

SOURCES OF RACIAL DISENFRANCHISEMENT IN THE JURY AND JURY SELECTION SYSTEM*

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INTRODUCTION

Historians have traced the origins of "trial by jury" to the fifth or sixth century B.C.¹ Jury trials have been an integral part of the criminal justice system in the United States since the establishment of the Republic over two hundred years ago. However, along with the reverence that has been accorded to the jury, there has been substantial criticism and controversy, particularly in recent years, concerning the frailties of the jury system.

Federal law currently requires a cross-sectional representation of the community on juries. Recent Supreme Court decisions are such that any substantial violation of this basic assumption of jury representation is a *prima facie* case of discrimination.² However, an increasing number of challenges concerned with the underrepresentation of cognizable groups, such as racial minorities, have been brought. These challenges typically claim violation of the Sixth Amendment, which requires a representative jury selected from a fair cross-section of the community.³

Explaining racially imbalanced juries has been the focus of many recent studies by criminologists, psychologists, and sociologists. In the late 1970s and early 1980s, sociologists and criminologists argued that "human capital" factors such as race, socioeconomic origins, educational achievement, and occupational standings of individual jurors generated differences in jury representation.⁴ For instance, potential jurors with specific human capital factors, such as higher income, higher education, and white racial background, were more likely to be represented on juries because they were more inclined to register to vote and could afford to take time off from work to serve on juries.⁵ Psychologists have further argued that

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1. LLOYD E. MOORE, *THE JURY: TOOL OF KINGS PALLADIUM OF LIBERTY* (1972).
2. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).
3. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Swain v. Alabama, 380 U.S. 202 (1965); Castaneda v. Partida, 430 U.S. 482 (1977).
4. Howard R. Alker, Jr. & Joseph J. Barnard, *Procedural and Social Biases in the Jury Selection Process*, 3 JUST. SYS. J. 220-241 (1976); David Kairys ET AL., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776-827 (1977); Jon M. VAN DYKE, *JURY SELECTION PROCEDURE* 258-262 (1977).
5. Hiroshi Fukurai & Edgar W. Butler, *Organization, Labor Force, and Jury Representation: Economic Excuses and Jury Participation*, 32 JURIMETRICS 49-69 (1981).

micro-dimensions of individuals influence jury composition. For example, legal scholars have argued that the inherent criminality of some groups and impaired intelligence of some potential jurors generally result in voluntary self-exclusion or being screened out by the selection process.⁶ Scholars have also indicated that the authoritarian personalities of some of those responsible for jury composition and decisions contribute to selectivity in jury composition.⁷ Once a pool of jurors has been selected, there are a number of additional factors that determine the ultimate composition of the jury, including the peremptory challenges by prosecution and defense lawyers in voir dire. Nevertheless, the goal of guaranteeing defendants a trial by a jury of a cross-section of the community begins with a randomly selected jury pool. If the initial pool is biased or skewed, the principle on which jury trial is based is violated at the outset.

This paper examines the variety of legal and non-legal factors that play a significant role in Black representativeness on both petit and grand juries. Legal variables include various statutes (both at state and federal levels) requiring racial and ethnic judicial participation, particular types of prospective juror source lists, specific procedural techniques (random selection or key-man selection), excuses, subjective qualifications, exemptions, legal disqualifications, and follow-up procedures for nonreturned qualification questionnaires. Extra-legal variables cover a broad range of political and economic factors reflecting the social climate of a particular epoch, including the presence of racism or prejudice operating at both individual and structural levels, and the socioeconomic and demographic status of potential jurors.

Detailed structural and institutional analysis of the jury selection process is an essential ingredient in extending knowledge of the degree and quality of justice. The questions asked must include: (1) how are jurors selected; (2) to what extent do juries actually represent the community; and (3) by what methods has racial discrimination been perpetuated and maintained? These questions are especially important because most psycho-legal research fails to address either social and institutional dimensions in the jury system and jury selection, or even the existence of judicial inequality. Psycho-legal research simply ignores the social significance of racial discrimination and unfairness in the jury system and jury selection, as well as *how* and *why* such inequities have emerged and been maintained.

The step-by-step analysis of jury selection procedures presented here elucidates restrictions and barriers to participation at each selection stage, specifying dimensions of racial and judicial inequality, and assessing their impact on racial representativeness.

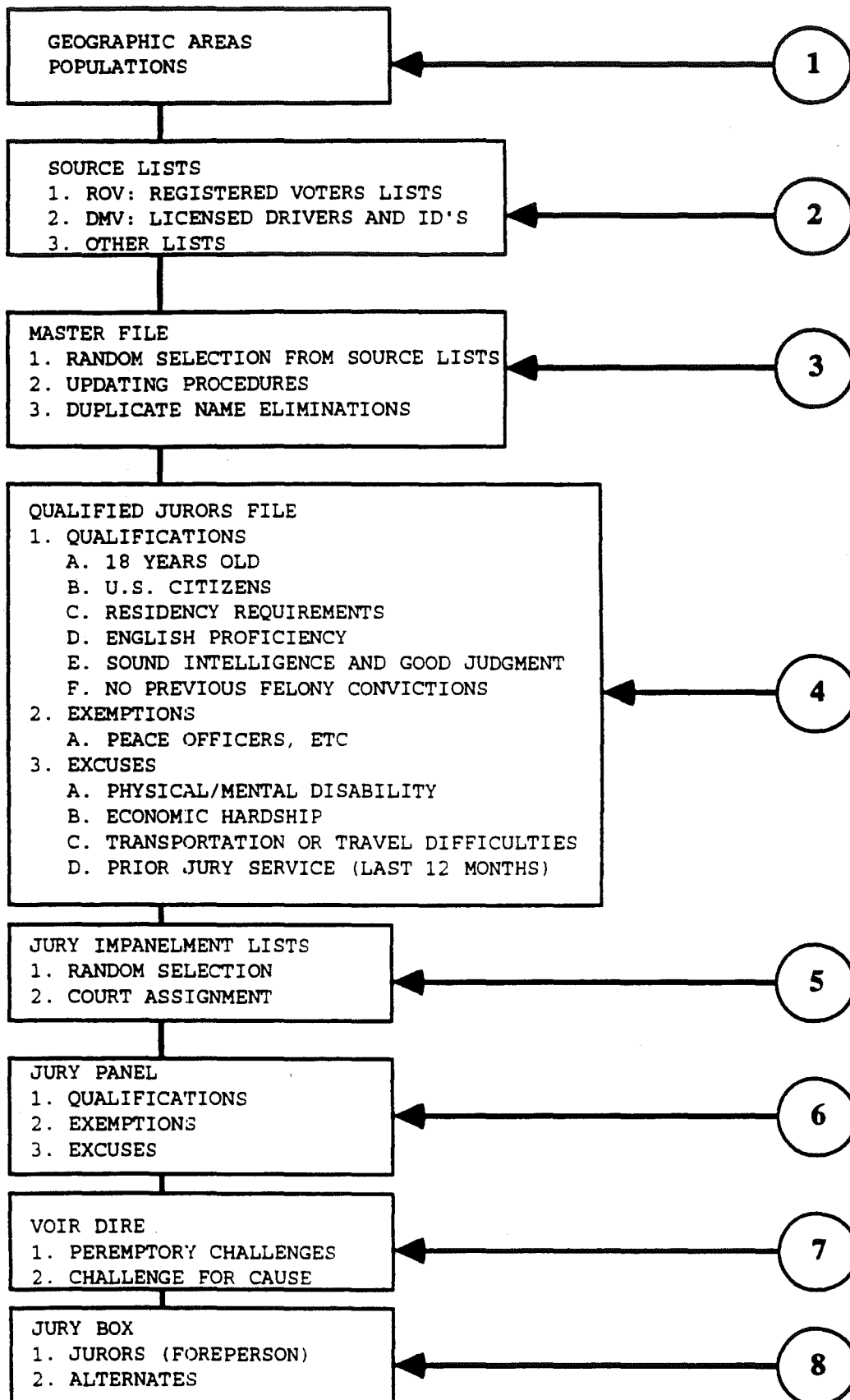
RACIAL INEQUALITY IN THE JURY SELECTION PROCESS

The general overall jury selection process employed in both federal and state courts is summarized in the schematic, step-by-step process shown in Figure 1.

6. For greater discussions on the social pathology of juror requirements, see Hiroshi Fukurai ET AL., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD. 196-215 (1991).

7. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 56-57 (1986).

FIGURE 1. JURY SELECTION PROCEDURES



In Figure 1, each of the eight boxes represents a single stage in the jury selection system. (1) First, a given population in a specified geographical area is defined as eligible for jury service. (2) Then, source lists are designed so as to enable the selection of potential jurors. (3) Next, a master file (or wheel) is constructed, which contains a list of names compiled from the source lists. (4) Jury qualification questionnaires are sent to (presumably) randomly selected candidates and a qualified jurors file is constructed that contains those who have met various requirements for jury service, such as residency, citizenship, and English language proficiency. (5) From these jury impanelment lists, potential jurors are assigned to various courts. (6) Qualified jury panels are now brought together, composed of those who actually show up at the courthouses. (7) After assignment to a courtroom and a trial, the *voir dire* screening process begins. *Voir dire* is designed to eliminate potential jurors who may be biased and unacceptable to the plaintiff or to prosecuting and defense attorneys. (8) This culminates in a selection of specific jurors for the jury box.⁸

The logic of the entire selection process is based on screening, from the target population to those who finally enter the jury box. The purpose of the selection procedure is to choose a jury that reflects a cross-section of the community. The chosen jurors are then viewed as being impartial and qualified to represent the community.

The shortcomings of the process are known. How closely juries reflect a community's cross-section depends on the success of the procedures by which jurors are chosen. For instance, white, Black and Hispanic representation on a master file and source list, as well as their qualifications for jury service, are considered to be the most direct determinants of balanced racial participation on jury panels.⁹ In each of the first six stages, however, there are many other factors influencing egalitarian participation, and these can have a cumulative effect on the racial and ethnic composition of jury panels. In the various stages of jury selection, moreover, there are a series of informal filtering techniques that shape and determine the racial, ethnic, and class balance of prospective jurors.

A. *Geographical Area and Population*

The starting point in jury selection is not merely sending a jury summons which calls prospective jurors to the courthouse. Relatively few eligible citizens are successful in finally entering the jury box. Before they reach the courthouse, most prospective jurors must be screened out by a variety of legal and extra-legal factors.

8. In some counties, the jury selection process has been consolidated. For example, in Riverside, San Bernardino, and Orange counties in Southern California, the actual qualification screening process and summons takes place in a one-step rather than two-step process as described here.

9. For further discussions of jury selection processes and their problems, see the following dissertations: Nijole V. Benokraitis, *Institutional Racism: An Empirical Study of Blacks and Jury Selection Process in Ten Southern States* (1975) (unpublished dissertation, Univ. of Texas (Austin)), Jo-Ellan Huebner-Dimitrius, *The Representative Jury: Fact or Fallacy?* (1984) (unpublished dissertation, Claremont Graduate School), and Jo A.M. Scott, *Jury Selection and the Right to a Fair Trial: The Genesis, Implementation and Impact of the Jury Selection Acts* (1984) (Univ. of California (Riverside)).

The first stage in the jury selection process is defining the geographical area from which the population for jury service is to be chosen. This feature defines the jurisdiction and geographic area served by the court. These two specific dimensions play an important mechanism of defining the eligible population for jury service.

A court of general jurisdiction refers to a trial court of unlimited original jurisdiction within the legal bounds of rights and remedies. A court of special or limited jurisdiction, on the other hand, covers only a particular class of cases. This includes cases in which the amount in controversy is below a prescribed sum, or which are subject to specific exceptions.¹⁰ The different levels of court structure define jurisdictional boundaries. There are mainly two jurisdiction levels: (1) state and (2) federal court jurisdiction. Each court possesses the power to define criminal conduct, to create civil rights and liabilities within its own boundaries, and to provide appropriate punishment. There are, however, limitations imposed by the Constitution: (1) no state can criminally punish conduct sanctioned by the Constitution, as it is interpreted by the Supreme Court of the United States; (2) criminal conduct should be brought to trial in a state where the crime was committed; and (3) a state may not interfere with any of its sister states. A civil action, however, can be brought in a state other than the one where the events giving rise to the claim took place.

Federal jurisdiction is a judicial system superimposed on the fifty states through a network of federal courts. The need for such courts is trifold: (1) it supervises the broad jurisdiction of state courts, (2) it enforces federal law, and (3) it creates uniformity of decision throughout the nation on questions of federal law.¹¹ It has been up to the federal courts, for example, to give meaning to the Sixth Amendment in deciding jury challenges. The Supreme Court has developed certain guidelines by which to judge jury challenges. To successfully challenge jury selection, a litigant must show that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable compared to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process.¹² Under this test, the Supreme Court has ruled that Blacks, Hispanics, and women are "cognizable classes."¹³

Various factors influence the social and racial makeup of what constitutes the general population for jury service for a given jurisdiction. Age, for instance, is an important dimension of juror eligibility. Every state has an age requirement. The minimum age limit ranges from eighteen to twenty-one years of age. Alabama, Connecticut, Mississippi, Missouri, New Jersey, New York, Rhode Island, South Carolina, and Utah have the

10. DELMAR KARLEN, *THE CITIZEN IN COURT* 11-20 (1964).

11. *Id.*

12. *Duren v. Missouri*, 439 U.S. 357 364 (1979).

