Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under *Duren v. Missouri*

"He uses statistics as a drunken man uses lamp-posts—for support rather than illumination."
Andrew Lang[1]

I. INTRODUCTION

It is undisputed that Hispanic populations are growing rapidly, even in states that have typically accounted for Hispanics as only a small percentage of their entire population.[2] For example, the Hispanic population in Utah increased by over 138% just between 1990 and 2000.[3] According to the 2000 census, while the Hispanic population grew approximately 39% nationwide between 1990 and 2000, and the western United States experienced a growth of approximately 27% during the same period, Utah experienced an 84% increase in the Hispanic population in relation to the overall population.[4] Utah is not alone in exhibiting a growth in the Hispanic population; it shares this trend with almost every state, especially with its western neighbors. Some of Utah's neighboring states—such as Nevada whose Hispanic population increased 89% in comparison to its overall population—also experienced similar growth.[5] Therefore, growth in the Hispanic population is substantial, and this holds true when analyzing both the

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1. ROBERT ANDREWS, FAMOUS LINES 464 (1997) (quoting Andrew Lang). As will be seen throughout this Comment, and more so in the cases it references, people can have the same statistics yet use them to reach conclusions at the opposite ends of the spectrum. Parties use statistics to support their position rather than to illuminate underlying problems.

2. According to the Utah Office of Ethnic Affairs, the Hispanic population in Utah rose from less than 5% in 1990 to greater than 10% in 2004. Utah State Office of Ethnic Affairs, The Hispanic/Latino Population in Utah 1 (2006), http://ethnicoffice.utah .gov/public_policy_and_research/documents/oea.his.lat.0505.pdf.

3. *Id.* at 2.

4. BETSY GUZMÁN, UNITED STATES CENSUS BUREAU, THE HISPANIC POPULATION: CENSUS 2000 BRIEF 4 (2001), *available at* http://www.census.gov/prod/2001pubs/ c2kbr01-3.pdf. Hispanics constituted 4.9% of the total population of Utah in 1990. *Id.* A decade later, the percentage had increased to 9.0%—an 84% increase. *Id.*

5. *Id.* The percentage of Hispanics in Nevada increased from 10.4% in 1990 to 19.7% in 2000—an 89% increase. *Id.*

total Hispanic population growth and the relative growth in population percentages compared to the overall population.

As the Hispanic population continues to grow across the country, jurisdictions encounter difficulty ensuring that their jury selection systems stay current to allow for a fair representation of Hispanics in jury venires, thus increasing the possibility of Sixth Amendment fair-cross-section challenges.[6] It is difficult for government agencies to keep census figures current and to ensure that growing populations, such as the growing Hispanic population, are registering to vote or obtaining driver's licenses so they can potentially be included on master source lists for jury service. The analysis used in this Comment for Hispanics can apply to any distinct group, especially where the distinct group includes a significant percentage of foreign-born individuals.

The representation of Hispanics and other minorities on jury lists has a heightened importance when viewed in light of the overrepresentation of minorities in other areas of the criminal justice system, such as incarceration. For instance, Hispanics and blacks, both male and female, are more likely to be incarcerated than are their white counterparts.[7] With a higher rate of incarceration for minorities, minority representation in jury venires is all the more relevant because underrepresentation of minorities on juries may influence the number of incarcerated minorities.[8] The lack of minorities on juries is particularly poignant with respect to Hispanics due to additional factors that lead to their underrepresentation—factors such as Hispanics who are non-citizens and Hispanics without the English competency required to be eligible for jury service. These are factors not typically faced by other minority groups to the same degree.

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6. *See, e.g.*, Kate Ashton, *Lawyer Sees Jury Selection Flaws*, DAILY HERALD (Provo, Utah), Aug. 27, 2006, at A1, *available at* http://www.heraldextra.com/ content/view/191310/; Sara Israelsen, *Hispanics Underrepresented on Juries, Lawyer Says*, DESERET MORNING NEWS (Salt Lake City, Utah), July 28, 2006, *available at* http://deseretnews.com/dn/view/0,1249,640198200,00.html.

7. U.S. Department of Justice, Criminal Offenders Statistics (Sept. 6, 2006), http://www.ojp.usdoj.gov/bjs/crimoff.htm.

8. The topic of overrepresentation of minorities is beyond the scope of this Comment. However, it has been noted that minority representation on juries has been noted to provide greater respect and familiarity with the law for minority populations. Butch Mabin, *Changes Reported in Minority Justice*, LINCOLN J. STAR, Feb. 2, 2006, *available at* http://www.lincolnjournalstar.com/articles/2006/02/02/local/doc43e22eeb25514934148817.txt. The underrepresentation of minorities on juries may result in minorities "tak[ing] the law into their own hands," which is a possible cause of the overrepresentation of minorities that are incarcerated. *Id.*

This Comment presents the argument that determining a jury selected from a fair cross section of the community in areas with growing Hispanic populations is extremely complex. Further, this Comment asserts that jurisdictions should address this complexity by taking necessary steps to ensure master jury venires are comprised of a fair cross section of the eligible population. Such steps could include developing and applying more precise statistical methods and using more inclusive potential juror sources. Additionally, the United States Supreme Court should provide additional guidance to courts encountering Sixth Amendment fair-cross-section violation claims so that courts and jurisdictions alike are able to ensure that jury venires pass constitutional muster. This would require the Supreme Court to settle questions regarding proper population numbers, proper statistical methods, and proper and constitutional sources of potential jurors. Although this Comment focuses on federal juries because of uniformity of juror qualifications, the same analysis is transferable to the states, most of which have jury qualifications similar to those on the federal level.

Part II of this Comment gives a brief background of equal protection claims under the Fourteenth Amendment and the development of the Sixth Amendment fair-cross-section violation claims by the United States Supreme Court. Part III analyzes the fair-cross-section violation test set forth by the Supreme Court in *Duren v. Missouri*, looking separately at each prong of the *Duren* test.[9] Part IV analyzes the various issues raised by court decisions seeking to implement the *Duren* test, and argues that (1) Hispanics should be considered a distinct group under the first prong of the *Duren* test, even in areas with relatively small Hispanic populations; (2) only the jury-eligible population should be considered in the statistical analysis in determining underrepresentation, and absolute disparity should be relied on except in unique situations; and (3) jury systems that use voter registration as the only source for jury venires are presumptively constitutional, but jurisdictions should analyze their jury venires and add additional sources as deemed prudent. Finally, Part V offers a brief conclusion.

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

II. BACKGROUND OF FAIR-CROSS-SECTION UNDERREPRESENTATION CLAIMS

Courts have considered the exclusion of various groups, historically racial minorities and women, from jury venires for quite some time now, but the form of the analysis has evolved. Early jury discrimination claims derived from a Fourteenth Amendment equal protection claim. Starting in 1975, however, courts have used the Sixth Amendment as the basis of such claims.

A. Equal Protection Claims

While courts have evolved away from early jury discrimination cases analyzed by courts under the Equal Protection Clause of the Fourteenth Amendment, early cases are still instructive of later Sixth Amendment fair-cross-section claims. In *Ballard v. United States*, the Supreme Court analyzed the intentional and systematic exclusion of women from jury service in southern California.[10] Borrowing from a civil case, *Thiel v. Southern Pacific Co.*,[11] the Court in *Ballard* explained that "[t]he American tradition of trial by jury . . . in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."[12] The Court also clarified that not every petit jury would contain representatives of all "economic, social, religious, racial, political and geographical groups of the community," as that would be impossible.[13] And even though the Court's analysis in *Ballard* was not based on the Sixth Amendment, the Court still required that "prospective jurors . . . be selected by court officials without systematic and intentional exclusion of any" economic, social, religious, racial, political, and geographical groups.[14] Thus, the Court started to pave the road for broad minority protection in jury selection despite the fact that the vehicle for protection evolved over time.

The Supreme Court specifically analyzed the exclusion of Hispanics from jury service as an equal protection claim in *Hernandez v. Texas*.[15] There, the Court noted that it had consistently held that a defendant was

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10. Ballard v. United States, 329 U.S. 187 (1946).

11. Thiel v. S. Pac. Co., 328 U.S. 217 (1946).

12. *Ballard*, 329 U.S. at 192 (quoting *Thiel*, 328 U.S. at 220).

13. *Id.* (quoting *Thiel*, 328 U.S. at 220).

14. *Id.* at 192–93 (quoting *Thiel*, 328 U.S. at 220).

15. Hernandez v. Texas, 347 U.S. 475, 477 (1954).

denied equal protection if all persons of "his race or color have, solely because of that race or color, been excluded by the State" from jury service.[16] Despite the fact that it was not based on a Sixth Amendment claim, *Hernandez* was especially significant for the recognition of Hispanic people because the Court recognized Hispanics as a distinct and protectable group, and that recognition has carried over to Sixth Amendment claims.[17]

B. Sixth Amendment Fair-Cross-Section Violation Claims

The beginning of Sixth Amendment fair-cross-section cases was *Taylor v. Louisiana*.[18] In *Taylor*, the Court declared that "the selection of a petit jury from a representative cross section of the community [was] an essential component of the Sixth Amendment right to a jury trial," thereby binding the Sixth Amendment and fair-cross-section claims.[19] *Taylor* also recognized Congress's stated intent in the development of the Federal Jury Selection and Service Act of 1968 ("Jury Act"): that all Federal Court litigants are entitled to trial by juries "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[20] Additionally, Congress had recognized that "the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice."[21] The Court, therefore, accepted the fair-cross-section requirement as "fundamental to the jury trial guaranteed by the Sixth Amendment," while ensuring that it was understood that petit juries actually chosen did not need to "mirror the community."[22]

It was not, however, until 1979 that the modern Sixth Amendment fair-cross-section jurisprudence came into being in *Duren v. Missouri*.[23] In *Duren*, the Court clarified its fair-cross-section analysis from *Taylor* and set forth a three-pronged test that courts could use to determine

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16. *Id.* (citing Carter v. Texas, 177 U.S. 442, 447 (1900)).

17. *Id.* at 482.

18. Taylor v. Louisiana, 419 U.S. 522 (1975). Justice Rehnquist, in his dissent in *Taylor*, states that while the majority looks back to *Smith v. Texas*, 311 U.S. 128 (1940), as the beginning of Sixth Amendment protection for jury selection, he viewed *Smith* and its progeny as equal protection cases. *Taylor*, 419 U.S. at 539 (Rehnquist, J., dissenting).

19. *Taylor*, 419 U.S. at 528.

20. *Id.* at 529 (citing 28 U.S.C. § 1861 (1968)).

21. *Id.* at 529–30 (citations omitted).

22. *Id.* at 530, 538.

23. Duren v. Missouri, 439 U.S. 357 (1979).

substantial underrepresentation of minority groups in jury venires. The *Duren* test requires a showing that (1) the allegedly underrepresented group is a distinct group, (2) the group is not fairly represented on the jury venires, and (3) the "underrepresentation is due to systematic exclusion of the group in the jury-selection process."[24] While the test to demonstrate a prima facie fair-cross-section violation claim appears to be rather succinct, its variables make the application complicated. Complicating the matter further, the Supreme Court has provided relatively little clarification since it developed the test in *Duren*.

III. SIXTH AMENDMENT REQUIREMENTS UNDER THE *DUREN* TEST

Since *Taylor* and *Duren*, the courts have consistently analyzed fair-cross-section claims under the Sixth Amendment. In so doing, the Supreme Court noted that the "Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community."[25] In analyzing the fair-cross-section requirement, however, it is essential to keep in mind that the purpose of the Sixth Amendment is not to create a representative jury, but "an impartial one."[26] The Supreme Court has stated that

> the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.[27]

Thus, the fair-cross-section requirement is intended to ensure the constitutional requirement of impartiality, thereby linking, if not equating, representativeness with impartiality.

The Supreme Court accepted the requirement that a jury venire represent a fair cross section of the community because juries protect defendants from "overzealous or mistaken prosecutors" and "overconditioned or biased" judges.[28] However, this protective function is absent when the jury pool is crafted from only certain segments of

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24. *Id.* at 364.

25. Holland v. Illinois, 493 U.S. 474, 477 (1990) (citing *Duren*, 439 U.S. 357; *Taylor*, 419 U.S. 522).

26. *Id.* at 480.

27. Buchanan v. Kentucky, 483 U.S. 402, 420 (1987) (quoting Lockhart v. McCree, 476 U.S. 162, 184 (1986)).

28. *Taylor*, 419 U.S. at 530.

society or if "large, distinctive groups are excluded from the pool."[29] The Court noted that Congress, in passing the Jury Act, observed the following regarding the role of juries:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.[30]

Thus, the Court recognized overly restrictive selection practices or categorical exclusion as unconstitutional.[31]

Four years after the Supreme Court determined that Louisiana's jury selection process in *Taylor* was unconstitutional, the Court again faced a Sixth Amendment challenge based on the exclusion of women from jury service in *Duren v. Missouri*.[32] The Court granted certiorari to *Duren* from the Supreme Court of Missouri due to apprehension that the Supreme Court of Missouri's decision in *Duren* was inconsistent with *Taylor*.[33] The Court reiterated the *Taylor* decision that "petit juries must be drawn from a source fairly representative of the community," and that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[34] It also explained, however, that while jury venires must represent a fair cross section of a population, this requirement does not apply to petit juries.[35]

The Supreme Court established a three-pronged test delineating the requirements "to establish a prima facie violation of the fair-cross-section requirement":

> [t]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;

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29. *Id.*

30. *Id.* at 529 n.7 (quoting H.R. REP. NO. 1076, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1797).

31. *Id.*

32. Duren v. Missouri, 439 U.S. 357 (1979).

33. *Id.* at 363.

34. *Id.* at 363–64 (quoting *Taylor*, 419 U.S. at 538).

35. *Id.* at 364 n.20 (quoting *Taylor*, 419 U.S. at 538) ("We further explained that this requirement does not mean 'that petit juries actually chosen must mirror the community.'").

and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[36]

While this three-part test has been a staple of Sixth Amendment jurisprudence for over twenty-five years now, the application of this test is still evolving. With an ever-changing population dynamic and an evolving test, understanding the evolution and function of the *Duren* test is imperative to a proper analysis regarding the underrepresentation of minority groups in jury venires.

A. Prong One: Distinctive Group in the Community

The Supreme Court's holding in *Duren* does not require the person challenging the composition of a jury venire to be a member of an underrepresented distinct group, but it does require that the allegedly underrepresented group be distinct.[37] "A group of people is distinct when they have a shared attribute that defines or limits their membership, and when they share a community of interest."[38] Courts have granted various gender and racial groups "distinct status," but they have typically not given the same status to specific age groups.

The First Circuit elucidated some factors to consider in determining the distinctiveness of a group:[39]

> (1) that the group be defined and limited by some clearly identifiable factor (for example, sex or race), (2) that a common thread or basic similarity in attitude, ideas, or experience run through the group, and (3) that there be a community of interest among the members of the group, such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.[40]

Courts employ these factors so that juries "generally represent the attitudes, values, ideas and experience of the eligible citizens that compose the community" in which a trial is taking place, rather than meet a statistical goal of minority representation.[41] Courts should utilize these factors to determine the distinctiveness of any group. In fact, the use of these factors is evident when courts have analyzed the distinctiveness of various groups.

