Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury

Stephanie Domitrovish
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INTRODUCTION

Jurors read, analyze and interpret trial evidence and testimony through the language of their life experiences, knowledge and perception of cases. Jurors hear and see various versions of stories in the courtroom from witnesses, litigants and lawyers. These jurors, while maintaining their individuality, together engage in the language of the decision-making process called deliberation. During deliberations, they voice their recall of testimony and they explore the credibility of witnesses and evidence. They reconstruct the story of the evidence. As one body—the jury—they unite their common experiences, knowledge and perceptions to arrive at their verdict. The process of voir dire purports to discover if this common language includes any biases or prejudices. Those who participate in voir dire are selected from jury source lists, such as lists for registered voters and licensed drivers. Hence, jury source lists are created to form the jury pool for voir dire purposes.

The community perceives the jury selection process to be fair when its members can participate fully in voir dire. Whether full participation is possible, however, is largely based on the foun-

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* B.A. Carlow College, J.D. Duquesne University School of Law, Master's Degree in Judicial Studies from the University of Nevada in conjunction with the National Judicial College. The author was elected in November, 1989, Judge in the Court of Common Pleas of the Sixth Judicial District of Pennsylvania, located in Erie County.

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1. Experts recommend that attorneys research the trial's locale for that particular community's nuances rather than relying upon information derived from national surveys. See, e.g., Michael J. Saks, Social Scientists Can't Rig Juries, in IN THE JURY BOX 48, 51 (Lawrence S. Wrightsman et al. eds., 1987).
dation of voir dire — jury source lists and random selection. This article focuses on the community's perception of the lack of minority participation on jury panels and offers solutions to alter and improve this perception by including more minorities on jury source lists and modifying random selection. This article examines the importance of the perception of fairness in the judicial system, discusses the development of the concept of an impartial and cross-representative jury and the current status of case law, and reviews the composition of source lists and solutions to the problem of minority underrepresentation. This article then recommends tools for increasing minority participation on jury pools.

A Background on Jury Selection

Experts recognize that practices involved in the jury selection process are often controversial. Trial lawyers have historically selected jurors under the premise that the ethnic background of jurors can affect decision-making. Clarence Darrow, for example, believed that Irish and Italian jurors were pro-defense, and that Scottish, Scandinavian, and German jurors were pro-plaintiff, and typically favored the Commonwealth.

Although biases are recognized, our judicial system is not designed to exclude all biases. Some biases, such as the presumption that a defendant is innocent, are actually encouraged. In addition, juries are selected from the locale where the offense was committed so that the jury will act as the "conscience of the community." Juries also apply current social attitudes to each case. Its perception of social attitudes and of the community's conscience is affected by its experience in society. These desir-

2. See, e.g., Section II, The Biased Juror, in IN THE JURY Box 81 (Lawrence S. Wrightsman et al. eds., 1987). In the jury selection process, questions arise as to whether attorneys should be permitted to ask questions regarding a potential juror's religious or political beliefs, their likes and dislikes and their family history. Id. Questions arise as to whether the court or counsel should conduct voir dire and whether jurors should be questioned individually in a private forum or collectively in a public forum. Id. The editors also note that the process of selecting a group of citizens to represent the community is based upon the premise that some potential jurors are too biased to make an impartial determination. Id.


4. Id. (citing SUTHERLAND & CRESEY, PRINCIPLES OF CRIMINOLOGY 492 (7th ed. 1966)).


7. Id.
able biases are therefore encouraged, and the system must select individuals with optimal biases and exclude those with undesirable biases.\(^8\)

In the process of excluding jurors with undesirable biases, the requirement that a fair and representative cross-section of the community sit in judgment cannot be sacrificed. Selecting jurors from a pool of candidates with diverse backgrounds furthers the goal of obtaining an impartial jury for the defendant, because a diverse jury will represent the experiences and perceptions of the community.

Consistent with the notion that a jury should be impartial, legislators and members of the judiciary have devised a jury selection system devoid of initial reference to gender, race or ethnic background — random selection. As a term, random selection has its roots in mathematical statistics; however, the judiciary has been careful to point out that random jury selection does not equate to the same mathematical certainty.\(^9\) Random selection is objective in that each name ideally has the same probability of selection.\(^10\) A randomly selected list therefore represents potential impartial jurors whose gender or race are unknown. While the selection from this list may indeed be random, the likelihood of selecting a jury that represents a fair cross-section of the community is contingent on the composition of the source list.

Clearly, without a sufficient source list, random selection is a hurdle to obtaining a fully representative jury. A perfectly representative and inclusive source list would contain the name of every individual from the eligible population. However, even if the list is perfectly inclusive, it remains statistically impossible

\(^8\) Id. This balancing approach to biases is illustrated in standard criminal jury instructions, which explain to jurors their role as fact-finders. See PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 7.05(3) (1979). Section 7.05(3) states:

However, in deciding the facts, you may properly apply common sense and draw upon your own everyday, practical knowledge of life as each of you has experienced it. You should keep your deliberations free of any bias or prejudice.

Both the Commonwealth and the defendant have a right to expect you to consider the evidence conscientiously and to apply the law as I have outlined it to you.

\(^9\) Illinois Supreme Court Committee on Implementation of Jury Standards, Illinois Standards Relating to Juror Use and Management, Final Draft 3 (June 5, 1989) (on file with the Administrative Office of the Illinois Courts) (recognizing that source lists consisting of 100% of the population will be impossible, and suggesting 85% as a reasonable goal).

\(^10\) Illinois Supreme Court Committee, cited at note 9, at 4.
to prove that those jurors selected from the list represent all of the community’s attitudes and experiences. Nevertheless, a list that is inclusive increases the likelihood that the jurors selected will represent a cross-section of the community.

Random selection should produce juries that are both representative and inclusive, if the source list itself is representative and inclusive. While many jurisdictions rely exclusively on voter registration lists as the source for potential jurors, these lists are neither inclusive nor representative because they reduce minority participation at a critical stage of the jury process. Census data indicate that a substantially higher percentage of middle-class Caucasians register to vote than do minorities or the poor, and the rate of voter registration is highest among middle-class Caucasians. Voter registration rates make clear that exclusive use of voter registration lists as source lists results in disparity between the composition of the community and the composition of the jury. Therefore, jurisdictions that rely primarily upon voter registration lists to develop source lists effectively exclude a significant number of minorities even before the selection process begins.

To increase minority participation, minority leaders must raise the community’s consciousness. The leaders must urge the community members to get on jury source lists and serve on the jury if chosen through the voir dire process. Trial judges should also stress the importance of the role of the juror to community members, especially minorities. Judges should stress the importance of removing all impediments to jury service, such as employment difficulties, so that minority jurors in particular can be panelists in the voir dire stage.

11. The Illinois Supreme Court Committee on Implementation of Jury Standards addressed this concept when it noted:

[C]onsider a county in which the source list includes 900 of the 1,000 eligible adults in the population. Further suppose that the list was constructed in such a way that only 50 of the 100 blacks in the population were included in the source list. Even though this hypothetical source list is 90% inclusive, it is nonetheless extremely underrepresentative with respect to race.

Id.


14. Id. at 1562-63.

15. One commentator asserts that legal reform advocating race and gender neutrality is not the solution for minorities. See Kimberle W. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1336 (1988). Crenshaw believes that the African-American community’s most valuable political asset is its “ability to assert a collective identity and to name its collective political reality.” Id.

16. For example, a minority juror in Texas recently indicated to a trial judge
While some members of the judiciary and the public have recognized that the lack of minorities on jury panels is a problem, other members of the judiciary remain divided on the issue. Some judges believe that it is not an issue in their community, while others realize that, even if it seems to be a non-issue in their jurisdictions, the absence of minorities on jury pools generally, is a potential problem. Other judges believe that following constitutional mandates is sufficient, regardless of the public’s perception. The following section of this article addresses the importance of the public’s perception of the jury selection process.

**IMPORTANCE OF THE PUBLIC'S PERCEPTION OF JURIES**

We need to increase minority participation because the value of juries to our system of justice cannot be underestimated. Juries channel community values. Juries also provide "a check on the possible excesses of the legislative branch." Juries protect and insulate litigants from a biased or corrupt lone decision maker.

A recent poll revealed that jurors perceived racial bias or imbalance in the justice system. The poll asked jurors whether they thought minority defendants — including African-Americans, Hispanics and Asians — were less likely to receive a fair
trial than a Caucasian defendant.\textsuperscript{21} A greater percentage of African-American jurors believed that minorities would not receive as fair a trial as Caucasian defendants.\textsuperscript{22}

The group's responses did not surprise the poll-takers, who noted that "the racial divide, which remains an indisputable fact of everyday life in America, also manifests itself in the nation's system of justice."\textsuperscript{23} The poll results indicated that African-Americans believe that the criminal justice system favors Caucasians in dispensing justice, as evidenced by the L.A. riots.\textsuperscript{24}

The jury, through its verdict, can have both a positive and negative impact upon the community. The nation witnessed the negative impact of the jurors' verdict in the Rodney King assault case when the Los Angeles community erupted with violence and looting as word of the verdict spread. However, this same verdict has had a positive impact on communities throughout the United States because it raised the level of consciousness concerning racial disparity in jury selection and participation.\textsuperscript{25}

The verdict "shook up jurors' perceptions of the judicial system."\textsuperscript{26} It "woke jurors out of a coma . . . [of] believing that law enforcement is always right."\textsuperscript{27}

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\textsuperscript{21} \textit{Racial Divide}, cited at note 16.

\textsuperscript{22} \textit{Id.} The poll-takers stated:
Blacks are convinced that they are executed in disproportionate numbers, and six out of 10 said that white civil plaintiffs get a fairer hearing than blacks. More than two-thirds of black jurors agreed that white plaintiffs are awarded more money for injuries than injured black, Hispanic or Asian plaintiffs. Only 25 percent of white jurors agreed that white plaintiffs are better compensated.

Sixty-seven percent of black jurors said they think that minority defendants — including blacks, Hispanics and Asians — in criminal cases get a less fair trial than their white counterparts. Only 33 percent of white jurors think minority defendants are unfairly treated in the system.

\textit{Id.} at S8.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} Public response to the poll results, however, was mixed:
"If you were caught in a foreign country and you're a Martian and you're being put to trial, and there's no Martian on the jury, no Martian judges and no Martian attorneys, it raises the likelihood that the Martian is not going to get a fair shake. That's how minorities see it," said Mr. Castillo, a Hispanic partner at Chicago's Kirkland & Ellis.

Black attorney Donald Hubert of Chicago's Donald Hubert & Associates said the jurors' attitudes toward race "scared" him. "Take all the questions of fairness, they blow my mind . . . . It's real apparent that blacks and whites have different attitudes on the fundamentals of fairness."

\textit{Id.}

\textsuperscript{25} \textit{Id.} at S9.

\textsuperscript{26} \textit{Racial Divide}, cited at note 16, at S9.

\textsuperscript{27} \textit{Id.} Sixty-one percent of all jurors interviewed believed that the police officers were guilty; only nine percent voted for an acquittal; twenty-nine percent offered no opinion. \textit{Id.} at S8-S9. When the statistics were separated by race, fifty-eight percent of white jurors would have convicted the police officers, contrasted with
Indeed, although jurors and many other individuals in our communities have faith in the jury system, some jurors and communities believe there is room for improvement, especially in the area of minority representation on juries. Perceptions of racial bias in the justice system can arise from the racial imbalance that is self-evident in communities where not even one minority juror is available for jury selection. The voir dire challenge requirements of *Batson v. Kentucky* do not remedy such a situation.

In *Batson*, the prosecutor employed four peremptory challenges to strike the only four African-Americans on the venire panel; the defendant was also African-American. The Supreme Court ruled that the Equal Protection Clause forbade prosecutors from excluding African-Americans on the basis of race or upon any assumption that African-American jurors as a group would be biased in favor of a defendant of the same race. The Court held that a defendant in a criminal case could establish a prima facie equal protection violation based solely on the prosecutor's use of peremptory challenges. The Court concluded that once the defendant made this prima facie showing, the prosecutor had to provide a racially neutral reason for the exclusion of African-Americans.

While *Batson* provides some assurances that minorities on the venire will not be summarily excluded from the jury, *Batson* does not address the composition of the jury pool. The source list for the master list of jurors creates the difficulty, for the source list is the basis of the jury pool. Jury pools are divided into panels or venires, and it is from a venire that a *Batson* challenge can be taken. The heart of the jury selection process is the list of names compiled to make available prospective cross-representative jurors for venires — a “pre-*Batson*” or “foundation-for-*Batson*” stage. *Batson* does not apply if there are no minorities to be challenged on the venire.

Trial judges who have had the opportunity to talk with jurors after they have rendered their verdicts are frequently faced with
the popular question of why not even one black juror was called for service in an African-American defendant's trial. The issue of minority representation on juries is presently being addressed by state legislatures and community action groups. In Pennsylvania, the General Assembly has proposed legislation to require minimum minority composition of venires where a defendant is a minority.33 Public forums have been held in communities such as Erie, Pennsylvania, where a non-profit organization known as Citizens Against Racism is searching for solutions.34

Other communities are grappling with the same issue and experimenting with more inclusive source lists for the benefit of minority defendants, thereby improving the community's perception of the jury process. Citizens' concerns stem from their fear that what occurred in Los Angeles could happen in their communities. This concern substantiates the urgent need to increase minority participation on juries.

In order to understand the significance of minority participation on juries, one must first understand the importance of the jury itself in our democratic system. The next section of this article discusses the development of the modern jury system.

"HERE COMES THE JU[RY]"—AN EVOLUTIONARY PERSPECTIVE

The ancient Greeks are often credited with creating the jury circa 400 B.C.35 This jury of the accused peers was to judge the accused according to their understanding of justice, rather than by applying the specific law.36 Jurors were randomly chosen from a list of qualified males over the age of thirty.37

Other historians, however, claim that the concept of a "jury of one's peers" originated in 1215 A.D. as a check on the king by the barons at Runnymede.38 The juror requirement meant that

34. A local newspaper article reported on an Erie town-meeting:
A panel of prominent citizens quarreled sometimes among themselves and sometimes with their audience about how best to achieve racially fair juries in Erie County.
They agreed on two things: a perception exists that all-white juries make it impossible for minorities to get a fair trial and that this perception, accurate or not, is as dangerous as the reality.
37. Id.
the peers of the barons, other barons, served as jurors. In this context, a "jury of one's peers" certainly did not connote a set of jurors drawn from the diverse background and heritage of the general populace.

The 11th century English practice of having neighbors of the defendant come into court and provide answers based on their personal knowledge, has also been viewed as the foundation of the jury system. Until the end of the 15th century, these jurors would serve a dual role as witnesses and factfinders. Over the next several hundred years, the jury's role as an independent body was solidified.

The jury has evolved into the cornerstone of impartial justice. The jury's power and influence triumphed over those in government who used their official powers to abuse their office by wrongfully charging individuals. An example of this abuse is illustrated by the famous 1670 trial of William Penn and the co-defendant Mead, and its associated action, Bushel's Case. The officials who leveled the charges against Penn and Mead hoped that the jury would convict the defendants and thereby hurt the images of both the Quakers and the King. The jury, however, failed to reach unanimity and was sent back several times to reconsider its verdict. When the jury found Penn guilty only of speaking in the street, the judge became irate. The jurors were told:

Gentlemen, you shall not be dismissed, till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire and tobacco; You shall not . . . thus . . . abuse the court, we will have a verdict by the help of God, or you shall starve for it.

