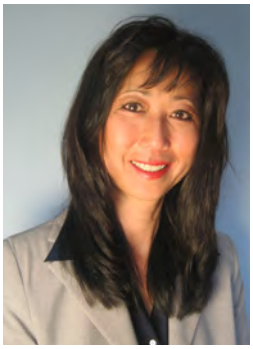
Jury Diversity

Policy, legislative and legal arguments to address the lack of diversity in juries.

BY HONG TRAN



Even before a defendant steps into a courtroom, there are forces at work that affect whether he or she will get a fair trial. As defense attorneys, we see how these forces have culminated in a jury pool that is largely white, middle and upper class ... deciding the fate of defendants who are not. Before I talk about what efforts should or could be taken, a discussion — while perhaps obvious — of why juror diversity matters merits some discussion.

Why Does Jury Diversity Matter?

The presence of minority jurors impacts the collective process of decision-making, causing jurors to be more careful and thorough in deliberations. Given the different experiences that persons of difference races have with the criminal justice system, a multiracial jury helps to eliminate biases and prejudices in the deliberation process.[1] Persons of different races often process the same information in different ways, often to different conclusions.[2] A diverse jury furthers the goal of ensuring litigants and the public that the system is impartial and fair.[3]

While beyond the scope of this article, it bears mentioning that it is unclear what effect the presence minority jurors has on implicit racial biases. "Implicit racial bias" describes the cognitive processes whereby people automatically classify information in racially biased ways. Researchers have found that people's implicit biases defy their awareness and self-reported egalitarian values.[4] As one defense attorney put it, "Sometimes the black person on the jury is no more favorable to me than any other juror.[5] Given the lack of diversity in our current jury pools, the defense attorney rarely gets to make such strategic calls.

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Why Are Minorities Underrepresented on Juries?

One factor associated with the underrepresentation of minorities is the percentage of juror summons that are undeliverable.[6] Individuals with lower socioeconomic status tend to move more frequently, making them difficult to locate to deliver juror summons.[7] Because race, ethnicity, and socioeconomic status are highly correlated, the effect on jury pools is that disproportionately fewer minorities serve as jurors.[8] The exclusion of individuals with felony convictions from jury service also disproportionately impacts minority populations. African-American men and women, in particular, are disproportionately overrepresented among individuals with a felony conviction, which in most states disqualifies a person from jury service.[9]

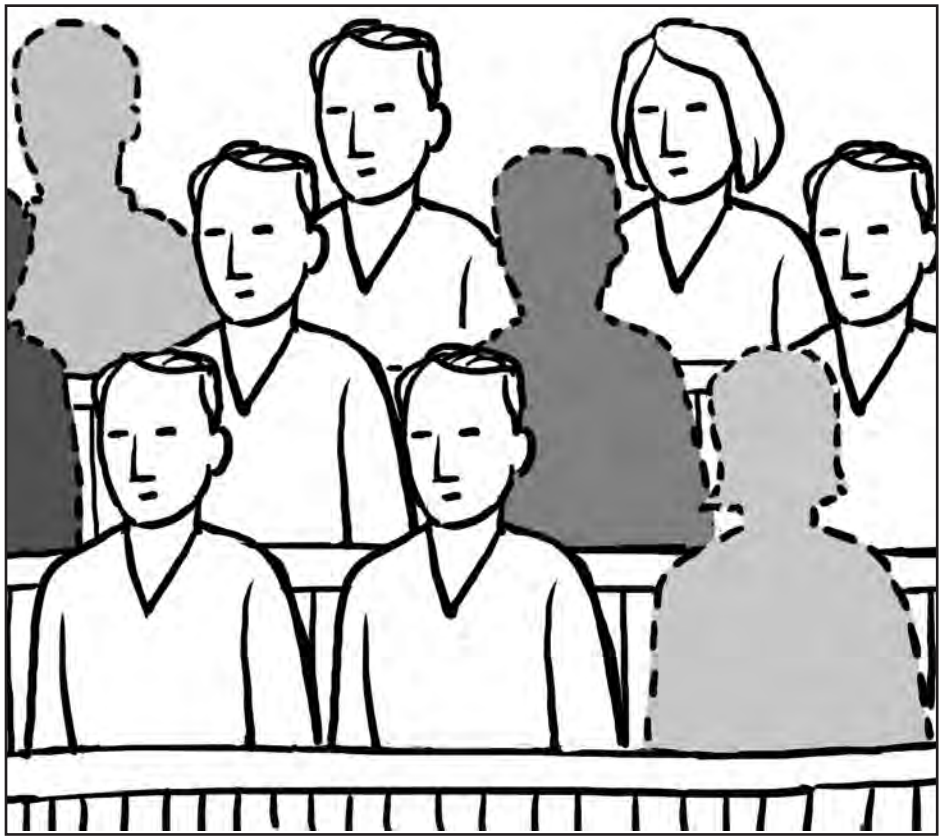
In 2009, the Washington State Legislature restored the right to vote for persons convicted of a felony, upon release from custody and completion of community custody.[10] The legislation did not address the right to jury service. However, since the right to jury service and the right to vote are highly correlated, defense attorneys should encourage their former clients to respond to their jury summons and then be prepared to defend their right to serve on the jury notwithstanding the felony conviction.