13. Age has yet to be recognized as constituting a cognizable class in the federal courts and in many state courts. See, e.g., *State v. Guirlando*, 93 So. 796 (La. 1922); *International Longshoreman & Warehouseman's Union v. Ackerman*, 82 F. Supp. 65 (D. Haw. 1943); *United States v. Fujimoto*, 104 F. Supp. 727 (D. Haw.), cert. denied 344 U.S. 852 (1953); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

lowest minimum limit of eighteen years. At the federal level, all citizens over eighteen years of age are eligible for jury service.¹⁴ Some states also set an upper age limit. In Alabama, South Carolina, and West Virginia, no one over sixty-five years of age can serve as a juror. Seventy years is the limit for Nebraska and South Dakota, while the limit is seventy-two for Wyoming and most of the counties in New York, and seventy-five for New Jersey. Other states, including California, do not have an upper age limit.¹⁵

In addition, there are U.S. citizenship requirements and a period of ineligibility after prior jury service (generally within the previous 12 months).¹⁶ There is a local residency requirement, a standard for the ability to read, write, speak and understand English, and requirements that prospective jurors have never been convicted of a felony, not have physical or mental incapacities impairing jury service, and not be members of the court or a law enforcement agency.¹⁷

Another important dimension of defining jurisdiction is the delineation of geographic boundaries of the judicial district. In the past, jury practitioners relied on counties, cities, and census tracts to define the judicial district and to evaluate jury representation. In California, as typical of most states, counties and census tracts are used to select and evaluate judicial representation.¹⁸ Each jurisdiction, for example, is defined by census tracts.¹⁹ The boundary of judicial districts for both municipal and superior courthouses in Los Angeles County, for example, is defined by census tracts and each census tract has known distance from each courthouse.²⁰ The list for jury summons upon which impanelment is based also lists potential jurors' residences and corresponding census tracts. In other states, when there is only one superior court per county, the geographic boundary of the judicial district generally overlaps with that of the county boundary.²¹

Research on the gerrymandering of the judicial district and minority representation in the jurisdiction has often relied on census tracts and their distance from courthouses. Kairys, for instance, illustrated the practicality of utilizing census tracts to generate statistical indexes (goodness-of-fit chi-square values) and examined jury representation of specific tracts and areas within a district.²² Since discrimination in jury representation takes place based on distance to travel to the courthouse, in some states, distance to the courthouse constitutes the criterion for the marking of geographic boundaries. The federal Jury Selection and Service Act authorizes each district to set maximum distances in either miles or hours beyond which jurors need not travel.²³ Given the vast differences in geography from district to district, the mileage figures range from 25 miles in the federal court

14. Jury Selection and Service Act of 1968, § 1865 (b).

15. VAN DYKE, *supra* note 4.

16. *Id.*

17. *Id.*

18. *People v. Harris*, 679 P. 2d 433 (Cal. 1984).

19. *Id.*

20. *Id.*

21. VAN DYKE, *supra* note 4, at 26-28.

22. David Kairys, *Juror Selection: the Law, a Mathematical Method of Analysis, and a Case Study*, 12 AM. CRIM. L. REV. 771-806 (1972).

23. Jury Selection and Service Act of 1968, § 1869(j).

for the Eastern District of New York, to 250 miles for grand jurors in South Dakota.²⁴ Thirty federal districts do not set a maximum mileage, despite the instruction in the statute.²⁵ Nevertheless, for the first stage of the jury selection process, the judicial district and the population are defined with respect to demographic characteristics and geographical boundaries.

B. *Source Lists*

The second stage of jury selection is to determine which lists containing names of potential jurors are to be used. The Jury Selection and Service Act of 1968 (the "Act") encourages the use of voter registration lists (ROV).²⁶ Congress was persuaded that voter rolls would meet the representativeness, or fair cross-section, test of random selection from the community, a requirement guaranteed by the Sixth Amendment to the Constitution. Because of differential registration rates by economic and racial groups, however, the use of ROV lists alone does not lead to a representative cross-section of the community.

In the federal system, voter registration lists are used as source lists, although the lists may be supplemented by other sources of names secured by federal statute.²⁷ The states, however, are given considerable leeway in application of the fair cross-section principles.²⁸

One source of the inadequacy of ROV lists is that registration laws vary by state. Arizona, for instance, has a fifty-day residency requirement before registering to vote, while Arkansas, Hawaii, Indiana, and many other states do not impose any residency requirement.²⁹

Research estimates that voter lists automatically exclude approximately one-third of the adult population, tipping prospective jurors toward the elderly, toward the relatively affluent, and toward the self-employed and government workers, and away from minorities, including Blacks, Hispanics, and women.³⁰

The residency criterion also imposes a restriction that affects the minority/majority composition of juries. People with jobs in unstable, secondary labor markets are characterized by a high incidence of residential and geographic mobility and a low incidence of residential ownership.³¹ Their high degree of residential mobility makes it less likely that they will register

24. VAN DYKE, *supra* note 4.

25. VAN DYKE, *supra* note 4, at 124-125.

26. See Jury Selection and Service Act, § 1861.

27. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE, § 1863 (b)(2) ABA, Standing Comm. on Association Standards for Criminal Justice (1982). The Supreme Court does not impose its conception of the proper source of jury lists on states, "so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." *Carter v. Jury Comm'n*, 396 U.S. 320, 332-333 (1970) (quoting *Brown v. Allen*, 344 U.S. 443, 473 (1953)). Thus, unlike in the federal system, states are not obliged to use source lists and random selection methods. As a result, states have retained systems that give authority to jury commissioners to exercise a wide range of choice in selecting jurors, including the 'key man' system. For greater discussion, see *Castaneda v. Partida*, 430 U.S. 482 (1977).

28. See *Taylor v. Louisiana*, 419 U.S. 522, 538, (1975).

29. See, e.g., HIROSHI FUKURAI, INSTITUTIONAL RACIAL INEQUALITY: A THEORETICAL AND EMPIRICAL EXAMINATION OF THE JURY SELECTION PROCESS, (1985).

30. Kairys ET AL., *supra* note 4.

31. FUKURAI, *supra* note 29, at 6-35.

to vote, particularly if there is a stringent residency requirement. Thus, the use of voter-rolls neither standardizes the nature of jury pools required for fair representation, nor leads to a jury representative of a cross-section of the community.

Some observers of the jury selection process assert that jury underrepresentation resulting from the exclusive use of the voter list is justified because it is the individual's responsibility to register to vote and that those uninterested in voting will probably not make good jurors. As a result, the voter list can be viewed as a screening mechanism to eliminate those who are deemed undesirable.³²

Irvin Kaufman, chairman of the committee which drafted the Act, stated that the voter list "supplies an important built-in screening element. It automatically eliminates those individuals not interested enough in their government to vote, or indeed not qualified to do so."³³ This position, however, seems to contradict the representative guideline specified in the Act. The guideline disqualifies only noncitizens, those under 18 years of age who have resided for a period of one year within the judicial district; those unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; those unable to speak the English language; those with mental or physical infirmity; and those under indictment or convicted of an offense punishable by imprisonment of more than one year.³⁴ While no specific criteria are given in the Act, participation in the electoral process has become a prerequisite to jury participation.

The rationale of the jury system is to lend legitimacy to justice through verdicts reached by a cross-section of the community. Excluding certain segments of populations from jury service because they failed to register to vote appears to contradict the democratic principle of the jury selection system itself. Further, some people purposefully fail to register to vote because they try to avoid jury duty. Thus, the exclusive use of voter lists as a source list not only fails to produce representative juries, it also discourages some people from voting, jeopardizing the democratic nature of both elections and jury trials.

The American Bar Association provides the following two standards for establishing source lists: (1) inclusiveness and (2) representativeness of the overall list.³⁵ Inclusiveness refers to the proportion of the adult population on the source list, whereas representativeness refers to the proportionate presence of cognizable groups on the list. The ABA suggests that voter

32. Jury Selection and Service Act, §§ 1792, 1796.

33. *Federal Jury Selection: Hearing Before the Senate Subcommittee on Improvements in Judiciary Machinery, Committee on the Judiciary, 90th Congress, 1st Sess. 253 (1967).*

34. Jury Selection and Service Act, § 1985 (b).

35. ABA, *supra* note 27, at § 3.7. The guideline for establishing source lists suggests: (1) the names of potential jurors should be drawn from a source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction, (2) the jury list should be representative and should be as inclusive of the adult population in the jurisdiction as is feasible, (3) the court should periodically review the jury source list for its representativeness and inclusiveness of the adult population in the jurisdiction, and (4) should the court determine if improvement is needed in the representativeness or inclusiveness of the source lists and if corrective action should be taken. *Id.*: see also ABA, *supra* note 27, at § 2.

lists supplemented by lists of licensed drivers will provide for reasonable inclusiveness and representativeness.³⁶

In some parts of the United States local censuses are used as a source for jurors. In Kansas City, Kansas, for instance, an annual census is combined with the voter list as a source list for prospective jurors.³⁷ In California, in an attempt to rectify voter registration bias, a 1981 law mandates the use of both voter registration (ROV) and driver registration (DMV) lists.³⁸ The figures in Table 1 demonstrate the enlarged jury pool available to the courts through the use of such multiple lists.³⁹ The use of both ROV and DMV lists, for instance, yielded approximately a seventy percent increase of potential jurors over using ROV lists alone.⁴⁰

TABLE 1
SEVEN CALIFORNIA COUNTIES USING MULTIPLE SOURCE LISTS

Courts	Names on ROV List	Names on DMV List	Names on Master List	Increase Over ROV
Santa Cruz (Superior & Municipal)	87,000	100,144	117,297	35%
San Luis Obispo (Superior & Municipal)	65,000	82,437	96,896	49%
San Diego (Superior & Municipal)	628,217	925,497	1,038,576	65%
San Francisco (Superior)	345,954	395,000	575,306	66%
Solano (Municipal)	75,000	126,000	139,136	86%
San Mateo (Superior & Municipal)	226,372	361,652	426,655	88%
Monterey (Municipal)	80,000	140,000	191,300	139%

Source: Judicial Council of California, "A Report to the Judicial Council on Ways to Improve Trial Jury Selection and Management," Prepared by National Center for State Courts, Western Regional Office, San Francisco, CA., April, 28, 1978, p.37.

* Also uses property tax lists, which contained 72,000 names

However, some areas have a greater advantage in using ROV lists since they cover a larger population than DMV lists. In a number of states, drivers lists are used instead of the voter-rolls. In the Eighth Judicial District of Nevada (which serves Las Vegas and surrounding Clark County), county drivers lists have been the sole source for selecting potential jurors

36. ABA, *supra* note 27 at § 3.7.

37. See, e.g., *Kansas v. Campbell*, 539 P.2d 329 (Kan. 1975).

38. Amendment to the CAL. CODE CIV. PROC., Ch. 81, § 16, 2054.7. (1981). An Act to amend sections 190, 193, 195, 196, 196.1, 203, 205, 206, 206a, and 246 were approved by the Governor and filed with Secretary of State on May 5, 1980. In addition, seven California counties utilized multiple source lists prior to 1981. (See Table 1).

39. NATIONAL CENTER FOR STATE COURT, A REPORT TO THE JUDICIAL COUNCIL ON WAYS TO IMPROVE TRIAL JURY SELECTION AND MANAGEMENT, Western Regional Office, San Francisco, CA, April 28, 1978 at 37.

40. *Id.*

since 1980.⁴¹ The exclusive use of the drivers lists, however, tends to discriminate against certain segments of the population, including the elderly, who generally drive less frequently than the young, the poor, particularly in urban settings, and women, who are less likely to hold drivers licenses than men.⁴² Research indicates that the percentage of males holding drivers licenses nationally dropped from 94% in 1978 to 91% in 1981, while female drivers remained at 75%.⁴³ Other supplemental lists include utility company lists, the list of welfare recipients, the list of selective-service registrants, telephone books, city directories, and tax rolls.

Despite the obvious advantages of using multiple source lists, the majority of states, as well as virtually all federal courts, continue to use only the ROV list to identify eligible jurors. The impact of narrowly defined source lists on minority representativeness is undoubtedly severe and cumulative, and its subsequent impact on racial underrepresentation becomes more problematic in the latter stages of jury selection.

C. *The Master File*

The third stage of jury selection deals with the task of constructing the master file based on names supplied from source lists. A master file, or wheel, of prospective jurors is compiled differently at federal and state levels. The three areas of mutual concern in compiling names of prospective jurors into a master file are: (1) random selection from source lists, (2) updating names, and (3) duplication of names on lists.

The Act established a detailed procedure for the compilation of the master file in order to ensure that it was broadly representative of the population of each geographically-bounded judicial district. Each district court was directed to compile a master file by taking names from the ROV list at chosen intervals, thereby selecting what is called an "interval number."⁴⁴ Once the master list was prepared, it was to remain unchanged and unsupplemented for four years.⁴⁵ In some states, however, because factors such as residential mobility and persons reaching eligible age affect the population of potential jurors, a new master wheel is prepared at least once every twelve months.⁴⁶

Because of differential residential mobility among racial and ethnic groups, the frequency of updating master files becomes important in ensuring a representative jury. The rate of geographic mobility for selected groups between 1986 and 1987 is indicated in Table 2.⁴⁷ The geographical mobility rate of Hispanic-origin persons (23%) and Blacks (20%) is higher

41. LOWMAN, *JURY MODERNIZATION IN LAS VEGAS* 5 (1981) (a report prepared for the Superior Court in Las Vegas).

42. For discussions on the use of multiple source list and the impact on jury composition, see HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND SEARCH FOR JUSTICE*, (1992).