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36. *Id.* at 364.
37. *Duren*, 439 U.S. at 364.
38. United States v. Black Bear, 878 F.2d 213, 214 (8th Cir. 1989).
39. Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc).
40. *Id.*
41. *Id.*

1. Women

The United States Supreme Court made it abundantly clear in *Taylor v. Louisiana* that women require Sixth Amendment fair-cross-section protection when it held that the fair-cross-section requirement was "violated by the systematic exclusion of women."[42] This protection for women as a distinct class went back as far as *Ballard v. United States*,[43] in which the Court ruled that the "systematic exclusion of women was unacceptable."[44] The Court also reiterated its position that "the two sexes are not fungible."[45]

2. Racial and ethnic minorities

The Ninth Circuit stated that "[i]t is clear that race is a cognizable factor" in determining a distinct group.[46] The Second Circuit stated that "[t]here is little question that both Blacks and Hispanics are 'distinctive' groups in the community for purposes of" the *Duren* test.[47] Thus, various races, as well as some ethnicities—such as Hispanics—are cognizable groups under the test. In fact, racial and ethnic groups generally satisfy the first prong of the test per se. Thus, courts have consistently held that race and ethnicity is a protected group and is considered distinct, and this appears to hold true regardless of the race's percentage of the total population. Nevertheless, the courts that recognize the distinctiveness of such groups have given some guiding factors that are important in determining the distinctiveness of any group.

a. Blacks. Courts have consistently held that "blacks are a 'distinctive group' for purposes of jury composition challenges."[48] This is the case even when the black population in a particular area constitutes a relatively small percentage of the total population. For example, in *United States v. Hafen*, the total estimated black population in the

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42. Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

43. Ballard v. United States, 329 U.S. 187 (1946).

44. *Taylor*, 419 U.S. at 531 (citing *Ballard*, 329 U.S. at 193–94).

45. *Ballard*, 329 U.S. at 193. This analysis also recognizes that men are a "cognizable class[] within the community" for Sixth Amendment purposes. United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977).

46. United States v. Potter, 552 F.2d 901, 905 (9th Cir. 1977).

47. United States v. Jackman, 46 F.3d 1240, 1246 (2d Cir. 1995) (citing United States v. Biaggi, 680 F. Supp. 641, 648 (S.D.N.Y. 1988), *aff'd*, 909 F.2d 662 (2d Cir. 1990)).

48. United States v. Hafen, 726 F.2d 21, 23 (1st Cir. 1984) (quoting Peters v. Kiff, 407 U.S. 493, 498–99 (1972)).

jurisdiction was only 3.73%, yet the court held that blacks as a group were distinctive.[49]

b. Hispanics. Hispanics are generally considered a distinct group for fair-cross-section claims. The government, in *United States v. Pion*, conceded "that Hispanics constitute[d] a distinctive ethnic group" in Massachusetts, even with a relatively small population percentage.[50] Courts have held that "Hispanics have long been recognized as a 'distinctive' group" in the community.[51] Thus, there no longer appears to be any legitimate argument against Hispanics being recognized and treated as a distinct group for Sixth Amendment fair-cross-section challenges. As the Supreme Court stated in *Castaneda v. Partida*, looking at the subset of the Hispanic population, albeit the majority subset given the time and location of the jury venire in question, "it is no longer open to dispute that Mexican-Americans are" clearly distinctive.[52]

Nevertheless, some argument over the distinctiveness of Hispanics— such as when Hispanics lack sufficient numerosity—still exists, although it is not pervasive or particularly persuasive. For example, the Utah Supreme Court in 1987 questioned the distinctiveness of Hispanic populations in *Utah v. Tillman*, articulating numerosity as a factor in determining distinctiveness based on the United States Supreme Court's statement that "a particular group must be of sufficient numerosity and distinctiveness to be cognizable for fair-cross-section purposes."[53] Rather than decide whether Hispanics were a distinct group for Sixth Amendment purposes, the Utah Supreme Court held that a group's distinctiveness was a "question of fact in any given community."[54] Thus, the court reasoned that even though "Hispanics may be a distinctive group in California for purposes of the sixth amendment [sic], it does not follow that they constitute such a group in Utah."[55] While the defendant

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49. *Id.*

50. United States v. Pion, 25 F.3d 18, 22–23 (1st Cir. 1994).

51. United States v. Rodriguez-Lara, 421 F.3d 932, 941 (9th Cir. 2005) (citing United States v. Sanchez-Lopez, 879 F.2d 541, 547 (9th Cir. 1989), *superseded by statute*, U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. n.2).

52. Castaneda v. Partida, 430 U.S. 482, 495 (1977) (citing Hernandez v. Texas, 347 U.S. 475, 478–80 (1954)) (noting that Mexican-Americans were a "clearly identifiable class"); *see also* White v. Regester, 412 U.S. 755, 767 (1973).

53. Utah v. Tillman, 750 P.2d 546, 575–76 (Utah 1987) (citing Duren v. Missouri, 439 U.S. 357, 364 (1979); Taylor v. Louisiana, 419 U.S. 522, 531 (1975)).

54. *Id.* at 575 n.125 (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

55. *Id.* at 576.

and state both urged the court to hold that Hispanics were a distinctive group, the court deemed that this assumption was "too hastily made."[56] Since Hispanics in Utah would presumably be as distinct in characteristics such as "religion, economic status, and cultural background" as would Hispanics in California, one could reasonably conclude that the Utah Supreme Court was implying that a "numerosity" requirement exists for the distinctiveness prong of the *Duren* test. However, it was the defendant's failure to submit evidence regarding the distinctiveness of Hispanics in Utah that was "fatal to [the] defendants'" claim.[57]

Tillman may be unique in that the courts generally hold racial and ethnic groups as distinct and do not commonly place a lot of emphasis on numerosity. For example, at the time of *Tillman*, Hispanics in Utah constituted approximately 5% of the population,[58] and courts have consistently held that Hispanic populations and other distinct group populations below this range are distinct for Sixth Amendment fair-cross-section purposes.[59] So while some courts may question the distinctiveness of groups based on numerosity, these courts are probably in the minority.[60] Therefore, it is likely that Hispanics would satisfy the distinctiveness prong of the *Duren* test, regardless of numerosity.

c. Native Americans. Native Americans are generally considered a distinct group for Sixth Amendment fair-cross-section claims. The Tenth Circuit explicitly stated that "[t]here is no question that [Native Americans] constitute a distinctive group in the community."[61] The Eighth Circuit likewise recognized the distinctiveness of Native Americans, stating: "We believe that [Native American] people are distinct and form a cultural community."[62] The Eighth Circuit used this

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56. *Id.* at 575.

57. *Id.* at 576.

58. *Id.*

59. *See, e.g.*, United States v. Orange, 447 F.3d 792, 796–97 (10th Cir. 2006) (noting that an Asian population of less than 1.5% was distinct); United States v. Weaver, 267 F.3d 231, 240 (3d Cir. 2001) (noting that a black population of 3.07% and a Hispanic population of 0.97% were both considered distinct).

60. Because the *Orange* court found the lack of evidence fatal to the defendants' claim, the actual effect of numerosity is uncertain. *See Orange*, 447 F.3d at 799. Nevertheless, because other distinctiveness factors seem consistent between Hispanics in California and Utah, numerosity appears to be the distinguishing factor.

61. United States v. Yazzie, 660 F.2d 422, 426 (10th Cir. 1981).

62. United States v. Black Bear, 878 F.2d 213, 214 (8th Cir. 1989).

same analysis implicitly in *United States v. Clifford*, when it scrutinized allegations that South Dakota's use of voter registration records to produce its jury lists led to an underrepresentation of Native Americans.[63] In that decision, the court did not address distinctiveness, but rather moved straight to the second prong of the *Duren* test to determine underrepresentation, thereby inferring that the distinctiveness prong had been met.[64]

d. Asians. The Tenth Circuit, in *United States v. Orange*, noted that there was no dispute regarding the distinctiveness of Asians.[65] The protection offered for Asians as a distinct group was present even though the total Asian population in the jurisdiction was less than 1.5%, and the qualified jury-eligible Asian population was less than 1%.[66]

3. Age group

Generally, age groups are not protectable distinct groups. While the Supreme Court has not ruled specifically as to "whether age groups are 'distinctive' enough for sixth amendment purposes," every circuit court that has analyzed the issue has determined that age groups are not distinctive.[67] Some courts have recognized specific age groups as distinct, but these decisions have not withstood appeal. For example, the First Circuit convened, en banc, to consider a prior panel decision in *Barber v. Ponte*,[68] and found that "young adults" were not "a cognizable group" for Sixth Amendment fair-cross-section purposes.[69]

Young adults, as an age group, were not considered distinctive because the court did not believe the group shared "specific common characteristics" or were "reasonably set apart from others by clear lines of demarcation."[70] While the court found that "disproportionality is bad" regardless of the classification, the idea that "any important deviation

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63. United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981).

64. *Id.*

65. *Orange*, 447 F.3d at 796–97; *see also* United States v. Shinault, 147 F.3d 1266, 1271–72 (10th Cir. 1998) (noting that it was not questioned that Asians were a distinct group for Sixth Amendment fair-cross-section challenges).

66. *Orange*, 447 F.3d at 796.

67. Barber v. Ponte, 772 F.2d 982, 1000 (1st Cir. 1985) (en banc); *see also* Thomas M. Fleming, Annotation, *Age Group Underrepresentation in Grand Jury or Petit Jury Venire*, 62 A.L.R.4th 882 (1988).

68. *Barber*, 772 F.2d at 982.

69. *Id.* at 1000.

70. *Id.* at 998 (citing United States v. Potter, 552 F.2d 901 (9th Cir. 1977)).

from a statistical cross section is suspect" was considered "torturing the words 'distinctive group' into a very different concept."[71] Thus, the *Duren* test did not require courts to bestow distinctive status on specific age groups.[72] Therefore, unless the Supreme Court holds differently, it is unlikely that age groups will be granted distinctive status.

B. Prong Two: Underrepresentation of a Distinctive Group

To satisfy the second prong of the *Duren* test, a criminal defendant must demonstrate that the jury venire is not representative of the distinct group established in the first prong.[73] In showing underrepresentation, the defendant has the burden of demonstrating the percentage of the underrepresented group in the community, although the state may challenge the number proffered by the defendant.[74] This is typically established by a statistical analysis.[75]

This prong appears straightforward: determine the representation of the group in the population as a whole, determine the representation on the jury venire, and then determine if the group is underrepresented. This prong, as simple as it may appear on its face, is complicated by three questions. First, what population should the jury venire be compared against: total population, age-eligible population, or jury-eligible population? Second, should absolute or comparative disparity be used to evaluate the comparison results? Finally, what percentage difference is required to establish the existence of a "substantial," and therefore unconstitutional, disparity?

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71. *Id.* at 999.

72. *Id.* The First Circuit in *Barber* stated that it was not persuaded by the "weight of their numbers but by that of the logic and policy they espouse." *Id.* at 1000. For cases declining to extend distinctive status to age groups, see *Cox v. Montgomery*, 718 F.2d 1036, 1038 (11th Cir. 1983); *Davis v. Greer*, 675 F.2d 141, 146 (7th Cir. 1982); *Brown v. Harris*, 666 F.2d 782, 783–84 (2d Cir. 1981); *United States v. Potter*, 552 F.2d 901, 905 (9th Cir. 1977); *United States v. Test*, 550 F.2d 577, 590–93 (10th Cir. 1976); *United States v. Olson*, 473 F.2d 686, 688 (8th Cir. 1973); *United States v. Gast*, 457 F.2d 141, 142–43 (7th Cir. 1972); *United States v. Di Tommaso*, 405 F.2d 385, 391 (4th Cir. 1968); *United States v. Guzman*, 337 F. Supp. 140, 144–45 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972).

73. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 364 (1979). In *Duren*, statistics were used to illustrate that 53% of the population eligible for jury service was female, while females comprised approximately 15% of jury venires. *Id.* at 362–64.

74. *See id.* at 364.

75. *Id.* at 364–65.

1. Determining the correct population for the statistical analysis

Determining population numbers and specific population representation in jury venires is an inexact science at best.[76] The use of census numbers, however, is generally acceptable, but as can be seen from several Ninth Circuit cases[77] originating in California, determining the proper numbers to use for a statistical analysis is still far from settled. This problem has troubled not only the Ninth Circuit, but federal and state courts from California to Georgia.[78]

a. Jury-eligible population. Some courts have held that the jury-eligible population is the correct statistical basis that should be used to demonstrate the underrepresentation of a distinct group. The Ninth Circuit has opted to follow this reasoning.

In *United States v. Esquivel*, the defendant presented evidence that the total Hispanic population of the applicable counties was 22.3%, far in excess of the 9.7% of Hispanics on the master jury wheel.[79] The government, in opposition to the statistics proffered by Esquivel, argued that the correct number for comparison should have been "the number of Hispanics eligible to serve as jurors," or, per the census figures, 14.6%.[80] To bolster its contention that only the jury-eligible population should be used, the government used the federal jury qualifications contained in the Jury Act, which specify that the individual must (1) be a United States citizen, (2) be at least eighteen years old, (3) be a resident of the judicial

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76. It has been said that "42.7 percent of all statistics are made up on the spot." NORMAN D. LIVERGOOD, THE PERENNIAL TRADITION 335 (1997) (quoting Stephen Wright). This statement of unknown beginnings can be used with any number and comments on the perception that statistics are made up rather than calculated by more "scientific" means.

One such difficulty, for instance, is the use of Hispanic surnames, post-hoc, to determine the number of Hispanics on a jury list. This would over-calculate the number if there were a Caucasian woman with a Hispanic surname, while it would under-calculate the number if there were a Hispanic woman with a non-Hispanic surname.

77. *See* United States v. Torres-Hernandez, 447 F.3d 699 (9th Cir. 2006); United States v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005); United States v. Artero, 121 F.3d 1256 (9th Cir. 1997); United States v. Esquivel, 88 F.3d 722 (9th Cir. 1996).

78. *See* United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) (comparing the percentage of the group on the jury wheel to the percentage of the group "eligible for jury service"); People v. Bell, 778 P.2d 129, 143 (Cal. 1989) (noting that in cases where the groups must have special qualifications, people stop being fungible); People v. Pervoe, 207 Cal. Rptr. 622, 628 (Ct. App. 1984) (looking at the adult population as compared to the total population); Smith v. State, 571 S.E.2d 740, 747 (Ga. 2002) (analyzing Sixth Amendment claims based on the jury-eligible population).

79. *Esquivel*, 88 F.3d at 726.

80. *Id.* at 726–27.

district for at least one year, and (4) have sufficient English proficiency.[81] The court agreed with the government prosecutors that the jury-eligible population should be used in lieu of the total Hispanic population.[82] Moreover, the court cautioned that "the defendant should not selectively include data which supports her position, while ignoring census data which, as here, also bears on the issue of disparity."[83]

In a case with facts very similar to *Esquivel*, the Ninth Circuit evaluated a fair-cross-section claim in *United States v. Artero* alleging that Hispanics were underrepresented on the jury list.[84] Artero, the defendant, presented evidence that the Hispanic population in the district constituted 24.2% of the total district population, while Hispanics comprised only 9.7% of the jury venire.[85] The government disputed Artero's use of the total Hispanic population due to the higher expected ineligibility of Hispanic constituents as compared with non-Hispanic constituents.[86] The court noted that the government in *Artero* used the same challenge to the use of the total population that it used in *United States v. Esquivel*:[87] "that the apparent disparity between Hispanics in the district and those in the jury wheel does 'not contemplate the number of those who are not eligible for selection on a jury.'"[88]

The court in *Artero* used the *Esquivel* analysis and reached a similar result despite the fact that the government failed to submit census information revealing the jury-eligible Hispanic population.[89] Rather, the Ninth Circuit affirmed the district court's dismissal of Artero's fair-cross-section claim because "[t]he defense statistics did not themselves make out a prima facie case, because the defense expert used the wrong numerator for the ratio of Hispanics to the general population."[90] The court put the burden on the defense to introduce the correct statistics to meet its prima facie case, rather than allowing the defense to use the total population if the government failed to offer more refined data.[91] Since

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81. *Id.* at 726 (citing 28 U.S.C. § 1865(b)(1)–(3) (1996)).

