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THE KEY-MAN SYSTEM FOR COMPOSING
JURY LISTS IN WEST VIRGINIA—THE
STORY OF ABUSE, THE CASE FOR REFORM

CHARLES R. DiSALVO*

I. INTRODUCTION

The jury is at the heart of our system of justice. This institution, rooted in centuries of history, and founded on almost mystical faith in the collective good judgment of ordinary people, approaches sacred status in a secular world.¹ So strong is our respect for the jury that despite Williams v. Florida² (chopping the minimum permissible size of state criminal trial juries to six), despite Colgrove v. Battin³ (doing the same for federal civil trials), and despite the effort to take so-called "complex" litigation away from the jury’s purview,⁴ the jury lives. The jury decides the fates of the John Mitchells, the John Hinckleys, and the Klaus von Bulows despite the hoopla of the media. In quieter contexts, the jury deals with the grit of the judicial mill, rendering decisions each day in garden variety commercial and personal injury cases. In the process, ordinary people are exposed to our methods of justice and come to have a stake in them.

The exclusion of groups from the possibility of jury duty is morally repugnant, for such unequal treatment offends human dignity. Moreover, it is highly dysfunctional in practical terms, for the exclusion of people from participation in the processes which affect their lives breeds rebellion. In contrast, inclusion breeds loyalty.⁵ Indeed, it is the fact of democratic participation that accounts in large part for the stability of American institutions.⁶

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¹ See generally L. E. Moore, The Jury (1973) (especially Chapter I, "Creation of Gods").
⁵ It has been reported that more than one million citizens serve on juries each year, a significant portion of our population. Because of the jury a great many people are involved in responsible governmental decision-making who probably never before and perhaps never again may become so involved in it. Such a popular appreciation of the difficulty of decision-making by government officials will go a long way toward supporting democratic government. More than any other single institution, the jury has brought people into government. It has brought them in as amateurs, has permitted them to serve for a short period, and has returned them to society more experienced in the problems of responsible decision-making. This valuable education in government cannot be underestimated as a significant strength of the civil jury.


⁶ For a more cynical view, see H. Marcuse, One Dimensional Man (1964).
Exclusion works injustices on individual litigants as well. The jury, as the conscience of the community, should be composed to reflect the community’s understanding of justice. When groups are excluded from the possibility of jury service, juries are produced that reflect not the community’s sense of justice but the sense of justice of a too narrowly defined subgroup. Limiting potential jurors to members of this narrow subgroup increases the likelihood that the jury will not understand the social, cultural, or political language of the individual litigant.

The jurisprudence of the United States Supreme Court relating to jury lists, described below, and the Federal Jury Improvement Act of 1968 (the Act), also described below, implicitly recognize these inherent, functional values of participation in our pluralistic society. The focus of the Act and the Court’s jurisprudence is on the manner in which names are selected to comprise the lists from which people are called to court for jury duty. (For the purpose of this Article these lists will be called “jury lists.”) The standards established by the Supreme Court, along with the statutory prescriptions of the Act, offer, within certain limits, diversity and fairness in juries.\[10\]

The same cannot be said of the statutory law that governs the composition of jury lists in the trial courts of West Virginia. By reason of its “key-man” system, West Virginia state court juries can be, and often are, the whimsical creations of the virtually unchecked discretion of powerful jury commissioners who operate unchecked by substantial statutory or other controls. Juries that result from the favoritism and caprice thus allowed by the West Virginia key-man system should be viewed as intolerable by a democracy that ranks fair play and equal treatment among its highest procedural goals.

This Article will review the West Virginia jury commissioner scheme, the contrasting federal procedure for composing jury lists, and the United States and West Virginia decisional law on jury list representativeness.

This Article will also report the findings of a jury list study conducted in six West Virginia counties. After reviewing the empirical data thus collected, the conclusion will be drawn that at least one cognizable group, women, is seriously underrepresented on West Virginia grand and petit jury lists. In addition, this Article will report a variety of other abuses in the West Virginia system that were uncovered during the study.

A call for abolition of the key-man system and the establishment of a random selection process using diversified multiple source lists concludes this Article.

\[7\] See infra text accompanying notes 71-124.
\[9\] See infra text accompanying notes 52-70.
\[10\] The Act governs only in federal courts, whereas the Court’s standards apply to all federal and state trials by virtue of the sixth and fourteenth amendments. See infra text accompanying notes 71-124.
\[11\] The gender is used advisedly. See infra text accompanying notes 185-201.
II. THE WEST VIRGINIA KEY-MAN SYSTEM: THE STATUTORY SCHEME

A. Petit Juries

Section 52-1-3 of the West Virginia Code gives birth to the system that creates state court petit juries. The statute provides for the appointment of two jury commissioners for each of West Virginia’s fifty-five counties. The Chief Circuit Judge for the circuit in which the county is included is given the power of appointment. In choosing commissioners, the court’s discretion is reined in by three requirements: one, the commissioners must be residents of the county for which they are selected; two, the commissioners must be “citizens of good standing;” and last, they must be “of opposite politics” and “well-known members” of their county’s “principal political parties.” Neither independents nor members of third political parties are eligible to serve. Commissioners serve for four-year terms.

Each year the commissioners are obligated to prepare a “jury list” of 200 to 1000 names, depending on the needs of the circuit. It is from this list that petit juries are eventually drawn.

What limitations are placed upon the discretion of the commissioners in the selection process? Section 52-1-4 requires that those selected—

—be inhabitants of the county,
—be not exempt or disqualified from service (Section 52-1-2 exempts hardship cases and disqualifies idiots, lunatics, paupers, vagabonds, habitual drunkards and persons convicted of infamous crimes.),
—be “of sound judgment,”
—be “of good moral character,”
—-and, most importantly, be people whom the commissioners “think well qualified to serve as jurors.”

The statutory scheme also prohibits the commissioners from placing on the list the names of those persons who served as petit jurors within the previous two years and from honoring the request of anyone who asks to be put on the list. In an apparent reference to the age bracket in which persons are liable for service,
eighteen to sixty-five, the statute requires that jurors be "free from legal exception."22

Finally, in what surely must be the draftperson’s feeble attempt at humor, section 52-1-4 requires that these "well-known" members of the Democratic and Republican parties select names for the list "without reference to party affiliations."23

After this list is compiled, it is placed in the hands of the circuit clerk for safekeeping.24 While the list is so secured, the judge and the commissioners have the discretion to remove from the list the names of those who have been convicted of "any scandalous offense" or who have "been guilty of any gross immorality."25

Section 52-1-6 then requires that each of the names on the list be put on separate ballots and that these ballots be put in a "jury box." It is from this box that the names of those who will be called to court at any particular term or trial are drawn.26 For any particular term or trial (depending on the discretion of the court), the court sets the number of potential jurors it wants in attendance.27 The statute suggests thirty, but allows the court to vary this number, based on need. The jury commissioners draw the required number of names from the jury box.28 The clerk then passes these names along to the sheriff,29 whose duty is to summon the named persons to court on the date specified.30

On the first morning of any jury trial, approximately thirty people, who have been summoned in this manner, appear in the courtroom. Their names will have been put on new ballots31 and inserted into a "jury wheel" (as distinct from the "jury box" from which their names were originally drawn32). The clerk then draws names, the exact number of which is set by custom or local rule.33 The people whose names are drawn constitute the "jury panel" with which the court and lawyers

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22 W. VA. CODE § 52-1-4.
23 See infra text accompanying notes 218-21.
25 Id. The author is unaware of any instances in which this procedure has been employed. See infra text accompanying notes 44-45.
28 W. VA. CODE § 52-1-10 (1981). Section 52-1-12 of the West Virginia Code gives the commissioners the power to return a name to the jury box if, after seeing the name, the commissioners believe the named person is sick, absent from home or otherwise unable to attend, or is exempt by law (a reference to hardship). The ballot naming such persons "shall be destroyed." See infra text accompanying notes 46-48.
29 W. VA. CODE § 52-1-10.
30 W. VA. CODE § 52-1-11 (1981). The sheriff is, of course, restricted to the names on the list.
32 W. VA. T.C.R., Rule XII (1).
33 W. VA. T.C.R., Rule XII (2).
34 W. VA. T.C.R., Rule XII (3). The number almost always exceeds the final number required for trial.
work in the voir dire process. Additional names are drawn from the wheel as jurors are excused for cause or favor, until "the required number of jurors, all free from challenge for cause, shall have been drawn. . . ." This process, by which the whole community is sifted for six to twelve jurors, comes to a close after the lawyers make their peremptory strikes.

B. Grand Juries

The selection process for the grand jury list differs from the petit jury process in only three material respects—

—The grand jury list is a much smaller list: Section 52-2-2 of the West Virginia Code calls for a list of one hundred to two hundred names.

—in choosing these names, the commissioners must see that each magisterial district is represented in proportion to its share of the population.\(^{35}\)

—in addition to having "good moral character," grand jurors must be free from felony convictions and convictions for "scandalous offenses," \(^{36}\) be citizens of the county and State for one year prior to their selection, and not be officeholders.\(^{37}\)

In essence, the commissioners are authorized to employ virtually as much discretion in the grand jury process as in the petit jury process.

III. Analysis of the West Virginia System

A. The Petit Jury List

There are three points within the West Virginia system at which the discretion of the jury commissioner or the circuit court judge in choosing potential petit jurors can be employed. In order of decreasing importance, they are:

1. Jury List Composition

The common practice among West Virginia jury commissioners is to divide in half the total number of potential jurors to be listed, with each commissioner then having responsibility for providing one-half of the names independently of the other commissioner.\(^{38}\) In compiling the hundreds of names required, the individual commissioner is clearly \textit{not} bound by statute or case law to use any source of objective information for finding names. There is no requirement that commis-
sioners use voter registration lists (a source widely used in other jurisdictions),
property tax lists, welfare rolls, or drivers license lists. The commissioners are
bound only by the criteria described earlier. These criteria are so amorphous and
subject to idiosyncratic personal interpretations that they provide no serious restraint
on the commissioners' range of choices. In the absence, then, of both direction
and restraint, the commissioners are on a romp. They can pick friends, relatives,
employees, previous jurors, whites but not blacks, the old but not the young, the
businessman but not the housewife, the white collar worker but not the blue collar
worker, or the rich but not the poor. The possibilities for abuse are limited only
by the imagination of the jury commissioner.

2. Removal of Names

After the list is tendered to the clerk, the judge or the commissioners can invade
the list to remove the names of those who have been convicted of "any scandalous
offense" or who have been "guilty of any gross immorality." While no instances
of such removals were reported in the interviews conducted for this study, the
existence of authority justifying them makes removals of this sort at least possible.
No statutory definition of scandalous offense or gross immorality is provided for
the jury commissioners or judge, thus leaving the determination of what constitutes
unacceptable behavior up to those responsible for enforcing these standards.

3. Destruction or Return of Drawn Ballots

When ballots are drawn from the jury box for the purpose of summoning
citizens to jury duty, the commissioners are empowered to destroy the ballots
of those whom they believe will be exempted from actual service. A fair reading
of West Virginia Code section 52-1-2 is that a person is exempt if the court would
find jury duty "an undue hardship." Thus, the commissioner assumes a power
normally thought to be reserved to the court. With this power each commissioner
has some control over the other's choices for the list. An unscrupulous commis-

39 "Voter registration lists are the single most frequent source specified in states' statutes," NATIONAL
40 The constitutionality of the personal property tax list as a sole source was at issue in State
41 The West Virginia Supreme Court of Appeals has rejected the argument that use of welfare
rolls must be a mandatory feature of jury list composition. State v. Williams, 249 S.E.2d 752
42 A few states supplement the use of voter registration lists with driver's license lists. See NATIONAL
43 See supra text accompanying notes 18-23.
44 W. VA. CODE § 52-1-5.
45 For the methodology employed, see infra text accompanying notes 181-84.
46 W. VA. CODE § 52-1-10.
47 W. VA. CODE § 52-1-12.
48 "The Judge of any court may, in his discretion, exempt or excuse any person from jury service
when it appears that such service would be improper or work an undue hardship." W. VA. CODE § 52-1-2.
sioner might simply brand a fellow commissioner’s choice as exempt, effectively checking the choices of his or her opposite number.

Again, while no instances of the use of this tactic have been reported in the course of this study, the machinery for its use is in place.

The following flow chart illustrates this analysis:

B. The Grand Jury List

Two of the points at which commissioners can exercise discretion in picking names for the grand jury list are similar to points in the petit jury procedure: (1)
the commissioners have broad discretion in the initial composition of the list;\(^49\) and (2) when names are drawn from the list for actual summoning to court, a commissioner can eliminate anyone he or she believes may be "disqualified or unable to serve."\(^50\)

Unlike the petit jury system, when the list of names is submitted to the circuit clerk, the responsibility of striking the names of those thought not to be qualified falls to the clerk or the judge, not the commissioners.\(^51\)

This study uncovered no evidence that discretion was actually exercised in composing grand jury lists, except at the important point of initial list composition.