43. FUKURAI, *supra* note 29, at 219-227.

44. Jury Selection and Service Act, § 1983 (b)(4).

45. *Id.*

46. CAL. CODE CIV. PROC., *supra* note 38, at Ch. 81, § 204.5 (a).

47. U.S. Bureau of Census, *Current Population Reports, Series P-20, No. 430, "Geographic Mobility: November 1986 to March 1987,"* U.S. Government Printing Office, Washington, D.C., 1987.

than the rate for whites (18%).⁴⁸ Minorities are also more likely to make short-distance moves than whites, i.e., mobility within a county rather than between counties.⁴⁹ Similarly, 14% of Blacks reported moving within the same county, compared with 11% of whites.⁵⁰ New job locations or searches, unpaid or rising rents and other costs are obvious reasons for such moves. Moreover, high geographic mobility among racial minorities, even short-distance moves, reduces the feeling of community involvement and commitment that is an essential ingredient of judicial participation.

TABLE 2
GEOGRAPHIC MOBILITY BY RACE AND HISPANIC ORIGIN,
1986-87 (PERCENTAGES)

Race	Total	Moved Within County	Moved Between County			
			Total	Same State	Different State	Movers From Abroad
White	17.8	11.2	6.6	3.8	2.9	0.4
Black	19.6	13.8	5.7	3.3	2.4	0.5
Hispanic Origin*	22.6	17.6	5.0	3.1	1.9	1.7

Source: U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 430, "Geographic Mobility: November 1986 to March 1987," U.S. Government Printing Office, Washington, D.C., 1987.

*: Persons of Hispanic origin may be of any race.

A frequent updating of the master file is clearly crucial in maintaining a representative master list. In all federal courts, the Act requires that the master list be filled only every four years and accentuates the weakness of the voter registration lists which already underrepresent minority populations.⁵¹ If updating is done every four years, for example, those who were seventeen years old at the time the master file was created will not be included in the list until they are twenty-one — violating federal, and sometimes state, laws on eligibility for jury service.

The potential number of people who are likely to be excluded depends upon the time period during which the master lists are updated (see Table 3).⁵² Even if the master list is updated every year, some potential jurors younger than 18 or 21 years of age will be systematically eliminated from jury service.

A 1986 California Jury Survey (the "Jury Survey") points out that when the master list is updated every four years, i.e., every presidential election year, almost two-thirds of the potential white jurors under 30 will be excluded until the next presidential election, while 70.6% of young

48. *Id.*

49. See, e.g., Maurice D. Van Arsdol ET AL., *Retrospective and Subsequent Metropolitan Residential Mobility*, 5 DEMOGRAPHY 249-267 (1968); Ronald J. McAllister et al., *Residential Mobility of Blacks and Whites: A National Longitudinal Survey*, 77 AM. J. OF SOC. 445-456 (1971); J. JOHN PALEN & BRUCE LONDON, *GENTRIFICATION, DISPLACEMENT, AND NEIGHBORHOOD REVITALIZATION* (1984).

50. U.S. Bureau of Census, *supra* note 47.

51. Jury Selection and Service Act, § 1983 (b)(4).

52. 1986 California Jury Survey, University of California, Riverside.

Black/Hispanic prospective juror candidates will be excluded.⁵³ Similarly, 43.4% of Black/Hispanic jurors between the ages of 30 and 54 will be excluded for with four-year intervals, while only 30.6% of white jurors would be subject to such systematic elimination (see Table 3).⁵⁴ Thus, the frequency of master file update is crucial in maintaining representative jury lists.

TABLE 3
FREQUENCY OF SOURCE LIST UPDATE AND THE ESTIMATED
PROPORTION OF POTENTIAL JURORS NOT INCLUDED

Updating Periods	Whites			Black/Hispanics			Others		
	< 30	30-54	55 +	< 30	30-54	55 +	< 30	30-54	55+
Every ¹ Year	26.5%	9.8%	3.2%	17.7%	7.9%	0.0%	35.0%	5.0%	14.3%
Every Two Years	42.2	15.3	5.3	38.3	30.6	0.0	45.0	7.5	14.3
Every Four Years	63.8	30.6	13.1	70.6	43.4	0.0	65.0	35.0	14.3
Every Ten Years	80.0	66.5	35.6	88.3	74.2	10.0	95.0	77.5	42.9
N	185	451	374	34	39	20	20	40	7

Source: 1986 California Jury Survey, University of California, Riverside.

1: Based on a number of years at the current residence.

While use of multiple source lists in the selection process results in a greater representativeness of the pool, it is important that duplicate names be eliminated. The elimination of duplicate names, however, poses some serious programming problems.⁵⁵ The Colorado Judicial Department estimated that about 10% of the names on its master lists were duplicates even after the computer's scanning efforts were completed.⁵⁶ *New Jersey v. Long* revealed that the drivers license list and the voter registration list in Atlanta County, New Jersey were often merged incorrectly.⁵⁷ The testimony revealed that approximately 180,000 names were shown in the merged list, while only 130,000 people between the ages of 18 and 72 resided in the county.⁵⁸ The Atlanta County jury panel thus had 40% overrepresentation of jurors, particularly those with Jewish and Italian backgrounds.⁵⁹ The selection process used constant numbers, rather than random numbers in subsequent runs through the list, and certain sections of the list were frequently selected while others were rarely selected.⁶⁰ In addition, fifth-letter alphabetization was used to select jurors, a method in which the same panel would have the same fifth letter in their last name, resulting in some panels having a large number of Jewish names (e.g., Wiseman, Feldman) or Italian names (e.g., Ferardo, Dinardo).⁶¹ As a result, the

53. *Id.*

54. *Id.*

55. LOWMAN, *supra* note 41, at 6.

56. VAN DYKE, *supra* note 4, at 103.

57. *New Jersey v. Long*, 499 A.2d 264

58. *Id.* at 266.

59. *Id.* at 268.

60. *Id.* at 264.

61. *Id.* at 269.

judge invalidated the jury selection system and required the Jury Commission to develop a new selection scheme.⁶²

The breakdown of California juror availability based on source lists in 1986 is shown in Table 4.⁶³ The figures are also broken down according to the year of master file updates.⁶⁴ The large proportions of white jurors are identified by both the ROV and DMV lists (70.5 and 87.8%, respectively).⁶⁵ The analysis suggests that regardless of the time intervals of the source list update, a large number of white prospective jurors would still be included in the master file and that their names would have to be purged. The notable finding is that the majority of Black/Hispanic jurors are identified through DMV lists. In fact, no additional names would be referred by ROV lists if four-year intervals were used for updating the master list. Similarly, other minority jurors would not be identified if the ROV were the sole source list. The finding also substantiates suggestions that minority jurors are mostly identified by DMV lists, not by ROV lists. Their names are more likely to come from DMV lists and are less likely to overlap the names on ROV lists. The analysis thus illustrates the importance of multiple source lists in maintaining racially representative jury lists. It also points out that even when DMV and ROV are both used, minorities remain less well-represented than whites because their names are more likely to be identified only once. Because of the difficulty of purging the master file of duplicate names, white prospective jurors are likely to appear in the file more than once, thus enhancing their chances of being chosen.

TABLE 4
ESTIMATED PERCENTAGE OF POTENTIAL JURORS IDENTIFIED BY
MULTIPLE SOURCE LISTS: WHITE, BLACK/HISPANIC, OTHERS

Source Lists	White		Black/Hispanics		Others	
	<4 Years ¹	4 + Years	<4 Years	4 + Years	<4 Years	4 + Years
ROV ¹	3.7%	4.9%	0.0%	1.7%	0.0%	0.0%
DMV ²	22.8%	6.2%	43.2%	20.7%	68.0%	35.7%
Both Lists	70.5%	87.8%	51.4%	72.4%	24.0%	59.5%
Neither List	3.0%	1.2%	5.4%	5.2%	8.0%	4.8%
Total	100.0	100.1*	100.0	100.0	100.0	100.0

Source: 1986 California Jury Survey, University of California, Riverside.

1: A number of years lived at the current residence.

1: Registered Voter's Rolls.

2: Driver's Motor Vehicle Registration Lists.

*: Due to rounding errors.

D. *Qualified Juror Files*

The fourth step of the jury selection procedure is to compile names of qualified potential jurors, after the randomly selected jurors are screened by jury qualification questionnaires. Once the master file has been created, there are two discretionary steps involved in compiling the qualified juror's

62. HANS & VIDMAR, *supra* note 7.

63. 1986 California Jury Survey, University of California, Riverside.

64. *Id.*

65. *Id.*

file: (1) setting qualification standards, and (2) designing the method for compiling the list of qualified jurors.

The Jury Selection and Service Act specifies the qualifications for jury service in federal courts: (1) a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district; (2) with an ability to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) with an ability to speak the English language; (4) prospective jurors must not be unable, by reason of mental or physical infirmity, to render satisfactory jury service; and (5) not have been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year, and his civil rights have not been restored by pardon or amnesty.⁶⁶

At the state level, because of variation in nationwide statutory qualifications, there are generally twelve different sets of mandatory, statutory qualifications. These include the elements of: (1) being mentally sound, [38 states]; (2) having no conviction [35 states]; (3) being physically sound [33 states]; (4) being of a certain age [30 states]; (5) having the ability to read, write and speak English [27 states]; (6) not having served prior jury service in a particular time [27 states]; (7) possessing "key-man" characteristics (as described below) [26 states]; (8) being a resident or citizen of the state [24 states]; (9) being a resident or qualified elector [23 states], (10) being a resident or citizen of the county [22 states]; (11) being a U.S. citizen [17 states]; and (12) becoming a juror by solicitation [8 states].⁶⁷

The important notion here is that some mandatory qualifications (especially 1, 3, and 7) rely on subjective criteria in determining the eligibility of potential jurors. There is no doubt that such subjective evaluations have played an important role in creating racially-demarcated juries in the race-conscious court structure in the South. For example, "of the eleven southern states, ten states require that a prospective juror be 'mentally sound'; ten states require that there be no conviction for a felony or 'immoral crime'; eight require physical soundness; and eight states stipulate that prospective jurors have 'key man' qualifications of 'good character,' 'sound judgment' and 'intelligence'."⁶⁸

These subjective criteria also play an important role in determining jury representativeness. For instance, California Assembly Bill No. 1454, which passed in 1981, contains subjective discretionary powers by providing: "[T]he qualified jury list . . . shall include persons suitable and competent to serve as jurors. In making such selections there shall be taken only the names of persons . . . who are in the possession of their natural faculties, who are of fair character and approved integrity, and who are of sound judgment."⁶⁹

At the state level, court officials may decide whether potential jurors are qualified or exempt by using three methods: (1) personal knowledge,

66. Jury Selection and Service Act, § 1965 (b)(5).

67. Benokraitis, *supra* note 9, at 37.

68. *Id.* at 38.

69. CAL. CODE CIV. PROC., *supra* note 38, at Ch. 81, § 17.205. (a).

(2) personal interviews, and (3) questionnaires.⁷⁰ Because the first two selection criteria are subjective, minority representation can be influenced by jury commissioners and district clerks, since they have substantial discretion regarding both the sources and methods of selection. Even in a judicial district where objective questionnaires are used as the primary means for selecting qualified jurors, adequate racial representation may still be lacking. The use of written questionnaires demanding thoughtful contemplation, for example, has resulted in the loss of 15% to 30% of potential jurors.⁷¹

A number of screening questions are also used to identify potential jurors. These include questions in the following three areas: (1) qualification, (2) exemption, and (3) excuses. The Jury Survey reveals that those screening questions contribute to racially-imbalanced representation.⁷²

Qualification criteria include requirements on age, citizenship status, residency, English proficiency, sound intelligence and good judgment, and no previous felony convictions.⁷³ The citizenship criterion excludes approximately 21% of Black/Hispanic females from jury service, and disqualifies a large number of other minority jurors (31.25 and 37.50% of non-Black/Hispanic minority male and female jurors, respectively) (see Table 5).⁷⁴ An English proficiency criterion also plays an important part in disqualifying a large proportion of Black/Hispanic jurors (36.59 of males and 25.81% of females, respectively).⁷⁵

Language requirements set limits on minority participation. All federal and many state courts currently disqualify prospective jurors devoid of English language competency. Consider a county such as Los Angeles with a Hispanic population accounting for more than 30% of the community. A large portion of the population is made up of short-distance migrants from adjacent counties, as well as from Mexico. The language requirement restricts those with Hispanic backgrounds from participating on juries.

The 1980 United States Census revealed that more than one million residents in Los Angeles County speak Spanish at home (1,118,081) and that Spanish speakers consisted of 21% of those over 18 years of age.⁷⁶ Further, 39% of the prospective jurors who spoke Spanish at home did not speak English well or at all (439,976 out of 1,118,081).⁷⁷ As a whole, 8% of the total eligible jurors in Los Angeles County did not speak English well or at all in 1980 (439,976 out of 5,446,115).⁷⁸ While no figures were given for racial and ethnic breakdowns of non-citizens, it is highly likely that the majority of non-citizens are members of the large Mexican and Hispanic population in Los Angeles. By assuming that if, in fact, those who speak Spanish at home were all Hispanics, the language proficiency criterion

70. Benokraitis, *supra* note 9, at 40.

71. *People v. Murphy*, 905 Cal. Rptr. 295, 302 (1973).

72. 1986 California Jury Survey, University of California, Riverside.

73. *Id.*

74. *Id.*

75. *Id.*

76. U.S. BUREAU OF CENSUS, CENSUS OF POPULATION AND HOUSING, 1980 SUMMARY TAPE FILE 3 DATA, U.S. Department of Commerce, Washington, D.C., 1982.

