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I. INTRODUCTION

IN 1940, William A. Vinson,[1] Sam W. Davis, and Harry W. Freeman presented a novel legal argument to the Supreme Court of the United States on behalf of their indigent eighteen-year-old African-American client convicted of rape: Juries and grand juries should accurately reflect the demographic makeup of the communities from which they are chosen. The Supreme Court, unanimously agreed, holding that "juries as instruments of public justice . . . [should] be a body truly representative of the community."[2]

More than six decades later, the promise of a "jury of our peers" remains largely unfulfilled in many jurisdictions throughout the country. Recent data reveals that in two Texas jurisdictions—Dallas and Harris counties—jury panels or jury venires are not representative of the local communities. In both jurisdictions, less than one-fifth of the people summoned to jury service ever make it to the courthouse. Among those who do show up, Latinos,[3] young adults, and lower-income hourly wage earners are significantly underrepresented when compared to their percentages in the general population.

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1. Vinson was a founding partner of Vinson & Elkins, L.L.P., the Houston-based international law firm.

2. *See* Smith v. Texas, 311 U.S. 128, 130 (1940).

3. The terms "Latino" and "Hispanic" are used interchangeably herein.

The data revealing the disparities is detailed, consistent, and growing. The first indication that there was a problem with the jury pools in Texas came in 2000, when *The Dallas Morning News* and *Southern Methodist University Law Review* did a comprehensive study ("DMN-SMULR Study") of whom participates in the Dallas County jury process.[4] The publication, after studying a week of Dallas County jury data, found: (1) four-of-five people called for jury service do not show up; (2) even though more than one-in-four Dallas County citizens are Hispanic, only one-in-fourteen people participating in jury service are Latino; (3) 8% of prospective jurors are young adults (eighteen to thirty-four year olds), while 37% of the county's population falls into that category; and (4) while nearly 40% of the population lives in households earning $35,000 or less, only 13% of the people participating in jury service do.[5]

Subsequently, the law firm Vinson & Elkins L.L.P., as part of a *pro bono* project, studied the jury venires of more than two dozen criminal and civil jury trials in Dallas and Harris counties. The law firm's findings were nearly identical to the DMN-SMULR Study. For example, the V&E study, which is ongoing, found that Latinos comprise between 7% and 12% of the jury venires in all two-dozen cases, even though Hispanics in 2005 comprise approximately one-third of the populations of Dallas and Houston. The V&E research, which is now being cited in at least four active death penalty appeals, shows a similar disparity for young adults.[6]

So what?

Why does it matter?

Juries are the community's representatives in the American justice system. It is the jury that instills public confidence in the court system by giving the people a voice in the administration of justice. Nearly 70% of Americans believe that the right to have disputes decided by a jury of ordinary, randomly selected citizens is the most important element in the legitimacy of the court system in the United States.[7] Without widespread public participation in the jury system, public confidence in the system itself will fail. This endangers the rule of law, and is therefore a grave threat to the health of our democracy.

The purpose of this article is to (1) bring to the attention of the legal profession, the judiciary, and the public at large that public participation in the American jury system is on the decline; (2) examine new data showing that specific segments of our society are significantly underrepresented in the jury system; (3) analyze the evolution of the law and

4. *See* The Dallas Morning News & SMU Law Review 2000 Study [hereinafter "DMN-SMULR Study"] (on file with the *SMU Law Review*).

5. *See* Mark Curriden & Allen Pusey, *A Poor Reflection: Number of Minority, Lower-Income Jurors Doesn't Mirror Community*, THE DALLAS MORNING NEWS, Oct. 22, 2000, at A1.

6. *See* Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 No. 4 JUDGES J., 17 (2004).

7. American Bar Association poll, *And Justice for All: Ensuring Public Trust and Confidence in the Justice System* (2001) (cited in Paula Hannaford-Agor, *Increasing the Jury Pool*, National Center for State Courts (August 2004)).

public policy regarding the need for representative jury pools; (4) study the current status of legal standards governing the composition of our jury pools; and (5) identify remedies being implemented to ensure the constitutional guarantee that all people have the right to a fair trial by an impartial jury.

A. The Power and Role of the American Jury

No country in the world matches America's embrace of using citizen panels to judge the guilt of those accused or to settle civil disputes. Every day, tens-of-thousands of people serve as jurors in courtrooms around the country. So important is the right to trial by jury that the Founding Fathers guaranteed it in two amendments in the Bill of Rights.[8] When it comes to citizenship, the ability to sit on a jury ranks with freedom of speech, freedom of religion, and the right to vote. Indeed, one may argue that jury service is more important than the right to vote.[9] After all, voting is merely a right; jury service is a requirement of citizenship. American juries serve many functions. They are judges of evidence, mediators of disputes, and the conscience of our communities and political institutions. Juries possess amazing power. They may sentence people to death or set free someone accused by the state of horrible crimes, bring influential corporations to their knees through damage awards, or toss out frivolous lawsuits by plaintiffs abusing the legal system. Consequently, the jury is arguably the purest form of democracy and self-governance. It is the way the people directly participate in the system of justice.[10] Juries are asked to weigh the evidence concerning major public policy issues—ranging from the coverage duties of healthcare maintenance organizations and the liability of tobacco companies, to the determination of what

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8. *See* U.S. Const. amend. VI ("In 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 . . . ."); and U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

9. *See* John Attanasio, *Forward: Juries Rule*, 54 SMU L. Rev. 1681, 1681-83 (2001). Attanasio is Dean of the Southern Methodist University School of Law and is revered as one of the premier experts on Constitutional Law in the United States.

> "The three most important powers of a citizen are the power to vote, the power to exercise free speech, and the power to sit on a jury," says Attanasio . . . "The additional, complicating legal issue with jury service is that while each citizen enjoys a constitutional right to participate in the jury process, the parties to a case also possess a constitutional right to have our citizens participate in the jury process."

Walters & Curriden, *supra* note 6, at 17 (quoting Dean John Attanasio).

10. *See* Balzac v. Porto Rico, 258 U.S. 298, 300 (1922) ("The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse.") (quoted in Powers v. Ohio, 499 U.S. 400, 406 (1991)).

is obscene material and what is freedom of expression.[11] As the Supreme Court has rightly explained:

> 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 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."[12]

The Sixth Amendment is the people's ultimate check on prosecutorial power.[13] A group of the accused's fellow citizens must give its unanimous approval before any state or federal agent imprisons, fines, or ends the life of an individual in the United States.

> 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 over-conditioned 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.[14]

Thomas Jefferson considered "trial by jury . . . as the only anchor yet imagined by man by which government can be held to the principles of its constitution."[15] Tocqueville wrote in 1835 that he "who punishes the criminal is therefore the real master of society."[16]

Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit has argued that the jury is an important political institution and that the Seventh Amendment's guarantee of the right to trial by jury in civil suits is "a powerful allocator of power and an equally powerful expression of the values of representation."[17] United States Chief Justice William Rehnquist recognized the importance of independent juries when he wrote that "[t]he founders of our Nation considered the right of

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11. *See* Mark Curriden & Allen Pusey, *Deliberate Influence: Juries are increasingly using verdicts to demand change, make statements*, THE DALLAS MORNING NEWS, June 25, 2000, at A1.

12. Powers v. Ohio, 499 U.S. 400, 407 (1991) (citations omitted) (quoting Duncan v. Louisiana, 301 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

13. *See id.* at 411 (stating that "[t]he jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors.") (citing Baston v. Kentucky, 476 U.S. 79, 86 (1986)).

14. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing in part Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968)).

15. *Letter from Thomas Jefferson to Thomas Paine* (July 11, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 269 (Julian P. Boyd ed., Princeton Univ. Press 1958).

16. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 272 (J.P. Mayer ed., George Lawrence, trans., Harper Perenial 1966) (1835).

17. *See* Patrick Higginbotham, *Foreword*, 54 SMU L. REV. 1679, 1680 (2001). Author Mark Curriden also interviewed Judge Higginbotham at length about the role of juries in current American society.

trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[18]

II. THE FACTS

In their Petition for Certiorari to the Supreme Court of the United States in *Smith v. Texas*,[19] attorneys Vinson, Davis, and Freeman developed not only a novel legal theory, but they also presented their argument in a novel manner: they used statistics.[20]

Smith's lawyers researched ten years of jury and grand jury records and compared the data with statistics from the 1930-U.S. Census report.[21] They found that while African-Americans comprised more than 20% of the Harris County population, only 1% of the people called to jury duty were African-American.[22]

In addition, Smith's lawyers argued that only eighteen of the 512 citizens summoned to grand jury service during the entire decade of the thirties were African-Americans, and only five of those eighteen people were chosen to actually serve on a grand jury.[23] By contrast, 379 of the 494 white people called for grand jury duty were selected and served.[24] In fact, the lawyers could identify only one African-American man whom had even been summoned in 1938 to grand jury service in Harris County, the year their client was indicted.[25]

A. V&E Jury Protect

In 2003, Vinson & Elkins created a *pro bono* effort, referred to as the "V&E Jury Project," designed to examine public participation and diversity in the Texas jury system.[26] Following in the footsteps of William Vinson and his co-counsel, the V&E Jury Project focuses on data collected from examining jury venires in more than two dozen individual cases in Dallas and Harris counties.[27] In all, demographic information for more than 4,000 jurors from the two jurisdictions has been examined and analyzed.[28]

A compilation of the data reveals that less than 20% of the people whom are mailed summonses for jury service in Dallas and Harris coun-

18. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).
19. Smith v. Texas, 311 U.S. 128 (1940).
20. *Id.* at 129.
21. *Id.* at 128-29.
22. *See* Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the United States, Smith v. Texas, 311 U.S. 128 (1940) (No. 33).
23. *Id.*
24. *Id.*
25. *See id.*
26. V&E Files Historic Constitutional Challenge, Seeks Greater Public Participation in Jury System, *available at* http://www.velaw.com/resources/firm_news.asp (Dec. 10, 2004).
27. *Id.*
28. *See id.*

ties ever make it to the courthouse. [29] Of those whom do show up, only about one-in-nine are Latino, even though Latinos comprise more than one-in-three of the people living in the two jurisdictions.[30] The data also shows that about 21% of the people participating in jury service are young adults (eighteen to thirty-four year olds), even though nearly 40% of the population in the two counties are in that age group.[31]

According to Thomas Baker,[32] a law professor at Florida International School of Law in Miami and an expert in U.S. Constitutional Law, "[t]he mere fact that so many people are not showing up is a big problem." "The jury is the community's representative in our justice system. If a representative cross-section means anything, we must have significant public participation. One out of every five people is not even close to being representative."[33]

As part of the V&E Jury Project, the law firm retained Dr. Harold J. Hietala[34] to review and analyze the data, and to work with counsel in petitioning courts regarding the issue of representativeness. As of March 1, 2005, he had filed affidavits regarding the statistical representativeness in five criminal cases in Texas—all on behalf of defendants.[35] In each case, lawyers for the defendant provided Dr. Hietala with the juror information cards that the completed in the five cases. The juror cards included the juror's name, maiden name, age, ethnicity, and other personal information. Dr. Hietala performed a two-prong-statistical analysis to determine the ethnicity of the juror: (1) he calculated the jurors' self-identification information regarding race; and (2) he examined the names and maiden names of each juror to see if they are recognized Hispanic names, as identified by the U.S. Census Bureau and other databases. Dr. Hietala then determined "minimum" and "maximum" estimates regarding ethnicity and age, and he compared those estimates to the Census Bureau data regarding population. Dr. Hietala has testified that he believes the "minimum" calculation is probably more accurate, but that the "maximum" calculation gives the state the maximum benefit of the doubt. [36]

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29. Aff. of Harold J. Hietala, *Ex Parte Anthony Dewayne Doyle*, Criminal District Court No. 2, Dallas County, Texas, No. F03-45484.

