

“The Case for Jury Inclusiveness and Reform: The Pennsylvania Story”

**Submitted by Attorney Lisette M. McCormick, Executive Director
The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness
Lisette.mccormick@pacourts.us**

Since the early days of our republic, jury service has remained a mark of citizenship and a touchstone of civic duty. One of the country’s founding fathers, President Thomas Jefferson, referred to jury service as “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” Yet, as the Supreme Court of Pennsylvania learned from its study of jury practices in the Commonwealth,¹ many people of color throughout the state are unable to perform this duty, in part due to jury selection procedures that fail to include or even eliminate them from the process.

The right of a defendant to a broadly representative jury is rooted in the Sixth Amendment to the U.S. Constitution, which guarantees a defendant charged with the commission of a crime the selection of a jury drawn from a representative cross-section of the community.² Although the Seventh Amendment pertaining to civil juries does not have a similar requirement for civil trials, the Equal Protection Clause of the Fourteenth Amendment prohibits discrimination on the basis of membership in protected classes.³ Additionally, in 1968, the Jury Selection and Service Act established statutory rights to a civil jury drawn from a representative cross-section of the community.⁴

Appointment of Supreme Court Committee to Investigate Bias in the Justice System: In 1999, the Supreme Court of Pennsylvania appointed a special committee, the Supreme Court Committee on Racial and Gender Bias in the Justice System (“Committee”), to investigate reports by female attorneys and attorneys of color of biased treatment and systemic discrimination in the Pennsylvania justice system. To discharge its mission, the Committee identified what it believed to be the key issues in its study. Among others, these included the access to the courts for litigants with limited English proficiency; racial and ethnic disparities in the juvenile justice system; the inadequacy of funding for and representation of indigent criminal defendants; racial, ethnic and gender disparities in criminal sentencing and in the imposition of the death penalty; and most pertinent to the subject of this article, the lack of racial and ethnic diversity in the composition of juries in Pennsylvania.

In 2003, the Committee produced its Final Report consisting of 550 pages and 173 recommendations, that provided a blueprint for addressing the inequities found by the Committee in the Commonwealth’s justice system.⁵ Approximately eighteen months later, the Supreme Court of Pennsylvania, along with the Executive and the Legislative branches of Pennsylvania government, established the Pennsylvania Interbranch Commission for Gender Racial and Ethnic Fairness (“Commission”). Its mission was to implement the Report’s recommendations; raise both public and professional awareness of the impact of race, ethnic origin, gender, sexual orientation, or disability on the fair delivery of justice; suggest ways to reduce or eliminate such bias or invidious discrimination with all branches of government and within the legal profession; and

increase public confidence in the fairness of all three branches of government in the Commonwealth of Pennsylvania. Sixteen years later, the Commission continues to implement the Report's recommendations in pursuit of its mission to promote the equal application of the law for all residents of the Commonwealth of Pennsylvania.

Racial and Ethnic Bias in Jury Selection: One of the first recommendations the Commission sought to implement after its establishment in 2005 was the need for county court administrators to use broader based sources in compiling their jury lists. Historically, most districts strictly relied on voter registration and driver's lists to compile their jury lists on which people of color, the poor, young adults, and the elderly were generally underrepresented. During its study of the jury selection process, the Committee found that the local court systems' procedures of constructing lists of potential jurors and selecting juries "failed at each step of the process to include a representative number of minorities."⁶ This finding was based, in part, upon a Commission-sponsored, two-part analytical study conducted by Temple University on minority participation in jury service and local Pennsylvania judicial districts' jury selection procedures.⁷ It was also supported by two other investigations, specifically of Allegheny County's jury selection processes⁸, as well as extensive testimony from public hearings conducted throughout the Commonwealth on the issue by the Commission.⁹