The jury refused to be swayed by the judge and came back with a verdict of not guilty for William Penn. With this ver-

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41. SIMON, cited at note 40, at 5.
42. Id. Historians have suggested that insuring the maintenance of the jury's role was one of the primary functions of the English Declaration and Bill of Rights. Id.
43. For an in depth discussion of Bushel's Case, see GUINThER, cited at note 35, at 24-26.
44. GUINThER, cited at note 35, at 25. Unidentified charges against Penn were allegedly derived from common law. Id. When the court refused to answer Penn's request to know which common law, Penn quipped, "if the common law [is] so hard to underst[and], it's far from being very common."Id.
45. Id. at 26.
46. Id.
47. Id.
48. Id. at 27.
dict, the judge relented and no longer tried to force the jury to find Penn guilty.49 However, "the judge turned to the jurors and fined them 40 marks each, and when they refused to pay, they too were sent off to Newgate Prison."50 Eventually, eight of the twelve jurors paid their fines to be released; however, four refused to pay the fines and remained in prison until they were granted bail.51 After nearly a year, the reviewing court concluded that they had been illegally jailed.52 The chief justice of the court asserted that a jury could not be punished for its verdict.53

Years later, the historian, Alexis de Tocqueville, compared English and American jury selection processes. He found that although England favored selecting jurors from its aristocracy, America did not make a class distinction.54 Tocqueville believed the power and role of the jury to be "the most energetic means of making the people rule" and "the most efficacious means of teaching [the people] how to rule well."55

49. GUINTHER, cited at note 35, at 27. Sir Samuel, the judge in Penn's case, knew that the Quakers would not bare their heads for any temporal authority. Id. at 25. Seeking to damage the image of the Quakers, he ordered hats to be placed on Penn and Mead and then fined them for refusing to remove the hats in court. Id. When Penn asked for his release after the jury's verdict of not guilty, the judge committed Penn to jail, charging him with contempt of court for failing to pay the fines. Id.

50. Id. at 27.

51. Id.

52. Id.

53. Id. The lead juror in this cause was Bushel — hence the reference to Bushel's Case. Id. Guinther notes that:

Bushel and his colleagues - men otherwise anonymous but distinguished in the history of freedom - had made it possible for all juries that came after them to render their verdicts without fear and as they, not the judge, saw the equities. The jury of one's peers that the barons had provided had at last become what the barons never wanted it to be, a democratic parliament of 12.

Id.

54. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 283 (Francis Bowen, trans., Alfred A. Knopf 1976) (1835). Tocqueville asserted:

The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage .... All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.

Id.

55. TOCQUEVILLE, cited at note 54 at 287. Tocqueville explained:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged .... The jury teaches every man not to recoil before the responsibility of his own actions ....
The nature of the jury in America as a guard against oppression changed after the Civil War. While northern juries were not likely to convict persons charged with violating the federal Fugitive Slave Law, Post-Civil War juries in reconstructed Southern states consistently ruled against African-Americans and in favor of Caucasians. These instances demonstrate that a biased jury may subvert the law, and that a non-inclusive jury system is prone to have biases. Fortunately, our concept of juries has broadened and developed to include all citizens of our nation. The courts have worked to achieve this through random selection.

RANDOM SELECTION AND INTERFERENCE WITH RANDOM SELECTION

The Fair Cross-section Requirement

The democratic overhaul of the jury began with the Supreme Court's decision in *Glasser v. United States.* Justice Murphy, writing for the majority, warned in *Glasser* that the use of any method of juror selection other than one which provided a representative group would negate the effectiveness of a jury trial and should be avoided. The following words of Justice Murphy are prophetic and unforgettable:

That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.

Four years later, in *Thiel v. Southern Pacific Co.,* Justice Murphy defined the concept of a "cross-section of the community" makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government.

*Id.* at 284-85.

57. *Id.*
58. 315 U.S. 60 (1942).
59. *Glasser,* 315 U.S. at 86.
60. *Id.* Justice Murphy also cited Blackstone, who commented on the power of the jury, stating:

Since it was first recognized in Magna Carta, trial by jury has been a prized shield against oppression, but, while proclaiming trial by jury as "the glory of the English law," Blackstone was careful to note that it was but a "privilege."... Our Constitution transforms that privilege into a right in criminal proceedings in a federal court.

*Id.* at 84 (quoting 3 BLACKSTONE, COMMENTARIES *379).
to include persons in every stratum of society. According to Justice Murphy, jurors should be selected from every racial, political, religious or social group. He recognized jury competence as an individual matter rather than as a group or class matter.

In *Thiel*, qualified individuals had been excluded from the jury list. The clerk of the district court and the jury commissioner customarily excluded ironworkers, bricklayers, carpenters, machinists, and other mechanics and laborers because these persons earned wages as high as ten dollars a day and could not afford to sit as jurors for the nominal rate of four dollars a day. In rejecting the systematic exclusions, the Supreme Court asserted that juries must maintain a broad representative character to assure diffused impartiality and to share in the civic responsibility to administer justice.

In *Thiel*, the Supreme Court did not require “that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community.” The Court recognized that complete representation would be impossible. The Court did mandate, however, that jurors must be “selected by court officials without systematic and intentional exclusion of any... groups.” The Court reasoned that if basic democratic principles were disregarded, the door opened to class distinctions and discriminations.

In *Swain v. Alabama*, the jury commissioners had selected individuals for jury rolls from sources including city directories, registration lists, club and church lists, and word of mouth. Evidence of underrepresentation included the following:

While Negro males over 21 constitute 26% of all males in the county in

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63. Id.
64. Id.
65. Id. at 219.
66. Id. at 222.
68. Id.
69. Id.
70. Id.
71. Id. Statutory provisions should guide a court’s discretion in choosing methods to avoid unlawful classifications and discrimination. Id. at 220-21. In *Thiel*, the Court rejected the systematic exclusion of daily wage-earners from the jury list, even though the jury panel contained at least five members of the laboring class. Id. at 225.
73. *Swain*, 380 U.S. at 207-08 n.4.
this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes, there having been only one case in which the percentage was as high as 23%.

The Swain Court refused to conclude that purposeful discrimination existed based solely on an identifiable group in a community being underrepresented by ten percent. The Court also noted that a defendant was not entitled to a jury roll or a venire which was "a perfect mirror of the community or accurately reflect[s] the proportionate strength of every identifiable group." Although the Court observed that the selection process was "haphazard[ly]" done and with "little effort... made to ensure that all groups in the community were fully represented," the Court held that such a system, although imperfect, did not result in purposeful discrimination based on race.

Expanding Thiel, the Supreme Court in Taylor v. Louisiana, held that the fair cross-section requirement was violated by a state provision excluding women from jury service unless they requested in writing to serve. This provision excluded from jury service 53% of the potentially eligible citizens. The court noted that a jury drawn from a fair cross-section of the community was a necessary component of the Sixth Amendment's guarantee of a jury trial. The Court determined that as a group, women were sufficiently numerous and distinct from men. Thus, the systematic exclusion of a numerous and distinct class violated the Sixth Amendment's mandate that the jury be comprised of a fair cross-section of the community.

74. Id. at 205.
75. Id. at 208-09.
76. Id. at 208.
77. Id. at 209.
78. 419 U.S. 522 (1975).
79. Taylor, 419 U.S. at 530-31. The Louisiana code provided that, "[a] woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." Id. at 523 n.2 (quoting LA. CODE CRIM. PROC., Art. 402).
80. Taylor, 419 U.S. at 531.
81. Id. at 530. The Sixth Amendment provides, in part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

In interpreting the Sixth Amendment provision, the Taylor court emphasized that, "[t]he purpose of a jury is to guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Taylor, 419 U.S. at 530 (citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)).
82. Taylor, 419 U.S. at 531.
83. Id.
In the seminal case of *Duren v. Missouri*, the Supreme Court set forth the standards for determining whether the jury selection process complied with the fair cross-section requirement. In *Duren*, the Court applied its holding in *Taylor* to a Missouri statute which granted women an automatic exemption from jury service. The Court held that this statute was unconstitutional because it failed to satisfy the fair cross-section requirement. The Court asserted that if a defendant could establish underrepresentation of a cognizable group resulting from systematic exclusion, the defendant had established a prima facie violation.

After noting that the Court had previously determined in *Taylor* that women were a cognizable group, the *Duren* Court determined that the defendant had adequately demonstrated underrepresentation. With regard to systematic exclusion, the Court asserted that "a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic — that is inherent in the particular jury selection process utilized." Finally, the Court concluded that the state had failed to demonstrate a significant interest in systematically excluding women from the jury selection process.

The importance of a representative jury, particularly in a capital case, was illustrated in *Davis v. Zant*. In *Davis*, the court recognized the importance of a trial by a representative jury of the defendant's peers in a capital case, because the jury must consider mitigating factors, such as the defendant's character, prior record and any circumstances purported by the defendant to lead to a sentence less than death. The undisputed evidence

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85. *Duren*, 439 U.S. at 357. While women represented more than 50% of the population, they comprised less than 15% of the jury pool. *Id.* at 366.
86. *Id.* at 370.
87. *Id.* at 364. The Court required a defendant to show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
88. *Id.* at 364. The defendant presented census figures indicating that women constituted 54% of the community; however, 85% of the prospective jurors were male. *Id.* at 364-66.
89. *Id.* at 366.
92. *Davis*, 721 F.2d at 1482.
indicated that there was an 18.4% disparity between the percentage of women in Troup County and the percentage of women on the jury list, and an 18.1% disparity between the percentage of African-Americans in the county population and those on the jury list.\textsuperscript{93} The Georgia state legislature had enacted a statute which the Eleventh Circuit found did not utilize a random selection method.\textsuperscript{94} While applauding the state legislature for devising a procedure in keeping with decisions of the Supreme Court, the Eleventh Circuit found that the statute contained the "possibility of abuse" because it authorized jury commissioners to use their subjective judgment in supplementing the jury lists "by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented on the jury list."\textsuperscript{95}

Six of the eight jury commissioners testified that they knew only to utilize the voter registration lists and were not aware that they were required to supplement the voter registration list if necessary to achieve a representative pool.\textsuperscript{96} While four of the commissioners testified that they used a random selection process,\textsuperscript{97} the court found that "a significant proportion of the 4,015 names on the list were selected through subjective means."\textsuperscript{98} Several other commissioners recognized the race and gender of names on the registered voter's list, causing the selection criteria not to be "facially neutral."\textsuperscript{99} The selection of every sixth name only accounted for 2,800 of the names chosen, and the jury commissioners were unable to explain how the remaining 1,215 names were derived.\textsuperscript{100} The Davis court concluded that the jury selection procedure was "easily capable of being manipulated" to create disparities between the percentage of women and African-

\begin{itemize}
\item \textsuperscript{93} \textit{Id.} at 1481 n.3.
\item \textsuperscript{94} \textit{Id.} at 1483.
\item \textsuperscript{95} \textit{Id.} (citing GA \textsc{Code Ann.} § 91-106). The current version of the statute is GA \textsc{Code Ann.} § 15-12-40 (1994).
\item \textsuperscript{96} \textit{Davis}, 721 F.2d at 1484.
\item \textsuperscript{97} \textit{Id.} The four commissioners who used a random selection process testified that they chose every fifth name or every sixth name from the voter registration list. \textit{Id.}
\item \textsuperscript{98} \textit{Id.} The court cited specific instances in support of its factual conclusion. For example, one commissioner hand-selected 700 of the 4,015 total by "choosing persons that 'we knew or thought would make a good juror.' " \textit{Id.} Another commissioner claimed to use the every-sixth-name method, but closer inspection indicated that a number of consecutive names were selected, contradicting his initial position. \textit{Id.} At one point sixteen consecutive names were chosen. \textit{Id.} The commissioner then conceded that a random method had not been utilized. \textit{Id.}
\item \textsuperscript{99} \textit{Id.} at 1485.
\item \textsuperscript{100} \textit{Id.}
\end{itemize}
Americans in the county and in the jury pool. The court held that the petitioner had established a prima facie case that the jury selection process was unconstitutional and that the state had failed to provide adequate rebuttal evidence.

The New York Court of Appeals decision in People v. Guzman, discussed the different analyses applied to claims asserting due process violations and equal protection violations in jury pooling. In Guzman, an African-American defendant contended that the jury pool underrepresented Hispanics. The court cited Supreme Court precedent holding that, if a defendant could prove exclusion of another race from jury service, then the defendant had established a violation of due process. The court noted that prior case law established that a jury pool that represented a cross-section of the community was required to ensure that all defendants, not only a defendant of a particular excluded race, received due process.

To establish a prima facie case of exclusion, a defendant must show that a substantial and identifiable segment of the community was systematically excluded from service. Once the defendant has established a prima facie case, the burden shifts to the state to prove that a fair cross-section is incompatible with a significant state interest. The court in Guzman indicated that, although the defendant established that Hispanics were a substantial and distinct group, and that Hispanics were not reasonably represented in the pool in light of the number of Hispanics in the community, the defendant had failed to establish systematic exclusion.

Guzman focused on the mailing of subpoenas to Hispanics in direct proportion to the percentage of Hispanics in the population. The court noted that the response procedure for Hispanics was the same as for other groups, in that all of those respond-
In considering the equal protection issue, the court in Guzman noted that the defendant had established Hispanics were an “underrepresented group” and a “recognizable, distinct class” that received different treatment under the law. However, the court concluded that the other requirement for an equal protection violation, discriminatory intent, was not established. The state was successful in proving that there was no discriminatory intent on the face of the selection and response procedure, even though Hispanics responded at a disproportionately lower rate than non-Hispanics to qualification summonses. The court observed that, according to the statistics, nearly twenty-five percent of the responding Hispanics were disqualified for failing to sufficiently complete the questionnaire. In addition, some women with young children were exempted by their own request. This left approximately seventy-five percent of the responding Hispanics to be added to the pool.

In determining that there was no equal protection violation, the Guzman court opined that the low response rate led to the underrepresentation of Hispanics, and that there was no discriminatory intent in the process itself. The court concluded that the Hispanics caused the underrepresentation by failing to respond at all, failing to respond adequately, and by requesting exemptions. According to the court, the selection system itself was “racially neutral” and not intentionally discriminatory.