IV. THE FEDERAL JURY SELECTION AND SERVICE ACT OF 1968

A rising tide of criticism of the key-man system crested in 1966 with the Fifth Circuit's decision in *Rabinowitz v. United States*,\(^52\) in which the court reversed a number of federal criminal convictions on the theory that the jury commissioners departed without authority from the statutory qualifications for jurors.\(^53\) *Rabinowitz* illustrated the vices that can occur under the key-man system\(^54\) and set the stage for the Federal Jury Selection and Service Act of 1968.\(^55\)

The heart of the Act is its codification of the notion that the jury ought to represent a fair cross section of the community. This is clear from the Act's declaration of policy 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. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.\(^56\)

The Act attempts to achieve these goals by mandating the use of random selec-

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\(^{49}\) See W. VA. CODE § 52-2-2. See also supra text accompanying notes 36-37.  
\(^{50}\) W. VA. CODE § 52-2-3 (1981).  
\(^{51}\) W. VA. CODE § 52-2-2.  
\(^{52}\) *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). The effort to reform procedures for compiling jury lists progressed through several stages in the post-World War II period and was interwoven with the civil rights movement. For histories of this effort, see *Rabinowitz*, 366 F.2d at 44-93, and Daughtrey, *Cross Sectionalism in Jury Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975) [hereinafter referred to as Daughtrey, *Cross Sectionalism*]. See also infra text accompanying notes 71-124.  
\(^{53}\) *Rabinowitz*, 366 F.2d at 50-51. The statutory provision was found at 28 U.S.C. §§ 1861-1877 as amended by the Civil Rights Act of 1957.  
\(^{54}\) The key-men in *Rabinowitz* composed jury lists that greatly underrepresented blacks. 366 F.2d at 37-43.  
tion methods and by requiring district courts to obtain names from voter registration or actual voter lists as supplied by state, local, or federal authorities. Such lists may be supplemented with other lists, when necessary to obtain a fair cross section. In addition, each district court is required to comply with the standards expressed in the Act by establishing a local implementation plan. The plan must provide, among other things, for the management of the selection process by the appointment of the clerk or a one-person jury commission as manager; must specify the precise source of names; must specify in detail the random method employed for selecting names from the chosen list or lists; must specify those groups of persons or occupations whose members shall, on individual request, be excused on grounds of hardship previously established by the plan; and must specify those groups or occupational classes whose members shall be barred from jury service on the ground that they are exempt, as defined by the plan.

Under each plan, and pursuant to the Act, names are randomly taken from the source lists and each person so selected is sent a qualification questionnaire. After the questionnaires are returned, the district judge determines "solely on the basis of information provided on the . . . form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service." 28 U.S.C. § 1865(b) lays out the narrow disqualification criteria. Noncitizens, those not versed in English, the infirm, felons whose civil rights have not been restored, and those against whom certain criminal charges are pending, are disqualified. Unless a person meets one or more of these sharply defined criteria, he or she is deemed qualified. From among those not disqualified, names are then publicly chosen, on a random basis, for people to serve on specific grand or petit juries. A judge may excuse an individual juror on hardship grounds, but only as a temporary matter.

In short, the Act stands in high contrast to the West Virginia system which requires neither random selection nor the use of a designated source for names. In addition, the federal scheme presumes that an individual is qualified unless the discrete disqualification criteria are met. West Virginia instead depends upon nebulous qualification criteria, presuming that no one is qualified to

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58 Id. § 1863(b)(2), (d).
59 Id. § 1863(b)(2).
60 Id. § 1863(b).
61 Id. § 1864(a).
62 Id. § 1865(a).
63 Id. § 1865(b).
64 Id.
65 Id. § 1866(a).
66 Id. § 1866(c).
67 Id.
68 See 28 U.S.C. § 1865(b). See also supra text accompanying note 60.
69 See W. VA. CODE § 52-1-4. See also supra text accompanying notes 18-23.
serve except those whom the commissioners deign to find qualified.\textsuperscript{70}

V. FEDERAL DECISIONAL LAW ON JURY REPRESENTATIVENESS

The progress of the federal courts in outlawing juries that are unrepresentative of the communities from which they are drawn has occurred in several separate stages.\textsuperscript{71} Ironically, the story of the first stage begins in West Virginia.

A. Total Exclusion of Blacks by Statute

The history of the struggle to make the jury "truly representative of the community"\textsuperscript{72} began in West Virginia more than a century ago. On March 12, 1873 the West Virginia Legislature enacted a statute which declared "All white male persons who are twenty-one years of age or who are citizens of this State, shall be liable to serve as jurors, except as herein provided."\textsuperscript{73}

When the State tried a black man, Taylor Strauder, for murder in the Ohio County Circuit Court, Strauder argued that the 1873 statute was unconstitutional. The trial court, as well as our West Virginia Supreme Court of Appeals, turned a deaf ear to this argument in a bluntly worded opinion.\textsuperscript{74} The United States Supreme Court reversed,\textsuperscript{75} holding that the statute violated the fourteenth amendment. The Court asked:

how can it be maintained that compelling a colored [sic] man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?\textsuperscript{76}

\textsuperscript{70} One of the principal criticisms of the Act is that it excludes state court juries from its scope. See, e.g., Ashby, Juror Selection and the Sixth Amendment Right to an Impartial Jury, 11 CREIGHTON L. REV. 1137, 1143 (1978).

\textsuperscript{71} Fuller histories of the development of the law on jury representativeness can be found in Daughtrey, Cross Sectionalism, supra note 52, and Kairys, Kadane & Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 CALIF. L. REV. 776 (1977). For the analytic structure of the initial parts of this section I am indebted to Kairys, Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study, 10 AM. CRIM. L. REV. 771 (1972) [hereinafter cited as Kairys, Juror Selection].

\textsuperscript{72} Smith v. Texas, 311 U.S. 128, 130 (1940).

\textsuperscript{73} Act of March 12, 1873, ch. 47, § 1, p. 102, 1872-1873 W. Va. Acts.

\textsuperscript{74} State v. Strauder, 11 W. Va. 745 (1877), rev'd sub nom. Strauder v. West Virginia, 100 U.S. 303 (1879).

The negro has no more right to insist upon the equal protection of the laws, than a Chinaman or a woman. And surely it will not be pretended that a state, which by its laws, prohibits a Chinaman or woman, from sitting on a jury, does thereby deny to a Chinaman or woman, who is being tried for a felony the equal protection of the laws.

\textit{Id.} at 817.

\textsuperscript{75} Strauder, 100 U.S. 303.

\textsuperscript{76} Id. at 309.
B. Total Exclusion of Blacks by Practice

Strader and its companion cases77 were, as commentator David Kairys points out, “the easiest that the Court has had to face in the jury selection area.”78 A slightly different and more difficult situation was presented by those jurisdictions in which the total exclusion of people by race was achieved through the discriminatory practices and customs of jury commissioners.79 The Court banned this type of “de facto”78 total exclusion of blacks in Norris v. Alabama.81 Picking up a principle that it had articulated earlier in Carter v. Texas,82 the Norris court said:

Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as jurors . . . the equal protection of the laws is denied . . . , contrary to the Fourteenth Amendment of the Constitution of the United States . . . [A]lthough the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination.83

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77 Virginia v. Rives, 100 U.S. 313 (1879); Ex parte Virginia, 100 U.S. 339 (1879).
78 Kairys, Juror Selection, supra note 52, at 773.
79 Id.
80 Id. at 774.
81 Norris v. Alabama, 294 U.S. 587 (1935). Professor Daughtrey takes the view that the Court began to bar “de facto” total exclusion with its decision in Neal v. Delaware, 103 U.S. 370 (1880). She states:
In Delaware the state constitution confined the franchise to white males and defined juror eligibility in terms of one’s qualification as an elector. Despite the interposition of the fifteenth amendment and the absence in the jury-selection statute of any disqualification provision based on race, the Delaware officials continued to select only white males for jury service. Daughtrey, Cross Sectionalism, supra note 52, at 3 n.6. Indeed the Norris court cites Neal for the proposition that “although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision [the fourteenth amendment] affords protection against action of the state through its administrative officers in effecting the prohibited discrimination. Neal v. Delaware . . . .”

Others, like Kairys, place Norris at the head of the line, rather than Neal, because of the circumstances under which Neal arose. Kairys explains:
Neal was an exceptional case which forms a rather odd bridge between the Strader decision and the later cases. Although Delaware statutes were read as not unconstitutional on their face, Neal was able to construct a prima facie case without an inquiry into the practices of jury commissioners. He alleged that blacks had never served on a jury in Delaware despite the fact that in 1880 the black population exceeded 26,000 in a total population of less than 150,000. Because of the procedural effect of Delaware law the Supreme Court was able to take Neal’s allegations as affirmative uncontradicted evidence. Using the allegations as a basis, the Supreme Court found unconstitutional exclusion by those officials charged with jury selection.

Kairys, Juror Selection, supra note 52, at 773 n.8. The failure of the Court to examine the use of discretion of the jury officials in Delaware makes Kairys’ view the better one from historical and logical perspectives.
82 Carter v. Texas, 177 U.S. 442 (1900).
83 Norris, 294 U.S. at 589.
C. Underrepresentation of Blacks by Practice

This shift of focus of review, from statutorily-dictated practices to the voluntary customs of jury officials, did not stop with those cases in which exclusion of blacks was total. Rather, the Court began to consider a line of cases in which litigants claimed that blacks were underrepresented on jury lists. In Smith v. Texas, the jury commissioners testified that there were few blacks on juries because they either did not know any blacks or they did not believe the ones they did know were qualified to serve. The Court noted that the Texas statute on jury selection, although facially inoffensive, was nonetheless quite capable of supporting discrimination by the commissioners. Under these circumstances, the Court found that the extremely low number of blacks who had served could not have been the result of chance or accident but had to have been the result of either "ingenuous or ingenious discrimination." Accordingly, the Court reversed Smith's criminal conviction as being in violation of the fourteenth amendment.

The Court moved backwards in Akins v. Texas, a case in which the Texas jury commissioners, reacting to Hill v. Texas, deliberately placed one, and only one, black on the list of sixteen persons eligible to serve on the grand jury. The majority, relying in part on an unsophisticated underrepresentation analysis, upheld this practice. It found that the commissioners did not "deliberately and intentionally" limit the number of blacks. As Justice Murphy's dissent demonstrates, not only was this conclusion in direct conflict with the commissioners' admissions regarding their practices but "limitation no less than racial exclusion in the formation of

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4 Smith v. Texas, 311 U.S. 128 (1940). Pierre v. Louisiana, 306 U.S. 354 (1939) preceded Smith by one year. In Pierre, the defendant was indicted by a grand jury and then convicted by a petit jury. He moved to quash the indictment of the grand jury as well as the general venire from which both juries had been drawn. The trial court sustained the motion to quash the venire, ruling that a new petit jury of blacks and whites had to be composed. But the court refused to quash the indictment, saying an indictment is not evidence of guilt. The Louisiana Supreme Court affirmed, but the United States Supreme Court reversed on fourteenth amendment grounds. The evidence in Pierre demonstrated an exclusion of blacks that was not actually total. From 1896 to 1936, no black had served on a grand or petit jury. In late 1936, the names of three blacks appeared on a venire of three hundred; one was called for service on the petit jury in 1937. Because the exclusion of blacks was virtually total, Pierre is better classified with Norris than with Smith.

5 Smith, 311 U.S. at 131-32.
6 Id. at 130-31.
7 Id. at 130.
8 Id. at 132.
10 Hill v. Texas, 316 U.S. 400 (1942). The Hill Court overturned the criminal conviction of a black defendant on equal protection grounds when it found that the commissioners had "made no effort to ascertain whether there were within the county members of the colored [sic] race qualified to serve as jurors, and if so who they were." Id. at 404.
11 Akins, 325 U.S. at 400.
12 Id. at 405-06. Cf. infra text accompanying notes 130-45.
13 Akins, 325 U.S. at 407.
juries is an evil condemned by the equal protection clause."94 Soon thereafter, however, the Court, which had refused in Akins to decide "whether a purposeful limitation of jurors by race . . . is invalid under the Fourteenth Amendment,"95 effectively repudiated limitation practices in Cassell v. Texas.96

Representative of the next generation of black underrepresentation cases is Turner v. Fouche.97 In Turner, the black population of the relevant jurisdiction was 60% of the total population, while blacks constituted only 37% of the grand jury in question.98 The Court held that this underrepresentation was not "so insubstantial as to warrant no corrective action by a federal court charged with enforcing constitutional guarantees."99 Thus, Turner represents a genre of cases in which the Court compares the percentage of the excluded minority in the population at large against the percentage of that minority in the jury list under attack.100

D. Exclusion or Underrepresentation of Ethnic Groups

In 1954 the Court broadened its exclusion rule when it decided in Hernandez v. Texas101 that the total de facto exclusion of Mexican-Americans was unconstitutional.102 After Hernandez, the exclusion of groups on the basis of ethnicity, as well as race, would be prohibited. Later, in Castaneda v. Partida,103 the Court found that the proportion of Mexican-Americans on grand juries (39%) in Hildago County, Texas, was substantially lower than the proportion of Mexican-Americans in the total population (79.1%)104 and held that such significant underrepresentation made out a prima facie case of discrimination, violative of the equal protection guarantee.105 The Court reached this decision even though a fair number of Mexican-Americans were on the defendant's grand and petit juries and even though they controlled significant public posts.106

94 Id. at 408.
95 Id. at 407.
96 Cassell v. Texas, 339 U.S. 282 (1950). There was no majority opinion in Cassell. The plurality opinion was based on the failure of the commissioners to seek out qualified blacks. Justices Frankfurter, Burton, and Minton concurred in the judgment on the theory that the limitation imposed upon black representation on grand juries evidenced purposeful discrimination.
98 Id. at 359.
99 Id.
102 The Court articulated the circumstances under which exclusion would be unconstitutional: "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." Id. at 478.
104 Id. at 486-87.
105 Id. at 494-96.
106 "Because of the many facets of human motivation, it would be unwise to presume as a matter
E. Standing

At first, attacks on unrepresentative juries were raised exclusively by criminal defendants who argued that the exclusion or underrepresentation of a particular group violated the defendant's right to the equal protection of the laws.\textsuperscript{107} \textit{Carter v. Jury Commission},\textsuperscript{108} however, broke this mold. The \textit{Carter} Court recognized the rights of members of excluded classes to bring affirmative civil suits to challenge their exclusion or underrepresentation. The Court found that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."\textsuperscript{109} Later, in \textit{Peters v. Kiff},\textsuperscript{110} a white defendant was allowed to employ the wrongful exclusion of blacks as a basis for relief in his federal habeas corpus action. \textit{Peters} thus established that nonmembers of the excluded or underrepresented class had standing to challenge the exclusion or underrepresentation as violative of the nonmembers' rights to an impartial trial.\textsuperscript{111}

F. Factors Other Than Race and Ethnicity

The Court's concern with representativeness of juries does not end with the exclusion or underrepresentation of racial and ethnic groups. In \textit{Theil v. Southern Pacific Co.},\textsuperscript{112} the Court found that exclusion of daily wage earners violated the principle of cross-sectionalism.\textsuperscript{113} It must be quickly added, however, that the decision in \textit{Theil} was based on the authority of the Court to supervise its lower federal courts and not on constitutional grounds.\textsuperscript{114} The Court's supervisory power also served as the aegis for the decision in \textit{Ballard v. United States},\textsuperscript{115} in which the

of law that human beings of one definable group will not discriminate against other members of their group." \textit{Id.} at 499. Thus, the Court rejected what had been termed in \textit{Castaneda} the "governing majority" theory. \textit{Id.} at 491-92.