The Commission's initial step in the process of implementing this recommendation was to seek out a broader range of sources used by other states in creating their juror lists. Commission staff found that three states, Massachusetts, Connecticut and New York, produced statewide juror lists from broader based sources, such as recipients of public assistance, tax filers and licensed drivers.¹⁰ Their jury systems were quite distinct from Pennsylvania and other states, but the Commission determined that similar source lists could be obtained from Pennsylvania's corresponding state agencies. The Commission then proceeded to schedule meetings through the Governor's office with four state agencies, the Departments of Revenue, State, Public Welfare (now Department of Human Services) and Transportation, to discuss the concept with them. At the same time, the Commission sought the assistance of a legislator to sponsor legislation to amend the existing jury service statute, and to establish a new statewide juror list comprised of information provided by the four state agencies. In 2007, the Pennsylvania Legislature passed, and the Governor signed into law, Act 37, which amended 42 Pa.C.S. §4521.1.¹¹ Pertinent provisions of the law include the following:

General rule. -- Notwithstanding any prohibition found in any other law, regulation or rule to the contrary, the following departments shall submit to the Court Administrator of Pennsylvania, in a format provided herein, a list of individuals as designated for that department to be included in a Statewide jury information system on or before October 31 of each year:

- **The Department of Public Welfare** - every individual resident in this Commonwealth who receives cash assistance or food stamps pursuant to a Federal or State program through the department except as prohibited by Federal law or regulation.
- **The Department of Transportation** - every individual resident in this Commonwealth who has been issued a driver's license pursuant to 75 Pa.C.S. Ch. 15 (relating to licensing of drivers).

- **The Department of Revenue** - every individual resident who files a return for the payment of taxes imposed by the Commonwealth under Article III of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971.
- **The Department of State** - every individual resident who is listed as a registered voter under 25 Pa.C.S. Pt. IV (relating to voter registration).

Identifying Information: Each list submitted by a department pursuant to subsection(a) shall contain only the following identifying information of individuals to be included in the Statewide jury information system: name, including first, middle and last names, including any suffixes; except as provided in 23 Pa.C.S. Ch. 67 (relating to domestic and sexual violence victim address confidentiality), each individual's street address, municipality and zip code; date of birth; and the last four digits of the individual's Social Security number.

Duties of Court Administrator: The Court Administrator of Pennsylvania shall annually collect information for creation of a Statewide jury information system by collecting the names from the departments as submitted under subsection (a); combining each individual department list submitted into a master list; removing any information that identifies the source of the information submitted pursuant to subsection (a); assembling the names into groups arranged by the county of residence for each individual on the master list; removing duplicate names from each county list.

Dissemination: Upon request from the jury selection commission of the county, the Court Administrator of Pennsylvania shall make available to the requesting county the list of names for that county from the Statewide jury information system. In providing the information, the Court Administrator of Pennsylvania shall only provide the name, address and date of birth of each individual on the list being provided. All other identifying information shall be removed from any list; under no circumstances may the Court Administrator of Pennsylvania include any other identifying information.

Restrictions on Use of Information: Information provided by the departments to the Court Administrator of Pennsylvania shall be provided by agreement executed by the appropriate authorities which shall include the following conditions:

- Information required pursuant to this section will be provided only in an electronic form as determined by the Court Administrator of Pennsylvania.
- The information provided shall be used only for the purpose provided in this section and for no other purpose.
- Except for the purpose of internal review and compliance by the Court Administrator of Pennsylvania, no lists may be printed from the information submitted, created or produced under this section.
- Except as provided in section 4521(b) (relating to selection of prospective jurors), any rerelease of the information provided pursuant to this section is strictly prohibited.
- The Statewide jury information system and any list provided by the Court Administrator of Pennsylvania to the county jury selection commission pursuant to this section may not reveal the source of names on that list or indicate in any way the source of the names submitted pursuant to subsection (a).

- Except as provided in section 4521(b), nothing submitted, created or produced under this section shall constitute a public document, nor shall it be subject to release or disclosure under the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law, or any other similar rule, enactment or decision.

Following passage of the amendments, the four Commonwealth agencies began to collect the information required by the new law and forward it to the Administrative Office of the Pennsylvania Courts (“AOPC”). After receiving the information from the agencies, the AOPC began compiling a master list (the Statewide Juror List), divided by county, for confidential distribution to the county jury commissioners or court administrators who requested their portion of the master list. Importantly, the law did not (and still does not) mandate use of the list by the counties. This was a matter of concern for the Commission at the time the law was passed, but because the new list would save the districts the cost of compiling their own lists, the Commission concluded that most of them would probably utilize the statewide list after realizing the benefits of it. Unfortunately, this did not turn out to be the case, as the Commission learned over the next few months that most districts were not using the new list and had returned to using their own restrictive lists instead.