111. Guzman, 457 N.E.2d at 1147. Guzman failed to indicate whether other ethnic or racial groups were summoned in a number which was proportionate to the community population.
112. Id.
113. Id. at 1148.
114. Id.
115. Id. at 1148-49.
116. Guzman, 457 N.E.2d at 1149. The commissioner attributed the failure to complete the questionnaires to lack of proficiency in speaking, reading, writing and understanding the English language, and on that basis disqualified those returning incomplete questionnaires. Id.
117. Id.
118. Id. Non-Hispanic representation was nearly three times greater than Hispanic representation in the pool. Id.
119. Id. at 1148-49.
120. Id. at 1149.
121. Guzman, 457 N.E.2d at 1149.
Use of Voter Registration Lists as Source Lists

A number of courts have addressed the validity of using voter registration lists as source lists. The Third Circuit Court of Appeals addressed this issue in United States v. Lewis.\textsuperscript{122} In Lewis, the defendant alleged that because many African-Americans did not register to vote, the use of a voter registration list as the only source of potential jurors failed to provide a fair cross-section of the community and thus, effectively excluded African-Americans from jury service.\textsuperscript{123} The defendant argued that the court should use a multiple-source list composed of Social Security rolls, Public Assistance rolls, and census information.\textsuperscript{124} In order to prevail, the defendant had to prove that African-Americans who chose not to register to vote were a "cognizable group" and were "systematically excluded."\textsuperscript{125} The court held that people who chose not to vote did not constitute a "cognizable group" because their non-registration "was a result of their own inaction; not a result of affirmative conduct by others to bar their registration."\textsuperscript{126}

The court recognized that although a "fairer cross-section of the community may have been produced by the use of 'other sources of names,' " sole reliance on voter registration lists was constitutionally permissible.\textsuperscript{127} The principal source list for random selection was determined by Congress to be either "voter registration lists or the lists of actual voters" in addition to some other source or sources of names "where necessary to foster the policy and protect the rights secured by Sections 1861 and 1862."\textsuperscript{128}

\begin{itemize}
  \item \textsuperscript{122} 472 F.2d 252 (3d Cir. 1973).
  \item \textsuperscript{123} Lewis, 472 F.2d at 256.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id. According to the court in Lewis:
    The defendant had the right to a jury "selected at random from a fair cross section of the community." However, he had no right to be tried by a particular jury which was itself "a fair cross section of the community"; nor did he have a right to a jury selected at random from the fairest cross section of the community.
    \textit{Id.} at 255.
  \item \textsuperscript{128} Lewis, 472 F.2d at 255 (quoting 28 U.S.C. § 1863(b)(2)) (alteration in original). Section 1863(b)(2) reads in part:
    \textsuperscript{1863. Plan for random jury selection.}
    \begin{itemize}
      \item (b) Among other things, such plan shall—
        \begin{itemize}
          \item (2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition
    \end{itemize}
\end{itemize}
Therefore, the court deferred to the legislature's discretion to determine the principal source list.\textsuperscript{129} 

In \textit{United States v. Davenport},\textsuperscript{130} the defendant argued that the registered voter source list should be supplemented with other lists prescribed by law to expand minority representation in the jury pool.\textsuperscript{131} To obtain evidence for his argument of minority underrepresentation, the defendant requested to view completed "Juror Qualification Questionnaires."\textsuperscript{132} The court found the defendant's request unnecessary because prior public jury lists were available and sufficient as a public record for the defendant's purposes.\textsuperscript{133} According to the \textit{Davenport} court, "there is no need to search for and use other sources."\textsuperscript{134} The \textit{Davenport} court commented on the defendant's "frivolous exploration" by noting that "[t]he defendant may be seeking those forms as an aid for voir dire examination purposes, but that is not the purpose of the questionnaires."\textsuperscript{135} The Fourth Circuit in \textit{U.S. v. Cecil},\textsuperscript{136} appeared to be primarily concerned with the administrative burdens and hardships that would be created if the defendant's challenge to the jury selection process was successful, and less concerned with the constitutionality of the process. In upholding the process, the court emphasized that voter registration lists had been uniformly used in the federal system.\textsuperscript{137} The court was concerned that to hold otherwise would encourage challenges in other circuits, and noted that this would open up "opportunities for a criminal defendant to stymie the orderly jury selection process[, ...] render the efficient administration of criminal trials in this circuit difficult to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title."


\textsuperscript{129} Lewis, 472 F.2d at 255. \textit{Lewis} addressed two additional issues: (1) the failure of voter registration lists to include 18-20 year old voters; and (2) the fact that the lists were four years old. \textit{Id.} at 256-57. The court noted that the constitutional amendment enfranchising 18-20 year olds was enacted in 1972, the year of the defendant's trial. \textit{Id.} at 256. The \textit{Lewis} court then addressed the issue of stale lists, noting that jury selection plans should use current voter registration lists; however, in this case, the use of the stale list was constitutionally permissible because the jury was selected from a fair cross-section of the community. \textit{Id.} at 257.

\textsuperscript{130} 824 F.2d 1511 (7th Cir. 1987).

\textsuperscript{131} \textit{Davenport}, 824 F.2d at 1514. The Jury Selection and Service Act (the "Act") permits the court to utilize its discretionary power to authorize supplemental lists where necessary. 28 U.S.C. § 1863(b)(2) (Supp. 1993).

\textsuperscript{132} \textit{Davenport}, 824 F.2d at 1514.

\textsuperscript{133} \textit{Id.} at 1515.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} 836 F.2d 1431 (4th Cir.), cert. denied, 487 U.S. 1205 (1988).

\textsuperscript{137} \textit{Cecil}, 836 F.2d at 1454.
Beyond measure . . . [And] put in jeopardy the operation of criminal trials in this Circuit with disastrous effect on the enforcement of criminal laws. These results would amount to a "dilatory tactic" which would be used to harass the court and delay the trial. The court indicated that the jury selection process had become, in many instances, a "nightmare of delays and confusion for the courts." The court was concerned that the focus of the trial had improperly shifted from a determination of the defendant's guilt or innocence to the jury selection process.

In Cecil, the Fourth Circuit vigorously asserted that changing or supplementing source lists would create administrative burdens and therefore the established system should not be altered. The court noted that the Constitution did not require that the chosen jurors be a "statistical mirror of the community" but rather "a 'fair cross-section' gathered without active discrimination." Cecil implicitly distinguished between active versus passive discrimination. The court indicated that the systematic exclusion of a cognizable group is unacceptable active discrimination. But the court found passive discrimination resulting from unexplained statistical imbalances to be acceptable. The court required proof of intentional exclusion in order to avoid an administrative nightmare and change to the system.

The use of the list of actual voters in a presidential election as opposed to the list of registered voters as a source list, was addressed recently in United States v. Douglas. The court found that a provision of the Jury Selection and Service Act (the "Act") permitted either list to be used for the master list. The Douglas court also found that race played no role in a person's ability to vote or to register to vote, and neither the right to vote nor the right to register to vote was discriminatorily

138. Id. at 1454-55.
139. Id. at 1455.
140. Id.
141. Id.
142. Cecil, 836 F.2d at 1455. This assertion fails to consider that whether a procedure is unconstitutional should outweigh whether a modification of that procedure would impose administrative hardships.
143. Id. at 1445 (emphasis added) (citing Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985)).
144. Cecil, 836 F.2d at 1451.
145. Id. at 1454.
146. Id.
147. 795 F. Supp. 909, 913 (N.D. Iowa 1991)
denied to African-American individuals. On this basis, the court held that the list of actual voters was constitutional for jury purposes. The court also specifically found that this use resulted in a constitutionally valid cross-section of the twenty-two counties comprising its jurisdiction. Moreover, the court recognized that this procedure was constitutional and did not violate the Act, even though the use of lists of actual voters excluded those persons who failed to vote in the particular election from which the list was drawn.

A second issue in Douglas was whether African-Americans were systematically excluded where the fifty jurors randomly summoned for the venire did not include one African-American prospective juror for an African-American defendant's trial. The court rejected the defendant's argument, and reiterated the proposition established by prior case law that there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."

State courts have also examined the validity of using voter registration lists as source lists. The Supreme Court of Kansas, in the 1992 case of State v. Bailey, held that the use of voter registration lists as the sole source for the selection of jury panels was statutorily and constitutionally permissible. In this case, the defendant moved to discharge the jury panel because the use of voter registration lists excluded potential jurors and resulted in minorities being underrepresented on jury panels. In support of this motion, the defendant in Bailey cited statistical evidence showing that the total minority population of the county was 12.7%. The defendant also presented evidence demonstrating that people who lived in areas with a majority of Caucasians served on juries in greater numbers than people living in areas dominated by minorities. The defendant, however,

150. Id. at 914.
151. Id. at 913-14.
152. Id. at 912-13.
153. Id. at 913. The record indicated that an expert's opinion was considered at the trial level. Id. The expert, Dr. Shipman, testified that "race is not a good predictor of whether or not a given person will vote, and, outside of the deep South, race itself does not seem to be an important factor in who does or does not vote." Id.
155. Id. (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).
158. Id. at 346.
159. Id. at 346-47.
160. Id. at 347.
failed to produce statistics of the number of minority citizens summoned for jury service for his trial, and failed to offer statistics as to how many citizens of voting age resided in the areas in which his jury was to be selected.\textsuperscript{161}

The Bailey court noted, however, that the defendant produced evidence demonstrating that minorities were less likely to register to vote than Caucasians.\textsuperscript{162} This evidence was countered by the state’s evidence that no barriers existed for minorities to register to vote, and that the county had a rather extensive program aimed at increasing voter registration among minorities and persons of low income.\textsuperscript{163} The state also presented evidence that jurors were never refused or removed from jury service because of race and that the most influential factor affecting voter registration was socio-economic status, not race.\textsuperscript{164}

The Bailey court concluded that unregistered voters were not a cognizable group.\textsuperscript{165} Because the defendant failed to prove that groups such as African-Americans or other minorities were systematically or purposely excluded, he had not established a prima facie case of discrimination.\textsuperscript{166}

In Commonwealth v. Henry,\textsuperscript{167} the Pennsylvania Supreme Court addressed the use of voter registration lists as jury source lists.\textsuperscript{168} Recognizing that voter registration lists were generated by computer without knowledge of race, and that these lists were an established and acceptable source, the court rejected the argument that the use of voter registration lists was unconstitutional because African-Americans were underrepresented.\textsuperscript{169}

\begin{itemize}
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Bailey, 834 P.2d at 347.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. at 348.
  \item \textsuperscript{166} Id. In support of its assertion that unregistered voters were not a cognizable group, the Bailey court cited the U.S. Supreme Court cases of Duren v. Missouri and Swain v. Alabama. Bailey, 834 P.2d. at 347-48 (citing Duren v. Missouri, 439 U.S. 357 (1979) and Swain v. Alabama, 380 U.S. 202 (1965), overruled in part by, Batson v. Kentucky, 476 U.S. 79 (1986)).
  \item \textsuperscript{167} 569 A.2d 929 (Pa. 1990).
  \item \textsuperscript{168} Henry, 569 A.2d at 933.
  \item \textsuperscript{169} Id. In Henry, the source lists in Lancaster County’s jury pool included school census data as well as voter registration lists. Id. Only 2% of the residents of Lancaster County were African-Americans. Id. In the year this jury was selected, the computer tape of city school census data, which lists all persons over 18 living within the school district, was not compatible with the county’s computer tape and therefore was not used in selecting the annual jury pool. Id. The impact of excluding the city school census list from random selection cannot be underestimated. The court indicated that 80% of the African-American population of Lancaster County lived in the city. Id. Because the city school census information could not be used, registered voter lists alone were used. Id. Reliance solely on voter registration lists,
In *People v. Gregory ZZ*, a New York appellate court addressed the issue of whether the underrepresentation of African-Americans on jury panels was a result of systematic discrimination. Although African-Americans were a substantially large group in Ulster County, African-Americans were admittedly underrepresented on jury panels. The Appellate Division of the New York Supreme Court held however, that the defendant failed to prove that the underrepresentation resulted from any inherent deficiency in the selection procedure.

The court's reasoning was predicated on the fact that the jury panel lists resulted from random selection from the master index of county voter registration lists. In addition to the random selection procedure, the court emphasized that the community outreach efforts to bring more minorities into the jury pool had been undertaken by initiating discussions with members of the local chapter of the NAACP and students at a local state college.

While the cases discussed above suggest that the use of voter registration lists as source lists is necessarily constitutional, the California Supreme Court, in *People v. Harris*, challenged this proposition. In *Harris*, the defendants claimed African-Americans and Hispanics in Los Angeles County were systematically excluded and underrepresented when a voter registration list was the sole source for jury selection. The defendant pointed to the low percentage of minorities eligible to register to vote and the even lower percentage of minorities already registered to vote. These figures were then compared with the much higher eligibility and registration figures of Caucasians.

In the Los Angeles jury selection process at issue, questionnaires were sent to those persons randomly selected from the voter registration list. The jury commissioner reviewed the completed questionnaires and eliminated those persons that

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according to the defendant, resulted in systematic exclusion of African-Americans from the jury pool because "blacks, so it is claimed, do not register to vote in proportion to their numbers." *Id.*

172. *Id.* at 875.
173. *Id.* at 874.
174. *Id.*
175. 679 P.2d 1264 (Cal. 1984).
177. *Id.*
178. *Id.*
179. *Id.*
failed to comply with mandatory statutory requirements. The remaining persons who completed the questionnaires became the master jury pool. The commissioner did not follow-up on those who did not respond — their names were simply eliminated.

The California court in *Harris* cited its previous decision in *People v. Wheeler,* where the court noted that the requirement that the jury be selected from a fair cross-section of the community was based on the notion that:

> [I]n our heterogeneous society, jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

The court then examined the evidence presented in this case. After reviewing voluntary questionnaires completed by 98% of all jurors in the pool for a three-month service period, the defendant’s expert revealed that only 5.5% were African-American and 3.4% were Hispanic. Comparing these figures to census information, the defendant’s expert testified that substantial deviations existed for African-Americans and Hispanics; the expert indicated that the deviation was potentially between 50% to 67% for African-Americans and from 81% to 90% for Hispanics from a span of ten years beginning with 1970 for Los Angeles.

The *Harris* court rejected the Attorney General’s argument that the percentage of African-Americans and Hispanics on the

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180. *Id.*
181. *Harris,* 679 P.2d at 437.
182. *Id.*
183. 583 P.2d 748 (Cal. 1978).
184. *Harris,* 679 P.2d at 439 (quoting *Wheeler,* 583 P.2d at 754-55). Recognizing its inability to achieve representation of every race, religious, social, economic, political, and geographical group in the community on every jury panel, the *Wheeler* court attempted to approximate an ideal cross-section of the community within the limits of random selection. *Wheeler,* 583 P.2d at 754-55. In *Wheeler,* the court identified the importance of the list being cross-representative from the start, noting that if a list failed to represent a cross-section of the community, the process was constitutionally defective. *Id.* at 757.
185. *Harris,* 679 P.2d at 438.
186. *Id.*
venire should be compared with the percentage registered to vote, instead of to the percentage of the total population. The *Harris* court observed that the defendant did not claim jury panels did not constitute an unbiased cross-section of the voter registration list. The court explained that because the percentage of non-voting minorities substantially exceeded the percentage of non-voting Caucasians, voter registration lists were not representative of the population.

The court also noted that many counties relied upon voter registration lists for the source of venires despite the known risk of drawing unrepresentative juries because the requirements necessary to vote were similar to those for jury service. The use of this list, the court reasoned, created a "pre-screening" process. Nevertheless, the court did not specifically find that this pre-screening process interfered with random selection. The court also explained that its use of total population figures for comparison purposes was premised on statistical information. Requiring the defendant to obtain data in the community on jury eligibility, according to the *Harris* court, would be an insurmountable hurdle.

In holding that the exclusive use of voter registration lists as jury source lists was unconstitutional, the *Harris* court distinguished *People v. Sirhan,* in which the constitutionality of using a list of registered voters as the only source list was upheld. The court in *Harris* noted that the constitutional validity of using only a registered voter list had been qualified by lan-

187. Id. at 441.
188. Id.
189. Id.
190. Harris, 679 P.2d at 441-42.
191. Id. at 442.
192. Id.
193. Id. *Harris* quoted from statistical expert Professor Kairys, who stated, "eligible population figures are almost impossible to obtain." Id. (quoting David Kairys, *Jury Representativeness: A Mandate for Multiple Source Lists,* 65 CAL. L. REV. 776, 785-86 n.63 (1977)).
194. Harris, 679 P.2d at 443. *Harris* also explored another method of statistical analysis called absolute disparity and found underrepresentation of African-Americans by 7.1% and Hispanics by 24.2%. Id. at 444. These figures were determined by subtracting 5.5%, which is the number of Blacks completing the three-month survey, from the census figure of 12.6%; and by subtracting 3.4% as the completed questionnaires by Hispanics having served on juries during this three-month period, from 27.6%. Id. The court hesitated to use the absolute disparity analysis because the census figure of 12.6% for African-Americans in the general population permitted the unconstitutional exclusion of all African-Americans from the jury pool, which is contrary to the understanding of a fair cross-section of the community. Id. at 445.
guage specifying that the use of the list must not result in the systematic exclusion of, or discrimination against citizens. The court explained that statistics proved that the registered voter list showed inherent disparity under the standard set forth in *Duren v. Missouri*. Therefore, the court concluded that African-Americans and Hispanics were systematically underrepresented. Because the defendant proved inherent disparity, the question of whether the jury commissioner intentionally caused this disparity was foreclosed. This court held that evidence of inherent disparity was sufficient.