\textsuperscript{107} Typically an attack would be made upon an indictment by attacking the venire from which came the grand jury issuing it, as in \textit{Castaneda}, 430 U.S. 482, or by attacking the grand jury that indicted and the petit jury that convicted, as in \textit{Whitus}, 385 U.S. 545. Occasionally an attack on the petit jury alone would be made, as in \textit{Avery v. Georgia}, 345 U.S. 559 (1953).

\textsuperscript{108} \textit{Carter}, 396 U.S. 320.

\textsuperscript{109} \textit{Id.} at 329.


\textsuperscript{111} Justice Marshall, writing for himself, Justice Douglas and Justice Stewart, said that "the Court has . . . recognized that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." \textit{Peters}, 407 U.S. at 500.

In a distinction that would become more important with the decision in \textit{Duren}, 439 U.S. 357, Marshall chose to bottom his representative jury requirement on the due process clause rather than on the equal protection clause. \textit{See Peters}, 407 U.S. at 500, n.9.

\textsuperscript{112} \textit{Thiel v. Southern Pacific Co.}, 328 U.S. 217 (1946).

\textsuperscript{113} "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." \textit{Id.} at 220.

\textsuperscript{114} \textit{Id.} at 325.

\textsuperscript{115} \textit{Ballard v. United States}, 346 U.S. 187 (1946).
Court found that the exclusion of women from federal panels offended the cross-section principle articulated in *Theil*.116

The fair cross-section principle of *Theil* and *Ballard* was elevated to constitutional status117 by the Court’s decisions in *Taylor v. Louisiana*,118 which dealt with the exclusion of women, and *Duren v. Missouri*,119 which dealt with their underrepresentation.

The Louisiana statute attacked in *Taylor* required women to file written declarations of interest in order to be considered for jury service. The Court found that women had been, "for all practical purposes . . . excluded from jury service."120 This exclusion, which could not be justified on "merely rational grounds,"121 violated the sixth amendment’s fair cross-section requirement.122

By contrast with *Taylor, Duren* was an underrepresentation case. Because of a statute allowing women to exempt themselves, at will, from jury service, the *Duren* jury panels were composed of only 15% women.123 The Court held that the Missouri practice violated the defendant’s sixth amendment right to a fair cross section, since there was no "significant state interest"124 in the automatic exemption of women.

VI. TESTING THE CONSTITUTIONALITY OF A JURY LIST

There are essentially two types of constitutional attacks that can be made upon the composition of a jury list. The first argues that the impartial trial protections of the sixth amendment are violated when jury lists fail to represent fair cross sections of the communities from which they are drawn. Since the sixth amendment only applies to criminal defendants, the cross-section argument is only available in criminal cases. The second type of attack, available in both criminal and civil contexts, argues that composition procedures which discriminatorily exclude or underrepresent certain groups violate the equal protection clause of the fourteenth amendment.

A. The Equal Protection Case

The Court set forth in clear terms the structure of the equal protection argument in *Castaneda v. Partida*.125

116 *Id.* at 192-93.

117 The principle was read into the sixth amendment’s guarantee of an impartial trial and the fourteenth amendment’s equal protection clause. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 526-27 (1975).


119 *Duren*, 439 U.S. 357.

120 *Taylor*, 419 U.S. at 534.

121 *Id.*

122 In ruling for *Taylor* on this basis, the Court effectively overruled *Hoyt v. Florida*, 368 U.S. 57 (1961), which had upheld, against a due process and equal protection attack, a similar exclusion of women.

123 *Duren*, 439 U.S. at 360.

124 *Id.* at 367.

125 *Castaneda*, 430 U.S. 482.
In order to show that an equal protection violation has occurred... the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or applied... Next, the degree of underrepresentation must be proved, 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... Finally, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing... Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that purpose.¹²⁶

Let us consider these elements in turn.

1. Cognizable Groups

What is a cognizable group? Although no one clear definition has emerged from the case law,¹²⁷ there is little or no dispute that groups distinguished on the

¹²⁶ Id. at 494-95.
¹²⁷ See JURYWORK: SYSTEMATIC TECHNIQUES ch. 5, § 5.05(1) (B. Bonora & E. Krauss 2d ed. 1983) [hereinafter cited as JURYWORK] for a review of the cases defining “cognizability.”

West Virginia has adopted the definition set forth in United States v. Guzman:
A group to be “cognizable” for present purposes must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace.


[The focus of courts on factors such as those in Guzman] ignore[s] the significance of [some] serious underrepresentations [in terms of] the representativeness principle. For example, it has led courts to determine whether a precise age can be set as the dividing line between young and older people rather than determining the significance of serious underrepresentation of young people...

Similarly, consideration of group cohesiveness, demonstrably differentiable outlook, and size, though sometimes relevant, should not be determinative as to some groups. Exclusion or serious underrepresentation of people of eastern European ancestry, or non-whites, clearly should be ruled unconstitutional, yet in many areas of the country these groups are not cohesive, do not have a different outlook, and/or constitute only a small portion of the population.

To determine which groups [should be equitably represented in] jury pools, ... [courts should] look at the reasons why jury pools must be representative; appropriate standards of cognizability should be based on the policies underlying the representativeness principle.
characteristics of race, sex, religion, ethnicity, and political affiliation are, indeed, cognizable. More problematic distinctions, resulting in far fewer judicial conclusions of cognizability, involve wealth, age, student status, geographic location, educational attainment, and residency requirements.

2. Proportion Tests

A number of tests have been employed by courts for determining whether those chosen from a cognizable group are in fair and reasonable proportion to their numbers in the community at large.

a. Absolute Disparity. The absolute disparity test compares raw figures—the percentage of the group on the jury list versus the percentage of the same group in the population. Thus if women were 50% of the population but only 40% of the jury list, there would be an absolute disparity of 10%. (50% - 40% = 10%). This test has been heavily criticized as being unfair to minorities with relatively...

Viewed this way, considerations such as precise definability, cohesiveness, outlook, and size [may] be relevant, but other factors will, in some cases, [take precedence over them].

The representativeness principle furthers three important societal purposes. First, litigants should be guaranteed impartiality and integrity . . . in jury determinations. Second, direct citizen participation in the judicial process, an aspect of democratic and representative government, is . . . consistent with basic democratic principles [only] if it is cross-sectional or representative. Third, it is important not only that the jury system be fair and democratic but also that people generally can see and understand its fairness and democracy. [This too,] . . . depends on the system’s representativeness.

These policies suggest that standards of cognizability should be framed in terms of fairness to litigants, democratic participation, and the legitimacy of the judicial process. Traditional standards of cognizability largely focus . . . on the policy of fairness to litigants, which explains the emphasis on a differentiable outlook and size. But some groups have been historically excluded from democratic processes and/or their exclusion is basically offensive to contemporary notions of democracy, whether or not [group members are numerous] . . . or have a different outlook that should be represented.

Based on these policies, the concept of cognizability should clearly include groups based on race or ancestry, religion, economic or social status, sex, political or social beliefs and associations, and geography. [However,] [o]ther groups not usually viewed as cognizable by the lower federal and state courts, [such as young and elderly people and students,] cannot be excluded from or seriously underrepresented on jury pools without . . . contradicting these policies.

JURYWORX, supra note 127, at § 5.05(1).

128 See cases collected in JURYWORX, supra note 127, at § 5.05(1).

129 Id. The Second Circuit has recently ruled that aliens do not constitute a cognizable class. United States v. Toner, 728 F.2d 115 (2d Cir. 1984).

130 Those who study juries are indebted to David Kairys and others who have painstakingly applied statistical methods to jury observations. See, e.g., Kairys, Kadane, & Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Cal. L. Rev. 776 (1977) [hereinafter cited as Kairys, Jury Representativeness]. See also JURYWORX, supra note 127, at § 5.05(2). The descriptions of the various tests in jury representativeness presented here draw heavily upon these works.
small populations in the general community. For example, if a minority only represents 5% of the community population and is represented on the jury list at at 2% rate, the absolute disparity would appear to be a rather insignificant 3%. Other tests, described below, would give results more reflective of a minority’s poor showing on the jury list relative to its proportion in the general population.

The absolute disparity test is popular with courts, probably because of its simplicity. An absolute disparity of 10% to 15% is considered by some to be significant.

b. Comparative Disparity. The comparative disparity test measures disparity by comparing two different percentages against each other. The two percentages are: (1) the percentage of the subject group in the eligible population (e.g., women in the 18-65 age bracket); and (2) the percentage of the subject group on the jury list. To illustrate, if women represent 50% of the general population and also represent 50% of the jury list, there would be a perfect 1:1 ratio and no disparity between the two likelihoods of a woman being called for duty. Assume now that only 30% of the jury list is female, but that the percentage of women in the population at large remains 50%. Thus, women are represented on the jury list at only 60% of the expected rate. Under these circumstances a woman would have 40% less chance

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131 See, e.g., Kairys, Jury Representativeness, supra note 130, at 793:
The absolute disparity standard is objectionable on both legal and mathematical grounds, because it fails to account for the range at which the disparity occurs. For example, an absolute disparity of 10% in a jurisdiction that is 30% black is quite different from the same absolute disparity in a jurisdiction that is 11% black. In the jurisdiction that is 30% black, a 10% absolute disparity means that the eligible black person has 33% less chance of serving than the average eligible person, while in the jurisdiction that is 11% black, the same absolute disparity means that the eligible black person has 91% less chance of serving. This difference is, of course, legally significant as well: in the 11% black jurisdiction, the 10% absolute disparity amounts to almost total exclusion of black people. The absolute disparity standard yields the same result in situations in which the results should clearly differ.

132 The absolute disparity method was, in effect, used in Duren. The Duren Court compared the raw percentages—15% of the venire was female while 54% of the general population was female—and found this to be a “gross discrepancy,” requiring the conclusion that women were not “fairly represented.” Duren, 439 U.S. at 365-66. See also Turner, 396 U.S. 346 and Swain v. Alabama, 380 U.S. 202 (1965).

133 Kairys, Jury Representativeness, supra note 130, at 790.
The Supreme Court has invalidated jury systems with absolute disparities as small as 14%. Hernandez v. Texas... Alexander v. Louisiana... Jones v. Georgia, 389 U.S. 24 (1967).
Courts have tolerated selection systems with absolute disparities as large as 11%. United States v. Maskeny, 609 F.2d at 190; Thompson v. Sheppard, 490 F.2d 830 (5th Cir. 1974), cert. denied, 423 U.S. 857 (1975).
Jurywork, supra note 127, at § 5.05(2)(c)(ii). See also, Foster v. Sparks, 506 F.2d 805, 813 (5th Cir. 1975) (Appendix by Judge Walter P. Gewin, An Analysis of Jury Selection Decisions).

134 Put in terms of a ratio, the figures would be:

<table>
<thead>
<tr>
<th>Percentage</th>
<th>Number</th>
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<tbody>
<tr>
<td>30%</td>
<td>:</td>
</tr>
<tr>
<td>60%</td>
<td>100%</td>
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https://researchrepository.wvu.edu/wvlr/vol87/iss2/4
of being placed on the list than she would were her sex fully represented. The comparative disparity, therefore, would be 40%.

The commentators favor this method because it avoids the difficulties of the absolute disparity method, and because it is easy to use and understand. 135 A few courts have adopted this test as the appropriate one. 136 A comparative disparity of 15% to 20% is generally considered significant. 137

c. Proportion of the Eligibles. Those who subscribe to this test believe that if the percentage of the group in question on the jury list comes to less than 80% of what it ought to be under perfect circumstances, then the disparity between actual inclusion on the list and the inclusion rate of the group in the general population is significant. 138 Thus, if women were 50% of the general population and 50% of the jury list, there would be no disparity. The tolerable disparity here would be 80% of the ideal (i.e., 80% of 50%) or 40% representation on the list. Anything below 40% would be suspect.