In order to understand why the districts had rejected use of the new list, the Commission launched a series of regional seminars on jury diversity, meeting with jury commissioners and court administrators throughout the Commonwealth to share successful strategies on increasing jury diversity and to obtain feedback on the new statewide juror list. After concluding the seminars, it was apparent to the Commission that the main reason for the districts’ hesitancy about using the list was the large number of duplicate names on the list, which resulted in several embarrassing problems for the districts, such as sending more than one summons to the same person, sending one summons or more to children who were unable to serve due to their age, and other issues. The districts reported that they were unable to remove duplicate names from the list because they did not have the computer expertise or funds necessary to do so. The Commission shared these reports with the AOPC which had been working diligently on removing duplicate names from the statewide list. However, because of the lack of a “unique identifier” for individuals included in the four departments’ lists, the AOPC could not always conclusively identify an individual, and therefore, could not remove all the duplicates.

After re-examining the provisions of the new law and consulting with the AOPC about the data it was receiving from the four agencies, the Commission discovered that one of the agencies, the Department of Revenue, unintentionally failed to provide the birthdates of the individuals in their data, as required by the new law. The Commission met with the agency to discuss this oversight, and ultimately, the agency corrected its error, resulting in the distribution of several million new names and accompanying birthdates to the AOPC. This was a key identifier that enabled the AOPC to remove many of the duplicates in the lists they received from the agencies. As a result, the Commission recently learned that two-thirds of the Commonwealth’s judicial districts are now using the statewide juror list, including the two largest districts, Philadelphia and Allegheny Counties.

Juror Demographic Data Collection: The Commission is now working to encourage districts to collect data on juror demographics to help track jury diversity on an ongoing basis. The Commission had previously conducted a Jury Pilot Program in which each of four judicial districts were asked to work with the Commission to establish a standardized system for successfully tracking the race, ethnicity, gender, and age of individuals who were summoned for jury service; appeared in court in response to a summons; and were selected for jury duty within their judicial districts. The purpose of the program was to assist the districts with amending their summonses to request jurors' demographics on the jury summons itself, enabling them to track the data to determine if certain groups of individuals were disproportionately being removed during the jury selection process. The program was successful in that the four districts were able to track the diversity of their juries and take action to adjust the system if they found evidence of a problem.

Unfortunately, the Commission recently learned that only one of the four judicial districts is still collecting the demographic data, which they will cease collecting at year's end. Now that the statewide juror list is being utilized by two-thirds of the districts, however, the Commission has sent a survey to each of them with questions concerning the collection of juror demographic data and any impacts they have observed in jury diversity following their recent decision to begin using the statewide list. The information from the survey will be shared with the AOPC for possible use in encouraging the districts to establish a permanent procedure for collecting the demographic data as a means of establishing a baseline from which to judge the diversity of their juries.

Addressing Barriers to Participating in Jury Service: The Commission has also worked to implement other Report recommendations related to increasing jury diversity, such as addressing barriers to participation in jury service by lower-income citizens, immigrants with limited English proficiency, and individuals with criminal records.

Juror Excusals and Exemptions: The Commission has submitted proposed amendments to the Pennsylvania legislature to standardize statutory definitions within 42 Pa.C.S. § 4503, Pennsylvania's juror exemptions and excusals statute.¹² At present, the statute contributes to the lack of diversity on state court juries by permitting the courts to liberally grant excusals to individuals seeking to demonstrate that jury service would create an undue hardship. Although the courts' intent is laudable, the Commission supports legislation that both limits the terms of excusals *and* provides funding for prospective jurors' childcare, transportation, and employment-based compensation, such that most excusals for undue hardship are not necessary in the first place.