77. *Id.*

78. *Id.*

TABLE 5
 QUALIFICATION, EXEMPTION, AND EXCUSE ON RACIAL
 REPRESENTATIVENESS

Variable	White		Black/Hispanics		Others	
	Male	Female	Male	Female	Male	Female
<i>Qualification</i>						
Citizenship	8.09%	5.88%	14.63%	20.97%	31.25%	37.50%
Age (18+)	7.02	4.15	7.32	8.06	11.95	11.76
Residency	11.91	11.76	12.20	16.13	6.25	25.00
English Prof. ¹	7.45	4.84	36.59	25.81	25.00	40.00
Natural Fclty ²	8.30	5.36	9.76	9.68	3.13	15.00
Conviction	7.87	4.33	12.20	11.29	0.00	12.50
Memb. Grnd Jury	7.02	4.15	9.76	8.06	0.00	12.50
<i>Exemption</i>						
Peace Officer	8.30	4.15	7.32	8.06	0.0%	12.50
<i>Excuse</i>						
Mental Incapcty ³	19.36	20.24	19.51	19.35	3.13	17.50
Pers. Oblign ⁴	11.06	20.42	17.50	24.19	6.25	27.50
Economic Hard. ⁵	33.40	19.72	19.51	16.13	15.63	15.00
Transportation ⁶	10.64	12.46	12.20	22.58	3.13	17.50
Served on Jury	20.43	18.17	9.76	13.11	6.25	20.00
Other Excuses	16.38	11.76	19.51	12.90	9.38	20.00
N	470	578	41	62	32	40

Source: 1986 California Jury Survey, University of California, Riverside.

*: Due to rounding errors.

1: English Proficiency.

2: Natural Faculties.

3: Mental Incapacities.

4: Personal Obligations.

5: Economic Hardship.

6: Transportation and/or travel difficulties.

would eliminate 39% of the entire eligible Hispanic population in Los Angeles County. Thus, the language qualification engenders a complicated political issue. If a significant percent of defendants are Spanish-speaking Hispanics, the participation of Spanish-speaking peers is called for. On the other hand, bilingual trials are expensive and require added technical support systems in carrying out the trial.

Another important factor setting limits on minorities' judicial participation is the lack of follow-up of qualification questionnaires sent to prospective jurors. Highly mobile people have the least chance of receiving them. Though some receive the questionnaires, the feeling of reluctance to fill out the questionnaires and return them is strong among racial minorities.⁷⁹ Many minorities see no reason to participate in an institution controlled by those who lord over them. Their perceived social images appear so oppressive that these images have also led to their widespread mistrust of government and those with legal authority.⁸⁰ As a result, Blacks and other ethnic and racial minorities have learned to mistrust the fairness inherent in most white-dominated institutions of power, such as law enforcement agencies and court decisions through racially-discriminant juries.⁸¹

79. For further discussions on the recalcitrant, see Fukurai ET AL., *supra* note 6.

80. VAN DYKE, *supra* note 4, at 32; see also WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT* (1981).

81. *Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

The California Jury Survey also indicates that among those who ask to be excused from jury service, personal obligation is the most important excuse for Black/Hispanic jurors (17.5% for males and 24.2% for females).⁸² Only 11.1% and 20.4% of male and female white jurors, respectively, ask to be excused for personal reasons.⁸³ A high proportion of white female jurors ask to be excused because of mental and physical incapacities (20.2%).⁸⁴ Approximately 21% of white male jurors request to be excused from jury duty because they have previously served on juries, and the figure is the highest among the white male population.⁸⁵ Both Black and Hispanic jurors are more likely to request to be excused due to transportation and travel difficulties to the courthouse than their white counterparts.⁸⁶ One notable, and perhaps unexpected, finding is the high proportion of white jurors requesting to be excused because of the economic hardship that jury duties entail (33.4 and 19.7% for white males and females, respectively).⁸⁷

Two factors might shed light on this unexpected finding. First, white jurors might be characterized by greater apprehension of serving on juries.⁸⁸ They may feel that jury service is an undue hardship to be avoided by all means. Given the high incidence of economic excuses among white jurors, apprehension may be stronger than that of racial minorities. Because of the lengthy time commitment on many jury trials, the perceived threat to economic well-being may be greater for whites than Blacks.

In order to rectify some of those selection biases, by 1983, 39 states had adopted the one-day-one-trial scheme. Although the procedural operation varies, prospective jurors report for one day and if they aren't selected, they are excused. If they are chosen, that jury is the only one on which jurors are required to serve. Nevertheless, a great deal of the prospective jurors' time is spent waiting. Most jury commissioners summon many more jurors than they need, which in addition to wasting money, forces potential jurors to make necessary sacrifices to report for jury duty. The great apprehension and perceived threats related to jury service might be the greatest among the white jurors.

Secondly, excuse is closely linked to both the age and economic status of individual jurors. For instance, prospective jurors who just entered into the labor market might be faced with greater economic hardship because of jury duty, while employees with greater seniority are less likely to be burdened by the economic loss. The 1978 Jury System Improvement Act offered, in the federal court, the carrot of increased compensation and travel allowances and forbade employers from firing jurors or causing them to lose seniority as a result of their services.⁸⁹ However, the highest percent-

82. 1986 California Jury Survey, University of California, Riverside.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. U.S. DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 67 (1983).

89. For greater discussions on company compensations and the impact on jury composition, see Fukurai & Butler, *supra* note 5.

TABLE 6
EXCUSE ITEMS AND RACIAL REPRESENTATIVENESS

Excuses	Whites			Blacks/Hispanics			Others		
	< 30*	30-54	55 +	< 30	30-54	55 +	< 30	30-54	55+
Mental									
Incapacity	6.99%	10.70%	36.95%	2.86%	15.38%	50.00%	0.00%	14.63%	28.57%
Personal									
Obligation	13.98	20.52	12.14	14.29	21.05	40.00	4.55	19.51	42.86
Economic									
Hardship	29.03	33.19	16.02	20.00	15.38	20.00	9.09	17.07	28.57
Transportation									
Travel	9.68	8.73	16.02	17.14	12.82	35.00	9.09	9.76	28.57
Previously									
Served on Grand									
Jury	13.98	23.80	16.80	8.57	10.53	20.00	13.64	9.76	42.86
Other									
Excuses	21.51	12.66	12.14	20.00	10.26	20.00	13.64	12.20	42.86
N	185	451	374	34	39	20	20	40	7

Source: 1986 California Jury Survey, University of California, Riverside.

*: Age of the respondents.

age of economic excuse is still found in the prime earning years (30-54) and among prime earners (white males).⁹⁰ For example, Table 6 shows that approximately 33 percent of white jurors between the age of 30 and 54 requested to be excused from jury duty for economic hardship, compared to 15% of Black/Hispanic jurors and 17% of other minority populations.⁹¹ Whites earn more, but they have more to lose in objective and monetary terms. This relationship diminishes at age 55 - retirement age for large numbers of whites. It may be that the perception of jury duty varies according to the age structure and is, indeed, more of an economic hardship to the middle-age majority group.

The relationship among excuse items, sex, and age for white and minority jurors is examined in Table 7.⁹² It is apparent that for white jurors, the older the juror, the less likely he/she is to request to be excused for economic reasons (with a statistical index of 0.185). Thus, the economic excuse is closely related to racial backgrounds, employment status, and seniority in a company (or possibly retirement).

E. Jury Impanelment Lists

The fifth dimension in the jury selection process is to compile a short list of prospective jurors to be summoned to each respective courthouse. There are two major methods for determining those who will be summoned to serve. Both involve drawing names from the qualified juror file: (1) discretionary procedures in which drawing names is left to the discretion of court officials and (2) key numbers or random selection.⁹³ The Act mandates the use of random selection, providing that "the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand

90. 1986 California Jury Survey, University of California, Riverside.

91. *Id.*

92. *Id.*

93. Benokraitis, *supra* note 9, at 39-40.

TABLE 7
CORRELATION COEFFICIENTS AMONG EXCUSE ITEMS, AGE,
AND SEX FOR WHITE (ABOVE MAIN DIAGONAL)
AND BLACK/HISPANIC JURORS (BELOW
MAIN DIAGONAL)

Variable	Excuse Questions						Age	Sex*	Mean**	SD
	A*	B	C	D	E	F				
A		.170 ³	.050	.423 ³	.110 ³	.216 ³	-.368 ³	-.010	.748	.367
B	.326 ³		.142 ³	.372 ³	.180 ³	.288 ³	.072 ¹	-.126 ³	.925	.402
C	.350 ³	.352 ³		.240 ³	.044	.179 ³	.185 ³	.155 ³	.834	.372
D	.460 ³	.378 ³	.447 ³		.253 ³	.354 ³	-.154 ³	-.028	.845	.362
E	.445 ³	.412 ³	.433 ³	.457 ³		.218 ³	.019	.028	.873	.333
F	.374 ³	.339 ³	.405 ³	.386 ³	.457 ³		.075	.066	.845	.362
Age	-.390 ³	-.198 ³	-.063	-.173 ¹	-.157 ¹	-.038		.010	39.420	15.246
Sex	-.084	-.159 ³	.028	-.168 ¹	-.113	-.008	.039	-.010	.576	.495
Mean	.801	.837	.741	.883	.808	.861	47.720	.551		
SD	.399	.368	.438	.320	.393	.345	16.930	.497		

Notes: Significance is based on Cochran's test (1954) for linear relationship.

Source: 1986 California Jury Survey, University of California, Riverside.

*: A= Physical or mental incapacities, (0) asked (1) did not ask.

B= Personal obligations.

C= Serious economic hardship and burdens.

D= Difficulty in transportation and/or travel to the courthouse.

E= Served as a juror in the past 12 months.

F= Other excuses.

+ : (0) male (1) female.

++: Black/Hispanic jurors.

1: p<.05 2: p<.01 3: p<.001

and petit jury panels."⁹⁴ Thus the jury impanelment list should consist of those who are randomly selected from the qualified jurors' file and, therefore, are representative of "the cross section" of the community.⁹⁵ Similar requirements have been mandated in many states, including California.⁹⁶

There is an extra-legal dimension involved, however, particularly in large judicial districts in metropolitan areas where court competition by district courts affects the minority composition of potential jurors at the impanelment stage. Some large metropolitan areas, such as Los Angeles where thirty-two superior and municipal courts are crowded into a single county, have been given a legal definition of what constitutes judicial districts. California law provides that "in counties with more than one court location, the rules shall reasonably minimize the distance traveled by jurors. In addition, in the County of Los Angeles no juror shall be required to serve at a distance greater than 20 miles from his or her residence."⁹⁷ Yet, the practicalities in the large Los Angeles County judicial district require that its thirty-two courts obtain a necessary number of jurors every week. This has put the various courts in competition for potential jurors in overlapping regions where jurors have multiple opportunities to serve in more than one courthouse. Because judicial districts overlap, people residing in overlapping geographical regions have an increased chance of be-

94. Jury Selection and Service Act, § 1866 (a)

95. *Id.*

96. CAL. CODE CIV. PROC., *supra* note 38, at Ch. 81, §§ 219, 229, 255.

97. *Id.* at § 203.

ing called to serve in various courts.⁹⁸ Overlapped regions are more likely to be found in the central portion of Los Angeles County (see Region A in Map 1). Consequently, in some courts, persons in peripheral areas of the county tend to dominate the makeup of impaneled jurors in particular courts.⁹⁹

When comparing the racial and ethnic breakdown for the overlapped Region A with the overall composition in Los Angeles County, Region A tends to cover the area where minority populations are dominant. For example, the breakdown for whites, Blacks, and Hispanics in Los Angeles County is 40.3%, 12.6%, and 27.6%, respectively, while 11.5%, 48.3%, and 36.3% for Region A, respectively.¹⁰⁰ That is, 85% of the residents living in Region A are minorities, according to the 1980 United States Census.¹⁰¹

Table 8 suggests that in order to impanel prospective jurors, several Los Angeles superior court districts excluded a substantial number of census tracts in the overlapped region, while the law specifies the 20-mile radius from the respective courthouses.¹⁰² Long Beach and Van Nuys judicial districts excluded more than 50% of the tracts in the region (130 and 123, respectively).¹⁰³ In five out of eight superior court districts, the excluded tracts account for more than 20% of the entire tracts in Region A.¹⁰⁴ Thus, 70.9% of Black registered voters have been left out of these outlying districts, while Blacks make up only 48.3% of registered voters in Region A. This means that for the superior court districts where Region A's exclusion may have more significant impact upon the minority composition of a jury, approximately 22% of Black registered voters were systematically excluded from participating in juries in the outlying districts. This results in a deficit of minorities in jurisdictions outside Region A.

Table 8 also suggests that the 20-mile rule has never been fully applied in constituting the judicial district. Systematic exclusion has been exercised in overlapped Region A where approximately 85% of the residents are minorities. While there is no evidence to support such systematic exclusion in other overlapped areas, it is more likely that the 20-mile superior court districts guarantee neither the inclusion of all areas within the 20-mile radius, nor the exclusion of the tracts that fall outside the radius. In fact, such a violation has been reported for several jurisdictions including Torrance, Van Nuys, and North Valley.¹⁰⁵

98. Hiroshi Fukurai ET AL., *Cross-sectional Jury Representation or Systematic Jury Representation? Simple Random and Cluster Sampling Strategies in Jury Selection*, 19 J. OF CRIM. JUST. 31-48 (1991); Edgar W. Butler & Hiroshi Fukurai, *Computer-aided Evaluation of Racial Representation in Jury Selection*, 16 COMPUTER, ENV., AND URB. SYS. 1-25 (1992).

99. For example, some cases deal specifically with the constitutionality of the relationship between the selection of potential jurors and the question of territoriality of judicial districts. See *Bradley v. Judges of Superior Court for Los Angeles County*, 531 F. 2d. 413 (9th Cir. 1976); *People v. Taylor*, 120 Cal. Rptr. 762 (1975); *Sandoval v. Superior Court for Los Angeles County*, 104 Cal. Rptr. 157 (1972).