82. *Id.* at 727.

83. *Id.* at 727 n.2.

84. United States v. Artero, 121 F.3d 1256, 1260–62 (9th Cir. 1997).

85. *Id.* at 1260.

86. *Id.*

87. *Esquivel*, 88 F.3d 722.

88. *Artero*, 121 F.3d at 1260 (quoting *Esquivel*, 88 F.3d at 726).

89. *Id.* at 1260–61.

90. *Id.* at 1261.

91. *Id.* at 1261–62.

the counties in question in *Artero* shared a border with Mexico, the court reasoned that it was likely that "many Hispanic residents" would not be United States citizens or would lack English proficiency sufficient to meet the juror qualifications under the Jury Act.[92] The Ninth Circuit refused to reverse the district court's "common sense judgment" in spite of the government's failure to "present rebuttal evidence."[93]

The Ninth Circuit further noted that in one of its previous decisions, *United States v. Sanchez-Lopez*,[94] it allowed the use of the total population figures presented by the defendant when the government failed to present more precise evidence.[95] However, in trying to distinguish *Sanchez-Lopez*, the court also noted that the figure of total Hispanic population was irrelevant as "there was no prima facie case regardless."[96]

The defense in *Artero* presented evidence from a demographer who had extrapolated 1990 census data to arrive at a 24.2% Hispanic population in the two counties in question, and "applied a Spanish surname search program to the jury wheel" to determine Hispanic representation on the jury venire.[97] The demographer opined that Hispanics were "less likely to be registered to vote than non-Hispanics," leading to the inference that using the "voting registration list would underrepresent" Hispanics.[98] The court, however, determined that the correct question was "whether Hispanics eligible to serve on federal juries were unreasonably underrepresented because of systematic exclusion," rather than whether Hispanics, using the total population, were underrepresented on master jury wheels.[99] The demographer only proffered data for the second question rather than the first, and more pertinent, question. The court concluded: "[i]rrelevant question, irrelevant answer."[100] Moreover, the court noted that the demographer's opinion that Hispanics were less likely to register to vote could be attributed, at least in part, to the lower number of citizens in the Hispanic

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92. *Id.* at 1262.

93. *Id.*

94. United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989).

95. *Artero*, 121 F.3d at 1261 (citing *Sanchez-Lopez*, 879 F.2d at 547–48).

96. *Id.* (citing *Sanchez-Lopez*, 879 F.2d at 548).

97. *Id.*

98. *Id.*

99. *Id.* (citing United States v. Cannady, 54 F.3d 544, 548 (9th Cir. 1995)).

100. *Id.*

community that are eligible to vote, thus explaining the lower number of Hispanics on the master jury wheel.[101]

In the end, the Ninth Circuit held that "[o]ne claiming underrepresentation of a distinctive group must, to establish a prima facie case, present data showing that the percentage of persons in that group in the jury wheel is significantly lower than the percentage eligible to serve on juries."[102] The court felt it was in line with the Fifth Circuit decision that "a comparison of percentages in the jury wheel and 'the gross population' is 'irrelevant,' because 'the pertinent inquiry is the pool of [the group claimed to be underrepresented] in the district who are eligible to serve as jurors.'"[103] And although the jury-eligible population would be required when the distinct group is a Hispanic population, there are situations in which the total population would be an adequate substitute for jury-eligible population, such as when the distinct group is women.[104] This is true because there is "no reason to think women would be disproportionately ineligible to serve on juries."[105] Thus, the court articulated, "[w]here there is no reason to suppose that the percentage of persons in that group in the population is higher than the percentage eligible to serve, then the former may adequately support an inference as to the latter," but "[w]here such an inference is not reasonable, then disparity of percentages in the general population and in the jury wheel cannot suffice, because the general population ratio does not imply the jury-eligible ratio."[106]

b. Age-eligible or total population.[107] After deciding that *Artero* correctly required the submission of jury-eligible population data to determine underrepresentation, the Ninth Circuit in a later decision appeared to go back on its stance when it stated that *Artero* was "in

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101. *Id.* at 1261–62.

102*. Id.* at 1262.

103*. Id.* (quoting United States v. Fike, 82 F.3d 1315, 1321 (5th Cir. 1996)) (alteration in original).

104*. Id.*

105*. Id.*

106*. Id.*

107. Courts often use age-eligible populations in fair-cross-section claims, but total populations are also used with the understanding that a group's representativeness in the total population should be relatively consistent with age-eligible populations. This may not hold true, for instance, if a larger percentage of a particular group is under eighteen years of age, but generally courts assume that age-eligible populations are proportional to total populations. Thus, courts may use total populations as a substitute for age-eligible populations.

conflict with the Supreme Court and the *Sanchez-Lopez* line of cases."[108] In *United States v. Rodriguez-Lara*, the court returned to *Duren* to determine the "correct" standard for the representation prong of the *Duren* test, which "require[d] the defendant to show that the distinctive group [was] underrepresented in jury venires 'in relation to the number of such persons in the community.'"[109] The district court had required the defendant to use the Hispanic jury-eligible populations in his statistical analysis.[110] The Ninth Circuit, on the other hand, determined that the comparison of the jury pool should be to the number of the distinct group in the community, not to those that were jury-eligible.[111]

The court further determined that its decision was in line with the Supreme Court and the other circuits, all of which had found that "for purposes of the prima facie case, the proportion of the distinctive group in the jury pool is to be compared with the proportion of the group in the whole community."[112] It focused on the use of the word "community" in *Duren*, and opined that the Supreme Court had determined that the total group population, or community, should be used rather than the "voter registration lists."[113] The Ninth Circuit observed that in *Duren* the Supreme Court "not[ed] that no evidence in the record undermined the numbers proffered by the defendant," and "the Supreme Court evaluated the defendant's prima facie case using census data showing the proportion of age-eligible members of the distinctive group at issue."[114] The court in *Rodriguez-Lara* also relied on a plurality opinion from the Supreme Court that stated that "[t]he second prong of Duren is met by demonstrating that the [distinctive] group is underrepresented *in proportion to its position in the community as documented by census figures*."[115]

The Ninth Circuit cited several cases that used the *Rodriguez-Lara* line of reasoning it adopted. The first of these cases was *Castaneda v. Partida*,[116] in which the Supreme Court used the entire Hispanic

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108. United States v. Rodriguez-Lara, 421 F.3d 932, 942 (9th Cir. 2005).

109. *Id.* at 941 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (quoting *Duren*, 439 U.S. at 365 n.23).

114. *Id.* (citing *Duren*, 439 U.S. at 364 n.21, 365 & n.23). See *supra* note 107 for a discussion on the synonymous use of total and age-eligible populations by courts.

115. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 301 n.1 (1989) (plurality opinion)) (emphasis added).

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

population.[117] The second case the Ninth Circuit focused on was *Turner v. Fouche*,[118] in which the Supreme Court looked at the disparity between blacks in the community as a whole and their representation on a jury list used to select the grand jury.[119] Additionally, the Ninth Circuit seized the Supreme Court's use of age-eligible comparisons in *Alexander v. Louisiana*,[120] again analyzing the underrepresentation of blacks, in which the Court found that anyone of sufficient age was "presumptively eligible for grand jury service."[121] This, the Ninth Circuit noted, was in spite of the fact that the Supreme Court recognized possible disqualifications for potential jurors.[122]

The *Rodriguez-Lara* court then shifted away from Supreme Court precedent and analyzed the Ninth Circuit case law. It started with its decision in *United States v. Suttiswad*,[123] in which it used the total population percentages for minorities for the Northern District of California and found the absolute disparity[124] to be within constitutional limits.[125] Likewise, in *United States v. Armstrong*,[126] the court used total population figures and found the underrepresentation of the black population in the district to be within constitutional levels.[127]

Like the court in *Artero*, the *Rodriguez-Lara* court also used *United States v. Sanchez-Lopez*[128] to bolster its position, but with vastly differing interpretations as to the actual holding of that case.[129] Rather than agreeing with the *Artero* court that *Sanchez-Lopez* used total population values because the underrepresentation was within constitutional limits even using total population values, the Ninth Circuit in *Rodriguez-Lara* "squarely rejected the proposition 'that the defendants

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117. *Rodriguez-Lara*, 421 F.3d at 941 (citing *Castaneda*, 430 U.S. at 495–96). It is important to note, however, that the Ninth Circuit failed to discuss language from *Castaneda* in which the Supreme Court discussed the possibility of the state proffering evidence of how many of the residents of the county were non-citizens, felons, or lacked sufficient competency in English—all indicia of jury eligibility. *See Castaneda*, 430 U.S. at 498–99.

118. Turner v. Fouche, 396 U.S. 346 (1970).

119. *Rodriguez-Lara*, 421 F.3d at 941.

120. Alexander v. Louisiana, 405 U.S. 625 (1972).

121. *Rodriguez-Lara*, 421 F.3d at 941–42 (quoting *Alexander*, 405 U.S. at 627).

122. *Id.* at 942 (citing *Alexander*, 405 U.S. at 627, 628 n.4).

123. United States v. Suttiswad, 696 F.2d 645 (9th Cir. 1982).

124. See discussion *infra* Part III.B.2 regarding statistical analysis methodology.

125. *Suttiswad*, 696 F.2d at 648–49.

126. United States v. Armstrong, 621 F.2d 951 (9th Cir. 1982).

127. *Id.* at 955–56.

128. United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989).

129. United States v. Rodriguez-Lara, 421 F.3d 932, 942 (9th Cir. 2005).

were required to provide jury eligible population figures.'"[130] Instead, the *Rodriguez-Lara* court held that in *Sanchez-Lopez*, the defendant's statistics were presumed to be valid because the government failed to offer contradictory figures.[131] The court then stated that the Ninth Circuit "has generally continued to adhere to the *Duren/Sanchez-Lopez* view that the defendant need not come forward with jury-eligible population data in order to make a prima facie case."[132] The court recognized that it had required the use of a jury-eligible population in *Artero*[133] and in *Sander v. Woodford*.[134] However, it dismissed *Artero* and its progeny as incorrect due to the "overwhelming weight" of its "own prior case law" and Supreme Court precedent, and stated that it must "adhere to [its] longstanding authority that the defendant's prima facie case for a fair-cross section claim may rely on a comparison to total population data or, where available in the record, age-eligible population data."[135]

Additionally, while the Ninth Circuit could have rested *Rodriguez-Lara* on its interpretation of its own case law coupled with its interpretation of Supreme Court decisions, it decided to elaborate on the "wisdom of [its] position on its merits."[136] It stated:

> Whereas census data are readily accessible, jury-eligible population data will often be quite hard for fair-cross-section claimants to obtain, given the difficulty of sorting out from the general population figures the number of individuals who (for example) are not citizens, who are not fluent in English, or who are "incapable, by reason of mental or physical infirmity, to render satisfactory jury service." Other courts have noted the potentially "insuperable" burden that requiring such data could place on fair-cross-section claimants, as well as scholars' conclusion that "eligible population figures are almost impossible to obtain." Requiring a fair-cross-section claimant to come forward with a comparison to the jury-eligible population thus risks placing one of the

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130. *Id.* (quoting *Sanchez-Lopez*, 879 F.2d at 547).

131. *Id.*

132. *Id.* (citing Randolph v. California, 380 F.3d 1133, 1140 (9th Cir. 2004) (using the total population of both Hispanics and blacks to determine underrepresentation); Thomas v. Borg, 159 F.3d 1147, 1150 (9th Cir. 1998) (using the total population of blacks in the county for the *Duren* test); United States v. Nelson, 137 F.3d 1094, 1101 (9th Cir. 1998) (using the total population of Hispanics in the district)).

133. United States v. Artero, 121 F.3d 1256, 1261–62 (9th Cir. 1997).

134. Sander v. Woodford, 373 F.3d 1054, 1069–70 (9th Cir. 2004) (following the *Artero* analysis).

135. *Rodriguez-Lara*, 421 F.3d. at 943.

136. *Id.* at 943 n.9.

elements of the prima facie case for equal protection and fair cross-section claims out of reach, thereby insulating jury selection systems from judicial scrutiny entirely.[137]

Thus, while the Ninth Circuit did not forbid the use of jury-eligible data, it did cast doubt as to whether it should be used at all. The court definitely did not require a defendant to proffer this information, even if available. Rather, it gave the impression that age-eligible data would be the most appropriate to approximate the "community."

c. Jury-eligible Hispanic populations. The Ninth Circuit attempted to resolve the inconsistency in its decisions regarding the appropriate population statistics to meet the second prong of the *Duren* test by confidently siding with *Artero* in *United States v. Torres-Hernandez*.[138] It decided that "a district court need not and *may not* take into account Hispanics who are ineligible for jury service to determine whether Hispanics are underrepresented on grand jury venires."[139] Thus, "a defendant must prove in part 'that the representation of [an allegedly underrepresented] group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community,'" and to do so the court "must rely on that evidence which most accurately reflects the judicial district's actual percentage of jury-eligible Hispanics."[140] As such, the Ninth Circuit approved the district court's use of "data that excluded segments of the Hispanic population ineligible for jury service."[141]

The Ninth Circuit returned to *Artero*'s "common sense" approach, noting that lack of citizenship and English proficiency may explain, in part, underrepresentation of Hispanics on jury venires.[142] The court recognized its "intra-circuit conflict" created by the differing analyses in *Artero* and *Rodriguez-Lara*, but determined that it did not have to resolve the conflict in this case because the district court had satisfied the "higher evidentiary burden of *Artero*," as well as the "lesser burden of

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137. *Id.* (citations omitted).

138. *See* United States v. Torres-Hernandez, 447 F.3d 699, 704 (9th Cir. 2006).

139. *Id.* at 701 (emphasis added).

140. *Id.* (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

141. *Id.* at 702. The court in *Torres-Hernandez* relied on precedent, including *United States v. Esquivel*, in which the court used the jury-eligible statistics, even though not offered by the government at trial, to support its decision to require the use of figures with only jury-eligible Hispanics. *Id.* at 703 (citing United States v. Esquivel, 88 F.3d 722, 726 (9th Cir. 1996)).

142. *Id.* at 705 n.9 (quoting United States v. Artero, 121 F.3d 1256, 1261 (9th Cir. 1997)).

Rodriguez-Lara."[143] The court summed up its approach as requiring a court to "rely on the statistical data that best approximates the percentage of jury-eligible Hispanics in the district," "[w]hen presented with various types of data to determine whether Hispanics are underrepresented on grand jury venires."[144] The court reasoned, as it had in *Esquivel*, that "using the total population of Hispanics" was "inaccurate and overestimated."[145]

While deciding that courts should use refined data excluding jury-ineligible populations if available, the *Torres-Hernandez* court failed to answer the question of "whether less refined data can satisfy a prima facie case when more refined data is available, but not proffered."[146] However, it reaffirmed its position established in *Esquivel* that "a defendant may not 'selectively include data which supports her position, while ignoring census data which . . . also bears on the issue of disparity.'"[147] The court noted that it would be objectionable to submit less refined data if more refined data, such as data that incorporates citizenship and English proficiency statistics, were available, and that either party could provide the data.[148] Therefore, while *Torres-Hernandez* may not have settled all issues regarding the correct population statistics, it shows a shift towards recognition that it is prudent to analyze the second prong jury-eligible populations, especially when dealing with Hispanic populations.[149]

2. Statistical analysis

Statistical analysis is the method used to demonstrate underrepresentation on jury venires, probably because it would be extremely difficult, if not impossible, to confirm underrepresentation

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143. *Id.* at 704 (citing United States v. Rodriguez-Lara, 421 F.3d 932, 941–44 (9th Cir. 2005); *Artero*, 121 F.3d at 1256, 1261).

