

NOTES

SUBSTITUTION OF ALTERNATE JURORS DURING DELIBERATIONS AND IMPLICATIONS ON THE RIGHTS OF LITIGANTS: THE *REGINALD DENNY* TRIAL

INTRODUCTION

Historically, when faced with the situation of an incapacitated or disqualified juror, courts discharged that juror and declared a mistrial.¹ This practice necessitated the substantial expenditure of prosecution, defense and court resources.² The emergence of longer, more complex trials,³ in which jurors are more susceptible to incapacitation or disqualification, exacerbated the problem.⁴ As Chief Justice Burger pointed out, "even Jefferson would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in trials lasting many weeks or months."⁵ In an attempt to address this problem, Federal Rule of Criminal Procedure 24(c) per-

¹ See, e.g., *People v. Peete*, 202 P. 51, 65 (Cal. Dist. Ct. App. 1921); *People v. Curran*, 121 N.E. 637, 638 (Ill. 1918).

² See FED. R. CRIM. P. 23(b) Advisory Committee's Note, 97 F.R.D. 245 (1983). This committee was very concerned with the expenditure of resources when a juror is discharged after a lengthy trial. *Id.* at 298.

³ See Chief Justice Warren E. Burger, *Can Juries Cope with Multi-Month Trials?*, 3 AM. J. TRIAL ADVOC. 449, 449-52 (1980). Although Chief Justice Burger mainly criticizes the use of juries in protracted civil cases, he establishes that modern trials are becoming longer and increasing the burden on jurors. *Id.* at 450-52.

⁴ See Barry E. Ungar & Theodore R. Mann, *The Jury and the Complex Civil Case*, 6 LITIG. 3, 4 (1980). The authors point out the susceptibilities of a jury in a protracted trial. See *id.* Citing statistics from the U.S. Statistical Abstract, they write that in a two-year period, out of eighteen persons, three will die or lose a spouse, parent or child; two will lose a sibling; one will give birth; six will be admitted to a hospital; and at least two will move to another county. *Id.* Additionally, the authors note, the predomination of older, retired individuals on juries and the numerous business and personal reasons that cause jurors to withdraw, demonstrate the problem with using juries in lengthy trials. *Id.*

⁵ Burger, *supra* note 3, at 451.

mits the replacement of a juror before the commencement of deliberations.⁶ Once deliberations begin, however, Rule 24(c) requires courts to discharge any remaining alternates.⁷ Thus, the possibility of a costly mistrial still exists in the federal system.⁸ In response to the recurring possibility of mistrial, some courts have implemented their own procedures and permitted the post-submission substitution of alternates.⁹

In contrast to Rule 24(c), the California legislature explicitly authorized the post-submission substitution of alternates in section 1089 of the California Penal Code.¹⁰ As originally enacted, the California statute mirrored Rule 24(c) and only permitted the substitution of alternate jurors before deliberations.¹¹ Amending the original statute in 1933, the California legislature expanded the trial court's power in an effort to enhance judicial economy while preserving the rights of the accused.¹²

⁶ See FED. R. CRIM. P. 24(c). This rule provides in relevant part:

The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Id. Rule 23(b) also allows a limited solution to this problem, permitting district court judges to discharge one of the twelve jurors and proceed with only eleven jurors. FED. R. CRIM. P. 23(b)

⁷ FED. R. CRIM. P. 24(c).

⁸ See, e.g., *United States v. Quiroz-Cortez*, 960 F.2d 418, 419 (5th Cir. 1992) (court discovered juror's hearing impediment after deliberations had begun); *United States v. Lamb*, 529 F.2d 1153, 1155 (9th Cir. 1975) (court informed after start of deliberations that one juror was unable to continue due to death of close friend); *Leser v. United States*, 358 F.2d 313, 314-15 (9th Cir. 1966) (court informed that juror was unable to continue deliberations due to important medical appointment), *cert. dismissed*, 385 U.S. 802 (1966).

⁹ E.g., *Quiroz-Cortez*, 960 F.2d at 420 (post-submission substitution allowed where defendant suffered no prejudice); *United States v. Phillips*, 664 F.2d 971, 996 (5th Cir. 1981) (post-submission substitution allowed due to length and complexity of trial and absence of prejudice), *cert. denied*, 457 U.S. 1136 (1982); *Leser*, 358 F.2d at 317 (post-submission substitution allowed where defendants consented).

¹⁰ CAL. PENAL CODE § 1089 (West 1985). This statute provides, in relevant part:

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

Id.

¹¹ See *People v. Aikens*, 254 Cal. Rptr. 30, 31 (Cal. Ct. App. 1988).

¹² See *id.* at 31-33. The court balanced the constitutional rights of the accused against the consequences which result from granting mistrials and prolonging criminal proceedings. *Id.* at 33.

Concerns over the fairness of section 1089's application surfaced in the well-publicized trial of Damian Williams and Henry Watson, the two men accused of beating truck driver Reginald Denny during the Los Angeles riots of 1992.¹³ During the trial, Superior Court Judge John Ouderkirk replaced five jurors from the original panel of twelve with alternates, and two of these replacements occurred after the start of deliberations.¹⁴ While four of these substitutions appeared to be clearly within the judge's statutorily authorized discretion, the removal of juror 373 sparked controversy.¹⁵ Judge Ouderkirk replaced juror 373 for failing to deliberate after the other jurors accused her of lacking the mental capacity to contribute meaningfully to any discussions.¹⁶

This Note argues that Judge Ouderkirk's decision to replace juror 373 directly affected the defendants' rights, and more broadly, contravened a fundamental principle on which our jury system is based, that of free and uncoerced deliberation. Part I of this Note discusses the historical underpinnings of the jury system and the importance of the deliberation process.¹⁷ Part II discusses post-submission substitution in the federal courts.¹⁸ Part III reviews the California statute and relevant case law concerning the substitution of alternate jurors during deliberations.¹⁹ Part IV examines in detail the *Denny* trial and specifically Judge Ouderkirk's decision to replace juror 373 with an alternate.²⁰ Finally, Part V argues that because post-submission juror substitution potentially infringes on the defendant's Sixth Amendment right to a free and impartial jury, its use should be carefully restricted and strictly reviewed.²¹

I. JURIES—A HISTORICAL PERSPECTIVE

Reverence for the American jury dates back to the Founding Fathers, who firmly believed that the jury system was, at the minimum, a safeguard of liberty, and at the maximum, the "very palladium of free

¹³ See David A. Kaplan & Tim Pryor, *Disorder in the Court*, NEWSWEEK, Oct. 25, 1993, at 32. The authors state that Judge Ouderkirk's controversial decision to remove juror No. 373 could be reversed on appeal. *Id.*

¹⁴ Ashley Dunn & Penelope McMillan, *Jury's Ordeal: 2 Harrowing Weeks*, L.A. TIMES, Oct. 21, 1993, at A1, A29.

¹⁵ See Kaplan & Pryor, *supra* note 13, at 32.

¹⁶ Transcript at 8152, 8212, *People v. Williams*, No. BA058116 (L.A. Super. Ct. 1993).

¹⁷ See *infra* notes 22–50 and accompanying text.

¹⁸ See *infra* notes 51–142 and accompanying text.

¹⁹ See *infra* notes 143–239 and accompanying text.

²⁰ See *infra* notes 240–335 and accompanying text.

²¹ See *infra* notes 336–71 and accompanying text.

government."²² Many commentators share this view, noting that the jury system is fundamental to the ongoing health of a democracy.²³ Supporters of the jury system, throughout history, maintained that trial by jury was the "most effective weapon in democracy's arsenal to combat the tyranny that cannot emerge until it has effectively overridden the right of the individual to raise his voice, first in the legislature and then in the courtroom."²⁴

Scholars also praise the United States' commitment to the use of ordinary individuals in the administration of justice through the use of the common citizen on the jury.²⁵ Labeling the jury a "remarkable political institution," one commentator praises the practice of recruiting twelve individuals chosen at random, bringing them together for the purpose of a trial, and entrusting them with the power of decision.²⁶ This commentator notes that unlike systems focused on the use of professional, experienced judges to determine final judgments, the jury is an exciting experiment in human affairs.²⁷

From its inception, the jury comprised of ordinary citizens has been the subject of ongoing controversy, attracting sharp criticism in addition to extravagant praise.²⁸ Critics focus on the wisdom of haphazardly choosing amateurs from the street to render such crucial decisions, citing the inherent danger in choosing a body of people from the population at random.²⁹ In light of these criticisms of the use

²² BERNARD BOTEIN & MURRAY A. GORDON, *THE TRIAL OF THE FUTURE* 100 (1963). Patrick Henry hoped that Americans would never part with what he considered to be an astonishing and excellent mode of trial. Philip H. Corboy, *The Right To Trial By Jury*, 4 AM. J. TRIAL ADVOC. 65, 68 (1980).

²³ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-85 (1985 ed.). De Tocqueville states:

The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with the manly confidence without which no political virtue can exist. It invests in each citizen a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government.

Id. Blackstone described the trial by jury as the "glory of English Law . . . [T]he liberties of England cannot but subsist as long as this palladium remains sacred and inviolate." Corboy, *supra* note 22, at 67.

²⁴ BOTEIN & GORDON, *supra* note 22, at 115.

²⁵ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 1 (1966).

²⁶ *Id.*

²⁷ *Id.* at 1-2. Another commentator holds an even stronger opinion on the subject, criticizing judges' abilities as fact-finders: "I submit that the least reliable fact finder is that imperious, arrogant, impatient, irritable yet experienced specialist who has analyzed the same problem hundreds of times." Corboy, *supra* note 22, at 68.

²⁸ KALVEN & ZEISEL, *supra* note 25, at 4. The authors point out that most of the debate concerning juries is limited to the civil context and that the reasons underlying the use of juries in criminal trials are much stronger. *Id.* at 9.

²⁹ See *id.* at 6. The authors quote English scholar Glanville Williams, who questions the

of the jury in civil cases, many continue to support the use of juries in the criminal context.³⁰

In criminal cases, juries act as a "bulwark against oppression," according to former Chief Justice Warren Burger.³¹ By bringing together representative cross-sections of the community and their aggregate common sense judgment, the process promotes accurate and reliable findings of fact.³² The United States Supreme Court noted, in the 1967 case of *Duncan v. Louisiana*, that the use of ordinary laymen to determine guilt or innocence provides a safeguard against corrupt or overzealous prosecutors and against biased or eccentric judges.³³ The *Duncan* Court also pointed out that the creation of juries in federal and state constitutions demonstrated the reluctance of the framers to entrust powers over the fundamental rights of citizens to one judge.³⁴ Community participation in the verdicts of those standing trial, concluded the Court, helps ensure protection against government oppression.³⁵

Central to the proper functioning of our jury system is the deliberation process.³⁶ To deliberate is "to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion."³⁷ In the context of the Ameri-

practice of randomly choosing individuals to sit on juries. *Id.* This system is problematic, according to Williams, because many of the best qualified individuals are exempted. *Id.* The resulting jury may be "unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental." KALVAN & ZEISEL, *supra* note 25, at 6.

³⁰ See, e.g., *id.* at 9; Burger, *supra* note 3, at 451.

³¹ Burger, *supra* note 3, at 451.

³² See REID HASTIE ET AL., INSIDE THE JURY 5 (1983).

³³ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1967); see also Corboy, *supra* note 22, at 68-69 (criticizing judges' fact-finding abilities, pointing out that repetition does not improve ability to accurately assess facts).

