

## **Statement of Professor Valerie P. Hans, Cornell Law School**

### **Jury Pool Diversity in New York State**

#### **Public Hearing on Jury Diversity Assembly Standing Committees on Judiciary and Codes New York State Assembly, New York, NY April 30, 2009**

#### **Background and Overview of Statement**

I am honored by your invitation to present testimony regarding the issue of jury diversity in New York. I am Professor of Law at Cornell Law School, hold a Ph.D. in Social Psychology, and have spent the last thirty years researching, writing, and teaching about the American jury system. My writings include six books and over 100 research articles, many of which focus on the jury system, including the methods used to generate representative juries. I am a Research Affiliate of the National Center for State Courts, and was a member of the Advisory Committee for the Jury Summit 2001 held in New York City, hosted by the National Center for State Courts and the New York State Unified Court System. I have followed with great interest the impressive jury reform efforts in New York, led by former Chief Judge Judith Kaye.

I applaud you for focusing on the critically important topic of jury diversity. Although representativeness on juries is critical, many courts face challenges in assembling representative jury pools. In my statement, I examine the available evidence in New York, and then turn to considering the remedies that the New York Assembly is considering to promote jury diversity through Assembly Bill 11433. I conclude with a recommendation in favor of the proposal to gather accurate demographic data of jury pools across the state of New York, but I recommend against, at this time, the specific remedies of expanding current source lists and quarterly updating that would be mandated by the bill.

#### **The Importance of Jury Diversity**

My work on juries, and my review of jury research, has led me to appreciate the key importance of jury diversity. A representative decision making body is best able to serve the important purposes of trial by jury in the criminal and civil justice systems. A jury that reflects the full range of social, economic, and political perspectives as well as different life experiences is better at fact finding and at incorporating community values. A representative jury that delivers fair and just verdicts also promotes the legitimacy of the legal system in the eyes of citizens. Jury service educates citizens about the court system, appears to lead to more positive views about the jury system and the courts, and may also increase the likelihood of voting, so it is critically important that it be extended to all segments of society.

Research shows how diversity on juries promotes better fact-finding. As my coauthor Neil Vidmar and I wrote: “a diverse group is likely to hold varying perspectives on the evidence, encouraging more thorough debate over what the evidence proves.... The inclusion of minorities and women in a representative jury adds their life experiences and insights to the collective pool of knowledge. Research on heterogeneous decision-making groups supports the claim that diverse juries are better fact-finders. Minority jurors contribute their unique knowledge to the general discussion. Furthermore, when whites anticipate participating in a diverse jury, they tend to give more careful assessment of the evidence.”<sup>1</sup> In short, the decision making is of better quality in diverse juries.

Legal opinions at the national and state level underscore the value of jury representativeness and the constitutional necessity of drawing juries from representative cross-sections of the population. As the Supreme Court concluded in *Taylor v. Louisiana*: “The unmistakable import of this Court’s opinions, at least since 1940...is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.... The requirement of a jury’s being chosen from a fair cross section of the community is fundamental to the American system of justice.”<sup>2</sup> Furthermore, the ABA’s Principles for Juries and Jury Trials includes Principle 2: “Citizens have the right to participate in jury service and their service should be facilitated.”<sup>3</sup>

### **Meeting the Challenges of Achieving Representative Juries: Problems and Remedies**

Even though representative juries have important benefits, many jurisdictions face considerable difficulties in assembling panels that fully reflect their communities. Some of the key contributors to representativeness problems arise from (a) using source lists that are not completely inclusive; (b) having an excessive number of reasons for disqualification, exemption, and exclusion from jury service; (c) experiencing differential response rates to jury summonses; and (d) requiring lengthy or onerous terms of service.

The American Bar Association, the American Judicature Society, research scholars, and state jury reform commissions, including New York’s Jury Project, have all examined the effectiveness of different methods of improving jury pool representativeness. The ABA’s Principles for Juries and Jury Trials recommends (a) a limited set of juror eligibility requirements; (b) avoidance of discrimination in jury selection; (c) use of short terms of service such as one day/one trial; (d) minimization of waiting time; (e) a suitable environment; and (f) reasonable fees to compensate jurors for their service.<sup>4</sup> And more specifically, we know from research and court experience that the following approaches lead to increased representativeness of jury pools: the use of multiple source lists; frequent updating of source lists; multiple follow-ups to jury summonses for non-responders; reduction or elimination of exemptions; and shorter terms of service.