The court in *Harris* commented on the state's failure to rebut defendant's proof of gross disparity. The court stated that the state "has short-sightedly rested its entire argument on the mistaken claim that defendant failed to present a prima facie case." In contrast to many courts that rely on prior case law to maintain status quo analysis, this court analyzed this case on its merits and candidly and logically expressed its reasons, offering detail for every step of its analysis. *Harris* presents a strong argument that the use of voter registration lists as the only source list should not automatically be upheld as constitutional.

**Use of Random Selection to Draw a Fair Cross-Section of the Community**

Statistics have been used to both challenge and uphold the representativeness of the jury venire. The U.S. District Court in Puerto Rico, in the case of *United States v. Marcano*, explained that "random selection" did not correlate to "randomness" as used by mathematicians and sociologists. The court examined the Jury Selection and Service Act's legislative history and concluded that random selection entailed the selection of names by chance from registered voters lists.

The *Marcano* court then examined the statistics and upheld

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197. *Harris*, 679 P.2d at 446.
198. *Id.* (citing *Duren*, 439 U.S. at 366). See notes 84-90 and accompanying text for a discussion of *Duren*.
199. *Harris*, 679 P.2d at 446.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
the randomness which was employed.\textsuperscript{207} The defendants asserted that the names at the end of the list had no opportunity to be selected as required by the Act.\textsuperscript{208} The court rejected this argument, explaining that the Act did not require that the names at the end of the jury source list had to be selected.\textsuperscript{209} The court further observed that a requirement that the names at the end of the list be selected would violate random selection.\textsuperscript{210}

The defendants in \textit{Marcano} further alleged that the following were excluded from the jury pool: (1) the working class or those of lower socioeconomic status, (2) the lesser educated, (3) non-Caucasians and (4) young people.\textsuperscript{211} The court held that the working class or those of lower socio-economic status were not identifiable classes because these classifications were occupation-based and lacked identification as to "actual income, personal history and family background."\textsuperscript{212}

As to the defendants' allegation that "non-whites" were excluded, the \textit{Marcano} court held that although "race" was a cognizable factor, "non-whites" encompassed a multitude of diverse recognizable groups and was therefore overly broad.\textsuperscript{213} According to \textit{Marcano}, the evidence failed to prove that the members of such a broad and diverse classification as "non-whites" (which includes, African-Americans, Asians and Native Americans) share similar interests and, therefore, did not comprise a "separate identifiable class."\textsuperscript{214}

\begin{itemize}
\item \textsuperscript{207} Id. The court noted that, after the first name was drawn by lottery (the 22nd), every 25th name was drawn from a list of 1,701,217 registered voters until 68,000 were selected for jury service. \textit{Id.} Note that the 25th number was selected by dividing the number of names needed (68,000) by the list of 1,701,217 registered voters, and 25 is the rounded figure. The defendant in \textit{Marcano} asserted that the Act required that a non-zero probability of selection be used for each name on the list, and that the court had assigned a zero probability for the 1,217 remaining names after the 1,700,000th position. \textit{Id.}
\item \textsuperscript{208} \textit{Id.} at 466.
\item \textsuperscript{209} \textit{Id.} at 467.
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{Marcano}, 508 F. Supp. at 468.
\item \textsuperscript{212} \textit{Id.} at 469 (quoting United States v. Valentine, 288 F. Supp. 957, 974 (D. P.R. 1968) and citing Figueroa v. Com. of Puerto Rico, 463 F. Supp. 1212 (D. P.R. 1979) and United States v. Valentine, 288 F. Supp. 957 (D. P.R. 1968)). \textit{Marcano} further referred to \textit{United States v. Kleifgen}, which held that the "unemployed did not constitute an identifiable group." \textit{Marcano}, 508 F. Supp. at 469 (citing United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977)).
\item \textsuperscript{213} \textit{Marcano}, 508 F. Supp. at 469.
\item \textsuperscript{214} \textit{Id.} The court's conclusion was guided by the decision of the Fifth Circuit in \textit{United States v. Rodriguez} which found that those of "Latin origin" were not a separate cognizable group because "Latin origin" encompassed, for example, Cuban-Americans, Puerto Ricans, Argentinean-Americans and Spanish-Americans who did not share similar interests as one group but rather were several separate cognizable groups. \textit{Id.} at 469 (citing United States v. Rodriguez, 588 F.2d 1003, 1007 (5th Cir.}
With regard to the claim of wrongful exclusion based upon age, the *Marcano* court cited conflicting opinions as to whether the young and less educated were cognizable groups. Instead of following one of these lines of reasoning, the court in *Marcano* examined the statistics for each group. As to persons between the ages of eighteen and twenty-nine, the *Marcano* court found there was a 6.2% difference between those in the jury wheel and the 1970 census. The court held that this difference was not significantly unreasonable and was insufficient to establish a prima facie case of underrepresentation. Statistics as to the "less educated" were examined and found not to present a prima facie case because: (1) the defendant did not consider the eligibility requirements of the less educated concerning age, residency and English literacy and speaking proficiency; (2) the defendant could not establish any underrepresentation of the eligible portion of the less educated; and (3) the defendant failed to demonstrate that such individuals were systematically excluded from the qualified jury wheel.

The constitutionality of the English language proficiency requirement was also rejected by the *Marcano* court on the basis of *stare decisis*, reflecting the need to make the District of Puerto Rico consistent with the rest of the federal court system, which requires English language proficiency. Although the court in *Marcano* acknowledged that there was pending legislation before Congress to permit the use of Spanish in the federal court system, the court noted that even if the legislation were enacted, its effect on the jury selection process would be too speculative to be considered.

1979).


217. Id.

218. Id.

219. Id.

220. Id. (quoting United States v. Ramos Colon, 415 F. Supp. 459, 465 (D. P.R. 1976) and citing United States v. Test, 550 F.2d 577, 594 (10th Cir. 1976)).

221. *Marcano*, 470 F. Supp. at 471. In an interesting twist concerning proficiency in the English language, the defendants argued that persons were qualified as
The court also preliminarily ruled on whether the clerk's or the jury commissioner's failure to investigate unanswered jury questionnaires violated the Jury Selection and Service Act. The court cited prior case law to establish that the Act contained no requirement that the clerk or jury commissioner follow-up on any unanswered forms. Instead, the clerk or jury commissioner had discretionary power in this regard, and failure to follow-up was not "substantial noncompliance" with the Act.

In light of this preliminary ruling, the court focused on whether including people who did not answer questions about marital status, education, race and occupation in the jury qualified wheel affected the random nature of the jury selection process. The court found that these omissions did not affect randomness. The Marcano court cited prior case law to establish that these omissions were mere technical errors and harmless in nature, incapable of constituting substantial noncompliance with the Act. The court noted that education, marital status and occupation are addressed on a routine basis in voir dire. To further bolster its holding, the Marcano court reasoned that if data concerning a juror's education, marital status, race and occupation were not included in the jury forms in the percentages alleged by the defendants, then the lack of data could not have

jurors because they were proficient in Spanish. Id. The court dismissed this argument due to a lack of supporting factual data. Id. The Marcano court provided the following example of the jury selection process in Puerto Rico's federal system:

[An examination of the caselaw will show that "[i]n Puerto Rico, where the customary language is Spanish, not English, prospective jurors are routinely examined by a district judge, in English, with an eye to their proficiency in spoken English, before being admitted to the venire . . . . This is done after they have submitted their juror qualification forms and have been provisionally approved by the Clerk."]

Id. (quoting Thornburg v. United States, 574 F.2d 33, 35 (1st Cir. 1978)). After reviewing the trial court transcripts, the court concluded that the jury was extensively examined because several prospective jurors were eliminated for their inability to understand English. Marcano, 508 F.Supp. at 471.

222. Marcano, 470 F. Supp. at 467-68.
223. Id. at 467 (citing United States v. Santos, 588 F.2d 1300, 1303 (9th Cir.), cert. denied, 441 U.S. 906 (1979), and United States v. Jenison, 485 F. Supp. 655, 668 (S.D. Fla. 1979)).
225. Marcano, 508 F. Supp. at 468. Percentages of items left unanswered included in the jury qualified wheel were 1.9% regarding education, 5.9% on marital status, 10.3% on race, and 21% on occupation. Id.
226. Id.
227. Id. at 467 (citing United States v. Davis, 546 F.2d 583, 589 (5th Cir.), cert. denied, 431 U.S. 906 (1977), and United States v. Evans, 526 F.2d 701, 706 (5th Cir.), cert. denied, 429 U.S. 818 (1976)).
228. Marcano, 508 F. Supp. at 468 n.10. The court did not mention race or the absence of questions as to race.
served as the basis for invidious discrimination.229

In *Jackson v. State*,230 the defendant argued that he was entitled to have the county's proportionate number of his race represented on both the jury pool *and* the jury venire.231 After review of the pertinent Alabama statute and case law, the court dismissed the defendant's assertion that his Sixth and Fourteenth Amendment rights were violated; in upholding the selection process, the court focused on the fact that the selection of the jury venire was conducted at random from a list of licensed drivers.232

A North Carolina case relied almost exclusively on statistics in upholding the validity of the jury selection process. *State v. Avery*,233 noted that the court had previously concluded that a nine percent difference between the percentage of African-Americans in the county versus the percentage of African Americans in the jury pool was non-discriminatory.234 The statistics in the instant case showed a 9.6% deviation between the number of non-whites in the eligible population and the number of non-whites in the jury pool, which resulted in a deviation that was only .6% higher than in the prior case.235

Because there was no evidence that the jury commissioners acted improperly, and because the statistics were nearly the same as in *Avery I*, the court determined that the defendant's right to an impartial cross-representative jury had not been violated.236 In *Avery I*, random selection occurred when the computer selected every second, fourth, eighth, twelfth and fifteenth name from a master jury list composed of taxpayers and registered voters.237 The court distinguished this case from cases in which the United States Supreme Court had determined that the jury venire was selected in a discriminatory manner.238 This court asserted that in the cases finding discrimination, the statistical disparity was greater and there was also evidence that the selection process was subject to abuse.239 The court held that

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229. *Id.* at 468.
231. *Jackson*, 560 So. 2d at 1101-02.
232. *Id.* at 1102.
233. 337 S.E.2d 786 (N.C. 1985) [hereinafter *Avery II*].
234. *Avery II*, 337 S.E.2d at 794 (citing *State v. Avery*, 261 S.E.2d 803 (N.C. 1980) [hereinafter *Avery I*]).
235. *Avery II*, 337 S.E.2d at 794.
236. *Id.*
237. *Avery I*, 261 S.E.2d at 805.
238. *Id.* at 806.
the defendant failed to provide statistical evidence of under-representation and further failed to demonstrate that the selection system was subject to abuse. 240

_Avery II_ suggested that _Avery I_ set a status quo standard, from which later cases could be judged by statistical comparison. 241 A problem raised by the use of this closed window analysis is that other issues are ignored. One issue that is ignored is whether the random selection procedure designated in _Avery I_ as to every second, fourth, eighth, twelfth and fifteenth name selected should be perpetuated in later cases. But the chances of this issue being raised are unlikely if courts simply look to the percentage of statistical disparity and compare it with the percentages in earlier cases, rather than determining whether both the process and the result comply with the fair cross-section requirement.

The Philadelphia Court of Common Pleas case of _Commonwealth v. Rosado_, 242 involved a challenge to the jury selection process based largely on statistics. The defendant raised the following issues: (1) whether the system in effect before 1993 violated the statutory requirement of random selection from a representative list; (2) whether the 1993 representative list substantially underrepresented Hispanic people; (3) whether the 1993 representative list substantially underrepresented poor people; and (4) whether the 1992 representative list violated the statutory requirement of random selection because it contained more names than actual people in Philadelphia. 243 Through September 1992, Philadelphia utilized voter registration lists to obtain potential jurors. 244 Jurors drawn from this list were then classified according to the ward in which they resided, and placed in separate groups. 245 According to the trial court, particular wards could be overrepresented on jury venires. 246

The defendant contended that the selection process resulted in underrepresentation of Hispanics. 247 The defendant's expert in-
dicated that although between 4.66% and 5.16% of voter-age population of citizens in Philadelphia were Hispanic, only 2.4% of the jury pool were Hispanic. The defendant contended that this statistical disparity demonstrated that Hispanics were significantly underrepresented in the jury venires. The defendants also argued that the disparity was exacerbated by the jury commissioner's failure to follow-up when questionnaires were not returned. Despite defendant's arguments, the trial judge ruled that the statistical evidence was insufficient to warrant a finding of either a substantial underrepresentation or any systematic exclusion. The court determined that the source list was derived in a facially neutral manner. The court also noted that the selection process had recently been reformed.

The trial court then addressed the defendant's contention that poor people and welfare recipients were underrepresented in the jury selection process. The court found that this group was not a distinctive group or identifiable class, that the words "poor person" were unable to be precisely defined, and that the defendant failed to provide any evidence to prove the presence of a quality or attribute defining or limiting the group. The defendant failed to establish that poor persons shared attitudes, experiences and interests that were different from those of the community at-large; therefore, they were not a cognizable group.

According to the trial judge:

Welfare recipients have never been a class singled out for distinct treatment under the laws except those laws which may inure to their benefit. Persons receiving monies from the government, whether through Social Security, Welfare, Unemployment, or Workmen's Compensation are not and should not be cognizable groups for jury selection. This court rejects the classification.

The trial judge next addressed the issue of the duplication of

pre-1993 jury selection procedure, the trial judge held that the defendant failed to prove that any significant number of jurors on the date of the trial would have been chosen from the pre-1993 list. Id. at 25. The court found that, at most, 5% of the jurors summoned were from the pre-1993 list. Id.