Citizens with Limited English Proficiency: The Commission recently produced a pamphlet entitled "Jury Service in Federal Courts for U.S. Citizens with Limited English" that explains the concept of a jury and clarifies the level of English proficiency needed to qualify for jury service. The Commission created this pamphlet after learning that many individuals in Pennsylvania who do not speak English well assume that they must speak English *fluently* to perform jury service. As a result, they often disqualify themselves for jury duty prior to ever coming before a judge to determine their competence to serve. The Commission's goal with this initiative was to provide individuals with enough details to seek out more information before making a decision about their language proficiency. The pamphlets are currently being distributed to new citizens during naturalization ceremonies in each of the Commonwealth's three federal district court districts. The

Commission also produced a version of the pamphlet for use in Pennsylvania state courts, which it distributed to court administrators throughout the Commonwealth, as well as to bar associations, community organizations, and other groups who frequently work with immigrant communities¹³.

Criminal Record Exclusions: During the 2019-2020 session of the Pennsylvania legislature, the Commission supported legislation that would have amended 42 Pa.C.S. § 4502, Pennsylvania's Juror Disqualifications statute.¹⁴ At that time and presently, the statute sweeps too broadly, permanently disqualifying prospective jurors for both felonies *and* first- and second-degree misdemeanors¹⁵, making Pennsylvania one of only three other states in the nation that permit misdemeanor convictions to trigger juror lifetime disqualification.¹⁶ The statutory regime also disproportionately excludes Black and Latinx individuals from serving on a jury.¹⁷ The General Assembly has not acted on this legislation, but the Commission recently re-visited the issue by reviewing current statistical data and consulting other states' recent amendments to their statutory restrictions.¹⁸ As a result, the Commission now supports proposed legislation that would remove disqualifications for *all* prior convictions, not just felony convictions, as the earlier legislation attempted to do.

Juror Pay: Pursuant to Pennsylvania Judicial Code Section 4561, jurors are currently compensated at the rate of \$9.00 per day for the first three days and \$25.00 per day for each day thereafter.¹⁹ Although many other states have increased the pay of individuals performing this civic responsibility, Pennsylvania's compensation schedule has not been raised in decades, effectively making it nearly impossible for low-income individuals or hourly wage workers to serve as jurors. Consequently, the Commission supports legislation that seeks such pay increases.

Hardship Excusals: Referenced above, 42 Pa.C.S. § 4503 currently permits individuals to excuse themselves from jury duty if they can demonstrate undue hardship or extreme inconvenience to the court.²⁰ To address low juror participation caused in large part by these hardships, the First Judicial District of Pennsylvania (Philadelphia) launched a Juror Participation Initiative in 2017. Commission Member Lynn Marks served as Director of the Initiative and Commission Executive Director Lisette McCormick headed the Initiative's Hardship and Inconvenience Workgroup. In recognition of the fact that jury service may be particularly burdensome for individuals whose jobs, financial security, or family members' safety may be adversely affected by interruptions in their daily routine, the Initiative produced a list of recommendations for the legislative and judicial branches.²¹ The recommendations include increasing juror compensation, requiring employers to pay employees during their jury service, providing economic support for jurors through parking vouchers and transportation reimbursements, and sponsoring childcare programs for jurors with children. Absent these reforms, instances of hardship will continue to disproportionately affect communities of color and thus, the courts' ability to rely on jury pools that reflect a fair cross-section of the community. The Commission has proposed new legislation or amendments to existing legislation to address most of these issues but thus far, the bills have not received the necessary support from Pennsylvania's legislative leaders.

Peremptory Challenges: Thirty-five years ago, in the *Batson* case, the U.S. Supreme Court prohibited reliance on race or gender in the use of peremptory challenges²², but empirical research suggests that the use of racial- and gender-based challenges by attorneys on both sides of cases

continues to flourish. In the portion of its Report addressing racial and ethnic bias in jury selection, the Committee urged the Supreme Court of Pennsylvania to direct trial judges to exercise increased scrutiny to ensure that peremptory challenges are not used improperly based on race in the *voir dire* process; require that all *Batson* and other similar challenges be made a part of the official court record; and require that a database be established regarding every *Batson* challenge and other similar challenges, containing the name and race of each juror, the basis for the challenge, and the names of the striking and challenging attorneys and trial judge.²³ Although the Commission has called for such measures to be taken by the bench, there is no mandate from the Supreme Court of Pennsylvania to do so.