The common rationale for excluding individuals with felony convictions from jury service is convicted felons "threaten the probity of the jury" and are "inherently biased against the government."[11] There are inherent flaws in the logic that excludes individuals with a felony history from jury service but allows the same individual to practice law, which is the case in twenty-nine states and the federal court system.[12]

The eligibility requirements for jury service are established by state[13] and federal[14] statute. Although a common

requirement for jury service is the ability to communicate in English,[15] some notable groups have called this requirement into question. The ABA Commission on the American Jury Project included among its recommendations to the courts that "every effort" be made "to provide reasonable accommodations for non-English speaking jurors."[16] The Washington State Jury Commission recommended that the courts implement a two-year project which would allow the state to gather information on the costs and logistics of accommodating the language needs of limited-English proficient jurors.[17] This recommendation has not been implemented.

Language to some extent can be a proxy for race and ethnicity. In some communities the percentage of the adult population that is limited-English proficient can be significant. If the courts do not consider steps to accommodate the language needs of these potential jurors, they are effectively excluding a portion of the population from jury service. More significantly, by failing to accommodate the language needs of these potential jurors, the court is not providing the litigants, but more critically a defendant, often a person of color, a jury that represents a true cross-section of the community.



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Where Do Our Jurors Come From?

To understand the reasons for the lack of juror diversity, it may help to understand where the courts get their jurors. State law determines who the courts summon for jury service.[18] In Washington, potential jurors are randomly selected from a "jury source list" which is created by merging voter registration lists for a county; licensed drivers who reside in the county; and state identicard holders who reside in the county.[19] The superior court assembles the jury lists from these sources annually.[20]

The persons on these lists are identified by first name; last name; middle initial; date of birth; gender; and county of residence.[21] No other information is tracked.[22] Consequently, the courts have no information about the race, ethnicity or socioeconomic status of the people who are receiving and responding to their jury summons. Without this data, we are left to guess if there is a problem with underrepresentation and the scope of the problem.[23]

What Efforts Have Courts Taken to Attain More Diverse Jury Pools?

In some states, state law allows the entities responsible for assembling the jury source list to supplement the list from other sources. While supplementing the jury source list may work, such success may depend on what is used to supplement the jury source list, as illustrated by the pilot project below.