249. Id. at 26.
250. Id. The court expressed concern over the jury commissioner's failure to follow-up on unreturned questionnaires. Id.
251. Id. at 30.
252. Id.
254. Id.
255. Id. at 31.
256. Id.
257. Id. at 32.
names caused by merging voter and driver lists.\textsuperscript{258} The trial judge found that this duplication was "neither purposeful nor ill-intentioned."\textsuperscript{259} The court found that no cognizable class was intentionally excluded and further found that the defendant was not prejudiced by this duplication.\textsuperscript{260} The court also noted that there was no evidence that the representative nature of the panel was compromised by duplication.\textsuperscript{261} The court, therefore, concluded that the jury selection system did not violate the principle of randomness and denied the defendant's challenge.\textsuperscript{262}

\textit{Use of Multiple Source Lists}

While the use of multiple source lists represents an obvious improvement over using only voter registration lists, the use of multiple source lists has also been challenged. In \textit{State v. Dogan},\textsuperscript{263} the defendant contended that African-Americans were underrepresented even though multiple source lists were used.\textsuperscript{264} The defendant's challenge was based on the fact that only two of the thirty-three persons selected randomly for his jury panel were African-American.\textsuperscript{265}

Citing prior Arizona cases where underrepresentation alone was insufficient to establish a prima facie case when only one source list was used, the court in \textit{Dogan} found the defendant's argument to be without merit.\textsuperscript{266} The court emphasized that the state was not to blame when a citizen failed to register to vote.\textsuperscript{267} Choosing not to act, such citizens excluded themselves from jury service if the state did not affirmatively interfere.\textsuperscript{268} The court in \textit{Dogan} asserted that the state need not act to correct the appearance of underrepresentation as long as the state did not create barriers to a person's ability to participate either as a voter or as a juror.\textsuperscript{269}

\textsuperscript{258} Rosado, 26 Phila. at 32.
\textsuperscript{259} Id. at 33.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{262} Id. at 34.
\textsuperscript{264} Dogan, 724 P.2d at 1268. Lists of registered voters and licensed drivers over the age of 17 were used as source lists. Id.
\textsuperscript{265} Id.
\textsuperscript{266} Id. (citing State v. Bernal 671 P.2d 399, 403 (Ariz. 1983) and State v. Lee, 559 P.2d 657 (Ariz. 1976)). Lists of registered voters were the only source lists used in Bernal and Lee. Dogan, 724 P.2d at 1268.
\textsuperscript{267} Dogan, 724 P.2d at 1268.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
The Colorado Supreme Court, in *People v. Sepeda*,\(^{270}\) considered whether Weld County systematically excluded Spanish-surnamed individuals by randomly selecting potential jurors from merged multiple-source lists of registered voters, licensed drivers and chauffeurs.\(^{271}\) While only 10.4% of those on the lists were Spanish-surnamed persons, census data suggested there was 15.4% Spanish-surnamed representation in the community.\(^{272}\) The defendant contended that the court should use a city and county directory, which had the same proportional percentage of minority names as the census data percentages for Spanish-surnamed individuals.\(^{273}\) The court noted that this list could not be used because it was not computerized and there was no funding available to convert it into a computerized form.\(^{274}\) The court found this determination to be within the trial court's discretion.\(^{275}\)

The court also recognized outreach efforts to increase Spanish participation on juries and efforts to use other lists, such as taxpayer and welfare lists to enlarge minority participation in the pool.\(^{276}\) Legal obstacles created by the confidential nature of these lists prevented their use.\(^{277}\) Telephone and utility lists were not used because of obvious gender discrimination, as male household members were predominately listed over females in the same household.\(^{278}\) The *Sepeda* court found no legal mandate to equate a reasonably representative pool with representation that was perfectly proportional to census data.\(^{279}\) The court concluded, "[w]hile the selection process may not be perfect, we cannot say that the jury pool is not reasonably representative of the community."\(^{280}\)

\(^{270}\) 581 P.2d 723 (Colo. 1978).
\(^{271}\) *Sepeda*, 581 P.2d at 726.
\(^{272}\) Id. at 726-27.
\(^{273}\) Id. at 727.
\(^{274}\) Id. at 727.
\(^{275}\) Id.
\(^{276}\) *Sepeda*, 581 P.2d at 728.
\(^{277}\) Id.
\(^{278}\) Id.
\(^{279}\) Id. The court found a 5% difference between the 10.4% listed on the master index and the 15.4% on the census figure. Id. The court further recognized that dividing the 5% difference by the 15.4% census figure resulted in a comparative disparity of 31% between the proportion of Spanish-surnamed individuals in the master index and the census data for this community. Id.
\(^{280}\) Id.
Judicial Interference With Random Selection

Courts have permitted other practices which interfere with random selection. In *United States v. Meredith,*231 the defendants alleged that the trial court erred in allowing rejected members of an earlier array to sit on another case.232 Hence, this issue involved whether the inclusion of "passed-over" jurors failed to follow the Jury Selection and Service Act.233 In rendering its decision, the *Meredith* court relied on the Tenth Circuit’s ruling in *United States v. Davis.*234

The trial court in *Meredith* questioned the official in charge of the selection process to determine whether a jury had been chosen at random from a representative pool.235 The administrator and deputy clerk averred that a random selection procedure had been followed.236 Despite evidence indicating that the procedure resulted in a low proportion of African-Americans, the trial court stressed that a defendant was not entitled to a "specific statistical balance in a jury panel."237 The court found that including the "rejected" or "leftover" jurors did not interfere with a random selection procedure.238

Specific exclusions have also been upheld despite constitutional challenges. A recent case in the Third Circuit, *Ramseur v. Beyer,*239 involved the intentional exclusion of two African-Americans from a randomly selected panel of grand jurors.240 The excluded jurors were eventually empaneled.241 The court noted that the assignment judge added the two African-Americans to the pool, thus creating a panel representing a cross-section of the community in order to obtain "an even mix" of various backgrounds, including race, on the jury.242

232. *Meredith,* 824 F.2d at 1424.
234. *Meredith,* 824 F.2d at 1424 (citing United States v. Davis, 456 F.2d 1192 (10th Cir. 1972)). In *Davis,* the Tenth Circuit held that use of "leftover jurors" from another trial was not precluded by the Act. *Davis,* 456 F.2d at 1192.
235. *Meredith,* 824 F.2d at 1424.
236. Id.
237. Id. at 1424 n.3.
238. Id. at 1424.
240. *Ramseur,* 983 F.2d at 1222.
241. Id.
242. Id. The assignment judge vocalized his deliberate intention on the record by adding, "if any of you think that I am in any way being sneaky about it, please understand that I am not. I am telling you like it is, and that is the reason I have done what I have done." Id.
The court ruled that the actions of the trial court could not be condoned, even though the appellate court noted that the trial judge was not altering the composition of the jury for invidious, racially-discriminatory purposes, but was merely attempting to make the jury more representative of the local population. Interestingly, the court pointed out that the assignment judges of Essex County routinely bypassed the statutorily mandated random selection procedure in favor of selection based on the judge’s own subjective observation or “discretionary judgment” of potential jurors.

The court in *Ramseur* observed that although the U.S. Supreme Court had not formulated a bright line test of mathematical standards to apply, inferences of unconstitutional exclusion could be made where a significantly large disparity existed between the percentage of minority population and the percentage of minority composition in jury panels, as compared to disparity resulting from random chance. The court pursued this analysis, utilizing all three statistical approaches: absolute disparity, comparative disparity, and standard deviation analysis. Absolute disparity is the difference between the percentage eligible and the percentage that actually appeared in the venire; comparative disparity is arrived at by dividing the absolute disparity by the total number in the population group; and standard deviation measures fluctuations from the expected value.

Applying a *stare decisis* analysis to the statistical figures, the *Ramseur* court found the absolute and comparative analysis figures to be within an acceptable range. The court also found that the standard deviation figure of 18.5% indicated that there was less than a one in 10,140 chance that these figures resulted

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293. *Id.* at 1226-28.

294. *Id.* at 1223. Proof of interference in random selection was provided by testimony from these judges:

   Asked if his choices were made as a result of his “discretionary judgment about each person,” the judge responded, “There is no question about that.”

   The record in this case contains many similar statements that show that Essex County assignment judges used subjective criteria to select grand jurors and often considered race, “a racial balance” or a “cross section” of black and white jurors when assembling grand juries.

   *Id.* (citations omitted).

295. *Ramseur*, 983 F.2d at 1231.

296. *Id.* at 1231-32.

297. *Id.* at 1232 (citing Castaneda v. Partida, 430 U.S. 482, 496 & n.17 (1977)).

298. *Ramseur*, 983 F.2d at 1232. The absolute disparity figures were 14.6% for the source list and 14.1% for the list of jurors qualified by the court to serve after the court reviewed completed questionnaires. *Id.* at 1231. Comparative disparity figures were 40.1% for the source list and 39.3% for the qualified list. *Id.*
from random chance.\textsuperscript{299} The \textit{Ramseur} court determined that the instant case was "virtually identical to the twenty-nine standard deviations condemned in \textit{Castaneda}," and concluded that the underrepresentation was not the result of random selection.\textsuperscript{300} However, the court cautioned that a statistical finding of underrepresentation alone did not constitute purposeful discrimination, without a review of the factual circumstances of both the jury selection procedure and the study.\textsuperscript{301}

The \textit{Ramseur} court then examined the duration and scope of the survey.\textsuperscript{302} Applying \textit{stare decisis}, the \textit{Ramseur} court concluded that although the survey indicated there was non-random underrepresentation, the two-year period was insufficient to satisfy the standard under \textit{Castaneda} that underrepresentation must occur over a substantial time period to violate equal protection.\textsuperscript{303} The court further noted that the use of voter registration and Department of Motor Vehicle lists was facially neutral.\textsuperscript{304} The court held that data produced by the defendant in \textit{Ramseur} failed to establish a prima facie equal protection violation.\textsuperscript{305}

The \textit{Ramseur} court also compared the figures presented by the defendant to the fair cross-section analysis for Sixth Amendment violations in \textit{Duren v. Missouri}.\textsuperscript{306} The court found that factors such as the short time period of the study, the use of facially neutral multiple source lists and the fact that there were "ongoing" reform efforts to improve the representativeness of juries in the state weighed against a finding that the Sixth Amendment cross-section requirement had been violated.\textsuperscript{307} The \textit{Ramseur} court asserted that a presumption should be created where a list \textit{appears} to be representative "ex ante" even though "ex post" evidence reveals that it is not representative.\textsuperscript{308} In light of that presumption, the \textit{Ramseur} court concluded that ex post evidence in the instant case was not sufficient to establish a Sixth Amend-

\textsuperscript{299} Id.

\textsuperscript{300} Id. at 1232 (citing \textit{Castaneda}, 430 U.S. at 496 n.17).

\textsuperscript{301} \textit{Ramseur}, 983 F.2d at 1233.

\textsuperscript{302} Id.

\textsuperscript{303} Id. at 1233. \textit{Ramseur} referred to \textit{Hobby v. U.S.}, 468 U.S. 339, 341 (1984) (seven years was the period of study); \textit{Castaneda v. Partida}, 430 U.S. 482, 487 (1977) (11 years was the period of study); and \textit{Hernandez v. Texas}, 347 U.S. 475, 481 (1954) (25 years was the period of study). \textit{Ramseur}, 983 F.2d at 1233.

\textsuperscript{304} \textit{Ramseur}, 983 F.2d at 1233.

\textsuperscript{305} Id. at 1233-34.

\textsuperscript{306} Id. at 1234. See notes 84-90 and accompanying text for a discussion of \textit{Duren}.

\textsuperscript{307} Id. at 1235.

\textsuperscript{308} Id.
ment violation.\textsuperscript{309} The court also determined that the lack of representation of African-Americans and women as forepersons did not impact "on the otherwise representative array of the panel."\textsuperscript{310}

Asserting that the assignment judge had discriminated against as many as five jurors on the basis of race in this case, the dissent in \textit{Ramseur} contended that the assignment judge had participated in purposeful discrimination.\textsuperscript{311} The dissent noted that the assignment judges routinely eliminated African-American jurors if the individual judge believed that there were too many African-Americans on a selection panel or if that judge believed that a juror was "undesirable."\textsuperscript{312} The dissent also focused on the removal and eventual reinstatement of African-American jurors, and took issue with the majority's characterization of the resulting prejudice to the defendant as minimal.\textsuperscript{313} Noting that the African-Americans were reinstated to the jury only at the last moment, the dissent contended that this procedure created the impression that the African-American jurors were chosen as a "last resort."\textsuperscript{314}

The dissent asserted that the temporary exclusion of the Afri-

\textsuperscript{309} \textit{Ramseur}, 983 F.2d at 1235.
\textsuperscript{310} \textit{Id.} at 1237. Essex County judges testified that race was a factor in the selection of forepersons. \textit{Id.} at 1235-36. These judges determined race from apparent physical characteristics belonging to racial groups because the questionnaires and jury lists lacked data on race. \textit{Id.} at 1236. The judges desired not only a cross-section in the body of the grand jury, but also among forepersons. \textit{Id.} One Essex County judge stated:

\begin{quote}
My ultimate choice may be based upon my desire to get a cross-section even in the selection of the foreperson or deputy foreperson; although as I indicated before, I do not think that it is a requirement. I think there should be a certain number of men and I think there should be a certain number of blacks and Hispanics and white and laboring groups and executive groups and housewife groups who should not only be on the Grand Jury body but even sharing as foreperson or deputy foreperson.
\end{quote}

\textit{Id.} In contrast to these efforts to increase cross-representativeness for forepersons, the defendant's survey of thirty-three of sixty-six persons serving as grand jury forepersons for terms beginning with 1979 and ending with September 1982 revealed that only 6.1% were African-Americans. \textit{Id.} The court did not focus on the individual citizen's right to a fair cross-section but, instead, focused on "jury review" as a buffer for citizens from the abuses of the government's power. \textit{Id.} Holding that a successful Sixth Amendment challenge to the selection of the jury foreperson must show that the foreperson exerted a strong influence over the other jury members, thereby diminishing their views significantly during deliberations, the \textit{Ramseur} court did not find that the Essex County foreperson bore a constitutionally significant role in the indictment process. \textit{Id.} at 1237.

\textsuperscript{311} \textit{Id.} at 1249 (Cowen, J., dissenting). Justices Mansmann and Nygaard joined in the dissent. \textit{Id.} at 1252.
\textsuperscript{312} \textit{Id.}
\textsuperscript{313} \textit{Id.} at 1250.
\textsuperscript{314} \textit{Ramseur}, 983 F.2d at 1249 (Cowen, J., dissenting).
American jurors implied that they were second class citizens and unworthy of being the first choice. The dissent was concerned that the judge was furthering negative stereotypes of minorities and that this stigmatization of African-Americans would bias the jury against the defendant, for the defendant was also African-American.

*State v. Ji,* a 1992 Kansas case, addressed another challenge to the exclusion of cognizable groups from source lists. The defendant in *Ji* challenged the constitutionality of excluding illiterates as potential jurors. The exclusion of those who were unable to read or write was held to be constitutional by the court, because in the interest of fairness to the defendant, jurors should possess a reasonable knowledge of the English language. The court noted that the right to vote and the right to serve as a juror shared several commonalities, but a person's status as a registered voter did not presume that one also had the competency to serve as a juror.

Other constitutional issues regarding jury selection raised by the defendant in *Ji* concentrated on the defendant's argument that aliens, foreign students, and handicapped persons were also wrongfully excluded from consideration as potential jurors. All of the groups were considered, but rejected by the court because the defendant's claim that the jury panel was improperly selected was unsubstantiated and therefore failed to establish a prima facie case of discrimination.

In *State v. King,* the North Carolina Supreme Court found that interference with random selection was not discriminatory. In *King,* names were selected for the jury list by taking every fourth name from the tax list from the letters "A," "B," "C," "D" and "M," rather than from the entire list. The court held that this procedure was not prejudicial to the defendant, even though the procedure was not a systematic selection of names as

315. *Id.* at 1250. The dissent criticized the majority's justification of the lower court's actions in this case by pointing to a single instance in another case in which an assignment judge had excused an admittedly prejudiced juror. *Id.*

316. *Id.*


318. *Ji,* 832 P.2d at 1183.

319. *Id.* at 1185.

320. *Id.*

321. *Id.* at 1184.

322. *Id.*

323. 264 S.E.2d 40 (N.C. 1980).

324. *King,* 264 S.E.2d at 43.

325. *Id.* at 42.
contemplated by the applicable statute. The court found no constitutional violation because the defendant could not show any significant underrepresentation of African-Americans on the jury list to indicate intentional discrimination.\(^\text{327}\)

In *State v. Langford*,\(^\text{328}\) the issue was whether the clerk of courts could routinely exclude certain occupational groups from the jury list.\(^\text{329}\) The court upheld the process, noting that the clerk had followed guidelines prepared by the court and had acted as the court's agent.\(^\text{330}\) The court concluded that what otherwise would have been improper interference with random selection was proper when undertaken pursuant to the court's direction.\(^\text{331}\)

In *Commonwealth v. Henry*,\(^\text{332}\) the Supreme Court of Pennsylvania addressed the exclusion from jury service of those convicted of lesser crimes.\(^\text{333}\) Such persons were excluded from jury service based on their responses to questionnaires asking if they had been convicted of a crime.\(^\text{334}\) The court asserted that those convicted of juvenile and minor crimes were not entitled to the relief afforded by *Duren v. Missouri*.\(^\text{335}\) The court concluded that the defendant was not entitled to relief because the defendant neither alleged nor demonstrated that the exclusion was prejudicial.\(^\text{336}\)

The cases discussed above involved criminal defendants. However, issues of interference with random selection are not limited

\(^{326}\) Id. at 43.