³⁴ *Duncan*, 391 U.S. at 156.

³⁵ See *id.* at 156.

³⁶ HASTIE ET AL., *supra* note 32, at 5; see *Tanner v. United States*, 483 U.S. 107, 127 (1987) (affirming district court's denial of post-verdict evidentiary hearing to determine if jury members consumed alcohol and drugs during trial); see also FED. R. EVID. 606(b) which states in relevant part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

³⁷ Transcript at 8159, *People v. Williams*, No. BA058116 (L.A. Super. Ct. 1993). The judge issued this definition before questioning some of the jurors concerning the conduct of juror 373. See *id.*

can judicial system, deliberation is the procedure where the jury, analyzing information within the secrecy of the jury room, discusses and weighs the evidence presented in an effort to reach a verdict based on the law applicable to the facts.³⁸ This popular notion of jury deliberation surfaced in early case law.³⁹ In 1873, in *Railroad Co. v. Stout*, the United States Supreme Court described deliberation as a process where twelve individuals come together, debate, apply their real world experiences to the problem at hand, and eventually arrive at a unanimous determination.⁴⁰ Both courts and social scientists agree that the free and uncoerced contributions of all jurors are likely to overcome any biases harbored by individual jurors, thus resulting in more accurate and objective determinations of fact.⁴¹ To encourage the unfettered contributions of all jurors, both courts and the drafters of the Federal Rules of Evidence vehemently protect the secrecy surrounding the deliberation process.⁴²

Members of both the legal and social science communities also note the importance of group dynamics in the deliberation process.⁴³ Research demonstrates that many factors aside from the evidence play an integral role in verdict determinations.⁴⁴ Social scientists have discovered that juror age, gender and social class are among a variety of factors that influence the deliberation process.⁴⁵ These demographics affect the way jurors handle themselves individually, and the way they interact in the effort to render a verdict.⁴⁶ Certain courts have noted that the importance of group dynamics is further illustrated when an alternate juror enters deliberations after the original jury has deliberated for some time.⁴⁷ Supporting this view, studies indicate that new-

³⁸ *Id.* at 8159.

³⁹ See *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873).

⁴⁰ *Id.*

⁴¹ See *Ballew v. Georgia*, 435 U.S. 223, 234 (1977); HASTIE ET AL., *supra* note 32, at 5.

⁴² See *Tanner v. United States*, 483 U.S. 107, 127 (1987) (affirming district court's decision to deny post-verdict evidentiary hearing to determine if members of jury consumed alcohol and drugs during trial). Others have observed that the secrecy surrounding jury deliberations is intentional and serves, in part, to encourage the sharing of information. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES & PROBLEMS* 12 (1988). The Federal Rules of Evidence also place substantial limitations on any post-verdict inquiry conducted by the court. See FED. R. EVID. 606.

⁴³ See *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975); *People v. Collins*, 552 P.2d 742, 746 (Cal. 1976), *cert. denied*, 429 U.S. 1077 (1977); James Davis et al., *The Empirical Study of Decision Processes in Juries: A Critical Review*, in *LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 341-351. (J. Louin Tapp & F. Levine eds. 1977).

⁴⁴ See HASTIE ET AL., *supra* note 32, at 119; Davis et al., *supra* note 43, at 341-51.

⁴⁵ HASTIE ET AL., *supra* note 32, at 121.

⁴⁶ *Id.*

⁴⁷ See *Lamb*, 529 F.2d at 1156; *Collins*, 552 P.2d at 746.

comers to a group encounter substantial opposition when trying to change the practices and beliefs of an established body,⁴⁸ and in some cases, the newcomer erroneously accepts the false, yet preconceived ideas of the group.⁴⁹ Thus, some courts and commentators criticize the practice of post-submission juror substitution, questioning the alternate's ability to fully and effectively participate in deliberations.⁵⁰

II. POST-SUBMISSION SUBSTITUTION BY FEDERAL COURTS: FEDERAL RULE OF CRIMINAL PROCEDURE 24(C) AND ITS LIMITED EXCEPTIONS

Federal Rule of Criminal Procedure 24(c) explicitly permits substitutions of alternate jurors prior to the start of jury deliberations.⁵¹ However, Rule 24(c) mandates the discharge of any alternate juror who has not been substituted before the jury retires into deliberations.⁵² Thus, Rule 24(c) prohibits alternate substitutions of jurors during deliberations.⁵³ The committee charged with formulating Rule 24(c) considered the possibility of post-submission substitution.⁵⁴ It rejected this notion, however, because the United States Supreme Court questioned the constitutionality and desirability of such a practice.⁵⁵ Despite a subsequent Judicial Conference Committee recommendation to amend Rule 24(c) to allow the substitution of alternate jurors during deliberations,⁵⁶ the rule remains unchanged.⁵⁷ Citing the coercive effects upon an alternate joining a jury which, for all intents and purposes, has already determined the outcome of the deliberations, the American Bar Association, in 1974, supported Rule 24(c)'s prohibition of post-submission substitution.⁵⁸ Despite the unambiguous language of

⁴⁸ Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 FORDHAM L. REV. 861, 878-79 n.125 (1987).

⁴⁹ *Id.* at 878 n.124.

⁵⁰ See *Lamb*, 529 F.2d at 1156, *Collins*, 552 P.2d at 746.

⁵¹ FED. R. CRIM. P. 24(c).

⁵² *Id.*

⁵³ See *id.*

⁵⁴ *United States v. Phillips*, 664 F.2d 971, 993 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

⁵⁵ See *id.*; Lester B. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1961).

⁵⁶ 37 F.R.D. 71, 74 (1965). Citing the California Penal Code section that permits post-deliberation substitution, this committee believed that there was a need to allow post-submission substitution in the federal courts. *Id.* They commented that the need for amendment was greater in the criminal context. *Id.*

⁵⁷ FED. R. CRIM. P. 24(c). The practice of prohibiting post-submission juror substitution has gained the support of one prestigious commentator, Professor Charles Wright. See *Lamb*, 529 F.2d at 1156. Wright concludes that any violation of Rule 24(c)'s requirements should result in reversal, regardless of whether the defendant consented to such a procedure. *Id.*

⁵⁸ *Id.* at 1156 n.5.

Rule 24(c), however, some federal circuits have endorsed procedures which allow for alternate substitution during deliberations.⁵⁹

Federal case law indicates that alternate substitution is clearly permissible before the start of deliberations.⁶⁰ Citing the language in Rule 24(c) which allows the replacement of a juror before deliberations when that juror becomes "unable or disqualified to perform [his or her] duties," courts have replaced jurors for a number of reasons, including juror bias and tardiness.⁶¹ In 1950, in *Gillars v. United States*, the United States Court of Appeals for the District of Columbia held that the district court judge acted properly in replacing a juror who misrepresented herself during voir dire.⁶² During voir dire, the juror failed to respond truthfully to a question concerning her personal opposition to the death penalty.⁶³ The juror advised the district court of this fact after the jury was sworn but before the commencement of opening statements.⁶⁴ The *Gillars* court noted that the plain language of Rule 24(c) gives the district court judge the authority to replace any juror who, prior to deliberations, is unable or disqualified to perform their duties.⁶⁵ The disclosure of her true feelings concerning the death penalty, concluded the court, disqualified this juror and made the alternate substitution proper.⁶⁶ The court indicated that the fact that the jury had been sworn was irrelevant, and that the substitution was timely because it was effectuated before the start of deliberations.⁶⁷ Thus, the *Gillars* court, relying on the plain language of Rule 24(c), endorsed alternate substitutions which occurred prior to deliberations.⁶⁸

Over the past twenty-five years, a trend in favor of post-submission juror substitution in limited circumstances has emerged in some cir-

⁵⁹ E.g., *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992) (allowing post-submission substitution where defendant suffered no prejudice); *Leser v. United States*, 358 F.2d 313, 317 (9th Cir.) (allowing post-submission substitution of alternate jurors where defendants consented), *cert. dismissed*, 385 U.S. 802 (1966).

⁶⁰ See, e.g., *United States v. Floyd*, 496 F.2d 982, 990 (2d Cir.) (affirming trial court's decision to replace juror during trial when it became known that juror had prejudice which would prevent him from rendering fair decision), *cert. denied*, 419 U.S. 1069 (1974); *Gillars v. United States*, 182 F.2d 962, 980 (D.C. Cir. 1950) (affirming trial court's replacement of juror with an alternate when it became known to the court that juror failed to disclose bias that would prevent her from rendering fair decision).

⁶¹ *Floyd*, 496 F.2d at 990 (replacing juror for bias); *United States v. Domenech*, 476 F.2d 1229, 1232 (2d Cir.) (replacing juror for tardiness), *cert. denied*, 414 U.S. 840 (1973).

⁶² *Gillars*, 182 F.2d at 980.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*; see FED. R. CRIM. P. 24(c).

⁶⁶ *Gillars*, 182 F.2d at 980.

⁶⁷ *Id.* at 980-81.

⁶⁸ See *id.* at 980.

cuits.⁶⁹ The first court that circumvented the mandatory language of Rule 24(c) based its decision on the consent of the parties involved.⁷⁰ Another court endorsed post-submission substitutions only in exceptional circumstances.⁷¹ Finally, other courts have allowed the practice of alternate substitutions during deliberations as long as the defendant has suffered no prejudice.⁷² While constantly reaffirming the mandatory nature of Rule 24(c)'s language, these courts have nonetheless managed to carve out limited exceptions to this rule.⁷³

The United States Court of Appeals for the Ninth Circuit, in the 1966 case of *Leser v. United States*, permitted the post-submission substitution of a juror because defense counsel consented to the move in the presence of the defendants.⁷⁴ The day before deliberations began, one of the jurors informed the district court that he had an appointment the following day for an important medical procedure.⁷⁵ The district court judge suggested that both parties stipulate that the alternates not be discharged at the outset of deliberations, but instead remain in attendance and available until after the verdict.⁷⁶ Both sides agreed and the district court substituted one of the alternates the next day.⁷⁷ The jury returned with a guilty verdict approximately four hours later.⁷⁸ The Ninth Circuit found the post-submission substitution permissible in light of the defendants' voluntary stipulation to the procedure.⁷⁹ The knowing and intelligent nature of their consent, explained the court, bound the defendants to accept the verdicts as rendered.⁸⁰ In the absence of prejudice, the *Leser* court construed Rule 24(c) to allow post-submission substitution if the defendants knowingly and intelligently consented to the procedure.⁸¹

⁶⁹ See, e.g., *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992); *United States v. Hayutin*, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); *Leser*, 358 F.2d at 317-18.

⁷⁰ *Leser*, 358 F.2d at 317.

⁷¹ *Phillips*, 664 F.2d at 996.

⁷² *Quiroz-Cortez*, 960 F.2d at 420-21; *Hayutin*, 388 F.2d at 950.

⁷³ See, e.g., *Quiroz-Cortez*, 960 F.2d at 420; *Phillips*, 664 F.2d at 994; *Hayutin*, 388 F.2d at 950.

⁷⁴ 358 F.2d at 317.

⁷⁵ *Id.* at 314.

⁷⁶ *Id.* at 315. The judge was careful in his wording to ensure that both sides understood that any stipulations were purely voluntary. See *id.*

⁷⁷ *Id.* at 315-16.

⁷⁸ *Leser*, 358 F.2d at 316. The judge informed the court at 5:40 p.m. that the juror's condition grew worse and that he was replaced with an alternate. *Id.* The jury returned with the guilty verdict at approximately 10:30 p.m. *Id.*

⁷⁹ *Id.* 358 F.2d at 317.