100. U.S. BUREAU OF CENSUS, *supra* note 76.

101. *Id.*

102. Office of the Los Angeles Jury Commissioner. ROV data are prepared by R.F. Arce, Director of the Jury Service Division.

103. *Id.*

104. *Id.*

105. Hirsoshi Fukurai ET AL., *Spatial and Racial Imbalances in Voter Registration and Jury Selection*, 72 SOC. AND SOCIAL RES. 33-38 (1987).

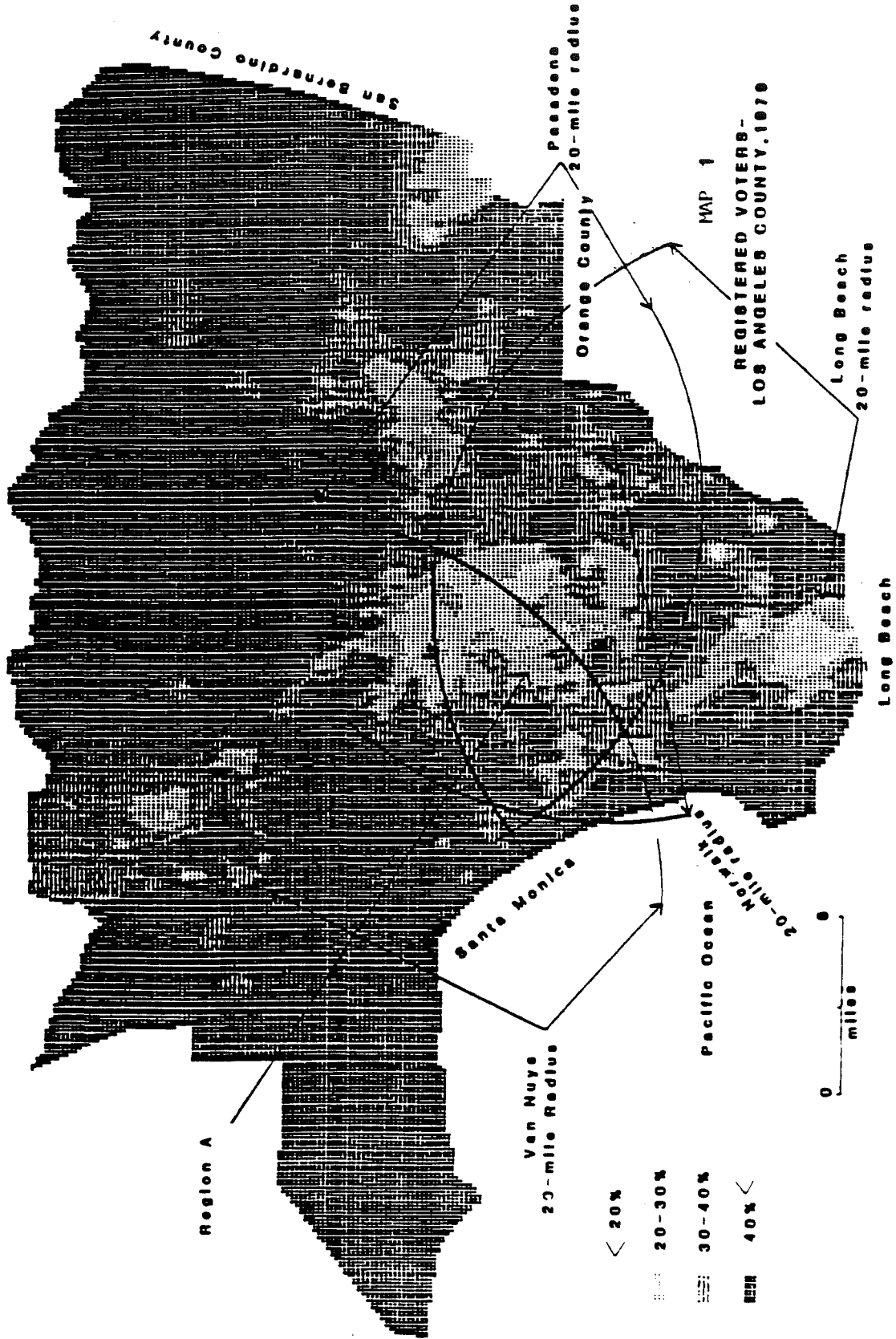


TABLE 8
LOS ANGELES COUNTY CENSUS TRACTS AND REGION A

Superior Court District	Race/ Ethnicity	Overlapped Census Tracts Not Included		Included Registered Voters in Region A		Excluded Registered Voters in Region A*	
		No.	(%)	No.	(%)	No.	(%)
L.A. Central	Anglo			36,759	20.3	10,724	12.3
	Black	49		93,241	51.4	72,184	82.4
	Hispanic . .	(23.1)		37,734	20.8	2,677	3.0
	Others . . .			13,768	7.5	1,986	2.3
Santa Monica	Anglo	8		44,192	17.0	3,291	37.7
	Black	8		163,848	62.9	1,577	18.0
	Hispanic . .	(3.8)		37,278	14.3	3,133	35.8
	Others . . .			15,029	5.8	752	8.6
Van Nuys	Anglo			34,782	31.1	12,701	8.5
	Black	123		53,552	47.9	111,873	74.8
	Hispanic . .	(58.0)		21,857	19.6	18,554	12.4
	Others . . .			1,524	1.4	6,485	4.3
Pasadena	Anglo			11,886	10.0	35,597	23.7
	Black	88		63,934	53.7	101,491	67.7
	Hispanic . .	(41.5)		33,991	28.5	6,420	4.3
	Others . . .			9,331	7.8	6,423	4.3
Norwalk	Anglo			32,699	16.8	14,784	19.9
	Black	46		114,355	58.7	51,070	68.8
	Hispanic . .	(21.7)		36,437	18.7	3,974	5.4
	Others . . .			11,404	5.8	4,350	5.9
Torrance	Anglo			46,524	18.1	959	7.9
	Black	14		163,282	63.6	2,143	17.5
	Hispanic . .	(6.6)		32,890	12.8	7,521	61.6
	Others . . .			14,166	5.5	1,588	13.0
Long Beach	Anglo			11,159	11.2	36,324	21.5
	Black	130		62,375	62.5	103,050	60.9
	Hispanic . .	(61.3)		21,574	21.6	18,837	11.1
	Others . . .			4,757	4.7	10,997	6.5
Compton	Anglo			46,297	17.4	1,186	38.2
	Black	3		164,417	61.9	808	26.0
	Hispanic . .	(1.4)		39,913	15.0	498	16.0
	Others . . .			15,136	5.7	618	19.8

Source: Office of the Los Angeles Jury Commissioner. ROV data are prepared by R.F. Arce, Director of the Jury Service Division.

* Divided by the total number of census tracts in overlapped regions, 212.

What would be the racial composition of respective judicial districts if the excluded areas are incorporated to the defined boundaries of the districts? Table 9 indicates the possible contribution by including all census tracts of Region A into the judicial district as defined by the law.¹⁰⁶ When Region A is completely excluded from the 20-mile radius court jurisdiction, impaneled white jurors are disproportionately overrepresented and make up approximately 80% of registered voters outside Region A.¹⁰⁷ The overrepresentation of white jurors in the Los Angeles County jury panel substantiates the exclusion of the overlapped region. Socioeconomic and extra-legal variables need to be taken into consideration to make the explicit causal connection. On the other hand, by representing all the tracts in Region A, the minority breakdown of registered voters enlarges the potential jury pool for both Blacks and Hispanics, with an average increase of

106. Office of the Los Angeles Jury Commissioner. ROV data are prepared by R.F. Arce, Director of the Jury Service Division.

107. *Id.*

approximately 11% and 2%, respectively. The inclusion of the entire overlapped region would have greatly enhanced the degree of minority participation at the jury impanelment stage of jury selection, since the average of 63.1% and 41.3% of Black and Hispanic registered voters, respectively, lived in Region A, whereas only 5.4% of whites lived in the region.

TABLE 9
LOS ANGELES COUNTY REGISTERED VOTERS WITH AND
WITHOUT OVERLAPPED REGION A

Superior Court District	Ethnicity	Registered Voters Without Overlapped Region		Registered Voters With Overlapped Region		Difference %	Proportionate Increase by Inclusion of Region %
		No.	%	No.	%		
L.A. Central	Anglo	850,991	83.3	898,474	69.6	-13.7	5.3
	Black	70,173	6.9	235,598	18.3	11.4	70.2
	Hispanic . .	60,121	5.9	100,532	7.8	1.9	40.2
	Others . . .	40,460	3.9	56,214	4.3	0.4	28.0
Santa Monica	Anglo	693,359	85.1	740,842	68.3	-16.8	6.4
	Black	98,985	12.1	264,410	24.4	12.3	62.6
	Hispanic . .	15,533	1.9	55,944	5.2	3.3	72.2
	Others . . .	7,107	0.9	22,861	2.1	1.2	68.9
Van Nuys	Anglo	1,068,398	87.7	1,116,881	75.1	-12.6	4.2
	Black	80,721	6.6	246,146	16.5	9.9	67.2
	Hispanic . .	37,804	3.1	78,215	5.3	2.2	51.7
	Others . . .	30,920	2.6	46,674	3.1	0.5	33.8
Pasadena	Anglo	934,393	80.6	981,876	68.8	-11.8	4.8
	Black	78,420	6.8	243,845	17.1	10.3	67.8
	Hispanic . .	98,933	8.5	139,344	9.8	1.3	29.0
	Others . . .	46,834	4.1	62,588	4.3	0.2	25.2
Norwalk	Anglo	781,442	75.2	828,925	63.4	-11.8	5.7
	Black	107,017	10.3	272,442	20.8	10.5	60.7
	Hispanic . .	104,419	10.0	144,830	11.1	1.1	27.9
	Others . . .	46,311	4.5	62,065	4.7	0.2	25.4
Torrance	Anglo	853,091	79.4	900,475	67.0	-12.4	5.3
	Black	131,426	12.2	296,851	22.1	9.9	55.7
	Hispanic . .	54,887	5.1	95,298	7.1	2.0	42.4
	Others . . .	34,768	3.3	50,522	3.8	0.5	31.2
Long Beach	Anglo	609,915	78.6	657,398	62.9	-15.7	7.2
	Black	78,630	10.1	244,055	23.4	13.3	67.8
	Hispanic . .	61,995	8.0	102,406	9.8	1.8	39.5
	Others . . .	24,953	3.3	40,707	3.9	0.6	38.7
Compton	Anglo	1,038,007	77.3	1,085,490	67.4	-9.9	4.4
	Black	145,947	10.9	311,372	19.3	8.4	53.1
	Hispanic . .	108,314	8.1	148,725	9.2	1.1	27.2
	Others . . .	49,968	3.7	65,722	4.1	0.4	24.0

Source: Office of the Los Angeles Jury Commissioner. ROV data are prepared by R.F. Arce, Director of the Jury Service Division.

The notion of structural judicial competition offers the opportunity for and may lead to greater racial discrimination in jury selection. Table 10 indicates the frequency of 1980 summon requests by designated court locations in Los Angeles County.¹⁰⁸ The Central District alone drew at least one-third of the total number of potential jurors in Los Angeles County (33.9%).¹⁰⁹ Map 2 shows the location of the Los Angeles Central Superior Court and its 20-mile judicial district. Since it draws jurors first, the Cen-

108. *Id.*

109. *Id.*

tral District Court pulls them from much of the central part of the county, leaving a smaller number of eligible and qualified jurors available for outlying courts. Competition for obtaining a sufficient number of summoned jurors, particularly by the dominant superior court such as the Central District, thus tends to undermine the representative nature of the jury selection process itself.

TABLE 10
SUMMONS REQUESTED BY COURT LOCATION

Court District	(S=Superior M=Municipal)	No. of Panels Requested	%	Total Jurors Summoned	%
Central S (Los Angeles) ¹		68	10.4	43400	33.9
Northwest S (Van Nuys)		39	6.0	8125	6.4
Antelope Valley M (Lancaster)		16	2.5	1540	1.2
Newhall M		11	1.7	1320	1.0
East Los Angeles M		27	4.1	4744	3.7
Northeast S (Pasadena)		40	6.1	5613	4.4
Alhambra M		18	2.8	2525	2.0
East S (Pomona)		35	5.4	3525	2.8
Citrus M (West Covina)		21	3.2	2250	1.8
Rio Hondo M (El Monte)		22	3.4	2075	1.6
Southeast S (Norwalk)		36	5.5	5420	4.2
Los Cerritos M		5	0.8	660	0.5
Southgate M		19	2.9	3400	2.7
Huntington Park M		17	2.6	3250	2.5
Whittier M		27	4.1	3125	2.4
Downey M		14	2.1	2250	1.8
South S (Long Beach)		38	5.8	3200	2.5
South Central S (Compton)		59	9.0	10725	8.4
San Pedro branch of Los Angeles		22	3.4	2243	1.8
Southwest S (Torrance)		8	1.2	950	0.7
Inglewood M		5	0.8	825	0.6
West S (Santa Monica)		27	4.1	5500	4.3
Culver M (Culver City)		2	0.3	550	0.4
Beverly Hills M		15	2.3	2350	1.8
Malibu M		4	0.6	725	0.6
West Los Angeles branch of Los Angeles M		24	3.7	3240	2.5
North Central S (Glendale)		24	3.7	3375	2.6
North Central S (Burbank)		10	1.5	950	0.7
Total		653	100.0	127,855	100.0

Source: Office of the Los Angeles Jury Commissioner. Data are prepared by R.F. Arce, Director of the Jury Service Division.