In 1995, the Eastern District of Pennsylvania joined several other federal districts in a two-year project

to determine whether using multiple lists improved minority representation in the jury selection process.[24] The two groups examined during the pilot were African-Americans and Hispanics.[25] The overall conclusion was that if the primary source list — the voter registration lists — are supplemented with driver's license lists, the underrepresentation of minorities actually *increases*![26]

Colorado considered the use of utility customer lists; however, rejected the proposal as gender and economically biased, noting that most utility listing as under the name of the male member of the household.[27] Also, the listings lacked representation from persons between the ages of eighteen and twenty-one.[28] The same issues existed with the use of telephone directories.[29] Property tax records were also biased against those unable to afford a home.[30] Young adults were underrepresented in these lists.[31]

New York has gone the furthest by combining lists of voters, drivers, income tax payers, and welfare and unemployment compensation recipients.[32] However, it is unclear whether this merger of multiple lists results in greater minority representation.[33] In 2010, New York Governor David Patterson signed the Jury Pool Fair Representation Act.[34] The act allows the collection and assembly of race and other demographic data into an annual report designed to address the underrepresentation of minorities on New York juries.

Erie County Pennsylvania sought to increase its jury pool by soliciting volunteers. When volunteers did not come forward, letters were sent to church leaders, two of whom submitted the names of the entire adult congregation of their church. The use of the parishioner lists substantially increased the minority representation of the jury pool.[35]

What Efforts Have Been Pursued to Encourage Minority Jurors to Respond to the Juror Summons?

The biggest predictor of nonresponse rates was jurors' expectations of what would happen if they failed to appear. People who believe nothing would happen were less likely to appear for jury service than those who believed they would be punished if they failed to appear.[36] Nationally, about 12% of jury summons are returned as "undeliverable."[37] The nonresponse rate is between 20% to nearly two-thirds.[38]

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In 1997, a pilot project in Eau Claire, Wisconsin found that increasingly aggressive steps to follow up with nonresponsive individuals reduced the non-response rate from 11% for the first mailing to 5% after a second mailing; the rate fell below 1% after a third mailing that included an Order to Show Cause and warrant. Los Angeles similarly reduced their non-response rate from 41% after the first mailing to 2.7% after follow up efforts.[39]

It appears that the follow-up efforts employed by the Eau Claire and Los Angeles courts involved a threat of sanction. Courts that relied only on a second summons mailing have noted little change in the failure-to-respond rates.[40]

Since 1989, the State of Georgia has been summoning jurors for jury service in proportion to their gender, race, and age.[41] Recent legislative efforts suggest these practices failed to create inclusive and accurate jury lists.[42]

The Eastern District of Massachusetts and the District of Kansas have replaced undeliverable jury questionnaires and nonresponses with mailings "randomly" selected from the jury list to the same zip codes, as those individuals who failed to respond to their summons. No formal evaluation has been made of the effectiveness of this practice.[43]

In 1999, the Board of Judicial Administration created the Washington State Jury Commission to conduct an inquiry into the state jury system. The commission published its lengthy list of recommendations in July, 2000.

The commission has given the highest priority to increasing juror fees, although all of its recommendations are important steps toward improving jury service. Increased fees will not only address the current inequity in juror compensation, but will contribute to more economically and ethnically diverse juries by enabling a broader segment of the population to serve.[44]

In addition, two of the commission's recommendations address proposals to increase jury pool diversity. One proposal suggests "extensive outreach to targeted communities," which would include educational campaigns targeting high school students, new citizens and minority communities; public service campaigns to promote jury service on radio, television, print media, public transit and other outlets; more extensive advertisement of "juror appreciation week;" and outreach to business and labor groups.[45] The commission also recommended amending state law to launch a pilot project allowing non-English speaking citizens to serve on a jury with the aid

of a certified interpreter. "Amending RCW 2.36.070(4) would lead to a more diverse jury pool, which would ultimately be more likely to arrive at the truth in a decision-making process."[46]

To date, it does not appear that the commission's recommendations have been implemented. Indeed, when I recently spoke to Greg Wheeler, manager of jury services for the King County Superior Court, he was unaware of the commission's report and recommendations.

What Legal Claims Are Available to Challenge the Lack of Juror Diversity?

Ligation challenging the lack of juror pool diversity has primarily evolved around a defendant's Sixth Amendment right to an "impartial jury."[47] The right to an impartial jury includes the requirement that the jury be drawn from a fair cross-section of the community.[48]

A prima facie violation is established by the *Duren* test:[49]

1. The group alleged to be excluded is a "distinctive" group in the community;
2. The group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; *and*
3. The under-representation of the group results from systemic exclusion of the group in the jury selection process.