144. *Id.*

145. *Id.* at 705 (quoting *Esquivel*, 88 F.3d at 727).

146. *Id.* at 705 n.8.

147. *Id.* (quoting *Esquivel*, 88 F.3d at 727 n.2).

148. *Id.*

149. The Tenth Circuit has also discussed the issue of the appropriate population for comparative analysis in *United States v. Shinault*, and implicitly agreed with using only jury-eligible populations when it stated that the position had "intellectual merit." United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998) (quoting United States v. Rioux, 97 F.3d 648, 657 (2d Cir. 1996)).

without some use of statistics, even if their use is only cursory.[150] Courts use statistics to "demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark for the Sixth Amendment fair-cross-section requirement," and this demonstration of underrepresentation is typically accomplished through "statistical presentation[s]."[151] The two most common forms of statistical analysis are absolute and comparative disparity,[152] with absolute disparity being the "preferred method of analysis in most cases."[153]

Absolute disparity is the preferred method of statistical analysis generally employed by courts in analyzing fair-cross-section claims, and it "measures the difference between the percentage of a group in the general population and its percentage [on the jury venire]."[154] Absolute disparity is calculated by acquiring the actual percentage difference between the expected representation based on population and the actual representation. Thus, if the total population of women in a community is 50% but women comprise only 40% of the master jury list, there is an absolute disparity of 10%.

The comparative disparity method, on the other hand, "measures the *decreased likelihood* that members of an underrepresented group will be

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150. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 364 (1979). In *Duren*, statistics were used to demonstrate underrepresentation, and this use of statistics to demonstrate underrepresentation has continued.

151. *See, e.g.*, *Torres-Hernandez*, 447 F.3d at 702 (using statistics to demonstrate that Hispanics were underrepresented); United States v. Rodriguez-Lara, 421 F.3d 932, 943–44 (9th Cir. 2005) (using a statistical analysis in an attempt to prove the underrepresentation of Hispanics from the jury venire); United States v. Artero, 121 F.3d 1256, 1260–61 (9th Cir. 1997); *Esquivel*, 88 F.3d 722 (introducing statistics through expert testimony); *Duren*, 439 U.S. at 364–65 (showing a statistical discrepancy of 39% in the number of women in the population compared to the number of women in the jury venire).

152. See discussion *infra* Part III.B.2 for examples of courts using absolute and comparative disparity. Other alternate methods include calculating the number of standard deviations between the expected and actual results or considering the actual number of people. Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977) (using absolute disparity); United States v. Suttiswad, 696 F.2d 645, 648–49 (9th Cir. 1982) (quoting United States v. Kleifgen, 557 F.2d 1293, 1297 (9th Cir. 1977)) (noting that the court would "look to *people* not *percentages*"); *see also* United States v. Armstrong, 621 F.2d 951, 955–56 (9th Cir. 1980) (citing *Kleifgen*, 557 F.2d at 1293, 1297) (looking at "absolute numerical composition" rather than percentages). However, some courts have shied away from these approaches. *See, e.g.*, United States v. Jackman, 46 F.3d 1240, 1246–47 (2d Cir. 1995) (noting that the absolute numbers approach is not appropriate for small group populations).

153. United States v. Weaver, 267 F.3d 231, 242 (3d Cir. 2001) (noting that while absolute disparity is the preferred method, it has its critics as well).

154. United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998).

called for jury service."[155] Comparative disparity is used sparingly and typically when required to "adequately protect the interests of those challenging the [jury] selection system."[156] Comparative disparity is calculated by dividing the absolute disparity of a group by that group's total percentage of the population.[157] Thus, again using the total population of 50% women and 40% representation, the comparative disparity would be 20%, as compared to a 10% absolute disparity.[158]

Although *Castaneda v. Partida* was decided before *Duren*, the Court implicitly used absolute disparity to determine the underrepresentation of Hispanics[159] summoned for jury service.[160] The total population of Hispanics in the county was 79.1%,[161] but only 39% of persons summoned for jury service were Hispanic.[162] The Court stated that the difference was 40%, which is the difference, in absolute terms, between the expected or anticipated value based on the percentage of Hispanics in the populations and the actual value of Hispanics summoned for jury service.[163] While the Court delved into a long statistical analysis wherein it calculated the standard deviation and the number of standard deviations between expected and actual representation, the Court seemingly based its decision on the 40% actual disparity. However, it is hard to determine the weight the Court placed on each of the various statistical analysis methods.[164]

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155. *Id.*

156. Foster v. Sparks, 506 F.2d 805, 835 (5th Cir. 1975).

157. *Shinault*, 147 F.3d at 1272. As an example of the possible distortion, the court discusses a population with "500,000 whites and one black eligible to serve as jurors," with a random system selecting the juror list, that leaves the one black person off the list. *Id.* at 1273. This would leave an absolute disparity of one hundred percent, "even though an all-white jury would clearly form a 'fair-cross-section' of the community." *Id.* (quoting United States v. Hafen 726 F.2d 21, 24 (1st Cir. 1984)).

158. This is calculated by dividing the absolute disparity of 10% by the total representation of the population of 50%. See discussion *supra* Part III.B.2 regarding absolute disparity.

159. The Supreme Court used the term Mexican-Americans. *See* Castaneda v. Partida, 430 U.S. 482 (1977). This Comment will use Hispanics as a broader group that subsumes the group identified by the Supreme Court as Mexican-Americans in *Castaneda*.

160. *Id.* at 495–96.

161. *Id.* at 486. The Court noted that while there were probably some foreign-born Hispanics included in the calculations, the difference would only account for a 3% difference that was negligible. *Id.* at 486 n.6. For a more in depth discussion of the use of jury-eligible population statistics, see discussion *supra* Part III.B.1.

162. *Castaneda*, 430 U.S. at 495.

163. *Id.*

164. *Id.* at 495–96 n.17.

The First Circuit has consistently held that absolute disparity is the more appropriate method to determine underrepresentation on jury venires, especially when the distinct group's population is a relatively small percentage of the total population.[165] Despite being urged to accept the "'comparative disparity' method" to calculate jury representation, the court in *United States v. Hafen* used the absolute disparity method.[166] It reasoned that using a comparative disparity analysis was not appropriate for small populations of a distinct group due to a distortion in the results.[167] The court noted that while it had used the comparative disparity method in *LaRoche v. Perrin*,[168] it observed that in that case the absolute disparity would have been sufficient to find substantial underrepresentation.[169] Moreover, it then clarified that *LaRoche* "did not adopt the comparative disparity analysis to deal with . . . the situation in which the group allegedly underrepresented form[ed] a very small proportion of the total population."[170] Where, as in *LaRoche*, "[b]lacks constituted under 1% of Rockingham County's population during the relevant period," and "hence at most one or two blacks should have served under a random selection system," "[a] shortfall from 1% to 0% hardly constitute[d] material under-representation."[171] In so doing, the court also noted one potential shortfall of using absolute disparity, as noted by the Fifth Circuit in *Foster v. Sparks*:[172] analyzing the underrepresentation of small populations using absolute disparity may allow the entire exclusion of a group while the absolute disparity is within generally accepted limits.[173]

Some courts argue that the use of absolute disparity is a better measure when analyzing the underrepresentation of groups that comprise

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165. *See* United States v. Pion, 25 F.3d 18, 23 (1st Cir. 1994); United States v. Hafen, 726 F.2d 21, 24 (1st Cir. 1984) (citing United States v. Whitley, 491 F.2d 1248, 1249 (8th Cir. 1974)).

166. *Hafen*, 726 F.2d at 23–24.

167. *Id.*

168. LaRoche v. Perrin, 718 F.2d 500 (1st Cir. 1983), *overruled by* Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc) (holding that "young people" were not a distinct group for Sixth Amendment purposes).

169. *Hafen*, 726 F.2d at 24 n.3 (citing *LaRoche*, 718 F.2d at 502).

170. *Id.*

171. *Id.* (quoting *LaRoche*, 718 F.2d at 502) (internal quotation marks omitted).

172. Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975).

173. *See Hafen*, 726 F.2d at 24. See discussion *infra* Part III.B.3 regarding constitutionally permitted levels of underrepresentation. However, it should be noted that underrepresentation of 10% and under is typically allowed, and when dealing with small group populations, such as the 3.73% black population in *Hafen*, exclusion of the entire group would be within the 10% accepted limit. *Id.* at 23.

a small percentage of the total population. For example, the First Circuit echoed its opinion from *Hafen* in using the absolute disparity method in *United States v. Pion*.[174] The Eighth Circuit also approved of the use of the absolute disparity method in these situations.[175]

The Eighth Circuit also appears to favor the absolute disparity method, as evidenced by *United States v. Clifford*,[176] in which the court used absolute disparity to determine that Native Americans were not underrepresented in South Dakota's jury venire instead of using the comparative disparity method as urged by the appellant in the case.[177] While the court did analyze the statistics using comparative disparity as well and found that the numbers still did not amount to substantial underrepresentation, the court noted that it "ha[d] not seen fit to adopt the comparative disparity concept as a better means of calculating underrepresentation."[178]

The Ninth Circuit has consistently employed the absolute disparity test, as illustrated by the court's statement in *United States v. Rodriguez-Lara* that "[o]ur case law has settled on 'absolute disparity'—the difference between the percentage of the distinctive group in the community and the percentage of that group in the jury pool—as the appropriate measure of the representativeness of the jury pool."[179]

The Eleventh Circuit also uses absolute disparity as demonstrated in *United States v. Rodriguez*.[180] It noted that the absolute disparity method should be used with minority group populations that exceed 10%, but is not the only statistical method available:

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174. United States v. Pion, 25 F.3d 18, 23 (1st Cir. 1994).

175. United States v. Whitley, 491 F.2d 1248, 1249 (8th Cir. 1974) (using absolute disparity to affirm the holding that when the total black population was only 2.33%, an absolute disparity of 2.05% was insufficient to meet the defendant's prima facie case in his fair-cross-section claim, while the court rejected the defendant's use of comparative disparity).

176. United States v. Clifford, 640 F.2d 150, 155–56 (8th Cir. 1981).

177. *Id.* at 155.

178. *Id.*

179. United States v. Rodriguez-Lara, 421 F.3d 932, 943 (9th Cir. 2005) (citing United States v. Sanchez-Lopez, 879 F.2d 541, 547 (9th Cir. 1989)); *see also* United States v. Torres-Hernandez, 447 F.3d 699, 705–06 (9th Cir. 2006) (employing absolute disparity to determine that Hispanics were not underrepresented in that case). The Ninth Circuit also utilized absolute disparity in *United States v. Nelson*, 137 F.3d 1094, 1101 (9th Cir. 1998); *United States v. Artero*, 121 F.3d 1256, 1260–61 (9th Cir. 1997); *United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir. 1996); and *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989). However, see *Rodriguez-Lara*, 421 F.3d at 944 n.10, for the court's discussion of some drawbacks and shortcomings of the absolute disparity method.

180. United States v. Rodriguez, 776 F.2d 1509, 1511–12 (11th Cir. 1985).

> Although the absolute disparity method is not the sole means of
> establishing unlawful jury discrimination, where small absolute
> disparities are proven, as in this instance, and the minority group
> involved exceeds ten percent of the population, which is also the case
> in this challenge, it is not necessary to consider other statistical
> methods.[181]

The Tenth Circuit appeared to accept both measures of disparity, absolute and comparative, but still recognized that "[a]bsolute disparity is the starting point for all other methods of comparison in this circuit."[182] In *United States v. Orange*, the court performed its analysis using both methods and found the underrepresentation to be within constitutionally acceptable levels in either case.[183] In *United States v. Chanthadara*, the Tenth Circuit even opined that a court "*must consider* both absolute and comparative disparities to determine whether a [fair-cross-section] violation has occurred."[184]

The Tenth Circuit further noted that "small absolute disparity figures are less persuasive" in cases where minority populations are small, because "even the complete exclusion of the groups would result in absolute disparities" within limits accepted by courts as constitutional.[185] However, the court observed that the comparative disparity method may overrepresent disparity in small group populations and, rather than decide which method was most appropriate, it resolved the issue by stating that under either method the disparities found were not sufficient to find a fair-cross-section violation.[186]

Thus, it is clear that not all of the circuits agree when it comes to the method of analysis used to determine whether the second prong of the *Duren* test has been satisfied. But, while some courts have recognized

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181. *Id.* at 1511 n.4 (citing United States v. Butler, 615 F.2d 685, 686 (5th Cir. 1980)); *see also* United States v. Grisham, 63 F.3d 1074, 1078–79 (11th Cir. 1995) (using the absolute disparity method); *Rodriguez*, 776 F.2d at 1511–12 (using the absolute disparity method).

182. United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006) (citing United States v. Chanthadara, 230 F.3d 1237, 1256 (10th Cir. 2000); United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998)); *see also* United States v. Yazzie, 660 F.2d 422, 427 (10th Cir. 1981).

183. *Orange*, 447 F.3d at 798–99.

184. *Chanthadara*, 230 F.3d at 1257 (emphasis added); *see also* United States v. Gault, 141 F.3d 1399, 1403 (10th Cir. 1998); *Yazzie*, 660 F.2d at 427. The Fifth Circuit, on the other hand, recommended, but did not require, "flexible use" of both the absolute disparity and comparative disparity methods. Foster v. Sparks, 506 F.2d 805, 835 (5th Cir. 1975).

185. *Shinault*, 147 F.3d at 1273 (citing United States v. Jackman, 46 F.3d 1240, 1247 (2d Cir. 1995)) (noting the weakness of absolute disparity analysis when dealing with small populations).

186. *Id.* (noting the weakness of comparative disparity as well when dealing with small group populations).

merits in comparative disparity, courts tend to favor the use of absolute disparity, especially in cases where the population of the distinct group is small.

Nevertheless, while some courts have "rejected a comparative disparity analysis,"[187] others use it in conjunction with an absolute disparity analysis.[188] However, when dealing with a small minority population, it is unlikely that a statistical analysis using comparative disparity will meet the second prong of the *Duren* test when the absolute disparity is within constitutional limits, barring any practices such as intentional discrimination or exclusion.[189]

3. Constitutionally permitted disparity for underrepresentation

Courts have not thus far established bright-line limits for absolute or comparative disparities, perhaps because it is not feasible to do so. However, some have established general guidelines as to what figures are—and are not—constitutionally permitted under the second prong of the *Duren* test. In *Duren*, the Supreme Court found that the jury venires contained approximately 15% women, while the general adult population was over 50% female, leaving an absolute disparity of approximately 35% that was sufficient to show underrepresentation.[190]

The United States Supreme Court found an unconstitutionally high disparity of 40% when analyzing the number of Hispanics summoned for jury service in *Castaneda v. Partida*.[191] The Court undertook a rather elaborate statistical analysis, calculating the standard deviation for the binomial distribution, and concluded that the disparity in representation should be within two to three standard deviations.[192] Fortunately for the math averse, few courts since *Castaneda* have used this type of statistical analysis. In addition, even if the Court had used an absolute disparity analysis in *Castaneda*, one may suppose that 40% absolute disparity would have been well beyond constitutional limits.

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187. United States v. Sanchez-Lopez, 879 F.2d 541, 547 (9th Cir. 1989).