30. *Id.*

31. *Id.*

32. Walters & Curriden, *supra* note 6, at 17.

33. *Id.* (internal quotations omitted).

34. Dr. Harold J. Hietala is Professor Emeritus at the Departments of Anthropology and Statistical Science at Southern Methodist University in Dallas, Texas. He has a Doctorate in Biostatistics with a minor in Anthropology from the University of California at Los Angeles, and a Master's Degree in Mathematics from Montana State University.

35. Aff. of Harold J. Hietala, *supra* note 29.

36. *Id.* In this affidavit, Dr. Hietela provides cumulative jury data for the various cases that he has studied, including the following: *Texas v. Rayford*, Writ Case No. 73,991, Criminal District Court, Dallas, Texas, No. F00-01529-1H; *Texas v. Rivas*, Criminal District Court, Dallas County, Texas, No. F01-00323-T; *Texas v. Battaglia*, Criminal District Court, Dallas County, Texas, No. F01-52159; *Ex Parte Anthony Doyle*, Criminal District Court No. 2, Dallas County, Texas, No. F03-45484; and *Texas v. Ronald Prible*, 351st District Court, Harris County, Texas, No. 921126-A.

1. Texas v. Rayford[37]

Rayford is a death penalty case pending in Dallas County.[38] Dr. Hietala was hired in 2002 by defense counsel Lydia Brandt during the state habeas petition proceedings to examine the juror information cards for the 683 prospective jurors who appeared for jury service in the case. Of those, 104 prospective jurors identified themselves as Hispanic.[39] In Dr. Hietala's examination of names, surnames and maiden names, he identified an additional twenty-four jurors whom might have been Latino, even though they did not identify themselves as Hispanic.[40]

In a sworn affidavit filed in the matter, Dr. Hietala testified that the percentage of Hispanics in the *Rayford* jury venire ranged from a minimum of 7.53% to a possible maximum of 9.66%.[41] The 2000 U.S. Census Bureau calculates that Hispanics comprise 26.37% of the Dallas County population.[42] As a result, the absolute disparity between the percentage of Hispanics in the population and the percentage of those participating as jurors in the *Rayford* case ranged from a minimum of 15.18% to a maximum of 18.84%.[43]

Dr. Hietala also examined the percentage of young adults (eighteen to thirty-four year olds) among the prospective jurors. He found that 23.11% of the panel fell into that age group, even though 39.81% of Dallas County's population is in that age group—an absolute disparity of 16.70%.[44]

2. Texas v. Rivas[45]

Rivas is a death penalty case currently on appeal in the state habeas phase.[46] Dr. Hietala was hired in 2003 by defense counsel to examine demographic information regarding the 540 individuals who appeared for jury service in the case. He found that a minimum of 8.27% and a maximum of 10.93% of the prospective jurors were Hispanic, causing an absolute disparity of between 15.24% and 18.40%.[47]

Dr. Hietala also found that 20.41% of the jury panel in the *Rivas* case were young adults (eighteen to thirty-four), even though 39.81% of Dallas County's population is in that age group—an absolute disparity of 19.40%.[48]

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37. Writ Case No. 73,991, Criminal District Court, Dallas, Texas, No. F00-01529-1H.
38. The *Rayford* case was not originally part of the V&E Jury Project; however, V&E Jury Project team members have collaborated with defense counsel.
39. *See* Aff. of Harold J. Hietala, *supra* note 29.
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. Criminal District Court, Dallas County, Texas, No. F01-00323-T.
46. The *Rivas* case was not originally part of the V&E Jury Project; however, V&E Jury Project team members have collaborated with defense counsel.
47. *See* Aff. of Harold J. Hietala, *supra* note 29.
48. *See id.*

3. Texas v. Battaglia[49]

Battaglia is a death penalty case on appeal in the state habeas petition phase. Dr. Hietala was hired as part of the V&E Jury Project to examine the demographic information of the 480 members of the jury panel who appeared in the matter. Hispanics, according to his analysis, comprised a minimum of 8.83% to a maximum of 12.03% of the jury venire, causing a minimum absolute disparity of 14.87% and a maximum disparity of 17.54%.[50]

Dr. Hietala also found that 23.75% of the jury venire in the Battaglia case were young adults (eighteen to thirty-four), even though 39.81% of Dallas County's population is in that age group—an absolute disparity of 16.06%.[51]

4. Texas v. Doyle[52]

Doyle is a death penalty case on appeal in the state habeas stage. Dr. Hietala was hired as part of the V&E Jury Project to analyze the demographic information of the 565 prospective jurors who appeared for jury service in the case. The examination found that Hispanics comprised a minimum of 7.96% and a maximum of 9.73% of the jury panel, causing an absolutely disparity of between 16.64% and 18.41%.[53]

Dr. Hietala also found that 20.71% of the jury venire in the *Doyle* case were young adults, even though 39.81% of Dallas County's population is in that age group—an absolute disparity of 19.10%.[54]

5. Texas v. Prible[55]

Prible is a death penalty in the state habeas stage of the appeal. Dr. Hietala was contracted as part of the V&E Jury Project to examine the demographic information of the 300 prospective jurors who appeared for jury duty in the case. He concluded that a minimum of 9.96% and a maximum of 12.33% of the jurors were Hispanic.[56] Harris County's adult population is 29.64% Hispanic.[57] As a result, the absolute disparity in the Prible case was between 17.31% and 19.68%.[58] Dr. Hietala also reported that 22.7% of the jury panel was between the ages of eighteen and thirty-four.[59] Harris County's population for that age group is 38.3%, an absolute disparity of 15.6%.[60]

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49. Criminal District Court, Dallas County, Texas, No. F01-52159.
50. *See id.*
51. *See id.*
52. Criminal District Court No. 2, Dallas County, Texas, No. F03-45484.
53. *See id.*
54. *See id.*
55. 351st District Court, Harris County, Texas, No. 921126-A.
56. *See id.*
57. *Id.*
58. *See id.*
59. *See id.*
60. *Id.*

In addition, there is new data from Harris County that appears to strongly support the argument that there is an underrepresentation in the jurisdiction's jury pool. An independent report conducted by the Houston Chronicle found:

> Residents of Harris County's predominantly white, affluent neighborhoods are up to seven times more likely to show up for jury duty than those in the county's lower-income, mostly minority neighborhoods . . . The low turnout from some pockets of the county skews the racial, cultural and economic makeup of the jury panels from which juries are chosen.[61] The newspaper also found that only 17% of Harris County residents respond to their jury summonses.[62]

According to the report:

> The 10 ZIP codes with the highest turnout, all exceeding 30%, are predominantly white, with a median annual income of $77,083. The 10 ZIP codes with the lowest turnout, all below 10%, have populations that are predominantly Hispanic or black. Those areas had a median income of $29,636. [T]he areas with the lowest jury participation were Hispanic.[63]

B. The Dallas Morning News-SMU Law Review Study

While many lawyers and judges had suspected for years that their jury venires were not representative of the community, the evidence supporting such a view was thin.[64] That changed on October 22, 2000, when *The Dallas Morning News* unveiled a series of studies it had conducted with the *SMU Law Review* regarding the demographic make-up of the Dallas County jury pool and jury venires.[65]

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61. Andrew Tilghman, *Turnout Skews Juries' Makeup*, Houston Chron., Mar. 6, 2005, *available at* http://www.chron.com/CDA/ssistory.npl/topstory/3070514 (last visited May 26, 2005).

62. *Id.*

63. *Id.* Tilghman analyzed data from the Harris County District Clerk's Office, which revealed that more than 772,000 residents were summoned from more than 140 ZIP Codes for jury duty in 2004.

64. The statistical evidence required to determine if segments of society are being excluded is scant. The few studies that have been done are quite recent, have been promoted very little, and will likely face scrutiny. But these statistical studies are the only measuring stick available.

65. *See* DMN-SMULR Study, *supra* note 4. The DMN-SMULR Study examining the demographic make-up of Dallas County's jury pool was part of an eighteen-month examination by the newspaper and the law school. The research resulted in sixteen articles in The Dallas Morning News and a special issue of the SMU Law Review. Special Issue, 54 SMU L. Rev. 1679 (2001). The articles received wide acclaim, winning the prestigious American Judicature Society's Toni House Award, the American Board of Trial Advocates Journalism of the Year Award, the Amicus Award given by the Association of Trial Lawyer of America, and numerous other journalistic and law-related honors. In addition, the authors of the studies have lectured on their findings at state and federal judicial conferences around the country. The examination of juror demographics was chronicled in detail in two articles. *See* Ted Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. Rev. 1813 (2001); Curriden & Pusey, *supra* note 5, at A1. Mark Curriden, one of the authors of the instant article, was a leader in the development and execution of the DMN/SMULR Study.