Various federal agencies 139 and at least two federal courts have adopted this test. 140

d. Statistical Significance Test. This test measures the number of standard deviations by which the actual sample departs from the ideal. More than two or three standard deviations is considered statistically significant, 141 indicating that the results

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135 See the defense of the comparative disparity method made in Kairys, Jury Representativeness, supra note 130, at 793-99. See also J. Van Dyke, Jury Selection Procedures 98 (1977) [hereinafter cited as Van Dyke].


137 JURYWORK, supra note 127, at § 5.05(2)(c)(ii) (citing Kairys, Jury Representativeness, supra note 130, at 799); Foster, 506 F.2d 805, 818 (Appendix); United States v. Facchiano, 500 F. Supp. 896, 903 (S.D. Fla. 1980).

138 JURYWORK, supra note 127, at § 5.05(2)(c)(iii).

139 Id.

140 The United States Commission on Civil Rights proposes that any disparity of 20% or more between the proportion of eligible whites selected for master jury wheel and proportion eligible minority persons selected be remedied by supplementation. Under this measure, if 70% of the voting age population of whites are registered, then at least 56% of the voting age population of negroes must be eligible for the jury wheel (56 is 80% of 70 (80 = 100 - 20)). Foster, 506 F.2d 805, 818 (Appendix) (footnote omitted). The Equal Employment Opportunity Commission (EEOC) has issued guidelines which provide that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1983).


142 "As a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." Castaneda, 430 U.S. at 496, n.17.
probably did not occur by chance.\textsuperscript{142} The method by which the number of standard deviations is calculated may be illustrated by the following hypothetical which assumes a female population of 50\%, a female jury list representation of 40\%, and a jury list totalling 400 names. One would multiply the jury list size (400), times the percentage of women in the general population (50\%), times the percentage not in the class (50\%). \((400 \times .50 \times .50) = 100\). One then determines the square root of 100, which of course is 10. Ten jurors becomes the standard deviation. The disparity is found by multiplying the sample size (400) by the absolute disparity (10\%), \((400 \times .10 = 40)\), and dividing this number by the standard deviation number \((40 \div 10 = 4)\).\textsuperscript{143}

The result of our statistical significance hypothetical, four, is more than three standard deviations from the ideal and is therefore unacceptable. Accordingly, the statistical difference in our hypothetical between the ideal and the actual is significant.

This test has received only a mixed greeting from the courts.\textsuperscript{144} The commentators have criticized it on the ground that it is not as easily understood as the absolute and comparative disparity methods. Critics have also pointed out that the validity of statistical significance tests depends upon the size of the group studied and the proportional composition of the sample.\textsuperscript{145}

3. Selection Procedures

The final element of an equal protection attack is the existence of "a selection procedure that is susceptible of abuse or is not racially neutral."\textsuperscript{146} While it is neutral on its face, nothing could be more "susceptible of abuse," in practice, than the key-man system. While the Court has not found key-man systems facially unconstitutional, it has found them most susceptible of abuse in application.\textsuperscript{147}

B. The Fair Cross-Section Case

After considerable development over the years,\textsuperscript{148} the elements of a fair cross-

\begin{footnotesize}
\begin{enumerate}
\item[142] "In employment discrimination cases, [the] rule has been refined to require a probability of less than .05 (1 in 20, 1.96 standard deviations) or .01 (1 in 100, 2.56 standard deviations) for significance." Jurywork, supra note 127, at § 5.05(2)(c)(iv) n.110.
\item[143] See id. at § 5.05(2)(c)(iv).
\item[144] For cases favoring the statistical significance test see Castaneda, 430 U.S. 482; Alexander, 405 U.S. 625; and Whittus, 385 U.S. 545 (1967). The test is disfavored in United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980) and Test v. United States, 550 F.2d 577 (10th Cir. 1976).
\item[146] Castaneda, 430 U.S. at 494.
\item[147] Id. at 497.
\item[148] For an excellent historical analysis of the constitutionalization of the fair cross-section princi-
\end{enumerate}
\end{footnotesize}
section attack on a jury list are now clear. The Court explicitly articulated them (in terms very similar to the elements of the equal protection case) in *Duren v. Missouri*:

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury selection process.149

The first two of these elements are virtually identical to the first two elements that make up the prima facie equal protection case.150 The third element, which for all practical purposes is also the same as the equal protection requirement, requires that the systemic source of the exclusion be identified.151 In *Taylor*, the source was the Louisiana statute requiring women to affirmatively express their desire to serve on juries in order to be placed on the jury list.152 In *Duren*, the systemic defect was the Missouri provision allowing women to automatically exempt themselves from service.153 In a state with a long history of underrepresentation of a distinct group, this third element could be made out by simply establishing the existence of a key-man system that vests discretion in the jury commissioners.154

C. *Rebuttal*

The key difference between the two types of cases is the manner in which each may be rebutted.155 In the instance of the equal protection case, which establishes presumptive discriminatory purpose, the state may rebut by demonstrating the nonex-

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149 *Duren*, 439 U.S. at 364.
150 See *supra* text accompanying notes 125-45.
151 Although the equal protection cases are distinguishable by their references to "purposeful discrimination" (see, e.g., *Castaneda*, 430 U.S. at 493), there is no functional difference in the elements constituting the prima facie cases. "The prima facie tests for an equal protection claim and a fair cross-section claim are almost identical." *Davis v. Zant*, 721 F.2d 1478, 1482 (1983), reh'g granted, 728 F.2d 492 (1984).
152 *Taylor*, 419 U.S. at 523.
153 *Duren*, 439 U.S. at 359.
154 Any key-man system not harnessed to a purely random selection process will inevitably allow the commissioners to know, in advance, at least the sex if not the race, ethnicity, and age of prospective jurors. See *Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983).
155 *Davis*, 721 F.2d at 1482, n.6.
istence of intentional discrimination, or by showing that the discriminatory purpose did not have a determinative effect. 156 Alexander v. Louisiana 157 teaches that such a showing may be made in race cases by proving that "permissible racially neutral selection criteria and procedures . . . produced the monochromatic result." 158 In Alexander the Court is also quick to point out that simple "affirmations of good faith [on the part of the commissioners] in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." 159 In contrast, the opposition must defend against an equal protection attack by producing rebuttal evidence that is "affirmative and substantiated rather than negative." 160

The fair cross-section case is more difficult to rebut. Proof of the nonexistence of intentional discrimination will not suffice. 161 Instead, the state must demonstrate the existence of a "significant state interest" 162 in the practice resulting in the underrepresentation. No mere rational basis will do. 163 Thus, in Duren the state did not come forward with a significant interest justifying the automatic exclusion granted to women, and was accordingly unable to rebut the prima facie cross section case which had been made. 164

VII. WEST VIRGINIA DECISIONAL LAW

The limited corpus of West Virginia decisional law is distinguished from the federal decisional law by two characteristics: the apparent failure of sufficient fact preparation by those attacking the composition of jury lists and the consistent resistance of the Supreme Court of Appeals of West Virginia to attacks on these lists. In large part, the second characteristic may very well be the effect of the first.

In State v. Johnson, 165 the defendant was unable to prove to the court's satisfaction that the commissioners excluded a class of low-income persons when they

156 Castaneda, 430 U.S. at 497-98.
157 Alexander, 405 U.S. 525.
158 Id. at 631-32.
159 Id. at 632. See also cases collected at JURYWORK, supra note 127, at § 5.05(3) n.116.
160 JURYWORK, supra note 127, at § 5.05(3).
161 In a footnote distinguishing the equal protection claim from the fair cross section claim, Mr. Justice White laid out the contents of the respective rebuttals for each prima facie case: [E]vidence [of discriminatory purpose in an equal protection claim] is subject to rebuttal evidence either that discriminatory purpose is not involved or that such purpose did not have a determinative effect. See Castaneda, . . . Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977). In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. Duren, 439 U.S. at 368.
162 Id.
163 Taylor, 419 U.S. at 534.
164 Duren, 439 U.S. at 368-70.
applied (in theory) the no-paupers criterion\textsuperscript{166} to their selection choices.\textsuperscript{167} In light of the defendant’s apparent failure to provide statistical or other proof of the commissioners’ active discrimination against those of low-income, Justice Neely, writing for the court, refused to treat the statutory proscription against service by paupers as anything more than a prophylactic measure aimed at barring disruptive types from the orderly processes of the courtroom.\textsuperscript{168} Accordingly, the constitutionality of the provision was upheld.\textsuperscript{169}

The petitioners in \textit{State ex rel. Whitman v. Fox}\textsuperscript{170} alleged that because the commissioners in the petitioners’ county used voter registration and land books for their sources they excluded nonvoting, non-landowners from the jury lists, thus failing to produce a list that was a fair cross section of the community. In an opinion also written by Justice Neely, the court rejected the petitioners’ pleas for a hearing at which the petitioners could examine the commissioners. The opinion does not make it clear whether the basis for the court’s ruling is that nonvoting non-landowners do not constitute a cognizable group\textsuperscript{171} or whether the petitioners were barred from raising a challenge because they did not belong to the excluded group.\textsuperscript{172}

In yet a third opinion written by Justice Neely, the court in \textit{State v. Williams}\textsuperscript{173} upheld the constitutionality of voter registration rolls as the sole source of names for the jury list. The court had no difficulty reaching this decision because the

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\textsuperscript{167} \textit{Johnson}, 157 W. Va. 341, 201 S.E.2d 309. The court also refused to find W. Va. Code § 52-1-4 unconstitutional. Section 52-1-4 instructs commissioners to find jurors who are of “sound judgment” and “good moral character.” The defendants had argued that these terms were too imprecise to pass constitutional muster. (Neither the defendants nor the court made any reference to the exact nature of the constitutional infirmity of these provisions as alleged by the defendant).
\textsuperscript{168} \textit{Johnson}, 157 W. Va. at 346-47, 201 S.E.2d at 313. Justice Neely’s feelings about the “disruptive” segment of society are revealed again later in \textit{State ex rel. Whitman v. Fox}, wherein he writes: “There is nothing which gives a person the right, at his election, to be judged by the scrappings and leavings of life, whom we may infer might lack the intellectual competence to do justice and before whom all orderly procedure could well be farce.” \textit{State ex rel. Whitman v. Fox}, 160 W. Va. 633, 650, 236 S.E.2d 565, 575 (1977).
\textsuperscript{169} \textit{Johnson}, 157 W. Va. 341, 201 S.E.2d 309.
\textsuperscript{170} \textit{State ex rel. Whitman}, 160 W. Va. 633, 236 S.E.2d 565.
\textsuperscript{171} \textit{Id.} at 648, 236 S.E.2d at 574.
\textsuperscript{172} “We find that the petitioners have not alleged that they are members of a recognizable group...” \textit{Id.} at 649-50, 236 S.E.2d at 575.
\textsuperscript{173} \textit{State v. Williams}, 249 S.E.2d at 752 (W. Va. 1978).
\end{flushleft}
appellants failed to offer proof that there was intentional discrimination, or even that there was an underrepresentation of blacks or the poor.\(^\text{174}\)

The proof adduced by the appellants in State v. Hobbs\(^\text{175}\) in support of their assertion that the use of personal property rolls resulted in lists that were not representative of a fair cross section of the community was rejected by the court as "incomplete and unpersuasive."\(^\text{176}\) The court criticized the failure of the appellants to demonstrate the important details of the property rolls, such as whether they included children, spouses, the elderly, and the indigent. In addition to this failure on the facts, the appellants failed to convince the court that those excluded by the use of this source represented a cognizable group.\(^\text{177}\)

Despite the absence of a single decision in favor of those attacking the composition of jury lists, the approach of the Supreme Court of Appeals of West Virginia has steadily reflected the change in jury composition law as developed by the Supreme Court of the United States. Hence, in State ex rel. Whitman v. Fox,\(^\text{178}\) the West Virginia court adopted the Castaneda formula for defining an equal protection violation.\(^\text{179}\) When the United States Supreme Court shifted toward a sixth amendment fair trial analysis with its decisions in Taylor and Duren, the West Virginia Supreme Court reflected this shift with its decision in State v. Hobbs.\(^\text{180}\)

Reading these cases, one obtains the sense that the court would not turn aside a challenge based on sound precedent and well-organized, complete data.

VIII. THE WEST VIRGINIA JURY LIST: THE DATA OF FAILURE

A. Methodology

Under the supervision of the author, law students conducted studies of jury lists and the processes of their composition in six West Virginia counties. These counties included one in the Northern Panhandle, one in the south, one in the central section of the state, and three in the north central region of West Virginia.\(^\text{181}\) Two essential functions were performed in each county: jury commissioners were interviewed, and records for the jury lists for 1981 and 1982 were scrutinized.

Commissioners were asked questions about their backgrounds (such as party affiliation and years as commissioner), about the characteristics they seek in jurors as well as the number of jurors sought for each year's list, about the methods

\(^{174}\) Id. at 757.


\(^{176}\) Id. at 268.

\(^{177}\) Id. at 267.

\(^{178}\) State ex rel. Whitman, 160 W. Va. 633, 236 S.E.2d 565.

\(^{179}\) "Finding that the Castaneda standards are compatible with our own constitutional doctrine, we adopt those standards in West Virginia under West Virginia Constitution, Art. III, § 17 and under § 10, the due process clause with its inherent equal protection component." Id. at 649, 236 S.E.2d at 575.

\(^{180}\) Hobbs, 282 S.E.2d at 265-70.

\(^{181}\) These counties will be referred to as County Northern Panhandle, County South, County Central, and Counties North Central A, B, and C.
they employ to obtain names for the list (including the sources used and whether the selection process was random), and whether persons are selected with knowledge of their party affiliation, sex, race, or age.