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<sup>1</sup> Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 74 (2007).

<sup>2</sup> 419 U.S. 522, 528-30 (1975).

<sup>3</sup> American Bar Association, *Principles for Juries and Jury Trials* 7 (2005), available at: [http://www.abanet.org/juryprojectstandards/The\\_ABA\\_Principles\\_for\\_Juries\\_and\\_Jury\\_Trials.pdf](http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf).

<sup>4</sup> *Id.* at 7-14.

Employing these approaches, many states have dramatically improved the representativeness of their jury pools, although a number fall short of the goal of fully representative juries.

### **New York's Efforts to Achieve Representative Juries**

In New York, the jury system has undergone tremendous transformation. As you may know, New York in the past used a permanent qualified list from which to draw potential jurors, updated it infrequently, and allowed a large number of exemptions from jury duty for all manner of occupational and other reasons. What is more, New York routinely sequestered juries during deliberation, reducing the ability of people with family and other obligations to serve.

Today, following substantial jury reforms, the operation of New York's statewide jury system is, in my view, admirable for its strong commitment to achieving jury representativeness and its endorsement of best practices in assembling and employing juries.<sup>5</sup> New York has eliminated its former permanent qualified list approach and all automatic exemptions from jury service, has reduced the length of jury service, and has increased its juror daily pay to \$40.00, one of the highest rates in the country. New York employs five source lists: a list of registered voters; holders of drivers' licenses or ID's issued by the Division of Motor Vehicles; New York state income tax filers; recipients of family assistance; and recipients of unemployment insurance. In addition, New Yorkers are able to volunteer for jury service.<sup>6</sup> So far as I know, New York ranks above most if not all other states in the number of source lists that are combined to create a master list for jury summonses. According to the 2008 Best Practices for Jury System Operations report, New York's combined source list is updated annually, consistent with recommended practices.<sup>7</sup> New York also participates in the U.S. Post Office's automatic address updating, which is done every 90 days. Two follow-ups are automatically sent to non-responders. All of these elements – the use of multiple source lists, the regular updating, the follow-ups for nonresponders, the short term of service, and the reasonable jury pay – should in theory produce jury pools that are generally representative of the jurisdictions.

It is surprising and disturbing, then, to read the 2005 Citizen Action of New York study that concluded there was very substantial racial and ethnic underrepresentation in Manhattan jury pools.<sup>8</sup> Researchers for the project conducted the study in Manhattan jury assembly rooms. They recorded the apparent race and apparent Hispanic ethnicity of each prospective juror present in the assembly room during each day of observation. The study was conducted for approximately 12 weeks from late 2006 to early 2007 at two courthouses. Researchers recorded their observations of the race and ethnicity of

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<sup>5</sup> See Judith S. Kaye & Ann Pfau, *New York State Unified Court System Best Practices for Jury System Operations* (2008), available at <http://www.nycourts.gov/publications/pdfs/JuryBestPractices.pdf>.

<sup>6</sup> *New York State Petit Juror's Handbook*, available at [http://www.nyjuror.gov/users/wwwucs/pdfs/hb\\_Petit.pdf](http://www.nyjuror.gov/users/wwwucs/pdfs/hb_Petit.pdf).

<sup>7</sup> Kaye & Pfau, *supra* note 3.