The study scrutinized every aspect of jury service in Dallas County during the week of March 6, 2000.[66] The publications obtained the names, addresses, and contact information for each of the 13,612 people summoned to serve jury duty that week. These 13,612 people were randomly chosen by a computer from nearly two million Dallas County residents on the juror roll. The Secretary of the State of Texas supplies the names of prospective jurors to Dallas County court officials. The state compiles the names from two lists: Texas Driver's License and Voter Registration. According to the survey, the demographic (ethnicity, age and income) make-up of the 13,612 closely resembled the demographics of Dallas County, with an average variance of approximately 3%.[67] Of the 13,612 people randomly called for jury service, only 2,214—or 17%—showed up.[68] In 1999, Dallas County court officials sent jury notices to more than 650,000 people, but only 19% responded.[69]

Dallas and Harris counties are not alone in their struggle of getting citizens to fulfill their jury service. In Los Angeles, officials say the response rate is closer to 11%.[70] Tom Munsterman, the director of Jury Studies at the National Center for State Courts ("NSCS") in Washington, D.C., says that, "'most states wrestle with equally high no-show rates.'"[71] He says "'this very same problem is playing itself out in just about every major city in this country.'"[72]

The lack of cross-sectional representativeness in the jury venire is likely worse in states with large Hispanic populations. Hispanics are the fastest growing segment of the population in forty-two of the nation's fifty largest cities.[73] But the NCSC reports that the underrepresentation of Hispanics is "bad and getting worse" in most major metropolitan communities.[74] NCSC officials cite Florida, Georgia, California, and Texas as facing the biggest problem.[75]

Specifically, the DMN-SMULR Study found that 6.55% of the people who appeared for jury service the week of March 6, 2000 were Hispanic.[76] When calculating that Hispanics comprised 26.37% of the adult popula-

66. *See* Aff. of Allen Pusey, *Ex Parte William Earl Rayford*, 125 S.W.3d 521 (Tex. Crim. App. 2005). Part of the DMN-SMULR Study examined the Dallas County jury pool for the week of March 6, 2000. Researchers, with the assistance of Dallas County court officials, followed the 13,612 summonses mailed to jurors that week to see what would happen to each one. The researchers also commissioned a survey, conducted by a professional polling service, to interview 401 of those who did not respond to the jury summons and 400 of those who did.

67. *See* Curriden & Pusey, *supra* note 5, at A1.

68. *Id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See* U.S. Census Bureau, 2000.

74. *See* Curriden & Pusey, *supra* note 5, at A1.

75. Information obtained from interview with Tom Munsterman by Mark Curriden in Fall 2004.

76. DMN-SMULR Study, *supra* note 4.

tion of Dallas County in 2000, the absolute disparity is 19.82%.[77]

The DMN-SMULR study also revealed that young people (eighteen to thirty-four) were 7.87% of the prospective jurors, even though 39.81% of Dallas County falls into that age bracket.[78] The absolute disparity is 31.94%.[79]

But the most revealing part of the DMN-SMULR Study was the finding that while nearly 40% of the adult citizens living in Dallas County earn less than $35,000 annually, only 13% of prospective jurors from the week of March 6, 2000 were in that category.[80] By contrast, more than 68% of the people who presented themselves for jury service came from households earning incomes of $50,000 or more, even though only 42% of Dallas County earn that much money annually—an actual disparity of 26%.[81]

The question, of course, is why do more than 80% of the people called for jury duty not show-up?

The Study found that just slightly more than 3,000 of the 13,612 jury summons were returned unopened to Dallas County-court officials as undeliverable by the U.S. Postal Service.[82] The reason that the summons are returned, according to the study, is that the people had moved.[83] The problem is that Texas—like most states—uses the mailing addresses on people's driver's licenses, which are updated only every four-to-six years.[84] If a citizen moves during that time, but does not inform the Texas Department of Public Safety, the summons is mailed to an incorrect address.[85]

This inaccurate mailing list does not affect all groups equally. The DMN-SMULR Study found that Hispanics, young adults, and low-income adults were disproportionately represented among the 3,000 summonses returned undeliverable.[86] According to social scientists quoted in the report, one likely reason for this trend is that these demographic groups are moving up the economic ladder in Texas and therefore tend to move more frequently as their income allows them to afford nicer places to live.[87]

The study also revealed that 1,600 of the people summoned either claimed an exemption or said that they were disqualified from serving.[88]

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77. *See* Mark Curriden, *A Poor Reflection: Number of Minority, Lower-Income Jurors Doesn't Mirror Community*, THE DALLAS MORNING NEWS, Oct. 22, 2000, at A1.
78. DMN-SMULR Study, *supra* note 4.
79. *See id.*
80. *Id.*
81. *See id.*
82. DMN-SMULR Study, *supra* note 4.
83. *Id.*
84. *See* Aff. and Test. of Donna Roach, Jury Services Manager, Dallas County, Texas (July 15, 2002), *Ex Parte William Earl Rayford*, Texas Court of Criminal Appeals, No. 73,991 (2003).
85. *See id.*
86. DMN-SMULR Study, *supra* note 4.
87. *See* Curriden & Pusey, *supra* note 5, at A1.
88. DMN-SMULR Study, *supra* note 4.

To claim a voluntary exemption, citizens must be in school, have children at home under the age of ten, or be over the age of sixty-five.[89] The study found that the citizens who claimed the exemptions were disproportionately Hispanic, young adults, and low-income adults.[90] About 2,100 of the people who were mailed summonses were notified that they were on standby status and were not required to report unless contacted by the court.[91] That left roughly 4,600 people who received their jury summonses and were expected to report to the courthouse.[92] The summonses informed potential jurors that they could call the courthouse to reschedule, though few did. The notice also informed the citizens that failing to appear for jury service might result in a $1,000 fine. Nevertheless, only 2,214 actually appeared for jury duty.[93]

According to the Study, the low number of non-white people was reflected in the fifty-one civil and criminal trials tried in Dallas County the week of March 6.[94] Accounting for the adult population of Dallas County, a twelve-person jury that exactly reflected the population would include three Hispanics and at least one black person.[95] However, non-white people did not comprise a majority in any of the fifty-one trials examined, even though 49% of Dallas County is non-white, and one may argue that through random selection, at least one of the juries would include more non-whites than whites.[96] By contrast, eight of the juries were all white.[97] Twenty-three of the juries had no Hispanics at all.[98] Eighteen juries included only one Hispanic.[99] Only three of the fifty-one juries had three Hispanics on it. Fifteen of the juries had no African-Americans.[100]

To find the answer why Hispanics, young adults, and low-income adults are not showing up for jury service in representative numbers, the DMN-SMULR Study had surveyed the 401 no-shows and 400 shows. The

89. A person is disqualified to serve as a petit juror unless he: (1) is at least eighteen years of age; (2) is a citizen of this state and of the county in which he is to serve as a juror; (3) is qualified under the constitution and laws to vote in the county in which he is to serve as a juror; (4) is of sound mind and good moral character; (5) is able to read and write; (6) has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court; (7) has not been convicted of a felony; and (8) is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.
TEX. GOV'T CODE ANN. § 62.102 (Vernon 1997).

90. DMN-SMULR Study, *supra* note 4.

91. *See* TEX. GOV'T CODE ANN. § 61.001(a) (Vernon 1997) (providing that reimbursement of jurors is to be not less the $6 nor more than $50 per day); *see also* Curriden & Pusey, *supra* note 5, at A1.

92. *See* Curriden, *supra* note 5, at A1.

93. *See id.*

94. DMN-SMULR Study, *supra* note 4.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

surveys found:[101]

- Twice as many Hispanics as white people found it difficult to take time off work for jury duty.
- More than 19% of Hispanics and 17% of African-Americans received no wages from their employers if they reported to jury service. By comparison, only 5% of white people made that claim.
- People earning less than $35,000 annually were twice as likely as those making more money to have their employers take steps to discourage them from doing their jury service.
- Forty percent of people who made $35,000 or less had their employers cut their wages or refuse to pay them during their jury service. By contrast, only 14% of those earning more than $35,000 had their wages reduced.
- Forty-four percent of the no-shows with annual incomes of less than $35,000 received no salary at all if they reported to jury duty.
- Nearly 86% of the people who showed up for jury service said they received their full salary. Only 57% of the no-shows said they would have received their full wage if they had gone.

The bottom line, according to the Study, was money.[102] Texas pays jurors six dollars per day[103]—about the cost to park at the downtown courthouse. The state does not cover the cost of lunch.[104] Nor does it pay the cost of transportation.[105] Additionally, the state does not require employers to pay workers while they do their civic duty.[106]

The most common reason given for why people skipped jury service was because they could not afford it.[107] If they did not go to work, they would not be paid. If they were not paid, they could not put food on the table, pay the car bill, or the rent. Unfortunately, these issues disproportionately impacted Hispanics, young adults, and low-income, hourly-wage earners.[108] True, there were other significant factors. There were cultural

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101. *See id.*

102. *See id.*

103. The National Center for State Courts (NCSC) reports that Missouri, New Jersey, and Texas pay jurors the least $6 a day. Alabama, Arizona, California, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin pay $10-19. Alaska, Arkansas, Delaware, Maryland, Mississippi, Montana, New Hampshire, North Dakota, Pennsylvania, and Washington pay $20-25 a day; District of Columbia, Florida, Georgia, Hawaii, Minnesota, Nebraska, Nevada, North Carolina, Vermont, Virginia, and Wyoming pay $30-35 a day; New Mexico, New York, South Dakota, and federal courts pay $40 a day; Colorado, Connecticut, Massachusetts, and Utah pay $50 a day. *Jury Management: Juror Pay in the States*, National Center for State Courts, *available at* http://www.ncsonline.org/wc/Publications/KIS-JunManPayStates.pdf (last visited May 28, 2005) [hereinafter NCSC Report].

104. *Id.*

105. *Id.*

106. The United States Department of Justice reports that six states, as well as the District of Columbia, require employers to pay their employees while they are serving jury duty: Alabama, Colorado, Georgia, Massachusetts, New Jersey, and New York. *State Court Organization 1998*, Bureau of Justice Statistics, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sco9806.pdf (last visited May 28, 2005).

107. *See* Curriden & Pusey, *supra* note 5, at A1.

