Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County

Ted M. Eades

REVISITING THE JURY SYSTEM IN TEXAS: A STUDY OF THE JURY POOL IN DALLAS COUNTY

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The 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. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.[1]

I. INTRODUCTION

THE American jury system is designed so that litigants—both civil and criminal—can argue their cases to people drawn from a cross-section of society. The founding fathers guarded this right because most citizens were confident that an impartial jury of their peers would decide cases fairly, at least more so than judges who were instruments of the state.

Today public confidence in the jury system has waned. Although few people heard the evidence presented at trial, the public was outraged by jury verdicts in both the O.J. Simpson and McDonald's hot coffee cases. And Americans continue to be ashamed of our history of all-white juries

* Ted M. Eades is an Associate of Weil, Gotshal & Manges LLP in Dallas, Texas. He served as editor-in-chief of the *SMU Law Review* from 1999 to 2000.

1. Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) (citations and quotation marks omitted). The importance of the jury system applies to the administration of civil justice as well.

condemning African-American defendants.[2] Sometimes the appearance of justice is as important as justice itself.

In 2000 The Dallas Morning News and the *SMU Law Review* examined a list of the people summoned for jury duty in Dallas County and the resulting venire.[3] The study shed light on possible constitutional challenges to the jury selection process in Dallas County. The purpose of this article is twofold: (1) to highlight various findings in the study, and (2) to give an overview of the potential constitutional problems with the jury selection procedures in Dallas County.

II. DESCRIPTION OF THE STUDY

In a study conducted by The Dallas Morning News and *SMU Law Review*, pollsters found that in mid-February 2000, Dallas County officials mailed out 13,027 summonses in anticipation of the fifty-five civil and criminal trials scheduled to begin the week of March 6, 2000. An additional 585 people—not included in the mail-out figure—were expected to show up at the courthouse because they had answered summonses for earlier court dates but asked to reschedule to this date. Of the 13,612 who were supposed to show up for jury service, only 2214 did.

Some of the people who did not show up were people who would have been disqualified anyway because of their age, because they cannot read or write English, or because they are not legal citizens. But most of the citizens who did not post simply refused to participate in the jury system.

More than 3,000 summonses were returned unopened because they could not be delivered, and 1,600 people actually returned their summonses with reasons for why they could not or would not serve. Many others called the clerk's office to reschedule.

The Dallas Morning News and *SMU Law Review* decided to focus on the people who actually showed up to the courthouse ready to serve—those referred to as the "Shows"—and the people who presumably received their summonses but neither showed up nor called to reschedule—the "No-Shows." The pollsters then randomly selected 401 of the Shows and 400 of the No-Shows to create an accurate sample of the respective populations. Dallas County District Attorney Bill Hill gave the No-Shows who responded immunity from any potential prosecution for failing to appear for jury duty.[4]

The results of the study suggest two major problems with the jury selection process in Dallas County. First, two distinct groups of people are substantially underrepresented on the venire—Hispanic Americans and those in low-income households. A possible constitutional challenge to

2. For a fascinating story about one such incident, *see generally* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT (1999).

3. "Venire" is the word used today to describe the panel of persons selected for jury duty and from which the jurors are to be chosen. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 909 (Oxford University Press 1995) (1987).

4. We would like to thank Mr. Hill for his support and assistance with this study.

the jury selection procedures in Dallas County will be addressed in Part IV.E below. Second, at least 80% of the people summoned each week for jury duty disregard their summonses and refuse to participate in the system. Some of the reasons given by the No-Shows for their lack of participation and their demographics will be examined in Part III below.

III. RESULTS OF THE STUDY

In *Powers v. Ohio*,[5] the court best exemplified the importance of citizens' roles in the jury system by stating:

> Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. . . . It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law. . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.[6]

If citizens appreciate the honor and privilege of jury duty, then why do many of them choose not to report for service? Four out of five people summoned for duty in Dallas County do not show up at the courthouse.[7]

A. A Look at the Venire

The study suggests that three groups of people are underrepresented on the venire in Dallas County—young adults (aged 18 to 34), Hispanic Americans, and those living in households earning less than $35,000 each year. Thirty-seven percent of Dallas adults are between the ages of 18 and 34,[8] but only 8% of the prospective jurors are in that age group.[9] Hispanic Americans represent 23% of the population in Dallas County[10] but only 9% of the venire.[11] And nearly 40% of people in Dallas County live in households earning less than $35,000 a year,[12] while just 13% of jury candidates are in that group.[13]