188. *See, e.g.*, *Orange*, 447 F.3d at 798–99.

189. No cases were found wherein the absolute disparity was within accepted limits while the second prong of the *Duren* test was met by comparative disparity alone, barring a problem with the system in prong three, such as intentional discrimination. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 260–64 (1986) (noting intentional discrimination).

190. Duren v. Missouri, 439 U.S. 357, 365–66 (1979).

191. Castaneda v. Partida, 430 U.S. 482, 495–96 (1977). *Castaneda* was decided before the three-pronged test of *Duren*, but the Court noted that the defendant had established his prima facie case of discrimination against the state for underrepresentation of Hispanic potential jurors.

192. *Id.* at 496–97 n.17.

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Duren and *Castaneda* both furnish some values of disparity that are undoubtedly greater than what is constitutionally viable. The Supreme Court in *Castaneda* strengthened its decision that 40% absolute disparity was unconstitutional by citing other cases where less disparity was found to be unconstitutional.[193] For example, a 23% disparity in *Turner v. Fouche*,[194] an 18% disparity in *Whitus v. Georgia*,[195] a 19.7% disparity in *Sims v. Georgia*,[196] and a 14.7% disparity in *Jones v. Georgia*[197] were all sufficient disparity "to make out a prima facie case of discrimination."[198] One can only assume, had these cases been decided post-*Duren*, that the disparity figures would have met the second prong of the *Duren* test.

Thus, at first glance, the Supreme Court created a ceiling for absolute disparity somewhere near 15%. The circuit courts have further defined acceptable limits. This section will highlight the upper ranges of acceptable levels of disparity because these are more helpful in determining the current constitutional limits of underrepresentation.

The Eighth Circuit set a theoretically high limit when it stated that even a 22% underrepresentation of women on a particular jury venire may not be "under all the circumstances, constitutionally offensive."[199] Additionally, absolute disparities of less than 22% disparity have been found substantial enough to meet the second prong of the *Duren* test, so 22% underrepresentation should not be considered a common ceiling.

Other Eighth Circuit decisions help shed more light on the levels of disparity that the court is willing to accept as not representing substantial, and hence unconstitutional, underrepresentation. In *United States v. Clifford*, the court found that neither a 7.2% absolute disparity nor a 46% comparative disparity violated the defendant's Sixth Amendment rights

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193. *Id.* at 495–96. All of these rulings were, of course, before the Supreme Court proffered the *Duren* test in 1979, but are still useful in determining limits.

194. Turner v. Fouche, 396 U.S. 346, 359 (1970) (calculating a disparity of 23% from a 60% black population with 37% black representation on jury lists).

195. Whitus v. Georgia, 385 U.S. 545, 552 (1967) (calculating a disparity of 18% from 27.1% taxpayers that were black with 9.1% blacks on the grand jury venire).

196. Sims v. Georgia, 389 U.S. 404, 407 (1967) (calculating a disparity of 19.7% from a 24.4% tax list and 4.7% of grand jury lists).

197. Jones v. Georgia, 389 U.S. 24, 25 (1967) (calculating a disparity of 14.7% from a 19.7% tax list and 5% of grand jury lists).

198. *Castaneda*, 430 U.S. at 495–96.

199. United States *ex rel.* Shepard v. Wyrick, 675 F.2d 161, 163 (8th Cir. 1982) (noting that the population was 57% women while women comprised 35% of the jury venire).

to a jury taken from a fair cross section of society.[200] In *Clifford*, the court observed that courts had accepted absolute disparity levels of 10% and comparative disparity levels of 75%, and determined that the figures before the court in this case were unsubstantial.[201] Additionally, the court noted that 10% was a quasi-benchmark when it acknowledged that "[t]his court has stated that in the absence of any evidence indicating an opportunity to discriminate in selection procedures, the [10%] figure approved in *Swain* is an appropriate standard for finding underrepresentation."[202]

In accepting an absolute disparity of 2.02% within the limits of providing a fair cross section, the First Circuit listed a number of percentages of absolute disparity that were found, amongst various circuits, to be "insufficient to show underrepresentation" under the second prong of the *Duren* test, ranging from 2.8% to 10%.[203] The First Circuit was not swayed, however, by the request to use comparative disparity in lieu of absolute disparity, and thus the comparative disparity of 54.2% was deemed acceptable.[204]

The Ninth Circuit opinions discussing constitutionally acceptable levels of disparity have typically found that an absolute disparity of 7.7% or lower is not substantial underrepresentation.[205] Conversely, an absolute disparity of 15.4% for Hispanics on a master jury list was substantial.[206] In *United States v. Artero*, the court analyzed an apparent absolute disparity of 14.5%, but determined that by using the jury-eligible population data, the disparity was only 4.9%—within the 7.7%

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200. United States v. Clifford, 640 F.2d 150, 155–56 (1981).

201. *Id.* (citing Swain v. Alabama, 380 U.S. 202, 208–09 (1965) (noting that the Supreme Court indicated that underrepresentation of as much as 10%, as calculated by the absolute disparity method, does not constitute evidence of a prima facie case); United States v. Test, 550 F.2d 577, 589 (10th Cir. 1976) (finding that a comparative disparity of 46% was not substantial); United States v. Armsbury, 408 F. Supp. 1130, 1139 (D. Or. 1976) (finding that comparative disparities of 45.5% among blacks and 75% among Mexican-Americans were not substantial underrepresentation)).

202. *Clifford*, 640 F.2d at 155 (citing Murrah v. Arkansas, 532 F.2d 105, 109 (8th Cir. 1976)).

203. Unites States v. Hafen, 726 F.2d 21, 23 (1st Cir. 1984) (citing United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981) (absolute disparity of 7.2%); United States v. Armstrong, 621 F.2d 951, 956 (9th Cir. 1980) (absolute disparity of 2.8%); United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980) (absolute disparity of 10%)).

204. *Id.* at 23–24.

205. United States v. Rodriguez-Lara, 421 F.3d 932, 943–44 (9th Cir. 2005) (citing United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir. 1982)).

206. Randolph v. California, 380 F.3d 1133, 1140 (9th Cir. 2004) (noting, however, that defendant was able to meet the first and second prong of the *Duren* test, but unable to prove systematic exclusion to meet the third prong).

absolute disparity levels typically found to be unsubstantial.[207] Thus, the Ninth Circuit has framed its benchmark for substantial underrepresentation for fair-cross-section violations somewhere between 14.5% as substantial and 7.7% as unsubstantial.

The Tenth Circuit, in *United States v. Orange*, noted that it had accepted absolute disparity levels of up to 7%,[208] but also observed that other circuits have accepted absolute disparity levels between 2% and 11.5%.[209] The court in *United States v. Shinault* noted that courts were typically "reluctant to find that the second element of a prima facie Sixth Amendment case has been satisfied when the absolute disparities are less than 10%."[210] The Tenth Circuit, therefore, has implicitly accepted a 10% benchmark for absolute disparity. The *Orange* decision also laid out some accepted levels of comparative disparity.[211] The court noted that it had upheld comparative disparities up to 59.84% with the total group population comprising 1.27%, and that while "more indicative of a Sixth Amendment violation," they were distorted numbers because of the small size of the group.[212] The court, therefore, found that even with the seemingly sizeable comparative disparities, the figures "were not 'gross' or 'marked' enough to warrant judicial intervention."[213] Based on Tenth Circuit case law, however, it is difficult to determine the comparative disparity number a court would find offensive and sufficient to meet the second prong of the *Duren* test; the adequacy of the number perhaps depends on the group's percentage in the population.

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207. United States v. Artero, 121 F.3d 1256, 1261 (9th Cir. 1997) (citing *Suttiswad*, 696 F.2d at 649).

208. United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006) (citing United States v. Gault, 141 F.3d 1399, 1402–03 (10th Cir. 1998) (7% absolute disparity); United States v. Yazzie, 660 F.2d 422, 427 (10th Cir. 1982) (4.29% absolute disparity); United States v. Test, 550 F.2d 577, 588–89 (10th Cir. 1976) (4% absolute disparity)).

209. *Id.* at 798 n.7. The Tenth Circuit noted that "[o]ther circuits have upheld selection mechanisms with absolute disparities between 2% and 11.5%." *Id.* (citing *Hafen*, 726 F.2d at 23 (2.02%); Bryant v. Wainwright, 686 F.2d 1373, 1377–78 (11th Cir. 1982) (7.4%); United States v. Hawkins, 661 F.2d 436, 442 (5th Cir. 1981) (5.45%); United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981) (7.2%); United States *ex rel.* Barksdale v. Blackburn, 639 F.2d 1115, 1126–27 (5th Cir. 1981) (11.5%); United States v. Potter, 552 F.2d 901, 906 (9th Cir. 1977) (2.7%), *rev'd on other grounds*, United States v. Brady, 579 F.2d 1121, 1132 (9th Cir. 1978); Thompson v. Sheppard, 490 F.2d 830, 832–33 (5th Cir. 1974) (11.0%); United States v. Musto, 540 F. Supp. 346, 356 (D.N.J. 1982) (5.4%), *aff'd sub nom.* United States v. Aimone, 715 F.2d 822 (3d Cir. 1983) (5.4%)).

210. United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998) (citing United States v. Rioux, 930 F. Supp. 1558, 1570 (D. Conn. 1995) (collecting cases)).

211. *Orange*, 447 F.3d at 798–99.

212. *Id.* at 798 (citing *Shinault*, 147 F.3d at 1273).

213. *Id.* at 799 (citing *Shinault*, 147 F.3d at 1273).

The Eleventh Circuit also set a benchmark of 10%, but was careful to note that "precise mathematical standards" were not possible.[214] However, the court stated that it "ha[d] consistently found that a prima facie case of underrepresentation ha[d] not been made where the absolute disparity between these percentages [did] not exceed ten percent."[215]

Thus, while precise mathematical standards may not be utilized to determine a constitutional ceiling, a ceiling of 10% for absolute disparity appears to generally conform to what had heretofore been accepted by courts. A comparative disparity ceiling is not readily apparent.

C. Prong Three: Systematic Exclusion

To satisfy prong three of the *Duren* test, a defendant must demonstrate that the underrepresentation in the second prong is caused by "systematic exclusion of the group in the jury-selection process."[216] The third prong analyzes the jury selection system in place to determine if the underrepresentation found under the second prong was "inherent in the particular jury-selection process utilized."[217] In actuality, most courts use the second prong of the *Duren* test as a prerequisite to prong three, and, therefore, stop their analysis at prong two if the defendant fails to satisfy that point.[218] Not only is the third prong seldom analyzed, even when it is analyzed it "is usually the most difficult to establish."[219] Courts generally analyze this systematic exclusion by either looking at flaws in the selection process or flaws in the sources used to select potential juror names.

1. Jury selection systems

Flaws in a jury selection system may satisfy the third prong. In *Duren*, for example, the Supreme Court found that the underrepresentation of women in jury venires was due to the system used

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214. United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985).

215. *Id.* (citing United States v. Tuttle, 729 F.2d 1325, 1327 (11th Cir. 1984); United States v. Butler, 611 F.2d 1066, 1069–70 (5th Cir. 1980); United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980)). The court also noted that it had "adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981." *Id.* at 1511 n.3 (citing Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)).

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

217. *Id.* at 366.

218. *See, e.g.*, United States v. Sanchez-Lopez, 879 F.2d 541, 549 (9th Cir. 1989) ("Because the second prong of the *Duren* test has not been met, we do not reach the final prong.").

219. United States v. Reyes, 934 F. Supp. 553, 557 (S.D.N.Y. 1996).

to select potential jurors, which "systematically underrepresented" women.[220] The Missouri jury selection system in question "provided an automatic exemption from jury service for any women requesting not to serve," while a similar exemption was provided to men only if they were older than sixty-five.[221] Further exacerbating the underrepresentation of women under this system was the fact that women who failed to return their summons and who failed to appear to report for jury service were treated as if they had claimed the exemption.[222] This system, the court held, was substantially underrepresenting women in the jury system.[223]

In *Castaneda*, the Supreme Court commented on the deficiencies of the "key-man" system used to select jury venires in Texas.[224] The Court held that although the system was facially constitutional, it was susceptible to abuse because officers of the system were given discretion in the selection of jurors, and the system was therefore "highly subjective."[225] Thus, where the system allows officers to manipulate the results the system is open to abuse and is under higher scrutiny.

The Eighth Circuit, in *United States v. Garcia*, distinguished an Iowa jury plan from the "key-man" system in *Castaneda* and found that the Iowa plan had a "random selection process" rather than a "highly subjective" system.[226] This, the court reasoned, caused the defendant's reliance upon *Castaneda* in assaulting Iowa's jury selection system to be misplaced.[227]

The Second Circuit found systematic exclusion of Hispanics and blacks due to a flawed process in updating a jury wheel.[228] Under the system in question, an earlier selection of the jury wheel had completely excluded residents of communities with higher minority populations, and even after the list was updated, the resulting system still left the jury pool with a cross section that was unrepresentative of the community.[229] Thus, the court reasoned, since the exclusion was due to a flawed

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220. *Duren*, 439 U.S. at 367 (referencing Taylor v. Louisiana, 419 U.S. 522 (1975)).

221. *Id.* at 359–62.

222. *Id.* at 362.

223. *Id.* at 369–70.

224. Castaneda v. Partida, 430 U.S. 482, 497 (1977).

225. *Id.* at 491, 497; *see also* 38A C.J.S. *Grand Juries* § 18 (2006) (describing that the key-man system "is not unconstitutional per se").

226. United States v. Garcia, 991 F.2d 489, 492 (8th Cir. 1993) (citing *Castaneda*, 430 U.S. at 495).

227. *Id.*

228. United States v. Jackman, 42 F.3d 1240, 1246–48 (2d Cir. 1995).

229. *Id.*

selection process, the defendant had met the third prong of the *Duren* test.[230]

While a flawed selection process may be sufficient, a defendant must make more than a statistical showing of underrepresentation to meet the third prong of the *Duren* test. Consequently, a defendant must demonstrate some inherent problem in the process.[231] Otherwise, as discussed by the Ninth Circuit in *Randolph v. California*, to allow a statistical showing of underrepresentation to suffice would collapse the second and third prongs "into one inquiry."[232] Because the defendant in *Randolph* failed to show any connection between the underrepresentation of Hispanics in the jury venire and the jury selection system used by the county, the court could not conclude that the underrepresentation was inherent in the selection process.[233]

The Eleventh Circuit, in *Gibson v. Zant*, determined that the third prong of the *Duren* test was met due to the selection procedures used.[234] Because jury commissioners were able to select potential juror names based on the commissioners' own "subjective judgment about which individuals were intelligent and upright," the court found that the selection procedures used were "'not racially [or sexually] neutral' and were 'susceptible of abuse.'"[235] The Court noted that systematic exclusion was present in this case due to the inherent problems in the system, which was "easily capable of being manipulated."[236]

2. Source of names for potential jurors

The sources used for potential jurors may also lead to fair-cross-section claims under the third prong of the *Duren* test. A common source of contention regarding jury selection is the use of voter registration lists as the source of prospective jurors. The Tenth Circuit, pre-*Duren*, noted that voter registration lists were "the 'preferred source' of names for prospective jurors" because "Congress not only intended to provide a relatively large and easily accessible source of names, but one to which

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230. *Id.* at 1248.

231. *See* Duren v. Missouri, 439 U.S. 357, 366–67 (1979).

232. Randolph v. California, 380 F.3d 1133, 1141 (9th Cir. 2004).

233. *Id.* at 1141–42.