108. *See id.*

differences.[109] There were those who simply believed jury service was a waste of time.[110] There were those who reported being so disappointed in the justice system that they did not want to participate.[111] But the bottom line is that the law and how it is applied makes jury duty an onerous task.[112]

In addition, Dallas County, like most jurisdictions including Harris County, employs no enforcement mechanism to encourage people to go to jury service.[113] As a result, people in the survey said they knew that there would be no consequence if they simply ignored the jury summons.[114]

The DMN-SMULR Study is not alone in its conclusion that juror pay is the preeminent issue involving public participation. Jury researchers from NCSC surveyed 34,827 people who participated in jury service in California state courts in March 2004. They found that 67.1% of the prospective jurors whom were employed did not experience financial hardship as a result of their jury service.[115] By contrast, 67% of those who were self-employed said that jury duty caused them financial hardship.[116] The survey also found that money was a major issue in longer trials. Only 5% of the prospective jurors who earned less than $25,000 said that their employer would continue to pay their salary after ten days of jury service.[117] By comparison, 39.3% of those earning $65,000 said their employer would continue to pay them after ten days of serving on a jury.[118]

According to Paula Hannaford-Agor, a nationally-recognized expert in jury studies with NCSC, "[i]n spite of the historical importance and ongoing public support for the jury system, financial hardship—specifically the loss of income while on jury service—makes it more difficult for a large segment of the population to participate in the jury system in California and elsewhere in the United States."[119] She further asserts that

> [t]he absence of these individuals has profound implications for the continued viability and credibility of the jury system. It tends to skew the resulting composition of the jury pool to the more affluent segments of society; it distributes the burden of jury service inequitably on those with the financial wherewithal to serve; and it increases the costs associated with administering the jury system.[120]

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109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. *See* Aff. and Test. of Donna Roach, *supra* note 84.
114. *See* Curriden & Pusey, *supra* note 5, at A1.
115. Paula Hannaford-Agor, *Increasing the Jury Pool,* National Center for State Courts, August 2004, at 13.
116. *Id.*
117. *Id.*
118. *Id.* at 11.
119. *Id.* at 1.
120. *Id.*

III. THE LAW

A. *SMITH V. TEXAS* (1940): THE PROMISE OF THE TRULY REPRESENTATIVE JURY

An all-white Harris County grand jury in 1938 indicted Edgar Smith, a young African-American man from Houston, Texas, of raping a white woman. The jury convicted and sentenced him to life in prison.[121] Throughout the proceedings, Smith maintained his innocence and testified that the act of intercourse was at the invitation and with the consent of the alleged victim.[122]

To handle Smith's case, the court appointed Sam W. Davis and Harry W. Freeman, prominent criminal defense lawyers from Houston. After losing at trial and at the Texas Court of Criminal Appeals, Davis[123] and Freeman obtained the help of William A. Vinson, a prominent corporate litigator from Houston, for the appeal to the Supreme Court of the United States.[124] On March 18, 1940, Smith's lawyers filed a Petition for Writ of Certiorari presenting a novel and groundbreaking argument: Smith's constitutional rights under the Fourteenth Amendment[125] had been violated because Texas jury selection laws—and specifically the implementation of those laws—systematically excluded African-Americans from serving on the grand jury that indicted Smith and from participating in the jury that convicted him.[126]

Smith's lawyers presented the evidentiary record that no African-Americans were on the list of citizens from which the grand jury and the jury were chosen, even though more than 20% of Harris County was African-American.[127] The absence of non-white people, they argued, was not a statistical anomaly but was common place at the Harris County Courthouse in Houston.[128] Smith's lawyers argued that "Harris County had arbitrarily and systematically for a period of many years excluded" African-Americans from jury and grand jury service.[129] "[T]he discrimination is covered with a thin veneer of compliance with the law but which even upon a superficial examination appears inescapably as a scheme to

121. *See* Smith v. Texas, 311 U.S. 128 (1940).

122. *See* Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the United States, *supra* note 22.

123. Sam Davis's son, Sam W. Davis, Jr., went on to become a lawyer and a long-time partner at Vinson & Elkins L.L.P.

124. *See* Brief in Support of Petition for writ of Certiorari to the Supreme Court of the United States, *supra* note 22. *See also* HAROLD M. HYMAN, CRAFTSMANSHIP & CHARACTER: A HISTORY OF THE VINSON & ELKINS LAW FIRM OF HOUSTON 1917-1997, 212-213 (University of Georgia Press) (1998).

125. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

126. *See* Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the United States, *supra* note 22.

127. *Id.*

128. *Id.*

129. *See id.*

evade the law."[130] "Is it equal protection when, in *nearly ten years*, one percent of the grand juries are composed of Negroes, while more than twenty percent of the population is of that race!"[131]

> [E]qual protection to all is the basic principle upon which justice under law rests. Indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service.[132]

Smith's lawyers argued that jury attendance records in Harris County "clearly shows a sophisticated evasion of the law rather than an honest attempt to comply with the law."[133] "*The [Fourteenth] Amendment nullifies sophisticated as well as simple minded modes of discrimination.* It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[134] "Throughout every age and in every country, minorities—racial, religious, social or political—have been opposed or ignored by devious methods, oft times ingenious and sometimes ridiculous. . . . It is against such unjust practices that the Fourteenth Amendment stands."[135]

The Texas Attorney General countered that Texas law did not intentionally discriminate based on race.[136] Instead, the Attorney General argued that African-Americans tended to be excluded from jury service because they failed to meet non-racial qualifications required under state law.[137] The Attorney General argued that Edgar Smith still received a fair trial by an impartial jury despite the lack of African-Americans on the grand jury and in the jury venire.[138]

Justice Hugo Black, writing for a unanimous Supreme Court, sided with Smith's lawyers in a precedent-setting decision. With *Smith v. Texas*, the Supreme Court forged a new perspective in the evaluation of jury challenges. Although the Supreme Court acknowledged that the Texas jury scheme was "not in itself unfair; [and that the jury scheme was] capable of being carried out with no racial discrimination,"[139] Smith's lawyers proved to the Court that, despite the facially neutral Texas jury scheme, the jury officials in Harris County, Texas had intentionally and systemati-

130. *See id.*
131. *Id.* at 19.
132. *Id.* at 20-21 (citing Pierre v. Louisiana, 306 U.S. 354 (1939)).
133. *Id.* at 21.
134. *Id.* at 21.
135. *Id.* at 22.
136. *Smith*, 311 U.S. at 131.
137. *Id.* at 132.
138. *Id.*
139. *Id.* at 130-131. The Texas "key-man" jury selection scheme, in which jury commissioners personally selected jurors from the community, had the practical effect of excluding black citizens from jury service. *Id.*; *see also* Mitchell S. Zuklie, *Rethinking the Fair Cross Section Requirement*, 84 CAL. L. REV. 101, 107 (1996) (using the phrase "key man" when discussing *Smith v. Texas*.).

cally excluded black citizens from jury service.[140] The Supreme Court reversed Smith's conviction on the ground that enforcing an indictment returned by such a jury violated the equal protection rights of the defendant.[141] Justice Black wrote:

> 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. 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. . . . The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.[142]

B. The Fair Cross-Section—From *Smith v. Texas* to the Present

1. The Early Decisions

Smith v. Texas, which was brought under the Fourteenth Amendment, was a true landmark case in the advancement of the fair cross-section requirement, and it became the foundation for the development of modern fair cross-section analysis.[143] Specifically, as *Smith v. Texas* established, a person is denied his equal protection right to an impartial jury when the venire from which his jury was chosen is not reflective of a fair cross-section of the community. Of course, the idea of citizens sitting in judgment of one another can be found as far back as the drafting of the Magna Carta.[144] The right to have citizen juries was clearly on the minds of the Founding Fathers. Thomas Jefferson, in penning the Declaration of Independence, cited the fact that England had not permitted citizen juries as one of the reasons for rebellion."[145] However, American juries at that time were anything but a representative cross-section of the community. The first jury rolls consisted only of property owners, which by definition meant only wealthy white men.[146] While the Sixth Amendment provided for an "impartial jury," the legal interpretation of what that means has evolved significantly since the Founding Fathers drafted the amendment in 1791. In the years following *Smith v. Texas*, the Supreme Court periodically expanded and clarified the fair cross-section doctrine. However, as discussed herein, it was not until the court decided

140. *Smith*, 311 U.S. at 131.
141. *Id.* at 132.
142. *Id.* at 130.
143. *See* Zuklie, *supra* note 139, at 107-118 (arguing that the poor should be considered a "distinctive group" for purposes of fair cross-section analysis). The organization of this Section follows chronologically the relevant fair cross section cases and statutory developments presented in Zuklie's excellent summary. *See id.*; *see also* Eades, *supra* note 65, at 1820-21.
144. *See* Duncan v. Louisiana, 391 U.S. 145, 151 (1968).
145. *See* The Declaration of Independence para. 20 (U.S. 1776).
146. Zuklie, *supra* note 139, at 107 (citing Jon Van Dyke, Jury Selection Procedures 13-14 (1977)).

Taylor v. Louisiana in 1975 that the Court formally recognized the principle that inherent to the impartial jury of the Sixth Amendment is the right to have juries selected from a representative cross section.[147]

In *Glasser v. United States*, a 1942 case, the Supreme Court, in its first post-*Smith v. Texas* fair cross–section decision, further expanded the fair cross-section requirement by ruling against the requirement that jurors be selected from a particular private organization.[148] Glasser and two other defendants had alleged that "they were denied an impartial trial" in violation of the Sixth Amendment because the jury panel excluded "all women not members of the Illinois League of Women Voters."[149] The Supreme Court stated that notions "of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."[150] The Supreme Court noted that "[t]endencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."[151] Citing *Smith v. Texas*, the Court held that for the jury to be a "body truly representative of the community," [152] it must reflect a "cross-section of the community."[153] The Court further held that "[t]he deliberate selection of jurors from the membership of particular private organizations" violates the fair cross-section requirement.[154]

In *Thiel v. Southern Pacific Co.*, a 1946 case, the Supreme Court extended the fair cross-section requirement by ruling that jury officials might not intentionally exclude "daily wage earners" from federal jury service.[155] Declaring that "those eligible for jury service are to be found in every stratum of society," the Supreme Court held that discrimination against potential jurors on the basis of economic status was "abhorrent to the democratic ideals of trial by jury."[156] The Court stated "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community," and requires that court officials must select prospective jurors without systematically and intentionally excluding any of the economic, social, religious, racial, political, and geographical groups of the community[157]

In *Hernandez v. Texas*, a 1954 case, the Supreme Court recognized Mexican-Americans as a distinct group whose exclusion from jury service

147. 419 U.S. 522, 526-30 (1975).
148. 315 U.S. 60, 85-86 (1942).
149. *Id.* at 83-84.
150. *Id.* at 85.
151. *Id.* at 86.
152. *Id.* at 85 (citing Smith v. Texas, 311 U.S. 128, 130 (1946)).
153. *Id.* at 86.
154. *Id.*
155. 328 U.S. 217, 224 (1946). The underlying dispute was a civil claim removed to federal court under diversity jurisdiction. *Id.* at 219.
156. *Id.* at 220.
157. *Id.*

violates the Fourteenth Amendment.[158] As in *Smith v. Texas*, the Court noted that "the Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized without discrimination."[159] In reversing the conviction, however, the Supreme Court found the exclusion of Mexican-Americans from jury service to be unconstitutional because the statistics showed that for twenty-five years not a single Mexican-American had served on a jury in a county where 14% of the population were of Mexican-American descent.[160]

2. The Jury Selection and Service Act

In 1968, Congress reformed the federal jury system and enacted the Jury Selection and Service Act ("JSSA").[161] The JSSA provides that, "[i]t 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.*"[162] The JSSA further provides that "[n]o citizen shall be excluded from [jury service in the Federal courts] on account of race, color, religion, sex, national origin, or economic status."[163] Under the JSSA, Congress "established the machinery by which the stated policy was to be implemented."[164] That machinery was designed to "ensure the random selection of a fair cross section of the persons residing in the community."[165] In passing the JSSA, the congressional committees recognized the "political function" of the jury in the administration of law and that "the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice."[166]

3. Taylor v. Louisiana

In *Taylor v. Louisiana*, a 1975 case, the Supreme Court, while weighing a challenge to Louisiana's "opt-in" jury selection system, referenced the watershed significance of *Smith v. Texas* and declared:

> The unmistakable import of [the Supreme Court's] opinions, at least since 1940 , *Smith v. Texas, supra,* 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

158. 347 U.S. 475, 481-82 (1954) (holding unconstitutional the exclusion of Mexican-Americans from jury service).
159. *Id.* at 478-79.
160. *Id.* at 481-82.
161. Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified as amended at 28 U.S.C. §§ 1861-1869 (2000)); *see also* Zuklie, *supra* note 139, at 110-111 (citations omitted).
162. 28 U.S.C. § 1861 (2000) (emphasis added).
163. 28 U.S.C. § 1862 (2000).
164. *Taylor*, 419 U.S. at 529 (citing 28 U.S.C. §§ 1862-1866).
165. 28 U.S.C. § 1863(b)(3) (2000).
166. *Taylor*, 419 U.S. at 529-530 (citing H.R. 1076, 90th Cong. (2d Sess.1968) and S. 891, 90th Cong. (1st Sess. 1967)); *see also* Zuklie, *supra* note 139, at 110.