B. A Look at the No-Shows

As part of the study, the participating Shows and No-Shows answered demographical questions, as well as other questions that delved into the attitudes of their respective employers toward jury service and the wages

5. 499 U.S. 400, 407 (1991).
6. *Id.* (internal quotations marks and citations omitted).
7. *See* 2000 Study conducted by The Dallas Morning News and *SMU Law Review* (hereinafter "DMN/SMULR Study") (on file with the *SMU Law Review*).
8. *See* Statistics compiled by the Texas State Data Center at Texas A&M University and CACI Marketing Systems, Inc. (hereinafter "TSDC and CACI data") (on file with the *SMU Law Review*).
9. *See* DMN/SMULR Study.
10. *See* TSDC and CACI data.
11. *See* DMN/SMULR Study.
12. *See* TSDC and CACI data.
13. *See* DMN/SMULR Study.

they received or would have received from their employers had they served. The answers to these questions may help explain why so many of these people refused to report for jury duty.

Twice as many Hispanic Americans as Whites, about one in five, responded that it is difficult to take time off work in order to serve.[14] About the same ratio of people earning less than $50,000, about one in five, also find it difficult to take time off work.[15]

One of three Hispanic No-Shows say they do not receive any wages from their respective employers if they serve on a jury, while only one in five Whites make the same claim.[16] Even more dramatically, 44% of the No-Shows with annual household incomes of less than $35,000 say they receive no wages at all from their respective employers if they serve on a jury.[17]

In Texas, employers are not required to pay their employees full wages even though the employee is taking time off work to serve. Furthermore, jurors who serve are paid only $6 per day, which is the amount it costs to park at the courthouse. This policy has a disparate impact on racial minorities.[18] Even in the group who showed up for jury duty, 17% of African-Americans and 19% of Hispanic Americans claim they received no wages at all from their employers while serving on the jury, while only 5.4% of Whites claim the same thing.[19] And in a telling sign, 85.8% of the Shows received full wages, while only 56.9% of the No-Shows would have received full wages.[20] The No-Shows were three times more likely than the Shows to receive no wages at all.[21]

The study shows that when people of racial minorities do show up for jury service, they are pleased with the system. Of the people who showed, 65.4% of the Hispanic Americans, 55.2% of the African-Americans, and 46.6% of the Whites believed that jury service was time well spent.[22] Of the Hispanic Americans who reported for duty, 84.6% said they had faith in the jury system, while only 7.7% of them had very little faith in the system.[23] These data indicate why it is so important to involve all groups of citizens in our jury system.

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14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. In the No-Show group, 51.2% of the Hispanic respondents, 45.1% of the African-Americans, but only 15.2% of the Whites have an annual household income of less than $35,000. *See id.*
19. *See* DMN/SMULR Study
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*

IV. CONSTITUTIONAL CONCERNS

A. INTRODUCTION

One of the fundamental aspects of our justice system is that criminal defendants have the right to be tried by an impartial jury "of the State and district wherein the crime shall have been committed, ..."[24] It has long been recognized that this means a jury representative of the community as a whole.[25] "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."[26] But what happens if a jury does not truly represent the community?

A defendant may bring an action challenging the jury selection process. Although he cannot expect an exact reflection of the community in his jury of twelve, he can expect the venire, the pool of people from which the twelve will be selected, to be a true reflection of the community.[27] If the venire does not mirror the community, the defendant has two ways to challenge it: (1) on equal protection grounds, under the equal protection clause of the Fourteenth Amendment for state juries or under the due process clause of the Fifth Amendment for federal juries; or (2) on grounds that a violation of the fair-cross-section-of-society requirement found in the Sixth Amendment has occurred.

The study suggests that two groups in particular are underrepresented on the Dallas County venire—Hispanic Americans and low-income people. The venire thus does not reflect the community as a whole, and if the legislature in Texas does not act to reform the jury selection process, Dallas County could be open to challenge under the U.S. Constitution. Jury selection procedures in Texas have faced many constitutional challenges in the past.[28]

B. TEST FOR AN EQUAL PROTECTION VIOLATION

Ordinarily, equal protection challenges are brought by criminal defendants. To bring a challenge to the jury selection procedures on equal protection grounds, a defendant must meet the following elements of the requisite prima facie case. First, he must "establish that the group [to which he belongs] is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or applied."[29] Second, he must prove "by comparing the proportion of the group in the total

24. U.S. CONST. amend. VI.

25. *See* Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

26. *Id.*

27. *See* Holland v. Illinois, 493 U.S. 474, 480 (1990).

28. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Carter v. Texas, 177 U.S. 442 (1900).

29. Castaneda v. Partida, 430 U.S. 482, 494 (1977).

population to the proportion called to serve" as jurors the degree of underrepresentation.[30] Third, he must show that the selection procedure "is susceptible of abuse or is not racially neutral," which is supported by "the presumption of discrimination raised by the statistical showing."[31]

Once the defendant has demonstrated the elements of a prima facie case, he has raised an inference of a discriminatory purpose.[32] The burden then shifts to the State to rebut the case. To rebut the defendant's prima facie case, the State must proffer evidence that shows a "discriminatory purpose was not involved or that such purpose did not have a determinative effect."[33]

Two other ways exist to challenge an equal protection violation caused by underrepresentation of certain groups in jury wheels. A criminal defendant who is not a member of the underrepresented group may be able to bring an action on behalf of a third party. In addition, members of the underrepresented group may challenge the venire despite the fact that they are not on trial.

Under *Castaneda v. Partida*,[34] a defendant who wishes to raise an equal protection challenge must be a member of the underrepresented group. But some courts have allowed defendants to raise equal protection challenges on behalf of third parties, those members of society who have been excluded from jury service.[35] Most of the courts allowing this have decided that the Supreme Court left room for these arguments in *Peters v. Kiff*.[36] It can be argued that the Court settled this issue in *Powers v. Ohio*.[37] In *Powers*, the Court decided that a criminal defendant has standing to object to the prosecution's use of peremptory strikes to exclude members of a race even though the defendant does not belong to that race.[38] The Court set forth the requirements needed to assert a third-party claim in the following way:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute, . . . the litigant must have a close relation to the third party, . . . and there must exist some hindrance to the third party's ability to protect his or her own interests.[39]

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30. *Id.* (Although *Castaneda* involved the selection of grand jurors, the argument applies equally to the selection of petit jurors.)

31. *Id.*

32. *Id.* at 495.

33. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

34. 430 U.S. at 494.

35. *See* Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1924 n.58 (1994).

36. *Id. See also* Peters v. Kiff, 407 U.S. 493 (1972).

37. *Id.* Powers v. Ohio, 499 U.S. 411 (1991). *See also* Mata v. Johnson, 99 F.3d 1261, 1269 (5th Cir. 1996) (stating "a litigant need not be of the same race as the excluded jurors to have standing to champion their rights.").

38. *See Powers*, 499 U.S. at 416.

39. *Id.* at 410-11 (internal quotation marks and citations omitted).

The Court held that the first criterion was met because the prosecution's discriminatory use of peremptory challenges caused the defendant "cognizable injury," and the defendant had a "concrete interest" in challenging the practice.[40] The reasoning behind the Court's decision is that "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process, . . . and places the fairness of a criminal proceeding in doubt."[41] A criminal defendant attempting to bring an equal protection claim on behalf of a third party who was excluded from the jury wheel at the beginning of the jury selection process could argue that the first criterion was also met in his case based upon the same reasoning.

The second criterion—a close relationship between the defendant and the third party—was met in *Powers* because the defendant was "as effective a proponent of the right as the [third party], . . .[b]oth the excluded juror and the criminal defendant ha[d] a common interest in eliminating racial discrimination from the courtroom, . . ." both might otherwise have "los[t] confidence in the court and its verdicts, . . . [a]nd, there can be no doubt that [the defendant would] be a motivated, effective advocate for the excluded venirepersons' rights."[42] The same reasoning would apply in the case of a criminal defendant attempting to bring a cause of action on behalf of a member of a race systematically excluded from jury service by being underrepresented on the venire.

Finally, the third criterion in *Powers* was met because, although a potential juror has the right to bring suit on his own behalf, these cases are rare.[43] The barriers to these types of suits are "daunting"—the potential juror has no opportunity to be heard at the time of exclusion, and the financial burden of litigation far outweighs the financial stake involved.[44] Again, the same reasoning would apply to a defendant bringing an equal protection challenge on behalf of a person systematically excluded from the jury pool.