⁸⁰ *Id.*

⁸¹ *Leser*, 358 F.2d at 317. The prejudice the court was addressing was the situation that had arisen in another case where the alternate retired with the jury and was instructed not to participate in the proceedings unless one of the regular jurors became ill. *Id.*; see also *United*

In 1968, in *United States v. Hayutin*, the United States Court of Appeals for the Second Circuit held that the practice of not discharging jury alternates at the beginning of deliberations was not prejudicial under the circumstances and thus did not automatically require reversal.⁸² The district court judge failed to discharge the alternates at the start of deliberations.⁸³ The Second Circuit, although admonishing the lower court for contradicting the mandatory language of Rule 24(c), upheld the conviction due to the absence of prejudice.⁸⁴

In *Hayutin*, the district court judge refused to discharge the three remaining alternates at the commencement of deliberations, although the defendant requested such discharges.⁸⁵ The district court did not replace any of the regular jurors with these alternates.⁸⁶ On appeal, the Second Circuit pointed to the mandatory nature of the language of Rule 24(c) that required the discharge of alternates at the outset of deliberations.⁸⁷ Citing the original drafters' consideration of post-submission substitution and the explicit decision not to incorporate such a procedure into Rule 24(c), the court questioned the wisdom of retaining alternate jurors once deliberations had begun.⁸⁸ The court then admonished the district court for retaining alternates in case substitutes were needed during deliberations, because such a practice had no statutory or regulatory basis.⁸⁹ The court concluded that "the absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24."⁹⁰ The Second Circuit, however, did not reverse the lower court conviction because the defendant suffered no prejudice.⁹¹ In sum, while the *Hayutin* court reiterated the mandatory nature of Rule 24, requiring the

States v. Virginia Erection Corp., 335 F.2d 868, 871-72 (4th Cir. 1964) (reversible error to place alternate with jury during deliberation even if the alternate is instructed not to participate). The *Leser* court noted that having more than twelve jurors in deliberation, in contravention of the constitutional right to a trial by jury, was not an issue because there was nothing in the record to suggest that more than twelve jurors were present at any time during deliberations. 358 F.2d at 318.

⁸² 398 F.2d 944, 950 (2d Cir. 1968).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Hayutin*, 398 F.2d at 950.

⁸⁸ *See id.*

⁸⁹ *Id.* This decision appears to disapprove of the earlier Ninth Circuit opinion *Leser*, in which the court affirmed the retention of alternates in hopes of a stipulation by both parties. *See id.*; *see also Leser*, 358 F.2d at 317. The *Hayutin* court never cites the *Leser* decision, but questions the rationale behind this earlier decision. *See* 398 F.2d at 950.

⁹⁰ *Hayutin*, 398 F.2d at 950.

⁹¹ *Id.*

dismissal of alternates after deliberations had begun, it chose not to reverse the district court's error in the absence of prejudice.⁹²

The Ninth Circuit, which allowed the post-submission juror substitution upon the knowing and intelligent stipulations of both parties in *Leser*, refused to expand that standard in 1968, in *United States v. Lamb*.⁹³ The *Lamb* court, noting the importance of deliberations free of coercion, held that the defendant's failure to consent to the alternate substitution after deliberations had begun made the district court's action reversible.⁹⁴ Limiting the *Leser* holding to instances where the parties' consent is clear and undisputed, the court refused to extend this exception to situations involving implied consent.⁹⁵

In *Lamb*, the district court judge excused the alternate juror at the start of deliberations with the instruction to "stand by" in case her presence became necessary.⁹⁶ Four hours into deliberations, one of the jurors informed the judge that due to the sudden accidental death of a close friend, he was unable emotionally to render a decision.⁹⁷ After questioning the juror, the judge discharged the juror and substituted the alternate.⁹⁸ Defense counsel objected and immediately made a motion for a mistrial.⁹⁹ The judge denied defense counsel's motion and the alternate juror joined the original panel.¹⁰⁰ Twenty-nine minutes later, the jury returned a guilty verdict.¹⁰¹

In reversing the district court's verdict, the Ninth Circuit held that alternate substitution after the start of deliberations and without the defendant's consent is fraught with coercive dangers on the new juror and thus constitutes reversible error.¹⁰² The court explained that Rule 24(c)'s mandatory language serves the important task of protecting the sanctity of deliberations.¹⁰³ By ignoring the mandate of this rule,

⁹² *Id.* The absence of prejudice, according to the court, was due to the precautionary procedures employed by the lower court. *Id.* The alternates were sequestered separately, and the record demonstrates an absence of communication between the alternates and the jurors during deliberations. *Id.*

⁹³ See 529 F.2d 1153, 1157 (9th Cir. 1975).

⁹⁴ *Id.* at 1156-57.

⁹⁵ *Id.* at 1157.

⁹⁶ *Id.* at 1154-55. The judge even allowed the juror to go home during this "stand by" period. *Id.* at 1155.

⁹⁷ *Lamb*, 529 F.2d at 1155. The juror informed the judge through a note, which stated: "your honor, due to the sudden accidental death of one of my close co-workers during the course of this trial, I feel emotionally unable to come to a decision." *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Lamb*, 529 F.2d at 1155.

¹⁰² *Id.* at 1156-57.

¹⁰³ See *id.* at 1156.

the court explained, the district court judge placed the alternate in an inherently coercive atmosphere in which the jury may have already determined the final verdict.¹⁰⁴ The *Lamb* court determined that such impermissible coercion was clearly present because deliberations, which had been in progress for approximately four hours prior to the alternate substitution, only lasted twenty-nine minutes after the replacement.¹⁰⁵ Thus, the court concluded that the jury had failed to clearly and conscientiously reconsider the issues in the manner required to guarantee the defendant a fair trial.¹⁰⁶ Additionally, the court noted that the defendant not only failed to offer the consent which may have validated the court's procedure, but in fact objected to the substitution.¹⁰⁷ Reaffirming the importance of protecting uncoerced deliberations, and implicitly limiting *Leser* to situations involving the knowing, intelligent and undisputed consent of the defendant, the *Lamb* court reversed the district court's decision because the defendant never consented to the substitution procedure.¹⁰⁸

In 1981, in *United States v. Phillips*, the United States Court of Appeals for the Fifth Circuit held that post-submission substitution was permitted in exceptional circumstances if the defendant suffered no prejudice, thereby expanding the district court's power.¹⁰⁹ At the outset of the deliberations, the district court judge chose not to discharge the remaining alternate juror, although the defense objected to such a move.¹¹⁰ After a day and a half of deliberations, one of the jurors was hospitalized and consequently discharged from the jury.¹¹¹ The district court replaced the juror with the remaining alternate and instructed the jury to begin deliberations anew.¹¹² Six days later the jury reached a verdict.¹¹³

In support of the district court's post-submission substitution, the Fifth Circuit noted that the language of Rule 24(c) which deals with

¹⁰⁴ *Id.* Likewise, the court reasoned that the district court's alternate substitution could encourage situations in which the lone dissenting juror is pressured to "feign illness or other incapacity so as to place the burden of decision on an alternate juror." *Id.*

¹⁰⁵ *Lamb*, 529 F.2d at 1156. The short period of deliberations, while indicating the presence of coercion on the will of the new juror, also appeared to violate an explicit court instruction to begin deliberations anew after the substitution of an alternate. *Id.*

¹⁰⁶ *See id.* at 1156.

¹⁰⁷ *Id.* at 1157.

¹⁰⁸ *See id.* at 1156-57.

¹⁰⁹ *Phillips*, 664 F.2d at 996.

¹¹⁰ *Id.* at 990. The court ordered that the alternate be sequestered from the regular jury. *Id.*

¹¹¹ *Id.* The juror who was discharged had suffered a heart attack and thus was clearly unable to resume deliberations. *Id.*

¹¹² *Phillips*, 664 F.2d at 990-91.

¹¹³ *Id.* at 991.

the substitution of alternate jurors before deliberations is not constitutionally mandated.¹¹⁴ According to the court, the Federal Rules of Criminal Procedure were not intended to be a rigid code inflexible to special circumstances.¹¹⁵ The court emphasized the fact that the precautions taken by the trial court judge, such as sequestering the alternate separately during preliminary deliberations and carefully instructing each juror to begin deliberations anew, protected the alternate from the inherently coercive atmosphere present when a new juror joins a group already involved in deliberation.¹¹⁶ The court reasoned that these precautions, combined with the fact that the jury deliberated for another week, negated the possibility of any coercion.¹¹⁷ Expressly disagreeing with the *Lamb* court's holding that any post-submission substitution requires reversal, the *Phillips*' court cited the Federal Rule's focus on simplicity, fairness and the elimination of unjustifiable delay to justify the district court's substitution procedure.¹¹⁸ While the *Phillips* court limited its holding to situations involving exceptional circumstances,¹¹⁹ it nonetheless expanded the district court's post-submission juror substitution powers.¹²⁰

Continuing this trend, in the 1986 case of *Peek v. Kemp*, the United States Court of Appeals for the Eleventh Circuit held that the post-submission substitution of a juror did not constitute a reversible error in the absence of any identifiable prejudice.¹²¹ After the jury deliberated for approximately two hours, the foreman informed the court that one of the jurors was "at the breaking point" and wanted to be excused.¹²² Without interviewing the juror, the district court dismissed him and

¹¹⁴ *Id.* at 992.

¹¹⁵ *Id.* at 993.

¹¹⁶ *Id.* at 995-96. The court pointed out the concern that when an alternate joins a jury after deliberations have begun, the alternate may be coerced into supporting previously accepted viewpoints or decisions. *Phillips*, 664 F.2d at 995. The procedural measures implemented by the trial court, however, negated the potential for undue influence under the circumstances. *Id.* at 995-96. Here the trial judge questioned each of the regular jurors individually to ensure that they would be able to begin deliberations anew, and then instructed the jury to do just that. *Id.* at 996.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 996 n.21. The court cited Rule 2 of the Federal Rules of Criminal Procedure. *Phillips*, 664 F.2d at 996 n.21. The full text of the rule is as follows: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." FED. R. CRIM. P. 2.

¹¹⁹ *Phillips*, 664 F.2d at 996. The "exceptional context" alluded to by the court refers to the fact that the trial was extremely complex and lasted four months. *Id.*

¹²⁰ See *id.* at 995-96.

¹²¹ 784 F.2d 1479, 1485 (11th Cir.), cert. denied, 479 U.S. 939 (1986).

¹²² *Id.* at 1481-82.

seated an alternate.¹²³ Subsequent fact-finding revealed that the replaced juror was the lone hold-out at the time of the dismissal.¹²⁴

In affirming the district court's decision, the *Peek* court noted that the record supported the finding that the juror was too ill to continue deliberations.¹²⁵ The court further explained that the defendant's right to be tried by the originally selected jury must sometimes be subordinated to the public's interest in achieving fair trials that result in jury verdicts.¹²⁶ Concluding that the district court's failure to question the ill juror did not result in any prejudice, the *Peek* court affirmed the post-submission substitution and found no constitutional error.¹²⁷

The Fifth Circuit expanded its *Phillips* holding in 1992, when it decided *United States v. Quiroz-Cortez*.¹²⁸ The *Quiroz-Cortez* court affirmed the post-submission juror substitution because the defendant suffered no prejudice.¹²⁹ Forty-five minutes after the jury retired into deliberations, the district court learned that one of the jurors had a hearing impediment which may have prevented him from hearing all of the testimony.¹³⁰ After questioning the juror, the district court decided to replace him with one of the available alternates, who had already been dismissed.¹³¹ Defense counsel objected and asked for a mistrial, which the trial court immediately denied.¹³²

The *Quiroz-Cortez* court pointed out that Rule 24(c) does not expressly forbid the substitution of jurors after deliberations have commenced.¹³³ Instead, noted the court, this prohibition originated in prior case law.¹³⁴ The court then concluded that verdicts remained binding if the defendant suffered no prejudice.¹³⁵ Under the circumstances, the court found the risk of prejudice minimal in light of the court's explicit instruction to start deliberations from the beginning, and the fact that the jury deliberated for an hour and a half after the alternate had been substituted.¹³⁶ The court failed to mention the

¹²³ *Id.* at 1482.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1483.