If a prima facie violation is established, the burden shifts to the state to provide a compelling justification for systemic exclusion of the distinctive group.

In defining the "distinctive" group, courts have looked for the following:[50]

1. Whether the group is defined and limited by some identifiable factor;
2. Whether a common thread or basic similarity in attitude, ideas, or experience runs through the group; and
3. Whether the group's interests cannot be adequately represented if the group is excluded from the jury process.

Applying the "distinctive" group test, the groups typically recognized are those based on gender, race, or ethnicity.[51]

The second *Duren* prong involves a two-part assessment. First, there is a determination of who is qualified and available for jury service. States retain broad discretion to define eligible qualifications and exemption criteria.[52] In Washington State, jurors are qualified for service if they meet the following criteria:[53]

- Eighteen years old or older;
- U.S. citizen;
- Resident of the county in which summoned;
- English proficient; and
- If convicted felon, had civil rights restored.

Jurors are "available" if they are able to be located and can serve on a jury on the date they are summoned.

Then there must be a statistical measure of under-representation. The two most commonly used statistical tests employed to measure under-representation are absolute disparity and comparative disparity.

Absolute disparity equals % (group) in community minus % (group) in jury pool. For example, 54% (women in community) – 14.5% (women in jury pool) = 39.5%. The courts typically require a threshold showing of 10% or greater.[54] Comparative disparity equals absolute disparity divided by % (group) in jury-eligible community. For example, 39.5% (absolute disparity)/54% (jury eligible population) = 73%. The threshold showing is typically 50% or greater. Comparative disparity is useful where the distinctive group is a small percentage of the population.

However, Ninth Circuit case law has upheld the absolute disparity test as the governing measure of under-representation for Sixth Amendment claims.[55] Unfortunately, this case law poses a significant obstacle: the absolute disparity test fails to capture under-representation for communities that comprise a small percentage of the overall community.

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Generally, courts have found under-representation where the absolute disparity is at least 10%. That means that it will be impossible to prove underrepresentation for communities making up less than or slightly more than 10% of the population. However, recent cases open the door to challenging the dominance of the absolute disparity test. The recent United States Supreme Court case, *Berghuis v. Smith*,[56] stated that no statistical measure is superior, and that trial courts should examine all evidence presented. Additionally, in a recent Ninth Circuit concurrence, Judge Kozinski stated that while the absolute disparity test "faithfully applies the law of our circuit," that test, "is clearly wrong."[57]

The final prong under *Duren* is sys-

temic exclusion, defined as an inherent result of the jury selection process. Examples of systemic exclusion are a statue granting automatic exemption to women who when requested or a law providing that women should not be selected for jury service unless she first filed a written declaration of her desire to be subject to jury service.

In Washington State, recent claims challenging the validity of the geographic area from which the jury pool is drawn have proven unsuccessful.[58] The courts have also rejected claims that convicted felons could constitute a distinctive group in the community for purposes of a Sixth Amendment claim.[59]

Despite the limited successes in the courts, there are still legal theories that have yet to be tested in the courts. Three areas particularly noteworthy are challenges to the citizenship,[60] the English-proficiency requirement, and economic status. Among the mandates of the jury service are that "[a] citizen shall not be excluded from jury service in this state on account of ... economic status."[61] To the extent the current jury service requirements exclude potential jurors because of their economic status, defendants may have an actionable claim.