A third alternative for equal protection challenges is as follows. Members of a group systematically excluded from the jury venire, even though they are not the ones on trial, may bring a cause of action. For example,

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40. *Id.* at 411. *But see* Justice Scalia's dissenting opinion, 499 U.S. at 426-27, in which he states:

> Today's opinion makes a mockery of [the injury-in-fact] requirement. It does not even pretend that the peremptory challenges here have caused this defendant tangible injury and concrete harm—but rather (with careful selection of both adjectives and nouns) only a "*cognizable* injury," producing a "concrete *interest* in challenging the practice." .... I have no doubt he now has a cognizable injury; the Court has made it true by saying so. And I have no doubt he has a concrete interest in challenging the practice at issue here; he would have a concrete interest in challenging a mispronunciation of one of the jurors' names, if that would overturn his conviction. But none of this has anything to do with injury in fact.

Id. at 427 (emphasis in original) (citations omitted).

41. *Id.* at 411 (citation and internal quotation marks omitted).

42. *Powers*, 499 U.S. at 413-14.

43. *See id.* at 414.

44. *Id.* at 414-15.

in *Berry v. Cooper*, black and female residents of Peach County, Georgia, filed a class action lawsuit claiming that they had been excluded from jury service based upon their race and gender.[45] They asked the district court to declare that the grand and petit juror lists were unconstitutionally composed, to enjoin their use, and to order new lists prepared.[46] State judges had ordered new lists to be prepared, and the federal district court ordered the defendants to comply with these orders. After the defendants complied with the orders, plaintiffs again filed suit claiming that the revised lists were unconstitutionally composed. The district court found that although the revised lists might not have remedied the intentional discrimination, the plaintiffs, by showing nothing more than statistical underrepresentation, failed to prove intentional discrimination.[47] The Fifth Circuit reversed the district court, citing *Castaneda v. Partida* for the proposition that statistical evidence is sufficient to establish a discriminatory purpose.[48]

C. Test for a Sixth Amendment Violation

In *Glasser v. United States*, the Supreme Court said that the selection of jurors must "comport with the concept of the jury as a cross-section of the community."[49] Unfortunately the Court has never addressed exactly how this ideal should be accomplished.

In 1968 Congress passed the Jury Selection and Service Act (JSSA),[50] which codified the fair cross-section requirement. Congress declared, "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[51] And, "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status."[52] Although the JSSA applies to the federal courts only, the Sixth Amendment guarantee is required in the state courts as well.[53]

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45. 577 F.2d 322, 324 (5th Cir. 1978).
46. *See id.*
47. *See id.* at 327.
48. *See id.*
49. 315 U.S. 60, 86 (1942). *See also* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("The unmistakable import of this Court's opinions, at least since 1940 . . . and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.")
50. The Jury Selection and Service Act, Pub. L. No. 90-274, § 101, 82 Stat. 54 (1968) (codified at 28 U.S.C. §§ 1861-1869 (1994)).
51. 28 U.S.C. § 1861 (1994).
52. 28 U.S.C. § 1862 (1994).
53. Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.")

In 1979 the Court set forth a three-part test for proving a violation of the fair-cross-section requirement.[54]

> [T]o establish a prima facie violation of the fair-cross-section requirement, the defendant must 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.[55]

"[O]nce the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community," the burden shifts to the State to "justify[ ] this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest."[56]

D. Applying the Tests Generally

The two tests outlined in Parts IV.B and IV.C above are similar in application. Two major differences are (1) an equal-protection claimant must demonstrate intentional discrimination, and (2) the equal-protection test requires an examination of the alleged underrepresentation over a significant period of time.[57] For these reasons, claimants generally find it easier to bring an action under the Sixth Amendment's fair cross-section requirement. But in some circumstances claimants find it wiser to bring equal-protection challenges, either because they desire the different mathematical criteria that some courts have imposed for determining what constitutes substantial underrepresentation, or because it is the only way to challenge successfully the jury selection process when filing on behalf of a third party or on their own behalf when they are not litigants.[58]

1. Defining a Distinctive Group

Both the equal protection and Sixth Amendment tests share the same first element. The group of people allegedly excluded from jury service must be "sufficiently numerous and distinct,"[59] and must be recognizable as a class of people singled out for different treatment "not based on some reasonable classification."[60] The Court notes that race and color are easily identifiable groups, but "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."[61] Groups that the

54. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979).
55. *Id.*
56. *Id.* at 368.
57. *See* Timmel v. Phillips, 799 F.2d 1083, 1083 n.1 (5th Cir. 1986).
58. *See* Detre, *supra* note 34, at 1916.
59. Taylor v. Louisiana, 419 U.S. 522, 531 (1975).
60. Hernandez v. Texas, 347 U.S. 475, 478 (1954).
61. *Id.*

Court has recognized as distinct include Hispanic Americans,[62] African-Americans,[63] groups defined by gender,[64] economic status,[65] and other classifications.[66]

2. Measuring Underrepresentation

Courts have employed four different methods of measuring underrepresentation.[67] The most common method is absolute disparity. The Court itself used absolute disparity in determining underrepresentation in both *Castaneda v. Partida*[68] and *Duren v. Missouri*.[69] In order to calculate absolute disparity, the percentage of representation of a distinct group on the venire is subtracted from the percentage of representation of the group in the population as a whole.[70] For example, if women comprise 50% of the population but only 35% of the venire, then the absolute disparity is 15%. Although this is a simple calculation to make, some commentators and advocates have argued that this measure is not an accurate reflection of the potential problem.[71] If Native Americans, for instance, represent 5% of the population but are totally excluded from jury service, the absolute disparity is only 5%. Therefore, when the distinct group in question is a relatively small minority of the population, the resulting absolute disparity calculation underestimates the effect of the alleged systematic exclusion.

A second measure of underrepresentation is absolute impact. To calculate absolute impact, multiply the absolute disparity by the size of the panel in question.[72] Using the absolute disparity of 15% in the example above, if the venire includes sixty people, then the absolute impact of the jury selection procedures is nine. That is, if the percentage of women on the venire was an accurate reflection of the population, then it would include nine more women than it does now. This measure has the same drawbacks as absolute disparity; in fact, absolute impact is merely another way to look at absolute disparity.

A third measure of underrepresentation is comparative disparity. This measure is calculated by dividing the absolute disparity figure by the percentage of the group in the overall population, then multiplying that result by 100%.[73] If Native Americans represent 5% of the population but only 1% of the venire, then the comparative disparity is 80% (4% divided

62. *See id.* at 479-80; Castaneda v. Partida, 430 U.S. 482, 495 (1977).
63. *See* Strauder v. West Virginia, 100 U.S. 303, 308-309 (1880).
64. *See Taylor*, 419 U.S. at 531.
65. *See* Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946).
66. *See id.* ("[P]rospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these [economic, social, religious, racial, political, and geographical] groups.").
67. *See* Detre, *supra* note 34, at 1917.
68. 430 U.S. 482, 495 (1977).
69. 439 U.S. 357, 365-66 (1979).
70. *See* Detre, *supra* note 34, at 1917.
71. *See id.* at 1921.
72. *See id.*
73. *See id.*

by 5%, multiplied by 100%). This measure is sometimes flawed in that it tends to overestimate the damage caused by jury selection procedures that for whatever reason exclude a tiny minority from jury service.[74]

The fourth measure that has been mentioned by some courts is the statistical decision theory (SDT).[75] The SDT method, which is generally calculated by using the binomial distribution, reflects the probability that the underrepresentation of the distinct group was the result of chance.[76] Although this method has been mentioned as a possible means of measuring underrepresentation, it is rarely used.[77]

No matter which measure is employed to determine the effect of the underrepresentation, a number of other problems exist. First, how is the composition of the population determined? Courts typically examine United States Census Bureau data.[78] Although this is probably the most accurate information available, some argue that minority figures are not fairly reflected in the census numbers.[79] A second problem is whether the percentage of a group on a panel should be compared to the population as a whole or to the population eligible to serve as jurors. The *Castaneda* and *Duren* courts compared the representation to the census data, which reflect the population as a whole. But other courts have refused to follow.[80] It makes sense to compare the group on the venire to the population of eligible jurors, but as a practical matter, unless one of the parties to the action can prove the composition of eligible jurors, the Census Bureau is the most accurate, readily available source of data.