¹²⁶ *Peek*, 784 F.2d at 1484.

¹²⁷ *Id.* at 1485.

¹²⁸ See 960 F.2d 418, 420-21 (5th Cir. 1992).

¹²⁹ *Id.* at 421.

¹³⁰ *Id.* at 419.

¹³¹ *Id.* As the jury retired into deliberations, the judge dismissed the two alternates and instructed them not to discuss the case with anyone until a verdict had been rendered. *Id.*

¹³² *Quiroz-Cortez*, 960 F.2d at 419. After the judge denied the motion for a mistrial, the defense counsel settled for the first alternate. *Id.*

¹³³ *Id.* at 420.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Quiroz-Cortez*, 960 F.2d at 420. The court also minimized any potential prejudice by

exceptional circumstances requirement stated in *Phillips*.¹³⁷ Thus, while reaffirming the mandatory nature of Rule 24(c)'s language, the *Quiroz-Cortez* court decided only to enforce this provision if the defendant suffered prejudice.¹³⁸

These cases illustrate the willingness of certain circuits to depart from the mandatory language of Rule 24(c) in limited circumstances, and hold that post-submission substitution does not mandate automatic reversal.¹³⁹ The exception originally applied only when both parties stipulated to the procedure.¹⁴⁰ Subsequent courts expanded the post submission juror substitution procedure to exceptional circumstances,¹⁴¹ and cases where the defendant suffered no prejudice.¹⁴²

III. POST-SUBMISSION SUBSTITUTION BY CALIFORNIA COURTS: CALIFORNIA PENAL CODE SECTION 1089 AND THE EMERGING TREND IN ITS APPLICATION

Unlike the Federal Rules of Criminal Procedure, which purport to prohibit the substitution of alternate jurors after the start of deliberations,¹⁴³ California Penal Code section 1089 explicitly authorizes this practice.¹⁴⁴ The statute allows the court to discharge any juror, "whether before or after the final submission of the case to the jury," if that "juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty," and to replace that juror with an alternate.¹⁴⁵ Before the 1933 amendment allowing post-submission substitution, this statute only authorized alternate substitutions before a case was submitted to the jury.¹⁴⁶ The California legislature enacted the amendment, in part, to prevent the needless expenditures of prosecution, defense and judicial resources that result from declaring mistrials after a lengthy trial.¹⁴⁷

Over the years, California courts have employed section 1089 under a variety of circumstances.¹⁴⁸ The least controversial cases have

extensively questioning the alternate to ensure that she had not discussed the case with anyone since she had been released. *Id.* at 419.

¹³⁷ See *id.*, 960 F.2d at 420-21.

¹³⁸ *Id.* at 420.

¹³⁹ See, e.g., *Quiroz-Cortez*, 960 F.2d at 420; *Hayutin*, 388 F.2d at 950; *Leser*, 358 F.2d at 317-18.

¹⁴⁰ See *Leser*, 358 F.2d at 317-18.

¹⁴¹ *Phillips*, 664 F.2d at 996.

¹⁴² *Quiroz-Cortez*, 960 F.2d at 420; *Hayutin*, 398 F.2d at 950.

¹⁴³ FED. R. CRIM. P. 24(c).

¹⁴⁴ CAL. PENAL CODE § 1089 (West 1985).

¹⁴⁵ *Id.*

¹⁴⁶ See *People v. Thomas*, 267 Cal. Rptr. 865, 870 (Cal. Ct. App. 1990).

¹⁴⁷ See *id.* at 870-71.

¹⁴⁸ See, e.g., *People v. Roberts*, 826 P.2d 274, 303-04 (Cal. 1992); *People v. Daniels*, 802 P.2d

involved juror illness or requests for discharge, as these causes fall directly under the explicit language of the act.¹⁴⁹ Citing the "other good cause" provision of section 1089, trial court judges discharged jurors for a variety of reasons, including a death in the juror's family,¹⁵⁰ a change in the juror's state of residence,¹⁵¹ or juror bias which became known to the court.¹⁵² In determining what constitutes good cause, the trial court's discretion is clearly limited and subject to reversal.¹⁵³ Although section 1089 fails to specify the required procedures when exercising this discretion, the California Supreme Court has outlined certain procedures to be followed when substituting an alternate during deliberations.¹⁵⁴

One of the early cases to rely on section 1089 to justify the substitution of an alternate juror was the 1956 case of *People v. Abbott*.¹⁵⁵ In *Abbott*, the California Supreme Court held that the trial court was fully within its discretion when it discharged a juror due to the potential embarrassment or criticism which may have resulted from the unique circumstances.¹⁵⁶ The *Abbott* court noted that section 1089 empowered the trial court to determine if good cause existed to replace a juror with an alternate.¹⁵⁷

Approximately eleven days into the presentation of evidence, the trial court learned that one of the jurors worked in the same office as the defendant's brother.¹⁵⁸ The juror denied ever having spoken to the defendant's brother, and only discovered his identity when he was pointed out in court.¹⁵⁹ The judge replaced the juror with an alternate in order to save him from any potential embarrassment or criticism.¹⁶⁰

906, 929 (Cal.), *cert. denied*, 112 S. Ct. 145 (1991); *People v. Collins*, 552 P.2d 742, 750 (Cal. 1976), *cert. denied*, 429 U.S. 1077 (1977).

¹⁴⁹ See *People v. Dell*, 283 Cal. Rptr. 361, 363-65 (Cal. Ct. App. 1991) (one juror replaced when she had an attack of phlebitis during the trial; another replaced after suffering minor injuries in accident); *People v. Pervoe*, 207 Cal. Rptr. 622, 631 (Cal. Ct. App. 1984) (juror replaced when arthritis condition acted up during trial).

¹⁵⁰ *People v. Ashmus*, 820 P.2d 214, 245 (Cal. 1991), *cert. denied*, 113 S. Ct. 124 (1992) (court cited death of juror's mother as good cause to discharge juror).

¹⁵¹ *People v. Green*, 93 Cal. Rptr. 84, 86 (Cal. Ct. App. 1971).

¹⁵² *People v. Abbott*, 303 P.2d 730, 736-37 (Cal. 1956).

¹⁵³ E.g., *Roberts*, 826 P.2d at 304; *Collins*, 552 P.2d at 748.

¹⁵⁴ See *Collins*, 552 P.2d at 747. Although § 1089 does not expressly mandate any specific procedural mechanisms during post-submission substitutions, the *Collins* court construed this statute to require that deliberations begin anew after the substitution of an alternate. See *id.*

¹⁵⁵ See 303 P.2d at 736-37.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* at 736. The juror informed the court that his desk was approximately twenty-five feet away from that of the defendant's brother. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Abbott*, 303 P.2d at 736. At this point the defense made a motion for a mistrial which was subsequently denied. *Id.*

In reviewing the lower court's decision, the Supreme Court of California held that the determination of "good cause" under section 1089 was within the trial court's discretion.¹⁶¹ The court stated that absent any abuse of this discretion, the trial court's determination would stand.¹⁶² The *Abbott* court also permitted courts to exercise procedural discretion when implementing section 1089.¹⁶³ Citing the absence of any statutory provision in section 1089 requiring specific procedural mechanisms, the *Abbott* court explained that adherence to the formal rules of evidence was not necessary if the facts on which the substitution was predicated were uncontroverted.¹⁶⁴ Thus, the court noted that the taking of sworn testimony was not necessary under these circumstances.¹⁶⁵ While the substitution in *Abbott* occurred prior to deliberations, the court significantly explained the trial court's discretion with respect to section 1089 and the determination of good cause.¹⁶⁶

In the 1963 case of *People v. Hamilton*, the Supreme Court of California held that the juror's act of reading the penal code in an effort to become better informed did not constitute, on its own, any inability to perform her duties as a juror.¹⁶⁷ The court restricted section 1089 to the four situations covered by the explicit language of the statute: juror death or illness, other good cause, or when a juror requests a discharge.¹⁶⁸ Explaining that the juror's conduct did not fall within these established categories, the *Hamilton* court reversed the trial court's post-submission substitution decision.¹⁶⁹

The alternate substitution issue arose after the jury reached a verdict on the issue of guilt and during the presentation of evidence at the penalty phase of the trial.¹⁷⁰ The trial court discovered that one of the regular jurors read the penal code for the purpose of becoming well informed.¹⁷¹ The juror stated her intention to accept the law as explained by the court and not to substitute her own interpretations.¹⁷²

¹⁶¹ *Id.* at 736-37; see CAL. PENAL CODE § 1089.

¹⁶² *Abbott*, 303 P.2d at 736-37.

¹⁶³ See *id.* at 736.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *Abbott*, 303 P.2d at 735-36.

¹⁶⁷ 383 P.2d 412, 424 (Cal. 1963).

¹⁶⁸ *Id.* at 423; see CAL. PEN. CODE § 1089.

¹⁶⁹ *Id.* at 423-24.

¹⁷⁰ *Id.* at 422.

¹⁷¹ *Id.* The juror also said that she did not understand the code and that she had not looked for those specific sections of the code which were pertinent to the case. *Id.* Instead, she claimed to have read the code in its entirety. *Id.*

¹⁷² *Hamilton*, 383 P.2d at 422. Additionally, the juror maintained that she had not talked to any of the other jurors about having read the code. *Id.*

In response to this finding, the trial court discharged the juror and replaced her with an alternate, citing section 1089 as its authority.¹⁷³

In reversing the trial court's decision, the *Hamilton* court determined that the lower court had abused its discretion because there was no statutory basis for its decision.¹⁷⁴ The court explained that the mere reading of the penal code does not, on its own merit, render an individual unable to perform the duties of a juror.¹⁷⁵ Thus, the court held that juror misconduct did not fall under the purview of section 1089.¹⁷⁶ The *Hamilton* court cited the legislative history of section 1089 to demonstrate a clear unwillingness of the Legislature to endorse the practice of unlimited substitutions of jurors.¹⁷⁷ The court reasoned that an overly broad discretionary standard would allow trial courts to "load" juries by replacing jurors without proper, or any cause.¹⁷⁸ Unlike the *Abbott* decision in which the court endorsed the trial court's discretionary power,¹⁷⁹ the *Hamilton* court limited substitution to the instances specifically enumerated in section 1089.¹⁸⁰

In 1971, in the seminal case of *People v. Collins*, the California Supreme Court held that the failure of the trial court to instruct the jury to begin deliberations anew, after an alternate had replaced a regular juror, constituted a harmless error and thus did not require reversal.¹⁸¹ The trial court replaced a juror who requested to be discharged for cause.¹⁸² The *Collins* court provided a thorough review of section 1089, including a discussion of its constitutionality and the necessary procedural requirements for substitution.¹⁸³

¹⁷³ *Id.* After the court chose to discharge this juror, defense counsel moved for a mistrial and then asked the court whether the discharge was predicated on the juror's misconduct. *Id.* at 423. Upon learning that the decision was based on misconduct, defense moved for a mistrial not only for the penalty phase of the case, but also for the guilt phase, claiming that the juror's ability to deliberate was impaired for the entire trial. *Id.* The trial court denied the motion, stating that only after reading the code had the juror become unable to perform her duties, and that this occurred after the guilt phase was completed. *Id.*

¹⁷⁴ *Hamilton*, 383 P.2d at 423.