234. Gibson v. Zant, 705 F.2d 1543, 1547 (11th Cir. 1983).

235. *Id.* at 1547–48 (quoting Turner v. Fouche, 396 U.S. 346, 355 (1970)); *see also* Foster v. Sparks, 506 F.2d 805, 810 (5th Cir. 1975) (noting that the system was not "inherently unfair," but still suspect (quoting *Turner*, 396 U.S. at 355)).

236. *Gibson*, 705 F.2d at 1549.

all potential jurors would have equal access and which disqualified jurors solely on the basis of objective criteria."[237] Additionally, the court noted Congress's mindfulness of the similarities for qualifications to serve on a jury as compared to the qualifications to vote, excepting language proficiency requirements, so that using voting registration lists would perform as an "initial 'screening' function."[238] Thus, the Tenth Circuit reasoned:

> In the absence of any specific evidence regarding the disproportionate impact, if any, of these requirements on blacks and Chicanos, we cannot conclude that the decision of Congress to adopt the voter registration lists as a preliminary screening device was unreasonable. Neither can we say that the district court erred in accepting the government's contentions that some of the demonstrated disparities could be explained by the operation of this screening process.[239]

In *United States v. Garcia*, the court explicitly recognized that it had consistently approved the selection of the jury lists using voter registration lists.[240] The defendant in *Garcia* "argued that Native Americans," as well as Hispanics and blacks, "were systematically underrepresented" because they were less likely to register to vote.[241] The court restated a conclusion from a previous case: "[t]he mere fact that one identifiable group of individuals votes in a lower proportion than the rest of the population does not make a jury selection system illegal or unconstitutional."[242] Furthermore, because there was nothing in the voter registration process that prevented minorities from registering because the operation of the jury selection process was not discriminatory, a "numerical disparity" in minority representation alone did not violate the defendant's constitutional rights.[243]

Another example of a court's analysis regarding the proper sources of potential jurors under the third prong of the *Duren* test can be found in the First Circuit's analysis of the underrepresentation of Hispanics in the District of Massachusetts. In *United States v. Pion*,[244] the defendant was

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237. United States v. Test, 550 F.2d 577, 587 n.10 (10th Cir. 1976).

238. *Id.* (citing 28 U.S.C. § 1865(b) (1976)).

239. *Id.* at 587–88 n.10.

240. United States v. Garcia, 991 F.2d 489, 492 (8th Cir. 1993).

241. *Id.*

242. *Id.* (quoting United States v. Clifford, 640 F.2d 150, 156 (8th Cir. 1981)) (alteration in original).

243. *Id.*

244. United States v. Pion, 25 F.3d 18, 23 (1st Cir. 1994).

not able to identify any "systematic defect" or "operational deficiency" in the jury plan, nor did he allege that the plan was designed to exclude Hispanics.[245] The district court found that the jury list was constructed using resident lists, the "broadest data available," and that there was no data alleged or shown that was more representative of Hispanics.[246] The court held that the allegations of systematic exclusion based purely on statistical underrepresentation were "pure speculation."[247] Thus, a statistical underrepresentation did not equate to systematic exclusion.

The Eight Circuit, in *United States v. Clifford*, also analyzed the issue of using voter registration lists to select potential jurors.[248] The defendant argued that the voter registration lists "should be supplemented by other sources more accurately reflecting" the Native American population, but the court retorted that any underrepresentation was due to a "failure to register to vote" rather than systematic exclusion.[249] The court held that "[a]bsent the showing of systematic exclusion of a class of qualified citizens, voter registration lists may be used as the sole source of persons to serve on petit juries."[250] Thus, the presumption is that the use of voter registration lists as the sole source for jury venires is valid unless, by so doing, a group is systematically excluded.

The Ninth Circuit was clear in stating that when analyzing the third prong of the *Duren* test, the underrepresentation must be systematic, but need not be intentional.[251] In support of his case, the defendant in *Rodriguez-Lara* submitted a report "assert[ing] that the practice of selecting jurors from voter registration lists underrepresent[ed] racial and ethnic minorities."[252] Thus, voter registration lists, a seemingly neutral

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245. *Id.* (citing Duren v. Missouri, 439 U.S. 357, 366 (1979)).

246. *Id.*

247. *Id.* at 23–24 (citing United States v. Garcia, 991 F.2d 489, 492 (8th Cir. 1993)) (emphasis omitted). The First Circuit also compared *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (en banc) ("[C]ourts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not actively prevent people from serving or actively discriminate, and so long as the system is reasonably open to all.").

248. United States v. Clifford, 640 F.2d 150, 156 (8th Cir. 1981).

249. *Id.*

250. *Id.* (citing United States v. Warinner, 607 F.2d 210, 214 (8th Cir. 1979); Hallman v. United States, 490 F.2d 1088, 1092 (8th Cir. 1973)).

251. United States v. Rodriguez-Lara, 421 F.3d 932, 944 (9th Cir. 2005) (quoting Randolph v. California, 380 F.3d 1133, 1141 (9th Cir. 2004)).

252. *Id.* at 945 (citing People v. Harris, 679 P.2d 433, 446 (Cal. 1984) (plurality opinion)). The plurality opinion in *Harris* held that the third prong of the *Duren* test was met "with a sufficient

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source not leading to intentional underrepresentation, again came under scrutiny by the courts. Nevertheless, the Ninth Circuit responded that the Supreme Court of California had revised its understanding of *Duren* since *People v. Harris* and accepted the use of voter registration lists, while the court also indicated that "challenges to the use of voter registration lists as the sole source for jury pools have not met with success in the federal courts."[253]

In *United States v. Orange*, the defendant proposed "use of the Department of Public Safety list of holders of drivers' licenses and identification cards."[254] Additionally, the defendant proposed several possible causes "for the alleged minority underrepresentation," including:

> (1) the clerk's office made no effort to update addresses before mailing questionnaires, or any effort to locate those whose questionnaires were returned as undeliverable, thereby decreasing representation in the more mobile minority population; (2) the minority population was less likely to return the juror questionnaires and the clerk's office takes no further follow-up action; and (3) the voter registration list is itself unrepresentative because minorities are less likely to register to vote as their majority counterparts.[255]

The Tenth Circuit analyzed this proposal and held that it did not "find any systematic exclusion in the district's jury selection methods"[256] and defined systematic exclusion as "inherent in the particular jury-selection process utilized."[257] Furthermore, the court determined that none of the potential causes of underrepresentation listed by the defendant "constitute[d] systematic exclusion," as "[d]iscrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*."[258] The court in *Orange* also observed that "[t]he circuits are 'in complete agreement that neither the [Jury] Act nor the Constitution require that a supplemental source of

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showing that underrepresentation result[ed] from the use of voter registration lists as the sole source of names for the jury pool." *Id.* at 945 (citing *Harris*, 679 P.2d at 446).

253. *Id.* at 945 n.13 (citing United States v. Cecil, 836 F.2d 1431, 1445–49 (4th Cir. 1988) (en banc) (collecting cases and discussing the history of such challenges in the courts)).

254. United States v. Orange, 447 F.3d 792, 800 (10th Cir. 2006) (citations omitted).

255. *Id.* (citations omitted).

256. *Id.*

257. *Id.* (quoting Duren v. Missouri, 439 U.S. 357, 366 (1979)).

258. *Id.* (citing *Cecil*, 836 F.2d at 1446–47; Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc); United States v. Test, 550 F.2d 577, 586–87 (10th Cir. 1976)).

names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.'"[259] In addition, the court opined that "voter registration lists are the presumptive statutory source for potential jurors."[260]

Thus, the third prong really has two main avenues for attack: the jury selection system and the sources of names for potential jurors. If the system, however, has subjective elements rather than objective components, it is more suspect and more likely to be held to be systematically exclusionary under the third prong of the *Duren* test. Likewise, the third prong may be satisfied if the sources used to obtain names for potential jurors are overly exclusionary, but generally using voter registration lists to supply names will withstand judicial scrutiny.

IV. MAKING A PRIMA FACIE CASE OF UNDERREPRESENTATION OF HISPANICS ON MASTER JURY LISTS

The Supreme Court decided *Duren v. Missouri*[261] more than twenty-five years ago. But twenty-five years of jurisprudence have done little to clarify certain aspects of the three-pronged test established in that case. As such, the Supreme Court needs to clarify some issues that affect Hispanic representation on jury venires. While it is a relatively settled question, the Court should nevertheless establish the clear distinctiveness of Hispanics, as well as the distinctiveness of other racial and ethnic groups, regardless of their percentage of the total population. The Court should also settle the question regarding the appropriate population statistics that courts should use to calculate underrepresentation for the second prong of the *Duren* test, as well as the proper statistical approach or approaches, and the Court should provide some relative guidelines for interpreting the results. Lastly, the Court should establish the constitutionality of using voter registration lists as the primary source for jury service while allowing other pertinent sources to supplement voter registration lists. Thus, as Hispanic populations continue to grow in various regions,[262] jurisdictions will be better prepared and have a clear vision of what is required under the *Duren* test.

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259. *Id.* (quoting *Test*, 550 F.2d at 587 n.8 (collecting cases)).
260. *Id.* (citing 28 U.S.C. § 1863(b) (2006)).
261. *Duren*, 439 U.S. at 364.
262. *See* GUZMÁN, *supra* note 4.

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Even with a better understanding or a more inclusive pool, jurisdictions may not be able to prevent fair-cross-section challenges.[263] But a clearer understanding and a more inclusive pool will provide two clear advantages: jurisdictions will have more confidence that their jury selection system will be found to be constitutional, and minority group involvement in the criminal justice system will increase.

A. Hispanics as a Distinct Group

Most courts today will grant distinct group status to Hispanics to satisfy the first prong of the *Duren* test, even where the total racial populations are less than 1.5% of the total population.[264] So while some state courts, like the Utah Supreme Court, have questioned whether Hispanics constitute a distinct group based on low numerosity, most courts and states are willing to accept the distinctiveness of racial and ethnic groups regardless of their percentage of the total population. Although the Supreme Court has implicitly accepted that Hispanics are a distinct group regardless of their population size,[265] the Court should do so explicitly to remove any challenge under the first prong of the *Duren* test.

B. Correct Statistical Analysis

Clearly, the main area the Supreme Court must shed light on is the appropriate population statistics that courts should use to analyze the second prong of the *Duren* test. Since the first prong of the *Duren* test is often assumed or given only a cursory analysis, especially when dealing with racial or ethnic groups,[266] and the third prong of the test is often not

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263. *See, e.g.*, United States v. Pion, 25 F.3d 18, 23 (1st Cir. 1994) (looking at a fair-cross-section violation claim even when the jurisdiction used the broadest list available).

264. United States v. Shinault, 147 F.3d 1266, 1273 (10th Cir. 1998) (noting that the Asian population, totaling 1.27% of the population, was still argued by the defendant, and conceded by the State, to be distinct).

265. Castaneda v. Partida, 430 U.S. 482, 495 (1977) (noting that Mexican-Americans were a "clearly identifiable class"); Hernandez v. Texas, 347 U.S. 475, 477–80 (1954) (recognizing persons of Mexican descent as a class of persons). It should be noted that the Court referred to Mexican-Americans or Chicanos, which are only a subset of Hispanics. However, this subset was found to be distinct, and correspondingly it is not a stretch to find that Hispanics as a larger group are equally distinct using the same analysis.

266. *See, e.g.*, United States v. Orange, 447 F.3d 792, 797 (10th Cir. 2006) (stating that without question racial groups were distinct); United States v. Torres-Hernandez, 447 F.3d 699, 703 n.6 (9th Cir. 2006) (satisfying first prong of *Duren* test automatically as Hispanics are considered a distinctive group in the Ninth Circuit); *Pion*, 25 F.3d at 22–23 (noting the government concession

analyzed if the second prong is not satisfied,[267] the second prong is the crux of the underrepresentation issue. Because the second prong is typically proven with statistical analysis, it is imperative that courts are given guidance concerning the correct statistics to use and the correct methods with which to analyze them.

1. Use of jury-eligible population where possible

Courts should use statistical data that best approximates the percentage of jury eligible Hispanics in the judicial jurisdiction. Assuming that the Jury Act set forth factors for jury service that are not constitutionally objectionable, it is logical to then use these factors to determine if any distinct groups are underrepresented.[268] When comparing a Hispanic total population and a jury-eligible population, the language and citizenship discrepancies render the representation analysis more difficult than the analysis of other distinct groups. As a general proposition, because a substantial amount of the Hispanic community are foreign born and may not be native English-speakers, Hispanics as a whole face jury eligibility issues in ways not faced by blacks, Native Americans, or women. United States government census data has estimated that of the foreign-born people living in the United States, only 40.3% are naturalized citizens.[269] Of the 40.3%, however, only 5.7% are persons who entered the country between 1990 and 2000.[270] Additionally, more than thirteen million foreign-born persons entered the United States between 1990 and 2000, and only 13.4% of those persons

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that Hispanics are a distinct group, then moving to second prong); United States v. Garcia, 991 F.2d 489, 491 (8th Cir. 1993) (holding that Hispanics are a distinctive group based on a previous Supreme Court opinion without further analysis).

267. *See, e.g.*, United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) (limiting discussion to second prong of *Duren* test because it was dispositive).

268. *See* United States v. Artero, 121 F.3d 1256, 1261–62 (9th Cir. 1997) (delineating a "common sense" approach that analyzes jury-eligible populations). The *Artero* panel noted that "[a]s a matter of common sense, the percentage of Hispanics eligible for federal jury service in those two [border] counties was likely to be lower than the ratio for the general population," due to the counties' location bordering Mexico. *Id.* at 1261. The panel also noted that there was a high probability that the jurisdiction contained "many Hispanic residents who had not yet attained [the] citizenship or English proficiency" necessary to serve on a federal grand jury. *Id.*

269. U.S. CENSUS BUREAU, PROFILE OF SELECTED DEMOGRAPHIC AND SOCIAL CHARACTERISTICS FOR THE FOREIGN-BORN POPULATION: 2000, at 1, *available at* http://www.census.gov/population/cen2000/stp-159/foreignborn.pdf.

270. *Id.*

have become naturalized citizens.[271] Granted, only 45.5% of foreign-born persons entering the United States were Hispanics, but there is nothing in the census statistics that demonstrates that Hispanics gain citizenship at a rate faster or slower than any other foreign-born group.[272]

Therefore, it is important to analyze the population trends to determine the prevalence of a large number of non-citizens falling within the Hispanic groups when analyzing underrepresentation. For example, in the decade between 1990 and 2000, the Hispanic population in the United States grew from over twenty-two million to over thirty-five million.[273] During that that same time period, assuming trends remained constant and that 45.5% of foreign-born persons entering the United States were Hispanic, approximately six million Hispanics entered the United States.[274] Of these six million Hispanics, over five million of them would be non-citizens as of 2000.[275] Thus, approximately one third of the new Hispanic population growth would be ineligible for jury duty based on lack of citizenship alone.[276]

When compared to other distinct groups, Hispanic populations have a greater discrepancy between the total Hispanic population and the foreign-born Hispanic population. Nationwide, out of a total Hispanic population of thirty-five million, over fourteen million, or approximately 40%, were foreign-born.[277] Of that number, approximately 60% of those fourteen million foreign-born Hispanics are non-citizens.[278] Thus, the

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271. *Id.* The total number of foreign-born citizens that entered the country from 1990 to 2000 numbered 13,178,275. *See id.* Only 1,759,385 of those people gained United States citizenship. *Id.* That equals 13.4%.

272. *Id.* The total number of Hispanic persons entering the United States is 14,157,815, or 45.5% of the total number of 31,107,890 foreign-born persons entering the United States. *Id.*

273. *See* GUZMÁN, *supra* note 4.

