lawyers' practices.

On the positive side, the proposal has potential for considerable benefits to the courts and to the justice system. Strictly in monetary terms, the proposed reduction in peremptory challenges, and the commensurate reductions in panel sizes, would significantly reduce the number of Californians required to report for jury service, reducing both direct and administrative costs for the courts as well as the disruptions to the lives of those summonsed to serve. As importantly, reducing the number of peremptory challenges would place greater responsibility on trial judges to conduct effective screening on challenges for cause. Heightened attention to this role would likely strengthen judicial consensus on appropriate criteria for evaluating those challenges and prompting greater consistency among judges in how those criteria are applied.

2. Invest in judicial education on challenges for cause.

To do so, of course, will require an investment first in judicial consensus-building about appropriate criteria and then in judicial education and training on how those criteria should be applied. Observations of the voir dire from the 18 trials in

this study suggest the existence of a currently unarticulated, but likely broad, consensus about basic criteria that are important to judicial decision-making on removal for cause. What remains to be developed is refinement with respect to the weight that should be given to objective and subjective criteria such as juror self-assessments about fairness. Judicial curricula on this topic should also heighten awareness about the risks associated with "silent jurors" and the difficulty involved in evaluating ambivalence in jurors' responses to questions about their ability to serve fairly.

> Judicial education can refine how judges weigh the criteria for removing jurors for cause and heighten awareness about the potential juror bias in silent jurors and jurors expressing ambivalence about their ability to be fair.

3. Monitor juror dispositions and the relationship between peremptory challenges and challenges for cause.

Due to time constraints, the observations of jury selection were limited to a total of 18 criminal trials in eight, urban courts. Most of the conclusions drawn from these observations are supported by overwhelming similarities in judicial and legal practice across those cases and courts. For example, it is fairly that judges initiate the vast majority of removals for cause in criminal trials; lawyer motions to remove for cause were all but non-existent in this sample of cases and anecdotal reports tend to confirm this assessment. It is not clear, however, how a reduction in the number of peremptory challenges may affect this dynamic. It is possible that judges may become more sensitive to the issues of juror bias and will initiate even more challenges for cause; or, alternatively, lawyers may feel compelled to make more motions for cause as a result of the reduction. If, however, judges maintain the existing criteria for removal, some jurors of questionable suitability may continue to survive removal for cause, leaving lawyers with fewer peremptory challenges with which to remedy the judicial error. The Administrative Office of the Courts should monitor juror dispositions and the relationship between peremptory challenge and challenges for cause in both criminal and civil trials to ensure that implementation of the proposed reductions in peremptory challenges does not adversely affect the likelihood of impaneling a fair and impartial jury.

4. Pursue other improvements in juror utilization.

As noted occasionally throughout this report, and discussed at length in the Blue Ribbon Commission and Task Force reports, the jury selection process in California trial courts has several additional components that also contribute to less efficient, and less effective use of court resources and jurors' time. The costs and potential cost savings for several of these components are discussed in greater detail in *Increasing the Jury Pool: Fiscal Impact of an Employer Tax Credit*.[100] It is true that a reduction in the number of peremptory challenges would contribute significantly to decreased panel sizes, thus reducing administrative costs to the courts and disruptions to the lives of California citizens. A far greater impact, however, would be realized by reducing the existing number of prospective jurors who are "not reached" – that is, not questioned before the jury is impaneled – and reducing the number of "excess jurors" who are told to report for jury service but are never sent to a courtroom for voir dire. In addition to implementing the Blue Ribbon Commission and Task Force proposal on peremptory challenges, the Judicial Counsel of California should pursue strategies to address these other components of jury management.

[100] Paula L. Hannaford-Agor, Increasing the Jury Pool: Fiscal Impact of an Employer Tax Credit 11-13 (2004).

Appendix A

Circle County of Court: LA RV CC SF SD SC

Voir Dire Coding Sheet

Case Information

Judge: _____

Case Name: _____ Docket No.: _____

Prosecutor: _____

Defense Attorney: _____

Defendant(s) name, race, gender, and other notable characteristics:

_____

_____

_____

Case Description (charge, est. trial length, pertinent details):

_____

_____

_____

Voir Dire Information

Date(s): _____ Panel Size: _____

Not Reached: _____ Voir Dire Style: _____
(1= Very Restrictive/ 5 = Very Lenient)

Voir Dire Methods:

_____

_____

_____

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APPENDIX B

Case Name: Circle County of Court: LA RV CC SF SD SC

INDIVIDUAL VOIR DIRE SHEET

Juror No:_____ Badge No:_____ Name:_____

Gender: M F Race/Eth: Wh Bl As His Minority DK Age (or est):_____

Occupation:_____ Marital: S M D W DK # Kids: (<=18)____ (#>18)____

Spouse Occup.:_____ Adult Child Occup._____

Sidebar/In camera examination: Y / N Observer Flag: Y / N

SOURCE OF BIAS	ISSUE	CIRCUMSTANCE	Jr. FAIR? (1=N, 5=Y)	C ATTEMPT by D, P, Jd)	RESULT (Denied/ Granted)
	1. Time conflict w/trial		N/A		
	2. Financial hardship		N/A		
	3. Relationship w/parties				
	4. Relationship w/witness				
	5. Know case facts/area				
	6. Know case w/ same charge				
	7. Been vic other crime				
	8. Know vic other crime				
	9. Been def. other crime				
	10. Know def. other crime				
	11. Jury/ court experience				
	12. Demographic/Occup.				
	13. Know law enforcement				
	14. Know attorney(s)				
	15. Have legal training				
	16. Relevant life experience				
	17. Voluntary orgs				
	18. Views/concerns this case				
	19. Views/concerns about law				
	20. Other views/concerns				

DISPO: SEL ALT EX-HARDSHIP EX-CAUSE EX-PEREMP(P) EX PEREMP(D) Q-ED