\(^{327}\) Id. The court stated:

While we do not condone the practice of choosing names only from certain letters of the alphabet because the statute seems to contemplate systematic selection of names from the entire alphabet, we perceive no prejudicial error to the defendant in this case. The procedure was not so arbitrary or nonsystematic as to fail to comply with [the statute]. The purpose of [the statute] is to insure that jury lists are systematically compiled so as to rule out arbitrary, subjective, discriminatory selection methods which would be violative of defendant's constitutional rights. There has certainly been no constitutional violation since defendant has not shown any significant underrepresentation of his race on the jury list or jury venire from which to infer there was intentional discrimination.


\(^{329}\) Langford, 837 P.2d at 1042.

\(^{330}\) Id. at 1043.

\(^{331}\) Id.


\(^{333}\) Henry, 569 A.2d at 933.

\(^{334}\) Id.

\(^{335}\) Id. See notes 84-90 and accompanying text for a discussion of *Duren*.

\(^{336}\) Henry, 569 A.2d at 933-34.
to criminal cases. The plaintiffs in a complex civil litigation case, *Haas v. United Technologies Corp.*,\(^{337}\) challenged the exclusion of women and young persons from special juries.\(^{338}\) Before trial, the parties had agreed to a special jury pursuant to the Delaware Special Jury Statute.\(^{339}\) Before the special jurors actually appear in court, the attorneys alternately strike jurors from a Prothonotary's list of forty-eight individuals until twenty-four remain.\(^{340}\) At issue was the procedure used to select the list of the initial forty-eight jurors.\(^{341}\)

The plaintiffs challenged the system, relying upon the following statistics: the female population of New Castle County in Delaware was 53%; the female composition of the jury pool was only 33.9%; the jury panel in the instant case was only 16% female; the youngest member of the jury was thirty-seven.\(^{342}\) The Supreme Court of Delaware did not discuss the source of the list itself. While the court noted that no specific guidelines existed for jury selection by the commissioners, the commissioners acknowledged that they had selected jurors on the basis of age and education.\(^{343}\)

The *Haas* court held that the foregoing statistical figures did not demonstrate that the procedure was actually, intentionally, or systematically exclusionary.\(^{344}\) Nevertheless, the court ruled that this selection process represented a potential abuse to state court litigants.\(^{345}\) The court recognized its responsibility to prevent the potential for abuse from being realized, and directed the superior court to draft guidelines for juror selection.\(^{346}\) The Delaware Supreme Court emphasized the importance of random selection and noted that, in drafting guidelines, the superior court should focus upon the need to "ensure 'a cross-section of the population suitable in character and intelligence for that civil duty.'"\(^{347}\)

The Supreme Court of Delaware suggested that random selec-

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339. *Id.* at 1181. The Delaware Special Jury Statute is set forth at DEL. CODE ANN. tit. 10 § 4541 (1974).
340. *Haas*, 450 A.2d at 1181 (citing DEL. CODE ANN. tit. 10 § 4541 (1974)).
342. *Id.* at 1184.
343. *Id.* The Superior Court Administrator indicated that the Commissioners selected jurors between the ages of 30 and 70 who possessed more than twelve years of formal education. *Id.*
344. *Id.*
345. *Id.*
347. *Id.* at 1185 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)).
tion should occur "from a special jury pool comprised of individu-
als meeting specified age, intelligence and educational require-
ments and . . . special occupational skills" as permitted by
law. The court also suggested a bachelor's degree from an ac-
credited college or university as a specific minimum educational
criterion. The supreme court affirmed the superior court's
ruling in the instant case in favor of the plaintiffs, and simulta-
neously directed the superior court not to schedule any trial by
special jury until new rules were approved and available for
use.

A challenge to the jury selection process based on the under-
representation of eighteen through twenty-one year old African-
Americans was rejected in People v. Waters. The Appellate
Division of the New York Supreme Court held that the defendant
had failed to prove at the pre-trial hearing that this particular
group was a cognizable group in the community. Further, the
defendant failed to prove that the underrepresentation resulted
from any systematic exclusion.

The court addressed the issue of the "appearance of intentional
discrimination." The court pointed out that the county had a
practice of seeking names and addresses of recent high school
graduates to supplement jury source lists; however, the court also
indicated that this practice was "concededly poorly adminis-
tered." Noting that many high schools declined to respond to
this solicitation, the court concluded that although the program
was poorly administered, it adequately rebutted the appearance
of intentional discrimination.

The Florida appeals court case of Jordan v. State, presented a prima facie case of racial discrimination in the jury selection
process. In Sarasota County, although prospective jurors were
derived from voter registration lists, they were not chosen from
one list covering the entire county, but were selected from areas
consisting of four or five precincts. The jury commissioner
then examined each selected person's voter registration card to
determine that person's ability to qualify as a juror. The cards were examined to determine the voter's age, occupation and felony record; then the names of qualified prospective jurors were pulled randomly from a drum as needed for each jury panel.

In *Jordan*, the master jury list for the defendant's trial was composed of only five precincts in the county. Based on the precincts chosen, the chance of having more than four African-Americans among the 1,344 potential jurors was less than one in ten million. The court concluded that the defendant had sufficiently proven the "statistical dissimilitude" between 2.65% of registered non-white voters and the .297% prospective jurors selected for his list.

The defendant also argued that because the race of prospective jurors was evident on the voter registration cards, the opportunity to discriminate based on race existed. The court determined that the jury precinct selection itself had been discriminatory because jurors were chosen from all-white precincts. Here, jurors were not randomly selected in an objective manner but, instead, in a subjective and impermissible manner, resulting in purposeful discrimination. Under the analysis applied in *Jordan*, because the selection must occur from the whole county and not from political sub-units, any defendant would be discriminated against if his or her jury list were drawn from precincts having highly disproportionate members of any race.

Another example of interfering with random selection occurred in Georgia where the names of potential Caucasian jurors were placed on white cards and those of potential African-American jurors were placed on yellow cards. The use of the different cards interfered with random selection and created the possibility of an absence of minority representation on juries.

Other factors, such as the length of the trial, tend to interfere with random selection and make it even more difficult to obtain a representative jury. For practical reasons, the trial judge

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359. *Id.*
360. *Id.* at 132-33.
361. *Id.* at 133.
362. *Id.* at 133 n.4.
363. *Jordan*, 293 So. 2d at 133.
364. *Id.*
365. *Id.* at 133-34.
366. *Id.* at 134.
367. *Id.* The court noted that this scenario would not be repeated because Sarasota County had since abandoned this discriminatory, subjective approach to juror selection. *Id.*
368. SEYMOUR WISHMAN, ANATOMY OF A JURY 29 (1986).
369. WISHMAN, cited at note 368, at 29.
370. JOE S. CECIL, E. ALLEN, & GORDON BERMANT, JURY SERVICE IN LENGTHY
must weigh the importance of the jury service against the juror’s need for job security. 371 This balancing is necessary to avoid jury panels consisting of reluctant jurors, or jurors with an inability to focus on the facts of the case due to their own concerns. 372 In lengthy trials, it is not unusual to find that the court has excused over half of the jury venire because of employment hardship. 373 For obvious reasons, lengthy trials reduce the possibility of inclusiveness and representativeness. Courts in various jurisdictions — both state and federal — have developed methods to reach the goal of obtaining an impartial jury. The following section will discuss the types of source lists and other solutions that have been either suggested or employed.

COMPARISON OF SOURCE LISTS AND SOLUTIONS FROM VARIOUS JURISDICTIONS

The ABA standards for selecting prospective jurors require the court to review and test its use of jury source lists. 374 The need

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371. CECIL, cited at note 370, at 6-7.
372. Id. The authors discuss the balancing of the jurors’ needs against the necessity of juries and state:
In trials lasting a week or less judges are generally reluctant to excuse persons from jury service. However, as the anticipated length of trial increases, the burden imposed on the potential jurors is given greater weight and more jurors are excused. An extended absence from the place of employment can result in economic loss and have a detrimental effect on the career of the juror. Many who are not employed nevertheless have personal responsibilities that cannot go unmet for extended periods. In considering requests to be excused, the trial judge must balance the burden placed on the individual jurors against the interest of the litigants in having a trial before a representative cross section of the community. Too lenient a policy in this regard may needlessly excuse prospective jurors with characteristics that are typical of the community . . . . On the other hand, too strict a policy may place improper burdens on individual jurors and others who depend on them, causing resentment toward jury service and perhaps even litigants.

Id.

373. Id. at 7. The authors relate that:
[The jury selection process in a lengthy trial demonstrates the difficulty of obtaining a representative jury. Eighty-four persons appeared for jury selection in a case that was to require a trial lasting more that two hundred days. Of these, forty-eight persons were excused by the judge because of the hardship lengthy jury service would impose. Those who were excused represented an important segment of the community; they were more likely to have an education beyond high school and more likely to have occupational experience that was relevant to the commercial issues raised in the litigation. In fact, all potential jurors with managerial, supervisory, scientific, or engineering experience were excused.

Id.

for inclusiveness is clear in that the jury should be composed of individuals with different life experiences. If the jury is not inclusive, an important and necessary perspective may be missing.\(^{375}\) When this perspective of "unsuspected importance" is missing, the jury is less than fully inclusive.\(^{376}\) The importance of the missing perspectives cannot be quantified; these perspectives may vary from the perspectives of those selected for jury service, due to differences in values, attitudes and life experiences.

Whether and to what degree the source list is representative clearly affects inclusiveness.\(^{377}\) We will only have representative juries when source lists approach 100% inclusiveness. No minimum standards define inclusiveness, beyond the widely accepted assumption that jury source lists consisting of 80% of the population is sufficient. The absence of a standard necessitates the use of a multiple-source list. This involves merging another list, such as a list of licensed drivers, with the registered voters list in order to derive an inclusive compilation.

Other supplemental lists which may be used to achieve inclusiveness are local census lists, city and/or telephone directories, lists of utility customers, and lists of those who pay state real estate tax, personal property tax and income tax. Women and young people may nevertheless be underrepresented in supplemental lists. These lists are also problematic because they contain business entries, and the area covered is often not limited to a particular political subdivision. In addition, multiple source lists only become effective when they have been purged of deceased persons or persons who have moved away from the jurisdiction.

Different jurisdictions have utilized a variety of methods to procure jurors. One method widely used before computerized random selection was the key-man system. Under the key-man system, upstanding individuals in the community were appointed, and would propose to the court a list of names of other upstanding individuals.\(^{378}\) This system has also been referred to as the "old boys" network.\(^{379}\) Summoning anyone found near the courthouse, including pedestrians on the street was another

\(^{375}\) Standards Relating to Juror Use and Management, cited at note 374, at 4.
\(^{376}\) Id.
\(^{377}\) Id.
\(^{379}\) KASSIN, cited at note 378, at 22.
method of jury selection.  

Prior to random selection, there were a vast number of methods employed to select jurors. In fact, according to a 1961 United States Department of Justice Report, 92 federal district courts utilized 92 different methods of selecting jurors. All of these methods shared the same result: none generated juries that adequately represented the local population.

Legislative Reforms

While some state legislatures have attempted to increase the inclusiveness of their juror lists, many states still rely primarily or exclusively on voter registration lists. In Arkansas, the master juror list consists of the names of the registered voters in each county. Potential jurors are selected from the list either by computer, or through a process that begins with the selection of a random number by the circuit judge; the clerk then takes from the master juror list the name corresponding to that random number and every one-hundredth person thereafter. This process is then repeated until the proper number of potential jurors has been selected.

In Rhode Island, the jury commissioner, with approval from the justice of the superior court, selects jurors from registered voters by using electronic data processing equipment. This occurs after the secretary of state certifies that the electronic equipment was furnished with the names of all persons registered to vote in the cities and towns. The jury commissioner supervises the equipment operator so that neither individual determines which name shall be drawn. After all names are drawn, the machine compiles a list, randomly mixing the names drawn.

In Colorado, the primary source for the master juror list is the voter registration list for each county. The Colorado Supreme Court is vested with the power to supplement the master juror list with names of licensed drivers and other lists of persons

380. Id.
381. Id. at 23.
382. Id.
384. § 16-32-103(1).
385. § 16-32-103(3).
388. Id.
389. Id.
residing in the counties.\textsuperscript{391} The Colorado state court administrator must use electronic means to randomly select names from the master juror list to comprise the master juror wheel.\textsuperscript{392}

Interestingly, Colorado chose not to include utility customers, property taxpayers and persons listed in telephone directories in its master lists.\textsuperscript{393} In Colorado, utility customer lists were considered to be biased in terms of economics and gender because most utility listings are under the name of the male member of the household.\textsuperscript{394} Also, these lists lack representation of those between the ages of eighteen and twenty-one.\textsuperscript{395} Because lists of property taxpayers are biased against those unable to afford to purchase property, the eighteen to twenty-one year age group is significantly underrepresented.\textsuperscript{396} Finally, telephone directories are not used in Colorado, as the same biases present in utility lists are also present in telephone lists.\textsuperscript{397}

In Hawaii, for example, the clerk for each circuit annually prepares a master list.\textsuperscript{398} A state statute requires that the master list be drawn from the voter registration list which must be supplemented with names on other lists of residents, such as the taxpayers and licensed drivers lists.\textsuperscript{399} The names of prospective jurors are then chosen at random from the master list to make up the master jury wheel.\textsuperscript{400}

To select names for the master jury list in Indiana, the jury commissioners for each circuit court place in a box twice as many names from the voter registration list for the county as are needed for the grand and petit juries for the following year.\textsuperscript{401} The commissioners may supplement the voter registration list with names from lists of utility customers, persons filing income tax returns, motor vehicle registration, city directories, telephone directories and driver's licenses.\textsuperscript{402} The box containing the selected names is delivered to the clerk of the circuit court for the

\begin{footnotes}
\footnote{391}{\textsuperscript{\textsection} 13-71-107(1).}
\footnote{392}{\textsuperscript{\textsection} 13-71-108.}
\footnote{393}{Maureen Solomon, American Bar Association, Report \& Recommendations to the ABA Commission on Standards of Judicial Administration, Management of the Jury System 14 (1975).}
\footnote{394}{Solomon, cited at note 393, at 14.}
\footnote{395}{\textit{Id.}}
\footnote{396}{\textit{Id.}}
\footnote{397}{\textit{Id.}}
\footnote{398}{32-36 HAW. REV. STAT. \textsection 612-11(a) (Supp. 1992).}
\footnote{399}{\textsection 612-11(a).}
\footnote{400}{\textsection 612-12.}
\footnote{401}{IND. CODE ANN. \textsection 33-4-5-2(a) (Burns 1992).}
\footnote{402}{\textsection 33-4-5-2(e).}
\end{footnotes}
The clerk then draws the names of potential jurors from the box in the presence of the jury commissioners.404

In Pennsylvania, the jury selection commission is required to annually prepare a list of prospective jurors.405 This list must contain the voter registration list of the county or the names from other lists which the jury commission believes provide a number of names equal to, or greater than, the number supplied from registered voters.406 The commission may, but is not required to supplement the list with names from telephone, city or municipal directories, tax assessment rolls, names of participants in any state, county or local program authorized by law, available names of participants of federal programs authorized by law, school census lists and the names of any person who is not on the master list but applies to the commission to be a potential juror.407 At least once a year, the commission must select the names of the prospective jurors at random.408

Certain county-level court systems in Pennsylvania, such as Allegheny County, have used three jury source lists — voter registration lists, licensed drivers' lists, and telephone directories.409 Significantly, if there is any discrepancy on the qualification questionnaires or any failure of a potential juror to sign the form, a commission staff member will investigate.410 Where a signature is omitted, a staff member will interview and obtain the signature of the prospective juror.411

Other jurisdictions have expanded the source lists beyond voter registration lists. This increases the likelihood of obtaining a jury comprised of a fair cross-section of the community. The master jury list in New Hampshire is compiled from official records of persons holding current driver's licenses or department of safety identification cards.412 Each year, the department of safety com-

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403. § 33-4-5-2(a).
404. Id.
405. 42 PA. CONS. STAT. § 4521(A) (1994).
406. § 4521(A).
407. Id.
408. § 4521(C).
411. Id. This investigative procedure is effective. In 1988, for example, the commission staff investigated 73,000 out of 100,000 individuals sent questionnaires. Id. The staff members were able to qualify 60% to 65% of the total individuals investigated (approximately 60,000 to 65,000 persons). Id.
piles a master jury list for each county or district within the state. The clerk of courts then selects prospective jurors from the list randomly, by drawing or by computer.