¹⁷⁵ *Id.* Absent any indication that this juror would substitute her own knowledge for the instructions given by the court, or that she would discuss her reading with the other jurors, the *Hamilton* court indicated that there was no basis for disqualification. *Id.*

¹⁷⁶ *Id.* at 425. Thus, the *Hamilton* court explained that the proper course of action in light of juror misconduct is for the judge to declare a mistrial. *Id.*

¹⁷⁷ *Hamilton*, 383 P.2d at 424.

¹⁷⁸ *See id.* at 425.

¹⁷⁹ *See Abbott*, 303 P.2d at 736-37.

¹⁸⁰ *See Hamilton*, 383 P.2d at 423-25.

¹⁸¹ *Collins*, 552 P.2d at 744, 749.

¹⁸² *Id.* at 744.

¹⁸³ *Id.* at 744-49.

After the jury deliberated for approximately one and a half hours, the trial court received a note from one of the jurors who asked to be discharged because she was unable to follow the trial court's instructions concerning deliberations.¹⁸⁴ After questioning the juror and discovering that she felt unable to cope with the experience of being a juror, the trial court discharged this juror and replaced her with an alternate.¹⁸⁵ The defense objected to the substitution and asked for a mistrial.¹⁸⁶ The trial court denied the motion.¹⁸⁷ After the substitution, the trial court failed to instruct the jury to start deliberations from the beginning and a verdict was returned a few hours later.¹⁸⁸

In upholding the trial court's decision to replace the juror with an alternate, the *Collins* court reiterated the limited discretion afforded the trial court when attempting to determine whether good cause exists under section 1089.¹⁸⁹ The inability of the juror to perform her duties, according to the *Collins* court, "must appear in the record as a demonstrable reality."¹⁹⁰ The *Collins* court indicated that some type of court investigation was necessary to reach the conclusion that a juror was unable to perform her duties.¹⁹¹ The court concluded that the thorough hearing conducted by the trial court was sufficient to demonstrate this reality.¹⁹²

The *Collins* court also discussed the procedural requirements that must accompany the substitution of a regular juror with an alternate after deliberations have begun under the authority of section 1089.¹⁹³ In order to ensure that defendants received a unanimous verdict reached by a jury of twelve, the court stated that the proper construction of section 1089 requires that deliberations begin anew any time an alternate replaces a juror during the course of deliberations.¹⁹⁴ The court reasoned that in order to arrive at a unanimous verdict, the jury must deliberate and review all applicable evidence.¹⁹⁵ The court noted the

¹⁸⁴ *Id.* at 744. The juror stated that she felt more emotionally than intellectually involved in the case and thus would not be able to render a decision based on the evidence or the law. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Collins*, 552 P.2d at 744.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 748.

¹⁹⁰ *Id.*

¹⁹¹ See *Collins*, 552 P.2d at 748.

¹⁹² *Id.* The court refuted the idea that the juror must provide a factual basis to justify her request for a discharge, explaining that such a requirement in this case would add nothing to the inquiry. *Id.*

¹⁹³ *Id.* at 746-47.

¹⁹⁴ *Id.* at 747.

¹⁹⁵ *Id.* at 746.

importance of the personal reactions and interactions among the jurors throughout the deliberation.¹⁹⁶ A juror who is thrust into a situation in which deliberations are ongoing, according to the court, loses the benefit of these interpersonal dynamics unless deliberations begin anew.¹⁹⁷

Despite the court's conclusion that the trial court had failed to give the proper instructions, the court affirmed the trial court's decision because the error was harmless.¹⁹⁸ The court noted that the case against the defendants was very strong and there was no indication that a different, more favorable verdict would have resulted from the issuing of the proper instructions.¹⁹⁹ The court reasoned that although trial courts are bound by procedural requirements regarding substitution, failure to adhere to these requirements does not mandate reversal in the absence of prejudice.²⁰⁰ Thus, the court upheld the trial court's guilty verdict.²⁰¹

In 1989, in *People v. Aikens*, the Court of Appeals for the Second District of California held that the substitution of an alternate juror after the jury had reached a verdict on one of the two counts was proper.²⁰² After replacing the juror, the trial court issued the instruction mandated by the *Collins* court and informed the jury to begin deliberations on the second count from the beginning.²⁰³ The court of appeals affirmed the decision based on an interplay of factors.²⁰⁴

First, the *Aikens* court noted that the trial court judge issued the proper instructions.²⁰⁵ These instructions, reasoned the court, preserved the defendant's right to a verdict reached after the full participation in deliberations of the twelve jurors who ultimately issue the verdict.²⁰⁶ Next, the court cited the one-sided nature of the case making the possibility of prejudice minimal.²⁰⁷ Both victims and one inde-

¹⁹⁶ See *Collins*, 552 P.2d at 746.

¹⁹⁷ See *id.* at 746-47.

¹⁹⁸ *Id.* at 749.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 748-49.

²⁰¹ *Collins*, 552 P.2d at 749.

²⁰² 254 Cal. Rptr. 30, 31-33 (Cal. Ct. App. 1989).

²⁰³ *Id.* at 32. The instructions read, in relevant part:

You are therefore instructed to set aside and disregard all past deliberations as to Count 2 and begin those deliberations anew. This must mean that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place. . . .

Id.

²⁰⁴ See *id.* at 32-33.

²⁰⁵ *Id.* at 32.

²⁰⁶ See *id.*

²⁰⁷ See *Aikens*, 254 Cal. Rptr. at 32.

pendent witness positively identified the defendant, thus negating the only defense asserted—mis-identification.²⁰⁸ Finally, the court determined that a policy denying trial courts the ability to replace jurors with alternates in post-verdict situations would have negative consequences.²⁰⁹ For instance, the *Aikens* court explained that trial courts would likely refuse to discharge jurors in these situations, creating the potential for a hurried and dispassionate consideration of the evidence and a rushed judgment.²¹⁰ The *Aikens* court concluded that trial courts should balance the constitutional rights of the accused against the state interest in judicial economy.²¹¹ Recognizing the conflicting interests involved, the court struck the balance in favor of the state interest and affirmed the post-verdict substitution.²¹²

Continuing to recognize these important state interests, the California Supreme Court, in the 1991 case of *People v. Daniels*, held that juror misconduct now constituted good cause for juror substitution.²¹³ The trial court received word that one of the jurors was violating court instructions by discussing the case with outsiders and had expressed an opinion on the issue of guilt prior to deliberations.²¹⁴ The trial court concluded, after an investigatory hearing, that the juror was guilty of serious misconduct that would prevent both sides from receiving a fair trial.²¹⁵ The trial court replaced the juror with an alternate.²¹⁶

In affirming the replacement of the juror, the *Daniels* court voiced its disapproval of the language in *Hamilton* concerning juror misconduct.²¹⁷ Unlike the *Hamilton* court, the *Daniels* court explained that juror misconduct provided good cause to determine that a juror would be unable to perform his duty.²¹⁸ The court noted that misconduct raised the presumption of prejudice.²¹⁹ The substitution of a juror

²⁰⁸ *Id.*

²⁰⁹ *See id.* at 32–33.

²¹⁰ *Id.* The court went on to say that a refusal to substitute an alternate for the juror in this case would have been an abuse of the trial court's discretion. *Id.* at 33.

²¹¹ *Aikens*, 254 Cal. Rptr. at 33. The court pointed out four factors which support the post-submission substitution of an alternate. *Id.* First, the court cited the traumatic effect that relitigating the issues would have on the victims. *Id.* Next the court explained that the expense involved in retrying cases would be considerable. *Id.* Thirdly, the court expressed its concern that public confidence in the system would be eroded due to the needless prolongation of criminal proceedings. *Id.* Finally, the court stated that any deterrence would be diluted because any convictions would be so remote from the actual crime. *Id.*

²¹² *Aikens*, 254 Cal. Rptr. at 31–33.

²¹³ *See Daniels*, 802 P.2d at 929.

²¹⁴ *Id.*

²¹⁵ *Id.* at 929–31.

²¹⁶ *Id.* at 929.

²¹⁷ *Id.* at 930; *see Hamilton*, 383 P.2d at 423–25.

²¹⁸ *Daniels*, 802 P.2d at 929, 930–31.

²¹⁹ *Id.* at 929.

engaged in misconduct promotes judicial efficiency, according to the court; likewise, a strict rule barring substitution in these situations and mandating mistrials would have a "monstrous effect" on the judicial process.²²⁰ Thus, in *Daniels*, the court explicitly expanded the discretion of the trial court to replace a juror with an alternate by recognizing misconduct as "good cause" for juror substitution.²²¹

Although section 1089 helps to promote judicial efficiency by preventing repeated litigation of certain trials, the California Supreme Court has recognized that the application of section 1089 could potentially lead to certain abuses.²²² For example, in 1992, in *People v. Roberts*, the California Supreme Court affirmed the trial court's substitution of an ill juror.²²³ The court explicitly recognized and discussed the inherent danger of allowing a jury to exercise control over its makeup by encouraging substitution.²²⁴

In *Roberts*, a juror became ill during a weekend recess in the course of deliberations.²²⁵ Although the juror indicated that she might be able to resume her duties in three days, the trial court discharged her and seated an alternate.²²⁶ In reaching its decision, the trial court solicited input from the jury as to their preference.²²⁷ The jury conferred momentarily, then announced its preference for the substitution of an alternate.²²⁸ After the substitution, defense counsel learned from the discharged juror that she had reservations concerning a verdict that had been reached while she was a member of the jury, and that the other members of the panel were displeased with these doubts.²²⁹ The juror also informed defense counsel that she would have preferred to continue deliberations if permitted by the court.²³⁰

²²⁰ *Id.* at 929, 930.

²²¹ *Id.* at 930-31.

²²² See *Roberts*, 826 P.2d at 303-04; see also *People v. Keenan*, 758 P.2d 1081, 1116 (Cal. 1988) (court recognized that certain actions of the court, if not handled correctly, can have coercive effect on jury); *People v. Burgener*, 714 P.2d 1251, 1260 (Cal. 1986) (court recognized that foreperson's assertion that another juror was intoxicated during deliberations may have been motivated by concerns other than integrity of deliberative process).

²²³ 826 P.2d at 304.

²²⁴ *Id.*

²²⁵ *Id.* at 303.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Roberts*, 826 P.2d at 303. While defense counsel agreed that the jury should be informed of the juror's illness, counsel wanted to ensure that the jury did not think that they had the power to choose whether to seat an alternate. *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 303-04. The defense submitted an affidavit with these statements from the juror. *Id.* at 303. Additionally, the defendant based the appeal on the fact that the court erred in removing the "recalcitrant juror" to facilitate a unanimous verdict. *Id.* at 304.