Amendment right to a jury trial.[167]

In *Taylor*, the Court was evaluating the Louisiana's "opt-in" jury selection process that automatically included men on the master jury list but included women only if they registered with local jury officials.[168] Although women were 53% of those eligible for jury service, they were only 10% of the jury wheel.[169] Noting that while Louisiana's "opt-in" system did not disqualify women from jury service, the *systematic* impact on the system was "that only a very few women . . . [were] called for jury service."[170] And, for the first time, the Supreme Court held "that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community."[171] While expanding the fair cross-section requirement to ban systematic exclusion of women from participating in the jury system, the Supreme Court stated: "Defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[172] Thus, in *Taylor*, the Supreme Court formally stated what it had promised in *Smith v Texas*—that a grand or petit jury must be drawn from "a representative cross-section of the community" to satisfy the Sixth Amendment's guarantee of trial by an impartial jury.[173]

4. Duren v. Missouri

In *Duren v. Missouri*, a 1979 case, the Supreme Court began to clarify "systematic exclusion," "distinctive groups," and it set forth the prima-facie case for a fair cross-section challenge.[174] In *Duren*, Missouri's jury-selection procedure granted women an automatic exemption from jury service if they so requested.[175] Although women were 54% of those eligible for jury service, they were less than 27% of those summoned for jury service and approximately 15% of those present on venires.[176] In response to Durens's challenge that these statistics demonstrated a violation of the fair cross-section requirement, the Supreme Court announced

167. 419 U.S. at 528; *see also*, *Zuklie*, *supra* note 139, at 107 n.52.

168. *Taylor*, 419 U.S. at 525-26. The Court was evaluating Louisiana's "opt-in" jury-selection system after its holding in *Duncan*, that the Sixth Amendment's provision for jury trial is made binding on the States by virtue of the Fourteenth Amendment. *Id.* at 527.

169. *Id.* at 525-526.

170. *Id.* at 525.

171. *Id.* at 535-536.

172. *Id.* at 538 (citations omitted); *see also* Powers v. Ohio, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").

173. *Taylor*, 419 U.S. at 527-28.

174. 439 U.S. 357, 360-68 (1979).

175. *Id.* at 360.

176. *Id.* at 362.

a three-prong test to make a prima facie showing that the composition of the jury wheel does not represent a fair cross-section of the community:

(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.[177]

Because Duren met the first two prongs of the test, the critical issue was whether he had shown "that the underrepresentation of women, generally and on his venire, was due to their *systematic* exclusion in the jury-selection process."[178] The Court stated that underrepresentation is "systematic" if it is "inherent in the particular jury-selection process utilized."[179] Because "a large discrepancy" between the number of women eligible for jury service and the number of women impaneled on the venire "occurred not just occasionally, but in every weekly venire for a period of nearly a year," the Court held that there was systematic exclusion.[180]

C. Fourteenth Amendment Claims

The Equal Protection Clause of the Fourteenth Amendment provides a second means for challenging the constitutionality of a jury selection process.[181] Whereas the Sixth Amendment guarantees every criminal defendant the right to a jury selected from a fair cross-section of the community, the Equal Protection clause prohibits states from excluding jurors on the basis of race or membership in some other protected class.[182] In *Strauder v. West Virginia*, a 1880 case, the Supreme Court for

177. *Id.* at 364.
178. *Id.* at 364-66 (emphasis added).
179. *Id.* at 366.
180. *Id.* Although "large discrepancy" is not defined, the second prong of the *Duren* test requires a petitioner to prove that the representation of a group "is not fair and reasonable in relation to the number of such persons in the community." *Id.* at 364. However, the *Duren* test provides no standards for defining what "fair and reasonable" means. *See* Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 Yale L.J. 1913, 1927-30 (1994) (discussing the competing methodologies for measuring underrepresentation).
181. In addition to the Sixth Amendment and the JSSA, a petitioner may base a challenge as to the composition of the jury wheel on the Equal Protection Clause or on the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* Detre, *supra* note 180, at 1914.
182. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1. Notably, forty-nine state constitutions—with the exception of Colorado—contain language nearly identical to the Sixth and Seventh Amendments regarding rights to a "fair trial" and to an "impartial jury." For example, Article I, Section 15, and Article V, Section 10, of the Texas Constitution guarantee the right to a jury trial, except in certain limited circumstances. State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 291-92 (Tex. 1975).

the first time found an equal protection violation in the jury selection context.[183] In *Strauder*, the Court held that the state had denied equal protection under the law to an African-American criminal defendant because he was tried by a jury that, by state law, explicitly excluded all African-Americans.[184] The Court has since expanded the clause to prohibit jury selection practices that on their face are race neutral but have the effect of disproportionately excluding certain protected classes.

In 1977, in *Castaneda v. Partida*, the Supreme Court issued the seminal equal protection case involving statistical disparity (rather than absolute exclusion), laying out the mechanics of an equal-protection claim, which are similar to the those of a fair cross section claim.[185] To state a prima-facie case of discrimination, the claimant must do three things: (1) prove that the group at issue "is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied;" (2) prove that there is substantial underrepresentation of that group in the jury pool "by comparing the proportion of the group in the total population to the proportion called to serve as jurors over a significant period of time;" (3) prove that the selection procedure is susceptible of abuse or is not racially neutral will further support the presumption of discrimination raised by the statistical showing.[186] Unlike the Sixth Amendment claim, an equal protection petitioner must prove intentional discrimination and that the alleged underrepresentation occurred over a period of time.[187]

The criminal defendant in *Castaneda* demonstrated that over an eleven-year period, only 39% of the jurors summoned in Hidalgo County, Texas were Hispanic, while over 79% of its population was Hispanic.[188] Although the county's jury selection procedure did not discriminate against Hispanics on its face, it gave the county's jury commissioner the discretion to exclude individual jurors based on highly subjective (and potentially nefarious) criteria.[189] The Court held that in light of the statistical evidence, the subjective method of selection, and the state's failure to offer a competent rebuttal, the defendant had established an equal protection violation as a matter of law.[190]

Once the defendant establishes a prima facie case of discrimination, the

183. 100 U.S. 303 (1880).

184. *Id.* at 309. The Civil Rights Act of 1875 "made it a criminal offense to exclude persons from jury service on account of their race. In a trilogy of cases decided soon after enactment of this prohibition, [the Supreme] Court confirmed the validity of the statute, as well as the broader constitutional imperative of race neutrality in jury selection." Powers v. Ohio, 499 U.S. 400, 402 (1991) (citing Strauder v. West Virginia, 100 U.S. 303, 310 (1880) ; Virginia v. Rives, 100 U.S. 313, 321 (1880); *Ex parte* Virginia, 100 U.S. 339 (1880)) (citations omitted).

185. 430 U.S. 482 (1977).

186. *See id.* at 493-94.

187. Eades, *supra* note 65, at 1821 (citing Timmell v. Phillips, 799 F.2d 1083, 1083 n.1 (5th Cir. 1986)).

188. 430 U.S. at 495-96.

189. *Id.* at 497-99.

190. *Id.* at 500-01.

burden shifts to the government to rebut that presumption.[191] The government may rebut this presumption by presenting evidence that it had no discriminatory purpose in its selection process or that its process did not have a determinative effect on the jury wheel.[192]

Courts have also applied different methods for calculating the statistical underrepresentation of a given group depending on whether the process is challenged on equal protection or fair cross-section grounds.[193] As one might expect, there are several ways to calculate the percentage by which a jury selection process underrepresents a certain group of people.[194] The most common method used in both equal protection and fair cross-section claims is the "absolute disparity" method.[195] To calculate the absolute disparity between a group's presence in the general population and its presence on the jury wheel, courts simply subtract the latter percentage from the former.[196] Thus, if a group represents 80% of the county's population but accounts for only 40% of the jury wheel, the absolute disparity is forty percentage points. But although its simplicity makes it attractive, the absolute disparity does not always give an accurate picture of the potential problem, especially if the general population of the group is relatively low.[197]

As a result, some courts have begun to use a second, more sophisticated measure of proportional disparity called "statistical decision theory" (SDT) to establish equal protection violations.[198] SDT is calculated using binomial distribution to determine the probability that a group's underrepresentation on the jury wheel was the result of chance.[199] This metric is intuitively appropriate in equal protection cases in which the stated objective is to prove intentional discrimination. Furthermore, since the focus of an SDT calculation is on the likelihood that the disparity is the result of chance and not on the sheer size of the disparity, this calculation may provide a strategic advantage for a claimant attempting to establish the under-representation of a relatively small minority.[200] For instance, if Native Americans constitute 4% of the general population of a given county but only 1% of the people selected for the jury wheel are Native Americans, the absolute disparity is only 3%. Thus, a claimant may have a difficult time establishing an unfair cross-section defense. If, however, a claimant shows that it is highly unlikely that this 3%

191. *Id.* at 495.

192. *See Duren* v. Missouri, 439 U.S. 357, 370-71 n.26 (1979) (discussing the difference between rebutting a presumption in an equal-protection case and one involving a fair-cross-section claim).

193. *See* Eades, *supra* note 65, at 1822-23; Detre, *supra* note 180, at 1917-18.

194. *See* Eades, *supra* note 65, at 1822-23; Detre, *supra* note 180, at 1917-18.

195. *See Detre, supra* note 180, at 1923.

196. *Id.* at 1917.

197. *See* Eades, *supra* note 65, at 1822-23; Detre, *supra* note 180, at 1917-18.

198. *See* Eades, *supra* note 65, at 1823; Detre, *supra* note 180, at 1918.