In examining the jury lists and associated records, the researchers identified the sex of each person listed. So skimpy were the records kept by most counties that virtually no information was available on other factors that would characterize cognizable groups, such as race and age.

Because of the impracticability of obtaining information relating to age, race, and occupation, the across-the-board information reported here will deal exclusively with sex.

B. Results

1. Overview

In five of the six counties studied, women were underrepresented on the petit jury lists for 1981 and 1982, while in only one county were they overrepresented.

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182 Some counties keep on file the juror information cards filled out by jurors at the start of their service. Commonly such cards will reveal the name of the juror's spouse, the juror's address, and in some instances, the juror's age, occupation and whether the juror has performed previous service.

183 Because many counties do not keep records that identify anything more than the jurors' names and addresses, researchers had to rely upon their own good judgment in deciding whether first names belonged to males or females.

184 This led the author to propose a simple reform that cries out to be made. See infra text accompanying notes 224-25.

185 The data concerning two of the five underrepresentation counties will receive detailed scrutiny later in this section. The table below displays the data for the remaining four counties, three of which underrepresent women, one of which underrepresents men:

<table>
<thead>
<tr>
<th>County</th>
<th>% of Males 19-64a</th>
<th>% of Females 19-64b</th>
<th>% of Females 1981 List</th>
<th>% of Females 1982 List</th>
</tr>
</thead>
<tbody>
<tr>
<td>County Northern Panhandle</td>
<td>47.3</td>
<td>52.7</td>
<td>46.6</td>
<td>45.9</td>
</tr>
<tr>
<td>County North Central B</td>
<td>49.5</td>
<td>50.5</td>
<td>55.6</td>
<td>60.1</td>
</tr>
<tr>
<td>County North Central C</td>
<td>47.6</td>
<td>52.4</td>
<td>42.3</td>
<td>48.8</td>
</tr>
<tr>
<td>County Central</td>
<td>49.5</td>
<td>50.5</td>
<td>50.0</td>
<td>49.8</td>
</tr>
</tbody>
</table>

a,b The data in these columns was obtained from Bureau of the Census, U.S. Department of Commerce, 1980 Census of Population, Vol. 1, Characteristics of the Population, Chapter B, General Population Characteristics, Part 50, West Virginia, PC80-1-B50 (August, 1982) [hereinafter cited as Census].

Although there is census data for the number of 18 year olds found in each county there is no report of the number of 65 year olds. Accordingly, for purposes of comparing the general population with the jury lists, both ends of the 18 to 65 age bracket were removed to arrive at a fair general population figure. There are generally more 18 year old males than females, and more 65 year old females than males.
In the five underrepresentative counties the absolute disparities\(^{187}\) for petit jury lists ranged from a low of .5% to a high of 18.7%.\(^{188}\) Two counties, one in the north central region (County North Central A) and one in the southern part of the state (County South) had petit jury list disparities that are legally significant by today's standards.\(^{189}\) As might be expected, these two counties also had legally significant disparities between the numbers of men and women on their grand jury lists. In each of these two counties judicial supervision of the process was fairly loose, and no commissioner applied random selection measures to a source list.

In all six counties sampled, the commissioners violated one or more of the statutory standards imposed upon them in the selection of jurors.\(^{190}\)

2. The Commissioners

Eleven of the twelve commissioners in the six counties surveyed consented to interviews. Eight were male, three were female. Only four of the commissioners were under the age of sixty. The commissioners' average (mean) age was fifty-eight, while their median age was sixty-five.\(^{191}\) All were Caucasian. As for occupation, five of the eleven were businessmen. Two were county school employees while another was a retired school employee. A business manager, a housewife, and a paralegal comprised the remaining three commissioners. Of the eleven, six were Democrats and five were Republicans.

The picture of the typical commissioner that emerges from this sample therefore is that of an older, white male with a career in business.

3. The Underrepresentation of Women in "County South"

In County South, the commissioners are responsible for compiling petit jury lists of 2000 names and grand jury lists of 150 names. The Republican commissioner, a white businessman of advanced years, stated that his sources included tax rolls, city directories, telephone books, and club rosters. He also scanned the society pages for the names of young people getting married since "they should be fairly good kids if they're getting married." This commissioner also "asked a couple of prominent coloreds [sic]" to give him "a list of about twenty or so to put in the box."\(^{192}\) In addition, he used the names of people he knew. For the

\(^{187}\) Other disparity measurements for two of the six counties are summarized infra in the text accompanying notes 206-207.

\(^{188}\) See supra table of results at note 185.

\(^{189}\) See infra text accompanying notes 201-15.

\(^{190}\) These violations, as well as other abuses of which key-men are guilty, are categorized infra in the text accompanying notes 218-24.

\(^{191}\) The ages of the commissioners interviewed, in ascending order, were 32, 44, 49, 49, 60, 67, 67, 68, 68 and 70.

\(^{192}\) The black population of County South is slightly less than 7%. Census, supra note 185.
grand jury list he used exclusively people he knew, because he wanted "good, upright people for the grand jury."

The Democratic commissioner, also an elderly, white, male business person, restricted his sources to the telephone books, city directories and names of people who were known to him. Commenting on the role racial and sexual characteristics played in his selection procedures, the commissioner maintained that "we don't go by that. It's not supposed to come into the process. We just pick names." This same commissioner later stated, however, that he too put the names of about twenty known blacks onto his half of the list.

Neither of the commissioners employed random selection methods.

The lists that resulted from these procedures and criteria were lopsided in favor of males. In 1981 the commissioners produced a 2000 name list that included 1267 men and only 733 women, for a percentage of 63.35% men and 36.65% women. For that same year the commissioners produced a 150 name grand jury list with 101 males and only 49 females on it, for a 67.33% to 32.67% breakdown.

The disparity grew even larger in 1982 when the jury list showed the names of 1354 men (67.7%) and only 646 women (32.3%). The grand jury list showed 106 men (70.7%) as compared to 44 women (29.3%). The 1980 census figures for County South show that in the nineteen to sixty-four age bracket women outnumbered men, 52.4% to 47.6%. In the nineteen and above age bracket, the gap widened, 54.1% to 45.9%.

These disparities on the jury lists were reflected in the actual petit and grand juries that performed in the circuit court of this county. Female representation on petit juries ranged from a high of only 44% to a low of 30%. The underrepresentation on grand juries was even more shocking, ranging from a high of 39% to a

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193 Telephone books, because they contain the names of heads of households, contain mostly male names. See Van Dyke, supra note 135, at 101-10.

194 This position appears to be inconsistent with the commissioners' positive duty to "develop and pursue procedures aimed at achieving a fair cross-section." People v. Superior Court, 38 Cal. App. 3d 966, 972 (1974). See also Avery, 345 U.S. at 561.

195 These admissions by the commissioners lead to some speculation about whether blacks are underrepresented in County South where, according to the Bureau of the Census, blacks make up just under 7% of the total county population. See Census, supra note 185. If the only blacks on the County South list were those specially placed on the list, then blacks would represent 2% of the list. These figures would result in a comparative disparity of 71%, and an absolute disparity of almost 5%. Under the proportion-of-the-eligibles test blacks should represent at least 5.6% of the list. Under the statistical significance test, the disparity is 8.76 standard deviations.

Unfortunately, West Virginia circuit courts are not required to collect data about the race of those on jury lists. Consequently, there is no reliable method for determining how many blacks, if any, beyond the 40 handpicked by the commissioners were actually on the petit jury list.

196 Because people between the ages of 18 and 65 are liable for jury duty, this is the most relevant age bracket provided in the census data. See supra note 185.
low of 0%. By every measure of disparity described in Part VI above, these differences in the representation of women as compared to men were legally and statistically significant.

For petit jury lists, the absolute disparity grew from 15.75% in 1981 to 20.10% in 1982. In 1981 women had, by a comparative disparity measure, 28% less chance of serving than they should have had, while in 1982 they had 37% less chance. Using the nineteen to sixty-four age bracket and the proportion-of-the-eligibles test, women should have had a representation on the petit and grand jury lists of at least 41.92%. Finally, using standard deviation analysis, there was a disparity in 1981 of 14.10 standard deviations and in 1982 of 18.00 standard deviations.

The disparities for the County South grand jury lists are equally significant. The absolute disparity grew from 19.71% in 1981 to 23.10% in 1982, while the comparative disparity grew from a very high 37.65% to an even higher 44.03%. The statistical significance measure shows 4.83 standard deviations in 1981 and 5.67 in 1982. Under the proportion-of-the-eligibles test, one would expect for each of these years a female representation of 41.92%, rather than the actual representation figures which were 32.67% for 1981 and 29.33% for 1982.

4. The Underrepresentation of Women in “County North Central A”

In County North Central A, the commissioners compiled petit jury lists of approximately 430 names for each of the years studied. For a county as large as North Central A, one would expect a larger number of names. The Office of the Circuit Clerk of this county provided this number of names to this study's researchers upon inquiry and again upon re-inquiry.

Because there are no regular number of pages turned, no regular number of names passed over before choosing the name to be listed, and because the commissioner can see the names of persons he passes over as well as those he chooses, this is not a random system in any meaningful sense of the term. Contrast it with those systems in which (1) the number of names to be selected is divided into the number of names on the source list (e.g., 40,000 ÷ 50 = 80); (2) the resulting number serves as the identifier number (e.g., every 80th name is selected) and (3) a number is drawn from a hat to determine the starting point.

In addition, this commissioner knows the party affiliation of the voter he selects. See text accompanying footnotes 214-19. But cf., the proposed West Virginia Jury Selection and Service Act, § 6(b), Appendix B.

Despite the clear direction of W. Va. Code § 52-1-4 that commissioners select persons of "good moral character."
task of determining whether those selected are "qualified." He performs this task by excluding from the jury list elderly persons for whom service would be inconvenient, or difficult because of a lack of mental ability. In the end, says this commissioner, he is personally acquainted with approximately 20% to 25% of those he chooses to be listed.

The Democratic commissioner is a white, female senior citizen. For sources she employs the voter registration lists, the telephone book, lists of recent high school graduates, and a "list of blacks [she keeps] at home." In addition, this commissioner takes the "recommendations made by others in the community." This commissioner stated that she knows approximately 10% of those she lists, and that she makes no judgments whatsoever about the qualifications or moral character\(^\text{200}\) of those selected. In describing the discretion she used in picking names from the voter registration rolls, the commissioner said she would "go down the list" looking "for names that sound good."

Both these processes produced lists that clearly favored males over females. In 1981 the commissioners placed 271 men but only 159 women on the petit jury list, for a percentage difference of 63.02% to 36.98%. The disparity for the 1981 grand jury list was nearly as severe: 180 men—or 60%—as compared to 120 women—40%.

Coincidentally with the figures from County South, these disparities rose in 1982 when the petit jury list showed 274 men (63.28%) and, again, 159 women (36.72%). In like fashion, male representation on the 1982 grand jury list grew to 63.78% (125 men) while female representation fell to 36.22% (71 women).

The petit jury lists also contained relatively large numbers of potential jurors who had previously performed jury duty—50 (or 12%) of the 1981 list, and 60 (or 14%) of the 1982 list.\(^\text{201}\)

County North Central A, according to the 1980 Census, had a nineteen to sixty-four age group population that was 49.5% female and 50.5% male. Its nineteen and above bracket for the same year was 51% female and 49% male.

For small samples, like the grand jury lists for County North Central A in 1981 and 1982, the absolute disparity, proportion-of-the-eligibles, and statistical significance tests are not as reliable as they would be with large populations. Thus the grand jury list readings are fairly marginal: absolute disparities of 9.50% (1981) and 13.30% (1982) and standard deviations of 3.36 (1981) and 3.72 (1982). By the proportion-of-the-eligibles test one would expect a minimum of 39.6% of the list

\(^{200}\) Id.

\(^{201}\) These numbers are troubling because jurors with previous experience may be predisposed toward a certain view as a result of that experience. See generally Sannito & Arnolds, Jury Study Results, TRIAL DIPLOMACY J., Spring, 1982, at 6; Sannito & Arnolds, Jury Study Results, Part II, TRIAL DIPLOMACY J., Summer, 1982, at 13 [hereinafter cited as Sannito, Jury Study Results, II].
to be female; for 1981, the female percentage barely exceeds this by .14 of 1%. In 1982, however, the percentage of women does fall below this standard.

Using the more reliable comparative disparity analysis, we find that women had significantly less chance of being put on the grand jury list than they should have had in 1981—19.72% less chance. In 1982, their position worsened—women stood 26.83% less chance of being selected than their percentage in the population warranted.

The underrepresentation of women on the grand jury lists shows up clearly when one looks at the composition of the six individual panels drawn from the lists. Five of the six individual grand jury panels for 1981 and 1982 (with twenty-two persons to a panel) showed an underrepresentation of women. In only one panel were men underrepresented (thirteen women to nine men). The five underrepresentation panels ranged from a high of nine women (40.9%) to a low of four women (18.18%).

Like the figures for County South, the petit jury data, by every measure of disparity, produce underrepresentation results for women that are statistically and legally significant. For 1981, under the statistical significance test, there was a disparity of 4.83 standard deviations, while in 1982 there was a disparity of 5.67 standard deviations. In each of the two years studied, the percentage of women fell below the 40% of representation called for by the proportion-of-the-eligibles test. For each year the absolute disparity was approximately 13%. And in each year women had about 25% less chance of being placed on the petit jury list than they would have had, had they been represented on the list in proportion to their numbers in the population.