In upholding the lower court's substitution decision, the *Roberts* court reiterated the well accepted notion that the trial court's discretion is limited, and the cause cited for the discharge must appear in the record as a demonstrable reality.²³¹ The court reasoned that this standard was satisfied because the trial court spoke on the telephone with the ill juror and confirmed her condition.²³² While determining that the trial court acted within its discretion, the *Roberts* court warned against allowing jurors to exercise control over their own composition.²³³ The court explained that the determination of good cause and whether to substitute an alternate should be made exclusively by the trial court and not by the jurors.²³⁴ In affirming the trial court's substitution of an alternate, the court indicated that merely consulting the jury with respect to the decision did not automatically demonstrate impermissible jury control and was within the trial court's discretion.²³⁵

As demonstrated, California courts have employed section 1089 to replace jurors who become unable to perform their duties, either before or after the commencement of deliberations, for a variety of reasons.²³⁶ While the California Supreme Court repeatedly discussed the limited discretion of trial courts in making the determination as to when to utilize section 1089, it repeatedly affirmed the trial court decisions.²³⁷ Additionally, the court established certain procedural requirements that are necessary when exercising this power, including appropriate investigation into the cause of the discharge and the required jury instructions.²³⁸ The California Supreme Court has concluded, however, that violations of these common law mandates do not require automatic reversal in the absence of prejudice.²³⁹

IV. THE REGINALD DENNY TRIAL

Section 1089 played a pivotal role in the *Denny* trial.²⁴⁰ The trial court judge employed this provision to discharge and replace one of

²³¹ *Id.*

²³² *Id.*

²³³ *Roberts*, 826 P.2d at 304.

²³⁴ *Id.*

²³⁵ *See id.*

²³⁶ *See, e.g., Roberts*, 826 P.2d at 304; *Daniels*, 802 P.2d at 930-31; *Collins*, 552 P.2d at 748.

²³⁷ *See, e.g., Roberts*, 826 P.2d at 304; *Collins*, 552 P.2d at 748; *Abbott*, 303 P.2d at 737.

²³⁸ *See Collins*, 552 P.2d at 747-48.

²³⁹ *See, e.g., Roberts*, 826 P.2d at 304; *Collins*, 552 P.2d at 748.

²⁴⁰ *See* Transcript at 8208, *People v. Williams*, No. BA058116 (L.A. Super. Ct. 1993); Edward J. Boyer & Ashley Dunn, *Denny Juror Dismissed; Deliberations Start Over*, L.A. TIMES, Oct. 12, 1993, at A16.

the jurors for failing to deliberate.²⁴¹ The decision received considerable publicity as people questioned both the rationale and fairness underlying this post-submission juror substitution.²⁴²

A. *Factual Background*

On April 29, 1992, while passing through the intersection of Florence and Normandie Avenues in Los Angeles, California, truck driver Reginald Denny was pulled from his vehicle and brutally attacked in the riots following the verdicts in the Rodney King trial.²⁴³ Approximately two weeks later, the Los Angeles Police Department arrested Henry Keith Watson and Damian Monroe Williams, and charged them with beating Denny.²⁴⁴ On August 19, 1993, the *Denny* trial began in the Superior Court of Los Angeles, with Judge John W. Ouderkirk, a former deputy district attorney and police officer, presiding.²⁴⁵ The trial lasted until September 30, 1993, when the case was submitted to the jury.²⁴⁶ Deliberations lasted approximately two weeks, marked by periods of high tension and controversy.²⁴⁷ On October 18, 1993, the jury returned thirteen verdicts.²⁴⁸ Damian Williams was acquitted on all counts except a mayhem charge,²⁴⁹ for which he received 10 years in prison.²⁵⁰ Henry Watson was also acquitted on most counts.²⁵¹ With respect to the charge of assault with a deadly weapon, the court declared a mistrial.²⁵²

During this high-pressured, racially significant trial, the composition of the jury underwent significant changes.²⁵³ At the outset of the trial, twelve jurors were chosen for the panel along with six alternates.²⁵⁴ During the trial, Judge Ouderkirk replaced two jurors with

²⁴¹ Transcript at 8208, 8217, 8219, *Williams*, No. BA058116.

²⁴² See Kaplan & Pryor, *supra* note 13, at 32; Dunn & McMillan, *supra* note 14, at A29.

²⁴³ Edward J. Boyer & Jesse Katz, *Jury Convicts Denny Defendants On Reduced Charges, Acquits on Others*, L.A. TIMES, Oct. 19, 1993, at A18.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See Dunn & McMillan, *supra* note 14, at A1, A29.

²⁴⁸ Boyer & Katz, *supra* note 243, at A1, A18.

²⁴⁹ *Id.* at A1.

²⁵⁰ Edward J. Boyer & Andrea Ford, *Williams Given Maximum 10 Years In Denny Beating*, L.A. TIMES, Dec. 8, 1993, at A1.

²⁵¹ Boyer & Katz, *supra* note 243, at A1.

²⁵² Edward J. Boyer & John L. Mitchell, *Watson Pleads Guilty to Felony Count in Riot Case*, L.A. TIMES, Nov. 3, 1993, at A1. Watson eventually pleaded guilty to this unresolved charge in exchange for a sentence of probation. *Id.*

²⁵³ See Dunn & McMillan, *supra* note 14, at A1, A29.

²⁵⁴ See *id.* at A29.

alternates due to health related problems.²⁵⁵ Immediately after the start of deliberations, Judge Ouderkirk discharged a juror for good cause.²⁵⁶ The court learned that this juror, brandishing the fact that he was a member of the jury in the *Denny* trial, read newspapers concerning the case, discussed the case with others and even announced his intention to convict the defendants before hearing the defense attorneys put on their case.²⁵⁷ Judge Ouderkirk also replaced this juror with an alternate.²⁵⁸

The most publicized juror substitution took place on October 11, 1993, after deliberations had been underway for over one week.²⁵⁹ Judge Ouderkirk discharged an elderly black woman, juror 373, for good cause, stating that she was failing to deliberate.²⁶⁰ The court then replaced the juror with an alternate.²⁶¹ The other eleven jurors on the panel initiated this substitution by submitting a note to the court complaining about the juror and questioning her mental faculties.²⁶²

The final juror substitution in this case occurred the very next day.²⁶³ One of the jurors requested a discharge for an unspecified personal hardship.²⁶⁴ Judge Ouderkirk granted the juror's request and replaced him with an alternate.²⁶⁵ The court's decision to discharge and replace this juror depleted the pool of available alternate jurors to one.²⁶⁶

B. Section 1089 Applied to the *Denny* Jury Substitution: Juror 373

Of the five substitutions that transpired throughout the course of the *Denny* case, the replacement of juror 373 for "failing to deliberate" sparked the most controversy.²⁶⁷ According to one critic, replacing a

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Edward J. Boyer, *Another Denny Juror Out; Panel Starts Over*, L.A. TIMES, Oct. 13, 1993, at A1, A13.

²⁵⁸ *Id.*

²⁵⁹ See Kaplan & Pryor, *supra* note 13, at 32; Boyer & Dunn, *supra* note 240, at A1; Dunn & McMillan, *supra* note 14, at A29.

²⁶⁰ *Id.*

²⁶¹ Boyer & Dunn, *supra* note 240, at A1.

²⁶² Kaplan & Pryor, *supra* note 13, at 32.

²⁶³ See Boyer, *supra* note 257, at A1.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See Kaplan & Pryor, *supra* note 13, at 32; Boyer & Dunn, *supra* note 240, at A16. The other substitutions fall more directly within the trial court's discretion because illness and misconduct have been previously cited as valid reasons to discharge a juror and substitute an alternate. See, e.g., *People v. Roberts*, 826 P.2d 274, 304 (Cal. 1992); *People v. Collins*, 552 P.2d 742, 748 (Cal.

juror for failing to deliberate "is unheard of."²⁶⁸ Some critics accused the judge of stacking or manipulating the jury in order to ensure a verdict, while others objected to the apparent power of the jury over its own composition.²⁶⁹ Judge Ouderkirk's decision raises questions as to the extent of the trial court's discretion to determine what constitutes good cause under section 1089, and whether such a substitution can adversely affect the substantive rights of the accused.²⁷⁰ In order to explore the rationale behind this pivotal decision, this Section will examine the entire process which resulted in the removal of juror 373.²⁷¹

On Monday, October 11, 1993, eleven members of the jury in the *Denny* trial informed the court, through a note, of a problem which had developed in deliberations, bringing all progress to an impasse.²⁷² The note indicated that one of the jurors, number 373, could not comprehend anything the jury was attempting to accomplish and repeated efforts to help her understand the process failed.²⁷³ The note concluded that this juror should be removed from deliberations.²⁷⁴ The judge informed both parties of the situation and his plan to investigate the matter.²⁷⁵ The defense objected to any court inquiry into the matter, claiming that the other jurors were not capable or permitted to pass judgment on the qualifications of a juror.²⁷⁶ The authority to pass judgment on juror qualifications, according to the defense, rested solely with the court.²⁷⁷ Because the court had subjected juror 373 to

1976), *cert. denied*, 429 U.S. 1077 (1977). Likewise, case law supports the practice of replacing a juror who requests a discharge for personal reasons, when such reasons would affect the juror's capacity to adequately perform the duties of a juror. *See* *People v. Goins*, 173 Cal. Rptr. 655, 656 (1981) (upheld trial court's discretion to excuse a juror who claimed that relationship to witness would prevent him from rendering impartial verdict).

²⁶⁸ *See* Kaplan & Pryor, *supra* note 13, at 32.

²⁶⁹ *See id.*

²⁷⁰ *See* Kaplan & Pryor, *supra* note 13, at 32.

²⁷¹ *See supra* notes 272-335 and accompanying text.

²⁷² Transcript at 8148, 8152, *People v. Williams*, No. BAO58116 (L.A. Super. Ct. 1993).

²⁷³ *Id.* at 8152. The note read as follows:

Judge on behalf of eleven jurors we are in agreement that juror number 373 *cannot* comprehend anything that we have been trying to accomplish. We have tried patiently to talk and work with her all to no avail. It is unanimous, and we feel she shouldn't continue in the deliberations. This has nothing to do with her views on issues or her personally—she doesn't use *common sense*. Lastly, just when we have made progress and final decisions she is totally oblivious to what we discussed and decided.

Id.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 8149-50.

²⁷⁶ *Id.* at 8151.

²⁷⁷ Transcript at 8151-52, *Williams*, No. BAO58116.

an extensive selection process and to voir dire,²⁷⁸ the defense argued that the other jurors had no authority to assess her qualifications.²⁷⁹ The court rejected this argument.²⁸⁰

To investigate the circumstances which prompted the note, Judge Ouderkirk questioned several jurors, including juror 373.²⁸¹ The first juror interviewed was the foreperson, who expressed the serious frustration of the entire panel.²⁸² The foreperson stated that the presence of juror 373 in deliberations would likely prevent the jury from reaching a verdict on any of the numerous counts.²⁸³ In support of this claim, the foreperson recounted instances where juror 373 would raise her hand in agreement with whatever had been decided, and then deny voting on the matter soon thereafter.²⁸⁴ Referring to juror 373 as a "stumbling block," the foreperson also explained how the other jurors had repeatedly and unsuccessfully attempted, both collectively and individually, to aid 373's understanding of the material through the use of simple examples sketched on the chalkboard.²⁸⁵ Additionally, the foreperson noted that while the rest of the jury was able to remember the nicknames of the other jurors which were written on the chalkboard for a long period of time, juror 373 could not remember them.²⁸⁶ Assuring the court that the note had nothing to do with juror 373's stance on the issues, the foreperson claimed that juror 373 was not participating in deliberations and, in fact, her behavior thwarted any potential progress.²⁸⁷ Questioning juror 373's mental capacity, the foreperson recounted that while the jury was discussing important matters, juror 373 would be looking at a variety of papers and notes which appeared to be in total disarray.²⁸⁸ The foreperson concluded that juror 373 was unable to participate meaningfully in deliberations.²⁸⁹

²⁷⁸ See Kaplan & Pryor, *supra* note 13, at 32.