274. U.S. CENSUS BUREAU, *supra* note 269, at 1. If 13,178,275 foreign-born people entered the country during the decade of 1990 to 2000, and 45.5% of them were Hispanic, 5,997,693 of them would be Hispanic. *See id.* Moreover, assuming only 13.4% of foreign-born persons entering the United States during that time period obtained citizenship, 5,196,962 of those foreign-born persons that entered the United Stated between 1990 and 2000 would be Hispanic and non-citizen.

275. *Id.*

276. The statistics used here are not precise. The purpose of this Comment is not to determine with statistical precision the percentage of Hispanics in any given area that are eligible to serve on a jury. Rather, the statistics are employed merely to show that compared to the population as a whole, Hispanics as a group face different obstacles because the percentage of foreign-born Hispanics to United States-born Hispanics is greater than the percentage of foreign-born blacks, for instance, as compared to United States-born blacks.

277. *See* U.S. CENSUS BUREAU, *supra* note 269, at 1.

278. *See id.*

maximum jury-eligible Hispanic population would be approximately 76%.[279] As compared to the black population in the United States, the percentage of foreign-born Hispanics is much higher. While the total black population in the United States in 2000 was greater than thirty-six million,[280] the total foreign-born black population was just over two million.[281] Thus, even without taking into account the percentage of the foreign-born blacks that became citizens, over 90% of blacks would be presumptively eligible for jury service.[282] While these numbers are undoubtedly imprecise and are not presented to give exact percentages of eligible populations, they demonstrate the potential issues in determining relevant populations for underrepresentation analysis.

It should therefore be apparent that even without showing the percentage of jury-eligible Hispanics compared with other groups such as blacks and women, statistical evidence makes the use of total Hispanic population figures questionable when determining underrepresentation. Nonetheless, despite the wisdom in using jury-eligible population data, there are difficulties in determining the jury eligible data. These difficulties led the Ninth Circuit to reject the need for jury-eligible data in *Rodriguez-Lara* because it felt that determining

> jury-eligible population data will often be quite hard for fair-cross-section claimants to obtain, given the difficulty of sorting out from the general population figures the number of individuals who (for example) are not citizens, who are not fluent in English, or who are "incapable, by reason of mental or physical infirmity, to render satisfactory jury service."[283]

The Ninth Circuit also observed other courts' awareness of the "potentially 'insuperable' burden that requiring such data could place on fair-cross-section claimants," as well as "scholars' conclusion that

279. ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 200 BRIEF 3 tbl.1 (2000), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf. This is calculated by taking the total Hispanic population of 35,305,818, and subtracting out approximately 60% of the 14,157,815 foreign-born Hispanics, leaving 26,853,602, or 76.06%. *See id.*

280. *See* GUZMÁN, *supra* note 4.

281. *See* U.S. CENSUS BUREAU, *supra* note 269, at 1.

282. Based on the figures given, assuming all foreign-born blacks were ineligible, over 94.2% of blacks would not be foreign-born and hence presumably eligible. Other issues include higher minority felony convictions, which can be construed as somewhat circular since felony convictions often occur at a higher rate among minority groups.

283. United States v. Rodriguez-Lara, 421 F.3d 932, 943 n.9 (9th Cir. 2005) (citing 28 U.S.C. § 1865(b) (2005)).

'eligible population figures are almost impossible to obtain.'"[284] The court perceived that "[r]equiring a fair-cross-section claimant to come forward with a comparison to the jury-eligible population thus risks placing one of the elements of the prima facie case for equal protection and fair cross-section claims out of reach, thereby insulating jury selection systems from judicial scrutiny entirely."[285]

While concern for the ability to obtain jury-eligible population data is valid, it does not indicate the population values that should be used in a statistical comparison of distinct group representation on jury venires. Some courts have determined that "total population figures" were "an appropriate basis for comparisons for the purposes of a prima facie case under *Duren*," while noting "one corollary to [that] rule," which is that courts may use more refined data when the population is broken down by age.[286] It seems apparent that the only reason to use age-refined data is because of a minimum age requirement to serve on a federal jury, and courts need not consider underage persons when analyzing underrepresentation. Thus, if age-eligibility is an appropriate device for determining the correct populations to use for statistical analysis, then citizenship-eligibility should also be an appropriate device.

As an example of a court attempting to strengthen its position that total population values were appropriate, the *Rodriguez-Lara* court relied on Supreme Court and Ninth Circuit cases in which the courts faced vastly differing circumstances: the use of total group populations were presumed appropriate, or at least not problematic.[287] None of the Supreme Court cases cited by the *Rodriguez-Lara* court, however, analyzed group populations where use of the total population, or even age-eligible populations, would have provided a vastly different result than the use of jury-eligible populations. In *Duren*, for instance, the Supreme Court analyzed the underrepresentation of women on juries.[288] There is nothing in the analysis of the underrepresentation that would indicate that women would be ineligible for jury service at a rate higher

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284. *Id.* (quoting People v. Harris, 679 P.2d 433, 442 (Cal. 1984) (plurality opinion)).

285. *Id.*

286. *Id.* at 942 (citing United States v. Esquivel, 88 F.3d 722, 726–27 (9th Cir. 1996)).

287. *Id.* at 941–42 (citing Duren v. Missouri, 439 U.S. 357, 365 n.23 (1979); Castaneda v. Partida, 430 U.S. 482, 495–96 (1977); Alexander v. Louisiana, 405 U.S. 625, 627 n.4, 628 (1972); Turner v. Fouche, 396 U.S. 346, 359 (1970)).

288. *Duren*, 439 U.S. at 364–65.

than that of men.[289] In another Supreme Court case in which jury-eligible population data would have had a negligible effect when compared with total population data, *Castaneda v. Partida* analyzed underrepresentation where the non-native born minority population was very small according to the census figures.[290] In *Castaneda*, even if the Court assumed that all foreign-born persons on the census were Hispanic and that all of them were ineligible for jury duty, the jury-eligible Hispanic population dropped a mere 3%—a number that made no practical difference.[291]

The facts of *Duren* and *Castaneda* greatly differ from the situation encountered by the Ninth Circuit in *United States v. Torres-Hernandez*, where removing Hispanics from the statistics due to ineligibility to serve as jurors made a significant difference in the statistical analysis regarding Hispanic underrepresentation under the *Duren* test. In fact, eliminating the ineligible group from the analysis reduced the Hispanic population number from 24.8% to 16.1%.[292] This, along with other factors such as age-eligibility, reduced the absolute disparity of Hispanics on the jury list from 14.8% to 2%.[293] Therefore, in some situations, the use of jury-eligible populations has a significant impact on courts' analyses in determining underrepresentation.[294]

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289. In fact, the opposite is true: conviction of felonies makes one ineligible for jury service, and men have a higher rate of felony conviction. United States v. Artero, 121 F.3d 1256, 1262 (9th Cir. 1997) (noting that on average, women "live longer and get convicted of felonies less than men").

290. *Castaneda*, 430 U.S. at 498.

291. *Id.* at 486 n.6. However, if the numbers from *Castaneda* are taken at face value, they demonstrate the need for the use of jury-eligible population data. If *Castaneda* analyzed a jurisdiction in which over 95% of the Hispanic population was native born, to get an average of 60% native born across the country, some jurisdictions must conversely have a relatively high percentage of foreign-born Hispanics, much higher than 40%. The Court, rather than dismiss the idea that non-citizens would have any effect on the statistical analysis, merely pointed out that even if foreign-born persons were non-citizen Hispanics, it made no "practical difference" in the analysis because it would reduce the Hispanic population from approximately 79% to 76%. *Id.*

292. United States v. Torres-Hernandez, 447 F.3d 699, 702 (9th Cir. 2006).

293. *Id.* Also of interest is that just by using age-eligible populations instead of total populations, the absolute disparity dropped from 14.8% to 10.7%. *Id.*

294. Or it has at least removed some jury-ineligible populations. It should be noted that the resulting numbers referred to as "jury-eligible" populations may still include persons that would not be eligible to serve on juries, such as felons, residents not living with the jurisdiction for a sufficient amount of time, or persons with other such disqualifications. This data, if available, could be used, but without data to the contrary, one could assume these additional disqualifications are not dependent on race or ethnicity. In the end, courts should use the numbers that best approximate the jury-eligible population, but should not restrict the administration of justice bogged down in a quagmire of uncertainty regarding jury-eligible statistics. Using citizenship and language proficiency

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Despite the conspicuous effect of using jury-eligible population data, the *Rodriguez-Lara* court also drew on *Esquivel*[295] and *Sanchez-Lopez*[296] to strengthen its view that jury-eligible population statistics were not required.[297] In *Sanchez-Lopez*, the Ninth Circuit assumed that the numbers proffered by the defendant using total populations figures were valid, despite the fact the government questioned the use of those numbers.[298] Because the government raised its concerns in a case that "was not a close call," however, its difference in population data did not affect the outcome of the court's decision.[299] In *Esquivel*, on the other hand, even without the government offering the evidence at trial, the Ninth Circuit took judicial notice of census data that provided the jury-eligible Hispanic population, thereby reducing the absolute disparity from 14.5% to 4.9%.[300] This change in underrepresentation potentially changed the outcome of the case by reducing the underrepresentation well below the 10% guideline.

Consequently, the pressing question is whether a defendant can meet the prima facie burden of *Duren*'s second prong without presenting statistics regarding the jury-eligible Hispanic population. In the Ninth Circuit, the *Rodriguez-Lara* decision clearly allows the use of the total population,[301] while the *Artero* decision requires a defendant claiming group underrepresentation "to establish a prima facie case, present data showing that the percentage of persons in that group in the jury wheel is significantly lower than the percentage eligible to serve on juries."[302] Rather than answer this question, the Ninth Circuit's decision in *Torres-Hernandez* simply resolved its case by stating that the jury-eligible statistics satisfied both the higher standard of *Artero* and the lower standard of *Rodriguez-Lara*.[303] In so doing, however, it explained the principle used to resolve the issue: "When presented with various types

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is likely to have a much larger effect on the determination of underrepresentation than these other disqualifications, and hence the focus should be on those factors, especially due to their effect on Hispanics.

    295. United States v. Esquivel, 88 F.3d 722 (9th Cir. 1996).

    296. United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989).

    297. United States v. Rodriguez-Lara, 421 F.3d 932, 942 (9th Cir. 2005).

    298. *Sanchez-Lopez*, 879 F.2d at 547.

    299. *Esquivel*, 88 F.3d at 726 (citing *Sanchez-Lopez*, 879 F.2d at 547, in which the absolute disparity even using total values was 2.05%).

    300. *Id.* at 726–27.

    301. *Rodriguez-Lara*, 421 F.3d at 942.

    302. United States v. Artero, 121 F.3d 1256, 1262 (9th Cir. 1997).

    303. United States v. Torres-Hernandez, 447 F.3d 699, 704 (9th Cir. 2006).

of data to determine whether Hispanics are underrepresented on grand jury venires, a court must rely on the statistical data that best approximates the percentage of jury-eligible Hispanics in the district."[304]

Using the statistical data that best approximates the percentage of jury-eligible Hispanics in the district is the approach best suited to analyze the underrepresentation of Hispanics in jury lists because it leaves open the possibility that in situations where determining the jury-eligible populations is impossible, total population values may be used.[305] Even if the refined data available is rough, it still probably represents a better approximation of the jury-eligible population, and this data should be used. Additionally, a mere declaration that the data is difficult to obtain should not be sufficient to allow defendants to meet their prima facie case if a significant portion of the Hispanic population is not eligible to sit on a jury. Widely available census data provides the information necessary to compile a list of jury-eligible population. Therefore, even if the data is not perfect, few situations will exist where the total population is the most refined data available.

If the United States Supreme Court grants certiorari to any fair-cross-section violation claim, it should hold that the correct group for the statistical analysis should be Hispanics, or any race or ethnic group, that are citizens and over the age of eighteen, because only persons meeting these two requirements are eligible for jury service. To hold otherwise (1) may lead to a high burden for jurisdictions creating jury lists because they would be held responsible for underrepresenting groups comprised of large segments that are ineligible for jury service, and (2) the remaining members of minority groups that are jury-eligible would be required to be "overrepresented" on the jury lists.[306] Thus, the Supreme Court should set the criterion that data best approximating the jury-eligible population should be applied to determine the underrepresentation of Hispanics, or any distinct group. The Court should also approve of the use of census data, where applicable, to approximate jury-eligible populations unless more precise data is available.

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304. *Id.*

305. *Rodriguez-Lara*, 421 F.3d at 943 n.9.

306. For example, if a Hispanic population only had 75% of its population eligible for jury service, using the total Hispanic population instead of the jury-eligible population would require the 75% of the group population that is eligible for jury service to have their names included on the jury list 33% more often.

2. Use of absolute disparity as the primary source of analysis for groups that constitute a small percentage of the total population

The Supreme Court should adopt the absolute disparity method as the best method for determining the underrepresentation of groups whose populations make up a small percentage of the total population.[307] With this additional guidance from the Supreme Court, courts would typically utilize the absolute disparity method, while generally dismissing comparative disparity except in exceptional circumstances where a distinct group's underrepresentation approaches very close to complete.

While absolute disparity is not a perfect method for analyzing the underrepresentation of Hispanics on jury lists, it is arguably the best option, especially when analyzing areas with a relatively small Hispanic population.[308] As of the year 2000, forty states had Hispanic populations comprising less than 10% of the total populations,[309] and twenty-eight states had Hispanic populations comprising less than 5% of the total population, ten of which had Hispanic populations of less than 2% of the total populations.[310] Dealing with these relatively small percentages causes some difficulties for the absolute disparity method, but it is still the best analysis tool even with small populations.[311] One of the main advantages of employing the absolute disparity method is that courts have established 10% as a quasi-benchmark, where absolute disparities of less than 10% are presumptively valid[312] absent other evidence of intentional discrimination.[313] While this benchmark is not absolute, it does provide courts an instrument to utilize that carries with it some of the benefits of a bright-line rule, especially the benefit of consistency among various jurisdictions. Additionally, the use of absolute disparity

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307. *See supra* Part III.B.2 for a discussion noting that absolute disparity has also been used with large population groups like women. Nevertheless, this Comment focuses on the advantages of this method with smaller population totals.

308. *See* GUZMÁN, *supra* note 4, at 4. Looking at the 2000 census, only four states have Hispanic populations greater than 20% of the total population: Arizona (25.3%), California (32.4%), New Mexico (42.1%), and Texas (32.0%). *Id.*

309. *Id.*

310. *Id.*

311. *See supra* note 307.

312. *See supra* Part III.B.2 for a discussion of cases that have used the absolute disparity method and the corresponding disparities that were found to be unsubstantial.

313. It should be noted that "courts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not *actively* prevent people from serving or actively discriminate, and so long as the system is reasonably open to all." Barber v. Ponte, 772 F.2d 982, 997–98 (1st Cir. 1985) (citations omitted).

with its quasi-benchmark would still provide courts the latitude to provide justice in the jury selection system; a court can still find substantial and unconstitutional underrepresentation when the absolute disparity is less than 10% if the court deems so necessary in the administration of justice. This ameliorates the potential harshness of a strict bright-line rule. Additionally, the absolute disparity method is preferable to the comparative disparity method because absolute disparity better reflects the reality of the statistics, while comparative disparity can distort the actual effect of the deviation.[314]

In contrast, nothing even close to a benchmark exists with comparative disparity. For example, one court found that even 75% comparative disparity did not fulfill the substantial requirement.[315] While some courts have used comparative disparity to supplement their absolute disparity analysis,[316] other courts have questioned whether comparative disparity "necessarily produces a more accurate result where . . . the group allegedly underrepresented forms a very small proportion of the total population."[317] Nevertheless, other courts have raised a valid concern with the absolute disparity method, observing that if the group population is small, even entire exclusion of the group might fall within constitutionally permitted levels of absolute disparity.[318] However, these concerns can be abated as courts may use comparative disparity as a useful tool if the court suspects active discrimination. The closer comparative disparity moves toward 100%, or total exclusion, the closer a court should come to finding substantial underrepresentation even when the absolute disparity is within constitutional bounds.[319] In these situations, the courts should also look at intentional discrimination or

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314. United States v. Armstrong, 621 F.2d 951, 955 (9th Cir. 1980) (citing United States v. Potter, 552 F.2d 901, 906 (9th Cir. 1977)).