C. Do West Virginia Jury List Composition Practices Pass The Equal Protection and Fair Cross Section Tests?

1. The Prima Facie Cases

   a. Equal Protection. The elements of an equal protection case have been described in detail above⁴ and can be summarized here as: the existence of a cognizable group; substantial underrepresentation of the group; and a selection procedure that is susceptible of abuse or is not sexually neutral.⁵

   Given these elements, a prima facie equal protection case is easy to establish for County South and County North Central A. There is no doubt that women are a cognizable group under Taylor⁶ and Duren.⁷ As for the requirement of

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⁴ See supra text accompanying footnotes 125-47.
⁵ Castaneda, a race case, uses the phrase "racially neutral," 430 U.S. at 494, while Davis, 721 F.2d 1478, 1483, uses the term "sexually neutral."
⁶ Taylor, 419 U.S. at 531.
⁷ Duren, 439 U.S. at 364.
substantial underrepresentation, the disparities in both counties are legally and statistically significant by any established measure of disparity. The following table illustrates this point for the petit jury lists:

<table>
<thead>
<tr>
<th>Test</th>
<th>Disparity Level Considered Substantial</th>
<th>Actual Disparity County No.</th>
<th>Actual Disparity Cent. A.</th>
<th>Actual Disparity County South</th>
</tr>
</thead>
<tbody>
<tr>
<td>Absolute</td>
<td>10-15% and above</td>
<td>12.52%</td>
<td>12.80%</td>
<td>15.75% 20.10%</td>
</tr>
<tr>
<td>Comparative</td>
<td>15-20% and above</td>
<td>26%</td>
<td>26%</td>
<td>28% 37%</td>
</tr>
<tr>
<td>Proportion-of-the-Eligibles</td>
<td>No. Cent. A: less than 39.6% South: less than 41.9%206</td>
<td>36.98%</td>
<td>36.72%</td>
<td>36.65% 32.3%</td>
</tr>
<tr>
<td>Statistical Significance</td>
<td>More than 2 or 3 standard deviations</td>
<td>5.19</td>
<td>5.32</td>
<td>13.38 17.35</td>
</tr>
</tbody>
</table>

Finally, there is no doubt that the West Virginia key-man system is susceptible to abuse. This Article has already analyzed the various points in the West Virginia jury list composition scheme at which commissioners can exercise a discretion that is, for all practical purposes, unfettered.207

b. Fair Cross Section. The first two elements of the prima facie fair cross section case are virtually identical to the first two elements of the prima facie equal protection case. If there is a difference in the two prima facie cases, it would be found in some distinction between the equal protection requirement of an abuse-susceptible system and the cross section requirement of "systematic"208 exclusion or underrepresentation of a cognizable group.

In theory there may be a difference. Under equal protection theory it would be possible to have unconstitutional underrepresentation as a result of a single, isolated instance of abuse, without repeated, long-standing, systematic exclusion—if that abuse were intentional. Under fair cross section theory, it appears that the courts require repeated violations, not single instances, as proof that the alleged

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206 These figures were arrived at in the following manner. In County North Central A women constitute 49.5% of the 19-64 age bracket. In the proportion-of-the-eligibles test one multiplies this figure by 80% (80% x 49.5% = 39.6%). Any actual representation on the list that is less than this percentage is suspect.

In County South, women represent 52.4% of the 19-64 age bracket. 80% of 52.4% is 41.9%.

207 See Turner, 396 U.S. at 360 ("[t]he disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria."); see supra text accompanying notes 38-48.

208 See Duren, 439 U.S. at 366.
discrimination stems from some feature of the system. This theoretical distinction is consistent with the notion that equal protection analysis involves the intent of individuals\textsuperscript{209} while fair cross-section analysis involves the operational results of a system over time.\textsuperscript{210} In theory, then, a single, unintentional, aberrational instance of underrepresentation would result in neither an equal protection nor a fair cross-section violation. The intent required for an equal protection violation would be absent, as would the consistent exclusion over time required by the fair cross-section case.

In practice, however, the difference disappears.\textsuperscript{211} Virtually all the equal protection and fair cross-section cases involve continued, consistent underrepresentation and a system that makes underrepresentation possible.\textsuperscript{212}

Both these features have been identified in the West Virginia system. The system's practically unrestricted reliance on the discretion of key men is an open invitation to abuse\textsuperscript{213} while the data reported in this Article reveals discriminatory results over a significant period of time.\textsuperscript{214}

c. Summary. The statistics for the two counties whose underrepresentation of women was most egregious provide support for both the equal protection and the fair cross-section prima facie cases. Moreover, the statistics for five of the six counties surveyed are an indication of widespread underrepresentation of women on jury lists all across West Virginia.

2. Rebuttal

As indicated earlier, the prima facie cases differ only in the ways they can be rebutted.

\textsuperscript{209} See, e.g., Castaneda's reference to "purposeful discrimination." 430 U.S. at 493.

\textsuperscript{210} The Court in Duren, for example, said:
His [petitioner's] undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized. 439 U.S. at 366.

\textsuperscript{211} For example, the Eleventh Circuit in Davis, 721 F.2d 1478, began its evaluation of a Georgia jury list by stating that the two tests were "identical" except for the manner of rebuttal. The court then proceeded to analyze the third element of the Duren cross-section test in the language of the equal protection test, by asking whether the Georgia system was susceptible of abuse and not sexually neutral. Davis, 721 F.2d at 1483.

\textsuperscript{212} See, e.g., Duren and Taylor, fair cross-section cases, in which the Court pointed out the structural defects of the Louisiana system, and Castaneda and Hernandez, equal protection cases, in which the exclusion of cognizable groups over "significant," 430 U.S. at 494, and "extended," 347 U.S. at 480, periods of time was considered to constitute "systematic exclusion." 347 U.S. at 482, 430 U.S. at 492-501.

\textsuperscript{213} The structural defect in the key-man system is that such a system cannot be sexually neutral unless a random selection method is employed. Is it not safe to assume that the vast majority of names accurately reflect the sex of the name holders?

\textsuperscript{214} The results reported in this study extend over two full years, whereas the time periods in both Duren and Taylor were less than one year. See Duren, 439 U.S. at 362, and Taylor, 419 U.S. at 524.
To rebut an equal protection case, one may show either the absence of discriminatory purpose, or that the method of selecting names that is under attack is not the factor which resulted in the underrepresentation in controversy. The interviews with jury commissioners, which were conducted for this study, produced no confessions of pro-male or anti-female bias. Most commissioners said they choose names without regard to sex. In the presence of significant underrepresentation data, however, protestations of innocence are not sufficient to carry the day. The commissioners must present affirmative evidence, of a sort not heard in the interviews, that they lack discriminatory purpose. And surely the commissioners cannot be heard to say that the discretion vested in them by the statutory structure of the key-man system was unrelated to the underrepresentation result, for the key-men are free to choose.

Will the State have any better luck in rebutting a fair cross-section case? To do so, it must show a significant state interest. If those defending the Missouri statute in Duren could not show a significant state interest in exempting women on a considered, programmatic basis, what success will West Virginia commissioners have in efforts to defend their idiosyncratic decisions to exclude women? Should the commissioners turn to the State's supposed interest in keeping women at home for child-rearing purposes, the Court will surely strike that motivation down, just as it did in Duren.

In sum, there appears to be no refuge from equal protection or fair cross-section attacks for commissioners in underrepresentation counties.

IX. **BEYOND UNDERREPRESENTATION: THE STORY OF DISCRETION RUN AMUCK**

The previous section demonstrated the consistent and constitutionally impermissible underrepresentation of women on jury lists in West Virginia. But other abuses also exist, even if in less systematic ways. This section is devoted to report-

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215 See Alexander, 405 U.S. at 632; see supra text accompanying notes 159-60.

216 As Mr. Justice White, writing for the majority, noted:

We recognize that a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would, we think, survive a fair-cross-section challenge. We stress, however, that the constitutional guarantee to a jury drawn from a fair cross section of the community requires that States exercise proper caution in exempting broad categories of persons from jury service. Although most occupational and other reasonable exemptions may inevitably involve some degree of overinclusiveness or underinclusiveness, any category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement—such as women—runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement. We also repeat the observation made in Taylor that it is unlikely that reasonable exemptions, such as those based on special hardship, incapacity, or community needs, "would pose substantial threats that the remaining pool of jurors would not be representative of the community."

*Duren*, 439 U.S. at 370.
ing anecdotal evidence of varied and widespread abuses of the key-man system. These miscellaneous abuses have not a single thing in common—except that each abuse exists only because our current statutory scheme heaps mammoth helpings of discretion upon jury commissioners.

A number of disturbing incidents of abuse were uncovered during the course of this study. They are detailed below.

—In County Central it was reported that after a particular term of court those responsible for the jury list separated the names of those jurors who had convicted criminal defendants from those who had acquitted. The names of those who had convicted defendants were preserved for future jury duty, while the names of those who had acquitted defendants were discarded.

It almost goes without saying that such a procedure is not guaranteed to produce a fair cross-section of the community and creates serious equal protection and due process issues. No one disputes that those who have convicted before are more prone to convict again than those who have previously acquitted.217 It is also widely believed that certain socio-economic, educational, and religious characteristics account for the inclination to convict or acquit.218

—In blatant violation of the statutory command to choose names "without reference to party affiliations,"219 four of the eleven commissioners interviewed admitted to being aware of the affiliations of those whom they were selecting. Indeed, in County North Central A, the Republican commissioner took names from a special voter registration list containing the names of all the Republican registrants, while the Democrat took names from a separate set of books providing the names of all the Democratic registrants.

Such a procedure illustrates a certain internal conflict between two different aspects of West Virginia’s key-man system. On the one hand, the court is required to appoint commissioners on the basis of politics—the court must appoint one Democrat, one Republican, both of whom are to be "well-known members of [their] political parties."220 On the other hand, these commissioners are commanded to select potential jurors "without regard to party affiliations." Asking a veteran politician to block from his or her mind the party status of his appointments to the jury lists is probably asking for the impossible.

Why appoint commissioners on the basis of politics? If the purpose is to prevent political affiliation from playing a role in the selection process then the legislative theory must have been that the two commissioners would cancel each other out. But if a nonpartisan approach were the goal, then a better route would seem to

217 See Sannito, Jury Study Results, II, supra note 201, at 10-11.
218 See, e.g., JEANS, TRIAL ADVOCACY 167-72 (1975).
be the appointment of persons not prominent in politics, and perhaps, persons of independent voter registration status.

If the commissioners do make selections according to party lines, which is a reasonable expectation, then it seems clear that no fair cross-section of the community can result. The Democrat would make his or her half of the list Democrats, and the Republican, Republicans. Yet what West Virginia county has this one-to-one ratio in its general population? If names were selected on a purely random basis, there is no doubt that Democrats would be more heavily represented on lists than they currently are—at least in those counties where the commissioners are not party-blind.221

The most extreme example of this particular type of failure of cross-sectionalism occurred in a recent case, on which the author was a consultant on jury selection. The case was set for trial in early 1984 in a north central county. Of the fifty persons summoned from the jury list for service at the trial, one was an independent, eight were Democrats, and forty-one were Republicans. In 1984, Democrats outnumbered Republicans in this county 68% to 32%.222

—In County North Central A, a circuit court judge sensed during a recent term of court that he was familiar with a greater number of jurors than was normal. Upon inquiry, the judge learned that the commissioners had simply re-run names from a previous list. Such a procedure offends several democratic values. It does not make citizen participation as widespread as it ought to be. The knowledge that a privileged few are called to serve again and again, while thousands of others are never called, weakens faith in government. This distribution of jury duty unfairly burdens those who are called repeatedly. The resulting jury list does not represent a fair cross-section of the community, and those with previous jury duty are more likely to convict in criminal cases than those who hear cases for the first time.223

—The West Virginia Code lays out the various criteria commissioners are to employ in selecting names for their lists.224 These criteria were variously not known, ignored, or idiosyncratically enforced in every county studied. Several commissioners insisted that they had no business judging whether the individuals they selected were of "good moral character." Others maintained that decisions on such criteria were solely the judge’s. Some, in remarkable candor, stated that they did not know what legal standards, such as minimum age, were required of jurors.

221 In West Virginia, Democrats outnumber Republicans 675,106 to 300,147. Independents and others total 21,436. Thus, Democrats represent 68% of all registered voters in the state. Telephone interview with Mrs. Charlotte Cox, Elections Division, Office of the Secretary of State (July 21, 1984).

222 An additional problem exists. When commissioners compose lists that are 50% Democratic and 50% Republican, there is an increased likelihood that blacks will be even more severely under-represented than they already are. Proportionately more blacks are Democrats than the population of the state at large.


The diversity of viewpoints on this issue stems from a fatal combination of ambiguous statutory prescriptions and the unsupervised discretion given to the commissioners.

—Two of the commissioners legislated their own exemptions. One excluded all attorneys and all persons known to be members of an attorney's family, while the other commissioner excluded all persons known to be between fifty-five and sixty-five years of age. In the first instance the commissioner believed that, because such persons were likely to be excused by the court, his selection of them would be futile. In the second instance the commissioner wanted to be sure of avoiding those who were sixty-five years or older and, therefore, might be excused for age reasons.

In a democratic society such categorical exclusions should not be a matter for the private determination of individual jury commissioners. Rather, they should be the product of deliberation by the appropriate rule-making body. In addition, such personally-designed exemptions offend commonly held democratic values of broad participation and equality of treatment.