199. *See* Eades, *supra* note 65, at 1823; Detre, *supra* note 180, at 1918.

200. *See* Eades, *supra* note 65, at 1823; Detre, *supra* note 180, at 1918.

disparity is the result of chance, the claimant may have a better chance of asserting an equal protection claim.

Some commentators have stated that the Sixth Amendment is a more effective means of challenging a jury selection process because, unlike an equal protection claim, it does not require evidence of intentional discrimination.[201] While it is true that an equal protection claim requires a showing of intentional discrimination, the effect of this difference should not be overstated. The burden shifting analysis of an equal protection claim is in practice quite similar to the burden shifting analysis for a fair cross-section claim. Because defendants rarely have direct evidence of intentional discrimination, the most common means of stating an equal protection violation is by demonstrating disparate impact through statistical evidence.[202] Upon a showing of disparate impact, once the defendant has stated a prima-facie case of discrimination, the burden shifts to the state to show that it did not act with discriminatory intent or that its actions did not have a determinative effect on the jury pool.[203] As Justice Rehnquist observed in his dissenting opinion in *Duren*, there is little practical difference between a showing that the state acted without discriminatory intent and a showing that it acted with "adequate justification."[204]

In some ways, the Equal Protection Clause may give claimants more flexibility in challenging jury selection procedures that cause the underrepresentation of certain groups. Unlike a fair cross-section claim, which only criminal defendants have standing to assert,[205] equal protection claims may be asserted either by a defendant, an excluded juror, or a class of persons systemically excluded from the jury wheel.[206] As at least one commentator has noted, that from a strategic standpoint, a class of potential jurors requesting prospective relief may have better luck presenting the issue to the court than a criminal defendant who is requesting reversal of his conviction.[207]

In 1986, in *Batson v. Kentucky*, the Supreme Court ruled that the Fourteenth Amendment prohibits lawyers in criminal and civil cases from using their peremptory strikes to remove people from serving on juries

201. *See* Eades, *supra* note 65, at 1821; Detre, *supra* note 180, at 1916; *see also*, Zuklie, *supra* note 139, at 132-133.

202. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 494 (1977).

203. *Id.* at 495.

204. *Duren*, 439 U.S. at 370-71 (Rehnquist, J., dissenting) (proclaiming the difference between the state's burden to prove a "adequate justification" to rebut a Sixth Amendment claim and its burden to prove the "absence of intent to discriminate" to rebut an equal protection claim to be a mere "fiction").

205. U.S. CONST. amend. VI (entitling the "*accused*" in a criminal case to "the right to a speedy and public trial, by an impartial jury") (emphasis added); *see also* United States v. King, 36 F. Supp. 2d 705, 710 n.3 (E.D. Va. 1999) (explaining that Sixth Amendment rights are "personal to the defendant, and [do] not support a third-party standing analysis.").

206. Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970); *Berry v. Cooper*, 577 F.2d 322, 324 (5th Cir. 1978). At least one commentator has argued that race-based jury selection injures *only* the excluded juror. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726-27 (1992).

207. *See* Underwood, *supra* note 206, at 744.

because of race, ethnicity and gender. [208] The Supreme Court ruled that *jurors* (as opposed to defendants) have a right to not be discriminated against based on race.[209] The question here is how state laws being implemented regarding the jury system systematically encourage or dissuade certain groups of individuals (e.g., Hispanics, young adults and low-income adults) from participating in jury service. May such a claim be brought and by whom—a juror, a class of jurors, a criminal defendant, of a civil plaintiff or defendant?

IV. A PRESSING CONCERN OF THE AMERICAN BAR ASSOCIATION

Jury pools not being as representative of the community as they should be clearly concerns the nation's leading legal organization. On February 14, 2005, the American Bar Association implemented new model standards for jury service.[210] The issue of diversity and representativeness is such a concern for the ABA that four of the nineteen principles address it.[211]

- *Principle 2, Section B* reads: "Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction. . . ."[212]
- *Principle 5, Section B* states that, "[c]ourts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure: (1) The representativeness and inclusiveness of the jury source list; (2) The responsiveness of individual citizens to jury duty summonses."[213]
- *Principle 10, Section A* states:
  Juror source pools should be assembled so as to assure representativeness and inclusiveness. (1) The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained lists of persons residing in the jurisdiction. These source lists should be updated at least annually. (2) The jury source list and the assembled pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the

208. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

209. *Id.* at 87; *see also JSSA*, *supra* note 162; *see* Eades, *supra* note 65, at 1819-20 (citing Berry v. Cooper, 577 F.2d 322, 324 (5th Cir. 1978)).

210. *Principles for Juries and Jury Trials,* American Bar Association, *available at* http://abanet.org/juryprojectstandards/principles.pdf (last visited May 28, 2005).

211. *Id.*

212. *See id.*

213. *See id.* A principal reason that the V&E Jury Project is data intensive is the fact that courts and clerks are not required to maintain the relevant data to measure the representativeness of jury pools.

population. (3) The court should periodically review the jury source list and the assembled pool for their representativeness and inclusiveness of the eligible population in the jurisdiction. (4) Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.[214]

- *Principle 10, Section E* states: "Opportunity to challenge the assembled jury pool should be afforded all parties on the ground that there has been material departure from the requirements of the law governing selection of jurors. The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors."[215]

Robert Grey, President of the American Bar Association, stated that the implementation of these jury principles is essential to the future of the American jury system.

> As our nation continues to grow and diversify, we must work hard to guarantee that every group, every part of our community, indeed every person participates in the jury process. The American justice system will not survive if we do not make the jury process accessible to every citizen. The participation of every member of our society is necessary if the jury system, which is the backbone of our justice system, is to remain strong.[216]

V. FRAMEWORK OF THE CONSTITUTIONAL CHALLENGE

Now, six decades after the historic argument of *Smith v. Texas* before the Supreme Court, the promise of the representative jury continues to be as questioned as unfulfilled.[217] The well-documented diversification of America continues, yet the constitutional requirement that jury venires be "truly representative" of the demographics of our local communities continues to evade many courthouses across the United States and appears to be increasingly difficult to achieve. State jury laws and how they are implemented are being challenged on the grounds that juries are still not a "representative cross-section of the community."[218] Using *Texas v. Rayford*[219] as a model, the argument frame work presented by the V&E Jury Project is presented below.

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214. *See id.*

215. *See id.*

216. American Bar Association President Robert Gray, Speech at Georgetown Law Center's Black Law Students Association's Annual Alumni Association Program (Feb. 26, 2005).

217. *See* 311 U.S. 128 (1940).

218. *See Taylor,* 419 U.S. at 528.

219. *See* Writ Case No. 73,991, Criminal District Court, Dallas, Texas, No. F00-01529-1H.

A. Step One: Applicant Was Denied His Constitutional Right to an Impartial Jury Because the Venire Did Not Reflect a Fair Cross-Section of the Community.

In 1975, the United States Supreme Court in *Taylor v. Louisiana* held: "[T]he jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[220] Because Dallas County systematically excludes Hispanics from jury service, Rayford was denied his right to a jury drawn from a fair cross-section of the community as guaranteed by the Sixth and Fourteenth amendments. As explained below, each of the elements required to establish a prima-facie violation of the fair cross-section requirement is satisfied. In particular:

- Hispanics qualify as a distinctive group.[221]
- Hispanics are underrepresented on the venire as a matter of law. Based on his analysis of the data, Dr. Hietala determined that Hispanics were in fact significantly underrepresented.[222] Hispanics make up 26.4% of persons in the county eligible for jury service, but Rayford's venire panel included between fifty and sixty-six Hispanics out of 683 prospective jurors, a range of 7.53% to a maximum 9.66%.[223] Rayford's twelve person jury contained zero Hispanics.
- The exclusion of Hispanics from venire panels is systematic in that it is the direct result of procedures adopted by the State of Texas and implemented by court officials. As shown below, Hispanics are being excluded primarily because the pay for jury service (six dollars a day) is the lowest in the nation.[224]

B. Step Two: Applicant Has an Absolute Right to a Jury Drawn From a Fair Cross-Section of the Community

The right to a fair and impartial jury in criminal cases is one of the most fundamental aspects of the government and society of the United States.[225] "Jury service preserves the democratic element of the law . . .

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220. *Taylor*, 419 U.S. at 538.

221. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482, 495 (1977); Aldrich v. State, 928 S.W.2d 558, 560 (Tex. Crim. App. 1996) ("We accept that Hispanics are a distinctive group in any community . . ."). Although young people have been held not to qualify as a distinctive group, Dr. Hietala also analyzed the jury venire data from this case to determine whether young people (persons aged 28-34) were underrepresented. The data show an absolute disparity ranging from 16.06% to 17.06%. *See* Aff. of Professor Harold Hietala, Ph.D., *supra* note 29. Professor Hietala also analyzed the data from two other cases, as well as the DMN-SMULR Study. *See id.* Together, the data show an absolute disparity ranging from 16.70% to 31.94%. *Id.* These numbers are much higher than would be necessary to show systematic underrepresentation in violation of the Sixth Amendment. *See* United States v. Maskeny, 609 F.2d 183, 189 (5th Cir. 1980).

222. Aff. of Harold J. Hietala, *supra* note 29.

223. *Id.*

224. *See* NCSC Report, *supra* note 103.