In New Jersey, the assignment judge for the superior court of each county must prepare a jury list from the lists of the names of all the registered voters and the licensed drivers in the county. The assignment judge must then direct that a public random drawing be made of the names of persons to be called for jury duty.

Each county clerk in New Mexico must provide the secretary of state with a list of the registered voters in the county, and this list is then made available to the state general services department. The director of the motor vehicle division must provide to the general services department a list of all the licensed drivers in each county. These two lists are merged to form the master jury data base and the names of potential jurors are then selected randomly by computer. These names of potential jurors are provided to the district or magistrate courts. In cases where the county has adequate computer capability, the general services department may transfer the master jury data base to the county and the county may perform the random selection of names.

In Wisconsin, each county board has the power to determine whether the selection of jurors will be made by the clerk of the circuit court or by the jury commissioners appointed by the circuit court judges. The Wisconsin Department of Transportation provides a list of persons residing in the county where the circuit court is located to the clerks of the circuit courts each year. The jury commissioners randomly choose two hundred names from the department list or from a master list comprised of the department list and one or more additional lists of county

413. § 500-A:2. This procedure replaces the prior selection process whereby town lists, which were derived from the voter registration list, were compiled by the town selectmen and used as the basis for the master jury list. N.H. REV. STAT. ANN. §§ 500-A:1, 500-A:2 (1983), amended by N.H REV. STAT. ANN. §§500-A:1, 500-A:2 (Supp. 1993).
416. § 2A:70-4a.
418. § 38-5-3(A).
419. Id.
420. § 38-5-3(B)
421. § 38-5-3(D).
422. Wis. STAT. ANN. § 756.03 (West Supp. 1993).
423. § 756.04(1).
residents, including but not limited to voter registration lists, telephone and municipal directories, utility company lists, lists of real property taxpayers, lists of high school graduates or lists of persons receiving general relief or aid to families with dependent children. The list is to include a statement which sets forth the manner in which the list was compiled and the sources from which the names were derived. The names of those on the list who are eligible for jury service are then randomly drawn by the clerk of the circuit court.

Of the jurisdictions mentioned, Delaware has been the most successful in compiling a representative jury list. The Delaware jury list includes 94.5% of citizens 18 years of age and over. The lists are derived by random selection from merging and regularly maintaining registered voters and licensed drivers lists for each county. The Delaware Methodology Manual for Jury Systems sets 85% as the minimum for inclusiveness.

Many of the states discussed rely heavily upon voter registration lists as a source of names for jury selection. Therein lies the problem. The list of registered voters tends to underrepresent minorities, the poor, the young, the elderly and the less educated and tends to overrepresent Caucasians, the middle-aged and those who are better educated. Surveys show that some people do not register to vote in order to avoid the call of jury duty.

Voter registration lists will become even less representative of our citizenry because experts have predicted that non-voters will increase in numbers in the future. This concern over the inclusiveness and representativeness of voter registration lists led one federal judge to recuse himself from jury challenge petitions because he strongly believed that voter lists were unsatisfactory and incomplete as to minority representation. The judge recognized that minorities and the youth of our nation were not registered to vote in the same ratio as middle-aged Caucasians.

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424. § 756.04 (am) 1.
425. § 756.04(2).
426. § 756.04(3).
429. Id. at 5. According to the Delaware Jury Manager, "Delaware, then, is well above this standard." Id.
430. WISHMAN, cited at note 368, at 29.
431. Id.
433. GINGER, cited at note 432, at 308.
sians. He further criticized the federal system because the use of the lists created further inequities; he asserted that the computerized random selection from the lists favored suburbs over cities, small towns over the suburbs, short streets over long streets and persons living in single dwellings over those living in multiple-unit dwellings.

Concerned organizations, such as The League of Women Voters, have studied the lack of representativeness of voter lists. The results of these studies pointed to the failure of administrators in voter registration offices to encourage participation. The next section of this article analyzes how jurisdictions are trying to improve their community's perception of a fair and impartial jury.

NEW TRENDS

Numerous suggestions and proposals have been made to make juries more inclusive and thereby improve the community's perception of the fairness of the jury system. One proposal, currently under consideration by the Pennsylvania General Assembly, is a bill that proposes "jury peer representation." The bill's drafter, Representative Harold James of Philadelphia and a supporter of the legislation, Linda Bebko-Jones of Erie, have indicated that they intend the bill to mandate minimum representation of minorities on juries in order to prevent discrimination in the jury process. These legislators recognize that even though Batson affords minority defendants and victims opportunities to curb discrimination, minority defendants and victims have no legal

436. GINGER, cited at note 432, at 308.
437. Id. The author states:
   According to this study, election officials have never been required to take affirmative steps to encourage people to vote. Furthermore, they have never been required to adopt practices to increase voting convenience. The study noted that 38 percent of all polling places observed were not clearly marked, 58 percent of the surveyed polling places lacked convenient public transportation, and 89 percent of the local voter officials in the communities observed did not publish a voter information guide.
439. Harold James, Memorandum, Proposed Legislation, Jury peer Representation (February 2, 1993) (on file with the author); Interview with Linda Bebko-Jones, Member of the Pennsylvania House of Representatives (April, 1993).
recourse should the jury panel or pool lack peer representation.440

This bill targets minorities who are members of either a significant or small racial group, and correlates census figures with the twelve members of the jury.441 The bill provides that if a defendant or victim is a member of a racial category which represents one-fourth or more of a judicial district, and there is no juror from the same racial group, then three jurors of the victim's or defendant's race must be selected.442 If a defendant or victim is a member of a racial group of one-sixth or more of the district, but less than one-fourth, the proposed bill guarantees two jurors from that racial group will serve on the final jury panel.443 Finally, if a defendant or victim is a member of a race comprising less than one-sixth of population of a judicial district, then one juror from that racial group will serve on the final jury panel.444

Another recent development which may increase minority representation on juries is the new federal "motor voter" law.445 Under this law, citizens can register to vote by applying for or renewing their drivers' licenses.446 The motor voter law forbids the purging of names from voter lists for reasons other than those explicitly set forth in the law.447 Under the new law, a name is purged from the list only when a potential voter incurs a felony conviction, becomes mentally disabled, dies, relocates to a new jurisdiction or makes a personal request.448 While this legislation is a positive step toward achieving representative jury source lists, it creates difficulties. One example is the administrative burden of keeping track of voters who move and fail to quali-

442. H.B. 1182 § 1 (a)(1).
443. Id. at § 1 (b)(1).
444. Id. at § 1 (c)(1).
446. 42 U.S.C. § 1973gg-3. See Gary Wesman, 'Motor Voter' Law Seen as Boost to Electoral Process, ERIE MORNING NEWS, May 21, 1993, at B1. Currently, Erie County records indicate that only two-thirds (2/3) of voting-age adults are registered voters. Id. Well before this law was passed, Vernon Dobbs, the Director of the State Welfare Department's Public Assistance Office in Erie, acknowledged that his office had been helping citizens to register to vote for approximately eighteen months prior to the passage of the new law. Id. Recipients were asked if they are registered to vote, and if not, they are provided with voter registration forms to fill out at their convenience. Id.
fy because of the restrictions.

Although the administrative burden may be increased, if the new law achieves the dramatic growth in voter registration that is anticipated, voter registration lists will more accurately represent the community. Citizen participation will expand, and the jury selection process will benefit from the access to a greater number of potential jurors. As was previously mentioned, the more inclusive a voter registration list, the greater the chance that a jury pool will accurately represent the entire community.

Pennsylvania legislators have also proposed that, upon graduation, all high school students receive a voter registration form with their diploma. In addition, the Pennsylvania General Assembly has also introduced a bill that would permit easier access to voting for the homeless. These proposals increase the representative nature of the jury pool and forbid the use of voter registration lists as source lists for jury selection.

The American Bar Association proposes the following steps for implementing the jury selection process to prevent any discriminatory practices:

1. Compare the source list being used for the names of potential jurors with population data of the jurisdiction.
2. Take corrective action(s) such as supplementing the source list with additional lists.
3. Examine court policies on granting excuses.
4. Take corrective action(s) such as establishing written and uniform procedures for granting excuses.
5. Examine court practices with respect to peremptory challenges during the voir dire process.
6. Take corrective action if the voir dire process discriminates against any cognizable group in the jurisdiction.

Others have argued in favor of class conscious juries as a possible solution. Until 1970, jurors in the District of Columbia of the same socio-economic background as the litigants were selected to assess condemned property value because the jury represented a trial by one's "peers." These condemnation juries were patterned after the Norman concept that a jury composed of

451. See Joseph Coleman, House Dems propose bills to boost voter registration, ERIE MORNING NEWS, March 24, 1993. This prohibition is based on the assumption that many people do not register to vote for fear of being selected for jury service.
453. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 10 (1977).
knights who owned property should decide a case involving a fellow knight. 454

Class conscious jurors fulfill the jurors' and the judicial system's need for understanding a particular defendant. 455 However, sole use of one's class undercuts the entire community's role in the judicial process, and ignores the defendant's and the victim's needs. 456 Nevertheless, choosing a jury designed to represent both the accused and the victim also presents administrative and philosophical difficulties. 457 The specialized jury would require that court administrators handle each case individually, thereby delaying an already prolonged process. 458

Some researchers have suggested redistricting as a means to achieve proportionate representation on jury pools. 459 Support-

454. VAN DYKE, cited at note 453, at 10.
455. Id. The author states, "[t]hose who advocate a class-conscious jury have argued that the economic and social conditions of the black community, for instance, cannot be understood except by persons who live there, and hence that black defendants should be judged by all-black juries." Id.
456. Id. at 10-11. As indicated by the author:
The problem with a jury drawn only from a narrow group - from the community of knights if the accused is a knight, for example, or from the black community when the defendant is black - is that such a jury fails to recognize adequately the concept of community. The jury's role is not only to protect the accused but to represent the public that has been victimized. A jury composed entirely of members of the defendant's racial or socioeconomic group would certainly be able to understand the defendant's point of view but might not be able to understand the perspective of the victim. In contemporary society, selection of a jury must take into account the fact that the victim may come from another part of the community than the accused. For this reason, "community" must be broadly defined. The point of view of the victim's community would not be represented in a "specialized" jury consisting only of the defendant's peers. Only in a situation that is truly self-contained, such as a minor crime on Native-American land, would a jury drawn from only one group serve as an impartial arbiter representing all the competing factions. Id. at 10-11.
457. Id. at 11.
458. Even if it were feasible to handle each case in a distinct manner, Van Dyke notes:
Such juries would be administratively impossible to achieve in today's society, which includes many more than two identifiable groups and where the groups relevant to the case might differ according to the crime. (For example, a black woman who had been raped might consider her "community" in this case to be women; while if she had been robbed by a white, she might consider it to be blacks, both men and women).
Id.
It is possible to solve the problem of both numbers and control. In Northern urban areas, jury districts could be redrawn so that each black community would constitute a jury district, or vicinage, the other vicinages being predominantly white. Juries drawn from vicinages duplicating the boundaries of the black community would be by natural consequence all-black. In the Black Belt
ers of the redistricting or vicinage proposal do not believe that redistricting polarizes races. Instead, they assert that as society becomes less racist, the different districts will also become less polarized with regard to color. Through redistricting, the burden of eradicating racism is on society as a whole, rather than on the jury system. A redistricting proposal, however, offers no solution to the problem of a non-representative jury and a defendant who is a minority in the community.

Another proposal involves the use of a formula to determine the number of minority jurors necessary in a case through calculating not only the degree to which race is central to the verdict, but also the number of minority jurors necessary to arrive at a fair decision. This final number is contingent upon the minority interest that is affected by the issue. The weight given to this interest plays a significant role in resolving the pressing issue.

Other researchers dismiss the argument that juries should include proportional representation based on the percentage of the minority population. They argue that the result of such a system would be that one African-American would be on every jury and proportional representation of every identifiable group in the community would be impossible.

Another problem arises where entire classes or categories of individuals are excluded from jury service. For example, until counties of the rural South, however, the black and white communities are not so readily distinguishable, and the problems outlined would not be solved simply by reconstituting jury districts. Here we would do better to require that every jury be proportionately representative of the black population in the vicinage. In most cases this would yield juries that are at least three-quarters black.

The problem of numbers and control could be solved in the federal context by dividing federal jury districts into sub-districts paralleling the proposed state jury districts in the North, and paralleling counties (that is, existing state jury districts) in the South. Legal problems that black people face tend to arise where they live and carry on their daily business. By requiring that juries trying civil cases be drawn from the community where the cause of action arose, and in criminal cases where the crime occurred, we could ensure that civil and criminal law for black people would be administered by substantially all-black juries.

Id.

460. The Case for Black Juries, cited at note 459, at 549.
461. Id.
462. Id.
463. Id.
464. Id.
466. Id. at 549 n.90.
1984, Georgia excluded the following individuals from jury service:

1. Police and other law enforcement officers employed or appointed on a full-time basis.
2. Officers and personnel of any court employed or appointed on a full-time basis, including attorneys at law engaged regularly in the practice of law in Georgia.
3. Officers, firemen and other personnel of any fire department employed on a full-time basis.
4. Physicians, surgeons, medical intern and medical technicians actively engaged as such.
5. Dentists and pharmacists, duly licensed, who are engaged in the practice of their profession.
6. Persons who are sixty-five years of age or older.
7. Any other person summoned to jury duty may be excused by the judge upon a showing that he will be engaged during the term of his service in work necessary to the public health, safety or good order or that she is a housewife with children fourteen years of age or younger.
8. Any teacher or principal of Georgia who does not desire to serve upon jury may obtain a permanent excuse by notifying the clerk in writing of that fact.467

Experts recommend that blanket exemptions for individuals in certain occupations should be eliminated.468 Historically, these exemptions derived out of a need for safety in the community.469 For example, requiring the town's only doctor to serve as a juror for a two-week trial would be a community hardship.470 Today, however, numbers have grown in most, if not all, occupations, and jury service is frequently limited to a brief period of time. If occupational excuses are necessary, the court should listen to each juror's situation and excuse individually, rather than grant blanket exemptions. The removal of blanket exemptions is in keeping with the principle of inclusiveness, and represents how laws must change with the pace of society.471

G. Thomas Munsterman and Janice T. Munsterman472 pro-


469. Munsterman, cited at note 468, at 8.

470. Id.

471. Id. at 11. The authors note:

As the courts strive for wide citizen participation in the jury process, as the use of multiple source lists and short term of service indicate, the singling out of certain professions is no longer in keeping with the intent of jury service and makes the public admonitions for universal participation somewhat hollow.

Id.