—Finally, there is the case of the commissioner who revealed his unique method of selecting names for the list. He distrusted his abilities, as well anyone in his shoes might, to know in full detail the moral character of every person in the county. Accordingly he sought the aid of those with a close familiarity with people in the county, whom he termed "informants." To such persons he would turn over his list of registered voters. The "informants," frequently local postmasters or postmistresses, would then place check marks alongside the names of those they deemed fit to serve. The commissioner then submitted these names as his choices.

Such reliance on opinion is the true essence of the key-man system.

X. Conclusion

The procedures we employ to compose our jury lists must serve democratic values. All parties to civil and criminal litigation are entitled to juries drawn from lists that reflect a fairly accurate representation of society at large. The unfettered discretion handed over to jury commissioners by the key-man system does not insure such lists. As demonstrated by the investigation reported here, such discretion has led to a host of abuses, including sex discrimination, in the composition of jury lists. These abuses rob criminal defendants of their right to a fair cross-section of the community, and all parties of their legitimate expectation that the procedures of jury list composition do not stack the deck for or against any one interest.

The citizenry, too, has legitimate expectations that are threatened by the key-man system. Citizens want to believe that each of them stands on an equal footing with all others, that each has an equal right of participation in our system of justice. Revelations that men are favored over women, the old over the young, or white over black, destroy confidence in democratic values. Revelations that jury commis-
JURY LISTS

Jury lists are ignorant of the law, or flout it with impunity when they are aware of it, destroy confidence in our judicial institutions.

Thus, it is in society's best interest to discard the key-man system, just as it has already discarded the laws that prohibited women and blacks from serving as jurors. West Virginia needs a jury list composition scheme that will be fair to women and other groups. Such fairness can be achieved through the use of random selection procedures and multiple source lists. Randomized selection will eliminate favoritism, idiosyncratic practices, and criminal abuse. The use of multiple source lists, the virtues of which have been amply demonstrated elsewhere, will produce a more accurate cross-section of the community than the sole use of voter registration lists. West Virginia would also be wise to require its courts to keep information about the most common characteristics of cognizable groups concerning sex, race, age, and occupation. While in the past such record-keeping was emblematic of racial prejudice, today it should be required to determine whether jury practices are fair to minorities and others. In addition, a standardized method for assessing the qualifications of jurors must be established.

As a starting point for the discussion of reform, the author proposes in Appendix B a new statutory scheme—The West Virginia Jury Selection and Service Act. It is modeled after the Uniform Jury Selection and Service Act which itself draws heavily upon the Federal Jury Selection and Service Act.

It is time for West Virginia to reject the key-man system, its corruption, and its unfair results, and embrace those democratic values which moved Lord Justice Patrick Devlin of England to call the jury "more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." 26

211 See Appendix A, The Underrepresentative Quality of Voter Registration Lists, and the authorities cited there.
212 P. DEVLIN, TRIAL BY JURY 164 (1956), quoted in VAN DYKE, supra note 135, at 8.
APPENDIX A

THE UNREPRESENTATIVE QUALITY OF VOTER REGISTRATION LISTS

Random selection procedures alone do not guarantee that a jury list will reflect a fair cross-section of the community. Random selection from an unrepresentative source list will produce a similarly unrepresentative jury list. It is therefore essential that the source list, from which names are randomly selected, must represent as closely as possible a fair cross-section of the community.

Sole Reliance on the Voter Registration List is Unwarranted

The most commonly used source list is the voter registration list. The Federal Jury Selection and Service Act and many state acts require its use. Voter registration lists are also sometimes used in discretionary systems, such as West Virginia's key-man system, although as a matter of free choice by individual jury commissioners rather than by statutory prescription.

Use of the voter registration list appeals to some for several reasons: (1) it is convenient to use; (2) it excludes those who would be poor jurors because it contains only the names of those who are interested enough in the duties of citizenship to register to vote; and (3) for a single list, it approximates better than most others a fair cross-section of the community.

Let us examine these reasons.

(1) Registration lists are indeed easy to use. They are usually well ordered and are easily available from public offices. Other possible source lists, such as drivers license lists, however, are equally well ordered, accessible and convenient to use.

(2) The second reason relies on a supposed relationship between the registrant's status as a registrant, and the registrant's desirability as a good juror. This narrow approach ignores an important value implicit within the jury system, namely broad public participation in the institutions of self-government. Because those who participate have a stake in the outcome, it serves society's interest in stability to have as many people as possible participate in the judicial system, whether they are registered or unregistered. For example, a litigant is likely to be less resentful of

1 "The overwhelming majority of jury systems throughout the country use voter registration lists as the source, although all available studies and data indicate that voter registration lists do not represent a cross-section of our communities and are substantially underinclusive." Kairys, Kadane & Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 CALIF. L. REV. 776, 805 (1977) [hereinafter cited as Kairys, Jury Representativeness].
3 See J. Van Dyke, JURY SELECTION PROCEDURES 88 (1977) [hereinafter cited as Van Dyke].
4 See NATIONAL CENTER FOR STATE COURTS, FACETS OF THE JURY SYSTEM: A SURVEY 11 (1976) [hereinafter cited as FACETS]; Van Dyke, supra note 3, at 86.
an unfavorable verdict when the litigant’s racial, sexual, age, or other group is fairly represented than when his or her group is excluded or is underrepresented. Both litigants and nonlitigants are likely to lose confidence in the integrity of the judicial system if they observe that its decisions are made by a select few rather than the democratic many.

Moreover, there is no real proof that nonregistrants make less able jurors than registrants. Some nonregistrants may have philosophical reasons for not voting that would not interfere in the least with their ability to serve on juries. Others may be the victims of the practical difficulties of registration which prevent many citizens from enrolling. The United States’ voter registration rate is much lower than those of other industrial democracies for this very reason.

(3) The voter registration list, as a sole source for names, does an inadequate job of reflecting a fair cross section of the community.

Use of voter lists as the sole source of names is a major cause of unrepresentativeness. Registration lists are unrepresentative because different groups register at quite different rates: whites more than minorities, older people more than younger people, college graduates more than the less educated, white collar workers more than blue collar and service workers, and high income people more than low income people. Registration lists may also be unrepresentative because registration officials have failed to keep them up to date or have improperly limited registration.

Copious empirical data exist to demonstrate this conclusion. A Census Bureau study of 1972 data, for example, revealed these figures:

(1) Whereas 73.4 percent of whites reported that they were registered to vote, only 65.5 percent of blacks so stated and only 44.4 percent of Hispanics said they were registered; (2) 58.1 percent of the country’s 18-20 year olds, 59.5 percent of our

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6 See Id. at 91-92.
7 Id.

While using voter registration lists to develop a list of potential jurors at the outset may appear to be the easiest and fairest method of obtaining a representative sample, there are limitations to its use. Those citizens who are interested in politics and motivated to participate in referendums or elections would register to vote. Thus their names would appear on the registration list. However, voting or registration are not franchises that are exercised uniformly by all groups within a community or district. Rather, voters have a distinct set of characteristics that separate them from nonvoters. They are usually better educated, have higher incomes and higher occupational levels. Young people, minority groups, and low-income groups, who would tend to vote Democratic, as well as new residents are least likely to have registered.


Id. at 105); S. LIPSET, POLITICAL MAN 186 (1963).
21-24 year olds, and 66.1 percent of the 25-29 year olds said they were registered, compared to percentages of at least 70 percent for all other age groups, ranging up to a high of 80.2 percent for the 55-64 age category; (3) 61.2 percent of those making less than $3,000 said they were registered, 64.1 percent of those earning between $3,000 and $4,999, and only 65.7 percent of those earning between $5,000 and $7,499 were registered, compared to 77.7 percent for those earning $10,000 to $15,000 and 85 percent of those making over $15,000; (4) 61.5 percent of those with an eighth-grade education or less said they were registered, compared to 84.4 percent of those with at least one year of college; and (5) only 66.5 percent of the nation's blue-collar workers said they were registered, compared to 82.4 percent of the white-collar employees.9

In the ensuing years since the 1972 study, the situation has worsened. The percentage of black non-registrants grew from 34.5% in 1972, to 41.5% in 1976, and 42.9% in 1978. Hispanic non-registrants accounted for 55.6% of the eligible Hispanic population in 1972, 62.2% in 1976, and 67.1% in 1978.10 In the absence of new data, it is not yet possible to determine if the 1984 presidential campaign of Jesse Jackson, with its emphasis on voter registration, has at least arrested this trend.

The evidence collected by jury scholars from individual jurisdictions conforms to this portrait of the nation as a whole. Two examples should suffice:

—[i]n 1976 the sole source list for the United States District Court for the Eastern District of Pennsylvania was the voter registration list. While non-whites represented 15.7% of the population, they represented only 11.7% of the source list. While those in the under-30 age group represented 25.5% of the eligible population, they represented only 17.2% of the source list. Those under 40, representing 41.8% of the eligible populations, represented only 32.2% of the source list.11

—[i]n 1974 the voter registration list was a principle source list for the Supreme Court of New York for Erie County. The list showed blacks having 8.4% of the population but only 6.5% of the list, and those 21 to 29 as having 20.7% of the population but only 4.5% of the source list.12

In addition to failing to represent a true cross-section of the community, voter registration lists are also underinclusive; they fail to capture a satisfactorily large number of those in the eligible age bracket.13 In 1972, 27.7% of those eligible to register did not do so. This figure grew to 33.3% in 1976 and an even larger 37.4% in 1978.14

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9 Van Dyke, supra note 3, at 89.
10 These figures are relied upon by the California Supreme Court in its recent decision regarding the voter registration list as underrepresentative of minorities. See People v. Harris, 679 P.2d 433 (Cal. 1984).
11 Kairys, Jury Representativeness, supra note 1, at 804.
12 Id.
13 "Representativeness and inclusiveness are conceptually distinct. . . . Inclusiveness has to do with the percent of the entire adult population in a jurisdiction which is included in the source list." American Bar Association Standards Relating to Juror Use and Management (1983).
14 Harris, 679 P.2d 433.
In sum, approximately one-third of our citizens do not register to vote, and those who do register do not collectively represent a true cross-section of their communities.

Multiple Lists

The majority of researchers on jury selection methods advocate the use of voter registration rolls and at least one additional list to effect an accurate cross-section of the community.\textsuperscript{15} Increased representation of young adults and blacks, groups routinely underrepresented on voter registration lists, has been promoted by the use of supplemental lists, specifically drivers’ license lists.\textsuperscript{16} Furthermore, multiple list systems regularly produce 80% inclusiveness compared to about 62% for voter registration lists.\textsuperscript{17}

In recognition of the possible inadequacy of voter registration lists, the Federal Jury Selection and Service Act of 1968 provides that, while voter registration lists are to be the primary source for names, they must be supplemented when they are not representative.\textsuperscript{18} The Uniform Jury Selection and Service Act makes the use of multiple lists mandatory,\textsuperscript{19} while computerized selection systems for using multiple lists are being used in a number of jurisdictions.\textsuperscript{20}

The use of multiple lists for juror selection also has some disadvantages. Certain lists, such as telephone directories, property tax rolls, and city directories, have a built-in male bias or socio-economic prejudice.\textsuperscript{21} The use of multiple lists may also increase the error factor because any errors created by the lists’ originators, that is incorrect spelling of names or wrong addresses, are then incorporated into the selection system. Some lists include the names of businesses as well as the names of individuals. A method or program must be developed for deleting these business names from the jury selection process.\textsuperscript{22}

\textsuperscript{15} See generally, Facets, supra note 4, at 13; Kairys, Jury Representativeness, supra note 1; and Van Dyke, supra note 3, at 78-105.

\textsuperscript{16} Jurywork, supra at note 8, ch. 5, § 5.04[1].

\textsuperscript{17} Id.

\textsuperscript{18} 28 U.S.C. § 1863(b)(2) (1982) provides that the federal courts “prescribe some other source or sources . . . where necessary to foster the policy . . . ” of representation of a cross-section.


\textsuperscript{20} See Kairys, Jury Representativeness, supra note 1, at 823, Table E.

\textsuperscript{21} Id. at 825, n.247.

\textsuperscript{22} American Bar Association Judicial Administration Division, Standards Relating to Juror Use and Management 26 (1983).
The major argument against the use of multiple lists is the high cost of setting up such a system of jury selection. Critics have complained about the expense of computer programming and updating, the problems of coordinating information and differing formats, and the sheer human effort necessary where computer technology is not utilized. These arguments are dissipating rapidly, however, as new and effective techniques are being developed to accomplish the combining of lists at an economical rate.23

Although authorities do not agree on which particular type of supplemental list to use, the American Bar Association has developed some guides for establishing a multiple list system when a jurisdiction’s single list is unrepresentative. The ABA position is that unrepresentative lists should be supplemented with other lists to obtain a combination of names that “yields as broad a current census of citizens of the jurisdiction as practical,” while at the same time minimizing the “duplication of names as far as possible.”24 Close attention should be given to the probability that the supplementary list chosen will yield additional names and not merely duplicates.25

The list that best meets these criteria, generates maximum inclusiveness, produces a better cross section of the community than the voter list, and avoids many of the difficulties described above, is the drivers’ license list.