225. Powers v. Ohio, 499 U.S. 400, 407 (1991).

[because it] affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law."[226] Jury service also "guard[s] against the exercise of arbitrary power . . . [by making] 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."[227] Accordingly, the right to an impartial jury, which traces its roots back to the signing of Magna Carta in the thirteenth century,[228] is preserved by the Sixth Amendment to the Constitution.[229]

"The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status as that which he holds."[230] Thus, "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community" and requires that "prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of [the economic, social, religious, racial, political and geographical] groups."[231]

The tool provided to ensure this requirement is met is the fair cross-section claim, articulated by the Supreme Court in *Duren v. Missouri*.[232] To prove a violation of Rayford's right to a jury drawn from a fair cross section of the community, an individual 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 under-representation is due to systematic exclusion of the group in the jury-selection process.[233]

Once the defendant makes a prima-facie showing of a fair cross-section violation, the burden shifts to the state to show "that the disproportionate exclusion manifestly and primarily advances a significant governmental interest."[234]

Fair cross-section claims are not limited to federal courts.[235] Rather,

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226. *Id.* (internal quotation omitted).
227. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).
228. Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).
229. "In 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.
230. *Taylor*, 419 U.S. at 536 n.19 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).
231. Thiel v. U.S. Pac. Co., 328 U.S. 217, 220 (1946).
232. 439 U.S. at 364.
233. *Id.*
234. Aldrich v. State, 928 S.W.2d 558, 560 (Tex. Crim. App. 1996) (quoting *Duren*, 439 U.S. at 367-68); *see also* United States v. Maskeny, 609 F.2d 183, 189 (5th Cir. 1980) ("unless the state shows that the aspects of the process that result in the disproportion manifestly and primarily advance a significant state interest.").
235. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

the requirement applies to state court criminal proceedings by virtue of the Fourteenth Amendment.[236] Nor is membership in the excluded class a requisite for raising a claim.[237] Finally, the requirement is not a guarantee of "a jury of any particular composition."[238] Instead, the right to bring a fair cross-section claim ensures only that venires from which juries are drawn do not systematically exclude distinctive groups in the community.[239]

C. Step Three: Hispanics Are a Distinctive Group Under the Duren Test.

Hispanics have repeatedly been held to be a distinctive group.[240] The Supreme Court has never defined "distinctiveness" but has held that "the concept . . . must be linked to the purposes of the fair cross-section requirement."[241] The "purposes" were identified by the court as:

> (1) 'guarding against the exercise of arbitrary power' and ensuring that the 'commonsense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor,' (2) preserving 'public confidence in the fairness of the criminal justice system,' and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'[242]

In *Weaver v. State*, the Dallas Court of Appeals held that distinctiveness is found where a "common thread of shared experience or political, social, or religious viewpoint binds this group together."[243]

D. Step Four: The Under-Representation of Hispanics on Dallas County Venires is Both Unfair and Unreasonable

The second element of the *Duren* test requires that Rayford show "that the representation of [Hispanics] in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community."[244] To meet this requirement, a defendant should present

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236. *Id.*

237. *Duren*, 439 U.S. at 359 n.1 (citing Taylor v. Louisiana, 419 U.S. 419 U.S. 522, 530 (1975)).

238. *Taylor*, 419 U.S. at 538; *see* Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair cross section principle . . . to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.").

239. *Taylor*, 419 U.S. at 538.

240. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482, 495 (1977); Aldrich v. State, 928 S.W.2d 558, 560 (Tex. Crim. App. 1996) ("We accept that Hispanics are a distinctive group in any community . . . .").

241. *Lockhart*, 476 U.S. at 174.

242. *Id.* at 174-75 (quoting *Taylor*, 419 U.S. at 530-31).

243. 823 S.W.2d 371, 373 (Tex. App.—Dallas 1992, writ. ref'd) (citing United States *ex rel.* Silagy v. Peters, 713 F. Supp. 1246, 1251 (C.D. Ill. 1989)); United States v. Blair, 493 F. Supp. 398, 406 (D. Md. 1980), *aff'd*, 665 F.2d 500 (4th Cir. 1981).

244. *Duren*, 439 U.S. at 364.

evidence to show an absolute disparity[245] of more than 10%.[246] The representation of the distinct group is measured against the community of eligible jurors, rather than the whole community.[247] An absolute disparity is calculated by subtracting the percentage of the jury venire that is composed of members of the distinct group from the percentage of the community of eligible jurors made up of members of the distinct group.[248] The Supreme Court has not determined precisely the point at which the representation of a distinctive group is so low as to be unfair and unreasonable.[249] However, a showing of an absolute disparity greater than 10% should be sufficient to satisfy the second element of the *Duren* test.[250]

Here, the absolute disparity exceeds 10% by a substantial margin. Based on the analysis of Dr. Hietala, the absolute disparity in the *Rayford* case—making all assumptions in favor of the state—is a minimum of 15.18%.[251] As explained in his affidavit, Hispanics make up approximately 26.37% of persons eligible for jury service.[252] Because this number is drawn from year-2000 figures, Dr. Hietala suggests that this number could be somewhat higher due to dramatic Hispanic growth in Dallas over the last four years.[253] In comparison, based on Dr. Hietala's analysis of Rayford's 683 person panel, only sixty-six prospective jurors members could possibly have been considered Hispanic (9.66%).[254] Also, Rayford's petit jury contained no Hispanics.[255] Thus, based on the evidence, Professor Hietala concluded that Hispanics were underrepresented on Rayford's venire panel, that the absolute disparity was

245. United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980).

246. United States v. Haley, 521 F. Supp. 290, 292 (N.D. Ga. 1981) ("[C]ourts have clearly arrived at the conclusion that more than 10% absolute disparity is necessary to implicate a violation of the fair cross section rule.") (citing Swain v. Alabama, 380 U. S. 202, 208-09 (1965)); United States v. Butler, 611 F.2d 1066, 1070 (5th Cir. 1980); *Maskeny*, 609 F.2d at 190; Thompson v. Sheppard, 490 F.2d 830 (5th Cir. 1974); *see also* Eades, *supra* note 65, at 1823 (saying that most courts use the 10% floor from *Swain*).

247. United States v. Williams, 264 F.3d 561, 568 (5th Cir. 2001); United States v. Brummitt, 665 F.2d 521, 529 (5th Cir. 1981) ("[T]he disparity . . . must be based not on total population but, instead, on those of the identifiable class who are *eligible* to serve as jurors."); Pondexter v. State, 942 S.W.2d 577, 580-81 (Tex. Crim. App. 1996).

248. *Maskeny*, 609 F.2d at 190.

249. The Supreme Court has never articulated precise standards for determining what constitutes a significant under-representation. *See Haley*, 521 F. Supp. at 292 (citing Alexander v. Louisiana, 405 U.S. 625, 630 (1972)).

250. *Maskeny*, 609 F.2d at 190.

251. *See* Aff. of Harold Hietala, *supra* note 29. Dr. Hietala actually produced a range of numbers account for certain assumptions. *See id.* The 15.18% number is the result of those assumptions having been made in the State's favor (e.g., whether the number of reporting Hispanics should be determined solely on the basis of self-identification, or should include individuals who are Hispanic, but chose either not to identify themselves as Hispanic or not to provide a racial information). *Id.* The maximum absolute disparity calculated by Dr. Hietala was 17.54%. *Id.* Either number is substantially higher than the necessary minimum of 10%. *See Maskeny*, 609 F.2d at 190.

252. Aff. of Harold Hietala, *supra* note 29, at 6.

253. *Id.*

254. *Id.* at 7-8.

255. An all-white jury tried Rayford. Even the alternative juror was white.

well in excess of 10%, and that the possibility that mere random chance created the disparity was less than one in 10,000,000.[256]

Although the disparity in *Duren* was shown to have existed for nearly a year, the Supreme Court did not explicitly state a minimum period of time over which a disparity must be shown.[257] However, courts in subsequent cases have required a showing of underrepresentation for a substantial period of time, though no court has ever stated exactly how much time is really necessary.[258] Dr. Hietala has analyzed Dallas County venire data dating back to March 2000, and the data shows a significant and consistent underrepresentation of Hispanics over time.[259] The absolute disparities since 2000 have ranged from a minimum of 15.18% to a high of 15.52%.[260] Taking away the assumptions that favor the state increases that range to 18.40% to 19.82%.[261] In either case, the data shows that the underrepresentation of Hispanics on the venire panel from which Rayford's all-white jury was drawn was not the result of chance. On the contrary, it is consistent with a larger pattern of underrepresentation of Hispanics that, as shown below, is both inherent to and the systematic result of the jury selection process employed in Dallas County.

E. Step Five: The Under-Representation of Hispanics on Venires in Dallas County is Systematic

The third element of the *Duren* test requires that the disparity be the result of systematic exclusion.[262] In Dallas County, all of the evidence, the analysis contained in related studies and other jurisdictions, and any reasonable interpretation of the facts points to the systematic exclusion of Hispanics. This is mostly because six dollars a day is so low—the lowest in the nation—that the working poor cannot afford to attend jury duty. This falls disproportionately on Hispanics who make up a large part of the working poor in this county. Because this and other procedures inherent to Dallas County's venire selection are employed daily against every defendant in Dallas County courts, the disparity is systematic under *Duren's* requirements.

1. Juror Pay Excludes Hispanics Disproportionately

In Texas, employers do not have to pay their employees for time spent serving as a juror.[263] Thus, jury duty often means losing a daily wage for day laborers and hourly workers summoned for jury duty. In Dallas,

256. *Id.* at 7-10.
257. *See generally Duren*, 439 U.S. at 362-63.
258. *See, e.g.*, Timmel v. Phillips, 799 F.2d 1083, 1086 (5th Cir. 1986) (holding that the long-term requirement applies to both the second and third prongs of the *Duren* test).
259. *See* Aff. of Harold Hietala, *supra* note 29.
260. *Id.*
261. *Id.*
262. *Duren*, 439 U.S. at 364.
263. Eades, *supra* note 65, at 1816; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 122.001 (Vernon 2004).

where six dollars a day is also the prevailing rate, studies have shown that the poor, especially day laborers, many of which are Hispanics, fail to show up for jury duty.[264] Six dollars barely pays for parking at the court building, which leaves jurors without any money to buy lunch. Thus, the poorest citizens—to whom jury duty is a secondary concern to providing food and shelter for their families—are forced to choose between a day's wage, perhaps $45, or attending the courthouse. The evidence suggests that people for which financial hardship is the primary factor in their non-participation are disproportionately Hispanic.[265] Experience in other jurisdictions also suggests that raising the daily pay from six to forty dollars would greatly increase participation by low wage earners and Hispanics.[266]

The problem is compounded because Dallas County systematically fails to enforce juror summonses—this allows many poor Hispanics to simply opt out of the system.[267] As explained in *Duren* and *Taylor*, such an arrangement is unconstitutional and unacceptable.[268] As the Supreme Court reasoned in those cases, procedures allowing most women to opt out of jury service violated the defendants' rights to a jury from a fair cross section of the community.[269]

2. *Update of Addresses*

Hispanics are also disproportionately affected by the county's failure to update its address lists. Dallas County gets its addresses from voter registration lists and driver's license and state ID card databases. However, because addresses are often not updated until a person renews their driver's license, many of the addresses become bad addresses when a person changes residences. Studies reflect that huge numbers of jury summonses are returned because of bad addresses.[270] The evidence also shows that this disproportionately affects Hispanics because Hispanics move more frequently than other groups.[271] New York—whose driver's licenses are updated every eight years (Texas licenses usually expire in six)—resolved this very problem by subscribing to a national change of address service.[272]

In sum, all of the essential elements of *Duren* are met. Hispanics are a distinctive group. They are being dramatically underrepresented on the

264. Eades, *supra* note 65, at 1813; Curriden, *supra* note 5, at A1.
265. Eades, *supra* note 65, at 1813.
266. *See* Mark Curriden, *Extra Money Helps El Paso Lure More Prospective Jurors*, DALLAS MORNING NEWS, October 24, 2000, at A8 [hereinafter "Curriden III"]; Mark Curriden, *No Excuses: New Yorkers Who Try to Avoid Jury Duty Find That System Has Gotten Serious About Service*, DALLAS MORNING NEWS, October 24, 2000, at A1 [hereinafter "Curriden II"].
267. *See* Aff. and Testimony of Donna Roach, *supra* note 84.
268. *Duren*, 439 U.S. at 357; *Taylor*, 419 U.S. at 522.
269. *Duren*, 439 U.S. at 375; *Taylor*, 419 U.S. at 522.
270. Curriden & Pusey, *supra* note 5, at A1.
271. *Id.*
272. Curriden II, *supra* note 266, at A1.

venire panels and have been since at least March 2000. And the cause of the underrepresentation is systematic. Therefore, Rayford has made a prima-facie case that his Sixth Amendment right to a jury drawn from a fair cross section of the community has been violated.