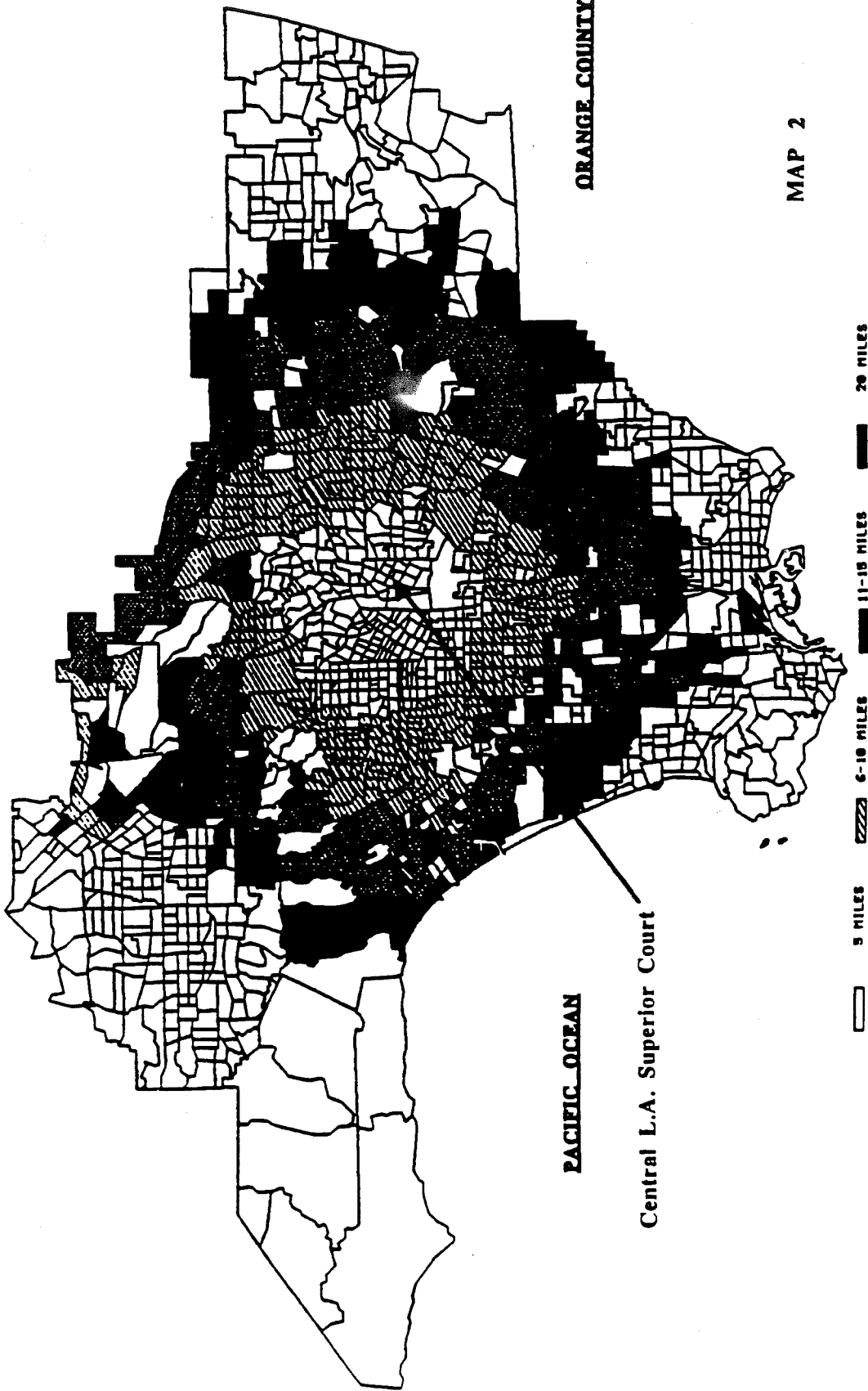
1: City where the court is located.

F. Jury Panels

The sixth stage of jury selection takes place at courthouses, when impanelled jurors are actually called in to serve on juries. Here two factors affect the racial composition of jury panels: (1) the method of summons and (2) the method of selection.

The Jury Selection and Service Act recommends the use of registered or certified mail or personal delivery of summons by the clerk, jury commission, or marshal to the selected person at his/her usual residence or

LOS ANGELES CENTRAL SUPERIOR COURT JUDICIAL DISTRICT



PACIFIC OCEAN

Central L.A. Superior Court

ORANGE COUNTY

MAP 2

5 MILES 6-10 MILES 11-15 MILES 20 MILES

business address.¹¹⁰ Residentially mobile individuals, however, tend not to receive such summons and the Act does not mandate follow-up procedures at this stage of the jury selection process.

Once they have been summoned, there are three methods of eliminating certain potential jurors: (1) excuses, (2) exemptions, and (3) disqualifications. These factors are almost identical to those required at the qualification stage of jury selection. The basic assumption remains the same: potential jurors who have not met statutory requirements are to be identified and excluded from subsequent jury selection procedures. At this stage, however, the screening process is performed at the courthouse, not through mail.

Research indicates that, overall, "about sixty percent of all people whose names are pulled from the master wheel and who receive a questionnaire seeking to determine their qualifications for jury service return document requesting to be excused."¹¹¹ Only a few jury commissioners grant temporary excuses and then call the person again when the juror recovers from illness. It is much easier administratively to summon some other name off the list than to bother to keep track of those who are excused for illness. It is unknown whether permanent removal of these names results in less representative juries, although it is likely that a large number of the sick are elderly and that the proportion of elderly jurors is thus reduced.

Five factors affect the group of individuals likely to be excused from jury service at both federal and state levels: (1) economic hardship, (2) child care, (3) age, (4) distance traveled and transportation, and (5) illness. As a result, socioeconomic and demographic factors such as race, sex, age, education, and income level affect the extent of judicial representation at the jury impanelment stage of jury selection. In addition, those elements are likely to overlap one another and provide more complex pictures of racial and ethnic representation on juries.

Fukurai and Butler, for example, examined the educational and racial backgrounds of impaneled jurors.¹¹² A jury survey was conducted in 1986 to examine the jurors who appeared at the superior courthouse in Sacramento County, California.¹¹³ Four thousand six potential jurors appeared on 57 jury panels between April 21, 1986 and September 7, 1986.¹¹⁴ Table 11 shows the cross-classification of race and educational background of prospective jurors.¹¹⁵ The findings suggested that for all racial and ethnic groups, potential jurors with less than high school education are significantly underrepresented. Further, Black and Hispanic jurors who appeared at the courthouse did not resemble the representative minority population composition in the community. For instance, there is a pool of 0.8% and 2.9% of potential Black jurors with both grade and high school

110. Jury Selection and Service Act, § 1866 (b).

111. VAN DYKE, *supra* note 4, at 111; see also GORDON BERMANT, JURY SELECTION PROCEDURES IN THE UNITED STATES DISTRICT COURTS (1982).

112. Hirsoshi Fukurai & Edgar W. Butler, *Race or Social Class* (1992) (unpublished manuscript, on file with authors).

113. 1986 Jury Survey, the Scientific Legal Service, Inc.

114. *Id.*

115. *Id.*

TABLE 11
ELIGIBLE POPULATION AND JURY PANELS:
RACE AND EDUCATION

Variables	Population	Jury Panel	Absolute Disparity	Comparative Disparity	Z Scores
EDUCATION					
<i>White</i>					
Grade Sch.	6.7 (8.2) ¹	0.5 (0.3)	6.4 (- 7.9)	95.5 (-96.3)	16.20 (-16.44)
High Sch.	39.0 (47.6)	26.1 (31.8)	12.8 (-15.8)	32.8 (-33.2)	16.61 (-16.92)
Some College	19.8 (24.2)	28.0 (34.2)	8.2 10.0	41.4 (41.3)	13.02 (13.33)
College	16.4 (20.0)	27.6 (33.7)	11.2 (13.7)	68.3 (68.5)	19.14 (10.85)
<i>Black</i>					
Grade Sch.	0.8 (12.6)	0.1 (1.2)	0.7 (-11.4)	87.5 (-90.5)	4.97 (- 5.49)
High Sch.	2.9 (47.0)	1.9 (29.0)	1.0 (-18.0)	34.5 (-38.3)	3.77 (- 5.76)
Some College	1.7 (28.0)	3.0 (46.3)	1.3 (18.3)	76.5 (65.4)	6.36 (6.51)
College	0.8 (12.4)	1.5 (23.5)	0.7 (11.1)	87.5 (89.5)	4.97 (5.38)
<i>Hispanic</i>					
Grade Sch.	2.0 (27.1)	0.1 (1.6)	1.9 (-25.5)	95.0 (-94.1)	8.59 (- 7.97)
High Sch.	3.2 (43.7)	1.9 (38.8)	1.3 (- 4.9)	40.6 (-11.2)	4.68 (- 1.37)
Some College	1.4 (19.1)	1.8 (37.3)	0.4 (18.2)	28.6 (95.3)	2.15 (6.43)
College	0.7 (10.1)	1.1 (22.3)	0.4 (12.2)	57.1 (120.8)	3.04 (5.62)
<i>Others</i>					
Grade Sch.	1.2 (24.8)	0.1 (0.3)	1.1 (-23.6)	91.7 (-95.2)	6.39 (- 8.76)
High Sch.	0.6 (12.6)	1.2 (19.1)	0.6 (6.5)	100.0 (51.6)	4.92 (3.14)
Some College	1.5 (32.9)	2.5 (37.7)	1.0 (4.8)	66.7 (14.6)	5.21 (5.12)
College	1.3 (29.7)	2.7 (42.0)	1.4 (12.3)	107.7 (41.4)	7.82 (4.32)

Source: 1986 Jury Survey, the Scientific Legal Service Inc. The survey was conducted in Sacramento Superior Court Judicial District in 1986. Over 4,000 potential jurors appeared on 57 jury panels between April 21 and September 7, 1986.

1: Percentages in parentheses are *intra-racial* percentage comparisons for respective educational levels.

educational backgrounds, respectively, in the entire community.¹¹⁶ However, impaneled Black jurors only constituted 0.1% and 1.9% for the same educational backgrounds, respectively; 87.5% and 34.5% of the same groups, respectively, were excluded from jury panels.¹¹⁷ By the same token, 95.5% and 32.8%, respectively, of white jurors with similar education levels were eliminated from jury panels; 95.0% and 40.6%, respectively, of Hispanic jurors were similarly eliminated before they were called into the courthouse.¹¹⁸ The unrepresentative nature of the jury panel with respect to the cross-sectional community representation is further compounded by various legal and extra-legal factors that previously played an important role in pre-selecting and screening the jurors before they were called into the courthouse. Severe underrepresentation of minority groups and those without high school education on jury panels was reported in many jurisdictions in California, including Indio, Los Angeles, Sonoma, Riverside, San Bernardino, San Diego, and Orange Counties.¹¹⁹

Even though some jurors finally make it to the courthouse, "most jury commissioners and judges will automatically excuse laborers and sole pro-

116. *Id.*

117. *Id.*

118. *Id.*

119. For greater discussions, see Rita J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* (1980); FUKURAI ET AL., *supra* note 42.

prietors of a business who claim that jury service will cause them to lose their daily wage or to close up their business for a period of time."¹²⁰

In many districts, some women are automatically excused because courts do not pay a daily fee high enough to cover child care for their youngsters or reduce the time of jury duty to a manageable limit. Van Dyke reported that between 1971 and 1974, approximately 83% of the federal courts surveyed showed significant underrepresentation of women on jury panels.¹²¹ In the Northern District of California, for example, over half the qualified women between the ages 25 and 44 are excused because they have children.¹²² Such substantial numbers of excuses were not uncommon in other jurisdictions. In fifteen states, women with children no older than 16 can secure exemption, and in four states exemption can be extended to men caring for young children.¹²³

Age is another important factor that affects jury representation. Young and older jurors tend to be excused because the jury commissioner seldom reschedules them during school vacations, or, in the case of the elderly, for physical disabilities. Poor health is also a major cause of excuse, and a large number of the sick are elderly.¹²⁴

The Act also authorizes each district to set the maximum distance in either miles or hours beyond which jurors need not travel.¹²⁵ The Act notes that the court needs to "fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefore, be excused from jury service on the ground of undue hardship of traveling to the place where court is held."¹²⁶ The distance requirement often discriminates against those who live in rural areas. For instance, the Superior Court of San Bernardino County, California oversees the largest jurisdictional area in the United States. The jurisdiction encompasses 20,117 square miles and the SMSA (Standard Metropolitan Statistical Areas) within which the Superior Court is located is geographically the largest in America. Because the Superior Court excuses any prospective juror who lives more than 25 miles from the county courthouse, the residents in a large portion of the Mojave Desert and the areas close to the state of Nevada are automatically excluded from serving on juries. These residents are primarily Hispanics and American Indians.

Exemptions play another important role in perpetuating disproportionate jury representation. Three groups of individuals are likely to be exempted: (1) those performing vital functions for society, such as elected officials, clergy, doctors, police officers, and members of the military; (2) those, such as lawyers and police officers, who might exert an unusual amount of influence on the other jurors; and (3) those with an occupational

120. VAN DYKE, *supra* note 4, at 119.

121. *Id.* at 121-124. The American Bar Association, however, recommends that all automatic excuses or exemptions from jury service be eliminated; *see also* ABA, *supra* note 27, at § 6.60.

122. VAN DYKE, *supra*, note 4.

123. Paula DiPERNA, JURIES ON TRIAL: FACES OF AMERICAN JURIES 86 (1984).

124. VAN DYKE, *supra* note 4, at 120.

125. Jury Selection and Service Act, § 1863 (b) (7).

126. *Id.*

prejudice on the question of guilt or innocence such as clergy and, again, police officers.