315. United States v. Armsbury, 408 F. Supp. 1130, 1139 (D. Or. 1976) (comparative disparities of 45.5% among blacks and 75% among Hispanics were not found to be substantial underrepresentation).

316. United States v. Orange, 447 F.3d 792, 798–99 (10th Cir. 2006).

317. United States v. Hafen, 726 F.2d 21, 24 (1st Cir. 1984) (using the absolute disparity method with a black population of 3.73%).

318. United States v. Rodriguez-Lara, 421 F.3d 932, 944 n.10 (9th Cir. 2005) (using the absolute disparity method but noting its "short-comings").

319. See, for example, the Ninth Circuit's discussion of *Vasquez v. Hillery*, 474 U.S. 254 (1986), in *United States v. Sanchez-Lopez*, 879 F.2d 541, 548 (9th Cir. 1989). The *Sanchez-Lopez* court pointed out that in *Vasquez*, however, there was an absolute disparity of 4.7%, but the case was based on an equal protection claim rather than a fair-cross-section violation claim, and "intentional discrimination was established." *Id.* With intentional discrimination, 4.7% was sufficient for the equal protection case in *Vasquez*. *Id.*

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exclusion, in which absolute disparity may no longer control. However, absent any finding of active discrimination or defect in the jury selection system, even comparative disparity approaching 100% may be unsubstantial.

Thus, while a benchmark does not exist for comparative disparity—nor should one exist given the large disparities that can arise from merely excluding one potential juror—the courts should evaluate the disparity at least as a red flag to underrepresentation. Thus, the use of absolute disparity coupled with comparative disparity as a red flag would be the optimal use of these statistical methods.

C. Evaluate the System To Determine if the Underrepresentation is Systematic

The Supreme Court should also play a role in clarifying the third prong of the *Duren* test by resolving issues regarding sources used for potential jurors and jury selection systems used. This would provide guidance to lower courts, but perhaps even more importantly, this Supreme Court guidance may deter unnecessary fair-cross-section claims in the future. Even if a court finds substantial underrepresentation of a distinct group, the third prong of the *Duren* test still requires the defendant to show that the underrepresentation was caused by systematic exclusion. Generally, demonstrating that underrepresentation is due to systematic exclusion of a distinct group is difficult; that said, if a distinct group meets the second prong of underrepresentation and a court finds that the underrepresentation is caused by the jury selection system, that inherent exclusion may be sufficient. Most courts do not require that the defendant show an intent to exclude.[320]

Therefore, courts should scrutinize jury selection systems carefully to ensure that the selection is done in a race-neutral, ethnicity-neutral, and gender-neutral manner. An objective and random process is far less susceptible to systematic exclusion challenges under the third prong of the *Duren* test. Additionally, a common claim of systematic exclusion is that the sole use of voting registration lists to select potential jurors excludes minorities.[321] It is therefore important to examine the constitutionality of voting registration lists as the sole source for jury

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320. *Rodriguez-Lara*, 421 F.3d at 944 (noting that exclusion need not be intentional).

321. *See, e.g.*, Cynthia A. Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 621–22 (1990) (noting that the current voter registration system "continues to result in the disproportionate exclusion of members of distinctive groups").

lists and analyze the benefits of using supplemental sources that are more inclusive, even if jurisdictions are within constitutional limits without supplemental sources.

1. Sources for jury lists

    a. Voting registration lists. The Supreme Court should decide that the use of voter registration lists as the sole source of jury lists is permissible. To date, the Supreme Court has not spoken directly to the issue of the constitutionality of using voting registration lists alone, but it has implied some judicial uncertainty. In responding to a request for stay from a California Supreme Court conviction, Justice Rehnquist, as a Circuit Justice, discussed the constitutionality of selecting juror lists from voting registration lists:

> Whether this sort of jury selection procedure can be described as "systematically" excluding classes that do not register to vote in proportion to their numbers, and whether the need for efficient jury selection may not justify resort to such neutral lists as voter registration rolls even though they do not perfectly reflect population, are by no means open and shut questions under *Duren*.[322]

    While the issue may not be open and shut, Courts have generally not "disallow[ed] the use of voter registration lists as juror source lists." [323] In fact, it has been documented that "hundreds of cases have challenged the reliance on voter registration lists alone to create juror pools," while "[n]one have succeeded on sixth amendment grounds."[324] The controversy over the systematic exclusion of minorities from voter registration lists, and hence jury lists that rely on voter registration lists, is not a new phenomenon.[325] Despite the controversy, most courts permit

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322. California v. Harris, 468 U.S. 1303, 1303 (1984) (citing Duren v. Missouri, 439 U.S. 357, 368–70 (1979)).

323. *See* Williams, *supra* note 321, at 626 (noting that decisions disallowing the use of voter registration lists were "remarkably absent").

324. United States v. Brummitt, 503 F. Supp. 859, 861 (W.D. Tex. 1980), *aff'd*, 665 F.2d 521 (5th Cir. 1981) (noting that no jury selection plan to that date had been found statutorily defective for "failure to supplement a primary list"); *see* Williams, *supra* note 321, at 626–27 (noting that by 1990, no challenge to the use of voter registration lists as the sole source for jury lists had succeeded on "sixth amendment grounds" (citing United States v. Cecil, 836 F.2d 1431, 1447–48 (4th Cir. 1988) (noting the failure to register to vote is not a proper basis for "judicial sanctions"))).

325. *See* David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 776 (1977) (noting that underrepresentation of groups on jury lists comes from the underrepresentation of groups on voting registration lists); Williams, *supra* note 321, at 616–24

the exclusive use of voter registration lists in creating a list of potential jurors.[326]

Along with many other courts, the Eighth Circuit refused to hold that sole use of voter registration lists to create jury lists fulfills the third prong of the *Duren* test.[327] The court noted that an identifiable group's failure to register to vote does not make a system that uses voter registration "illegal or unconstitutional."[328] Thus, regardless of the arguments against the constitutionality of utilizing voter registration lists, it appears that, absent some intervening guidance from the Supreme Court, most circuit courts will continue to hold that utilizing such lists as the sole source for populating a directory of potential jurors does not constitute systematic exclusion. The Fourth Circuit summed up the typical circuit court view:

> The authorities cited, from practically every Circuit including our own, in many of which certiorari has consistently been denied by the Supreme Court, as well as the legislative intent expressed in the Jury Selection Act itself, as found by the courts, categorically establish that there is no violation of the jury cross-section requirement where there is merely underrepresentation of a cognizable class by reason of failure to register, when that right is fully open. This form of jury selection (*i.e.*, by the use of [voter registration lists]) cannot be described "as 'systematically' excluding classes that do not register in proportion to their numbers"; it is a process that comports with the "need for efficient jury selection" even though it may not "perfectly reflect population." Nor does it follow that the voter registration lists do not satisfy the fair cross-section of the population simply because group members of one group neglected to register in the same proportion as was their share in the overall population. The Constitution and the statute do not require such perfection. It is sufficient that the system adopted provides a fair cross-section and we find both common sense and precedent establish that if the voter registration lists do this they are not tainted by some affirmative form of discrimination.[329]

(noting that underrepresentation of minorities and poor people on jury lists is a byproduct of the voter registration system that underrepresents minorities).

326. It is beyond the scope of this Comment to analyze all of the arguments for and against using voter registration lists; rather, this Comment will discuss the general judicial consensus that use of voter registration lists to create jury lists is permitted. See *supra* Part III.C for further discussion regarding the use of voter registration lists.

327. United States v. Garcia, 991 F.2d 489, 492 (8th Cir. 1993).

328. *Id.* (citing United States v. Clifford, 640 F.2d 150, 156 (8th Cir. 1981)).

329. United States v. Cecil, 836 F.2d 1431, 1448–49 (4th Cir. 1988).

Nevertheless, while most circuit courts will probably stay on present course, explicit Supreme Court guidance would ensure consistency across all circuits and would expectantly reduce challenges in the courts.

Yet even if courts continue to validate the use of voter registration lists to create jury venires, the use of more inclusive sources may help provide defendants the rights they are entitled to under the Sixth Amendment: a jury selected from a fair cross section of society.[330] Failure to do so will ensure that defendants in criminal trials will continue to appeal their decisions claiming fair-cross-section violations. However, as noted by the Supreme Court in *Vasquez v. Hillery*, if "grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it."[331] Therefore, the onus is on jurisdictions to fortify their jury selection process to attempt to immunize them from Sixth Amendment fair-cross-section claims.

b. Supplemental sources. The Supreme Court should not invalidate a jury selection plan because of its reliance on voter registration lists for potential names. Nevertheless, jurisdictions may wish to protect themselves from fair-cross-section claims, which continue to be brought despite their lack of success when based solely on an objection to voter registration lists, by compiling jury lists using multiple sources. This would supplement voter registration lists with other available sources of names for potential jurors, such as with lists of licensed drivers or residents lists. While courts have declined to do so, some legal authors have opined that supplementing voter registration lists with other, more inclusive lists is a constitutional mandate to ensure a jury representing a fair cross section of society.[332] Other authors, however, have determined that supplementing voter registration lists with supplemental sources may fail to achieve its desired result—increased minority representation.[333]

In *Crank v. Utah Judicial Council*, a Utah court analyzed a county's attempt to supplement a jury list created by voter registration and driver's license lists with a tribal list that purportedly contained the

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330. Williams, *supra* note 321, at 590 (noting that the "fair-cross-section requirement has developed in harmony with basic democratic ideals").

331. Vasquez v. Hillery, 474 U.S. 254, 262 (1986).

332. *See, e.g.*, Kairys et al., *supra* note 325, at 780–88 (discussing the constitutional mandate of representativeness).

333. *See, e.g.*, John P. Bueker, Note, *Jury Source Lists: Does Supplementation Really Work?*, 82 CORNELL L. REV. 390, 392 (1997) (noting that supplementing jury lists with other sources is costly and ineffective).

names of all adult Native Americans in the area.[334] The actions taken to include more Native Americans were met with difficulties, such as duplicated names with slightly varying spellings, and the council in charge of forming the jury list was unsuccessful in implementing a plan that achieved Native American representation within the limits set.[335] Although this case comes from the state level and deals with Native Americans instead of Hispanics, it is highly informative in that it implicitly discussed a problem facing all jurisdictions: what sources should these jurisdictions use to supplement voter registration lists?

Most jurisdictions that supplement voter registration lists do so with driver's license lists, which have also come under scrutiny for excluding minorities and the poor.[336] Even utilizing a list of residents within the jurisdiction could result in charges of underrepresentation. For example, a judicial division in Massachusetts used "resident lists" to make up the jury list, a source that the district court found to be "the broadest data available."[337] In fact, no indication was given of any data set that would have been more inclusive of Hispanics.[338] Yet even using the broadest data available, the judicial division found an underrepresentation of Hispanics on jury lists, although precise disparities were not contained in the record.[339] Consequently, even supplementing sources may fail to increase minority representation on jury lists. Nevertheless, using supplemental sources may still facilitate courts upholding jury selection systems even if the supplemental sources fail to dramatically increase minority representation because the third prong of the *Duren* test is less likely to be satisfied.

334. Crank v. Utah Judicial Council, 20 P.3d 307, 310–11 (Utah 2001).

335. *Id.* at 310–12.

336. Williams, *supra* note 321, at 632 (opining that the use of driver's license lists to supplement voter registration lists "may seem to reinforce the same biases of voter registration lists").

337. United States v. Pion, 25 F.3d 18, 23 (1st Cir. 1994). The fact that the data was the broadest available was not even disputed by the defendant in this case.

338. *Id.*

339. *Id.* at 23 n.5 (noting that the defendant wrongly assumed an absolute disparity of 3.4% based on the percentage of jurors reporting for jury orientation that were Hispanic, while the actual disparity was not known because the number of Hispanics on the master jury list was never established).

2. Use of an objective and random selection process that is race-neutral and gender-neutral

Even using the broadest data available is not a perfect safeguard against fair-cross-section claims. Nevertheless, if the broad data is coupled with a random selection process, prong three is likely to remain unsatisfied.[340] Thus, it is imperative that jury selection systems avoid the problems associated with jury selection systems discussed by courts in *Castaneda v. Partida*[341] and *Gibson v. Zant*:[342] subjective criteria, lack of randomness, and the potential for manipulation. Even if the sources used are acceptable, if the actual selection system is defective, courts are more likely to find that underrepresentation was caused by systematic exclusion or inherent problems in the system.[343]

V. CONCLUSION

The Supreme Court has consistently held that defendants have a fundamental right to a jury composed of persons selected from a fair cross section of society. This ideal, some have argued, has gone largely unrealized.[344] The exact cause of lack of a fair cross section on many juries cannot be pinpointed in most instances.

One problem facing jurisdictions attempting to create jury lists that represent a fair cross section of society is the data being used: imprecise census numbers, problems recreating the number of minority groups based on last names after the fact, and—especially in dealing with the underrepresentation of Hispanics—uncertainty regarding the correct population statistics to use when analyzing their underrepresentation. Additional problems arise because courts do not apply statistical analysis consistently and jurisdictions and divisions fail to consistently employ their selection systems.

The Supreme Court exacerbated the problems of creating representative jury lists by adopting a three-pronged test for determining

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340. *Id.*

341. Castaneda v. Partida, 430 U.S. 482, 495 (1977) (citing Hernandez v. Texas, 347 U.S. 475, 478–79 (1954)); *see also* White v. Regester, 412 U.S. 755, 767 (1973).

342. Gibson v. Zant, 705 F.2d 1543, 1547 (11th Cir. 1983).

343. *Pion*, 25 F.3d at 23.

344. *See* Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 319 (2005) (noting that "[m]ore than six decades later, the promise of a 'jury of our peers' remains largely unfulfilled in many jurisdictions throughout the country" and noting that "jury panels or jury venires are not representative of . . . local communities").

unconstitutional underrepresentation while failing to give proper guidance on the correct use of the test for the past twenty-five years. In dealing with underrepresentation of Hispanics on master jury lists, the Supreme Court could settle many areas of previously uncertain law by specifically holding that (1) Hispanics are always a distinct group, regardless of population percentages; (2) jury-eligible populations should be used, barring any extraordinary circumstances; (3) the courts should use the absolute disparity test with a presumed ceiling of ten percent, while utilizing comparative disparity to safeguard against the intentional exclusion of small population groups; and (4) voter registration lists and certain supplemental sources constitute viable constitutional resources for populating a directory of potential jurors.

By settling these questions, the Supreme Court would provide guidance to courts trying to apply the *Duren* test, provide guidance to jurisdictions trying to implement a constitutionally protected jury selection system, and provide protection to defendants in criminal proceedings that require a jury drawn from a fair cross section of society. In so doing, the Supreme Court would help ensure criminal defendants' fundamental right to a jury selected from a truly fair cross section of society.

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