VI. REMEDIES ARE AVAILABLE

Identifying the problem is one thing. Finding solutions is quite another. Fortunately, there are two excellent examples from which state and local governments can learn. The State of New York and El Paso County, Texas have separately and impressively attempted to reverse the negative trend of declining public participation in jury service.[273]

A. New York: The "Carrot and Stick" Approach

The first jurisdiction to take a broad and systematic approach in tackling low public participation was New York. The city and state that held the torch of light so many years for immigrants now shines the way for communities across the country to help the descendants of those immigrants serve a uniquely American obligation: jury service. New York Court of Appeals Chief Judge Judith Kaye, the state's highest ranking jurist, noticed in 1995 that New York City regularly faced a shortage of jurors to conduct trials.[274] In 1995, only 12% of the people summoned to jury duty in New York City showed up.[275] Judge Kaye realized that low citizen participation meant that it was increasingly likely that segments of society were being underrepresented.[276]

To fix the problem, Judge Kaye and the New York Legislature instituted a series of dramatic but amazingly commonsense reforms that more than tripled the response rate in Manhattan and other parts of New York City.[277] Some of the reforms, such as increasing juror pay and paying for transportation, cost a considerable amount of money.[278] Other reforms actually saved the state money.[279] But implemented together, the success was extraordinary. Just five years after the reforms were instituted, the public participation rate of New York jurors jumped from 12% to 37%.[280]

The first step taken by New York court officials was to repeal all exemptions from jury service.[281] Doctors, lawyers, dentists, podiatrists, embalmers and prostheticists had convinced the state legislature over the years to grant their professionals free passes from jury service.[282] "If you

273. *Id.*
274. *Id.*
275. *Id.*
276. *See id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *See id.*
281. *Id.*
282. *Id.*

had a successful lobby, the legislature would grant you an exemption," said Judge Kaye.[283] This added nearly 1,000,000 names to the pool.[284] At the same time, New York court officials expanded the lists from which they summon jurors.[285] Like most jurisdictions, New York identified potential jurors from voter registration and driver's licenses databases.[286] To reach more people, court officials added lists from New York State income tax payers and state unemployment and welfare rolls.[287] By doing so, the state added more than 500,000 residents of New York State to their jury pool.[288]

The second step addressed the high rate of jury summonses being returned to New York court officials as undeliverable by the U.S. Postal Service.[289] The fact that New York is a very mobile society and that the state updated its driver's license address lists only every eight years meant that large segments of the community had moved or died.[290] New York officials hired a national-change-of-address service to update the mailing addresses of its prospective jurors.[291] Court officials estimate that they have added thousands of people back onto the juror rolls and saved the state about $100,000 annually by not mailing out undeliverable summonses.[292]

New York increased the money it pays to jurors from ten dollars a day to forty dollars a day.[293] The increased amount raised the cost of juror pay from $7,000,000 to $24,000,000.[294] But state court officials report that the percentage of hourly wage earners publicly participating in the jury process rose significantly.[295] At the same time, New York officials required companies with at least twenty employees to pay their workers that are called to jury service.[296] Judge Kaye also created a juror compliance court to enforce public participation in the jury system.[297] Judge Kaye, like other judges around the country, disfavored the idea of sending sheriff's deputies or court marshals out to round up no-shows to force them to serve on juries.[298] Such a process is not only time consuming and expensive, but it also produces angry jurors—and no one wants an angry juror deciding their case.[299]

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283. *See Improving Our Jury System*, New York Unified Court System (1997).
284. Curriden II, *supra* note 266, at A1.
285. *Id.*
286. *Id.*
287. *Id.*
288. *See Improving on Jury System*, New Your Unified Court System (1997).
289. Curriden II, *supra* note 266, at A1.
290. *Id.*
291. *Id.*
292. *See id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *See id.*
297. *Id.*
298. *Id.*
299. *Id.*

Instead, Judge Kaye and her staff designed a system in which jurors are sent friendlier, more informational notifications to jury service.[300] If the citizen does not respond, then a follow-up reminder is sent six weeks later.[301] If there is still no response, New York court officials mail a warning letter stating that the resident may be found in contempt if they continue to ignore their responsibility as New York citizens to participate in the jury system.[302] A few weeks later, a show-cause order is delivered, finding the individual in contempt and notifying them that the State of New York has placed a lien against their property.[303] The lien effectively ends the individual's ability to obtain credit.[304] "It gets their attention," says Judge Kaye.[305] To remove the lien, citizens must appear before a specially designated state-trial judge to explain why they did not respond to their jury summons.[306] For example, the special "jury compliance court" in Manhattan is in session once a week and handles an estimated thirty to sixty cases a week of individuals who failed to respond.[307] "The goal isn't to punish people but to get people to understand the importance of jury service and to serve," says Judge Stella Schindler. "We don't want people to walk away from here angry. It's a civics lesson."[308] Residents who simply admit they ignored their summonses get a minimal fine of twenty-five dollars or so.[309] The cases are immediately dismissed for those with legitimate excuses.[310] But individuals who try to talk their way out of it often face stiffer fines of up to $1,000.[311] The penalty for one habitually delinquent juror, who happened to be an opera singer, was to perform for the more conscientious citizens who had voluntarily fulfilled their civic duty that day.[312] New York-court officials report that the compliance court generates an estimated $50,000 in fines for the state annually.[313]

Finally, New York-court officials made jury service more appetizing. Candidates may postpone their jury service for up to six months if their work schedules are too busy or if they have a vacation planned.[314] Single parents may have their appearances delayed for up to two years.[315] Court officials have added desks in juror waiting rooms that have electric outlets, phone lines, and data ports for laptops.[316] Judge Kaye also hired

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. Individual research by authors through interviews with New York court officials.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. Independent research.
314. *Id.*
315. *Id.*
316. *Id.*

an independent ombudsman to represent juror interests in any disputes.[317] And finally, court officials in Manhattan reward jurors who have served with an end-of-the-year juror-appreciation reception.[318] Beyond the cake, chips and punch, jurors also get to meet celebrity jurors who served that year, such as Woody Allen, Kevin Bacon, James Earl Jones and Tom Brokaw.[319] Which of the reforms were truly at the heart of New York's jury-participation turnaround is not clear.

B. El Paso—The "Carrot-Only" Approach

Nearly 2,000 miles southwest of New York, El Paso, Texas court officials faced their own problem with decreasing public participation in the jury system in the late 1990s.[320] Only 22% of people summoned to jury duty were showing up.[321] At the time, El Paso officials paid jurors six dollars aday—the minimum payment required under Texas law.[322] In 1999, El Paso residents voted to increase juror pay to forty dollars a day.[323] The result was astounding: public participation jumped from 22% to 46% within a year.[324] By 2002, the jury-show-up rate had climbed to nearly 60%.[325]

What was the cost to the average taxpayer? $1.75 a year.[326]

C. Other Proposed Legislation, Including the Jury Patriotism Act

There are several options regarding raising juror pay. One possibility is that states could pay nothing the first day, using those funds to pay jurors a reasonable wage starting on the second day of service. Second, states could exempt jurors whose employers pay their workers who serve on jury duty, allowing the courts to pay more to jurors who are not being paid by their employers. Third, states could provide tax incentives or credits to employers who pay their workers while serving on jury duty.

Eight states, as of 2004, have passed the Jury Patriotism Act.[327] The act imposes a surcharge on all civil-court filings.[328] The money from the fund is then paid to financially-strapped jurors who serve in long trials.[329]

317. *Id.*
318. *Id.*
319. *Id.*
320. Curriden III, *supra* note 266, at A8.
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. Jason Spencer, *Looking for a Way to Boost Juror Pay*, Austin Am. Statesman, Dec. 27, 2002, at A1.
326. *See id.*
327. *Id.*
328. *Id.*
329. *Id.*

VII. CONCLUSION

The problem of declining public participation in the American jury system is worsening. The evidence indicates that a disproportionately smaller percentage of the Hispanic, young adult, and low-income populations in our communities is not participating in the American jury system. So significant is the problem that it is clear that the constitutional challenges are starting and will only increase in the near future. Thousands, possibly tens-of-thousands, of criminal convictions may be subject to challenges.

"How can we say our justice system is working when we see one class of people—older, white, upper-middle-class citizens—always sitting in judgment of other classes of people?" says Neil Vidmar, a law professor at Duke University and an expert on jury studies.[330]

Yet, outside of New York and El Paso, very little has been done to attempt to address this growing problem of constitutional importance. Jurors have no ability to lobby legislatures to force change. Lawyer groups have their own agendas. The defense bar is concerned that expanding the jury pool to include more Hispanics, young adults, and low-income individuals will make jurors more sympathetic to plaintiffs—even though no evidence supports this position. And the plaintiff's bar continues to push for six-member juries, even though the reduction leads to less demographic diversity in the venire and on the juries themselves.

So, one question remains: Who will address the matter first? Will it be the courts that have the obligation to guarantee citizens the right to a fair trial by an impartial jury that is selected from a representative cross section of the community? Or will it be state legislatures and county governments that have the power to modify the jury process? On the eve of the publication of this article the Texas Legislature passed and the governor signed into law Senate Bill 1704, which will increase the compensation the state pays to jurors from six dollars a day to forty dollars starting the juror's second day of service. The jury pay increase, which goes into effect January 1, 2006 (Amended Texas Government Code Section 61.001), is a first and significant step toward fixing the problem.[331]

Public confidence in the American justice system and the individual's right to a fair trial, free from impartial jurors, may be compromised if this issue goes unaddressed. Broader participation in the jury system will promote needed confidence in and enhance the moral authority of the justice system. Taking steps to increase participation in the justice system to ensure selection of juries from truly representative cross sections of the community will enhance the fact-finding process and improve the function of perhaps the most truly democratic of American institutions.

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330. *See* Curriden & Pusey, *supra* note 5, at A1.

331. Authors Michael Martin and Mark Curriden drafted the proposed Senate Bill 1704 and testified before the Texas Senate Jurisprudence Committee in favor of the legislation.