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Notes

1. Edward S. Adams, *Constructing A Jury That is Both Impartial And Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U.L.Rev. 703, 709 (June 1998).
2. Id; see also Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 Duq. L. Rev. 39, 43-44 (Fall 1994); cf. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 704. 704, 722 (February 1995) ("Diverse viewpoints are more important to a jury's performance than diverse skin color, but promoting diversity of race and ethnicity may provide a more workable means of ensuring diverse viewpoints than attempting to probe viewpoints directly through questionnaires, voir dire examinations, and the like."
3. Paula Hannaford-Agor, *Systemic Negligence In Jury Operations: Why The Definitions of Systemic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761 (Spring 2011).
4. Robert J. Smith and Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretional*, 35 Seattle U. L. Rev. 795, 797-798 (Spring 2012).
5. cf. Judge Mark W. Bennett, *Unraveling The Gordian Knot Of Implicit Bias In Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of* Batson*, And Proposed Solutions*, 4 Hav. L & Pol'y Rev. 149 (Winter 2010) (Rev. Jesse Jackson told an audience, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery.... Then look around and see somebody white and feel relieved.") (citations omitted).
6. Hannaford-Agor, supra note 3, at 773.
7. Id. at 773-74; cf.Task Force on Race and the Criminal Justice System, *Preliminary Report of Race and Washington's Criminal Justice System*, 35 Seattle U.L. Rev. 623, 651 (2012) ("African-Americans and Latinos are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility.")
8. Hannaford-Agpr, supra note 3, at 774.
9. Darren Wheelock, "A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion In Georgia," *Justice System Journal Online* 32, no. 3: 335-36 (2011) 10.RCW 29A.08.520.
10. RCW 29A.08.520
11. James M. Binnall, *Convicts In Court: Felonious Lawyers Make A Case For Including Convicted Felons In The Jury Pool*, 73 Alb.L. Rev. 1379, 1387 (2010).
12. Id. at 1379.
13. For example, under Washington State law an individual is ineligible for jury service if he/she:
    - Is less than eighteen years of age;
    - Is not a citizen of the United States;
    - Is not a resident of the county in which he or she has been summoned to serve;
    - Is not able to communicate in the English language; or
    - Has been convicted of a felony and has not had his or her civil rights restored.
14. See 28 U.S.C.A. § 1856(b).
15. See, e.g. RCW 2.36.054; N.Y.Jud. § 510; Utah Code Ann. § 1297.
16. Resolution of American Bar Association amending 2005 Principles for Juries and Jury Trials, Res. No. 106, Principle 10, p. 3 (adopted 2013).
17. Washington State Jury Commission, *Report to the Board of Judicial Administration* (July 2000), http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf.
18. RCW 2.36.054.
19. RCW 2.36.010; see also GR 18.
20. RCW 2.36.054(1).
21. RCW 2.36.054(2).
22. In contrast to the state system, the Juror Qualification Questionnaire issued by the federal courts asks potential jurors to identify their race/ethnicity. The Jury Information Form attached to the juror summons, also asks for place of birth. The Western Washington District Court draws its jurors from merged lists of active voters, licensed drivers and state identicard holders. United States District Court for the Western District of Washing-

ton, *Amended Plan For The Random Selection Of Grand And Petit Jurors* (adopted September 28, 2011)

23. A 2005 study conducted by Citizen Action of New York, researchers recorded the "apparent" race and ethnicity of 14, 000 prospective jurors in Manhattan courts. Their observations form the basis of Citizen Action's conclusion that minorities were underrepresented in Manhattan courts. Professor Valerie Hans' of Cornell Law School testimony before the New York General Assembly of the flaws inherent in guessing someone's race or ethnicity helped in the passage of the Jury Pool Fair Representation Act. See John B. Bueker *Jury Source Lists: Does Supplementation Really Work?*, 82 Cornell L. Rev. 390 (January 1997).
24. Id. at 390.
25. Id. at 415.
26. Id. at 418-422.
27. Domitrovich, supra note 2, at 85.
28. Id.
29. Id.
30. Id.
31. Id.
32. Ronald Randall, James W. Woods and Robert G.Martin, "Racial Representativeness of Juries: An Analysis of Source List And Administrative Effects on the Jury Pool," *Justice System Journal* 29, no 71.: 75 (2008).
33. Statement of Prof. Valerie P. Hans, *Public Hearing on Jury Diversity, Assembly Standing Committees On Judiciary and Codes*, New York State Assembly, New York, NY (April 30, 2009).
34. N.Y. Jud. § 528 (September 13, 2010).
35. Domitrovich, supra note 2, at 100. Pennsylvania law does not limit the source of prospective jurors. See Pa. Const. Stat. Ann. § 4521(a).
36. Bueker, supra note 23, at 775.
37. Id.
38. Martin, supra note 32, at 77.
39. Hannaford-Agor, supra note 3, at 785.
40. Id.
41. Hannaford-Agor, supra at 3, at 795.

