

# IMMIGRATION STATUS IN JURY TRIALS: STATE LEGISLATURE & STATE SUPREME COURT INVOLVEMENT IN COMBATTING JURY BIAS

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## INTRODUCTION

In 2018, immigration was a controversial issue. On July 18, 2018 Mollie Tibbetts, a 20-year old student, was abducted while jogging through the rural town of Brooklyn, Iowa.<sup>1</sup> She disappeared without a trace and her story took the news by storm.<sup>2</sup> Over a month later, police arrested alleged undocumented immigrant, Cristian Rivera, for Mollie's murder.<sup>3</sup> President Trump immediately called for immigration reform, asserting that cities that have passed sanctuary city laws are responsible for her disappearance.<sup>4</sup> Given the prevalence and partisan nature of this topic, this Note seeks to clarify how immigration status is used in jury trials. Additionally, this Note analyzes whether recently enacted laws that limit the admissibility of immigration status meaningfully advance immigration reform and measures State Supreme Courts can take in order to mitigate immigration bias in jury trials.

### I. APPLICATION OF IMMIGRATION STATUS IN CALIFORNIA LAW

San Francisco's robust diversity, as manifested in jury composition and state laws on immigration, has had a significant impact on jury trials for undocumented immigrants. In July 2017, a jury in San Francisco, California found Jose Ines Garcia Zarate, a homeless, undocumented Mexican immigrant, not guilty of the murder of Kate Steinle.<sup>5</sup> Zarate had been deported five times and was scheduled for a sixth deportation in 2015 when he was in federal custody for felony re-entry.<sup>6</sup> Because San

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<sup>1</sup> *Mollie Tibbetts: Everything we Know About the Case*, 6ABC ACTION NEWS (Aug. 24, 2018), <https://6abc.com/mollie-tibbetts-everything-we-know-about-the-case/4020056/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Sophie Tatum, *Trump Blames Democratic Immigration Policies for Death of Mollie Tibbetts*, CNNPOLITICS (Aug. 24, 2018, 10:21 PM), <https://www.cnn.com/2018/08/24/politics/donald-trump-mollie-tibbetts/index.html>.

<sup>5</sup> Richard Gonzales, *Immigrant Acquitted of San Francisco Killing Sentenced On Lesser Gun Charge*, NPR (Jan. 5, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/05/576123068/immigrant-acquitted-of-san-francisco-killing-sentenced-on-lesser-gun-charge>.

<sup>6</sup> *Id.*

San Francisco is a sanctuary city, prosecutors dropped the charge.<sup>7</sup> The trial drew attention from then-candidate Trump during the 2016 presidential election. He tweeted, “My opponent wants sanctuary cities. But where was sanctuary for Kate Steinle?” and “Build the Wall.”<sup>8</sup>

In spite of the political rhetoric, Zarate’s immigration status was never mentioned in court.<sup>9</sup> From the outset, the judge barred any mention of Zarate’s immigration status or the five times he had been deported.<sup>10</sup> Zarate’s immigration status was irrelevant in considering whether he intended to pull the trigger.<sup>11</sup> In addition, the fact that the jury was composed of six men and six women, three of whom were immigrants, mitigated the presence of jury bias.<sup>12</sup> San Francisco Public Defender Matt Gonzalez stated that the jury understood “a lot of the concerns about the defendant receiving a fair trial.”<sup>13</sup>

In 2018, California Governor Jerry Brown passed Senate Bill 785, which prevents an individual’s immigration status from being used in open court, unless lawyers request a confidential in-camera hearing and a judge then determines the information is relevant and admissible.<sup>14</sup> The legislation was passed in order to enable immigrants to report crime and participate in trials without fear of deportation, ultimately resulting in a safer community.<sup>15</sup> Notably, in 2017, a San Francisco mother, who was a Latina immigrant, reported that her daughter had been assaulted and

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<sup>7</sup> *Id.*

<sup>8</sup> Gregory Korte, *Trump Says he’ll Make Kate Steinle’s Killer a 2020 Campaign Issue*, USA TODAY (Dec. 1, 2017, 9:17 AM), <https://www.usatoday.com/story/news/politics/2017/12/01/trump-says-hell-make-kate-steinles-killer-2020-campaign-issue/912603001/>.

<sup>9</sup> Paul Elias, *Despite Immigration Debate, US Jury Acquits Mexican National of Murder*, THE CHRISTIAN SCIENCE MONITOR (Dec. 1, 2017), <https://www.csmonitor.com/USA/Justice/2017/1201/Despite-immigration-debate-US-jury-acquits-Mexican-national-of-murder>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Angela Ruggiero & Tatiana Sanchez, *President and Others React Angrily After San Francisco jury Acquits Undocumented Immigrant of Murder, Manslaughter*, TIMES STANDARD (Dec. 1, 2017, 10:56 AM), <https://www.times-standard.com/2017/12/01/president-and-others-react-angrily-after-san-francisco-jury-acquits-undocumented-immigrant-of-murder-manslaughter/>.