In several state courts throughout the nation, however, the judiciary has begun to express concerns about the ineffectiveness of the *Batson* test. For instance, in *State v. Saintcalle*, the Washington State Supreme Court made the following comments about the need for changes in the *Batson* procedures:

“Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.”²⁴

Specifically, one of the amendments recommended, or actually implemented, by several state courts is to eliminate the first step in the *Batson* procedure, that is, the burden borne by the complaining attorney “to establish a *prima facie* case that gives rise to an inference of discriminatory purpose in using the peremptory challenge to remove a prospective juror.”²⁵ Another is to find that a *prima facie* case has been made if a party strikes the last member of a racially cognizable group.²⁶

The Commission is currently researching and developing a strategy for advocating in favor of one or more of the recommended approaches to effectively control the use of racially based peremptory challenges. Given its considerable contribution to the lack of diversity in our juries, this has become a high priority for the Commission.

Conclusion: Numerous studies have found that diverse juries aid the decision-making process, enhance the validity of judicial outcomes, educate citizen jurors, increase public regard for the courts, and raise overall civic engagement after jury service.²⁷ In addition to the “more robust fact-finding and deliberation”²⁸ diverse juries bring to the decision-making process, studies have found that “representative juries are more likely to be seen as legitimate decision makers, which in turn contributes to public confidence in the justice system.”²⁹ This is particularly important at this time in our nation’s history when challenges to the legitimacy of our institutions, including our system of justice, abound. Although removing bias from the jury selection process poses a formidable challenge, the U.S. Constitution, and the critical importance of securing the public’s trust in our courts, demand nothing less.

¹ Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System 51-102* (2003) [hereinafter *Final Report*].

² U.S. Const. amend. VI.

³ U.S. Const. amend XIV, § 1.

⁴ 28 U.S.C. §§ 1861-1874 (1968).

⁵ *Final Report*, *supra* note 1, at 1.

⁶ *Id.* at 54.

⁷ *Id.* (citing Ralph B. Taylor and Lillian Dote, *Understanding Juror Selection Processes Through Jury Documents and Administrator Surveys: Exploring Implications for Under-Representation of Populations of Color*, Phase I report to the Work Group on Racial and Gender Bias in Jury Selection (Aug. 2021) and Ralph B. Taylor, Jerry H. Ratcliffe, Ron Costeck and Lillian Dote, *Potential Under-Representation by Race and Class in the Middle Stages of Juror Selection in the Commonwealth of Pennsylvania: A Located Analysis*, Phase II report to the Work Group on Racial Bias in Jury Selection (June 2002)).

⁸ *Final Report*, *supra* note 1, at 71-73.

⁹ *Id.* at 74-82.

¹⁰ *Id.* at 86, 98.

¹¹ Act of Jul. 17, 2007, P.L. 123, No. 37 (providing for selection of prospective jurors and for statewide jury information system).

¹² 42 Pa.C.S. § 4503 (2015).

¹³ See the Interbranch Commission's website at <http://www.pa-interbranchcommission.com/>

¹⁴ 42 Pa.C.S. § 4502 (2001); H.B. 2037, 2019 Leg., Reg. Sess. (Pa. 2019).

¹⁵ 42 Pa.C.S. § 4502 (2001).

¹⁶ Ginger Jackson-Gleich, "Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records," *The Prison Policy Initiative* (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 42 Pa.C.S. § 4561 (2002).

²⁰ 42 Pa.C.S. § 4503(a)(3) (2015).

²¹ The First Judicial District of Pa., *FJD Juror Participation Initiative* (2018).

²² 476 U.S. 79 (1986).

²³ *Final Report*, *supra* note 1, at 97.

²⁴ 178 Wn.2d 34, 36 (Wash. 2006).

²⁵ Shari Seidman Diamond, *Judicial Rulemaking for Jury Trial Fairness* 13 (2021) [hereinafter *Judicial Rulemaking*].

²⁶ *Id.* at 14-15.

²⁷ Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection* 3-7 (2021)

²⁸ *Judicial Rulemaking*, *supra* note 20, at 25.

²⁹ Leslie Ellis and Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003).