State law authorizes the Department of Licensing and Elections to collect information regarding an individual's race and share such information with the courts. See Ga. Code Ann. § 15-12-40.1 and § 40-5-2(7).

42. Proposal would change Georgia jury selection process, (3/7/11), www.accessnorthga.com/details.php?n=236818.
43. Hannaford-Agor, supra note 3, at 795.
44. Washington Jury Commission, *Report to the Board for Judicial Administration, Executive Summary* (July 2000), http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf.
45. Id. (Recommendations 2-5).
46. Id. (Recommendations 19-22). The Commission argues that the current statutory requirement barring individuals who are "not able not to communicate in the English language" conflicts with the state's policy of providing equal access to the courts for those who do not speak English. See RCW 2.42 and 2.43.
47. See also Wa. Const. Art. 1, § 22 (interpreted as parallel to the Sixth Amendment) ("In criminal prosecutions the accused shall have the right . . . To have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.").
48. See *Taylor v. Lousiana*, 419 U.S. 522, 527, 530 (1975).
49. *Duren v. Missouri*, 439 U.S. 357, 368 (1979). This test was reaffirmed in Berghuis v. Smith, 130 S.Ct. 1382, 1385 (2010).
50. See, e.g. *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985), cert. denied, 475 U.S. 1050 (1986).
51. See, e.g., *Duren v. Mo.,* 439 U.S. 357, 364-365 (1979) (women a distinctive group); *Peters v. Kiff,* 407 U.S. 493, 498 (1972) (African-Americans a distinctive group); *but see, e.g., Lockhart v. McCree*, 476 162, 174 (1986) (individuals against the death penalty not distinctive group); *U.S. v. Raszkiewicz,* 169 F.3d 459, 466-67 (7th Cir. 1999) ("reservation [I]ndians" not a distinctive group).
52. See *Duren v. Missouri*, 439 U.S. at 368.
53. RCW 2.36.070.
54. See, e.g., *State v. Gladstone*, 29 Wn. App. 426 (1981) (2.2% disparity insufficient); *State v. Hillard*, 89 Wn.2d 430 (1977) (2.7% disparity insufficient).
55. See *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989); See also *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005).
56. 130 S.Ct. 1382, 1382 (2010).
57. *United States v. Hernandez-Estrada*, No. 11-50417, at 18 (9th Cir. Dec. 5, 2012).
58. See, e.g., *State v. Lanciloti*, 165 Wn.2d 661 (2009) (court rejected facial challenge to the constitutionality of RCW 2.36.055, which authorizes counties that have more than one superior court to divide the county into jury assignment areas, such that jury pools would be drawn for each superior court from the geographic area closer to that court; court also found issue fo whether jury source list established by RCW 2.36.055 and KCGLR 18(e) violates the 6th Amendment right to an impartial jury was "unripe" because of the "scant factual record of the actual makeup of the jr source lists."); City of *Tukwila v. Garrett*, 165 Wn.2d 152 (2008) (court rejected statutory and constitutional challenge of jury pool selected from three zip codes , which US Postal Service attributed to City of Tukwila, because zip codes included areas lying outside city as well. Defendant argued jurors should only be drawn from City of Tukwila.); *State v. Twyman*, 143 Wn.2d 115 (2001) (jury pool drawn from less than whole of county is compliant with RCW 2.36.050 and Const. art. 1, sec. 22).
59. *State v. Christian*, 151Wn.App. 1006 (Div 1 2009).
60. See Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded,* 64 Stan. L. Rev. 1503, 1510-12 (2012)
61. RCW 2.36.080(3).