472. G. Thomas Munsterman and Janice T. Munsterman are Director of the
pose yet another alternative. Using a stratified selection process, every "n"th name is selected following a random start.\footnote{G. Thomas Munsterman and Janice T. Munsterman, The Search for Jury Representativeness, 2 JUST. SYS. J. 59, 74 (1986).} The list is then divided into groups based on relevant demographic characteristics.\footnote{Munsterman, cited at note 473, at 74.} Each group is then sampled at random to arrive at a venire representing the desired cross-section of the community.\footnote{Id.} The Munstermans suggest that this type of selection can also occur at "secondary random draws."\footnote{Id. at 75.} A secondary random draw can occur in the selection of panels from the list of those qualified to serve.\footnote{Id. at 75.}

A second method of stratification suggested by the Munstermans is to select by district, town or voting precinct and to draw the same percentage of names from each subdivision.\footnote{Id. at 75.} Use of district stratification ensures that each subdivision in the community is proportionately represented.\footnote{Id.}

A final stratified selection procedure proposed by the Munstermans modifies each district by proportionately selecting jurors out of each district to compensate for the difference between districts.\footnote{Munsterman, cited at note 473, at 75.} This guarantees proper representation among citizens from each district.\footnote{Id.} To employ this method, however, jurisdictions must gather the necessary evidence to support the calculations of selection weights and to formulate the strata characteristics of each group.

The 1991 Report of the New York State Judicial Commission on Minorities proposed a different solution.\footnote{Report of the New York State Judicial Commission on Minorities, Vol. 2 (April, 1991) 225 (citing New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom).} A recommendation was made to either increase jury fees to an amount which will make it economically possible for all income brackets to serve on the jury, or to require employers to continue paying a juror's regular salary while employees are on jury duty.\footnote{Report of the New York State Judicial Commission, cited at note 482, at 225.}

An additional method to increase representativeness is to en-
courage participation. Before participation can increase, however, the judicial system must find ways to ensure that a citizens' participation is "meaningful and useful." This will help to enhance both the citizens' perception of the court system, and decrease a citizens' reluctance to participate on a jury. A decrease in the reluctance will also increase the quality of jury panels. As our judicial system strives to become, and does become, more inclusive, our perception of the cornerstone of that system — the jury — will come to reflect that inclusiveness, and more citizens will be willing to participate.

Even as legislators and community groups have deplored the lack of minority participation on juries, courts have begun to take action. The Fifth Circuit has recognized the distinction between the issue of whether a particular jury was picked by random selection, and whether African-Americans actually served on the jury. Courts should recognize the importance of whether minority jurors were actually summoned and served. Concern for whether the process is legitimate in its exclusion should not be relevant to the inquiry. Concern as to how many African-Americans or other minority group members should compose a jury panel are matters that should be answered by legislators and administrative agencies. If they fail to act, the courts must step in.

486. Id.
487. Id.
489. Supporters of this policy believe:
Court[s] will find that meaningful black representation in race-related cases is constitutionally compelled when it accepts one or both of two principles. First, when black people are not represented on juries, the black community and the black criminal defendant or civil litigant are denied the equal protection of the laws; any process which results in the absence of black jurors is constitutionally suspect. While random selection may in some cases suffice, any method of restricting jury service which is adopted creates a consequent obligation to ensure that that method does not result in the absence of blacks from juries. Second, in state criminal cases, any black defendant tried by a jury which does not significantly represent black people is denied a fair trial. The acceptance of either or both of these principles presumes that the Court[s] will remove the hurdles it has set up. But whether black representation be achieved by constitutional command or legislative or administrative innovation, another, and equally crucial, question will remain: how large should the black presence be? Not "whether black jurors," but "how many?"

The Case for Black Juries, cited at note 459, at 547.
In Ramsey County, Minnesota, District Court Judge Lawrence Cohen recently ruled that, in the interest of fairness, a Hispanic man could not be tried from a randomly selected pool of 113 prospective jurors that included only one Hispanic.\textsuperscript{490} Ramsey County utilizes a random selection process to derive a jury list.\textsuperscript{491} According to the 1990 census, 2.2\% of the residents of Ramsey County are Hispanic.\textsuperscript{492} Judge Cohen and the attorneys involved in the case agreed to supplement the jury pool with the names of two more Hispanic individuals who were already scheduled to be called for jury duty the next week.\textsuperscript{493} This is an example of the court employing its own methods to accurately reflect the entire community. Judge Cohen's mandatory minimum representation should result in more attorneys requesting a racially balanced jury, and will hopefully encourage other judges to address this issue.

Judge M. Andrew Dwyer, Jr., of the New York Rensselaer County Court, has utilized an innovative "coupon" idea to encourage community participation in the jury process.\textsuperscript{494} This coupon urges individuals to volunteer their names for the master juror list.\textsuperscript{495} Approximately one thousand people responded to the coupon call for jury service.\textsuperscript{496} Several hundred people responded to a similar advertisement in 1984.\textsuperscript{497}

In addition, Judge Dwyer stresses the importance of expanding source lists to increase minority participation on juries.\textsuperscript{498} His master source list has included, but is not limited to, names from the Department of Motor Vehicles licensed driver list, New York State's income taxpayers list, the Board of Elections voter registration list, housing authorities in the community, and volunteers

\textsuperscript{490} Transcript of Proceedings, Minnesota v. Charles (No. K0-92-1621) (Minn. 2d Jud. Dist. August 10, 1992) [hereinafter Charles Transcript].
\textsuperscript{491} Charles Transcript, cited at note 490, at 4.
\textsuperscript{492} Id. at 6.
\textsuperscript{493} Id. at 8-9.
\textsuperscript{494} Eric Drexler, Court issues juror coupon, TROY NEW YORK RECORD, January 7, 1993, at C1. The coupon reads "I WANT TO BE A JUROR" across the top, and has blanks for the individual's name, address and telephone number. \textit{Id.} The bottom of the coupon indicates the address to which it should be sent, and also states, "I would like to be placed on the jury eligibility list. I am at least 18 years old, a resident of Rensselaer County and have no felony convictions." \textit{Id.}
\textsuperscript{495} Drexler, cited at note 495, at C1.
\textsuperscript{496} Telephone interviews with the Honorable M. Andrew Dwyer, New York Rensselaer County Court Judge (August 6, 1993) and Peter Minahan, Jury Commissioner of Rensselaer County (October 24, 1994).
\textsuperscript{497} Telephone Interview with Judge Dwyer, cited at note 496.
\textsuperscript{498} Id.
Names are selected randomly by computer from the master source list. After random selection, most jurisdictions stop. Judge Dwyer, however, suggests adding another step. Individuals who are selected from the master source list are sent a jury questionnaire that requests, among other information, the race of the prospective juror. Once these forms are completed, the judge would have the jury commissioner randomly select, by computer, prospective jurors in proportion to the percentage that each racial group bears to the total population of the county. Judge Dwyer's proposed plan is a two-stage random selection process with intervention after the first stage to ensure a racial balance on the jury according to the demographic composition of the community.

A court in Sheridan County, Nebraska, where the source list had been comprised only of registered voters, has also interfered with the random selection process to increase the representativeness of jury pools. In one instance, the trial court heard testimony from defense witnesses who visually observed the race of jurors and reviewed the juror names. This evidence illus-

499. Id.
500. Id.
501. Judge Dwyer's jurisdiction has not yet implemented the Judge's proposal.
502. Id. Furthermore, similar procedures are employed by Maricopa County, Arizona and the Federal District Court system. Arizona's qualification form asks prospective jurors to indicate their race to aid the court in monitoring compliance with the fair cross-section requirement. The Federal District Court Juror Qualification Form also asks potential jurors to specify their race to insure compliance with the fair cross-section requirement. The federal form also notes that federal law requires prospective jurors to indicate their race so that racial discrimination in the juror selection process can be avoided.
503. Telephone Interview with Judge Dwyer, cited at note 496.
504. GINGER, cited at note 432, at 303.
505. Id. at 304. It is also interesting to note that the state, in voir dire, provided proof that Native Americans were a cognizable class by asking questions such as, "[d]o Indians in Sheridan County tend to stick together and do whites in Sheridan County tend to stick with whites?" Id. at 303. The two defense witnesses, Charles Plantz and David Clegg testified as follows:

Charles Plantz, a local attorney, testified that he had seen most of the jury panels from which juries had been selected in Sheridan County over the past seven years, that this was around 1600 people, that he would have noticed any Indian people on such panels since it was so unusual to see them there, and that he remembered only five or six Indian people on the panels. He also testified that he had received the key number list of 2137 jurors whose names had been selected for possible service over the past five years by the Clerk, that he would recognize the names of any Indian people on the list from his knowledge of the community (based on his lifelong residence and his law practice), and that he recognized 20 such names. He had reviewed the Clerk's list of 987 jurors who had actually appeared in court for services on juries over the past five years, and he recognized four or five Indian people on that list.

David Clegg testified that he had seen four jury panels in Sheridan
trated that one percent or fewer Native Americans were on jury panels in a community where four to six percent of the population was Native American.\(^{506}\)

Defense counsel in this case presented a motion to supplement the venire with additional Native American names.\(^{507}\) The trial judge instructed the clerk to supplement the venire as requested.\(^{508}\) The clerk procured a supplemental list of names of sixty-five Native Americans, after inspecting names and addresses from the County Department of Public Welfare, school census records, and tribal rolls.\(^{509}\) The district court judge then determined that six Native Americans should be added to the venire, so that the percentage of Native Americans on the venire would correlate to the percentage of Native Americans in the community.\(^{510}\)

**EFFORTS BEING UNDERTAKEN IN ERIE COUNTY, PENNSYLVANIA**

Erie County utilizes multiple source lists derived from the lists of registered voters and licensed drivers. These lists are updated annually. In addition, anyone can volunteer to be added to the list of potential jurors. When an individual volunteers for jury service, after verification, that person's name is inserted in the master list in the spaces where duplicate names have been deleted.

There have been efforts in Erie County to obtain minority volunteers for jury duty; however, these efforts have been unsuccessful.\(^{511}\) Because no minorities came forward to volun-
teer, it became obvious that new efforts to increase diversity in the master source list were necessary. One solution was to have church leaders submit the names and addresses of their entire adult congregation for the master list. The letters resulted in submission of names by only two church leaders. The total number of names submitted was two hundred forty-six.

Surprisingly, this list of minority parishioners did have a significant effect on minority participation on the master jury source list. One might think that church members would also be registered voters and, therefore, the court's efforts would merely duplicate the names already on the master juror list. But, when the names and addresses of parishioners were compared with the names on the master source list, the results were startling. Of the two hundred fifty-one parishioners, only seventy-three were on the voter registration list. The use of the parishioner lists, therefore, substantially increased minority participation in the jury process in Erie County.

I personally introduced the topic to twenty minority individuals who were participating in a leadership training course for the United Way, entitled "Project Blueprint". One item which was discussed was the court's efforts to have church leaders submit names of parishioners. Surprisingly, participants in the training course believed that because some church ministers engaged in factional religious conflicts or disputes among themselves, teambuilding among these ministers could not be expected to achieve the court's goal of including additional minority citizens on the source list. They were not astonished to hear that only two min-

supplement current jury selection lists.
UBASOE (United Brothers and Sisters of Erie) did circulate and re-circulate the enclosed juror sign-up sheet among the local minority community. However, the response has been nil . . .

. . . Erie's minority community needs to understand the importance of assuming personal responsibility for the lack of black jurors. The local minority community needs to act, not react!

Id.

512. Letters from the Honorable Roger M. Fischer of the Court of Common Pleas of Erie County to 33 local community pastors and elders whom Judge Fischer believed were leaders in churches predominately attended by minorities (June 12, 1992) [hereinafter June 12 Letter from the Honorable Roger M. Fischer]. Judge Fischer assured these community leaders that submission of names would increase minority representation on Erie County juries. Id. Judge Fischer also reduced any uneasiness about the submission of names without the permission of the congregants by stressing in his letters the importance of jury service and by stating that "all citizens are obligated to participate." Id.


514. Id. Several names were submitted to supplement this list to bring the number of names to a grand total of 251. Id.
isters had responded to the request for parishioners' names. Project Blueprint leaders suggested that the court approach non-religious leaders including people like themselves to obtain names of volunteers from the community.

Seeking access to broader lists to be added to the master juror list, this author personally contacted Attorney Jean Graybill, counsel from the Department of Public Welfare in Harrisburg, Pennsylvania, in March of 1993 and again in October of 1994. The Department's difficulties in releasing information about its clients were discussed. Ms. Graybill indicated that the lists of welfare recipients are confidential pursuant to federal and state law, which restrict the release of recipient information to very limited purposes that do not include master juror lists.515 The confidentiality of welfare recipients is intended to protect the privacy of welfare recipients. There is a concern that the lack of confidentiality of assistance records could have a chilling effect on applicants or potential applicants who may be entitled to benefits such as monetary and medical assistance, and food stamps.516

Housing authority lists may be another source of additional names. In the city of Erie, according to the controller for the Erie Housing Authority, forty-nine percent of the households are Caucasian, forty-one percent are African-American and ten percent are Hispanic.517 This author is not aware of a jurisdiction in Pennsylvania that has utilized housing authority lists and a concern arises as to whether access to these lists is statutorily permissible.

Court access to lists of high school graduates, however, is not prohibited.518 Because a large city school district could include the most concentrated minority population in the community, future use of lists of high school graduates could be an effective way to increase minority participation in the jury source list.

516. It is the Department's position that the Commonwealth Court, and not the Court of Common Pleas has sole jurisdiction to order the release of any records that are confidential under state law. Interview with Jean Graybill, Counsel for the Department of Public Welfare, October, 1994. According to Ms. Graybill, a jury commission which did not use school census lists, the telephone book, and other lists that were not confidential, would bear a heavy burden in demonstrating the necessity of using confidential public assistance lists. Id.
517. Interview with Charles J. Lepo, the Controller for the Erie Housing Authority (September 13, 1994). These statistics were valid as of December, 1993.
518. Letter from the Honorable Roger M. Fischer of the Erie County Court of Common Pleas to the author (December 22, 1992) and Interview with Donald Wright, Solicitor for the Erie County School District (August, 1994).
Pennsylvania neither prohibits nor authorizes inquiry into the racial identity of its prospective jurors. New York shares the same frustration over the absence of legislation permitting or prohibiting inquiries into the race of a juror.\(^{519}\) Data on jurors' race, however, is vital if courts are to monitor the representativeness of juror pools and to modify any identifiable weaknesses. Unless the court can identify jurors by race, "the court system is marred by inequality which it may be powerless to remedy under existing policies."\(^{520}\)

**CONCLUSIONS AND RECOMMENDATIONS**

Resistance to change is built into the court system through the concept of *stare decisis*. Case law precedents create consistency, reflect fairness and demonstrate "our commitment to equality, our respect for the individual, and our belief in personal freedom."\(^{521}\) We are indeed a "tradition-bound" judicial system.\(^{522}\) Although the system is rooted in fundamental traditional principles of fairness, however, the demographics of society have changed dramatically. Because our judicial system depends on the public's confidence and because society will continue to experience change, our judicial system must also change. Our goal is to place more minority jurors in jury pools, and a demographic approach accomplishes this goal. It incorporates an objective standard rather than a judge's or a jury commissioner's subjective standard to increase minority participation in the jury pool.

This concept will meet resistance because it means change. The paradigm of random selection can only be effectively changed through the court's leadership, direction, and involvement. Opponents of change will continue to point to the constitutionality of the current system of random selection. However, the Constitution provides only a starting point for rights and opportunities for fairness and justice. The Constitution does not prohibit or limit the courts from assuming the burden of improving the jury process.

The courts should also place reasonable limitations upon valid juror excuses. A balanced jury pool is diminished when jurors are excused without appearing before the court to explain their difficulty in serving as a juror. Thus, before a juror is excused, the

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520. *Id.* at 234.
court must emphasize to that juror the importance of all citizens participating in the jury process. If the court or jury commissioner finds this instruction too administratively burdensome, a video with a judge and potential juror requesting to be excused could suffice to inform the juror of the importance of service.

Resolving the community’s perception of minority representativeness will be healthy for the democratic principle embodied in the modern American concept of juries — impartiality. By addressing and resolving public perceptions, we can reach the laudable goal of proving that the judicial system and the jury process are both color-blind and color-conscious.