<sup>13</sup> Paul Elias, *Politically Fraught San Francisco Murder Trial Gets Jury*, RENO GAZETTE JOURNAL (Oct. 19, 2017, 1:56 PM), <https://www.rgj.com/story/news/crime/2017/10/19/politically-fraught-san-francisco-murder-trial-gets-jury/781924001/>.

<sup>14</sup> Evidence: immigration status, SB-785 (2018).

<sup>15</sup> *Governor Jerry Brown Signs Bill That Prohibits Mention of Immigration Status in Open Court* (May 20, 2018 11:51 AM), <https://cnpa.com/governor-jerry-brown-signs-bill-that-prohibits-mention-of-immigration-status-in-open-court/>.

testified against the man that had struck her daughter.<sup>16</sup> In open court, she was questioned about her immigrant status in order to determine whether she was testifying in order to receive a U-Visa.<sup>17</sup> Although the judge stated this was irrelevant, the damage had already been done.<sup>18</sup> The jury was unable to render a verdict and the prosecutors attempted to retry the case.<sup>19</sup> However, this time, the mother refused to testify in the event that her immigration status was brought into question.<sup>20</sup> Following the election of President Trump, San Francisco's Latino population reporting of domestic violence dropped eighteen percent compared to in 2016.<sup>21</sup> Undocumented immigrants are concerned that ICE agents will deport them should they hear this information in court. The San Francisco legislature sought to alleviate this concern through the passage of Senate Bill 785.

The California News Publishers Association is one of the few groups that has opposed the bill, stating that it undermines the integrity of the court by preventing the public from seeing whether trials are being conducted fairly.<sup>22</sup> Nevertheless, the law continues to allow attorneys to introduce immigration status to impeach a party or witness.

## II. APPLICATION OF IMMIGRATION STATUS IN WASHINGTON LAW

In addition to California, Washington has passed a law limiting the usage immigration status in jury trials. In 2002, Alex Salas slipped off of a ladder on a construction site, resulting in ten fractures.<sup>23</sup> Salas sued the site's scaffolding subcontractors because the ladder did not meet the code requirements.<sup>24</sup> In 2006, the defense admitted evidence that Salas' visa had expired, stating that his immigration status affected his claim for future wages.<sup>25</sup> The jury ruled that the subcontractors were negligent, but did not award Salas any money.<sup>26</sup> A decade later, after Salas' attorneys

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<sup>16</sup> Scott Weiner & Scott Gascón, *Now Immigrants are Being Harassed on the Witness Stand in California Courtrooms*, SACRAMENTO BEE (May 10, 2018, 9:10 PM), <https://www.sacbee.com/opinion/california-forum/article210594384.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Weiner & Gascón, *supra* note 16.

<sup>22</sup> Tatiana Sanchez, *Brown Signs Bill Preventing Disclosure of Immigration Status in Court*, VC STAR (May 17, 2018, 10:11 PM), <https://www.vcstar.com/story/news/2018/05/17/brown-signs-bill-preventing-disclosure-immigration-status-court/622165002/>.

<sup>23</sup> Beena Raghavendran, *After 13 years, Worker in Country Illegally Awarded \$2.6M for Injuries*, THE SEATTLE TIMES (Jul. 8, 2015, 8:03 PM), <https://www.seattletimes.com/seattle-news/immigration-court/>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

argued that the inclusion of the immigration status was prejudicial to Salas, the state Supreme Court awarded Salas a new trial because the lower court's decision to admit the evidence was an abuse of discretion.<sup>27</sup> The second jury awarded Salas 2.6 million dollars.<sup>28</sup>

In November 2017, the Washington Supreme Court approved a rule that makes evidence about a person's immigration status "generally inadmissible" in civil and criminal courts statewide unless the "status is an essential fact to prove an element of a criminal offense or to defend against the alleged offense or to show bias and prejudice of a witness."<sup>29</sup> Prosecutors and several immigration rights activists argued that inclusion of immigration status can bias jurors and prevent immigrants from reporting crimes.<sup>30</sup>

However, the rule received strong pushback from defense lawyers and immigrant rights groups when it was proposed. Defense lawyers argued this rule could bar otherwise admissible evidence and disadvantage their clients. "Let's say my client has an alibi, and his alibi is, 'I was in ICE [Immigration and Customs Enforcement] detention,'" said Kevin March, a criminal defense attorney and a member of the Washington Defenders Association.<sup>31</sup> "The current text of the rule could place procedural hurdles in the way of using that alibi in court."<sup>32</sup> In addition, defense attorneys state that they will be unable to impeach a party based on immigration status, similar to how rape shield laws prevent defense attorneys from introducing an alleged sexual assault victim's sexual history against the victim.<sup>33</sup>