²⁷⁹ See Transcript at 8152; *Williams*, No. BA058116. The parties selected juror 373 from a pool of 128 individuals. Kaplan & Pryor, *supra* note 13, at 32. She answered a thirty-five page survey and responded to questions both from the prosecution and defense. *Id.*

²⁸⁰ See Transcript at 8155; *Williams*, No. BA058116.

²⁸¹ *Id.* at 8160-76, 8182-85.

²⁸² *Id.* at 8169.

²⁸³ *Id.* The foreperson said that it had gotten to the point where the jury felt that it was either "her or us." *Id.*

²⁸⁴ *Id.* at 8160.

²⁸⁵ Transcript at 8161, 8163, *Williams*, No. BA058116.

²⁸⁶ *Id.* at 8162.

²⁸⁷ *Id.* at 8164, 8169. The foreperson stated that everyone on the jury respected the different individual opinions, and that their note had nothing to do with 373's views on the substantive issues. *Id.* at 8164

²⁸⁸ *Id.* at 8167.

²⁸⁹ See *id.*

After hearing the testimony of the foreperson, Judge Ouderkirk interviewed two other jurors individually, both of whom reiterated and expanded on the statements of the foreperson.²⁹⁰ One juror testified that juror 373 continually told the other members to organize their notes, although the jury was unsure what she meant by that request.²⁹¹ This juror also claimed that juror 373 was constantly confusing her own notes with the court's instructions.²⁹² Finally, this juror questioned the intelligence of juror 373, claiming that the latter was simply unable to understand the meaning of basic words, such as "or" and "and."²⁹³ The final juror interviewed stated that juror 373 was adding her own words and interpretations to the instructions and thus following her own law.²⁹⁴ In sum, both jurors concluded that juror 373 lacked the mental capacity to meaningfully participate in deliberations.²⁹⁵

Testifying on her own behalf, juror 373 stated her wish that the jury carefully review all notes and facts before delving into deliberations.²⁹⁶ She believed that such a practice would ensure that the instructions were fully understood and carefully applied to the correct charges.²⁹⁷ She claimed that the jury was inadvertently omitting certain instructions from the deliberation process.²⁹⁸ Additionally, she denied having any difficulty comprehending any basic English words, claiming that the preconceived notion regarding her confusion was erroneous.²⁹⁹ Juror 373 concluded that the jury's failure to fully incorporate the court's instructions was preventing the defendants from receiving a fair trial.³⁰⁰ Citing the "I got my mind made up" attitude prevalent in the deliberation, she claimed that she could not passively participate in a such a critically important process without voicing her opposition in light of the abrogation of the defendants' rights.³⁰¹ While never directly questioned about denying or forgetting about voting on an issue, juror 373 recalled changing her vote on a preliminary issue after additional facts were brought to her attention.³⁰²

²⁹⁰ See Transcript at 8170-76, 8182-85, *Williams*, No. BA058116.

²⁹¹ *Id.* at 8172.

²⁹² *Id.* at 8173.

²⁹³ *Id.* at 8174.

²⁹⁴ *Id.* at 8183.

²⁹⁵ See Transcript at 8176, 8183-85; *Williams*, No. BA058116.

²⁹⁶ *Id.* at 8186. It became obvious from juror 373's testimony that she did not understand that reviewing court instructions and the facts were part of deliberations. See *id.*

²⁹⁷ *Id.* at 8186.

²⁹⁸ *Id.* at 8188.

²⁹⁹ *Id.*

³⁰⁰ Transcript at 8191, *Williams*, No. BA058116.

³⁰¹ *Id.* at 8191, 8192.

³⁰² *Id.* at 8193.

At the conclusion of these interviews, the prosecution renewed its motion to remove juror 373, based on her inability to deliberate due to either incapacity or misconduct.³⁰³ The prosecution stated that this juror simply did not have the basic capacity to act as a juror, citing the instances of alleged forgetfulness and fluctuating positions.³⁰⁴ Additionally, the prosecution argued that she clearly was not participating meaningfully in deliberations due to her lack of concentration and her inability to understand simple language.³⁰⁵ The prosecution also stated that removal was necessary because juror 373 was not following the law as instructed, but instead was following her own interpretation or construction of the law.³⁰⁶ Relying on the testimony of the foreperson and the other two jurors, along with the note which represented the views of the remaining jurors, the prosecution concluded that juror 373 had to be removed because she simply did not have the capacity to act as a juror.³⁰⁷

Objecting to the prosecution's motion, defense counsel argued that juror 373's testimony should be accepted as credible, and that she should be afforded the same benefit of the doubt given other jurors in similar circumstances.³⁰⁸ Defense counsel maintained that the issue underlying this motion to excuse was the desire for unanimity which was upset by juror 373's dissenting presence.³⁰⁹ The fact that juror 373 would not agree with the other jurors, according to defense counsel, provided insufficient grounds to justify her dismissal.³¹⁰ Next, the defense counsel highlighted the lack of support for one juror's assertion that juror 373 followed her own law in contravention of the court's instructions.³¹¹ Defense counsel concluded that any acts of juror 373 which contradicted specific court instructions clearly did not rise to

³⁰³ *Id.* at 8208. The prosecutor cited § 1089 in support of her position, indicating that juror 373 could probably be discharged under the language of the statute, which permits the discharge of those jurors who are ill. *Id.* The prosecution also mentioned a previous case in which the judge had replaced a juror for failing to deliberate. *Id.* In that case the juror in question attempted to barter the verdict on one defendant with the verdict on another. *Id.* at 8208-09. Finally, the prosecution pointed out that the judge in this case chose to dismiss the juror based on the testimony of the other members of the jury, whose statements contradicted those of the juror in question. *Id.* at 8209.

³⁰⁴ *Id.* at 8178.

³⁰⁵ Transcript at 8178, *Williams*, No. BA058116.

³⁰⁶ *Id.* at 8195.

³⁰⁷ *Id.* at 8195-96.

³⁰⁸ *Id.* at 8198-99, 8207.

³⁰⁹ *Id.* at 8200.

³¹⁰ Transcript at 8200, *Williams*, No. BA058116.

³¹¹ *Id.* at 8201-02.

the level of another juror's act which did not result in dismissal, but was instead resolved through a jury instruction.³¹²

In that instance, a juror informed the court that certain evidence should not be considered by the jury.³¹³ Responding to this erroneous statement of the law, the court issued a specially worded jury instruction to clarify the misunderstanding.³¹⁴ Defense counsel argued that in this situation, rather than dismissing juror 373 for misconduct, the court should issue a specific instruction explaining that instructions and the law must be precisely followed without the addition of any words.³¹⁵

The defense's next objection focused on juror 373's desire for organization.³¹⁶ This request for organization, argued defense counsel, was reasonable because she was simply asking the other members of the jury to take the time to become familiar with the instructions before deliberating, rather than discussing the case with the erroneous presumption that they fully understood the law.³¹⁷ Supporting this argument, defense counsel cited an example where the jury demonstrated an erroneous presumption concerning the definition of the term "mob action."³¹⁸ The court learned of this incorrect presumption through a note from the jury, and consequently issued a specific instruction clarifying the term.³¹⁹ This example, noted the defense, demonstrated that juror 373 was correct in her fear that the jury did not fully comprehend the law.³²⁰ The defense concluded that juror 373's request for organization was reasonable in light of these circumstances.³²¹

Defense counsel's final objection centered on juror 373's alleged forgetfulness.³²² They argued that dismissal could not be justified on this basis because the court failed to question juror 373 on this issue.³²³ Concluding that the record as a whole provided no basis to find her guilty of any impropriety, much less misconduct, defense counsel argued that she should not be removed at such a late stage in the trial.³²⁴

³¹² *Id.* at 8203.

³¹³ *Id.* at 8202.

³¹⁴ *Id.* at 8203.

³¹⁵ Transcript at 8203, *Williams*, No. BA058116.

³¹⁶ *Id.* at 8204.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 8203.

³²⁰ See Transcript at 8204, *Williams*, No. BA058116.

³²¹ *Id.*

³²² *Id.* at 8205.

³²³ *Id.*

³²⁴ *Id.*

After taking a short recess to research the issue, Judge Ouderkirk decided to excuse juror 373 for failing to participate in meaningful deliberations due either to some sort of illness causing a mental defect, or to misconduct.³²⁵ Judge Ouderkirk offered three reasons supporting this determination.³²⁶ First, he noted juror 373's inability to comprehend some simple concepts, including basic words such as "and" or "or."³²⁷ Next, he cited those instances where juror 373 apparently forgot entire discussions or denied participating in them.³²⁸ Finally, Judge Ouderkirk explained that he based his determination, in part, on the fact that any verdict would be unlikely with her presence due to her lack of willingness or ability to deliberate.³²⁹ In reaching these conclusions, Judge Ouderkirk relied on the testimony of the three jurors interviewed and the note submitted on behalf of eleven jurors.³³⁰ Conversely, Judge Ouderkirk stated that he did not find juror 373's testimony to be credible.³³¹ Explaining that his decision was not predicated on any personality conflicts, or the desire to replace a hold-out juror, Judge Ouderkirk concluded that juror 373 failed to deliberate in a meaningful way and thus had to be discharged.³³²

Judge Ouderkirk dismissed juror 373 on Monday October 11, 1993, and replaced her with an alternate.³³³ After informing the jury of his decision, Judge Ouderkirk instructed them to begin deliberations anew.³³⁴ The jury, which had to begin deliberations anew again

³²⁵ Transcript at 8209-10, 8212, *Williams*, No. BA058116. Judge Ouderkirk expressly avoided definitively categorizing juror 373's conduct as deliberate or unintentional. *See id.* at 8212. He explained that, regardless of the basis of her failure to deliberate, juror 373 had to be discharged. *Id.*

³²⁶ *Id.* at 8216-17.

³²⁷ *Id.* at 8216.

³²⁸ *Id.*

³²⁹ *Id.* at 8217.

³³⁰ Transcript at 8217, *Williams*, No. BA058116.

³³¹ *Id.* at 8213.

³³² *See id.* at 8216-17.

³³³ *Id.* at 8148, 8219, 8226.

³³⁴ Transcript at 8227, *Williams*, No. BA058116. The court's instructions were as follows:

Ladies and gentlemen of the jury, one of your number has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose. The people and the defendants have the right to a verdict reached only after full participation of the twelve jurors who return a verdict. This right may be assured only if you begin your deliberations again from the beginning. You must therefore set aside all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place. In a moment you shall retire to begin anew your deliberations with all the instructions previously given.

Id. at 8227-28.

the very next day due to the discharge of another juror, deliberated for six more days before returning the verdicts.³³⁵

V. POST-SUBMISSION SUBSTITUTION'S EFFECT ON THE SUBSTANTIVE RIGHTS OF THE ACCUSED

Judge Ouderkirk's decision to replace juror 373 in *Denny* illustrates the wide discretion exercised by judges at the trial court level with respect to post-submission substitutions. While statutes allowing substitution during deliberations serve to protect limited judicial resources, their scope must be limited and trial court judges should be entrusted with little discretion. Post-submission substitutions add an outside element to the jury, giving rise to the threat of coercive group dynamics, which can potentially compromise a defendant's Sixth Amendment right to a trial by an impartial jury.³³⁶ Thus, any statutes specifically authorizing this practice should carefully limit its application to specifically designated situations and provide for strict appellate review procedures.