The Act provides exemptions for three occupations in federal court: (1) those on active duty in the military force, (2) firemen or policeman, and (3) "public officers" in the federal or any local government.¹²⁷ At the state level, a significant number of people in many jurisdictions are also exempted from jury duty because of their occupations.

At the state level, jurisdictions vary on granting exemptions. Three principal reasons for exemptions of some occupational groups are suggested: (1) persons who perform vital societal functions; (2) those who might exert significant influence on other jurors; and (3) persons who have occupational prejudice on the question of guilt and innocence.¹²⁸ Besides the above listed occupations, New York also exempts state-island ferry operators in New York City, as they are responsible for travel between state and island. Virginia exempts tobacco pickers during harvests.¹²⁹

There seems to be a close relationship between the exemption of certain occupational categories and minority representation. The Jury Survey indicated that a large number of minority women requested to be exempted from jury service because they were peace officers.¹³⁰ While the figures are based on the jury impanelment stage of jury selection, similar patterns are observed at jury panels (see Table 5). While approximately 8% of Black and Hispanic female jurors asked for exemptions, only 4% of white women asked to be exempted.¹³¹ There were no significant racial and ethnic differences for male jurors.¹³²

In other jurisdictions, however, twenty states including Michigan and Washington allow no occupational exemptions. The American Bar Association also recommends that all automatic exemptions be eliminated.¹³³ Further research is needed to examine the effect of occupational exemptions on minority representation.

G. *Voir Dire*

The seventh stage of jury selection is called *voir dire*, a process in which prosecuting and defense attorneys are actively involved in the selection of impanelled jurors. Depending upon the jurisdiction, the complexity of the cases, or whether a case involves extensive pretrial publicity, the length of *voir dire* varies. For instance, the highly publicized Hillside Strangler trial in Los Angeles, which had massive pretrial publicity, took forty-nine days of *voir dire* and jury selection.¹³⁴ Generally *voir dire* for an average trial may be as brief as 20 minutes or as long as 8 hours.¹³⁵ A federal court study revealed that judges require an average of 30 minutes for *voir*

127. *Id.*

128. VAN DYKE, *supra* note 4, at 130-131.

129. DiPERNA, *supra* note 123, at 85-86.

130. 1986 California Jury Survey, University of California, Riverside.

131. *Id.*

132. *Id.*

133. ABA, *supra* note 27, at § 6.60.

134. See, e.g., I. Brodie, *Putting the Brake on Wheels of Justice*, DAILY TELEGRAPHY 15 (March 1, 1982).

135. FUKURAI ET AL., *supra* note 42.

dire when they conduct *voir dire* alone.¹³⁶ In New York, lawyer-conducted *voir dire*s average 12.5 hours and sometimes up to six weeks, accounting for as long as the trial itself in twenty percent of the cases.¹³⁷

In many states, *voir dire* is generally conducted by attorneys, while in others it is carried out by the judge. The first factor which determines whether a prospective juror will be retained in the jury box is peremptory challenge, a process used by both sides to remove, without cause, objectionable prospective jurors (or, stating the cause and showing it is for other than racial exclusion). This challenge is usually followed by challenges for specific, demonstrable cause.¹³⁸

By proving a juror's bias to the judge's satisfaction in challenges for cause, and setting the number of peremptory challenges attorneys have and how they are exercised, these methods and causes coalesce in a way that defines the balance of the impanelled, prospective jurors. In California, typical of most states, there are four statutory situations authorizing a challenge of prospective jurors for cause: (1) if a juror is related to a party to the litigation; (2) if a juror has a unique interest in the subject matter; (3) if a juror has served in a related case; and (4) if the juror has "the state of mind" preventing him from acting impartially and without prejudice.¹³⁹

Evidence shows that despite the explicit objective of exposing juror biases to identify and obtain impartial jurors, *voir dire* may elicit, accentuate, and enlarge the jury's bias. In criminal cases, the prosecution tends to look for prospective jurors with certain characteristics, such as those who are white, middle-age, and middle class. The prosecution assumes this type of juror will identify with the government rather than with the defendant, and will be more likely to convict. Defense attorneys tend to look for jurors without extreme views and who are least "offensive."¹⁴⁰

In civil cases, certain juror characteristics are sought by both sides. In property and personal injury cases brought by those with lesser socio-economic power against those with greater status and wealth, jurors who favor defendants tend to be clerks, businessmen, or professionals, and of Profes-

136. For more discussions, see Gordon BERMANT & John SHAPARD, *THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY* (1981).

137. Irving R. Kaufman, *Verdict of Juries*, *NEW YORK MAGAZINE* 47 (April 1, 1984).

138. *Voir dire*, which figuratively means "to speak the truth," is a preliminary examination of prospective jurors to determine an individual's qualifications, reasons for disqualification, or bias that would eliminate an individual from a particular jury. There has been considerable debate over the possible reduction in the number of peremptory challenges at the state level. For example, since peremptory challenges are used by the prosecution to exclude Blacks from a jury solely because of their race, Justice William G. Clark of the Illinois Supreme Court has recently called on the General Assembly to limit the use of peremptory challenges. Research also urges the need for the internal check on misuse of peremptory challenges. See Note, *Justice Proposes Fewer Challenges*, 6 *CHI. DAILY L. BULL.* (Jan 3, 1984); Note, *The Peremptory Challenge in a Criminal Case After United States v. Barnes*, 71 *J. CRIM. L. & CRIMINOLOGY* 173-180 (1980); Case Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy: United States v. Barnes*, 93 *HARV. L. REV.* 720 (1980); Note, *Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusionary Justice for Minority Defendants*, 72 *J. CRIM. L. & CRIMINOLOGY* 1444 (1981); Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 *LAW AND HUM. BEHAV.* 1 (1982).

139. VAN DYKE, *supra* note 4, at 143; ANN F. GINGER, *JURY SELECTION IN CIVIL AND CRIMINAL TRIALS* (1984); B. COLSON, *JURY SELECTION: STRATEGY AND SCIENCE*, (1986).

140. VAN DYKE, *supra* note 4, at 152-160; James P. Brady, *Fair and Impartial Railroad: the Jury, the Media, and Political Trials*, 11 *J. OF CRIM. JUST.* 241, 242-263 (1983).

tant, Scandinavian, German, and "old American ethnic stock" from which several sequential family generations have been born in the United States.¹⁴¹ Those who favor plaintiffs tend to be skilled laborers with foreign ethnic origins, such as Polish, Irish, African, Jewish, or Italian.¹⁴² Thus, rather than representing a fair cross-section of the community, *voir dire* becomes a fight to enlarge the jury's bias toward one's client and thereby undermine jury representativeness.¹⁴³

Minority representativeness is also severely affected by *voir dire*. The effects of peremptory challenges on participation by racial minorities (i.e., the discriminatory use of peremptory challenges in striking minority individuals from becoming acting jurors) has been documented in a number of prominent cases. They are:

(1) *Black Panther Huey P. Newton in 1968*: the prosecution used three of its 15 peremptories against Blacks, to eliminate all but one Black from the resulting jury panel. When four alternates were picked, the prosecution used five of its six peremptories against Blacks to eliminate all Black jurors on the venire.¹⁴⁴

(2) *Angela Davis in 1972*: the prosecution used a peremptory challenge to eliminate the only Black on the venire. When alternates were picked, the prosecution challenged a Native American Indian, the only non-white to reach the jury box.¹⁴⁵

(3) *Harrisburg Seven in 1972*: the prosecution challenged two Blacks and four whites who expressed antiwar or other liberal viewpoints. The defense then used its twenty-eight challenges to eliminate the jurors with prosperous backgrounds and other well-established jurors characterized by conservative views.¹⁴⁶

(4) *Joan Little Trial in 1975*: the prosecution in the 1975 murder trial of Joan Little used eight of its nine peremptory challenges to eliminate Black jurors from the jury.¹⁴⁷

(5) *Greensboro Trials in 1980 and 1984*: in the trial of five members of Ku Klux Klan and American Nazi Party for murder in North Carolina (where twenty-five percent of the state's population was non-white), the

141. SIMON, *supra* note 119, at 35. In the discussion, Simon provided the following juror characteristics related to the verdicts: groups viewed to favor the prosecution include, men, Republicans, upper income groups, occupational groups such as bankers, engineers, and certified public accountants and others with positions of petty respectability and members of Teutonic ethnic groups such as Germans. Groups believed to favor the defendant include women, Democrats, middle and lower economic groups, social scientists, and racial and ethnic minority groups, particularly Latinos and Jews. Other research suggests that criminal defense attorneys are "advised never to drop an Irish person, for the Irish identify with defendants." When ethnicity is ranked on the emotional scale from high to low, it follows "Irish, Jewish, Italian, French, Spanish, and Slavic." See, REID HASTIE ET AL., *INSIDE THE JURY* 122 (1983).

142. *Id.*

143. Jury Selection and Service Act, § 1861; CAL. CODE CIV. PROC., *supra* note 31, at § 197; for more discussions, see Nancy L. Alvarez, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L. J. 959, 983 (1982); Stephen A. Saltzburg & Mary E. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 383 (1982); Faye A. Silas, *A Jury of One's Peer: Peremptory Challenges of Minorities Raises Fairness Issues*, 69 A.B.A. J. 1607, 1609 (1983).

144. For greater discussions of the Huey Newton trial, see ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972).

145. See, e.g., Reginald MAJOR, *JUSTICE IN THE ROUND: THE TRIAL OF ANGELA DAVIS* (1973); SIMON, *supra* note 119.

146. WILLIAM O'ROURKE, *THE HARRISBURG 7 AND THE NEW CATHOLIC LEFT* (1972).

147. JAMES RESTON, *THE INNOCENCE OF JOAN LITTLE* (1977); FRED HARWELL, *A TRUE DELIVERANCE* (1979).

eligible Blacks were stricken peremptorily by the defense. The second trial began in January 1984 in federal court for a lesser offense of conspiring to violate the victims' civil rights. Of 69 jurors who survived prescreening questions, 11 were Black. Every Black, in a row, was stricken by defense attorneys who represented either members of the Ku Klux Klan or the American Nazi Party, or both.¹⁴⁸

The systematic exclusion of racial minorities is not restricted to political and prominent trials. For example, in 53 criminal trials between 1972 and 1973 in the U. S. District Court, Eastern District of Louisiana, the federal prosecutor used 68.9% of all its challenges against Black jurors, although Blacks constituted only about a quarter of the eligible jurors on the venire.¹⁴⁹ Similarly, in the federal court, the Western Division of the Western District of Missouri, 70 Black jurors appeared for service in 15 trials involving Black defendants in 1974.¹⁵⁰ Fifty-seven of them (81.4%) were peremptorily challenged by the prosecution.¹⁵¹ This was despite the fact that those trials were held in federal courts where Blacks and other racial minorities were already underrepresented in the pool.

Of course, peremptory challenges are not only directed to racial minorities, but also to groups which are seen as being favorable to the opposing side. In the Mitchell-Stans conspiracy trial in 1974, for instance, the defense used its 20 peremptories to eliminate all jurors with college education from the jury.¹⁵² In the Dr. Spock trial in 1968, the prosecution used two peremptory challenges against women and one against a Black man, resulting in a jury of all white men.¹⁵³ Women were obviously deemed as a target in this trial involving a famous doctor who had written influential books on how mothers should care for their young children.¹⁵⁴

During most *voir dire* screening, opposing attorneys use their subjective and intuitive senses to evaluate prospective jurors. Unless the case has political or racial notoriety, attorneys often rely on intuitive judgement about the psychological and behavioral patterns of prospective jurors, rather than scientific research. An important observation is that prosecutors are more likely to peremptorily challenge minorities than are defense attorneys.¹⁵⁵ Since a large proportion of defendants in criminal trials are in fact minorities, it is likely that prosecutors view prospective jurors with minority backgrounds as being sympathetic to defendants; prosecutors may see some minority jurors as inherently criminal because of their race.¹⁵⁶ Whatever the reason, prosecutors often rely on their own intuitive and subjective evaluations in exercising peremptory challenges and most minority potential jurors in such circumstances realize they will be challenged. This undoubtedly has a demoralizing effect on minority jurors and discourages

148. DiPERNA, *supra* note 123, at 171-173; see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVE* 21 (1988).

149. VAN DYKE, *supra* note 4, at 155.

150. *Id.* at 156.

151. *Id.*

152. Hans Zeisel & Shari S. Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 AM. B. FOUND. RES. J. 162 (1976).

153. VAN DYKE, *supra* note 4.

154. *Id.*

155. FUKURAI, *supra* note 29.

156. *Id.*

people from making the time-consuming sacrifices required for jury duty. Thus, the exercise of peremptories gives attorneys vast power to create a jury composition which, as a result, seldom resembles a fair cross-section of the community, especially with the systematic exclusion of racial and ethnic minorities.