Conversely, prosecutors have asserted that the rule has emboldened several defense attorneys to "act first and ask forgiveness later."<sup>34</sup> Andy Miller, a Washington prosecutor, said that one of his witnesses was "visibly spooked" when a defense attorney asked him about his immigration status before trial even though he did not have to answer.<sup>35</sup>

In general, Washington's implementation of this rule provides more security for undocumented immigrants to report crimes, but may have the incidental effect of excluding evidence that would otherwise be relevant and admissible.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Wash. ER 413.

<sup>30</sup> Molly Redden, *Washington State Courts May Shield Immigrants' Status Amid Trump Fears*, THE GUARDIAN (Jul. 26, 2017, 8:00 PM), <https://www.theguardian.com/us-news/2017/jul/26/washington-state-immigration-status-criminal-cases-trump>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

### III. APPLICATION OF IMMIGRATION STATUS IN OTHER STATES

Many other states, including Texas, Delaware, and Florida, that have not promulgated laws specifically addressing the admissibility of immigration status in jury trials, nevertheless typically find that is either irrelevant or that the probative value of immigration status is very low compared to the danger of unfair prejudice and is, therefore, inadmissible.<sup>36</sup> Courts have made this determination in the context of impeachment of parties/witnesses and legal issues. However, these states may enhance immigration reform by adopting the California rule, where all determinations of admissibility status of immigration status are conducted privately, in order to further mitigate jury bias.

### IV. IMMIGRATION BIAS IN JURY SELECTION

A legal mechanism through which State Supreme Courts can reduce immigration bias is by promulgating rules aimed at eliminating implicit and intentional racial bias in jury selection. In selecting juries, lawyers, particularly defense lawyers, must grapple with the presence of immigration bias. Latinos are mostly convicted of immigration violations and are disproportionately represented in the United States criminal justice system<sup>37</sup>. Latinos who are stereotypically thought to commit crimes are often given lengthier sentences compared with other ethnic minority groups and Caucasians.<sup>38</sup>

Lawyers face the issue of whether to address viewpoints on immigration during voir dire. If lawyers do not bring this up during voir dire, not only have they squandered the opportunity in turning a peremptory challenge into a challenge for cause, but they have also opened the door to including jurors who may be implicitly thinking about immigration status throughout the trial.<sup>39</sup> In a 2007 trial, *People v. Rodriguez-Tellez*, the fact that defendant was an undocumented immigrant never arose during trials.<sup>40</sup> However, the defendant's attorney, Henry

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<sup>36</sup> Benny Agosto, Jr., Lupe Salinas & Eloisa Artega, *Can The Undocumented Worker's Alien Status Be Introduced At Trial?*, <https://www.abrahamwatkins.com/Articles/Bennys-Article-Can-the-Undocumented-Worker-s-Status-be-Introduced-at-Trial.pdf>.

<sup>37</sup> Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CENTER FOR AMERICAN PROGRESS (May 27, 2015, 12:01 AM), <https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/>.

<sup>38</sup> *Id.*

<sup>39</sup> Ben Rubinowitz & Evan Torgan, *Confronting the Immigration Bias in Jury Selection*, NEW YORK LAW JOURNAL (Sept. 7, 2017), [https://www.gairgair.com/docs/9\\_7\\_2017\\_immigrationbias.pdf](https://www.gairgair.com/docs/9_7_2017_immigrationbias.pdf).

<sup>40</sup> Rob Philips, *Attorneys Allege Jury Bias*, THE NORTHWEST HERALD (Jan. 7, 2007), <https://www.mchenrycountylaw.com/2007/01/07/attorneys-allege-jury-bias/>.

Sugden, stated that it was more likely than not that this information still in the back of their heads during deliberations.<sup>41</sup> Individuals are still acting upon implicit biases that they possess in making inferences in the case. In April of 2018, the Washington Supreme Court became the first court in the nation to adopt a rule that will expand the prohibition against using race based peremptory challenges.<sup>42</sup> Instead of proving juror exclusion based on intentional discrimination, attorneys now have to show that an “objective observer” might see the exclusion as connected to race.<sup>43</sup> Who the “objective observer” is may vary based on whether one is in California or in Iowa. However, other State Supreme Courts ought to consider tackling implicit bias in jury selection through similar means in order to ensure that juries are more diverse and that jury trials are, therefore, more fair.

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<sup>41</sup> *Id.*

<sup>42</sup> ACLU, <https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection> (last visited Dec. 17, 2018).

<sup>43</sup> *Id.*