A third concern in measuring underrepresentation is the period of time over which the underrepresentation must occur. Generally, the requirement to prove the second element of both the equal protection and Sixth Amendment tests is the same. But here, the two tests diverge. Under the *Castaneda* equal protection test, "the degree of underrepresentation must be proved . . . over a significant period of time."[81] This requirement is not found in the *Duren* fair cross-section test. Claimants may be able to prove, presumably, a degree of underrepresentation over a much shorter span of time in those cases. But some courts suggest that claimants need to have evidence that spans at least some time, otherwise they fail to meet the third element of the fair cross-section test, which is the systematic

74. *See id.* at 1921-22.

75. *See id.* at 1918.

76. *See* Detre, *supra* note 26, at 1918.

77. *See id.* at 1922-23.

78. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 495 (1977); Duren v. Missouri, 439 U.S. 357, 364-65 (1974); Alexander v. Louisiana, 405 U.S. 625, 627 (1972); Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954).

79. *See* Cynthia A. Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 605-06 (1990).

80. *See* United States v. Brummitt, 665 F.2d 521, 529 (5th Cir. 1981) ("[T]he disparity between the proportion of members of an identifiable class on a jury list must be based not on *total* population but, instead, on those of the identifiable class who are *eligible* to serve as jurors.") (emphasis in original).

81. *See Castaneda*, 430 U.S. at 494.

exclusion requirement.[82] Unfortunately, the Court has never addressed what time span is sufficient in each case.

Finally, the most important question is what constitutes "substantial" underrepresentation. In *Swain v. Alabama*,[83] the Supreme Court held that a showing that an identifiable group in a community is underrepresented by as much as 10% is not enough to prove purposeful discrimination under an equal protection examination. A strong argument can be made that this 10% floor should not apply to Sixth Amendment cases,[84] but most courts, even if they distinguish between the two tests, use the floor in either case.[85]

The *Castaneda* Court found a 40% disparity was enough to establish a *prima facie* case of an equal protection violation.[86] But the Court has never set forth a bright-line test—only that "substantial" underrepresentation lies somewhere between 10% and 40% absolute disparity. The Court has found, however, that a 14.7% absolute disparity was sufficient.[87]

3. *Proffering Evidence of Intentional or Systematic Exclusion*

To prevail on an equal protection claim, a claimant must prove intentional discrimination. A discriminatory purpose may be presumed by a showing of statistical evidence, but the State has an opportunity to rebut the presumption by demonstrating that a discriminatory purpose was not involved.

Claimants generally find Sixth Amendment claims easier to argue. Here the claimant need not show intentional discrimination but only systematic exclusion. This can be shown by examining the composition of the weekly venire over a period of time, which in *Duren* was "nearly" a year.[88] Once the examination "indicates that the cause of the underrepresentation [is] systematic—that is, inherent in the particular jury-se-

82. *See, e.g.*, McGinnis v. Johnson, 181 F.3d 686, 690 (5th Cir. 1999) (quoting Timmel v. Phillips, 799 F.2d 1083, 1087 (5th Cir. 1986)) ("We have held that 'one incidence of a jury venire being disproportionate is not evidence of a 'systematic' exclusion' .... Therefore, 'a one-time example of underrepresentation of a distinctive group wholly fails to meet the systematic exclusion element in *Duren*.'").

83. 380 U.S. 202, 208-09 (1965). This case was overturned by *Batson* v. *Kentucky* on other grounds. *See* 476 U.S. 79, 84 (1986). The test for representativeness still stands. *See id.*

84. *See* Williams, *supra* note 78, at 611.

85. *See id.*; United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980) ("Thus, while the *[Duren]* Court stated that statistical evidence is used to prove *different elements* in equal protection and sixth amendment claims, it did not indicate that the necessary amount of disparity itself would differ.").

86. *See* Castaneda v. Partida, 430 U.S. 482, 495-96 (1977).

87. *See* Jones v. Georgia, 389 U.S. 24, 25 (1967). *But see* United States v. Brummitt, 665 F.2d 521, 527 (5th Cir. 1981) (rejecting argument that a 19.6% disparity "between the percentage of Hispanics in the total population and the percentage of Hispanics in the Master Jury List result[ed] from the fact that prospective jurors [were] chosen solely from the voter registration lists and that Mexican-Americans traditionally register to vote in fewer numbers than do other recognizable groups").