On federal grand juries, jurors are rarely a fair cross-section of the community.¹⁵⁷ Women, racial minorities, those with less education, younger persons, and those with low socio-economic status are systematically underrepresented in grand jury populations.¹⁵⁸

H. *The Jury Box*

Once *voir dire* is completed, jurors enter the box and their alternates are assembled for call in case of need. During its term in the box, the jury is put to work by: (1) selecting a jury foreperson; (2) listening to evidence; (3) reviewing evidence and instructions; (4) identifying juror-verdict preferences; (5) checking whether a verdict-rendering quorum has been reached; (6) assessing progress toward consensus; and (7) requesting additional instructions if progress toward a verdict is impeded by disagreement or confusion concerning the law or evidence in the case.¹⁵⁹

The position of the foreperson in jury deliberations is foremost in influencing the outcome of jury-room deliberations. Becoming a jury foreperson is significantly associated with gender, race, and social class background.¹⁶⁰ Jury forepersons tend to be male and of higher status.¹⁶¹ They also dominate the jury, absorbing approximately one-quarter of the total jury discussion time, far more than the average juror.¹⁶²

Nietzel and Dillehay examined the composition of the actual jurors in relation to forepersons, using the criminal trial data in Fayette County Circuit Court (Kentucky) in 1973.¹⁶³ Their research revealed that jurors who have served once as a foreperson were more likely to serve in that capacity again, that forepersons generally had more experience in jury service than

157. Robert A. Carp, *Federal Grand Juries: How True a 'Cross Section' of the Community*, 7 JUST. SYS. J. 257, 277 (1982). Research indicates that grand jury composition is more unrepresentative and undemocratic than petit juries. They are chosen by the "key man" system, i.e., from among a list of names drawn up by state supreme court justices; see also George F. Cole, *POLITICS AND THE ADMINISTRATION OF JUSTICE* 209-210 (1973). Judges generally choose prominent businessmen, lawyers, and others whom they consider to be influential citizens or respectable civic leaders. For more discussions, see Marvin E. Frankel & Gary P. Naftalis, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 33-35 (1975); *Castaneda v. Partida*, 430 U.S. 482 (1977).

An exception is the three kinds of grand juries reported in the Southern District of New York: (1) a regular grand jury that passes on a great quantity and variety of criminal matters, (2) an additional grand jury that deals with lengthy and complex investigations, and (3) a special grand jury created by the Organized Crime Control Act of 1970. Research indicates that despite these differences, the selection process for all three types varies very little. Their members, however, "are drawn from the same pool of citizens gathered to supply trial juries." *Id.* at 43-44.

158. *Id.*

159. Hastie ET AL., *supra* note 141, at 24-26.

160. Ramesh Deosaran, *The Jury System in a Post-Colonial, Multi-Racial Society: Problems of Bias*, 21 BRIT. J. OF CRIMINOLOGY 305, 311-323 (1981).

161. *Id.*

162. Fred L. Strodbeck ET AL., *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713-718 (1957).

163. Michael T. Nietzel & Ronald C. Dillehay, *Psychological Consultation in the Courtroom*, 55-57 (1986).

other jurors, and that 89% of forepersons were men, whereas males comprised 56% of the jurors in the general pool.¹⁶⁴ They also found that previous jury experience of the foreperson all correlated significantly with the severity of sentence recommended by the jury.¹⁶⁵ A survey of 179 trials in San Diego also revealed that although 50% of the jurors were male, 90% of the forepersons were male.¹⁶⁶

There have been mixed research results, however, in uncovering relationships between individual juror characteristics and the jury verdicts. Approximately 800 people were recruited from jury pools in Massachusetts and sixty-nine 12-person mock juries were relied on by Hastie, et al.¹⁶⁷ They watched a three hour videotape of a reenacted murder trial.¹⁶⁸ The research found that no single characteristic correlated with verdicts rendered in a murder trial, including the age, sex, race, educational attainment, occupation, income, marital status, and political affiliation of jurors.¹⁶⁹

Other jury simulation analyses in the 1970s and 1980s also reflected the close relationship between the verdicts and jury composition. For example, the jury simulation research substantiated the history of extremely severe penalties for interracial rape.¹⁷⁰ There is strong evidence that Black men have historically received more severe sentences than white men for rape.¹⁷¹ The United States Supreme Court finally declared the death penalty for rape unconstitutional in 1980.¹⁷² Between 1930 and 1979, however, nine out of every ten men executed for rape were Black.¹⁷³ With respect to the association between trial verdicts and racial composition of the jury, Black jurors recommended comparable sentences regardless of the race of the defendant and the victim.¹⁷⁴ The strong negative reaction to Black men who are accused of raping white women appeared to be limited to whites.¹⁷⁵ When the victim was Black, offenders were treated no differently.¹⁷⁶ The unbalanced racial character of juries has, therefore, been a contributing factor in harsher penalties for Black men who were found guilty of rape.

164. *Id.*

165. *Id.*

166. Research indicates that a hung jury is a rare occurrence, largely because of the decisive role of a jury foreperson and the pressure of the dominant majority. See HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (1966); NORBERT L. KERR & ROBERT M. BRAY, *THE PSYCHOLOGY OF THE COURTROOM* (1982). The jury's social complexion is also crucial to final outcomes. The research notes that over 95% of all juror votes were unanimous in keeping with the prosecutor's recommendation due to the nonrepresentativeness of the jury. *Id.*; R. Carp, *supra* note 145.

167. Hastie ET AL., *supra* note 141, at 122.

168. *Id.*

169. *Id.*

170. See, e.g., J. Hagan, *Extra-legal and Inference in Courtroom Testimony in LANGUAGE AND SOCIAL IDENTITY* (John J. Gumperz ed., 1974); DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979).

171. *Id.*

172. Fukurai ET AL., *supra* note 6.

173. HUBERT S. FEILD, *Rape Trials and Juror's Decisions: A Psychological Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 *LAW & HUM. BEHAV.* 261, 284 (1979).

174. *Id.*

175. *Id.*

176. HUBERT S. FEILD & LEIGH B. BIENEN, *JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW* 141-142 (1980).

Research further points out the relationship between juror characteristics and juror verdicts: (1) "the jurors treated Black and white offenders no differently when the Black woman was raped; however, when the victim was white, the Black defendant was given a longer prison sentence;" (2) "if the rape victim was physically unattractive, her race had no influence on the sentencing of the Black defendant. When the woman was attractive, the Black offender of the white woman was treated more severely than if he had attacked a Black woman;" (3) "there were no racial differences in defendant sentencing for the sexually experienced victim regardless of her attractiveness. However, if the victim was sexually inexperienced and unattractive, the Black rapist was given a longer sentence than the white one."¹⁷⁷ The research further indicates that it was possible to predict juror decisions in rape trials by studying juror characteristics.¹⁷⁸ Although rape trials are an isolated case, race undoubtedly is an extremely important extra-legal factor affecting verdict patterns.

Another important factor related to racial composition of the final jury is the authority given to jurors in moulding the trial outcome. Thirteen states give juries a significant role in sentencing in noncapital crimes, as well as in death penalty sentencing. Some states give sentencing authority to the jury in all serious criminal cases, while others restrict the authority to particular types of cases. In Texas, for instance, a defendant has the right to be sentenced by the judge. The severity of minority underrepresentation on juries, accompanied by the multiple effects of extra-legal factors restricting full-community participation, introduces potential repercussions on sentencing. As a result, it might significantly impact both the moral frame of the judicial system and the legitimacy of jury trials.

CONCLUSION

The jury serves as a reminder that we have a democratic government that derives its power from the people. The jury shows that harmony is possible if we listen to each other and seek a unified judgment from a diversity of viewpoints. But those benefits of democratization can be only attained if the assembled jury is representative of a cross-section of the community, so that the persons deliberating will have a legitimate claim to speak on behalf of the community. The jury is an institution of the people, rather than the government. It is also a body that expresses the people's collective conscience, rather than expert opinions or racially motivated views. In other words, it is the essence of democracy. Thus, non-representative juries are detrimental to our commitment to democratic solution, and any non-representative nature of juries needs to be rectified. In addition, the sources of such disproportionate representation need to be critically examined and eliminated.

We have examined an array of both legal and extra-legal factors that set limits on jury participation by minorities. A number of important vari-

177. *Id.*

178. For Supreme Court cases, *see, e.g.*, *McGartha v. California*, 402 U.S. 183 (1971); *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*); *Gregg v. Georgia*, 428 U.S. 204 (1976); *Woodson v. North Carolina*, 428 U.S. 153 (1976). For theoretical discussions, *see* DAVID W. NEUBAUER, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* (1984).

ables in every selection process that influence the exclusion or inclusion of potential jurors are summarized in Figure 2. Those who have not registered for elections and/or with the state motor-vehicle department are automatically excluded from the selection process. Furthermore, the most recent entries on these lists are also likely to be excluded because source lists are updated infrequently (i.e., anywhere between twelve months and four years). Prospective jurors who do not return or respond to either jury qualification questionnaires or requests for jury summons, are also systematically eliminated from subsequent jury selection consideration because follow-up procedures are seldom carried out—even in those states where they are mandated by law. Court competition also influences the pool of potential jurors in some jurisdictions. And though certain segments of potential jurors make it to the jury-panel stage, the voir dire process then acts as a stumbling block when opposing attorneys eliminate certain categories of potential jurors, especially prosecutors who systematically exclude racial minorities.

Various determinants of racially-demarcated juries are also summarized from different points of view. Our analyses indicated that there are three important determinants of racially disproportionate juries. Those are: (1) racial discrimination in jury selection procedures, (2) socioeconomic barriers preventing full community participation by Blacks and other racial minorities, and (3) judicial discrimination that allows racially-demarcated jury representation. Those determinants of racial disenfranchisement in the jury and jury selection system are also summarized in Figure 3.

The factors outlined here are by no means exhaustive. At every stage at both federal and state levels, many elements determine and shape jury composition. The jury and its racial composition are also influenced by other statutory requirements (the legal variables) and extra-legal pressures — attitudinal prejudgments, socio-economic attributes, demographic characteristics of the parties and jurors, and other variables surrounding the case. Such extra-legal factors often have decisive influence on jury representativeness at every stage of the jury selection process.

Future research needs to focus on the structural cause of racially-demarcated juries and assess the extent to which such racially disproportionate representation influences the moral frame of the court and jury system and the legitimacy of jury trials.

FIGURE 2. DISENFRANCHISED POTENTIAL JURORS AT EACH STAGE OF JURY SELECTION

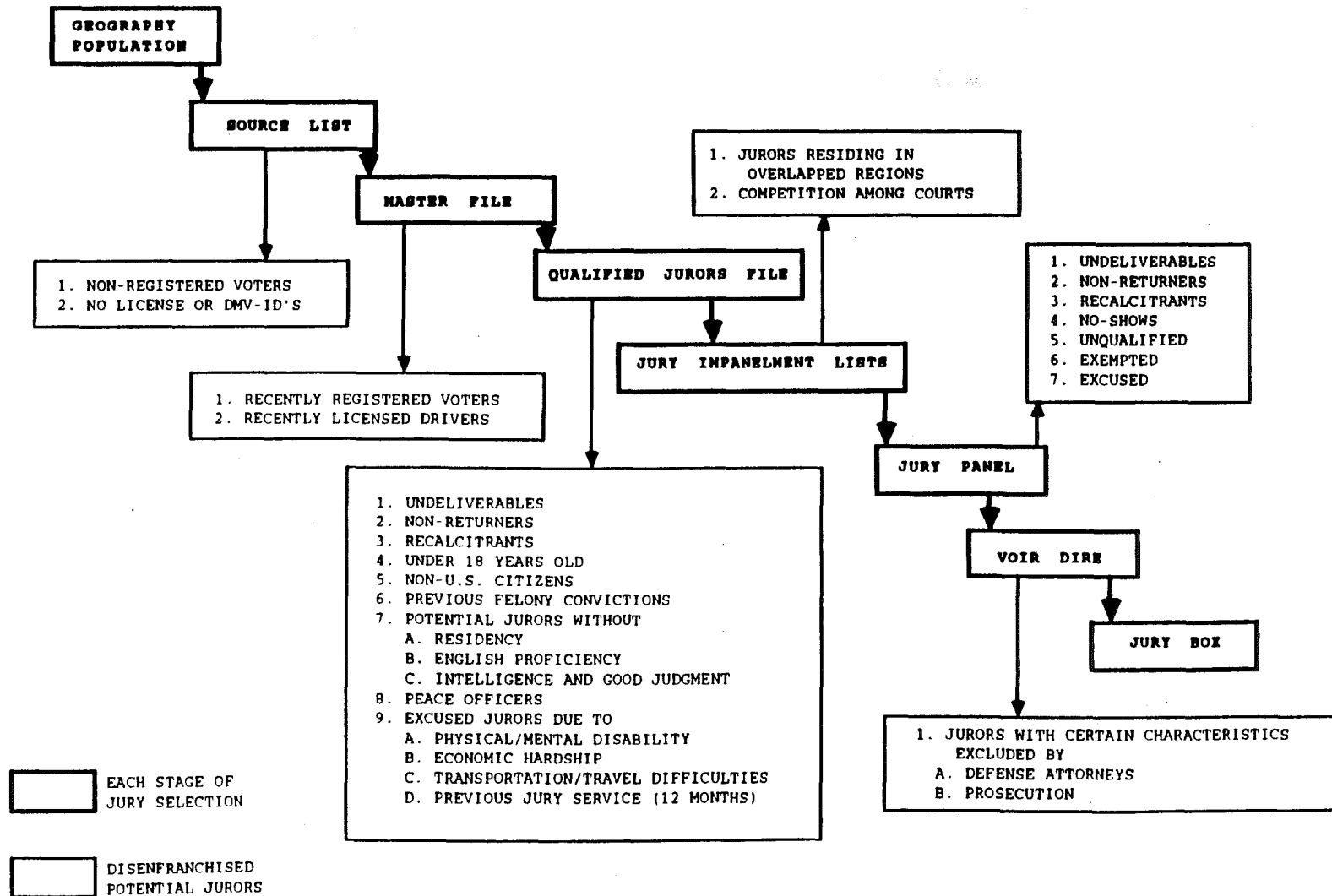


FIGURE 3. SOCIOECONOMIC AND LEGAL VARIABLES AFFECTING BLACK JURY PARTICIPATION