Drivers’ License Lists

Use of drivers’ license lists to supplement voter registration lists in jury selection appears to be the method of choice for multiple list jurisdictions. At least two federal district courts and some or all counties in sixteen states use multiple lists. In the great majority of these jurisdictions the drivers’ license list was the supplemental list.26 North Carolina and California both have juror selection statutes which mandate the use of the drivers’ license list as a supplement to voter registration lists.27

Drivers’ license lists are very inclusive because typically a very high percentage of the driving age population is licensed to drive. For example, a 1976 study by the San Diego County Superior Court found that the driver list included 83% of the county’s over-eighteen population, contrasted to a mere 56.6% on the voter

23 Id. at 27; Kairys, Jury Representativeness, supra note 1, at 822.
25 Id. at 5.
26 JURYWORK, supra note 8, at § 5.04[1].
27 N.C. GEN. STAT. § 9-2(e) (1981); CAL. CIV. PROC. CODE § 204.7 (Deering Supp. 1984). The California mandate, however, is conditioned on the premise that the systems for compiling names can be “practically modified, without significant cost.” Id.
registration list.\textsuperscript{28} In some states, including West Virginia, the percentage exceeds 90\%.\textsuperscript{29}

A second, related advantage of using the drivers' license list is that the list provides better representation for those who are currently underrepresented through the use of the voter registration list—the poor, the young, the uneducated, women, and minorities.

Driver's license lists therefore provide a fairer cross section of the community, as well as a more inclusive sample of the population. An economic advantage to using drivers' license lists rather than property tax rolls or telephone listings is that it avoids the added expense of deleting businesses. (Deleting sixteen and seventeen year olds would involve some costs however.)

The disadvantages of using drivers' license lists would be no greater than for any supplemental listing, and are inherently procedural rather than substantive. These disadvantages have been mentioned previously, and primarily involve the economics of administration, such as the cost of computer programming, errors, updating, deleting, and so forth. In light of continued rapid advances in technology, these drawbacks are negligible when compared with the goal of developing a jury selection system that will truly reflect a fair cross section of the community.

\textsuperscript{28} MUSTERMAN, MOUNT & PABST, MULTIPLE LISTS FOR JUROR SELECTION: A CASE STUDY FOR SAN DIEGO SUPERIOR COURT 3-6 (1978).

\textsuperscript{29} FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEP'T OF TRANSPORTATION, DRIVERS LICENSES, 1978 Table DL-1B (1979).
APPENDIX B

THE WEST VIRGINIA JURY SELECTION AND SERVICE ACT

Sec.
1. Declaration of Policy.
3. Definitions.
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7. Drawings from Master Jury Wheel; Juror Qualification Form.
8. Disqualification from Jury Service.
9. Qualified Jury Wheel; Selection and Summoning of Jury Panels.
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15. Length of Service by Jurors.
17. Protection of Jurors’ Employment.
18. Court Rules.
20. Short Title.
22. Repeal.

§ 1. Declaration of Policy

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all citizens have the opportunity in accordance with this Act to be considered for jury service in this state, and an obligation to serve as jurors when summoned for that purpose.

§ 2. Prohibition of Discrimination

A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

§ 3. Definitions

As used in this Act;
(1) "court" means the Circuit and Magistrate courts of this state, and includes, when the context requires, any judge of the court;

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(2) "clerk" and "clerk of the court" include any deputy clerk;
(3) "master list" means the voter registration lists and drivers' license lists for
the county which may be supplemented with names from other sources prescribed
pursuant to this Act (Section 5) in order to foster the policy and protect the rights
secured by this Act (Sections 1 and 2);
(4) "voter registration lists" means the official records of persons registered
to vote in the most recent general election;
(5) "drivers' license lists" means the official records of persons licensed by
the state to operate motor vehicles;
(6) "jury wheel" means any physical device or electronic system for the storage
of the names or identifying numbers of prospective jurors;
(7) "master jury wheel" means the jury wheel in which are placed names or
identifying numbers of prospective jurors taken from the master list (Section 6);
(8) "qualified jury wheel" means the jury wheel in which are placed the names
or identifying numbers of prospective jurors whose names are drawn at random
from the master jury wheel (Section 7) and who are not disqualified (Section 8).

§ 4. Jury Commission

A jury commission is established in each county to manage the jury selection
process under the supervision and control of the court. The jury commission shall
be composed of the clerk of the court and a jury commissioner appointed for a
term of 4 years by the court. The jury commissioner must be a citizen of the United
States and a resident of the county in which he serves. The jury commissioner shall
be reimbursed for travel, subsistence, and other necessary expenses incurred by
him in the performance of his duties and shall receive compensation at a per diem
rate fixed by the chief justice of the Supreme Court.

§ 5. Master List

(a) The jury commission for each county shall compile and maintain a master
list consisting of all voter registration lists and drivers' license lists for the county,
supplemented with names from other lists of persons resident therein, such as lists
of utility customers, property and income taxpayers, and motor vehicle registra-
tions, which the Supreme Court from time to time may designate. The Supreme
Court may exercise the authority to designate from time to time in order to foster
the policy and protect the rights secured by this Act (Sections 1 and 2). In compil-
ing the master list the jury commission shall avoid duplication of names.

(b) Whoever has custody, possession, or control of any of the lists making
up or used in compiling the master list, including those designated under subsec-
tion (1) by the Supreme Court as supplementary sources of names, shall make the
list available to the jury commission for inspection, reproduction, and copying at
all reasonable times.

(c) The master list shall be open to the public for examination.
§ 6. Master Jury Wheel

(a) The jury commission for each county shall maintain a master jury wheel, into which the commission shall place the names or identifying numbers of prospective jurors taken from the master list. If the total number of prospective jurors on the master list is 2,000 or less, the names or identifying numbers of all of them shall be placed in the master jury wheel. In all other cases, the number of prospective jurors to be placed in the master jury wheel shall be 2,000 plus not less than one percent of the total number of names on the master list. From time to time a larger or additional number may be determined by the jury commission or ordered by the court to be placed in the master jury wheel. In December of each even-numbered year the wheel shall be emptied and refilled as prescribed in this Act.

(b) Unless all the names on the master list are to be placed in the master jury wheel pursuant to subsection (a), the names or identifying numbers of prospective jurors to be placed in the master jury wheel shall be selected by the jury commission at random from the master list in the following manner: The total number of names on the master list shall be divided by the number of names to be placed in the master jury wheel and the whole number next greater than the quotient shall be the "key number," except that the key number shall never be less than 2. A "starting number" for making the selection shall then be determined by a random method from the numbers from 1 to the key number, both inclusive. The required number of the names shall then be selected from the master list by taking in order the first name on the master list corresponding to the starting number and then successively the names appearing in the master list at intervals equal to the key number, recommencing if necessary at the start of the list until the required number of names has been selected. Upon recommencing at the start of the list, or if additional names are subsequently to be selected for the master jury wheel, names previously selected from the master list shall be disregarded in selecting the additional names. The jury commission may use an electronic or mechanical system or device in carrying out its duties.

§ 7. Drawings from Master Jury Wheel; Juror Qualification Form

(a) From time to time and in a manner prescribed by the court, the jury commission publicly shall draw at random from the master jury wheel the names or identifying numbers of as many prospective jurors as the court by order requires. The clerk shall prepare an alphabetical list of the names drawn. Neither the names drawn nor the list shall be disclosed to any person other than pursuant to this Act or specific order of the court. The clerk shall mail to every prospective juror whose name is drawn from the master jury wheel a juror qualification form accompanied by instructions to fill out and return the form by mail to the clerk within 10 days after its receipt. The juror qualification form shall be subject to approval by the court as to matters of form and shall elicit the name, address of residence, sex, race, and age of the prospective juror and whether he (1) is a citizen
of the United States and a resident of the county, (2) is able to read, speak, and understand the English language, (3) has any physical or mental disability impairing his capacity to render satisfactory jury service, and (4) has lost the right to vote because of a criminal conviction. The juror qualification form shall contain the prospective juror's declaration that his responses are true to the best of his knowledge and his acknowledgement that a wilful misrepresentation of a material fact may be punished by a fine of not more than $500 or imprisonment for not more than 30 days, or both. Notarization of the juror qualification form shall not be required. If the prospective juror is unable to fill out the form, another person may do it for him and shall indicate that he has done so and the reason therefor. If it appears there is an omission, ambiguity, or error in a returned form, the clerk shall again send the form with instructions to the prospective juror to make the necessary addition, clarification, or correction and to return the form to the jury commission within 10 days after its second receipt.

(b) Any prospective juror who fails to return a completed juror qualification form as instructed shall be directed by the jury commission to appear forthwith before the clerk to fill out the juror qualification form. At the time of his appearance for jury service, or at the time of any interview before the court or clerk, any prospective juror may be required to fill out another juror qualification form in the presence of the court or clerk, at which time the prospective juror may be questioned, but only with regard to his responses to questions contained on the form and grounds for his excuse or disqualification. Any information thus acquired by the court or clerk shall be noted on the juror qualification form.

(c) A prospective juror who fails to appear as directed by the commission pursuant to subsection (b) shall be ordered by the court to appear and show cause for his failure to appear as directed. If the prospective juror fails to appear pursuant to the court's order or fails to show good cause for his failure to appear as directed by the jury commission, he is guilty of criminal contempt and upon conviction may be fined not more than $100 or imprisoned not more than 3 days, or both.

(d) Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a misdemeanor and upon conviction may be fined not more than $500 or imprisoned not more than 30 days, or both.

§ 8. Disqualification from Jury Service

(a) The court, upon request of the jury commission or a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror is disqualified for jury service. The clerk shall enter this determination in the space provided on the juror qualification form and on the alphabetical lists of names drawn from the master jury wheel.
(b) A prospective juror is disqualified to serve on a jury if he:

1. is not a citizen of the United States, 18 years old, and a resident of the county;
2. is unable to read, speak, and understand the English language;
3. is incapable, by reason of his physical or mental disability of rendering satisfactory jury service; but a person claiming this disqualification may be required to submit a physician's certificate as to the disability, and the certifying physician is subject to inquiry by the court at its discretion; or
4. has lost the right to vote because of a criminal conviction.

§ 9. Qualified Jury Wheel; Selection and Summoning of Jury Panels

(a) The jury commission shall maintain a qualified jury wheel and shall place therein the names or identifying numbers of all prospective jurors drawn from the master jury wheel who are not disqualified (Section 8).

(b) A judge or any court having authority to conduct a trial or hearing with a jury within the county may direct the jury commission to draw and assign to that court the number of qualified jurors he deems necessary for one or more jury panels or as required by law for a grand jury. Upon receipt of the direction and in a manner prescribed by the court, the jury commission shall publicly draw at random from the qualified jury wheel the number of qualified jurors specified. The qualified jurors drawn for jury service shall be assigned at random by the clerk to each jury panel in a manner prescribed by the court.

(c) If a grand, petit, or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons either personally or by registered or certified mail, return receipt requested, addressed to him at his usual residence, business, or post office address, requiring him to report for jury service at a specified time and place.

(d) If there is an unanticipated shortage of available petit jurors drawn from a qualified jury wheel, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the qualified jury wheel in a manner prescribed by the court.

(e) The names of the qualified jurors drawn from the qualified jury wheel and the contents of jury qualification forms completed by those jurors shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

§ 10. No Exemptions

No qualified prospective juror is exempt from jury service.
§ 11. Excuses from Jury Service

(a) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the space provided on the juror qualification form.

(b) A person who is not disqualified for jury service (Section 8) may be excused from jury service by the court only upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary, at the conclusion of which the person shall reappear for jury service in accordance with the court’s direction.

§ 12. Challenging Compliance with Selection Procedures

(a) Within 7 days after the moving party discovers or by the exercise of diligence could have discovered the grounds therefor, and in any event before the petit jury is sworn to try the case, a party may move to stay the proceedings, and in a criminal case to quash the indictment, or for other appropriate relief, on the ground of substantial failure to comply with this Act in selecting the grand or petit jury.

(b) Upon motion filed under subsection (a) containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with this Act, the moving party is entitled to present in support of the motion the testimony of the jury commissioner or the clerk, any relevant records and papers not public or otherwise available used by the jury commissioner or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with this Act, the court shall stay the proceedings pending the selection of the jury in conformity with this Act, quash an indictment, or grant other appropriate relief.

(c) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the State, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this Act.

§ 13. Preservation of Records

All records and papers compiled and maintained by the jury commissioner or the clerk in connection with selection and service of jurors shall be preserved by the clerk for 10 years after the master jury wheel used in their selection is emptied and refilled (Section 6) or for any longer period ordered by the court.

§ 14. Mileage and Compensation of Jurors

A juror shall be paid mileage at the rate of 20 cents per mile for his travel expenses from his residence to the place of holding court and return and shall be compensated at the rate of $20.00 for each day of required attendance at sessions.
§ 15. Length of Service by Jurors

In any 2 year period a person shall not be required:

(1) to serve or attend court for prospective service as a petit juror more than 10 court days, except if necessary to complete service in a particular case;

(2) to serve on more than one grand jury; or

(3) to serve as both a grand and petit juror.

§ 16. Penalties for Failure to Perform Jury Service

A person summoned for jury service who fails to appear or to complete jury service as directed shall be ordered by the court to appear forthwith and show cause for his failure to comply with the summons. If he fails to show good cause for noncompliance with the summons, he is guilty of criminal contempt and upon conviction may be fined not more than $100 or imprisoned not more than 3 days, or both.

§ 17. Protection of Jurors' Employment

(a) An employer shall not deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

(b) Any employer who violates subsection (a) is guilty of criminal contempt and upon conviction may be fined not more than $500 or imprisoned not more than 6 months, or both.

(c) If an employer discharges an employee in violation of subsection (a) the employee within 60 days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. If he prevails, the employee shall be allowed a reasonable attorney's fee fixed by the court.

§ 18. Court Rules

The Supreme Court may make and amend rules, not inconsistent with this Act, regulating the selection and service of jurors.

§ 19. Severability

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.
§ 20. Short Title

This Act may be cited as the West Virginia Jury Selection and Service Act.

§ 21. Application and Construction

This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.