<sup>8</sup> Bob Cohen & Janet Rosales, *Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform* (June 2007).

roughly 14,000 prospective jurors in the assembly rooms.<sup>9</sup> The researchers then compared the proportions of racial and ethnic groups in their study and the 2000 U.S. Census. The comparison showed very substantial disparities in apparent race and ethnicity of jury pool participants, as judged by the Citizen Action observers, compared to census figures.<sup>10</sup>

Although it is an admirable effort, problems with the project should limit our reliance on it. The Citizen Action researchers could not ask members of the jury pool directly about their racial or ethnic background, and had to rely on visual cues alone, introducing an unknown amount of error into their tallies. The researchers were clearly aware of the issue, and attempted valiantly to deal with it, for example, by collapsing some of the racial categories, and by comparing rates of attribution to different ethnic groups by different researchers. But, the problem remains and may have led to an undercount of minority jurors. The second issue is that although census figures can provide a starting point for comparison, they are not conclusive evidence for several reasons. The most important is that the census includes people who would not meet the qualifications for jury service and thus would not be eligible for jury duty, in particular, those who have been convicted of a felony, noncitizens, those who cannot understand or communicate in English, and people younger than 18.<sup>11</sup> All of these characteristics are found more frequently among nonwhites than among whites, and need to be taken into account in the comparisons. And finally, the study is of the two courthouses in Manhattan, leaving the jury diversity situation in the rest of New York open to speculation. Nonetheless, the project raises concerns about the extent to which New York jury pools adequately reflect the group of all jury-eligible citizens of New York.

### **Recommendations**

Because of the importance of jury diversity in New York jury pools on the one hand, and the uncertain and limited nature of the Citizen Action data on the other, I believe it is desirable for the New York Unified Court System to collect and analyze systematic demographic data of jury pools across the state of New York. I support much of the portion of Assembly Bill 11433 that requires collection of such information: “The Commissioner of Jurors shall collect demographic data for jurors who present for jury service, including each juror’s race, religion, ethnicity, age and sex, and submit the data in an annual report to the Governor, the Speaker of the Assembly and the Majority Leader of the Senate.” (I would not include the juror’s religion.) I also support the portion of Assembly Bill 11433 that envisions making the statistical data available to policymakers and the public. These data could be very useful both to those involved in jury system operations and to those involved in broader research on the courts and juries.

It might also be desirable to undertake an in-depth study of the multiple phases of the jury selection in one or more counties where there are the greatest concerns about jury

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<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 5-6.

<sup>11</sup> It does not appear that the census figures used in the Citizen Action report were limited to those 18 and older. See *id.*, p. 2 note 5.

diversity. Such a study might examine the effects on jury pool representativeness of the different stages of jury recruitment, including qualification questionnaires, nonresponses, disqualifications, postponements, excuses, and failures to show up for jury duty.

I believe other requirements of Assembly Bill 11433, the ones pertaining to quarterly updating and expansion of source lists, are not necessary at this time, and would create additional burdens on a court system that is, in my view, already following best practices in attempting to generate diverse jury pools. One major challenge of multiple source lists is the time-consuming process of eliminating duplicate names. It's critical to do so because otherwise an individual might have a double, a triple, or an even greater chance of being called, lessening the equality of jury duty burdens and benefits. I would rather see the courts schedule an annual updating process (supplemented by the U.S. Post Office address corrections) and have the time to carefully identify and remove duplicate names, than to engage in more frequent updating which might compromise the quality of the merged lists.

Regarding expansion beyond the current five lists, I believe that adding some of the new lists proposed in the bill might be counterproductive, time-consuming, and reduce the quality and comprehensiveness of any combined list. In 1994, the New York Jury Project report recommended against several options identified in the current bill, and their discussion bears repeating:

Telephone or other utility subscriber lists are frequently mentioned as a possible source of new names. Approximately eighty different telephone and public utility companies currently operate in New York, with subscriber lists of varying quality and comprehensiveness. Subscribers appear on more than one list, and many subscribers are businesses or corporations rather than individuals. Most individuals who have telephone or utility service in their own names are also drivers or taxpayers or voters; many are all three. And many whose names do not appear on utility subscriber lists – for example, tenants whose gas and electricity are provided for by their landlords, or members of the approximately 5% of U.S. households that have no telephone – are the same people who are least likely to be registered voters, licensed drivers or taxpayers.... Entries on telephone and other utility subscriber lists are also weighted heavily toward men, which could introduce an element of gender bias....<sup>12</sup>

Thank you for your consideration of my views on this important topic. Again, I very much appreciate your efforts to make New York's juries fully representative of the population.

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<sup>12</sup> The Jury Project: Report to the Chief Judge of the State of New York (March 31, 1994), at 5-6.