The recent trend, both in California and in the federal court system, has resulted in an expansion of the discretion that can be exercised by lower court judges.³³⁷ The California Supreme Court, for instance, endorsed a lower court's expansion of the term "good cause" to include juror misconduct.³³⁸ Additionally, this court permitted a trial court to replace a juror with an alternate after a verdict had been reached on one of two counts.³³⁹ Finally, the California Supreme Court even allowed the trial court to consult with the jury and evoke their preferences in an effort to determine whether substitution was appropriate.³⁴⁰ A similar trend has emerged in the federal courts.³⁴¹ Although Rule 24(c) prohibits post-submission substitution, some circuits have allowed the practice under certain circumstances, such as when the parties stipulate,³⁴² or in the absence of prejudice.³⁴³ Thus, in both jurisdictions, despite clear statutory language, the courts, in their interpretation and application of the statute, have expanded trial court

³³⁵ See Dunn & McMillan, *supra* note 14, at A29.

³³⁶ U.S. CONST. amend. VI. This amendment provides, in relevant part, that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury." *Id.*

³³⁷ See *supra* notes 51-239 and accompanying text.

³³⁸ *People v. Daniels*, 802 P.2d 906, 929 (Cal.), *cert. denied*, 112 S. Ct. 145 (1991).

³³⁹ *People v. Aikens*, 254 Cal. Rptr. 30, 31-32 (Cal. Ct. App. 1988).

³⁴⁰ *People v. Roberts*, 826 P.2d 274, 303-04 (Cal. 1992).

³⁴¹ See *supra* notes 51-142 and accompanying text.

³⁴² *Leser v. United States*, 358 F.2d 313, 317 (9th Cir.), *cert. dismissed*, 385 U.S. 802 (1966).

³⁴³ *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992).

judges' discretion with respect to post-submission substitution procedures.³⁴⁴

In *Denny*, Judge Ouderkirk exemplified this trend through his exercise of considerable discretion in replacing juror 373. He concluded that juror 373 failed to meaningfully deliberate based on, among other things, instances of alleged forgetfulness and confusion.³⁴⁵ While juror 373's conduct could be classified as stubborn or annoying, the determination that it constitutes "good cause" for post-submission substitution is debatable. Juror 373's testimony could easily lead to the conclusion that she was the lone juror protecting the rights of the defendants. As argued by defense counsel, juror 373's requests for increased organization and caution are not factors that normally indicate a failure to deliberate.³⁴⁶ In reaching his decision, however, Judge Ouderkirk rejected the credibility of juror 373's testimony while accepting the statements of the other jurors.³⁴⁷ Juror 373's presence may have indeed frustrated the deliberative process to a point where her dismissal was proper. Such a determination, however, hardly appears obvious from the record. Instead, it appears to be the result of Judge Ouderkirk's desire to remove a stumbling block in an effort to successfully conclude the litigation.

Allowing lower court judges such broad discretionary power with respect to post-submission substitutions raises important concerns about defendants' substantive rights.³⁴⁸ The decision to replace a juror during deliberations interferes with the interactive group dynamic on which our jury system is based.³⁴⁹ Both the federal courts and the California state courts have noted the importance of personal reactions and interactions as juries work to reach a consensus.³⁵⁰ Post-submission substitution procedures, however, alter this process, producing several negative consequences. Alternate jurors, for instance, participate in only part of the deliberations. Additionally, alternates substituted during deliberations are thrust into an inherently coercive atmosphere in which there is substantial pressure to accept the preconceived conclusions of the jury.³⁵¹ Next, broad substitution procedures adversely im-

³⁴⁴ See *supra* notes 51-239 and accompanying text.

³⁴⁵ Transcript at 8216, *Williams*, No. BA058116.

³⁴⁶ See *id.* at 8204.

³⁴⁷ *Id.* at 8216-17.

³⁴⁸ See *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975).

³⁴⁹ See *Lamb*, 529 F.2d at 1156; *People v. Collins*, 552 P.2d 742, 746 (Cal. 1976), *cert. denied*, 429 U.S. 1077 (1977).

³⁵⁰ See *Lamb*, 529 F.2d at 1156; *Collins*, 552 P.2d at 746.

³⁵¹ See *Lamb*, 529 F.2d at 1156.

pact the defendant's right to a hung jury.³⁵² Finally, this practice allows the jury to become actively involved in their own composition.

The deliberation process centers on the careful consideration and analysis of evidence by the entire jury after thorough discussion.³⁵³ In cases like *Denny*, however, the alternate who joins a panel that has already spent significant time deliberating misses part of the crucial deliberative process. While the other jurors are fully aware of each other's view points and the previously established conclusions, the alternate is not privy to such information. Thus, the defendants in *Denny* were not judged by a jury that deliberated together to unanimity because the alternates participated in only part of this important process.

Furthermore, the group dynamic element of the deliberative process is frustrated when alternates are subject to the inherently coercive atmosphere of joining a jury that has already agreed to a verdict.³⁵⁴ Studies demonstrate that individuals joining a previously established body are unable to alter the practices of the group.³⁵⁵ Research also indicates that an individual may ignore his or her own perceptions, even when correct, in favor of the incorrect group consensus due to the coercive atmosphere.³⁵⁶ In cases like *Denny*, therefore, the alternate is likely to experience pressure, and may eventually succumb to the preconceived conclusions of the jury, regardless of their accuracy. Thus, broad substitution powers drastically diminish the free and uncoerced deliberation process on which the jury system depends to overcome any individual biases.

Lamb v. United States demonstrated the inherently coercive pressures that accompany post-submission juror substitutions like *Denny*.³⁵⁷ The jury in *Lamb* deliberated for four hours before the alternate substitution, but took only twenty-nine minutes after a juror was replaced to reach a guilty verdict.³⁵⁸ The Ninth Circuit reversed the conviction, explaining that the alternate clearly succumbed to the coercive pressure to convict.³⁵⁹

Another case that illustrates the inherently coercive effects which potentially accompany post-submission alternate substitution is *Peek v. Kemp*.³⁶⁰ In *Peek*, the jury had been deliberating for two hours when a

³⁵² See *id.*

³⁵³ See *Collins*, 742 P.2d at 746.

³⁵⁴ See *Lamb*, 529 F.2d at 1156.

³⁵⁵ See Grunat, *supra* note 48, at 878 n.124.

³⁵⁶ See *id.* at 878-79 n.125.

³⁵⁷ See *Lamb*, 529 F.2d at 1156.

³⁵⁸ *Id.* at 1155.

³⁵⁹ *Id.* at 1156-57.

³⁶⁰ See *Peek v. Kemp*, 784 F.2d 1479, 1482 (11th Cir.), *cert. denied*, 479 U.S. 939 (1986).

sick member of the panel asked to be discharged.³⁶¹ The court discharged the juror and replaced him with an alternate.³⁶² Shortly after the replacement, the new jury returned a guilty verdict.³⁶³ The court later discovered that the sick juror was the lone hold-out voting for an acquittal.³⁶⁴ The situation in *Denny* paralleled *Peek* because evidence surfaced after the fact that juror 373 was, in fact, a dissenting opinion and possibly the lone hold-out.³⁶⁵ Eliminating her opinion diminished the defendants' protection against the biases of the other members of the panel.

While post-submission substitution interferes with the group dynamic and places the alternate in an inherently coercive atmosphere, this practice also significantly limits the accused's right to a mistrial if the original jury cannot reach agreement.³⁶⁶ Post-submission substitution decreases the likelihood of a hung jury in two ways. First, it allows the jury to effect their own composition in an effort to ensure a verdict. Second, studies demonstrate that hung juries are more likely when a lone dissenter, supporting the defendant, receives support for his or her position early in deliberations.³⁶⁷ Alternates who join ongoing deliberations miss this opportunity to gain early support, thus decreasing the probability that they will hold out and cause a mistrial.³⁶⁸ Judge Ouderkirk's decision to replace juror 373 appeared motivated, in part, by the desire to avoid a deadlocked jury and to ensure a verdict.³⁶⁹ It accomplished this end by removing the dissenting voice and seating an alternate who had no opportunity to gain the early support critical for a hold-out juror. As such, this exercise in discretion clearly diminished the defendants' right to a hung jury if the panel was unable to reach a decision.

Finally, post-submission substitution allows the jury to become actively involved in their own composition, and therefore undermines the free and unfettered deliberation process. Historically, the idea of earnest and robust debate was considered critical to the success of the system.³⁷⁰ When juror replacement procedures are broadly exercised, however, members of the regular jury may try to influence a dissenting

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ See Dunn & McMillan, *supra* note 14, at A29.

³⁶⁶ See KALVEN & ZEISEL, *supra* note 25, at 462-63.

³⁶⁷ See *id.*

³⁶⁸ See *id.*

³⁶⁹ Transcript at 8217, *Williams*, No. BA058116.

³⁷⁰ See HASTIE ET AL., *supra* note 32, at 5.

juror to feign illness, thus placing the burden of decision on the alternate.³⁷¹ The jury may also approach the court directly, as in *Denny*, and attempt to control their own composition. In *Denny*, the jury's note may have been motivated by the desire to remove the lone hold-out. Thus, the protection that generally results from the counterbalancing of a variety of juror biases was threatened by the elimination of juror 373. The *Denny* jury may well have sought to eliminate this dissenting viewpoint in an effort to achieve unanimity.

While post-submission substitution procedures potentially threaten some of the defendant's substantive rights, this practice has become more necessary due to the increasing length and complexity of trials and the substantial costs associated with mistrials. Statutes that authorize this procedure should be narrowly tailored and allow trial court judges little discretion. To protect the rights of the accused, while at the same time preserving judicial resources, jurisdictions that enact post-submission substitution procedures should specifically enumerate the permissible reasons for replacement and limit the judges power to substitute jurors to those specific situations. Such reasons should be limited to cases of juror sickness, death, incapacitation or misconduct. Amorphous phrases such as "good cause," found in section 1089 of the California Penal Code, should be eliminated to avoid the discretionary conflicts present in *Denny*. Additionally, appellate courts reviewing such replacements should conduct a thorough analysis of the trial court record, rather than give the trial court judge's decision automatic deference. Limited post-submission substitution, subject to strict appellate review procedures, would effectively balance the competing interests of individual defendants and the judicial system.

VI. CONCLUSION

Post-submission substitution procedures endanger the defendant's substantive right to a trial by an impartial jury and compromise the sanctity and freedom of the deliberation process. As demonstrated in *Denny*, broad substitution procedures allow jurors to control partially their own composition and in effect replace a dissenting voice to achieve unanimity. The advent of the lengthy trial, however, combined with the many costs, both financial and human, associated with re-litigating disputes, creates the need for some limited substitution procedures. In promulgating rules governing post-submission substitution, legislatures should narrowly tailor these provisions and leave the lower

³⁷¹ See *Lamb*, 529 F.2d at 1156.

court judge with little discretionary authority. Ad hoc deviations from the confines of these rules should constitute reversible error. Such a procedure would protect the constitutionally guaranteed rights of the defendant while furthering the judicial system's interest in avoiding mistrials.

DOUGLAS J. McDERMOTT