88. *See* Duren v. Missouri, 439 U.S. 357, 366 (1979).

lection process utilized,"[89] then the State "bears the burden of justifying this infringement [of claimant's constitutional right to a jury drawn from a fair cross section of the community] by showing attainment of a fair cross section to be incompatible with a significant state interest."[90]

E. Applying the Tests in Dallas County

In Dallas County, the jury selection procedures may be challenged in one of four ways. First, a person from a low-income household or a Hispanic American could bring a class-action lawsuit challenging a violation of his or her equal protection rights.[91] Second, a litigant could raise an equal protection claim on behalf of a third-party member of an excluded group. Third, a litigant who is a member of one of the excluded groups could raise an equal protection challenge himself. And fourth, a litigant, whether or not a member of one of the excluded groups, could claim a Sixth Amendment violation.

Under both the *Castaneda* and *Duren* tests, the first two elements are relatively the same. The first hurdle required to establish a *prima facie* claim under either approach is to prove that the members who have allegedly been excluded are a sufficiently numerous and distinct group. The Supreme Court has already identified Hispanic Americans as a distinct group.[92] Low-income wage earners have also been identified as a distinct group.[93]

The second hurdle is to demonstrate that these two groups are substantially underrepresented. The best way to do this is to compare Census Bureau data to the percentage of each group represented by the venire. It is important to recognize that the statistics set forth in this article are not official Census Bureau figures. The figures used in this article are estimates, and because the study examined only one week's venire, these numbers will probably not be sufficient to raise a constitutional challenge. The numbers in this study are important, however, because they reflect an estimate of the actual population and venire compositions.

Because Hispanic Americans represent 23% of the population in Dallas County but only 9% of the venire, the absolute disparity of Hispanic Americans is 14%. The absolute disparity of low-income individuals is 27%. If these numbers are supported by official Census Bureau data and the composition of the venire over a sufficient length of time, a court could find these disparities substantial.[94]

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89. *Id.*

90. *Id.* at 368.

91. Although the study shows that young adults are significantly underrepresented in Dallas County, the Supreme Court has never identified this as a distinctive class.

92. *See* Castaneda v. Partida, 430 U.S. 482, 495 (1977) ("[I]t is no longer open to dispute that Mexican-Americans are a clearly identifiable class.")

93. *See* Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) (holding that jury commissioners could not systematically exclude daily wage earners from the venire).

94. *See* Jones v. Georgia, 389 U.S. 24, 25 (1967) (finding a 14.7% disparity unconstitutional).

Facing the third hurdle, in an equal protection claim, the claimant must establish that these groups are intentionally discriminated against. In a Sixth Amendment claim, the claimant need show only a systematic exclusion. Dallas County officials can argue that they use voter registration and driver's license lists to randomly select who will be summoned. It will be difficult for a claimant to overcome this evidence in an equal protection case.

A Dallas County claimant will find it easier to bring a Sixth Amendment claim. An examination of the weekly venire will show that juries in Dallas County are not drawn from a cross-section of the community. Something in the system is inherently wrong, and is excluding distinct groups from the venire. The rules in Texas, such as paying jurors only $6 per day, make it so financially onerous that low income people cannot afford to fulfill their civic duty. While Dallas County officials may have an easy time showing that they do not intentionally discriminate against these groups, they will have a much more difficult time demonstrating a significant state interest that would justify this infringement.

In a class action challenge, members of either of these two groups could request a preliminary injunction enjoining Dallas County officials from using the existing jury selection procedures. It should be argued that the courts are under a duty to ensure that everyone is entitled to a jury drawn from a cross-section of society.

The statutory prohibition on discrimination in the selection of jurors, 18 U.S.C. § 243, enacted pursuant to the Fourteenth Amendment's Enforcement Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts have an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.[95]

This would be a difficult challenge, though, because of the intentional discrimination requirement found in the equal protection cases.

V. CONCLUSION

The Dallas County jury system is primed for a constitutional challenge. Although the intent of the officials operating the jury wheel may not be to discriminate, the reality is that at least two distinct groups are being excluded from the weekly venire. Something inherent in the design of the system causes large numbers of people to stay home. Commentators have suggested many ways to improve participation.[96] Some states, for example, Arizona and New York, have radically reformed their jury systems. The legislature in Texas should be proactive and not risk the chance that they will be forced to act under court order.

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95. Powers v. Ohio, 499 U.S. 400, 416 (1991).

96. *See* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995); Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238 (1994).